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**Clayton Thompson, J.**

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# LAW, RIGHTS AND REPRODUCTION: REPRODUCTIVE AUTONOMY IN ETHICAL RATIONALISM

JACK CLAYTON THOMPSON



A thesis submitted in partial fulfilment of the requirements of the  
University of Westminster for the degree of Doctor of Philosophy.

April 2016

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## Abstract

As medical technology has advanced, so too have our attitudes towards the level of control we can expect to hold over our procreative capacities. This creates a multi-dimensional problem for the law in terms of access to services which prevent conception, access to services which terminate a pregnancy and recompensing those whose choices to avoid procreating are frustrated. These developments go to the heart of our perception of autonomy.

In order to evaluate these three issues in relation to reproductive autonomy, I set out to investigate how the Gewirthian theory of ethical rationalism can be used to understanding the intersection between law, rights, and autonomy. As such, I assert that it is because of agents' ability to engage in practical reason that the concept of legal enterprise should be grounded in rationality. Therefore, any attempt to understand notions of autonomy must be based on the categorical imperative derived from the Principle of Generic Consistency (*PGC*).

As a result, I claim that (a) a theory of legal rights must be framed around the indirect application of the *PGC* and (b) a model of autonomy must account for the limitations drawn by the rational exercise of reason. This requires support for institutional policies which genuinely uphold the rights of agents. In so doing, a greater level of respect for and protection of reproductive autonomy is possible. This exhibits the full conceptual metamorphosis of the *PGC* from a rational moral principle, through an ethical collective principle, a constitutional principle of legal reason, a basis for rights discourse, and to a model of autonomy.

Consequently, the law must be reformed to reflect the rights of agents in these situations and develop an approach which demonstrates a meaningful respect of autonomy. I suggest that this requires rights of access to services, rights to reparation and duties on the State to empower productive agency.

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## Table of Abbreviations

AHAs	‘Area Health Authorities’
ASA	‘Argument from the Sufficiency of Agency’
AT	‘Autonomy Thesis’
Auth	‘Legal Authority’
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMAs	‘Early Medical Abortions’
FPA	‘Family Planning Association’
GFA	‘Generic Features of Agency’
HRA	Human Rights Act 1998
IA Theory	‘Institutionalised Autonomy Theory’
IA Thesis	‘Institutionalised Autonomy Thesis’
IC	‘I categorically need my freedom and well-being for whatever purpose I might have’
IP	‘I value my Purposes’
IR	‘Institutionalised Reasoning’
IUDs	‘Intrauterine Devices’
IVF	‘in vitro fertilisation’
L	‘Legitimacy’
LARCs	‘Long Acting Reversible Contraceptives’
LHAs	‘Local Health Authorities’
LPU	‘Logical Principle of Universalisation’
MyR	‘I have, at least, a prima facie claim-right to my freedom and well-being’



*Table of Abbreviations*

NBCA	‘National Birth Control Association’
NBCC	‘National Birth Control Council’
NHS	‘National Health Service’
OPM	‘Objective Public Morality’
OtO	‘Obligation to Obey’
PGC	‘Principle of Generic Consistency’
PPA	‘Prospective Purposive Agent’
PPAO	‘Other Prospective Purposive Agent’
PPAOC	‘PPAO categorically needs their freedom and well-being for whatever purpose they might have’
PPAOP	‘PPAO value their Purposes’
PPAOR	‘PPAO has, at least, a prima facie claim-right to his freedom and well-being’
SRO	‘Self-Referring Ought’
SPR	‘Subjective viewpoint on Practical Reasonableness’
TA	‘Transparent Autonomy’
UVD	‘Unilateral Value Disparity’
WHO	‘World Health Organisation’

## **Declaration**

The work included in this thesis is the author's own. It has not been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

Ethical considerations were made during the course my enrolment as a PhD student. The study originally contained an element of empirical research (interviews and focus groups), but I chose not to conduct these. As a result there was no need for formal ethical approval.

*We, the Willing, are led by the Unknown, doing the Impossible, for the  
Ungrateful. We have done so much, for so long, with so little, we are now  
qualified to do anything with nothing.*

Mother Theresa

# Chapter 1 Introduction

Through the advancement of technology and medicine in recent years, the aura of control over our reproductive choices is ever-growing and aptly classified as a matter of 'normal' life. In 2012-13, 9,100 women were sterilised and 15,300 men underwent the vasectomy procedure in England.<sup>1</sup> Over the same period, 7.3million prescriptions for the contraceptive pill were dispensed<sup>2</sup> and a further 1.31million Long Acting Reversible Contraceptives (LARCs) were prescribed.<sup>3</sup> 230,000 forms of emergency contraceptive were issued in clinics or in the community in 2012-13.<sup>4</sup> Finally, in 2013, 185,331 abortion procedures were performed<sup>5</sup> in England and Wales of which 182,406 (98.4%)<sup>6</sup> were performed under s1(1)(a) Abortion Act 1967.<sup>7</sup> The majority (146,703) of those were carried out in the first nine weeks of the pregnancy.<sup>8</sup> In 2004, a survey conducted by the Office for National Statistics suggested that 75% of women between 16 and 49 years of age were using at least one form of surgical, non-surgical or natural contraceptive method.<sup>9</sup> It is a hardly surprising that in modern society, 'Sex is no longer inevitably tied

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<sup>1</sup> Health & Social Care Information Centre, *NHS Contraceptive Services: England, 2012/13* (2013) available at <http://www.hscic.gov.uk/catalogue/PUB12548/nhs-cont-serv-comm-cont-clin-eng-12-13-tab1.xls> (accessed 02.06.2014), Table 1.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid, Table 11.

<sup>4</sup> Ibid, Table 1.

<sup>5</sup> Department of Health, *Abortion Statistics England and Wales: 2013* (June 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319460/Abortion\\_Statistics\\_\\_England\\_and\\_Wales\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319460/Abortion_Statistics__England_and_Wales_2013.pdf) (accessed 11.08.2014), 5.

<sup>6</sup> Ibid, see 12 and 19.

<sup>7</sup> S1(1): "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family;"

<sup>8</sup> Department of Health, *Abortion Statistics England and Wales: 2013*, 19.

<sup>9</sup> Office for National Statistics, *Contraception and Sexual Health, 2003* (2004) [http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod\\_consum\\_](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_)

to procreation'.<sup>10</sup> As one eminent Australian judge has noted, courts must be aware of the fact of, 'non-married, serial and older sexual relationships, widespread use of contraception, same-sex relationships with and without children, procedures for 'artificial' conception and widespread parental election to postpone or avoid children'.<sup>11</sup> As medicine advances, especially in the realms of procreation, it is inevitable that so do attitudes concerning sex, contraception, abortion, marriage, divorce and our autonomy more widely.

The use of contraceptives is the 'norm' in modern society. Yet, unintended pregnancies account for roughly half of all pregnancies in the UK.<sup>12</sup> It is a vital part of everyday life that individuals have control over their reproductive autonomy through the ranging methods of contraception available. The growth of these technological advances leads to questions as to the legal nature of these norms.<sup>13</sup> Society is forced to reflect upon how these are to be secured for individuals. To what extent can individuals hold rights-based security over their reproductive autonomy? Is there (or should there be) a right to receive contraceptives? Should parents of unexpected or uncovenanted children<sup>14</sup> be compensated for their losses? Can child-birth ever been considered as anything other than a 'blessing'?

In addressing questions such as these, this thesis attempts to consider the following overarching question: *Does moral rationality dictate that there ought to be legal rights over reproductive autonomy?* Reproduction is a catalyst for moral controversy and this is heightened by technological advancements. The abortion debate, discord regarding the

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dh/groups/dh\_digitalassets/@dh/@en/documents/digitalasset/dh\_4089946.pdf (accessed 02.06.2014), 9-10.

<sup>10</sup> Nicolette Priaux, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters?" (2008) 16 *Medical Law Review* 169-200, 169.

<sup>11</sup> *Cattanach v. Melchior* [2003] HCA 38 (Aus), [164] (Kirby J).

<sup>12</sup> Louise Bury and Thoai D Ngo, *The Condom Broke! Why do Women in the UK Have Unintended Pregnancies?* (Marie Stopes, 2009), 5.

<sup>13</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013), 1.

<sup>14</sup> The term "Uncovenanted Child" is preferred to "Unwanted Child" by the author for the same reasons given by Kenyon Mason & Graeme Laurie, *Mason and McCall Smith's Law and Medical Ethics* 9th Ed (Oxford University Press, 2013) 358: 'In Scots law, the word has been used to describe not so much an unexpected happening as one which was not contemplated by the parties concerned. It is, therefore, apt to describe the results of a failed sterilisation. We believe that it is preferable to use the expression in place of the more commonly used, but distasteful term 'unwanted pregnancy'.' For legal use of the term, see: *Richardson v. LRC Products Ltd* (2001) 59 BMLR 185, 195 per Kennedy J.

use of contraceptives and the potential for tort liabilities arising from the birth of a child will be the case studies for developing an approach to reproductive autonomy and for framing the limitations of this concept. In order to consider the validity of and justifications for reproductive autonomy, my task is to demonstrate that an account of the law (and, inherently, its legitimacy) based on *ethical rationalism* allows for consideration of the legal and moral implications of securing a right to reproductive autonomy in modern liberal democratic societies which can take place in an *objective* and *egalitarian* manner.

The theoretical framework is to be used in relation to the *negative* exercise of reproductive autonomy – that is, the exercise of choice(s) to remove fertility or postpone childbirth – and is framed around the provision of services which allow for these choices to be made and the protection of these choices when things go wrong. In relation to the provision of services, I will investigate the framework around abortion services and the use of contraceptives. Having done so, I will move on to consider the protection of the use of these services, as well as sterilisation, through the tort of Wrongful Conception. Essentially, Wrongful Conception<sup>15</sup> is a claim of clinical negligence; in the vast majority of cases a breach of the owed duty of care is admitted before the outset and instead it is whether harm exists which is at issue and leads us to give these claims a distinct nomenclature. A claim of wrongful conception arises where a patient has sought sterilisation as a means to avoid the use of contraceptives and to avoid the birth of an (at least originally) unwanted child. As a result of negligence on the part of the medical practitioner in either the performance of the procedure itself or in the provision of post-operative advice this has proved ineffective, the mother has subsequently become pregnant. The essence of the claim is that, because of the medical practitioner's negligence, the claimants have, contrary to their wishes and intentions, been burdened with the unwanted process of pregnancy and parental responsibilities; the very consequences that medical intervention was sought to avoid. The damage is essentially

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<sup>15</sup> It is also referred to as 'Wrongful Pregnancy' – see: Mason and Laurie, n 14, 358 - Wrongful Conception is preferred on the basis that it is in the conception of the child that part of the harm manifests.

split in to two elements. In the first, the 'Mother's claim', the damage claimed for arises as a result of the pregnancy and birth itself, for example the pain and suffering and loss of amenity. In the second, the damage claimed for is the financial burden of rearing the child up until the age of majority. It is this second claim which has proved particularly controversial.

## **1.1 Originality, Significance and Rigour**

In this thesis, I develop approaches to four problematic issues in jurisprudence and law. In relation to jurisprudence, these are: (1) theories of (legal) rights and (2) models of (legal) autonomy. In relation to law, these are: (3) the regulation of abortion and (4) the approach of the courts to Wrongful Conception. In this section I will outline the limitations of the current approaches and who is affected by these limitations. My response to these areas endeavours to provide a framework that these issues are resolvable by reference to a moral, *a priori*, categorical imperative.

### **1.1.1 Theories of Rights**

In relation to rights I claim that a theory of rights requires a demarcation between the function of a right and the justification for why that right is held. On this basis, I assert that discourse around rights merges claims of value with the nature of rights. As a result, the present theories of (legal) rights do not offer a complete explanation for rights holding. Choice theory denies rights to groups of persons that many would feel are most deserving of rights protection.<sup>16</sup> Whereas, Interest theory fails to give a clear account of how resources are to be allocated and which interests are deserving of protection.<sup>17</sup> Both tie in conceptions of either autonomy or welfare in resource allocation. Choice theory affects those who may be incapable of exercising discretion as to how to enforce rights. Interest theory may, potentially, affect a vast range of would-be right holders based on how valid 'interest' is determined.

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<sup>16</sup> Leonard Sumner, *The Moral Foundation of Rights* (Clarendon Press, 1987), 98.

<sup>17</sup> Neil MacCormick, 'Rights in Legislation' in Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society* (Clarendon Press, 1977), 189-209, 192.

I claim that a theory of *legal* rights must account for rights which in some cases empower choice, in others protect interests and in others perform some other function. As a result there is a necessary demarcation between the function of rights and the justification for right-holding. Rights on this approach hold a given function (of protection, provision or performance, or discretion, exemption or authorisation).<sup>18</sup> These functions are established through the indirect application of the Principle of Generic Consistency (*PGC*)<sup>19</sup> through the Tools for the Resolution of Intra-Variable Conflict.<sup>20</sup> This allows for the validity of a protected interest to be established according to the generic conditions of agency (and the *Hierarchy of Generic Goods*<sup>21</sup>). Similarly, those who may be incapable of exercising choice as to the enforcement of rights are protected by the right (in isolation) without the addition of a waivable component (thus further protecting the individual from their choices). The justification for right-holding is manifested by the need to avoid violations of the *PGC*.<sup>22</sup> As a result, I frame a theory of legal rights around the determinate commitments of this categorical imperative which allows for greater flexibility in the grounding of these underpinning considerations implicitly raised by the current approaches. In so doing, I seek to consider rights, not as abstract, individualised incidents, but as a complex, matrix which flows across a given community seeking to achieve reciprocity and mutualism.

### 1.1.2 Models of Autonomy

Here, I claim that the value of autonomy is to be found in the relationship between agents within a given community and that is the balancing of autonomy which culminates in *meaningful* respect for those choices. Present approaches to (legal) autonomy are overly focused on the individual act of 'choosing'.<sup>23</sup> For bioethics,<sup>24</sup> this comes in the form of an assimilation between the concepts of autonomy and informed consent. For feminism (or

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<sup>18</sup> See: 4.2.2 The Function Argument

<sup>19</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978).

<sup>20</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 68-78.

<sup>21</sup> Deryck Beyleveld and Shaun Pattinson, 'Precautionary Reasoning as a Link to Moral Action' In Michael Boylan (ed) *Medical Ethics*, (Prentice-Hall, 2000), 39-53, 43.

<sup>22</sup> See: 4.3 Rights, Justification and Precautionary Reasoning.

<sup>23</sup> See: 5.2 Revisiting Reproductive Autonomy.

<sup>24</sup> Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 6<sup>th</sup> ed (Oxford University Press, 2009), 127.



relational autonomy),<sup>25</sup> this comes predominantly in the application of the framework whereby the individual choice is given undue priority over competing values. Bioethics appears to align the notion of autonomy with something which can be 'done' to the individual through providing information and space to make a decision. Feminism on the other hand provides an excellent model of autonomy moving beyond the individual act and onto public considerations which sit behind that act, yet it falls into a similar trap by overstating the position of one interested group. These models of autonomy may be extremely influential on all of us. The bioethical approach has a lot of traction in relation to medical practice and medical law and is the primary focus in the application of our conceptions of what autonomy is practically. Feminism offers the opportunity to develop our understanding of the wider considerations involved with choosing and the notion of 'real' choice.

Against this, I claim that autonomy must be modelled rationally as a public and private good.<sup>26</sup> This requires subjecting the exercise of autonomy to the Tools for the Resolution of Intra-Variable Conflict in order to determine the legitimate exercise of choice (and to balance this interest across the community). Equally, I claim that it is necessary for the State to hold duties to empower *productive* agency through autonomy by means of research, funding, etc., so that individuals are enabled to make 'real' choices as to how to live their lives. In this way, the bioethical notion of informed consent alongside the Tools for the Resolution of Intra-Variable Conflict provide a platform for determining the exercise of private *Rational Autonomy*. The relational model of autonomy and the notion of *productive* agency is used to evaluate public rational autonomy. By framing autonomy as a right, derivable from agency, I assert that the individual claim to autonomy must not be overstated. Instead, what is important is the balancing of interests across a community.

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<sup>25</sup> Susan Sherwin, 'A Relational Approach to Autonomy in Health Care' in Susan Sherwin et al (eds), *The Politics of Women's Health: Exploring Agency and Autonomy* (Temple University Press, 1998), 44.

<sup>26</sup> See: Chapter 5 Rational Autonomy and Reproduction.

### 1.1.3 Regulation of Abortion

The regulation of abortion is demonstrably no longer fit for purpose. It remains, first and foremost, a criminal offence to terminate a pregnancy to which defences apply through the Abortion Act 1967 for the practitioners. This is the case *legislatively* but is not reflected practically. The Abortion Act 1967 is outdated and allows for a distinction between the legal position and the practical realities. Whilst s1(1)(a) may be practically a 'catch-all' ground sufficient to create, effectively, a right to termination, it places unnecessary requirements on the termination, such as approval by two practitioners, and misplaces the 'power' of choice away from the mother.<sup>27</sup> *BPAS v Secretary of State for Health*<sup>28</sup> has also demonstrated the inability for the law to develop in line with new technologies which allow for greater freedom, control and safety in the termination of pregnancies.<sup>29</sup> This creates a multifaceted problem for interested parties. For mothers, access to abortion is subject to the approval of two doctors rather than a choice to be made by her (with those around her). For doctors, the legal position fails to reflect medical practice. For fathers, rights to be involved are non-existent and any 'right to be informed' exists morally at best. For the foetus, the position is clearer - there is no right to life before birth - but this is not adequately reflected in the legislative position.

I claim that the model of *Rational Autonomy* adopted calls for the abortion debate to be reframed according to the requirements of Gewirth's argument to the *PGC*.<sup>30</sup> This means that we must balance any competing interests between "agents" on the grounds of the Tools for the Resolution of Intra-Variable Conflict.<sup>31</sup> That is, consideration must be given to the level of harm, the likelihood of that harm occurring and the level of agency demonstrated; ultimately, we must seek to find the response which is the least likely to violate the categorical imperative.<sup>32</sup> On this approach I assert that presumptions can be raised which may justify certain rights framed around a gradualist conception of the

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<sup>27</sup> See: 5.3.2 Abortion and Reproductive Autonomy.

<sup>28</sup> [2011] EWHC 235 (Admin).

<sup>29</sup> See: 5.3.2.g Early Medical Abortion.

<sup>30</sup> Gewirth, n 19.

<sup>31</sup> See: 5.3 Abortion.

<sup>32</sup> Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001).

foetus.<sup>33</sup> These rights seek to explain the law on abortion as an exercise of autonomy and as such subject to consideration at both private and public levels. As a result, I claim to demonstrate that a 'right to terminate a pregnancy' could be a *moral* right, in certain circumstances, which is subject to *other* moral rights of competing interest – by the father, a doctor, the foetus, or the community.

#### 1.1.4 Wrongful Conception

The legal position in relation to the pre-natal tort of Wrongful Conception<sup>34</sup> is to allow the claim in a non-traditional manner. Whilst the claim is allowed it is artificially limited by a 'conventional award' of £15,000 in all cases for the 'loss of autonomy'.<sup>35</sup> The result of this non-traditional approach is that a) claims can no longer be heard by the courts creating an access to justice issue, and b) the award treats all interferences with autonomy as equal and as a result fails to account for the real consequences of harm in these cases.<sup>36</sup> The combined effect of *McFarlane*<sup>37</sup> and *Rees*<sup>38</sup> is to create a standard approach to these claims. *McFarlane* outlaws compensation for the costs of raising an uncovenanted child (as this is either not a loss or, if it is, is not a consequential loss). *Rees*, meanwhile, provides the £15,000 'conventional award' for all claims for the loss of autonomy.<sup>39</sup> The numerous arguments raised across these cases only mask the true nature of disapproval of these claims *because* they challenge the conservative narrative of the value of children. The result is a lack of consistency in the law both within Wrongful Conception, itself, but also in relation to family planning. Simply, if the birth of a child is always a 'joyous' event then why is family planning provided by the State? These decisions have the propensity to affect anyone involved in the pursuit or restraint of exercising our reproductive capacities. It risks modelling the legal response to issues surrounding reproduction on the quasi-

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<sup>33</sup> Margaret Little, 'Abortion and the Margins of Personhood' (2007/08) 39 *Rutgers Law Journal* 331, 332.

<sup>34</sup> This is also referred to as 'Wrongful Pregnancy' – see: Mason and Laurie, n 14, 358 - Wrongful Conception is preferred on the basis that it is in the conception of the child that part of the harm manifests.

<sup>35</sup> See: 6.1.2 The Conventional Award and the Damages Claim,

<sup>36</sup> See: 6.3 Revisiting Rees and McFarlane.

<sup>37</sup> *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL).

<sup>38</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL).

<sup>39</sup> *Ibid*, [8], per Lord Bingham.

moral intuitions of judges. A risk is posed to the very notion of autonomy within our legal system if it can be frustrated without the right to repair based on non-explicit reasons of individual, subjective valuing.

I claim that in order for these claims to be appropriately resolved what is needed is a system for determining *objective value* in this area.<sup>40</sup> This, I suggest, is achievable using the tools set out in relation to the model of *Rational Autonomy*. What is required in these cases is a demarcation between the idea of value (as in *cost*) and the idea of dignity (as in *worth*).<sup>41</sup> In so doing, I hold that the individual and collective good of respecting autonomy outweighs that of the dignity of abstract reproduction.<sup>42</sup> As such, these claims must be treated according to the normal rules of negligence so that reproductive autonomy is meaningfully respected. This is original as it offers a consideration of these claims on the basis of moral reason and continues to evaluate the ethical rationalism thesis in a new area of legal concern.

In the remainder of this chapter, I will begin to forestall the arguments raised throughout this thesis. Firstly, I will begin to consider what is meant by ‘Autonomy’ and ‘Reproductive Autonomy’ and why it is of importance. I will also begin to sketch out my approach to this concept. Secondly, I will outline the theoretical framework used to investigate the subject matter of this thesis and emphasises the interconnectedness of the questions raised between ethical rationalism, law, rights and reproductive autonomy. Finally, I will provide an outline of the structure of the thesis and how I intend to present the arguments which provide the answer to the research question.

## **1.2 The Nature and Value of Reproductive Autonomy**

It is necessary to understand, for the purposes of this thesis, what I take to be within the ambit of Reproductive Autonomy and how the argument as to the existence of a right to

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<sup>40</sup> See: 6.2 Dignity, Value and Rational Autonomy.

<sup>41</sup> See: Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998), 42, [4:434-435].

<sup>42</sup> See: 6.2.3 Objective Goods in Autonomy and Dignity.

it will be framed in later chapters. Whilst the importance of reproductive autonomy is easily recognised, it remains a concept which lacks clear definition. As Nelson notes,

There is little disagreement that the freedom of choice in reproductive matters is critically important, but as a concept, reproductive autonomy remains somewhat inchoate. In part, the ambiguity is a result of the incomplete theorisation of the concept; in turn, this is tied to the contested nature of autonomy itself.<sup>43</sup>

In order to develop our understanding of the value of reproductive autonomy, it is necessary to consider issues involved with it, such as the domain in which our choices that are to be included in it and those issues arising from our understanding of the nature of the concept, as well as considering the notion of autonomy itself at a more general level. It is to this which we must first turn before returning to and building upon the notion of *Rational Autonomy* which will provide the framework of critique in this thesis.

The concept of autonomy is similarly important, yet its parameters are ill-defined and disagreement pervades much of the nature of autonomy. At a basic level, autonomy is understood as the ability for individuals to make choices in relation to how they are to live their lives.<sup>44</sup> This, in turn, begins to spur ideas of self-governance, self-rule, decision making and practical reason, freedom and liberty of the will, and with other concepts such as dignity, identity, and responsibility and relates to one's beliefs, values and reasons for acting.<sup>45</sup> Yet, within this maze of ideas and concept-unification, the nature of autonomy is an unclear one. It is our task, then, to sketch out a – necessarily brief – outline of the notion of autonomy which is to be adopted and developed into the understanding of reproductive autonomy in this thesis. In order to begin to understand what is meant by and included in the concept of autonomy, we must start by considering the notion in abstraction and within a single individual. We will then begin to open this conception up to the relational (or contextual) nature of autonomy.

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<sup>43</sup> Nelson, n 13, 11.

<sup>44</sup> John Christman, "Autonomy in Moral and Political Philosophy", in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* Spring Edition (2015), at <<http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>>.

<sup>45</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988), 6.

The concept of autonomy, as related to the importance of the choices that individuals make, is vital to an understanding of the relationship between moral and political values. It allows the tethering of our ideas around self-governance and State governance.<sup>46</sup> In this way, Christman claims, that to be autonomous is to 'be one's own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self.'<sup>47</sup> Autonomy, in this way, goes some way to helping us to understand modern notions of freedom in relation to thought, expression, religion and so forth.<sup>48</sup> Yet Dworkin seeks to separate notions of freedom and autonomy, claiming that whilst freedom refers to the uninhibited ability to particular acts, autonomy is concerned with the wider notion of one's personal state.<sup>49</sup> The two, however, are commonly used synonymously and in certain conceptions of *positive* freedom may be more closely related to one another.<sup>50</sup> For present purposes, I seek not to *completely* separate the notions of freedom and autonomy,<sup>51</sup> but to demarcate them whilst recognising an overlap, on the basis that the prior concerns 'both occurrent and dispositional non-interference with his actions by other persons or things, except insofar as such interference may help to assure either his freedom in respects he values more or his attainment of other valued purposes.'<sup>52</sup> The latter, meanwhile, and we will expand on this initial notion, concerns the ability for a person to make independent,

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<sup>46</sup> See: Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), 270-4. Also see: Nelson, n 43; Christman, n 44.

<sup>47</sup> Christman, n 44.

<sup>48</sup> See: Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996) and Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007).

<sup>49</sup> Gerald Dworkin, n 45 see: 13-5, 19-20.

<sup>50</sup> Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford University Press, 1969), 118-72, 131-4.

<sup>51</sup> It is worth noting that for Gewirth (both n 48 and n 52) the suggestion is that *autonomy* may be considered to be subtenets of freedom or a generic feature of agency in and of itself. See: Gewirth, n 48, 116-7. For the purposes of this thesis, I hold that it is, *essentially*, subtenets of freedom yet sufficiently demarcated so as to be treated independently. In either construction, however, it is clear that autonomy is due respect given its relationship with the possibility of successful action.

<sup>52</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 52. See also: Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 5-6.

calculated and unforced decisions as to their life and their value systems.<sup>53</sup> Autonomy, then, is related to but distinct from freedom.<sup>54</sup>

In addition to the demarcation between freedom and autonomy, we must also seek to delineate the notions of basic and ideal autonomy, which are somewhat blurred. Whilst basic autonomy refers to the minimal state of decision making as independent and speaking for oneself, ideal autonomy, as an aspirational notion, sets the goal of complete freedom from external forces and purely self-governing. The idea of basic and ideal autonomy leads us to begin to recognise that the failings around concept definition may arise from the attempt to (or perceived need to) define autonomy as an all-or-nothing construct.<sup>55</sup> Instead, what is required is a *continuum* of the degrees of autonomy. Perceived in this way, conditions relevant to the exercise of autonomy allow for minimal, moderate and maximal expressions of autonomy depending on their own competencies and the circumstances of the decision.<sup>56</sup> This sliding-scale approach to autonomy issues is ostensibly preferable.

What then are to be the conditions precedent to the exercise of autonomy in its varying degrees? Feinberg claims that assertions to ‘autonomy’ are done so with one of four different meanings: the capacity to self-govern, the actuality of self-governance, a personal ideal, and a set of rights which guarantee one’s self-governance.<sup>57</sup> Christman, meanwhile, claims that autonomy must, at the very least, imply the absence of ‘debilitating pathologies or...oppressive and constricting conditions’.<sup>58</sup> Most accurately, Beauchamp and Childress claim that to be autonomous is to be acting *intentionally, voluntarily* (that

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<sup>53</sup> Christman, n 44. See: Nicolette Priaux, *The Harm Paradox* (Routledge-Cavendish, 2007), 9.

<sup>54</sup> Gewirth, n 48, 116: “Autonomy differs from freedom, however, because it includes the idea of a ‘law’ or ‘rule’...autonomy requires that one exercise control not only over particular actions or behavioural episodes by also over the general pattern of one’s behaviour, including the ends of one’s action as well as their means.”

<sup>55</sup> Christman, n 44.

<sup>56</sup> Diana Tietjens Meyers, *Self, Society and Personal Choice* (Columbia University Press, 1989), 205.

<sup>57</sup> Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (Oxford University Press, 1986).

<sup>58</sup> Christman, n 44.

is, free from coercive forces), and *with a substantial understanding of the salient facts*.<sup>59</sup> Therefore a person may choose autonomously when they have ‘acquired pertinent information and [have] relevant beliefs about the nature and consequence of their actions’<sup>60</sup> and act free of coercive forces. It is this conception of autonomy which focuses, principally, on the conditions of decision making rather than the process of it, which is eminently preferable. Accounts of autonomy which feed into the nature of autonomous choice, the idea of competency<sup>61</sup> and authenticity of value, appear self-limiting.<sup>62</sup> This poses a problem if ‘we cannot know whether a decision has been made in spite of one’s reflectively endorsed values.’<sup>63</sup> Respect for autonomy must be founded on the autonomous choice itself and the inherent value of that choosing, rather than the subjective merit of the process of choosing.<sup>64</sup>

It is this account of autonomy which seems to feed into the understanding of autonomy as a continuum that will be taken on from this point. Yet this account comes with its own limitations. As Kukla notes,

While bioethicists know that the concept of informed consent does not exhaust the rich concept of autonomy, many still take it as a governing assumption that in the practical domain of health care, concerns about autonomy can be translated into concerns about self-determination, which can be in turn translated into concerns about informed consent.<sup>65</sup>

It has been suggested that the focus on informed consent, and therein Beauchamp and Childress’ third criteria, is to divert attention from *actually* respecting autonomy.<sup>66</sup> The problem, as Nelson suggests, is that this approach stagnates the debate upon the issue of

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<sup>59</sup> Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 6<sup>th</sup> ed (Oxford University Press, 2009), 127.

<sup>60</sup> Ibid.

<sup>61</sup> Meyers, n 56, 76.

<sup>62</sup> See: Christman, n 44; Nelson, n 43, 13.

<sup>63</sup> Nelson, n 43, 18.

<sup>64</sup> Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003), 20.

<sup>65</sup> Rebecca Kukla, ‘Conscientious Autonomy: Displacing Decisions in Health Care’ (2005) 35(2) *Hastings Centre Report* 34, 35.

<sup>66</sup> Nelson, n 43, 18



informed consent.<sup>67</sup> The problem, however, it is suggested, is that the principle itself cannot perform all the work needed of it. Walker claims,

The practically useful account of autonomy that is currently appealed to in medical ethics is conceptually inadequate. On the other hand, conceptually adequate accounts of autonomy are less practically useful and seem to provide suspect grounds for interference with patient decisions.<sup>68</sup>

The solution, it is suggested, is to ‘re-cast “respect for autonomy” in medical ethics as support for the conditions that are conducive to autonomous decision making on the one hand and abidance by the decisions of autonomous persons made under those conditions on the other hand.’<sup>69</sup> Nevertheless, in terms of a practical understanding of the requirements of the making of an autonomous decision, the threefold criteria of intent, voluntariness and sufficiency of information appear to offer a compelling account of what is required for such a decision to be made on a purely individual level. It fails somewhat, however, in its ability to recognise, or respond to, the broad scheme of decision making. As Jackson proposes, autonomy is ‘not just the right to pursue ends that one already had, but also to live in an environment which enables one to form one’s own value system and to have it treated with respect.’<sup>70</sup> That is, there is a lack of consideration made to the broader political, social and moral implications of autonomy<sup>71</sup> and it is to this that we must turn.

For Kant’s moral philosophy, autonomy becomes the focal point of our practical reason and our commitments to others. At a basic level, Kant’s argument was that if our practical reason (that is, the ability to choose one’s actions) presupposes our freedom, and that implies lacking external barriers to action, then our action ought not to affect others as an

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<sup>67</sup> Ibid, 18-9.

<sup>68</sup> Rebecca Walker, ‘Medical Ethics Needs a New View of Autonomy’ (2009) 33 *Journal of Medicine and Philosophy* 594, 595.

<sup>69</sup> Ibid, 605-6.

<sup>70</sup> Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001), 6.

<sup>71</sup> Catriona Mackenzie and Natalie Stoljar, ‘Introduction: Autonomy Refigured’ in Catriona Mackenzie and Natalia Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 4: “...persons are socially embedded and...agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”

external barrier to their action.<sup>72</sup> In this way, Kant finds the first formulation of the Categorical Imperative, ‘act only in accordance with that maxim through which you can at the same time will that it become a universal law.’<sup>73</sup> It is through this understanding of the rational implications of autonomy and practical reason which we are able to conceive of the *legitimate* exercise of one’s autonomy.<sup>74</sup> Since, ‘[w]ith the idea of freedom the concept of *autonomy* is now inseparably combined, and with the concept of autonomy the universal principle of morality, which in idea is the ground of all actions of *rational beings*.’<sup>75</sup> Accordingly, because rational beings, agents, require autonomy for the exercise of their rationality it is necessarily tied to the principle of moral law; that is, autonomy forms the basis for moral commitments. For instance, whilst it may be autonomous to do so, few would perceive the decision to injure another person rather than stroking a cat to be a *legitimate* exercise of that autonomy. Similarly, as Gewirth notes, ‘The agent’s freedom or voluntariness of action is thus *not violated* when he is subjected to duties or requirements imposed by [rational morality].’<sup>76</sup> On this basis, autonomy is both a public as well as private ideal. As such, a balance must be struck between the individual act of choosing and the interests of the community.

This, ultimately, is supported and developed by Gewirth’s argument to the Principle of Generic Consistency (*PGC*) – which holds that all agents have generic rights to freedom and well-being on account of their agency. In this way, we are capable of furthering our understanding of the concept of autonomy into the realms of public autonomy (that is, a scheme of autonomy that hosts both political and moral features). This, in turn, becomes the basis for the conceptualisation of a *Rational Autonomy*.<sup>77</sup> As Gewirth claims, ‘autonomy must be rational, in that the rules or laws that one sets for oneself have been

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<sup>72</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997).

<sup>73</sup> Ibid, 31, [4:421].

<sup>74</sup> It also helps to avoid criticism of Kant’s understanding that non-moral actions are non-autonomous. By instead conceiving of these actions as illegitimate, we are able to avoid the criticism that Kant’s approach excludes other features of the human condition, such as the ‘passions’, and the manner in which these are simultaneously and equally related to decision making. See: Gewirth, n 52, 138; Christman, n 44; and Nelson, n 43, 17.

<sup>75</sup> Ibid, 45, [4:452-3].

<sup>76</sup> Gewirth, n 52, 138.

<sup>77</sup> Gewirth, n 48, 117.

arrived at by, or at least compatible with, a correct use of reason so that one recognises that *all other prospective agents* have the same rights'.<sup>78</sup> Key to this is the framing of our understanding of autonomy around the Kantian arguments to rational morality and the curtailment and, indeed, empowerment of autonomy on this basis.

From this point we are able to further understand the relationship between the individual and the State. This opens the door to considerations of the legitimate role that the State may play in limiting individual freedom and autonomy.<sup>79</sup> This resembles Mill's claim that individual liberty, and thereafter autonomy, only be constrained by the liberty of, and non-maleficence towards, others. In so doing, we seek to promote individual – and, indeed, collective – autonomy and ultimately, the rejection of aggressive paternalism.<sup>80</sup> As Mill notes, in formulating the Harm Principle,

...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of 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 civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. 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.<sup>81</sup>

Freedom and autonomy become crucial in order to understand the parameters of self-governance and protection from interference by external (here, State) forces.<sup>82</sup> Yet this is not, as Nelson claims, to advocate the 'separate, isolated, self-sufficient individual'<sup>83</sup> rather

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<sup>78</sup> Ibid.

<sup>79</sup> John Christman and Joel Anderson, 'Introduction' in John Christman and Joel Anderson (eds) *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005), 4.

<sup>80</sup> Priaulx, n 53, 9.

<sup>81</sup> John Stuart Mill, *On Liberty* (Roberts and Green, 1869), 9.

<sup>82</sup> Nelson, n 43, 16.

<sup>83</sup> Ibid.

it is through the equalising conditions of Gewirthian *Rational Autonomy* and the evaluation of the *legitimacy* of autonomous decision making that we are able to conceive of the relational (or contextual) nature of autonomy.<sup>84</sup> This is because, ‘Rational Autonomy, far from being self-centred, incorporates the interconnectedness and concern for others emphasised in communitarian and feminist doctrines.’<sup>85</sup>

The Feminist approach is typically manifested as one of relational or contextual autonomy. As Sherwin notes,

A relational approach to autonomy allows us to maintain a central place for autonomy within bioethics, but it requires an interpretation that is both deeper and more complicated than the traditional conception acknowledges – one that sets standards that involve political as well as personal criteria of adequacy.<sup>86</sup>

The Feminist idea of relational autonomy is premised on the idea that, ‘persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex intersecting of social determinants’.<sup>87</sup> It is concerned with how autonomy is situated within the social order<sup>88</sup> and whether there are political solutions to individual problems of autonomy.<sup>89</sup> The approach requires that systems and structures are in place that foster the development of our autonomous selves.<sup>90</sup> It seeks to question, ‘not only...the social and political contexts of decision making...but also the options really available to women – and those who control those options.’<sup>91</sup>

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<sup>84</sup> Gewirth, n 48, 117.

<sup>85</sup> Ibid.

<sup>86</sup> Susan Sherwin, ‘A Relational Approach to Autonomy in Health Care’ in Susan Sherwin et al (eds), *The Politics of Women’s Health: Exploring Agency and Autonomy* (Temple University Press, 1998), 44.

<sup>87</sup> Catriona Mackenzie and Natalie Stoljar, ‘Introduction: Autonomy Refigured’ in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 4.

<sup>88</sup> Ibid.

<sup>89</sup> Carolyn McLeod and Susan Sherwin, “Relational Autonomy, Self-Trust, and Health Care for Patients who are Oppressed” in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 259, 260.

<sup>90</sup> Susan Dodds, “Choice and Control in Feminist Bioethics”, in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 259, 260.

<sup>91</sup> Priaux, n 53, 9.

Whilst also recognising that autonomy is ‘a capacity that requires ongoing relationships that help it flourish; it can wither or thrive throughout one’s adult life.’<sup>92</sup> But it ought not to go too far in advocating the importance of social constitution autonomy.<sup>93</sup> Especially not as being determinative of it.<sup>94</sup> Nelson prefers to term autonomy as a characteristic of individuals ‘who are inextricably embedded with relationships’.<sup>95</sup> In offering a contextual account of autonomy it seeks to look beyond whether X chooses within a given situation, beyond the choices which are available and onto social considerations around the meaningfulness of those choices.<sup>96</sup>

Yet, a tendency is apparent in the feminist approach to overstate the importance of autonomy beyond other competing values.<sup>97</sup> As a result, autonomy becomes a ‘meaningful’ concept only in relation to those abused, dominated and oppressed persons.<sup>98</sup> Whilst it demands ‘standards that involve political as well as personal criteria of adequacy,’<sup>99</sup> the application of the framework tends toward an overstated position in relation to the value of autonomy to certain persons only. There is a failure to account for, ‘corresponding rights and obligations whereby they mutually help one another to develop as autonomous and cooperative persons through the policies and institutions of the community of rights.’<sup>100</sup> Thus, we may be inclined towards the model of autonomy presented as an account of the broader, contextual implications, an approach which seeks to balance these rights and obligations across the social order through moral imperatives is to be preferred.

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<sup>92</sup> Jennifer Nedelsky, “Reconceiving Rights as Relationships” (1993) 1(1) *Review of Constitutional Studies* 1-26, 8.

<sup>93</sup> Friedman, n 64, 96. See also, John Christman, ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves’ (2004) 117 *Philosophical Studies* 143, 158.

<sup>94</sup> John Christman, ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves’ (2004) 117 *Philosophical Studies* 143, 158.

<sup>95</sup> Nelson, n 43, 27.

<sup>96</sup> Sherwin, n 86, 44 and Nelson, n 43, 46.

<sup>97</sup> Nelson, n 43, 157.

<sup>98</sup> Friedman, n 64, 4.

<sup>99</sup> Sherwin, n 86, 44.

<sup>100</sup> Gewirth, n 52, 139.

Autonomy, in this way, is more accurately seen as something which inherently and, indeed, fundamentally relates to our social order and the manner of legitimate regulation within that order but remains, ultimately, something which resides in the individual.<sup>101</sup> Autonomy, then, is the expression of rational, egalitarian choice and, simultaneously, the demarcation between the self and the State, individual and collective.<sup>102</sup> It is at once communal and relational but also isolated and individual in nature.

The notion of *Rational Autonomy* seeks to consider the social and political conditions of decision making, and therein the legitimate restriction of it, and ultimately involves cultivating the conditions of the exercise of autonomy and productive agency.<sup>103</sup> It seeks to build on the bioethical and feminist models of autonomy by recognising rational morality as the base point for determining the legitimacy of our autonomous choosing whilst also incorporating the communal and interconnected notions of self vital to that conception. What does Rational Autonomy, then, entail in regards to the issue of *reproductive autonomy*? Specifically, how is this to be framed in terms of the broader concerns raised in relation to autonomy itself? It is to this which we must now turn.

In narrowing down from autonomy considered more generally to those specific issues relating to the exercise of one's reproductive autonomy, it is necessary to focus on what will be contained within, and excluded from, the ambit of that definition. For Nelson, reproductive autonomy refers to 'the ability to be self-determining and to act on one's own values in making decisions about reproduction.'<sup>104</sup> For Dworkin, it refers to one's '...control [over] their own role in procreation unless the state has a compelling reason for denying them that control.'<sup>105</sup> He goes on to claim that, 'people have the moral right – and the moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences

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<sup>101</sup> Ibid, 39.

<sup>102</sup> Gewirth, n 48, 91: "Far from being 'unencumbered' by social ties, these ties are essential to personhood so that humans are inherently social beings."

<sup>103</sup> Ibid, 106-65.

<sup>104</sup> Nelson, n 43, 2.

<sup>105</sup> Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, And Individual Freedom* (New York: Knopf, 1993), 148.

and convictions.<sup>106</sup> Its importance has arisen and developed from reproductive ‘technologies [opening] the way to possibilities of self-determination and self-expression in reproduction that [goes] far beyond the avoidance of unwanted children.’<sup>107</sup> Yet the most influential articulation of reproductive autonomy - or as he terms it, ‘Procreative Liberty’ - is provided by Robertson, who notes, ‘Full Procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses.’<sup>108</sup> This is later developed into, ‘the freedom to decide whether or not to have offspring and to control the use of one’s reproductive capacity.’<sup>109</sup> Robertson is keen to caveat his definition and notes,

Not everything that occurs in and around procreation falls within liberty interest that are distinctly procreative. Thus whether the father may be present during childbirth, whether midwives may assist birth, or whether childbirth may occur at home rather than in a hospital may be important for the parties involved, but they do not implicate the freedom to reproduce...<sup>110</sup>

This statement raises two issues which ought to be responded to and clarified. Firstly, and contrary to the suggestion that some of these considerations ‘seems to largely discount the experience of reproduction from the reproducing woman’s point of view’,<sup>111</sup> whilst I would not agree that all of the examples which Robertson uses are apt, there are certainly issues that relate to, at least, *the manner of reproducing* which does not relate directly to reproductive autonomy in the way outlined above. This is not to suggest that they are unimportant, nor is it to detract from them in any way, rather it is to demarcate for the purposes of a concise understanding of the concept of reproductive autonomy. Secondly, it also, by its nature as a comment on the *freedom to (not) reproduce* is concerned with a narrower set of issues than those which may well be assumed with the concept of

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<sup>106</sup> Ibid, 166.

<sup>107</sup> Onora O’Niell, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002), 57.

<sup>108</sup> John Robertson, ‘Procreative Liberty and the Control of Contraception, Pregnancy and Childbirth’ (1983) 69 *Virginia law Review* 405, 406.

<sup>109</sup> John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994), 16.

<sup>110</sup> Ibid, 23.

<sup>111</sup> Nelson, n 43, 33.

reproductive autonomy. Held on its own premises, criticism of the passage seems off the mark.

In order to begin to offer a more comprehensive understanding of the concept of reproductive autonomy, it is important to consider *why* it is a valuable concept in the broader sphere of our lives and interests. Priaulx offers this vision,

For some, decisions to reproduce may constitute a critical part of their life plan and allow them to foster a sense of belonging, stability and love; it may also herald the beginning of a tremendously creative and enriching journey. A journey that begins with the pleasure of bringing new life into the world, to one where the individual might experience mutual love, a sense of 'greater' purpose, and learn to view the world afresh through the eyes of a child. For others, conversely, reproduction may threaten, disrupt or thwart one's idea of and pursuit of the good life. Whether enjoyed now or sitting on one's hoped for horizon, this may consist of a range of quite different experiences and responsibilities regarded by the individual as much more deeply fulfilling of their needs.<sup>112</sup>

She continues,

For example, the pursuance of a career, the discovery of new talents or hobbies, the fostering of friendships and relationships and challenging one's own conception of the world through the pursuit of knowledge or travel all sit among the many different ways that humans can conceive of their sense of purpose, and quite literally, the notion of 'who one is'. Therefore, although we can identify humanity as holding in common 'general human needs', how these might best be fulfilled is necessarily autobiographical in nature: we create radically different conceptions of how to best pursue our idea of the 'good life' in line with our preferences, capabilities, constraints and aspirations.<sup>113</sup>

The importance and value of one's reproductive autonomy stems from and relates 'to personal identity, to dignity, and to the meaning of one's life'.<sup>114</sup> Seemingly, 'disregard [for] an individual's reproductive preferences,...undermine[s] their ability to control one of the most intimate spheres of their life'.<sup>115</sup> It is in the deep, ingrained relationship between one's reproductive choices and the ideas one has over one's life more generally

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<sup>112</sup> Priaulx, n 10, 176-7.

<sup>113</sup> Ibid, 177.

<sup>114</sup> Robertson, n 109, 24.

<sup>115</sup> Jackson, n 70, 7.



that we begin to understand the broader context of the concept and its relationship to the legitimacy issues involved with autonomy generally.

What is important is to understand how the relationship between broader social issues surrounding the choice and the individual choice itself. Part of this requires an evaluation of the way in which those choices are offered to the individual and the legitimacy of that. Contrary to the suggestion that reproductive autonomy is simply concerned with the freedom from interference in making reproductive choices,<sup>116</sup> and therein only capable of a negative understanding of the rights it (*may*) offer, it appears on the face of things that any evaluation must be framed around positive duties of assistance.<sup>117</sup> As Roberts notes,

Liberals' defense of reproductive liberty as a 'moral right' central to 'personal identity, meaning, and dignity' is a compelling reason to ensure the equal distribution of procreative resources in society. Liberals give no good reason why our understanding of procreative liberty must adopt a baseline of existing inequalities or why the deepening of those inequalities should not weigh heavily in our deliberations about policies affecting reproduction.<sup>118</sup>

It is in this way that the *rational* model of reproductive autonomy seeks to recognise the need for a 'positive provision of resources and services [that] may be necessary in order to assist people both to work out their own priorities and to realise them'<sup>119</sup> and to empower productive agency.<sup>120</sup> This, as Nelson notes, broadens our considerations to issues of equality and social justice<sup>121</sup> and, therein, 'less about *kinds of reproductive decisions* (i.e. right to reproduce) and more about its instrumentality to the fostering of human needs'.<sup>122</sup> The impact of this issue and the need for positive requirements in order to nurture one's reproductive autonomy which goes beyond simply refraining from interfering. Nelson argues,

...the notion of reproductive autonomy as simply a negative liberty is, for many women, woefully inadequate. It is of little use to tell a woman that she is free to

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<sup>116</sup> See Robertson, n 109.

<sup>117</sup> Nelson, n 43, 46.

<sup>118</sup> Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (Vintage, 1997), 296.

<sup>119</sup> Jackson, n 115, 7-8.

<sup>120</sup> Gewirth, n 48, 348.

<sup>121</sup> Nelson, n 43, 36.

<sup>122</sup> Priaulx, n 10, 176.

terminate her pregnancy if she cannot afford to pay for the abortion procedure, or if she is required to travel not once but twice to a distant clinic in order to have the procedure, and her job, or her child or her elder-care responsibilities make that travel impossible.<sup>123</sup>

Simply put, the obligation to enable choice to take place requires that the choices are made *realistically* available. Reproductive autonomy then goes beyond simply the exercise of intentional, voluntary and informed choice on reproductive issues and is directed by a broader social understanding of the circumstances in which that decision *may* or *does* take place and requires an understanding and evaluation of the *legitimacy* of the choices which are both available and withheld from the individual and the collective. As Scott argues, 'reproductive autonomy is most valuable when there are good or serious reasons for certain choices.'<sup>124</sup> Nelson determines,

From a political perspective, law and policy have obvious implications for reproductive autonomy, and so can healthcare systems, institutions and providers. A contextualised understanding of reproductive autonomy lends itself to recognising this important connection between reproductive health and reproductive autonomy, and to seeking solutions that will improve both.<sup>125</sup>

This dual understanding of reproductive autonomy based on both personal and political factors provides the foundation of the investigation which is made in this thesis. Whilst elements will be further developed, and consideration of the broader interplay between agent and State is needed, it is this which form the key to the examination of the prospect of a Right to Reproductive Autonomy.

The notion of reproductive autonomy, as part of Rational Autonomy, develops beyond a narrow understanding of the relevance of *individual* instances of the ability to choose. It takes us beyond recognition of the need for persons *A* and *B* to be free of coercion and fully informed. Beyond which we find questions as to how the options available to choosers and the ability for these options to be secured may take place in the wider

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<sup>123</sup> Nelson, n 43, 38.

<sup>124</sup> Rosamund Scott, 'Choosing Between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis' (2006) 26(1) *Oxford Journal of Legal Studies* 153-178, 156

<sup>125</sup> *Ibid*, 54.

institutional arena. In this arena, we find poignant questions surrounding resource allocation and the nature of equality. As Nelson notes,

In terms of personal autonomy, as is the case in bioethics more generally, the key question in assessing the autonomous nature of a particular reproductive decision is whether informed consent was obtained. From the standpoint of the political sense of autonomy, the main concern is that the State not unduly restrict the scope of freedom to make reproductive decisions.<sup>126</sup>

It is to this end, and the political nature of reproductive autonomy, that this thesis focuses its attention. In so doing, it seeks to build upon an understanding of the multidimensional approach to procreative freedoms and how the ability to control one's reproductive capacity intersects with others.

### **1.3 Methodology and Theoretical Framework**

In order to understand what is meant by the notion of *Rational Autonomy* it is necessary to outline the theoretical framework which underpins it. What is required is a theoretical approach which incorporates a schema of hierarchically structured *objective* moral values within a rights-based model of practical reason. The theoretical framework which has been adopted for the purpose of evaluating these claims is that of *Legal Idealism*. Essentially, this is a conception of law which is premised on the *necessity* of law's natural connection with morality if it is to hold continued and continuing legitimacy as a form of practical reason. More accurately, it holds that the determinate moral commitments found in Gewirth's argument to the Principle of Generic Consistency (*PGC*)<sup>127</sup> – that all agents have, *prima facie*, rights to their freedom and well-being by reason of their being agents – holds a rational and logical basis by which agents and the institution can be tied.

I am not, however, for present purposes, concerned with *defending* the argument to the *PGC* itself.<sup>128</sup> Rather my concern in this thesis is with the *application* of the argument to

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<sup>126</sup> Nelson, n 43, 37.

<sup>127</sup> Gewirth, n 52, 135, as an imperative: "Act in accord with the generic rights of your recipients as well as of yourself."

<sup>128</sup> A range of defences to the argument in and of itself are available, the most thorough being supplied in Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan*

the notions of legal right and autonomy within the context of reproductive medicine and family planning.<sup>129</sup> I am concerned with a case study of the right to reproductive autonomy from the perspective of legal idealist theory, which is inherently a *contingent* application of the moral argument based on particular circumstances that exist to make the right feasible. That is, it is only within a society with the technology and knowledge to make family planning services possible, that a legally contingent version of the argument can be made.

Legal Idealism can be seen as a Kantian construction of moral principle akin to the 'Categorical Imperative' and focuses on considerations of practical reason. It builds into the concept of law, a view to moral concern which is allowed to 'shine through' in its reasoning and justification.<sup>130</sup> This is built upon further to construct a developed schema of rights which necessarily incorporate considerations of practical reason as part of their normativity.

The idea of law's separation from morality is the starting point for ideas about the role of morality and the aims of a theory of legal idealism.<sup>131</sup> The Positivist attempt to establish the 'pure' Autonomy Thesis and the critique of the Limited Domain<sup>132</sup> forces an attempt to integrate political morality into legal reasoning. In essence, Legal Idealism is concerned with the structures and procedures of institutionalised practical reasoning but especially with the notion of the 'final arbiter'.<sup>133</sup> The autonomy of law must be admitted as an organised system of reasoning different from political morality as an attempt to allow moral reasoning to function in a viable and *justifiable* way. The obligation to be under

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*Gewirth's Argument to the Principle of Generic Consistency* (London, 1991); Alan Gewirth, 'Replies to my Critics' in Edward Regis (ed), *Gewirth's Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth* (Chicago University Press, 1984) and Michael Boylan (ed) *Gewirth: Critical Essays on Action, Rationality, and Community* (Rowman and Littlefield, 1999).

<sup>129</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 9.

<sup>130</sup> Henrik Palmer Olsen and Stuart Toddington, *Law in its Own Right*. (Hart Publishing, 1999), 116.

<sup>131</sup> Olsen and Toddington, n 130, 156-8.

<sup>132</sup> Gerald Postema, "Law's Autonomy and Public Practical Reason" in Robert George (ed) *The Autonomy of Law* (Claredon Press, 1996) 79-119, 82; 'law defines a limited domain of practical reasons or norms for use by officials and citizens alike.'

<sup>133</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998).

the system is, then, an implication of morality itself. But morality cannot be reinstated as a final arbiter – this would merely reproduce the regulatory problem of Kant’s ‘unilateral moral will’.<sup>134</sup> Morality itself must become ‘omnilateral’ and establish *self* as the basis for public reason. The key is to allow morality to ‘shine through’ the *artificial* reasoning of the law. In this way, the seeming paradox between legal reasoning and moral reasoning is overcome. It is understood by the claim that *Law* entails *Practical Reason* which entails *Moral Reason* which, in turn, entails the *PGC*.<sup>135</sup> The aim of a legitimate legal order is to strive to do justice in the faith that moral reasoners invest when subordinating *selves* to legality. To put it another way,

[The] argument focuses on an agent’s claim to be an agent...[because] agents...are the only intelligible subjects and objects of practical prescriptions (*only for agents does the question arise as to what they may or ought to do, and only to agents is it rational to address a prescription of what they may or ought to do*) and the argument is most fundamentally addressing the question of what actions may or ought to be performed.<sup>136</sup>

This becomes central to the framework because only with (human) agency is there *both* a physical embodiment *and* a ‘consciousness of a kind that is capable of reflecting upon itself and its conditions.’<sup>137</sup> As Fromm notes, ‘Man is the only animal who has not only instrumental intelligence, but reason.’<sup>138</sup> The potential to derive categorical moral (and/or legal) imperatives is a reflection of human agents’ propensity to violate such imperatives; as Becker notes, ‘Man’s anxiety is a function of his sheer ambiguity and of his complete powerlessness to overcome that ambiguity, to be straightforwardly an animal or an angel.’<sup>139</sup> An agent is a being who looks ahead to acting and has both present and future

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<sup>134</sup> Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996), [6:224], 16. See also: Olsen and Toddington, n 130, 145.

<sup>135</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 156.

<sup>136</sup> Deryck Beyleveld and Roger Brownsword, “Principle, Proceduralism, and Precaution in a Community of Rights” (2006) 19(2) *Ratio Juris* 141-68, 144 (*my emphasis*)

<sup>137</sup> Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001), 115.

<sup>138</sup> Erich Fromm, *The Anatomy of Human Destructiveness* (Jonathan Cape, 1974), 225.

<sup>139</sup> Ernest Becker, *The Denial of Death* (Free Press, 1973), 70. See also: Beyleveld and Brownsword, n 137, 114 and Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 78.

‘purposes he wants to fulfil.’ Thus, Agency (‘defined as having purposes that one acts for’<sup>140</sup>) itself is enough to both explain and justify the imposition of *institutionalised* practical reasoning – those reasons for action which arise from a law making body.<sup>141</sup> Agency is the basis for the capacity to exercise choice. The *PGC*, by definition, creates a categorical *need* for<sup>142</sup> and interest in the generic features of agency.<sup>143</sup> It allows for the rational deduction to those other-regarding behaviours that agents *ought* to do at pain of contradiction.<sup>144</sup> It premises those determinate commitments which, when incorporated into a system of institutionalised reasoning, justify the exercise of power to create and enforce norms.<sup>145</sup> Agency itself becomes the basis for the procedural turn.<sup>146</sup>

The Gewirthian argument for the *PGC* necessarily and *logically* implies determinate moral commitments which, when used for the systematic weighting of ‘goods’ or ‘values’, imports the notion of *moral rationality* indirectly into the complex scheme of artificial, institutionalised reasoning. This relation to the basic strivings of agency, after all, ‘underpin[s] all our possible aspirations as *general means* to any hope of *successfully* realising them.’<sup>147</sup> The scheme of weighting afforded by the *PGC* enables the conception of legal authority as stemming from *transparent* autonomy as incorporating omnilateral public morality.<sup>148</sup> This provides, at least, some criteria for the evaluation of ‘justifiability’ in the sense of morally rational concerns relevant to the decision making process in law. The effect of this is to legitimate institutional reasoning – and thereby the obligation to obey – on the basis of its adherence to hierarchically structured objective moral values.

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<sup>140</sup> Beyleveld and Brownsword, n 137, 118.

<sup>141</sup> Beyleveld and Brownsword, n 135, 211-5.

<sup>142</sup> Beyleveld and Brownsword, n 137, 115.

<sup>143</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (London, 1991), 34.

<sup>144</sup> See: Gewirth, n 52, 135 and *ibid*, 118-20.

<sup>145</sup> Beyleveld and Brownsword, n 136, 149-54.

<sup>146</sup> *Ibid*.

<sup>147</sup> Olsen and Toddington, n 130, 156.

<sup>148</sup> Such a weighting is made possible by the fact that the various elements in the theory of the determinate presuppositions of agency can be seen as being more or less indispensable or efficient in relation to a person's general ability to pursue and succeed in achieving his or her freely chosen purposes. *Ibid*, 157.

Legitimacy stems not from technical validity but from the attempt to adhere to the commitments to the *PGC* which every agent must accept by reason of its agency.

This is not to demand or suggest that infallibility would result from such an institution, as ‘...even in an optimal social setting, [legal idealism] makes no romantic assumption that the general acceptance of governing moral principles will mark the end of regulatory conflict and controversy, of legal difficulty and dispute.’<sup>149</sup> The procedural turn is premised on the knowing fallibility of agents. The right answer is an exercise of choice *because* the adjudicators in such a system are not Hercules J.<sup>150</sup> It is fallibility which the *Right Answer Thesis* seeks to explain the requisite improvement and fulfilment of legal reasoning as a logical extension of the scheme of practical reasoning (in that it is ‘artificial’) under *recognised* imperfect conditions.<sup>151</sup> Once this line of thought is recognised and expanded across the horizontal and vertical structures of institutionalised reasoning,<sup>152</sup> it becomes apparent that agency fallibility explains the need for such a structure,<sup>153</sup> the incapability of complete, universal *pre-emption*<sup>154</sup> and, in turn, the impossibility of the resolution of hard cases solely on the basis of legal reasons of fit.<sup>155</sup> Rather, it is the ‘good faith’ attempt to situate institutional reasoning in its optimal manner which ought to be of paramount importance to the justification of artificial reason.

In the idealist sense maintained, the *PGC* is a guide for institutionalised reasoning. It allows for rational and reasonable discourse around the imposition of norms whilst providing criteria of weight based on the necessity for action of the generic features of

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<sup>149</sup> Beyleveld and Brownsword, n 136, 143.

<sup>150</sup> Olsen and Toddington, n 130, 143.

<sup>151</sup> Dworkin, n 133, 188.

<sup>152</sup> By the horizontal and vertical structures I mean, the manner in which the State and the ‘multitude’ or the citizens are divided within a society. This approach, see section 2.5 for more detail, seeks to hold that the vertical structure of society maintains equality and mutuality between all citizens in their commitments to the *PGC*. The horizontal structure maintains that those in positions of ‘power’ as elected representatives represent ‘actors’ whose role is equally defined by reference to the commitment to uphold generic rights of the multitude. See: Thomas Hobbes *Leviathan* (Elibron Classics, 2005), 119; Olsen and Toddington, n 130, 104-11; .and Gewirth, n 48, 341-4.

<sup>153</sup> Beyleveld, n 143, 113.

<sup>154</sup> Gerald Postema, ‘Law’s Autonomy and Public Practical Reason’ in R.P. George, *The Autonomy of Law: Essays on Legal Positivism* (Claredon Press, 1996), 79-119, 93.

<sup>155</sup> Dworkin, n 133, 218.

agency.<sup>156</sup> It provides a non-definitive point of reference for the resolution of disputes and creation of norms.<sup>157</sup> The *PGC* is the regulation of moral reasoning as transposed into *omnilateral* public morality as necessarily connected to legal reasoning.<sup>158</sup> Through an incorporation of the *PGC* into legal reasoning it serves to *justify* and, therein, legitimise the use of power by the relation to moral rationality.<sup>159</sup> It is the incorporation of the *PGC* into legal reasoning which allows the *rational* (as opposed to contractual<sup>160</sup>) loop between legitimacy, authority and the obligation to obey to be maintained and justified. In turn it is through the *necessary* commitment to the generic features of agency in the *PGC* that respect for *Rational Autonomy* can be sustained.

## 1.4 The Structure of the Thesis

This thesis is split into three parts which seek to develop the argument in favour of the theoretical framework maintained. These parts consist of investigating the relationship between ethical rationalism – as outlined by the *PGC* – and, in part one, Law; in part two, Rights; and, in part three, Reproductive Autonomy. It does so on the basis of the interconnectedness of these questions. Part one consists of Chapters Two and Three. Part two of Chapters Four and part three of Chapters Five and Six. It seeks to demonstrate that the equalising, mutualist requirements of the *PGC* offer an understanding of Law, Rights and Reproduction which goes beyond the traditional moral conflict and instead offers a regime which seeks to protect the definitive features of agency at the forefront of institutionalised reasoning.

On this basis, in Chapters Two and Three I will outline the adoption of the Legal Idealist conception of law and attempt to demonstrate that the connection between law and moral

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<sup>156</sup> Stuart Toddington, “The Moral Truth About Discourse Theory” (2006) 19(2) *Ratio Juris* 217-29, 228.

<sup>157</sup> Beyleveld and Brownsword, n 136, 154-5.

<sup>158</sup> Olsen and Toddington, n 130, 34.

<sup>159</sup> Beyleveld and Brownsword, n 135, 213.

<sup>160</sup> That is, the approach of social contract theory. See: Hobbes, n 152; John Locke, *The Second Treatise on Government* (Basil Blackwell, 1946); and, Jean-Jacques Rousseau, *The Social Contract* (Woodsworth, 1998).



rationality (and therein the determinate moral commitments of the *PGC*) entails a legitimisation criteria which logically flows from the agency concerns which justify the *PGC* itself. That is, law is legitimate where it adheres to the *PGC*.

From this, in Chapter Four, I go on to consider the nature of rights and using Hohfeld's Scheme of Jural Relations,<sup>161</sup> as the starting point for a conceptualisation of rights investigate an elucidation of the assertion 'I have a right to  $\phi$ '. In so doing I look to expand upon the original schema and consider how this can be furthered in order to more accurately explain and define the nature of rights-based relations. This is used to consider the normativity of rights and how the holding of rights and bearing of duties affects the practical reasoning of individual agents. It considers the role that common theories of normativity in rights hold and the inadequacies that these present. In the place of these, I seek to investigate and justify an alternative approach which, in keeping with the morally rational connection presented in Chapter Three, holds rights as fundamental devices in institutionalised and moral reasoning in a *Community of Rights*.

In Chapter Five, using the theoretical framework outlined, I consider the role of rights based relations in conjunction with the reproductive autonomy and the availability of family planning services. In doing so, I relate my arguments to questions involving the decision to avoid reproduction such as abortion and contraception. I seek to demonstrate that the supposed moral conflict in these situations can be evaluated in relation to the prospective harm to agents' rights. Building on the feminist model of relational autonomy, I seek to demonstrate that the rational model of autonomy provides a more appropriate means of evaluating and justifying the grounds for respecting reproductive autonomy. In this way, I offer an outline of rights-based reproductive autonomy which operates in accordance with the *PGC*.

Finally, in Chapter Six, I return focus to the issue of Wrongful Conception and the protection of a right to reproductive autonomy. In this chapter, if the law is necessarily connected to the moral commitments of the *PGC*, I seek to ask whether a right to

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<sup>161</sup> Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964).

reproductive autonomy can be secured within the current legal framework of the UK. In so doing, I develop the approach to Rational Autonomy from the previous chapter to consider the merits of *securing* respect for reproductive autonomy through the obligation of reparation. My attempt throughout is to evaluate the contradictions of the courts in these cases - troubled by the moral questions and subsequent appeals to public policy - in order to offer a determinate evaluation of the competing claims to value and dignity by the parents and on behalf of the child.

The overall flow of the thesis sets out to test the hypothesis: *moral rationality dictates that there ought to be legal rights over reproductive autonomy*. To do this it is necessary to demonstrate that there is a *necessary* connection between law and moral rationality (Chapter Two and Three). On the assumption that rights exist – even if as mere social constructs – it is necessary to understand conceptually what is meant by the claim ‘I have a right (to / that you (not))  $\phi$ ’ and normatively what is entailed by the assertion (Chapter Four). If these theoretical underpinnings are accepted then the next stage is to seek to demonstrate that a completed *PGC* (that is, an argument to a supreme legal legitimisation) can be applied to the concerns of reproductive autonomy which will be used to test the hypothesis.

## Chapter 2      Law's Autonomy and Moral Reason

In this chapter I intend to set out the beginnings of the argument to Legal Idealism and a thesis which holds that law and (rational) morality are *necessarily* connected. I will attempt to do so by examining the Positivist argument of the theory of law known as the Autonomy Thesis (the AT) and how this is used to explain the notions of legitimacy, authority and validity. I take that there exists (or ought to exist) legitimacy, authority and validity in given legal systems<sup>1</sup> and in the Kantian sense of 'analytic', work backwards from this point in order to purvey a *conception* of this notion which is both sustainable and necessary.<sup>2</sup> The theory adopted for this purpose is that of Legal Idealism, existing in the interstice between Natural Law Theory and Legal Positivism. It operates on the assertion that there is: (a) a *necessary* connection between law and moral rationality and (b) that the existence and dialectical necessity of certain 'goods' or 'needs' for agents establish and maintain said connection.<sup>3</sup> This approach operates simply to draw the Natural Law-Positivist debate to an end by reframing the claims of each side in order to show that a middle ground exists. Through the chapter, my focus is on deconstructing the Positivist argument to the Autonomy Thesis and beginning to reconstruct it through the application of morality to law's autonomous authority.

The methodology used ought briefly to be outlined. I began by noting that the 'relationship between law and morality is to be understood as expressing a prescriptive and critical ideal 'immanent' in the 'essential' concept of law.'<sup>4</sup> This, '...expresses an epistemological intent which, in terms of the essential understanding of legal concepts

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<sup>1</sup> Henrik Palmer Olsen and Stuart Toddington, *Law in its Own Right*. (Hart Publishing, 1999), 3-4.

<sup>2</sup> Ibid, 34.

<sup>3</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 8-10.

<sup>4</sup> Olsen and Toddington, n 1, 3.

such as validity and obligation, must inevitably encompass the wider issue of legitimacy in society and thus shares a common ground with the methodological problems of political philosophy and the social sciences.<sup>5</sup> Further to this,

...law can be seen as the practically reasonable attempt to institutionalise and uphold in a society certain practical norms, which, because of the special authority which has arisen in the institutions and offices responsible for the positing, application and enforcement of these norms, are seen to possess a legitimate priority – an *exclusionary* validity – as against other norms in that society...<sup>6</sup>

It is this relation to practical reason which defines the ambit of this chapter. My task, ultimately, is to demonstrate how, through the *concept* of law, practical reason might explain the related (and overlapping) notions of legitimacy, authority and the obligation to obey through the *necessary* connection of law and moral rationality.<sup>7</sup> That is, I must demonstrate that moral rationality both survives and remains identifiable (transparently) following the process of metamorphosis into *institutionalised* practical reasoning.<sup>8</sup> If this is so, the authority of and obligation to law is simultaneously a form of morally rational obligation.<sup>9</sup> Ultimately,

...a coherent legal idealism suggests that a rational understanding of the conception of the legal enterprise leads us to the conclusion that rules posited as laws *ought* to meet certain demands of morality *if* they are to achieve validity as laws. Legal validity, in this sense, and when ascribed to a rule or system of rules, implies a moral justification to promulgate and enforce, and consequently implies the existence of an obligation to obey.<sup>10</sup>

It is the notion of moral rationality as the legitimating criteria of legal reasoning and, hence, the rationale for the obligation to obey which is the end that the thesis seeks to demonstrate.

Where then does Legal Idealism sit within the arena of jurisprudence? As noted, it can be seen as existing in the space between Natural Law Theory and Legal Positivism. Central

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<sup>5</sup> Ibid, 3.

<sup>6</sup> Ibid.

<sup>7</sup> That is a *conceptually* necessary connection. See: Beyleveld and Brownsword, n 3, 9.

<sup>8</sup> Olsen and Toddington, n 1, 26.

<sup>9</sup> Ibid, 158. See also: Beyleveld and Brownsword, n 3, 352-6 and Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 94-5 and 317-8

<sup>10</sup> Ibid, 13.

to the (modern<sup>11</sup>) Idealist thesis then is a rejection of the Autonomy or Separation Thesis.<sup>12</sup> That is, the claim that law and morality are neither conceptually nor necessarily connected.<sup>13</sup> Legal Positivism's position was reinvigorated by HLA Hart in *The Concept of Law*<sup>14</sup> in 1961. From this, scholars such as Joseph Raz,<sup>15</sup> Neil MacCormick,<sup>16</sup> Jules Coleman<sup>17</sup> and Gerald Postema<sup>18</sup> set about furthering the positivist thesis.<sup>19</sup> Meanwhile, the Legal Idealist movement was developed by Lon Fuller<sup>20</sup>, Ronald Dworkin<sup>21</sup> and Alan Gewirth<sup>22</sup> in Anglo-American jurisprudence whilst Robert Alexy<sup>23</sup>, Jürgen Habermas<sup>24</sup> and Gustav Radbruch<sup>25</sup> pushed the anti-positivist thought in Germany. The debate between Positivism and Idealism continues to rage on.

The rejection of the Autonomy or Separation Thesis by Legal Idealism is premised on certain specified moral or social values that in turn provide 'ideals' which may be aspired toward.<sup>26</sup> For the 'Sheffield School' of Legal Idealism,<sup>27</sup> the basis for this moral value (or *substance*<sup>28</sup>) is found in Alan Gewirth's argument to the Principle of Generic Consistency

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<sup>11</sup> See: James A. Gardner, 'Legal Idealism and Constitutional Law' (1964) 10(1) *Villanova Law Review* 1-42, for an excellent review of the historical development of the 'Idealist' approach.

<sup>12</sup> Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Clarendon, 2002), 3.

<sup>13</sup> Beyleveld and Brownsword, n 3, 4.

<sup>14</sup> Herbert L A. Hart, *The Concept of Law* 3rd ed. (Oxford University Press, 2012). For discussion see: Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26(2) *Oxford Journal of Legal Studies* 257-88.

<sup>15</sup> Joseph Raz, *The Authority of Law* (Oxford University Press, 2009).

<sup>16</sup> Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982).

<sup>17</sup> Jules Coleman, *Markets, Morals and the Law* (Cambridge University Press, 1988).

<sup>18</sup> Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1989).

<sup>19</sup> See: Kent Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism' in Robert George (ed), *The Autonomy of Law* (Clarendon Press, 1996), 1-30, for an overview of the development and traits of modern Legal Positivism.

<sup>20</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969).

<sup>21</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998). Originally published in 1986.

<sup>22</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978).

<sup>23</sup> Robert Alexy, *A Theory of Legal Argumentation* (Clarendon Press, 1989). Original German in 1978.

<sup>24</sup> Jürgen Habermas, *Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Blackwell Publishing, 1996). Original German in 1992.

<sup>25</sup> Gustav Radbruch, *Rechtsphilosophie* (Heidelberg, 1999). Original in 1946.

<sup>26</sup> Bev Clucas, 'The Sheffield School and Discourse Theory: Divergences and Similarities in Legal Idealism/Anti-Positivism' (2006) 19(2) *Ratio Juris* 230-44, 233.

<sup>27</sup> Authors such as Deryck Beyleveld, Roger Brownsword, Patrick Capps, Stuart Toddington, and Shaun Pattinson. Ibid, 230-3. See also: Tony Ward, "Two Schools of Legal Idealism" (2006) 19(2) *Ratio Juris* 127-40.

<sup>28</sup> Clucas, n 26, 232-3.

(PGC).<sup>29</sup> For Alexy's 'discourse ethics',<sup>30</sup> the substance of the claim is based upon Radbruch's formula for the intolerable degree of injustice.<sup>31</sup> This holds that,

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice.<sup>32</sup>

This argument then, applied to individual norms or legal systems, holds that a boundary will be crossed from 'law' to not-'law' when a certain threshold of injustice is reached.<sup>33</sup> Yet, Radbruch continues,

It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law.<sup>34</sup>

Justice, and with it equality, is seen to be at the very heart of the idea of legal enterprise. In the absence of it, a 'law is (not) a law'.<sup>35</sup> In this way, key to the difference between these approaches is the Sheffield School's focus on what the connection between law and morality can supply conditions of legal *validity*<sup>36</sup> whilst the 'Discourse School' identifies what is legally *defective*.<sup>37</sup>

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<sup>29</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978).

<sup>30</sup> Authors such as Robert Alexy, Gustav Radbruch, Jürgen Habermas and Peter Koller. Tony Ward, n 27, 127.

<sup>31</sup> Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26(1) *Oxford Journal of Legal Studies* 1-11. See also: Alexy, n 12, 28 and for further discussion see: Brian Bix, 'Robert Alexy, Radbruch's Formula and the Nature of Legal Theory' (2006) 37 *Rechtstheorie* 139-49.

<sup>32</sup> Ibid, 7.

<sup>33</sup> Clucas, n 26, 239.

<sup>34</sup> Radbruch, n 31, 7.

<sup>35</sup> Adapted from Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)' (2006) 26(1) *Oxford Journal of Legal Studies* 13-15.

<sup>36</sup> For discussion of the approach from a discourse theorist perspective, see: Robert Alexy, 'Effects of Defects – Action or Argument? Thoughts about Deryck Beyleveld and Roger's Brownsword's *Law as a Moral Judgment*' (2006) 19(2) *Ratio Juris* 169-79.

<sup>37</sup> Alexy, n 12, 52. Peter Koller, 'The Conception of Law and Its Conceptions' (2006) 19(2) *Ratio Juris* 180-96 distinguishes the two as 'Strong Legal Moralism' and 'Weak Legal Moralism' respectively and Massimo La Torre, 'On Two Distinct and Opposing Versions of Natural Law: "Exclusive" and

In this chapter, my focus is on outlining the background to the contemporary version of Legal Idealism which is adopted in the course of this thesis. The version of idealism adopted is that of the Sheffield School and the moral foundations provided by Gewirth<sup>38</sup> and Beyleveld.<sup>39</sup> This brings us quite aptly to the need to summarise what is meant by the interrelated concepts of 'moral rationality' and the 'continuum of practical reason'<sup>40</sup> which will be outlined in the following section. Having done so, I will then go on to consider the critique of the Autonomy Thesis and related ideas. With this in mind I will make an attempt to *reconstruct* it as a Transparent Autonomy Thesis which, through a demonstration of *commensurable* moral goods, argues for the incorporation of *omnilateral* public morality as a *justificatory* line of reasoning in *institutionalised* practical reason.<sup>41</sup> It is through the claim to the *dialectically necessary* argument to a supreme moral principle – here the *PGC*<sup>42</sup> – that I hold the connection between law and moral rationality *necessarily* exists and is capable of surviving its transformation into *institutionalised* reasoning. Finally, I will seek to demonstrate *how* and on what grounding this transformation might *rationality* allow us to explain the intertwined notions of legitimacy, authority and the obligation to obey.

## **2.1 The Continuum of Practical Reason**

In this section I must consider the applicability of an integrated scheme of practical reasoning against the lines of reasoning which hold morality to be 'private, subjective and voluntaristic'<sup>43</sup> as opposed to a conception of the law as public, objective and non-optional.<sup>44</sup> This is not to say that, in portraying an opposition to this conception, that law

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"Inclusive" (2006) 19(2) *Ratio Juris* 197-216. See also: Stuart Toddington, "The Moral Truth About Discourse Theory" (2006) 19(2) *Ratio Juris* 217-29 on the unification of these approaches.

<sup>38</sup> Gewirth, n 29.

<sup>39</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (London, 1991).

<sup>40</sup> Olsen and Toddington, n 1, 20-6 and 118-9.

<sup>41</sup> Beyleveld and Brownsword, n 3, 33.

<sup>42</sup> See: Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978).

<sup>43</sup> Olsen and Toddington, n 1, 20.

<sup>44</sup> HLA Hart, *The Concept of Law* (Clarendon Press, 1961), 163-6. See also: Beyleveld and Brownsword, n 3, 141-2.

and morality are equivocal.<sup>45</sup> Rather, it is an attempt to reinterpret and reimagine (*rational*) morality as something which is also *capable* of being public, objective and non-optional, whilst still not maintaining the same definitional features as forms of legal, 'artificial' reasoning.

What, then, is meant by a *continuum of practical reason*? In order to understand it, it is necessary to attempt to decipher the shifts in the *types* of reasoning which influence our actions. To do so is to provide us with an understanding of how *reasons* bear upon our decisions for action. Olsen and Toddington identify three basic components of the scheme of practical reason - as encompassing: the instrumental, the prudential and the moral - before adding and demarcating a fourth, namely the *legal*.<sup>46</sup> At the most basic, *instrumental reason* is solely concerned with the (effective) employment of means in the achievement of certain *given* ends.<sup>47</sup> *Prudential reason* concerns the rational employment of means to ends which are constituted by the actor or agent based upon what he or she (or it<sup>48</sup>) might conceive of as valuable or in one's interests.<sup>49</sup> *Moral reason*, finally, is concerned with the universalisation of reason based on 'how I consider I should treat *others*'.<sup>50</sup> This ought not to be construed in the highly subjectivised sense in which it is initially purveyed. Instead, it moves from prudence on the basis that it is *logically* unavoidable to *universalise* in a *social* context.<sup>51</sup> Moral reason occurs when it is demonstrable that, "I ought, unconditionally or categorically, to sometimes prioritise the interests of others in the way that I act" when it appears to be contrary to my own direct interests.<sup>52</sup> As noted,

This type of argument....begins from prudence and tries to show that there *necessarily* arises from it categorical, overriding and other-regarding reasons for action which must condition what, rationally, I take to be valid prudential reasoning. ... [T]his view seeks to portray 'other-regarding' -i.e. moral -

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<sup>45</sup> Olsen and Toddington, n 1, 20-1.

<sup>46</sup> Ibid, 21.

<sup>47</sup> Olsen and Toddington, n 1, 21.

<sup>48</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (London, 1991), 15.

<sup>49</sup> Olsen and Toddington, n 1, 21.

<sup>50</sup> Ibid, 22.

<sup>51</sup> Gewirth, n 42, 1 and Beyleveld and Brownsword, n 3, 24-25.

<sup>52</sup> Gewirth, n 9, 26.



reasoning as a related, yet distinct *and superior*, form of practical reasoning in that prudence modified by rationality becomes subordinate to morality.<sup>53</sup>

It is at this point we find ourselves at the conception, and in this thesis, supervening point, of *moral rationality*.

It is this concept of *moral rationality* which is adopted henceforth and which is, to be shown as, demonstrably connected to institutionalised reasoning. 'Moral' and 'morality' are used in different ways, some of which are prone to confusion, as we have already seen, where 'moral rationality' is more concise. Finnis' characterisation is instructive,

Moral thought is *simply rational thought at full stretch*, integrating emotions and feelings, but undeflected by them... The fundamental principle of moral thought is simply the demand to be *fully rational*: in so far as it is in your power; allow nothing but the basic reasons for action to shape your practical thinking as you find, develop, and use your opportunities to pursue human flourishing through your chosen actions.<sup>54</sup>

Before outlining what is meant by the adopted terminology, I ought to outline my decision to drop the other terms. It is a generally accepted point that 'moral' reasoning – which I take here to mean the holding of goods based upon one's own subjective value system – ought to be excluded from the judicial and ministerial decision making processes.<sup>55</sup> That is, application of the law should be based on legal principles rather than on (subjective) moral value judgments. This interpretation of 'Morality' is proffered by Coleman,

If the legality of a norm depends on its substantive moral content (as opposed to its pedigree), then *because* the demands of morality are *controversial and the source of conflict and disagreement*, ordinary citizens will be unable to resolve authoritatively their doubts about what the law is or what it requires of them.<sup>56</sup>

It would be absurd (or at least prone to confusion) to simultaneously hold that morals – here used in a far more open sense than before - are necessarily connected with the

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<sup>53</sup> Ibid, 24.

<sup>54</sup> John Finnis, 'Natural Law and Legal Reasoning' in Robert George (ed), *Natural Law* (Claredon Press, 1981), 134-57, 136-7 (*my emphasis*).

<sup>55</sup> Olsen and Toddington, n 1, 87-88.

<sup>56</sup> Jules Coleman, "Authority and Reason" in Robert George (ed) *The Autonomy of Law* (Claredon Press, 1996), 289-320, 292.

legitimacy of a legal system and the *obligation to obey* said system. Whilst the expression of subjective 'morality' (or, henceforth, unilateral value disparity<sup>57</sup>) runs contrary to the lucid expression of legal principles, given its inherently paternalistic subjective viewpoint, a scheme of *morally rational* reasons acts to empower it. It is, 'the dialectical necessities of *prudential* reason [which] oblige[s] the agent to value, and thus defend, his generic capacity to act... when universalised logically...[this] results in the recognition of reciprocal duties to *others*.'<sup>58</sup> This separation and demarcation between "Morality" and "Moral Rationality" is lucidly expressed by Beyleveld and Brownsword,

...we hold that not only does practical reason presuppose moral reason, but *an absolute moral principle* as well. What would happen if we had argued instead that law must be analysed in terms of practical reason, that practical reason presupposes moral reason, but that no particular substantive moral principles can be shown to be presuppositions of moral reason? Such a position would amount to a form of moral relativism. Rational beings would be committed to adopting a moral point of view, but not to adopting any particular moral point of view. Different moral points of view would be rationally optional choices.<sup>59</sup>

It must be shown then, for the connection between Law and (Rational) Morality to be a functional one, that there exists some *objective* morality which is separate from *subjective moral viewpoints* or *unilateral value disparity*. *Moral rationality* acts as a public, objective and definitional consideration of how our prudential reasoning ought to be tailored around those other-regarding considerations which must be met by our very nature as rational agents.

Morally rational reasons, then, are those reasons which I am obliged to follow by the *categorical needs* of my own prudential interest which once universalised would lead me to contradiction were I to deny them to others. To demonstrate by example: if I believe that owning dogs (x) is a cure for loneliness (y), it would be illogical and contradictory for me to challenge your assertion that you need a dog because you are lonely. That is, if

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<sup>57</sup> Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996), [6:224], 16.

<sup>58</sup> Henrik Palmer Olsen and Stuart Toddington "Legal Idealism and the Autonomy of Law" (1999) 12(3) *Ratio Juris* 286-310, 307

<sup>59</sup> Beyleveld and Brownsword, n 3, 152 (*my emphasis*).

I ought to  $x$  because  $x$  is a means to  $y$  and  $y$  is in my interest, then, equally and necessarily, if  $y$  is in your interest then you ought to  $x$ .<sup>60</sup> This,

...approach to the problem seeks to demonstrate that there are compelling practical reasons which sometimes, and in some circumstances, *rationaly oblige* agents to subordinate or modify their prudential interests to take into account the interest of *others*.<sup>61</sup>

The claim to moral rationality ultimately rests on the intrinsic considerations of my own agency - and the categorical necessities of that *rational prudential will*<sup>62</sup> - which when logically universalised provides me with other-regarding reasons for curtailing my own prudential aspirations.<sup>63</sup> For the purposes of this thesis, the claim to moral rationality is framed around the determinate moral commitments of the *PGC*, which requires and agent to 'Act in accord with the generic rights of your recipients as well as of yourself.'<sup>64</sup> It is this which brings us to the inclusion of *legal reason* within our continuum of practical reason as the most complex form of practical reason with the continuum.

Legal or *institutionalised* reasoning comprises the principle use of 'exclusionary reasons', which provide a reason to refrain from acting for some *other* (than our own) reasons.<sup>65</sup> The effect is that 'the authority's directives become our reasons'.<sup>66</sup> However, working from the conception of moral rationality whereby individuals are rationally obliged to modify their own prudential on account of others, the interplay between those *rational obligations* to curtail one's own reasoning and the *formal* structure of our relations between each other becomes clearer through the imposition of exclusionary reasoning.<sup>67</sup> Added to this, upon the consideration of what *practically rational response* we might take to disagreement and uncertainty becomes clearer through the imposition of a final arbiter.<sup>68</sup> That is, given the choice between an institutionalised interpretation of those morally

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<sup>60</sup> For a more concise and accurate exemplification of the implication of morally rational reason by prudence, see: Gewirth, n 42.

<sup>61</sup> Olsen and Toddington, n 1, 25.

<sup>62</sup> Immanuel Kant, *The Critique of Practical Reason* (Bobbs-Merrill, 1956), 36-40.

<sup>63</sup> Olsen and Toddington, n 1, 24.

<sup>64</sup> Gewirth, n 42, 135.

<sup>65</sup> Joseph Raz, "Reasons for Action, Decision and Norms" (1975) 84 *Mind* 481-99, 487.

<sup>66</sup> Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999), 193.

<sup>67</sup> Olsen and Toddington, n 1, 25.

<sup>68</sup> Ibid.

rational concerns or a wholesale departure from them, it is through the incorporation of these general principles of practical precepts that we are to conceptualise legal reasoning.

As the workings from the *instrumental* and the *prudential* to the *morally rational* demonstrate, the conceptual relation between the legal and all three shows at least *some* connection between the law and the morally rational.<sup>69</sup> If this is accepted and *legal reasons* become the fourth aspect of our continuum of 'practical reasons', I must now consider whether through the institutionalisation process we can recognise the possibility that the application of moral rationality in the context of enforceable prescription is plausible. That is, if we can see a route from *prudential reason* to *morally rational reason* (through the process of *logical* universalisation) and consider that it is *morally rational* to establish legal authority – or *institutionalise* the decision making and enforcement process – then it is *logically* attached both at the point of ontological transformation and beyond throughout continuation. If accepted, then *legality* ought to strive to openly aspire to the exacting standards of *moral rationality* and, it will be shown, be enough to premise a legitimacy criterion which provides legality with *moral* authority and, in turn, its participants with a *moral* obligation to obey.

## 2.2 Critiquing the Autonomy Thesis

This section considers the attempt to argue for an autonomous conception of legality from morality, such that the latter ought not to be incorporated into the prior's system of reasoning. It is an attempt to show that law's legitimacy and authority is separate from, and exists independently of, moral justification.<sup>70</sup> Its account of law rests on the notion of the need to avoid, or remove oneself from, the unilateral value disparity (and, we are

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<sup>69</sup> As argued in Neil MacCormick, "Natural Law and the Separation of Law and Morals", in Robert George (ed.), *Natural Law Theory: Contemporary Essays* (Claredon Press, 1992), 105-33, 130. This is framed on the basis that *Law* entails *Practical Reason* which entails *Moral Reason* which, in turn, it will be shown, entails the *PGC*: Beyleveld and Brownsword, n 3, 156.

<sup>70</sup> Jeremy Waldron, 'The Irrelevance of Moral Objectivity' in Robert George (ed), *Natural Law Theory: Contemporary Essays* (Claredon Press, 1992), 160.

told, therefore, *morality*) of the 'original position'<sup>71</sup> or the 'state of nature'<sup>72</sup>, it is on account of this that law must eschew moral rationality if it is avoid reproducing the indeterminacy and conflict of the pre-legal position. The argument for law's autonomy is deconstructed on account of this misinterpretation of the value of *moral rationality* and on account of its own *indeterminacy* within the realms of dispute resolution.

The Autonomy Thesis (AT) represents the Positivist view that law is 'autonomous' or 'separate' from morality, in that it regards of law as a form of *legitimate* normative force which is distinct from the moral principles.<sup>73</sup> Olsen and Toddington claim that if an understanding of the need to initiate a social contract – 'the account of the practical reasoning leading to the institutional prioritisation of a set of authoritative norms'<sup>74</sup> – can be grasped whereby we recognise that moral rationality plays a part in getting us in to the social contract then doubt is raised as to the 'authoritative cut-off point for moral argument'.<sup>75</sup> That is, if moral rationality is sufficient to initiate the institutionalisation process then why and at what point is it to be dismissed from the practical reasoning of the institution? This question is seen differently dependent on one's conception of 'morality'. If one reasons – I claim incorrectly – that morality consists in subjective viewpoints and exists as unilateral value disparity causing a perennial state of war, pre-law then the initiation of institutionalisation is to resolve or fix *that* problem.<sup>76</sup> If, however, the conception maintained is one of *moral rationality* – for instance to Kant's Categorical Imperative<sup>77</sup> or Gewirth's *PGC*<sup>78</sup> – and the imposition of institutionalised reasoning is on account of the need to do justice or resolve the indeterminacy of the absence of the *formal* structure of reasoning, then the absence of 'morality' post-incorporation appears to create a greater risk of value disparity between the system and moral reason.

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<sup>71</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

<sup>72</sup> Thomas Hobbes *Leviathan* (Elibron Classics, 2005).

<sup>73</sup> Gerald Postema, 'Law's Autonomy and Public Practical Reason' in R.P. George, *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, 1996), 79-119, 80-2.

<sup>74</sup> Olsen and Toddington, n 1, 11.

<sup>75</sup> Ibid.

<sup>76</sup> Hobbes, n 72, 82-3.

<sup>77</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 421.

<sup>78</sup> Gewirth, n 42, 134.

The AT itself is based upon three sub-theses – the Limited Domain Thesis, the Pre-Emption Thesis and the Source Thesis<sup>79</sup> – which express demands that law (‘a body of autonomous norms’<sup>80</sup>),

...operates in a limited domain of practical reason common to officials and citizens alike; that these norms constitute *exclusionary* reasons for action in that they preclude and override conflicting reasons or normative preferences outside the domain, and these, therefore *pre-emptive*, norms be *identifiable at source* without recourse to moral argument or political evaluations which might exist and function in various influential ways outside the limited domain.<sup>81</sup>

This can therefore be seen as positivism’s attempt to demarcate law and morality within the realm of practical reasoning; that is, to isolate law and legal discourse from morality and moral discourse.<sup>82</sup> Simply, the AT, ‘offers an account of how the introduction of law into the practical reasoning of individual agents *alters* it. According to the AT, law *adds new* reasons and norms to the stock of practical considerations already available to agents and defines a special domain of distinctively legal reasons and norms.’<sup>83</sup> This is the Limited Domain Thesis. This is supplemented by the Sources Thesis which holds that law must be determined by reference to recognisable social facts and without recourse to moral argument.<sup>84</sup> Finally, the Pre-Emption Thesis holds that law’s limited domain is isolated from *other* practical reasons by the pre-emptive or exclusionary reasons for action it provides.<sup>85</sup> Thus,

Legal norms not only provide rational agents with positive (first-order) reasons to act in certain ways, but they also provide them with second-order reasons for *not acting* on certain *other* reasons. These second-order, pre-emptive reasons prevail over potentially competing reasons, not by outweighing those reasons, but by precluding an agent’s acting on them.<sup>86</sup>

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<sup>79</sup> Postema, n 73, 82.

<sup>80</sup> Olsen and Toddington, n 1, 30.

<sup>81</sup> Ibid, 30-1.

<sup>82</sup> Beyleveld and Brownsword, n 3, 2.

<sup>83</sup> Postema, n 73, 83.

<sup>84</sup> See: Joseph Raz, *The Authority of Law* (Oxford University Press, 2009), 45-52.

<sup>85</sup> See: Raz, n 66, 39-40.

<sup>86</sup> Postema, n 73, 85.

The effect of this assertion is that we are led to note that the 'addressee of a (legal or autonomous) norm'<sup>87</sup> with practical reasons for compliance. That is, if the law is accepted as autonomous then the addressee is given an *obligation to obey* which is not based or premised upon 'subjective personal or objective natural morality'<sup>88</sup> or coercive threat.<sup>89</sup>

The AT focuses upon the aspiration to or achievement of secure and determinate criteria of justice and right whereby individuals are provided with 'artificial' and publicly accessible norms which ought to be followed.<sup>90</sup> Relationally then, too, the institution must be given the authority to overrule – create, enforce and maintain norms – the individualised moral or value judgments of the 'addressees'.<sup>91</sup> That is, it is *because* of the subjective morality or value-pluralism and complexity of social groups to which the creation of a set of codified and institutionalised norms (law) seeks to address.<sup>92</sup> So, it is the destabilising indeterminacy of morality (or, here, unilateral value disparity) itself which bases the need for law and justifies the detachment and, in this regard, necessary (or *desirable*<sup>93</sup>) disconnect between law and morality.<sup>94</sup> It is the need for social co-ordination which acts as the criteria for law's legitimacy.

We must return our focus to the dispute between interpretations of 'morality' which situate it as either some form of unilateral value disparity or as the reasoning of moral rationality. This represents the crux of the dispute at hand. For the caution to tying legality to morality, if there can be no agreement as to what is represented by morality, appears to be the best option.<sup>95</sup> Simply, 'there may be disagreement both as to the appropriate moral standards and as to the required points of conformity.'<sup>96</sup> If so, and

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<sup>87</sup> Olsen and Toddington, n 1, 33.

<sup>88</sup> Ibid.

<sup>89</sup> Postema, n 73, 82-3.

<sup>90</sup> See: H.L.A. Hart, *The Concept of Law* 3<sup>rd</sup> Ed (Oxford University Press, 2012), 20-4.

<sup>91</sup> Olsen and Toddington, n 1, 33-4.

<sup>92</sup> Hobbes, n 72.

<sup>93</sup> Olsen and Toddington, n 1, 35.

<sup>94</sup> Ibid, 34.

<sup>95</sup> Gustav Radbruch, *The Legal Philosophies of Lask, Radbruch and Dabin* (Harvard University Press, 1950), 116.

<sup>96</sup> Hart, n 90, 205.

legality is concerned with stability and predictability,<sup>97</sup> then it would appear irrational to base the validity of law on such fragile and instable concerns.<sup>98</sup> This, however, only holds true if we conceive of morality as unilateral value disparity. If, rather, we are concerned by those rational principles which direct our behaviours on account of others because of our agency, then what is involved is an objective assessment of good.<sup>99</sup> This omnilateral public morality is surely then a direction to do 'our moral best'<sup>100</sup> in the weighing of conflicting interests and the interpretation of those relevant legal principles so as to give a coherent account of underlying, inherent and objective 'good'.

The Positivist account of the AT maintains that, on occasion, 'what is law' must prevail over 'what is just'.<sup>101</sup> As such, adjudication must prioritise *certainly* over any other values.<sup>102</sup> This, however, assumes that it is contingently possible to account for all conflicts by reference to 'what is law' alone. Given the claim that the law *necessarily* exists by reason of the unilateral value disparity, then the law is also *necessarily* the result of moral phenomenon and its complete severance cannot be made.<sup>103</sup> To put it another way, if the morality cannot settle its conflict then the law must create structured norms in its place. But this still cannot account for the complete separation of law and morality.

It is, resultantly, necessary for the law to appeal to *technical validity*, 'concerned with the observation of proper procedures'.<sup>104</sup> On this account, the law's validity and therein the obligation to obey are removed from the continuum of practical reason and sealed off as purely procedural and thus arbitrary and empty conceptions of validity.<sup>105</sup> In the absence of *moral validity*, law is to be validated by reference to those rules which are in place to

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<sup>97</sup> Raz, n 84, 49-50 and Coleman, n 56, 296.

<sup>98</sup> Olsen and Toddington, n 1, 36.

<sup>99</sup> Beyleveld and Brownsword, n 3, 23-5.

<sup>100</sup> Olsen and Toddington, n 1, 38

<sup>101</sup> Radbruch, n 95, 117.

<sup>102</sup> Olsen and Toddington, n 1, 40.

<sup>103</sup> Yet, even Hart, n 90, 206, suggests that 'basic protections and freedoms' is an 'ideal' for the law.

<sup>104</sup> Neil MacCormick 'The Concept of Law and the Concept of Law' in Robert George (ed) *The Autonomy of Law* (Clarendon Press, 1996), 163-93.

<sup>105</sup> Hart, n 90, 102-3. Cf: Beyleveld and Brownsword, n 3, 442-3: "...if 'law' is to be analysed in terms of practical reason – upon which affirmation we have simply sided with the mainstream modern analytical philosophy, without independent argument – then the 'extreme' viewpoint of 'Natural-Law Theory' is vindicated: objects (centrally, rules) which are immoral in substance cannot be *legally* valid."



determine the manner in which new law is made.<sup>106</sup> This is so, if as Hart claims, the law has adhered to the 'rule of recognition'.<sup>107</sup> But if law's validity is purely technical, and in that way demarcated from the obligation to obey it, for it provides *exclusionary* reasons for action, this undermines the justification for the authority to rule.<sup>108</sup> That is, there is an implication that legal rules provide guidance to practical reason, but these become absent of normative force where the concept of validity is purely technical and hence separated from the issue of an obligation to obey.<sup>109</sup> As Fuller has noted,

This obligation seems....wholly unrelated to any of the ordinary, extra-legal ends of human life... [That] law must be strictly severed from morality...seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations.<sup>110</sup>

Let us, however, overlook the misconstruction and reframe the question in line with the conception of *moral rationality* as leading to institutionalisation for the purpose of securing those reasons required by it. In this construction, the notion of procedure is equally relevant to a legal system built out of rational morality and it makes good sense to incorporate procedural validity.<sup>111</sup> For, after all, if *justice* requires the institution of an arbiter to settle disputes then the security of moral rights ought surely to maintain some form of rational procedure? If this is so, then immediately we can see that technical validity is also a relevant condition of a *connected* system as it is in a *disconnected* system where the problems of legitimacy are beginning to become apparent.

We might suppose, however, that procedural validity is sufficient for us to accept that, in turn, an obligation to obey exists. Are we not then faced with the questions posed by Raz, '...how could it be that the say-so of one person constitutes a reason, a duty, for another?

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<sup>106</sup> Coleman, n 56, 292.

<sup>107</sup> Hart, n 90, 100-4 and 250-1.

<sup>108</sup> Olsen and Toddington, n 1, 44.

<sup>109</sup> See: John Finnis, "The Truth in Legal Positivism" in Robert George (ed) *The Autonomy of Law* (Clarendon Press, 1996), 195-214, 203.

<sup>110</sup> Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) *Harvard Law Review* 630-72, 656.

<sup>111</sup> See: Deryck Beyleveld and Roger Brownsword, "Principle, Proceduralism, and Precaution in a Community of Rights" (2006) 19(2) *Ratio Juris* 141-68.

Is it that easy to manufacture duties out of thin air?<sup>112</sup> In the face of this there surely must be some conception of functional necessity to an overall social goal.<sup>113</sup> There must then be a *justificatory* reason;<sup>114</sup> a reason which would be valid independently of the procedural requirements comprising the validity of some authority.<sup>115</sup>

It appears that this notion of technical legal validity rests on the conception of 'law as a product'. As Postema recognises, 'Law, as the Autonomy Thesis conceives it, is not essentially *involved* in this process, it is a *product* of it.'<sup>116</sup> Van der Burg presents two models of visualisations of the law; 'law as a practice' and 'law as a product'.<sup>117</sup> The 'practice' model focuses on how the law is interpreted and applied in order to shape it,<sup>118</sup> whilst the 'product' model is concerned with how the law is constructed as a body of norms.<sup>119</sup> It is the appeal to legitimation of the *products* of a legal system which is sought by technical legal validity when we encounter an expression to 'the observation of proper procedures'.<sup>120</sup> Whilst, 'law in the books'<sup>121</sup> is of relevance to us, as an authoritative reason, it does not help to settling the issues of interpretation.<sup>122</sup> The law must therefore be imagined as a combination of both 'practice' and 'product' to ensure that those *justificatory* reasons for the law's legitimacy to act are enabled to 'shine through' in the production of norms.<sup>123</sup>

It is the existence of this problem which justifies a departure and shift from the reasoning behind this Positivistic view to the Idealistic view point which I seek to maintain in this thesis. It is the absence of the requisite 'openness' for these interpretative and justificatory

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<sup>112</sup> Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2006) 90 *Minnesota Law Review* 1003, 1012.

<sup>113</sup> Olsen and Toddington, n 1, 45.

<sup>114</sup> Ibid, 46.

<sup>115</sup> Finnis, n 109, 204.

<sup>116</sup> Postema, n 73, 110.

<sup>117</sup> Wibren Van der Burg, 'Two Models of Law and Morality' (1999) 3(1) *Associations* 61-82.

<sup>118</sup> Ibid, 63-5

<sup>119</sup> Ibid, 65-6

<sup>120</sup> Neil MacCormick 'The Concept of Law and the Concept of Law' in R.P. George, *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, 1996), 163-93

<sup>121</sup> Van der Burg, n 117, 65.

<sup>122</sup> Postema, n 73, 110.

<sup>123</sup> Olsen and Toddington, n 1, 116.

concerns which, as Postema highlights, is further limited when judges are unable to reason according to the law,

...adjudicative institutions are authorised to settle issues left unsettled by the set of source-based legal norms available at any point in time. They are authorised to add to or alter the norms of law. Since, in such cases, by hypothesis, the existing legal considerations are silent, indeterminate, or in conflict, the courts' setting of them is determined not by appeal to the law, but by appeals to considerations outside its limited domain.<sup>124</sup>

Therefore, the logic of the AT must be expanded to encompass this problem, it must be articulated in a way which informs the interpretative strategies of the adjudicative institutions in respect of the *pre-emptive* aims which justify the AT itself.<sup>125</sup> The AT here becomes the *Institutionalised* Autonomy Thesis (IA Thesis) which this requires an elucidation of the interpretive strategies of the adjudication process.<sup>126</sup> To this end, we must embrace a broad conception of the functional aspects of legal reason:<sup>127</sup> that moral rationality can be best secured through its incorporation in an 'artificial' structure of reasoning which is established to overrule unilateral value disparity by setting objective, omnilateral public morality and does so by the manifestation of authoritative underpinnings.<sup>128</sup> By this authoritative manifestation, it *justifiably* seeks to overrule the individualised practical reasoning of those participants (citizens) and actors (officials) who have a correlative obligation to obey and *in this way* becomes autonomous.

Returning to the AT, the IA Thesis, where we find that the logic of its reasoning is threatened,

Clearly, if interpretations of the norms – supposedly autonomous from political morality – are functions of evaluations from the very stock of political morality, then (*ex hypothesi* the AT) the logic of the co-ordinatory advantage accruing, ideally, to practical reasoners in respect of stable expectations appears to be inconsistent in the absence of an auxiliary modification to its expanded corollary, the IA Thesis.<sup>129</sup>

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<sup>124</sup> Postema, n 73, 93.

<sup>125</sup> Ibid, 110.

<sup>126</sup> Olsen and Toddington, n 1, 117.

<sup>127</sup> Postema, n 73, 110-1.

<sup>128</sup> Olsen and Toddington, n 1, 113.

<sup>129</sup> Ibid, 118.

From here, unless we are to qualify or abandon the AT, we must attempt to 'complete (or avoid) the missing link in the IA *Theory*'<sup>130</sup> – '[the] institutionalisation not just of autonomous norms, but of autonomous interpretations of norms, signals a crucial complexity in the idea of autonomous normativity'<sup>131</sup> – that is, unless it is supported by an 'extremely complex theory of autonomous interpretation, the (IA Theory) is egregiously incomplete'<sup>132</sup>. But can we circumvent the need for such a complex theory by appealing instead to moral rationality to supply us with the *justifications* needed to guide interpretation when it falls outside of legal reasoning's limited domain? Postema suggests we might,

...we should look for a model which *integrates* arguments of political morality into proper legal argument and justification, starting from recognition of the reflectively self-critical character of legal practice... Justification within such a practice can proceed despite differing strategies of reasoning, and will involve not only justifying that particular result, but also justifying the way one reaches that result to those who reason differently.<sup>133</sup>

It is to this end, and the attempt to *reconstruct* the AT as a *transparently* autonomous system of reason, that we must now turn.

### **2.3 Constructing a Transparent Autonomy Thesis**

This section seeks to reconstruct the argument as one of *transparent* autonomy. It allows us to explain and legitimise the function of institutionalised reasoning. In order to do so, I first return to the notion of interpretation and adjudication which it was found caused so many problems for the AT, in so doing I consider the lines of reasoning necessary in a transparently autonomous system. Having done so, I will turn to some arguments against the commensurability of moral value – on the grounds of its absent agreement or objectivity. In response to this claim, I seek to demonstrate that *morally rational* reasoning is perfectly able to offer a commensurate, even hierarchical, scheme for the weighting of

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<sup>130</sup> Ibid, 119.

<sup>131</sup> Olsen and Toddington, n 58, 297.

<sup>132</sup> Ibid, 298.

<sup>133</sup> Postema, n 73, 111.

individual's claims or interests, such that it is perfectly capable of shining through and elucidating those interpretative and justificatory concerns posed by the AT.

If we accept that the AT and the IA Thesis presuppose that a move exists from the 'pre-legal' to the 'legal' then we find that a social contract theory is equivocal in its stages of argument to that of the completion of the IA Theory.<sup>134</sup> These stages are conceived as follows:

- (i) *No Law / Pre-Law* - 'Acknowledgement of the intolerable condition of pre-legality'.<sup>135</sup>
- (ii) *Legal Incorporation* - 'A subsequent act of incorporation'.<sup>136</sup>
- (iii) *Law's Autonomy* - 'The strategy of autonomy'<sup>137</sup> or 'establishment of the terms and principles of the trusteeship (or sovereignty) of the powers resulting from incorporation'.<sup>138</sup>
- (iv) *IA Theory of Adjudication* - 'The problem of settling the criteria of valid interpretation and application of positive law in relation to the principles so established'.<sup>139</sup>

The task is principally to consider the passing through of the above stages in an attempt to complete the IA *theory*. This, as Postema claims, is to offer,

A theory of law which must give an account of how legal norms operate in the practical reasoning of those whom they govern. In view of the complex interdependence between the practical reasoning in courts and outside them, if source-based norms play an important role in the practical reasoning of both officials and citizens, then so too must non-source-based considerations.<sup>140</sup>

The problem is that if, in the state of nature, the conflict and normative uncertainty is such as to lead us to the logic of autonomy – or institutionalisation - as found in the bare version of the AT, and we are then forced to question that autonomy when reliance on the original principles behind incorporation are relied upon in the interpretation of positive laws. To put it another way, if we take the Hobbesian version of the contract as

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<sup>134</sup> Olsen and Toddington, n 1, 119.

<sup>135</sup> Ibid, 124.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid, 125.

<sup>139</sup> Ibid.

<sup>140</sup> Postema, n 124, 110-1.

our primary example,<sup>141</sup> we note that the 'state of nature' is conceived of as a place of misery and perennial war given that individuals are inherently motivated by concerns for self<sup>142</sup> but, empowered by rational thought, are capable of conceiving means to end that 'state of war' by institutionalisation through a social contract and the creation of a sovereign.<sup>143</sup> Simply, we find Hobbes' transition from stage (i) to (ii) to be based upon 'prudential' practical reasons.<sup>144</sup>

At stage (iii) we seek to elucidate some form of valid *legitimacy criteria*. The form of which, under the AT, appears to offer little more than an interpretation of *formal* or *procedural* legitimacy such as to offer the minimal imposition of what we are to call 'law'. For Hobbes, the 'covenant' is legitimised on the basis that to leave the 'commonwealth' is to return to the state of war.<sup>145</sup> This suggests that whether consent has actually been given or not, the prudential reasons for avoiding the state of war are sufficient to ground legitimacy.<sup>146</sup> But this is surely to be insufficient for the sacrifice of power post-incorporation? Rather, we might argue that, 'The logic of autonomy in stage (iii) from *any* perspective must then contain sufficient provision for the identification of a finite range of possibly acceptable claims to reasonable interpretations of the foundational principles.'<sup>147</sup> The essence of stage (iii) is to establish some objective criteria for the *reasonable* use of the power which has been conveyed in stage (ii);<sup>148</sup> it is, simply, the notion that the power should not be used arbitrarily.<sup>149</sup> It is for this reason that purely formal or procedural legitimacy criteria fail to properly maintain the strategy of autonomy and, ultimately, provide a conception of what is a *reasonable* exercise of institutionalised reasoning.

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<sup>141</sup> Hobbes, n 72, 115-9.

<sup>142</sup> Ibid, 82-3 and 115.

<sup>143</sup> Ibid, 119-28.

<sup>144</sup> Ibid, 117.

<sup>145</sup> Ibid, 120-2.

<sup>146</sup> Hobbes, n 72, 122: "...whether he be of the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of [war] he was in before; wherein he might without injustice be destroyed by any man whatsoever."

<sup>147</sup> Olsen and Toddington, n 1, 128.

<sup>148</sup> Ibid, 127.

<sup>149</sup> Beyleveld and Brownsword, n 3, 435-6.

If, then, we are to find a route from stage (iii) into a legal idealist vision of stage (iv) we ought to consider what may be encompassed as capable of solving the problem of interpretation. On the basis of this shift, from AT to IA Thesis and the attempt to complete the IA *Theory*,<sup>150</sup> we might begin by recognising the struggle inherent between law and political morality and this struggle may lead us to accept the need to institute some form of 'artificial' reasoning or autonomy, but qualify this by seeking instead to adhere to *transparent* autonomy.<sup>151</sup> This is defined as 'a form of autonomy which allows the law's background considerations and justifications to shine through and illuminate the processes of interpretation and application'.<sup>152</sup> That is, we envisage the law as being autonomous from moral rationality in the sense that it *ought not* to affect the reasoning, say, of those applying the law where to do so would pose a risk that the subjective values of the applicator may alter the modelling of, say, those rights being considered in the individual case.<sup>153</sup> As part of the *justificatory* regime, we must 'integrate arguments of political morality into proper legal argument'<sup>154</sup> and in such a manner, 'we must admit *ex hypothesi* that the principle in question must at least furnish a criterion to enable us to determine that *some* conceptions of the implications of practical reason are reasonable and some are not.'<sup>155</sup> My claim, then, is that moral rationality *ought* to hold a position behind the system as a whole whereby its influence to certain 'goods' or 'values' *for that system* operate as considerations for the application of rights and the justifications for the institution itself.<sup>156</sup> This is the end point which we must reach in the coming sections. My task then is to elucidate what *reasonable* use of moral rationality may be justified within a scheme of *transparently autonomous law*.<sup>157</sup> This is to logically expand from the

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<sup>150</sup> Postema, n 73, 110.

<sup>151</sup> Olsen and Toddington, n 1, 115.

<sup>152</sup> Ibid, 116.

<sup>153</sup> Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997), 90-4.

<sup>154</sup> Postema, n 124, 111.

<sup>155</sup> Olsen and Toddington, n 58, 305.

<sup>156</sup> Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007), 207: "In Gewirthian terms, Justice appears at the level of individual practical reason as an adherence to the Principle of Generic Consistency, in our collective arrangements it is an ethical principle and, in co-ordinatory and regulatory terms, it must also function as a *legal* principle." See also: Beyleveld and Brownsword, n 3, 435-40.

<sup>157</sup> Olsen and Toddington, n 1, 128.

idea that there is enough practical rationality to get us into the AT or incorporation stage then there ought to be enough to complete the IA *theory* and reach stage (iv).<sup>158</sup>

At a foundational level the argument is that legal *legitimacy* is, and ought to be, based upon the attempt to apply a set of norms which remains in touch with moral rationality such that it is capable of reacting to and pre-empting the problems associated with regulation and co-ordination in a complex society.<sup>159</sup> As Beyleveld and Brownsword note,

Having argued that law is an affair of practical reason, and that practical reason presupposes Moral Reason – indeed, that it presupposes the *PGC* – this neutrality is no longer sustainable: the ideal-typical case of the *Legal Enterprise* is where this enterprise is Morally legitimate, and, according to our specific argument, Moral legitimacy is to be judged using criteria which employ the *PGC* as the supreme moral/legal principle.<sup>160</sup>

It is not enough to base our conception of validity solely on *form*, in the Positivist sense, and instead we must – given that morality initiates the move from the state of nature to institutionalised reasoning in the first place – demonstrate that legal validity is essentially based upon moral rationality.<sup>161</sup> To put it another way, our concerns for ‘equality’, ‘justice’, ‘fairness’, the ‘Rule of Law’, and so forth are the very expressions of the law’s relation to moral rationality.<sup>162</sup>

## **2.4 Interpretation and Incommensurability**

I now return to the incorporation of interpretation in the process of adjudication of legal disputes; that is, the move to stage (iv). To do so, I consider the notion of the ‘hard case’ and the means by which we are to resolve and offer solutions against the contentious moral and legal backdrop which these cases inherently concern. In so doing, we must consider the pervasiveness to this thesis of Dworkin’s notion of the right answer and the lines of reasoning which demonstrate the *necessary* connection between law and moral

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<sup>158</sup> Ibid, 129.

<sup>159</sup> Ibid, 129-30.

<sup>160</sup> Beyleveld and Brownsword, n 3, 164.

<sup>161</sup> Ibid, 131.

<sup>162</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998), 214.



rationality. But with this we are faced with a further challenge to the connected system, namely the assertion that moral values are 'incommensurable' and are incapable of being ascribed a hierarchical scheme. Whilst this notion of commensurability remains throughout this section, it must be initially be challenged against the right answer thesis.

Interpretation in legal reasoning is apparent in both 'factual' and 'normative' stages; in the prior we find that, for judges to make decisions, we are less concerned by literal facts and instead find our attentions drawn to *statements of facts*.<sup>163</sup> This is not to deceive necessarily, rather it is to create of view, for legal purposes, of the 'event' which allow it to be 'filed' or fit into a format which is capable of being processed by the system. This is because of laws' construction of an 'artificial' reality through the use of norms.<sup>164</sup> By shaping and ordering laws' reality in relation to social practices which might not 'fit' perfectly we find that it becomes laden with value.<sup>165</sup> But how are we to evaluate the judgements and decisions taken by our legal system? Or, to put it another way, how do we know that the decision taken is the *right one*?<sup>166</sup> It is simply, 'The formal answer is that it should be based on a coherent and accessible scheme of practical rationality capable of incorporating both the substantive and procedural aspects of the problem of legitimacy.'<sup>167</sup> In searching for that answer, those charged with the power to make decisions are not entitled to balance the potential outcomes but instead they are responsible for making the *right* decision.<sup>168</sup> It is in doing so that we turn to Dworkin's right answer thesis, which, '...is simply the terminus of the view that the more knowledge one has about the dynamic relations between values and policies, the better one's decisions based upon weighing and balancing them would be.'<sup>169</sup> On this basis, our intuitive consideration that those empowered with decision making in the adjudication process are charged with not simply making *a* decision but making the *correct* decision. It is with a

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<sup>163</sup> Olsen and Toddington, n 1, 132.

<sup>164</sup> Ibid, 132.

<sup>165</sup> Ibid, 133.

<sup>166</sup> Postema, n 73, 110-1.

<sup>167</sup> Olsen and Toddington, n 1, 133.

<sup>168</sup> Dworkin, n 162, 218.

<sup>169</sup> Stuart Toddington, "Ronald Dworkin: To Be Continued" (2013) 69 *Student Law Review* 38-40, 40.

conception of what the relevant criteria is for determining what the *correct* answer is that we are able to concisely explain what grounds are relevant to the process.

It is with this that we turn to law's so called 'hard cases'; those in which a *legal* answer is controversial and troublesome because of the contentious moral backdrop. For Dworkin, legal reasoning – in the form of decision making – is premised upon two separate considerations.<sup>170</sup> First, the empirical notion of 'fit' – alluded to above – where, taking account of surrounding provisions, the decision maker is obliged to consider and account for the general direction of the law *as a whole* and conform the decision in the present case to the existing provisions.<sup>171</sup> Second, the dimension which is aligned with moral rationality as 'justification'.<sup>172</sup> It is in the balancing and weighing of these lines of reasoning which allow the decision maker to search for – and, preferably, find – the right answer.<sup>173</sup> As Dworkin notes,

They are entitled, in principle, to have their acts and affairs judged in accordance with the *best view of what the legal standards* of the community required or permitted at the time they acted, and integrity demands that these standards be as coherent, as the state speaking with a single voice.<sup>174</sup>

It is the search, in essence, for a decision which will make the whole system coherent.<sup>175</sup> A decision of this kind will be one which can be seen as *identifiable* in the existing legal provisions and rendered morally sound.

The pressing issue to consider at this juncture is the claim to the 'incommensurability of values', the reasoning of which can be briefly summarised. Essentially, as we have seen, we note that practical reason takes us beyond prudence as mere self-interest. But having stepped beyond this point we find, it is claimed, that 'moral goods' represent for us a complex matrix which no hierarchical scheme can be subscribed.<sup>176</sup> As such, law is

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<sup>170</sup> Dworkin, n 162, 228-32.

<sup>171</sup> Ibid, 230 and 255.

<sup>172</sup> Ibid, 231 and 255.

<sup>173</sup> Ronald Dworkin, 'No Right Answer?' in PMS Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977), 58–84.

<sup>174</sup> Dworkin, n 162, 218.

<sup>175</sup> Ibid, 245.

<sup>176</sup> Olsen and Toddington, n 1, 138.

requisitely authoritative because it allows the pursuit of multi-dimensional good to be achieved.<sup>177</sup> This, for Finnis, is the justification behind law's authority and the obligation to obey; simply because it is a means by which we can pursue 'goods'.<sup>178</sup> The effect of this is that, ultimately, if 'goods' are incommensurable and no scheme of hierarchy can be ascertained then the search for the right answer – in any conception of the thesis – is futile and doomed to be ineffective. Its relevance then is only apparent if we can show, through some deduction, that some hierarchical system or structure can be attained to those moral 'goods' which we might later hold as representing the 'ideals' of our concept of law.

Whilst Finnis asserts that these values are incommensurable<sup>179</sup> and doubt may remain as to what the right answer is in a particular case;<sup>180</sup> this does not justify that it is (a) implausible that a balance could be struck between the two lines of reasoning, nor that (b) an attempt should not be made to situate our decisions (or choices) in 'hard cases' as best as we can – knowing the fallibility of humans in the eclipsing shadow of Hercules J.<sup>181</sup> Further still, we are alerted to a logical shift in our focus if we follow Finnis' line of reasoning to its conclusion.<sup>182</sup> That is, if those values or lines of reasoning truly are incommensurable then we are no longer talking about a 'hard case' but instead we have on our hands an *impossible case* – for there is no plausible method of settling the conflict.<sup>183</sup> If this is so then we are forced to question the legitimacy of the very legal system we are attempting to legitimise; for, if 'a decision with any pretensions to authoritative status in relation to a correlative obligation to obey...[then it] must, at least ostensibly, be a *reasoned* resolution of a social conflict.'<sup>184</sup> If the values are truly held to be incommensurable, the result is no better settled than by a flip of a coin. Equally, our

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<sup>177</sup> Finnis, n 109, 202-3. See also: Ibid, 138-9

<sup>178</sup> John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) *Notre Dame Journal of Law, Ethics and Public Policy* 115-37.

<sup>179</sup> Ibid, 143-4.

<sup>180</sup> Ibid, 145.

<sup>181</sup> Dworkin, n 162, 245.

<sup>182</sup> Olsen and Toddington, n 1, 142.

<sup>183</sup> Finnis, n 54, 146. See also: Beyleveld and Brownsword, n 111.

<sup>184</sup> Olsen and Toddington, n 1, 142 (*my emphasis*).

Herculean strategy may not seem to encapsulate a 'choice' at all if there is only one answer at the end of it<sup>185</sup> – this is no longer choice but simply a stone turning exercise.

What then if we reason that it is the innate imperfections of human reasoning and possibility of unilateral value disparity which make these decisions difficult? In this light, we reason that there *is* a choice to be made and it is not that values are incommensurable – rather we are recognising that whilst we hold imperfections we are simply striving to situate ourselves in the best possible account of law as an element of practical reasoning.<sup>186</sup> As Pattinson notes, in 'an ideal world where supremely rational agents...[would] universally seek to uphold...[goods] without problems of scarcity'<sup>187</sup> but this is not realistic. The right answer thesis – termed in this way – is less a blind aspiration to perfection or *utopia* than it is to the improvement and fulfilment of legal reasoning as a logical extension of the scheme of practical reasoning (in that it is 'artificial') under *recognised* imperfect conditions.<sup>188</sup>

With this illumination the balance to be struck is one which must account for the existing legal conditions primarily through empirical observation – the reasoning of 'fit' – and the aspiration to ensure an elucidation and coherence to those pre-existing legal conditions to ensure that the decision is one supported by the moral rationality which supports the framework of 'artificial' reasoning of the AT – the reasoning of 'justification'.<sup>189</sup> As Olsen and Toddington argue,

From this perspective, the dimensions of 'fit' and 'justification', rather than being two parallel lines, are seen to have a common point of departure. The reason a case presents itself as a hard case is that the existing legal material presents itself as less than morally rational, because previous authorities (legislators, judges, etc.) have acted with less insight or resources (morally or empirically) than are available in the case at hand. It is this, rather than an insoluble conflict of values, that makes the case a hard one.<sup>190</sup>

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<sup>185</sup> Finnis, n 178, 146.

<sup>186</sup> Olsen and Toddington, n 1, 143.

<sup>187</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 169.

<sup>188</sup> Dworkin, n 162, 188.

<sup>189</sup> Ibid, 255. See also: Beyleveld and Brownsword, n 3, 426.

<sup>190</sup> Olsen and Toddington, n 1, 143-4.

Fundamentally, this is to recognise the *imperfection* in humanity and in an artificial scheme of practical reason - the need for which, after all, is premised on those imperfections – but this does not and ought not to impose upon the authority of a legal system when the decisions which are made and the forms of regulation created are imperfect. This leads us to a point raised earlier in this section but with a clearer view.<sup>191</sup> The AT suffers from a fatal flaw when the reasons used to institute its creation *in the first place* – through incorporation – are later overlooked in order to propound autonomy. It is those *imperfections* which impede the use of a Herculean autonomy from moral rationality<sup>192</sup> – in the absence of such we must resort instead to a form of autonomy which incorporates those imperfections and leads us to aspire for more;<sup>193</sup> namely *transparent* autonomy.

It is worth briefly reflecting on the line of argument so far. The point at which we find ourselves in our argument is aptly summarised,

If the jury is considering whether Dworkin's labours are an attempt to provide the institutions of adjudication with a logic of interpretation which *integrates* as Postema would say, the (AT) with its function argument, the (IA *Theory*), and it has good reason to find for the defendant, then, it seems, we might have an understanding of what constitutes a justification of Legal Idealism, for this is *precisely* what Dworkin sets out to do; and this is why, formally, and indisputably, the Herculean strategy is an expression of the optimal solution to the problematic of the (IA *Theory*). Formally, it recognises what is at stake, and formally, it urges us to do our best to preserve the *integrity of the continuum of practical reason* throughout the domain (or *The Empire*) of our now autonomously conditioned normative institutions.<sup>194</sup>

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<sup>191</sup> Beyleveld and Brownsword, n 3, 435: "If we read the Rights Thesis as a thesis within relativistic Natural-Law Theory, Hercules must treat the institutional material of his jurisdiction as legally valid only where it does not violate the regulating (relative) moral principles."

<sup>192</sup> Ibid, 436n: "Although Hercules is presented as superhuman and, no doubt, as one who unfailingly comes up with the right answer, we can read the concept of a Judge implicit in this as one who attempts sincerely and seriously to emulate Hercules. In other words, we do not need to worry about Hercules as a model of achievement; we can treat the concept of a Judge under the Rights Thesis, as under our own view, as essentially a model of attempt."

<sup>193</sup> Dworkin, n 168, 409.

<sup>194</sup> Olsen and Toddington, n 58, 306

As they go on to note, our task is not to show that this balance will always be achieved optimally but that we are able and concern to *try*.<sup>195</sup> We found that stage (iv) of the argument for autonomy was an impediment to completion of the IA Theory unless we were capable of devising some scheme for the considerations which interpretations should take account of<sup>196</sup> – in the absence of such we find ourselves at an impasse, if law is to be authoritative in the scheme of practical reasoning it must (as part of the pursuit of good) respond to the practically reasonable priorities of value where they are apparent, the system then is an *unreasonable* authority from moral rationality.<sup>197</sup> We must then question whether some schema for the order of ‘goods’ – which the law is pursuing – such that our interpretations are aided and therein the authority upon which the law rests is reinforced, ‘especially when that very claim lays the foundation upon which rests the separation of law’s authority from moral validity.’<sup>198</sup> It is to this end that we now turn our attentions, and do so through two alternate conceptions of resolution to this problem.

## **2.5 Artificial Weighting in Artificial Reasoning**

Given the need for us to find resolution as to what is required for the *justification* – for both the system’s use of power and within the adjudication process – and have found, in the face of an assertion to Dworkin’s appeal to finding the right answer, the claim that these values to which we strive for *justification* through are, alas, incommensurable and therefore incapable of achieving the status we require.<sup>199</sup> We must therefore seek to demonstrate, either, that these values are indeed commensurable and an inherent hierarchy of value exists, or that we could, at least, incorporate an ‘artificial’ scheme for weighting these incommensurable values such that they become commensurable.<sup>200</sup> That is, if a multiplicity of ‘good’ exists for which, as Finnis claims, the law’s authority is ingrained in the attempt to pursue these, then an *artificial* schema which allows the

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<sup>195</sup> *ibid*

<sup>196</sup> Postema, n 73, 110.

<sup>197</sup> Olsen and Toddington, n 1, 147.

<sup>198</sup> *Ibid*, 148 (*their emphasis*).

<sup>199</sup> Finnis, n 178, 146.

<sup>200</sup> Beyleveld and Brownsword, n 3, 154.

*artificial* determination of reasonability is surely preferable to the absence of any coherent attempt to balance between competing concerns, interests, or goods.

Are we then able to at least conceive of such a schema which would allow us to assess the weight of those morally rational claims which gave rise to the incorporation and institutionalisation of practical reason in the first place? Jansen notes,

In public discourse weight assessment criteria determine the weights of freestanding justified principles. They express what is important for public morality and therefore what 'counts' in freestanding discourse. They thereby assess the validity of moral norms.<sup>201</sup>

Then we might say, if we are to accept that values are indeed incommensurable are we not able to *artificially* relate them to one another thereby installing some means by which we are to create a system for them to be made commensurate for the purpose of our artificial institutionalised reasoning; that is, the IA *Theory*.<sup>202</sup> Jansen continues, '[as] weight assessment criteria are categorically different, they may run counter to each other. They therefore require a principled structure which enables varying weight assignment criteria to be taken into account simultaneously.'<sup>203</sup> It is in the creation of even 'artificial' criteria for weighting these values that we supply justification for the exercise of power; rather than claiming justification in the absence of reason.<sup>204</sup> Before we resort to an 'artificial' structure of weight assessment, we ought to at least attempt some attempt to show *logically* that a structure exists.

## 2.6 Summary

This chapter has intended to set out the beginnings of the argument to Legal Idealism and a thesis which holds that law and (rational) morality are *necessarily* connected. This has been done through the introduction of considerations of practical reason and the continuum on which the instrumental, prudential, moral and institutional exist. This is

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<sup>201</sup> Nils Jansen, 'The Validity of Public Morality' (1998) *Archiv für Recht und Sozialphilosophie*, 12.

<sup>202</sup> Olsen and Toddington, n 1, 152.

<sup>203</sup> Jansen, n 201, 13.

<sup>204</sup> Olsen and Toddington, n 1, 152.

a necessary point which forms a foundation for the arguments throughout the rest of this thesis.

Further to this, I have sought to deconstruct the Positivist argument to the Autonomy Thesis and, upon highlighting its flaws, attempt to complete the argument according a Legal Idealist framework. This task is yet to be completed and will be continued in the next chapter. However, up until this point the argument has been made that in the absence of some *justificatory* and, hence, *legitimizing* criteria the AT suffers a fatal flaw. It offers an incomplete explanation of legal relations and is incapable of offering answers to questions concerned with how hard cases might be resolved.

In view of these justificatory and legitimating grounds I have sought to demonstrate that at the very least the argument that moral justifications ought to be ascribed *artificial* weight (if they are thought to be incommensurable) within *artificial* reasoning. Simply, an institution ought to codify how these incommensurable values will be weighed in order to offer resolution of hard cases. In its absence we are left with an AT which does not explain the failure to consider the reasoning *for* institutionalisation post-incorporation. We must now move on to consider the merits of *completing* the AT thesis *transparently*. This requires that we consider the merits of Gewirth's argument to the Principle of Generic Consistency<sup>205</sup> which represents the claim that a supreme moral principle is logically related to the concept of agency itself.<sup>206</sup> It is this which is used as a demonstration of *commensurate* moral value sufficient at least for the *justificatory* reasoning necessary for the IA *Theory* and, further than this, sufficient to ground the notions of legitimacy, authority and the obligation to obey.

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<sup>205</sup> Gewirth, n 42.

<sup>206</sup> Beyleveld and Brownsword, n 3, 440.



## Chapter 3      Agency, Morality and Law

The composition of an ‘artificial’ scheme of weighting, as discussed in the previous chapter, is only required if we are unable to demonstrate that a scheme exists whereby values are indeed commensurable. It is claimed that this is attainable by reference to Gewirth’s argument to the Principle of Generic Consistency (*PGC*)<sup>1</sup> whereby determinate features of agency are established according to a hierarchy of respective *need* for the individual.<sup>2</sup> In so doing, we complete our circle to the conception of moral rationality outlined in this chapter and offer, as part of this argument to a transparent legal autonomy, the *justificatory* and interpretative element which we found was absent in the attempt to complete the *IA Theory*. That is, we are able to complete the theory by allowing *moral rationality* to shine through in our institutionalised reasoning.<sup>3</sup> I begin by expanding on some of the background concerns and introducing Gewirth’s argument before retracing the dynamic shifts in practical reason through the argument. Finally, I will consider how the determinate moral commitments in the argument import the notion of moral rationality directly into institutionalised reasoning through an evaluation of justification.

It is to this end that I turn my attention to the argument of *dialectical necessity*<sup>4</sup> – whereby individual agents must support those principles raised. Gewirth embarks upon attempting

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<sup>1</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 22-198.

<sup>2</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 33-7.

<sup>3</sup> Henrik Palmer Olsen and Stuart Toddington, *Law in its Own Right*. (Hart Publishing, 1999), 158.

<sup>4</sup> The argument is presented as being ‘dialectically necessary’ - Gewirth, n 1, 42-7. It is ‘dialectical’ as it begins from the statements and assertions which are made by agents and examines what these logically entail. (43) It is ‘dialectically necessary’ as it bases itself on the statements attributable to every agent, by reason of their agency, and logically explores what they must infer for *all* PPAs. (46-7); Gewirth’s focus on the notion of agency is indicative of the argument of advocates of choice or will theory and restricts the notion to those who are choosing or willing agents (thus regarding young children, the mentally impaired, etc., as non-agents who, as a result, are not included in the *PGC*, see below), however, his argument develops to consider the imposition of rights and obligations on the

to prove the thesis that ‘every agent, by the fact of engaging in action, is logically committed to accept a supreme moral principle having a certain determinate normative content.’<sup>5</sup> In order to do so he proposes three steps;

1. ‘Every agent implicitly makes evaluative judgments about the goodness of his purposes and hence about the necessary goodness of the freedom and well-being that are necessary conditions of his acting to achieve his purposes’.<sup>6</sup>
2. Because of that ‘every agent implicitly makes a deontic judgment in which he claims that he has rights to freedom and well-being’.<sup>7</sup>
3. Every agent must claim to bear these rights because he is an agent and so ‘must [logically] accept the generalisation that all prospective purposive agents have rights to freedom and well-being.’<sup>8</sup>

In so doing we are enabled to, once again, and through an alternate lens, trace the shifts along the continuum of practical reasoning from the *instrumental* to the *prudential* and, finally, and importantly, logically to the *moral*. It is in the attainment of this logical (or, more appropriately, rational) morality that we are able to offer a schema for the inclusive adjudication of disputes by both *artificial* and *moral* lines of reasoning based on the generic features of agency.<sup>9</sup>

Gewirth argues that all Prospective Purposive Agents (PPA)<sup>10</sup> *voluntarily* try, by their actions, to bring about results which they intend, or are inclined, to attain; or those with

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benefit an agent has in those ‘generic features’ of agency. Hence, leading to a different position whereby, essentially, only those individuals who are agents are able to require the generic features of agency; or, to put it another way around, only individuals expressing will are capable of having the interests required to ground rights. See: Olsen and Toddington, n 3, 54.

<sup>5</sup> Gewirth, n 1, 48.

<sup>6</sup> Ibid, 48, or, indeed, anything which might be termed as a ‘generic feature’ of agency; Olsen and Toddington, n 3, 4-5.

<sup>7</sup> Gewirth, n 1, 48.

<sup>8</sup> Ibid.

<sup>9</sup> Olsen and Toddington, n 3, 156; see also Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth’s Argument to the Principle of Generic Consistency* (London, 1991), 19-20

<sup>10</sup> Gewirth, n 1, 111-2, provides a distinction between a PPA and an ‘actual agent’. The prior is a being who looks ahead to acting and has both present and future ‘purposes he wants to fulfil’. An ‘actual agent’, meanwhile, is a being that acts or is capable of acting (that is, their behaviour is voluntary and purposive) – see: (26-42). The argument Gewirth presents is based upon the PPA because, “To restrict to his present purpose his reason for claiming the rights of freedom and well-being would be to overlook the fact that he regards these as goods in respect of all his actions and purposes, not only his present one.” (111-2)

the capacity to do so with some disposition to exercise.<sup>11</sup> As such the expression, by such an agent, 'I do X for purpose E' entails that 'E is good'.<sup>12</sup> The agent may desire some outcome for its own sake, as a means to some other 'good' or as a 'good' in itself; in short, he envisages a preferred outcome and acts with the view to attaining such outcome.<sup>13</sup> The PPA must, therefore, engage in a process of valuing<sup>14</sup> and will, at least, conclude that the preferred outcome is of sufficient value to warrant acting for the purpose of securing it.<sup>15</sup> The process of valuing may include a wide ranging criterion and include both short-term and long-term goals, the momentarily or perennially gratifying, and the means to some immediate or distant end.<sup>16</sup>

As a rational agent one seeks to avoid 'self-contradiction in ascertaining or accepting what is logically involved in one's acting for purposes and in the associated concepts... [, and who exhibits] a certain minimal inductive rationality'.<sup>17</sup> The criterion of rationality adopted by Gewirth is premised on the 'canons of deductive and inductive logic'<sup>18</sup> in an attempt to show that the concept of purposive agency is to logically presuppose acceptance of the Principle of Generic Consistency.<sup>19</sup>

### **3.1 Commensurate Value, Morality and Agency**

For Gewirth, 'freedom' and 'well-being' represent the *generic features of agency* and, for present purposes, are conceivable as the commensurate value for our moral line of reasoning. 'Freedom' represents an agent's ability to control 'each of his particular

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<sup>11</sup> Gewirth, n 1, 48-9. See also Beyleveld, n 9, xxxvi.

<sup>12</sup> Ibid, 49.

<sup>13</sup> This is not necessarily to say that he will achieve that preferred outcome, nor that that envisaged outcome is that good that he anticipated it to be (Ibid, 51). It is simply that as a PPA he acts with the view to bringing about some circumstance.

<sup>14</sup> Where 'value' is synonymous to 'good' - Ibid, 49-50.

<sup>15</sup> Ibid, 49.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid, 46.

<sup>18</sup> Ibid, 22.

<sup>19</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 143.

behaviours by his unforced choice<sup>20</sup> – termed as *occurent* freedom – and ‘his longer-range ability to exercise such control’<sup>21</sup> – termed a *dispositional* freedom. Dispositional freedom is ‘necessary in order to pursue or achieve any purpose at all’<sup>22</sup> for the agent. Any interference with it interferes with the purposivity of the agent and so is a generic feature of agency.<sup>23</sup> Occurent freedom, meanwhile, may also hold a generic-dispositional interpretation, in that, any purpose which the agent seeks cannot be pursued without it.<sup>24</sup> Each of these types of freedom sit within a *continuum of necessity*<sup>25</sup> based on their incidental value to the agent.

For a PPA, well-being is comprised of three levels; *basic*, *nonsubtractive* and *additive*.<sup>26</sup> *Basic* well-being refers to ‘the proximate necessary preconditions of his performance of any and all of his actions’<sup>27</sup> and encompasses a range of considerations from life, to physical integrity to mental stability and even the (perceived) ability to attain one’s goals.<sup>28</sup> *Nonsubtractive* well-being is comprised of those conditions which the PPA needs to retain that which it already holds and conceives as good.<sup>29</sup> *Additive* well-being is premised on those conditions which the agent requires in order to increase his ability to fulfil his purposes.<sup>30</sup> Like the (dispositionally interpreted) occurent and dispositional freedom, one’s *basic* well-being is a generic feature of agency for both the pursuit and attainment of any purpose.<sup>31</sup> *Nonsubtractive* and *addictive* well-being may be dispositionally interpreted as the abilities and conditions necessary to retain and attain those capacities

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<sup>20</sup> Gewirth, n 1, 52.

<sup>21</sup> Ibid.

<sup>22</sup> Beyleveld, n 9, 19.

<sup>23</sup> Gewirth, n 1, 52.

<sup>24</sup> Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2010), 113.

<sup>25</sup> Beyleveld, n 9, 19. See also: Pattinson, n 2, 68-75.

<sup>26</sup> Ibid.

<sup>27</sup> Gewirth, n 1, 53.

<sup>28</sup> Ibid, 54.

<sup>29</sup> Ibid, 54-5.

<sup>30</sup> Beyleveld, n 9, 19.

<sup>31</sup> Gewirth, n 1, 59.

for a particular action.<sup>32</sup> It follows that they are the necessary conditions of an agent *succeeding* in their purposes.

Both freedom and well-being are comprised of those considerations which are fundamental to the very nature of the agent himself; that is, they are the requisite conditions of the agent's ability to act *as an agent*.<sup>33</sup> As with the *continuum of necessity* of freedom, we find that the components of well-being 'fall into a hierarchy determined by the degree of their indispensability for purposive action.'<sup>34</sup> It is as a result of this consideration of continuum or hierarchy, respectively, that we find 'the rational necessity for PPAs to accept a *complex structure of rights* corresponding to the hierarchy in which components of freedom and well-being are arranged.'<sup>35</sup> It is through this schema, at least at the point of the opening assertion ('I am an agent'), that we find a hierarchy which allows for, at least, the possibility of weighting a claim right and it is this which offers a prima facie case for the commensurability of *moral* values.<sup>36</sup> That is, at this point, we have, at the very least, a criterion for determining how we might judge between those non-legal and rationally moral concerns and justifications as part of the adjudication process in a transparently autonomous system. In order to move the argument on from the prima facie position to one whereby we might consider that the *PGC* might offer us the schema of Dworkonian 'justification',<sup>37</sup> we ought to turn our attentions to the argument to the *PGC* itself.

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<sup>32</sup> Ibid, 61.

<sup>33</sup> See: Beyleveld, n 9, 20-1 and Gewirth, n 1, 62-3.

<sup>34</sup> Gewirth, n 1, 62.

<sup>35</sup> Beyleveld, n 9, 20-1 (*my emphasis*). See also: Pattinson, n 2, Ch. 2.

<sup>36</sup> Olsen and Toddington, n 3, 154-8.

<sup>37</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998), 231 and 255.

### 3.2 The Principle of Generic Consistency

It is now necessary to outline the stages of Gewirth's argument and this is done so according to the steps outline by Beyleveld<sup>38</sup> and in relation to the stages of the argument outlined in the introduction to this chapter.

#### *Stage I*<sup>39</sup>

On the basis that 'I' am an agent, by definition, I must claim:

1. I do (or intend to do)  $\phi$  for purpose E.

This entails that I must logically consider:

2. E is good.
3. My freedom and well-being are generically necessary conditions of my agency.

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<sup>38</sup> Beyleveld, n 9, 21-46. I have adopted Beyleveld's presentation of the argument on the grounds that it provides us with a organised and clarified formulation of the various steps of the argument. As Gewirth recognises in the Foreword to Beyleveld, n 9, (vii): 'Deryck Beyleveld has done me the great honor of working out an exceptionally acute, systematic, and thorough analysis and defense of the argument for the supreme principle of morality that I presented in *Reason and Morality*. I am immensely grateful to him for his vast and insightful labors in producing this treatise. It is not only by far the most valuable contribution to the many critical discussions that my book has received since its publication in 1978; in its penetrating analysis and chains of argument Beyleveld's book is also an excellent example in its own right of how moral philosophy, at the level of principle that constitutes its most fundamental phase, should be done.' Whilst there may be subtle differences in the accounts, I have attempted throughout to point to the relevant sections of each of the scholars' formulation/constructions. I am of the view that there are merits to both of the approaches taken and in the bodies of work of Gewirth and Beyleveld, and indeed related scholars, influence is drawn from both. As noted in the 'Introduction' (see: 1.3), I am not concerned with a defence of the argument to the – of either Gewirth or Beyleveld - PGC in and of itself, rather on the application of the argument based on the presumption that it is valid. Equally, I am of the view that the particular form of Legal Idealism is best placed by adopting the arguments of both of these excellent scholars as an evidence base for the contingent application of the argument to legal problems. I would also note that both Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2010), 117-22, and Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 4-5, adopted Beyleveld's presentation of the argument, as I have, whilst attributing it to Gewirth, n1. See also: Ari Kohen, "The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency" (2005) 7(1) *Human Rights Review* 49–75, 61: 'Gewirth has done us a great service in responding to many of his critics himself and he has also received considerable assistance from Deryck Beyleveld, whose own work examines and refutes sixtysix well-crafted objections to the PGC. It should be noted that it is not my intention, here, to rehearse all of these critiques, primarily because Beyleveld has done a fine job of collecting ten years of this scholarship, but also because such a rehearsal does not serve the interests of this paper.'

<sup>39</sup> See: Beyleveld, n 9, 14 and 21-4 and Gewirth, n 1, 22-63.

4. My freedom and well-being are necessary goods.

*Stage II*<sup>40</sup>

By virtue of this claim,<sup>41</sup> I must accept:

5. I have, at least, a prima facie claim-right (on purely prudential criterion<sup>42</sup>) to my freedom and well-being.
6. My agency is a sufficient reason for my having, at least, a prima facie claim right to my freedom and well-being.<sup>43</sup>

*Stage III*<sup>44</sup>

This is by the *Logical Principle of Universalisation* (LPU):

7. If, in system of reasoning Y, 'I have R because of A' is a valid inference, then so too is 'B has R because of A'.

This is expanded when, Y = my internal viewpoint as a PPA, R = a claim right to freedom and well-being (or 'the property of...'), A = agency (or 'the property of...'). Therefore,

8. My internal viewpoint, as a PPA, is a system of reasoning whereby [*any* PPA (PPAO<sup>45</sup>) has corresponding claim rights to freedom and well-being] is a valid inference.<sup>46</sup>

Therefore, from my *internal viewpoint* it is dialectically necessary for me to accept:

9. 'PPAO has at least a prima facie claim right to its freedom and well-being.'<sup>47</sup>

Since PPAO must also reason this way,

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<sup>40</sup> See: Beyleveld, n 9, 14 and 24-42 and Gewirth, n 1, 63-103.

<sup>41</sup> Beyleveld, n 9, 24-5.

<sup>42</sup> Ibid, 33-9.

<sup>43</sup> See: Deryck Beyleveld, "A Reply to Marcus G. Singer on 'Gewirth, Beyleveld and Dialectical Necessity'" (2002) 15(4) *Ratio Juris* 458-473.

<sup>44</sup> See: Beyleveld, n 9, 14 and 42-6 and Gewirth, n 1, 104-128.

<sup>45</sup> 'Other Prospective Purposive Agent' see: Beyleveld, n 9, xxxvi.

<sup>46</sup> Adapted from Beyleveld, n 9, 44.

<sup>47</sup> Ibid, 45.

10. 'From *its* internal viewpoint as a PPA, it is dialectically necessary for *every PPA* to accept that PPAO has at least a prima facie claim right to its freedom and well-being.'<sup>48</sup>

Since every PPA must reason about itself in the same way, from (6.) it follows,

11. 'From *its* internal viewpoint as a PPA, it is dialectically necessary for every PPA to accept that *it* has at least a prima facie right to freedom and well-being.'<sup>49</sup>

By (10.) and (11.) it follows,

12. 'From *its* internal viewpoint as a PPA, it is dialectically necessary for *every PPA* to accept that *every PPA* has at least a prima facie right to freedom and well-being.'<sup>50</sup>

The *Principle of Generic Consistency*, then, is represented as,

13. 'Every PPA has a prima facie claim right to its freedom and well-being.'<sup>51</sup>

The principle itself grants rights to agents on the basis of their generic features of agency as a sufficient justifying ground and, thus, situates all agents equally – in their holding of these rights. The *PGC* then is an egalitarian principle which equally situates all PPAs.<sup>52</sup> On the basis of the argument to the *PGC*, we ought to shift our attention to some of the principal considerations raised by the argument before returning to consider the inference which the completion of the *PGC* holds for the system of artificial in transparent autonomy.

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<sup>48</sup> Beyleveld, n 9, 45.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Gewirth, n 1, 138.



### 3.3 The PGC and the Continuum of Practical Reason

The shifts in practical reason have already aided our elucidation of the Autonomy Thesis (AT) and of social contract theory.<sup>53</sup> By further illuminating the alterations along the continuum of practical reasoning in the argument to the *PGC* we are further enabled to envisage the manner by which we are to trace, and ultimately, complete and justify the final *rational* move to institutionalised reasoning.<sup>54</sup>

In order to do so we must begin by focusing our attentions on the implications arising from step (4.) of the argument; namely, 'My freedom and well-being are necessary goods'. The statement at step (4.) is made on the basis that, for whatever purposes I (as an agent) am to have, I *need* my freedom and well-being to pursue or to achieve them, by reason of their *necessity*, as generic features of agency (GFA), to my generic purposiveness.<sup>55</sup> The assertion ((4.)) then is to infer, I need my GFA as conditions for *any purposes* which I may (intend to) pursue. Or, if I, occurrently, intend to pursue Y and require E to do so, then I logically must regard E as, at least, an *instrumental* requirement for my achievement of Y, on the condition that my intention to pursue Y remains.<sup>56</sup> But, if I, dispositionally, require E for whatever purpose Y might represent, then I must consider that E is good, at least for the fulfilment of my purposes, and at least for as long as I continue to hold, and seek to attain, purposes;<sup>57</sup> that is, E is good, for so long as I continue to claim 'I am a PPA'.<sup>58</sup> In this sense, my GFA are good, *instrumentally*, for whatever purpose I may have, as a PPA (and conditional upon my being a PPA). Because this is given a positive value by reason of my *internal viewpoint as a PPA* it becomes dialectically necessary that: 'I (at least instrumentally) ought to pursue my freedom and well-being, whatever my purposes.'<sup>59</sup>

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<sup>53</sup> See: 2.3 Constructing a Transparent Autonomy Thesis.

<sup>54</sup> Beyleveld and Brownsword, n 19, Ch. 4.

<sup>55</sup> Beyleveld, n 9, 28.

<sup>56</sup> Ibid, 23.

<sup>57</sup> Ibid, 32.

<sup>58</sup> Ibid, 23-4.

<sup>59</sup> Ibid, 26.

Further, given that this 'ought' is independent of any of my specified purposes (Y may represent any occurrent purpose I might hold), and my attachment to it is premised on my *internal viewpoint as a PPA*, it is clear that it is on my *prudential* criterion that I hold it as valuable. That is, E is good, *for whatever purpose I might have*, as a means to my *purposes*. As Beyleveld notes,

My freedom and well-being are of instrumental value to me, not just as being instrument to this or that particular occurrent purpose, but to my autonomous purposivity as such, to my *being a PPA*, in the achievemental mode; and my freedom and well-being are instrumental to my being a PPA at all. In other words, my freedom and well-being are of *intrinsic* value to me in the procedural context of my activity *as a PPA*.<sup>60</sup>

We find then that the shift from the *instrumental* criterion to the *prudential* takes place on the basis of the assertion 'I am a PPA'. Given that by definition I, by my internal viewpoint as a PPA, hold and will hold my own purposes, I cannot, without contradicting 'I am a PPA', deny the positive evaluation of my purposes.<sup>61</sup> However, the *prudential* claim runs deeper. In addition to my own positive valuation of my purposes, I, by reason of being a PPA, *categorically* need my freedom and well-being for my purposes.<sup>62</sup> We find that the reference throughout Stage II to a self-referring ought (or obligation) is on the basis that (generically and specifically<sup>63</sup>) *prudentially* (for whatever *my* purpose is) I ought to defend my freedom and well-being.

As we have already seen, Gewirth shifts this *prudential* reasoning into *moral* reasoning in Stage III through the *Logical Principle of Universalisation* (LPU). Whilst the move which takes place creates an other-regarding dimension to our practical reasoning, as PPAs, and is therefore a moral form of practical reasoning, the shift itself is done logically.<sup>64</sup> Two points must be noted at this juncture. Firstly, it ought to be noted that this shift is not one which is premised upon prudential reasoning. That is, it does not represent a claim that 'I (as a PPA) categorically need PPAO's freedom and well-being for my purposes.'<sup>65</sup>

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<sup>60</sup> Beyleveld, n 9, 28-9.

<sup>61</sup> Ibid, 31; see also, 29 for the argument to this end.

<sup>62</sup> Ibid, 38-9.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid, 257-80.

<sup>65</sup> Ibid, 55.

It is not necessary or even relevant to the universalisation that *I* (as a PPA) consider *your* categorical need for freedom and well-being even if this were to influence my own purposes.

Secondly, it is not a moral shift as the reasoning at (7.) and does not require an assumption that the agent (“I”) holds an other-regarding subjective viewpoint on practical reasonableness (SPR<sup>66</sup>). It holds simply on the basis that where, “{X → R because of A} in Y.” Then so too must, “{X<sup>N</sup> → R because of A} in Y.”<sup>67</sup> Where, X = ‘I (as a PPA)’, R = claim-rights to the generic features of agency, A = the property of being an agent, and Y = a system of reasoning. That is, if I (as a PPA) must hold that,

[‘I value my purposes’ (IP) *entails* ‘I categorically need my freedom and well-being for whatever purpose I might have’ (IC) *entails* ‘I have, at least, a prima facie claim-right to my freedom and well-being’ (MyR)].<sup>68</sup>

So, in short form,

$$[IP \rightarrow IC \rightarrow MyR].^{69}$$

Then - by the LPU - so too must X<sup>N</sup> (as a PPA) hold that [IP → IC → MyR] where ‘IP’, ‘IC’ and ‘MyR’ represent the PPAO’s valuation of *its* purposes rather than to mine.<sup>70</sup> The inference then is that,

$$[IP \rightarrow IC \rightarrow MyR] \rightarrow [PPAOP \rightarrow PPAOC \rightarrow PPAOR].^{71}$$

This shift is done then on the basis that once [IP → IC → MyR] is established, on the basis that ‘I (as a PPA)’, this acts as the sufficient reason for so holding; it is then, logically necessary that whenever X<sup>N</sup> has the property of being a PPA, which it does by reason of being X<sup>N</sup>, where X = ‘I (as a PPA)’, that X<sup>N</sup> also claim [IP → IC → MyR]. It is the

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<sup>66</sup> Beyleveld, n 9, 42.

<sup>67</sup> Adapted from Ibid, 44: “If S is a system of reasoning in which [A has property  $\pi \rightarrow$  A has property  $\epsilon$ ] is a valid inference, then [B has property  $\pi \rightarrow$  B has property  $\epsilon$ ] is also valid *in S*.”

<sup>68</sup> Ibid, 56-7.

<sup>69</sup> Ibid, 57.

<sup>70</sup> Ibid, 59.

<sup>71</sup> Ibid

argument's nature as a *reductio ad absurdum*<sup>72</sup> which logically<sup>73</sup> maintains the egalitarian (and thereby moral) nature of the *PGC*.<sup>74</sup> This is emphasised by the notion that it is illogical (rather than immoral) for a PPA not to accept the *PGC* but it would be immoral for the PPA not to follow the *PGC*.<sup>75</sup>

We find then, at the completion of the argument to the *PGC*, that any PPA ought, by definition, to follow the *PGC* in the determination of their actions. That is, the PPA must elucidate an SPR of egalitarian character, since being a PPA is the ground for a rights claim to freedom and well-being, and the SPR is essentially and necessarily the *PGC*.<sup>76</sup> The PPA is left with the necessity that, in conceiving of and (seeking to) attain its purposes, it must reason according to the claim-rights of PPAO to freedom and well-being.<sup>77</sup> This leads us to three further considerations; namely, (1) the *impermissibility* of violation of the *PGC*, (2) the definition of a PPA in contradiction, and (3) the *directing* nature of the *PGC* as an SPR.

On the first point, Gewirth asserts that to act contrary to the *PGC* is to contradict the claim to being a PPA, with the result that it is *impermissible* to violate the *PGC*.<sup>78</sup> This is not to say that it is *impossible* for this to occur. Gewirth maintains that a *rational* PPA, in the sense that they 'appreciate what they rationally ought to do'<sup>79</sup>, would act in accordance with the *PGC* (and therein avoid acting *irrationally*).<sup>80</sup> As Hølm and Coggon argue,

On these accounts, we can work out what is moral through a deductive exercise that tells us what is rational. The theories do not provide evidence of objective morality, they provide a priori reasons to follow an intellectual methodology that

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<sup>72</sup> Beyleveld, n 9, 47-55.

<sup>73</sup> Ibid, 56-64.

<sup>74</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 16-24.

<sup>75</sup> Beyleveld, n 9, 55. See also: 365, '...the "ought" of the *PGC* itself is moral. It is the "ought" of "PPAs ought to accept the *PGC*" which is logical.'

<sup>76</sup> Ibid, 33-42 and 47-56

<sup>77</sup> Gewirth, n 1, 49.

<sup>78</sup> Alan Gewirth, "Some Comments on Categorical Consistency" (1970) 20 *Philosophical Quarterly* 380-4, 384.

<sup>79</sup> Beyleveld, n 9, 366.

<sup>80</sup> Gewirth, n 74, 19 and 348.

can lead (in theory, at least) to a, or the, right answer, given the assumption that there is a right answer.<sup>81</sup>

This, however, is not to say that a PPA *cannot* feasibly violate the *PGC*. As we have noted, the *PGC* is, in itself, an SPR of egalitarian character, which, by reason of the PPAs status as a PPA, ought to be *logically* accepted with the result that their actions (and the practical reasoning guiding said actions) is influenced by *moral* concerns for PPAO. So, ‘rights require [that] PPAO’s basic needs to take precedence over any non-essential goods PPA might seek for himself.’<sup>82</sup> The effect is to suggest that, simply, as a PPA one *ought* to be guided by concerns for PPAO, rather than to outlaw contrary concerns.<sup>83</sup> Given that, were this the case, and violation was *impossible*, the argument would have a fundamentally different character.<sup>84</sup> This shifts our attention to the second point.

Now we must turn our attention to the linguistic concerns with the nomenclature of a PPA in contradiction of the *PGC*. This is on the same (or similar) grounds to the concern raised above; namely, a PPA contradicts his assertion to being a PPA when violating (or not following) the *PGC*. As Beyleveld notes,

A PPA has, as it were, a defining role – to conform to the *PGC*. If a PPA violates the *PGC*, then it departs from its role, and to do so is not to behave as a PPA. A PPA can only act as a PPA according to its role if it conforms to the *PGC*. In this sense it is true that a PPA *necessarily* conforms to the *PGC* and cannot violate it... However, this does not mean that PPAs (now considered as those *who have the capacity to occupy the role of PPAs* [])... cannot fail to act as PPAs according to their defining role.<sup>85</sup>

This, I claim, comes down to the *narrow* and *broad* senses by which we define persons involving in *φ-ing*. This point can be further elucidated by analogy.<sup>86</sup> Let us imagine that X is playing football, in this regard he is ‘A Person Playing Football’ or a ‘Football

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<sup>81</sup> Søren Hølm and John Coggon, “A Cautionary Note against “Precautionary Reasoning” in Action Guiding Morality” (2009) 22(2) *Ratio Juris* 295–309, 300.

<sup>82</sup> Stephen Brown, “The Problem with Marx on Rights” (2003) 2(4) *Journal of Human Rights* 517–22, 519.

<sup>83</sup> Beyleveld, n 9, 55.

<sup>84</sup> Ibid, 105.

<sup>85</sup> Ibid, 118 (*my emphasis*).

<sup>86</sup> This is notably developed from Gewirth, n 78, 384.

Player'<sup>87</sup>. Now further, let us imagine that X, in the course of the game, does something completely outside of the scope of the game; for instance, by picking up the ball or by rugby tackling another player. In this instance, it would be incorrect to assert that X is now 'A Person Playing Football' or a 'Football Player' by reason of his failure to adhere to (in fact, complete disregard of) the rules of the game. But, this is only in the *narrow* sense of the definition. In the broad sense, he remains a person playing football (if we imagine that he is able to continue playing). X's failure to adhere to the rules creates a label whereby he cannot be described as a player of the game given the inference that 'player of the game' infers adherence to the rules, at least in the narrow sense.

In order to further this claim, let us imagine that Y is a 'Christian' that is 'A Person Practicing the Faith of Christianity'. And suppose that Y commits a sin. Upon commission of the sin, it is incorrect *narrowly* to describe Y as 'A Person Practicing the Faith of Christianity' but *broadly* it is still correct to do so. Now, if we are to equate this back to the PPA. We find that the same would apply in this regard. That is, in failing to adhere to *PGC* (or the '*rules of the game of agency*') the PPA denies his status as a PPA only in the *narrow* sense whereby the failure to do so contradicts the PPAs *defining role* as establishing the *PGC*.<sup>88</sup> But in the *broad* sense the PPA is still a PPA even in the failure to adhere to the *PGC* *because* the defining criterion is the PPAs propensity to voluntary practical precepts.<sup>89</sup> In this manner, it is perfectly viable to assert that a *PPA* contradicts his assertion to being a PPA when violating the *PGC* (as it is viable to assert that a *Christian* contradicts his assertion to being a Christian when sinning).

Here, we ought to note that the *PGC* has a *directing* nature for PPAs to hold it as an SPR. This is to say, 'I (as a PPA), according to the *PGC*, must in my subjective viewpoint on practical reason be concerned by PPAOR'.<sup>90</sup> But the *PGC* is not definitive. It does not prohibit given actions but *directs* PPAs to concern for PPAOs prima facie claim-rights freedom and well-being (and vice-versa).<sup>91</sup> It is the concern for prima facie rights (as

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<sup>87</sup> But not a 'Footballer', given the professional inference that this carries.

<sup>88</sup> Beyleveld, n 9, 119.

<sup>89</sup> Ibid, 116.

<sup>90</sup> Ibid, 34-5.

<sup>91</sup> Ibid, 38.

opposed to *absolute* rights) which is vital in this regard. Given that the *PGC* directs to prima facie claim-rights rather than, by *absolute* right, mandate or prohibit actions (these may be intuitively ascertainable were the PPA to consider it<sup>92</sup>) and the categorical need for freedom and well-being is *hierarchical* it is moral but lacks sufficient definitive force to *regulate* between PPAs at the point of dispute (where claim-rights to freedom and well-being as of similar weight or force) to offer resolution.<sup>93</sup> It, at this point, becomes *interpretive* and requires an arbiter to do so and to offer resolution.<sup>94</sup> We find that the *PGC* must be institutionalised (much as autonomous institutions must be made *transparent*) if it to become an *effective* means of norm creation. To this end, Beyleveld notes,

In any case, what matters in formal terms is that Gewirth provides a clear objective criterion for allocating importance within the hierarchy. We can run the argument to the *PGC* in terms of relatively unspecified generic-dispositional freedom and well-being, leaving *application* of the *PGC* as, partly, an empirical matter employing the criterion of degrees of necessity.<sup>95</sup>

We find now that the argument to the *PGC* offers us the opportunity, and justification, for institutionalisation of practical reasoning in order that we might empirically resolve conflict by reference to a criterion of the degrees of necessity, whilst simultaneously accepting that PPAs logically, and thereby morally, have prima facie rights to their generic features of agency (without precisely determining what this is comprised of).<sup>96</sup> This is further developed in the next section.

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<sup>92</sup> For instance, most would intuitively consider murder, slavery and rape to be contrary to the rights of others without recourse to moral or legal arguments.

<sup>93</sup> See: Beyleveld and Brownsword, n 19, Ch. 4.

<sup>94</sup> This will be developed later in the chapter. See also: Deryck Beyleveld and Roger Brownsword, "Principle, Proceduralism, and Precaution in a Community of Rights" (2006) 19(2) *Ratio Juris* 141-68 and Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007).

<sup>95</sup> Beyleveld, n 9, 89.

<sup>96</sup> *Ibid.*

### 3.4 The PGC and Transparent Autonomy

At this stage, it is necessary to return to the need for a justificatory component in the completion of the IA *Theory* as transparently autonomous.<sup>97</sup> In so doing, I seek to demonstrate that a ‘good faith’ attempt to incorporate those dialectically necessary interests of each individual as an egalitarian community can produce the requisite moral obligations for that system.<sup>98</sup>

We find, then, with the Gewirthian argument for the *PGC* necessarily and *logically* implies determinate moral commitments which when used for the systematic weighting of ‘goods’ or ‘values’ imports the notion of *moral rationality* indirectly into the complex scheme of artificial, institutionalised reasoning.<sup>99</sup> This relation to the basic strivings of agency, after all, ‘underpin[s] all our possible aspirations as *general means* to any hope of *successfully* realising them.’<sup>100</sup> We therein find that the scheme of weighting afforded to us by the *PGC* takes us to the point at which we are able to conceive of legal authority as holding *transparent* autonomy from *natural* morality.<sup>101</sup> This is because,

Such a weighting is made possible by the fact that the various elements in the theory of the determinate presuppositions of agency can be seen as being more or less indispensable or efficient in relation to a person’s general ability to pursue and succeed in achieving his or her freely chosen purposes. In other words, the various elements of the generic features of action fall into a hierarchy determined by the degree of their indispensability for purposive action in general.<sup>102</sup>

This, we find, provides us with at least some criteria for the evaluation of ‘justifiability’ in the sense of morally rational concerns relevant to the decision making process in law.<sup>103</sup>

At the very least, we now have a scheme of practical reason whereby we are enabled to

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<sup>97</sup> Gerald Postema, ‘Law’s Autonomy and Public Practical Reason’ in R.P. George, *The Autonomy of Law: Essays on Legal Positivism* (Claredon Press, 1996), 79-119, 110.

<sup>98</sup> See: Deryck Beyleveld and Roger Brownsword, “Principle, Proceduralism, and Precaution in a Community of Rights” (2006) 19(2) *Ratio Juris* 141-68.

<sup>99</sup> Olsen and Toddington, n 3, 156.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid, 157.

<sup>102</sup> Ibid.

<sup>103</sup> See: Dworkin, n 37, 255 and Beyleveld and Brownsword, n19, 426.



envisage the continued relationship between the legal and the morally rational.<sup>104</sup> Given that,

...there might be enough morality to get us into the social contract (or the Autonomy Thesis), but once we are in, practical reasons which are exclusionary reasons must appeal to the logic of autonomy and not morality. But, as Postema demonstrates, *there is no logic of autonomy until we fill the substantive lacuna of the (IA Theory)*.<sup>105</sup>

Perhaps I have shown that some form of autonomy is sustainable to the point of completion provided we base this on the interplay between the realms of practical reasons.<sup>106</sup> This then is a demand that the form of autonomy necessary for legal authority is *transparent* such that moral rationality is the source of justification for the law's continued legitimacy (I will consider this further in the following section).

It is this argument in favour of Legal Idealism and the *necessary* connection between law and moral rationality which forms the theoretical spine of the remainder of this thesis. Olsen and Toddington summarise the view aptly,

A simple, but honest, theory of legal obligation based on moral rationality, we suggest, is not too difficult to envisage from this point in our discussion; especially if we accept that there is *some* necessary connection between law and morality (and given the foregoing discussion we can justifiably discount *tout court* those who do not). That is, notwithstanding the prudential benefits tantalisingly promised by incorporation, I ought to do what is morally right—even though there is reasonable disagreement about what that might be, or even if there are a range of alternative options of rightness. In the face of *this very problem alone*, practical reason acknowledges the *sufficiency* of the argument for establishing a pre-eminent normativity *autonomous from* personal morality. This means that I might have to submit to practical reasons which are not my personal reasons. But it is absurd to deny assertorically, and *a fortiori*, dialectically, *for this very reason*, that exclusionary reasons operating within this system of norms cannot, given a publicly accountable, good-faith attempt on the part of institutions of adjudication to remain within the bounds of an *integrated continuum of practical reason*, be seen to produce moral obligations.<sup>107</sup>

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<sup>104</sup> Beyleveld and Brownsword, n19, 164-5.

<sup>105</sup> Henrik Palmer Olsen and Stuart Toddington "Legal Idealism and the Autonomy of Law" (1999) 12(3) *Ratio Juris* 286-310, 308.

<sup>106</sup> Beyleveld and Brownsword, n 19, 8-10.

<sup>107</sup> Olsen and Toddington, n 105, 308-9.

We ought now to expand from the demonstration that such connection exists to the question of *how* it might operate within a given legal system. That is, we must attempt to flesh out how the interplay between law and moral rationality may influence our general understandings of legitimacy, authority and the obligation to obey.<sup>108</sup> It becomes important to engage in the discussion of *how* now that the *can* or *ought to* has been outlined. There are three key reasons for so doing:

1. Contradiction of the *PGC* is *impermissible* not *impossible*.<sup>109</sup>
2. If so, given that the hierarchy of generic features of agency is non-definitive dispute is, *at least*, plausible.<sup>110</sup>
3. The final shift in practical reasoning – to the legal or artificial – is not *explicitly* made by Gewirth.<sup>111</sup>

### **3.5 The PGC as a Legitimizing Ground for Legal Reason**

In this section, I attempt to demonstrate that, as we have seen, the necessary connection between law and moral rationality exists as the legitimizing ground for institutionalised reasoning. It is through the incorporation of the determinate moral precepts of the *PGC* that we are able to rationally tie agents, individually and collectively, to the system through an obligation to obey.<sup>112</sup> This is done so on the basis of those considerations established in the preceding sections. The argument itself comprises a total of eight steps working from the assertion ‘I am a PPA’ and attempts to show what this logically entails in relation to institutionalised reasoning.

I now intend to show that the Gewirthian notions of agency and the argument of the *PGC* allows us to *rationally* tie the agent to the system and vice versa. This is done through

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<sup>108</sup> Beyleveld and Brownsword, n 98, 147-154.

<sup>109</sup> Beyleveld and Brownsword, n 19, 124-5. See also: Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001), 114 and Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 78.

<sup>110</sup> Beyleveld and Brownsword, n 98, 147.

<sup>111</sup> See: Gewirth, n 74.

<sup>112</sup> Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), Ch. 10. See also: *Ibid*, Ch. 8.

reasoning based around the individual's agency and the system's need for transparent autonomy. My task is to demonstrate that by working from a starting point of the individual's agency or autonomy it can be shown that an argument of logical reasoning can be constructed which links into the transparent autonomy of the system. It is the *necessity* of transparent autonomy from which I claim that logical presupposes or predicates that system; the existence of which leads us back to a consideration of the individual's agency or autonomy from within that system. It is at this point that we are capable of *logically* and *rationally* completing the argument from the *PGC* that stakes the claim that this loop is a *dialectically necessary* assertion of legitimacy and authority of a system of institutionalised reasoning.

I now turn to the argument presented as demonstrating the rational connection between law and moral rationality. Ultimately, the claim is that the *need* for social order is presupposed by social *disorder*. In institutional reasoning, as an attempt at achieving social order, this is attained through a practically reasonable effort to posit *other's* reasons in place of our own. As practical reason *presupposes* agency and agency *presupposes* both moral reason and a supreme moral principle (here the *PGC*), institutional reasoning, ought, in an effort to achieve *transparent autonomy*, be based on the moral legitimacy and procedural turn necessitated by the *PGC*. The *PGC* acts to legitimate institutional reasoning in two ways: first, that rules be posited by an *authorised source* and, second, that rules posited be broadly *moral* in content. The legitimacy criteria of the *PGC* in turn entails legal *Authority* (the right to posit and enforce rules) which, correlatively, entails a moral *Obligation to Obey*.

### **3.5.1 'I am a PPA' entails PGC**

As we have seen, 'I am a PPA' entails ['I value my purposes' (IP) → 'I categorically need my freedom and well-being for whatever purpose I might have' (IC) → 'I have, at least, a prima facie claim-right to my freedom and well-being' (MyR)].<sup>113</sup> This is expressed as follows,

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<sup>113</sup> Beyleveld, n 9, 56-7.

$[IP \rightarrow IC \rightarrow MyR]$ .

This, by the LPU, entails,

$[PPAOP \rightarrow PPAOC \rightarrow PPAOR]$ .

So, as we have seen, so too must  $X^N$  (as a PPA) hold that  $[IP \rightarrow IC \rightarrow MyR]$  where ‘IP’, ‘IC’ and ‘MyR’ represent the PPAO’s valuation of *its* purposes rather than to mine.<sup>114</sup> The inference then is that,

$[IP \rightarrow IC \rightarrow MyR] \rightarrow [PPAOP \rightarrow PPAOC \rightarrow PPAOR]$ .

This provides a truncated version of the argument to the *PGC* which ultimately holds a supreme moral imperative: *Act in accord with the generic rights of your recipients as well as of yourself*.<sup>115</sup>

### 3.5.2 Social Order *presupposes* Social Disorder

This point builds from the claim made in the previous chapter in relation to the movement from stage (i) to (ii), which is the move from the non-legal to the legal. On this basis, Beyleveld and Brownsword argue,

So conditions of the possible existence of the *Legal Enterprise* are also conditions of possible knowledge of this enterprise. Since this enterprise could not exist unless it were possible for human conduct to be ordered in accordance with rules, the possibility of the *Legal Enterprise* presupposes the possibility of social disorder (the possibility of a problem of social order from the point of view of those who wish order).<sup>116</sup>

The key point here is that,

A transcendental conception of law is developed by asking what must be presupposed for knowledge of the *Legal Enterprise* to be possible. The conditions for this are closely related to the conditions which must be fulfilled if there is to be a perceived need for the *Legal Enterprise*.<sup>117</sup>

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<sup>114</sup> Ibid, 59.

<sup>115</sup> Gewirth, n 1, 135.

<sup>116</sup> Beyleveld and Brownsword, n 19, 121.

<sup>117</sup> Ibid, 444.

This is to note that any argument related to the concept of law presupposes that there is a need for the law to exist. The need for Legal Enterprise, or Institutionalised Reasoning, as a means of obtaining social order, stems from the potential for human conflict (whether that be due to unilateral value disparity, conflicting interpretations of moral principle, amorality or otherwise).<sup>118</sup> The need to avoid this social disorder is met, here, through the security of *legal* certainty by the incorporation of institutional reasoning.<sup>119</sup> The absence of ‘perfect consensus’ in societies – wherein persons know or agree upon their conduct in every conceivable situation and stick to those convictions<sup>120</sup> - explains the *need* for subordination to a social order. As Beyleveld and Brownsword note,

Although Gewirth refers to the procedural turn as “the method of consent”...it should be apparent that the key to the internal problem of authority in Gewirthia is not procedural justification on the basis of consent in the way that agents may authorise schemes of private governance or arbiters of private disputes. The reasons why Gewirthians are bound by their procedural turn is because they are not omniscient superbeings and this is their best practical strategy for defending and promoting the values of the *PGC*.<sup>121</sup>

This is reminiscent the interpretation of Dworkin’s right answer thesis where we recognised that it is *because* of the fallibility of persons that conflict on the best strategy for incorporating the commitments of the *PGC* is likely.<sup>122</sup> It is the threat to individuals’ interests from the actual or potential behaviour of others which generates the problem of social (dis)order.

Having already considered, in the previous chapter, the reasons for incorporation – the move from stage (i) to (ii) – from a variety of Positivist perspectives, the following sections seek to consider the reasons for incorporation from a moral perspective. In seeking to consider the *moral* reasons (or commitments) in favour of establishing a social order through institutionalised reasoning we must consider the grounds for reasonable dispute

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<sup>118</sup> As we saw in the previous chapter, for instance in Thomas Hobbes *Leviathan* (Elibron Classics, 2005). See also: Beyleveld and Brownsword, n 19, 124-5.

<sup>119</sup> Olsen and Toddington, n 3, 46.

<sup>120</sup> Beyleveld and Brownsword, n 19, 123.

<sup>121</sup> Beyleveld and Brownsword, n 98, 154.

<sup>122</sup> Joseph Raz, *Practical Reason and Norms* (London, 1975), 159: ‘Even a society of angels may have a need for legislative authority to ensure co-ordination.’

of the supreme moral principle, the need to supply a final arbiter, and the need for unilateral value disparity to transform into omnilateral public morality. First, however, it is necessary to recognise the *impermissibility* (rather than *impossibility*) of acting in conflict with the *PGC*.

***a. The morality of the PGC makes contradiction impermissible only.***

This point may seem of little consequence but given the propensity to misinterpret Gewirth's claim it is worth addressing at this juncture.<sup>123</sup> Gewirth's assertion is that it is logically *impermissible* for a PPA to violate the *PGC*. That is, the PPA contradicts that it is a *rational PPA* when contradicting the *PGC*. The *PGC* does not make violation impossible, were it to do so we would be at an end. Gewirth's argument would be an explanation of why agents acted in accordance with the *PGC* rather than why, *dialectically*, they '(logically) ought to consider that PPAs (*morally*) ought to respect freedom and well-being of all PPAs'<sup>124</sup> or, *assertorically*, they '(morally) ought to respect the freedom and well-being of all PPAs.'<sup>125</sup> The claim of the *PGC*, then, is that a PPA *may not* (logically) violate it; as opposed to '*cannot*' violate it. Were this latter expression the case, any empirical observation would disprove the *PGC*. The claim then, is that the *possibility* of violation is an imposition to PPA<sup>N</sup>'s freedom and well-being.

***b. The hierarchy of GFAs is not definitive, dispute is plausible and reasonable.***

As we have noted, the *PGC* provides us with a scheme of weighting based on the 'degree of necessity' which the GFA holds for the PPAs purposiveness. This offers us the opportunity to consider the *commensurate* value of these moral concerns. It does not, however, go so far as to provide a definitive schema for weighting in a case-by-case manner. Even for agents who subscribe to its commitments and use it for their reasoning, dispute as to its content is plausible and, indeed, reasonable.<sup>126</sup> Conflict over the content of the *PGC* may be based on:

1. Conflicts over what is optional, obligatory or prohibited.

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<sup>123</sup> See: Beyleveld, n 9.

<sup>124</sup> Ibid, 113.

<sup>125</sup> Ibid.

<sup>126</sup> Beyleveld and Brownsword, n 98, 147.

2. Conflicts over two or more behaviours which are optional under the *PGC* but incompatible in that to pursue both would lead to a violation of the *PGC* so that a choice must be made between them.<sup>127</sup>

The importance, and the value to be derived from Gewirth's thesis, is that we have a 'clear objective criterion for allocating importance within the hierarchy'<sup>128</sup> which allows for *empirical*, evidence-based application of the *PGC*. It is true that Gewirth 'fails to spell out and argue for specific prioritization of... factors necessary for well-being (e.g. intelligence, health, etc.); the substantive meaning of "well-being" thus remains ambiguous, perhaps inevitably.'<sup>129</sup> But is this necessary in a theory of *morality*? It need not be a *deus ex machina* for the resolution of our problems.<sup>130</sup> As Beyleveld and Brownsword argue, 'The application of the *PGC* to particular concrete situations is obviously a difficult and often controversial matter which may be contested. But this does not alter the fact that it *is* an Archimedean point for making objective and determinate moral decisions.'<sup>131</sup> The substance of the hierarchy, and the empirical balance of its application, is a matter for *institutionalised reasoning*.

***c. Resolution of the degrees of necessity ought to be by an impartial final arbiter.***

On this point we find it necessary to, in a 'good faith' attempt to adhere to the requirements of moral principle, institute a final arbiter. As Olsen and Toddington note, 'Morality does not require perfection, nor does it require success. '*Ought*' undeniably implies '*can*'; and thus we cannot reasonably ask for more than a good faith attempt to imbue legal reasoning with moral rationality.'<sup>132</sup> This is on the basis that, whilst agreement may be found as to the determinate, *prima facie*, commitments of the moral principle the substance of that principle in social reasoning ought to be made artificial and based on

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<sup>127</sup> Beyleveld and Brownsword, n 19, 178.

<sup>128</sup> Beyleveld, n 9, 89.

<sup>129</sup> Mary Mahowald, 'Review of Reason and Morality' (1980) 40 *Philosophy and Phenomenology Research* 446-7, 447.

<sup>130</sup> Olsen and Toddington, n 3, 154.

<sup>131</sup> Beyleveld and Brownsword, n 19, 141.

<sup>132</sup> Olsen and Toddington, n 3, 14.

evidence. So, 'legal authority must be used to terminate conflict by adopting one solution over another.'<sup>133</sup> This seeks to justify the 'procedural turn',

The setting, instead, might be one where not to reach agreement on matters of import under the PGC is either not to defend the interests that the PGC protects...or to positively invite persons to take matters into their own hands when they have disputes (resulting in animosity and ultimately resort to force that run directly contrary to the PGC). In settings of this kind, agents are required to settle their differences. If this is to be possible, it must, we contend, involve a procedural turn—that is to say, there must be a turn to solutions to the substance of the dispute at hand that are produced by procedures justified by the PGC rather than solutions required by particular substantive interpretations of the PGC.<sup>134</sup>

The shift from *moral* reasoning then to *institutional* reasoning is based on, 'The reasons why Gewirthians are bound by their procedural turn is because they are not omniscient super-beings and this is their best practical strategy for defending and promoting the values of the PGC.'<sup>135</sup> This requires a consensus to empower responsibility for resolving PGC-based conflict in those who are most capable of evidence-based resolution of that conflict.<sup>136</sup>

***d. Unilateral value disparity must become omnilateral public morality through institutionalisation.***

At this stage, we recognise that the institutionalisation process must exclude from its ambit the possibility of dispute as to unilateral value. That is, if UVD is the condition for institutionalisation then considerations of this nature must be excluded if we are to avoid reducing IR to formal scheme of UVD with the unproductive associations contained therein. As Olsen and Toddington note, 'If one allows subjective moral considerations to overrule positive enacted laws, then social life suffers damage infinitely worse than what might result from the acceptance of the 'validity', and hence the enforcement, of *some* allegedly 'immoral' rules.'<sup>137</sup> They go on to note,

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<sup>133</sup> Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007), 58.

<sup>134</sup> Beyleveld and Brownsword, n 98, 148-9.

<sup>135</sup> Ibid, 154.

<sup>136</sup> Ibid, 155.

<sup>137</sup> Olsen and Toddington, n 3, 13 (*my emphasis*).



Our position is that a moral authority can become genuinely autonomous from the flux of interpersonal and group conflicts only if it *simultaneously* solves the problem of the *unilateral assertion* of basic right whilst holding to the *fundamental precepts of [generic] right*. This is made possible, as we argued, by transforming natural morality into artificial morality – an artifice we will call law and legal reason.<sup>138</sup>

However, as we have already seen, the problem of interpretation in the attempt to complete the IA *theory* demonstrated to us that a viable type of *autonomy* in the use and furtherance of institutionalised reasoning is premised on transparency. This leads us to a twofold criterion of legitimacy in dispute adjudication and norm creation and enforcement,

Most people have a straightforward understanding of the general nature of this criterion: they know it has two elements, one procedural or formal (like elections) the other more widely substantive, that is, some genuinely relevant reason or ground (like values of freedom or equality) *behind* or collateral to a procedure whereby the power to command is attained and sustained legitimately.<sup>139</sup>

The AT's inability to offer solution to 'hard cases' and the absence of incorporation of the reasoning of 'justification' in order to avoid arbitrary decision making leads us to this juncture. It is to this end that we must now turn our attention to notions of legitimacy, authority and validity. It is the requirement that,

...rules posited as laws *ought* to meet certain demands of morality *if* they are to achieve validity as laws. Legal validity, in this sense, and when ascribed to a rule or a system of rules, implies a *moral justification to promulgate and enforce*, and consequently implies the existence of an obligation to obey. Moral rationality, legal validity and legal obligation are, therefore, held to be conceptually inseparable.<sup>140</sup>

As part of this transparently autonomous scheme of reasoning we noted that it is through the incorporation of a *unified* scheme of morally rational reasoning that this is best enabled to 'shine through' as both a *justifying* and, now, *legitimizing* ground for the 'artificial' reasoning:

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<sup>138</sup> Olsen and Toddington, n 133, 47.

<sup>139</sup> Stuart Toddington, Power, Authority and Legal Validity; Part 1: *The Ambiguous Role of Authority in Legal Orders* (2012) 66 *Student Law Review*.

<sup>140</sup> Olsen and Toddington, n 3, 12-3. (*my emphasis*)

The point here is that institutionalised reasoning must incorporate *omnilateral*, and hence universal, public morality. This ought, it has been shown, to be the argument to the *PGC*, ‘...the validity of Gewirth’s argument entails that, if “law” is to be analysed in terms of practical reason...then the “extreme” viewpoint of “Natural-Law Theory” is vindicated: objects (centrally, rules) which are immoral in substance cannot be *legally* valid.’<sup>141</sup> This is *because* the *PGC* derives determinate moral commitments from the nature of agency itself which allows for, and makes sense of, directing practical precepts to *agents*.

### **3.5.3 Social Order *presupposes* Practical Reason *because of* Institutional Reasoning**

Social order is attained through *institutional reasoning*, or Legal Enterprise, which is presented on the continuum of practical reasoning. *Institutionalised reasoning* comprises the principle use of ‘exclusionary reasons’, which provide a reason to refrain from acting for some *other* (than our own) reasons.<sup>142</sup> The effect is that ‘the authority’s directives become our reasons’.<sup>143</sup> Acting as it does, through the imposition of exclusionary reasons for action, institutional reasoning, as positivism acknowledges, seeks to direct practical precepts to agents. It does so through the ‘artificial’ reasoning of law; indirectly compelling behaviours of subjects to the establishment of norms.<sup>144</sup> This ‘[enables] us to place the Legal/Non-Legal distinction within the general field of human social attempts to maintain order and settle disputes.’<sup>145</sup> Institutionalised reasoning, by its nature, concerns human action.<sup>146</sup> ‘*Law*’ then is seen,

...as arising from the implications of a reliance on practical reason to resolve regulatory and co-ordinatory problems in a social context. That is, law can be seen as the practically reasonable attempt to institutionalise and uphold in a society certain practical norms, which, because of the special authority which has arisen in the institutions and offices responsible for the positing, application and enforcement of those norms, are seen to possess a legitimate priority – an *exclusionary* validity – as against other norms in that society.<sup>147</sup>

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<sup>141</sup> Beyleveld and Brownsword, n 19, 442-3.

<sup>142</sup> Joseph Raz, “Reasons for Action, Decision and Norms” (1975) 84 *Mind* 481-99, 487.

<sup>143</sup> Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999), 193.

<sup>144</sup> Olsen and Toddington, n 3, 154.

<sup>145</sup> Beyleveld and Brownsword, n 19, 28.

<sup>146</sup> *Ibid.*, 33.

<sup>147</sup> Olsen and Toddington, n 3, 3.

Simply put, social order is (attempted to be) attained by means of the incorporation of institutionalised reasoning which directs practical norms through both reasons for action and exclusionary reasons for action. In this way, 'The *Legal Enterprise* consists of means, or exercises of power, to ensure compliance with rules.'<sup>148</sup> Thus, 'If the enforcement of rules is seen to be a function of the problem of social order then the enforcement of particular rules must be seen to be a function of particular problems of social order.'<sup>149</sup> This is guided by the assumption that,

...law be an affair of social rules, and that the idea of "the social", as applied to human beings, is to be analysed in the terms of values which have bearing on reasons people have for acting. In other words, the argument requires that the key to the understanding of the *Legal Enterprise*, as a social enterprise, is an understanding of the nature and structure of practical reason and discourse.<sup>150</sup>

In this way, the study of *Law* is a study in attempts to deal with the problems of social (dis)order through the promulgation and enforcement of *rules* which are attempts to direct human (or agentic) behaviours.<sup>151</sup> Therefore, the need for social order entails a practically reasonable attempt to prioritise social cooperation through legitimate or authoritative power of '*Law*' or institutionalised reasoning.

#### **3.5.4 Practical Reason *entails* Moral Reason *entails* PGC**

This claim ought to be separated at this juncture. First, the claim is that Practical Reason entails Moral Reason. This, as we have seen from the previous chapter, is the simple claim that Moral Reason exists within the continuum of practical reason as those reasons for action which are motivated by the concern for others. This is not to 'claim that a commitment to practical reason *presupposes* a commitment to moral reason...[involves] showing that all practical reason *is* practical reason of a moral sort.'<sup>152</sup> Provided one does not subscribe to a version of amoralism this point should be of little note to acknowledge.

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<sup>148</sup> Beyleveld and Brownsword, n 19, 147.

<sup>149</sup> Ibid, 145.

<sup>150</sup> Ibid, 151.

<sup>151</sup> Beyleveld and Brownsword, n 19, 145.

<sup>152</sup> Ibid, 133.

The second claim, however, posits that Moral Reason entails (at least, a moral principle or, in particular) the *PGC*. This is supported by the argument that, ‘The *PGC* is a principle to which every agent is logically committed, irrespective of his purposes, of what he actually happens to think is good or right..., simply by conceiving of himself as a prospective agent with purposes.’<sup>153</sup> The move from Moral Reason to Moral Principle (the *PGC*) is outlined by Beyleveld and Brownsword,

The requirements of a moral position, it will be remembered, are that moral values have justificatory force, are universalisable, and are categorical. By demonstrating that the agent must employ *deontic* concepts (must claim *rights* to freedom and well-being, and must correlatively claim that others *ought* not to interfere with his freedom and well-being), Gewirth establishes that the agent must presuppose that his generic rights have justificatory force. By demonstrating that the agent must also respect the generic rights-claims of others, generic values are shown to be universalisable. Because generic values are values which the agent must have irrespective of what he values contingently (irrespective of his particular-occurrent values), generic values are conatively independent and thus fulfil the first criterion of categoricity.<sup>154</sup>

In this way, ‘Moral reason is shown to have a *necessary* content, a supreme moral principle which is, by the same token, a necessary presupposition of all practical reason.’<sup>155</sup> This is done, on the basis that the *PGC* derives its determinate moral commitments from the structure for action, practical reason, itself; the *possibility* of practical reason presupposes the *PGC* on this basis.<sup>156</sup> As Olsen and Toddington note,

Gewirth’s...[*PGC*] is a precept of practical reason that relates to the rationality of one’s self-interest *whatever* those interests might be. In this sense it is both *prudential* and *categorical*, but this categorical-prudential precept emerges from the logic of agency in general (not from personal, biographical or indexical reasons) and its *consistency* depends on its *logical* (not its morally charitable) universalisation. When universalisation occurs, the precepts not only govern the prudential concerns of ‘oneself’ or any particular agent in question, but oneself, any and all agents. Thus the Gewirthian logic of what constitutes rational action

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid, 142. Arguing against A. J. Watt, “Transcendental Arguments and Moral Principles” (1975) 25 *Philosophical Quarterly* 40-57.

<sup>155</sup> Beyleveld and Brownsword, n 19, 143.

<sup>156</sup> Ibid, 141.

in support of prudential interests has *other-regarding* implications that amount to moral duties.<sup>157</sup>

Whilst the argument to the *PGC* does not presuppose that all purposes are moral (as we have seen throughout this chapter), it does claim that purposive action *presupposes* moral principles.<sup>158</sup> Therefore the claim can be reframed as: ‘I am a PPA’ *presupposes* Practical Reason *presupposes* *PGC*.

### **3.5.5 Social Order entails Institutional Reasoning entails *PGC***

Given that, the attempt at social order through ‘*Law*’ is as a practically reasonable attempt to regulate human conduct through the authoritative promulgation and enforcement of rules *and* the continuum of practical reasoning itself presupposes the determinate moral commitments of the *PGC*, the essence of the assertion here is in the *necessary* connection and continued relationship between law and moral rationality, The claim here then is that, ‘any attempt to explain the *Legal Enterprise*, or its component activities, in terms of reasons provided by interests, involves judging that these activities are morally legitimate exercises of power, in the sense that these activities do not violate natural rights.’<sup>159</sup> Legal Idealism, ‘then, is the view that analysis of law must be in terms of practical reason, and that practical reason presupposes moral reason. Our particular view is that moral reason and practical reason generally presuppose a supreme moral principle, Gewirth’s *PGC*.’<sup>160</sup> On this basis, the key steps are as follows:<sup>161</sup>

1. Social Order involves and concerns the regulation of human (agentic) action.
2. The concept of action, as agency, commits any agents to the acceptance of the supreme moral principle, the *PGC*.
3. ‘*Law*’ as a form of social order constituted as *institutionalised reasoning* can only be properly understood by reference to the moral status and commitments of agents by reason of the *PGC*.

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<sup>157</sup> Olsen and Toddington, n 133, 8.

<sup>158</sup> Beyleveld and Brownsword, n 19, 143.

<sup>159</sup> Ibid, 147.

<sup>160</sup> Beyleveld and Brownsword, n 19, 152.

<sup>161</sup> Adapted from *ibid*, 33.

As such, 'A law is defined as a rule which there is a moral right to posit for attempted enforcement. A legal order is defined as a social order in which social relations and social actions are in accordance with laws.'<sup>162</sup> In this way,

...the logic of [generic] right gives *moral* and not merely 'prudential', 'organizational' or 'functional' coherence to the idea of legal validity, and moral rationality must inform and infuse legal authority if the idea of an *omnilateral* will is to remain consistent and integral with the continuum of practical reason.<sup>163</sup>

This is framed on the basis that *Law* entails *Practical Reason* which entails *Moral Reason* which, in turn, entails the *PGC*.<sup>164</sup> On the basis that the concept of 'law' is *necessarily* connected to the moral rationality of the *PGC*, the claim, ultimately, is that the Moral Legitimacy of a Social Order is to be judged according to the criteria derived from the *PGC*.<sup>165</sup> To put it another way, the *logic of agency* is sufficient to explain the need for and possibility of a social order based on practical reason (institutionalised reasoning) *and* the other-regarding commitments of morality; the *legitimacy* of the prior *must* then be framed on the latter.

### **3.5.6 Social Order *presupposes* Moral Legitimacy**

This claim should be seen as distinct from the suggestion that social order is legitimate *because* of the possibility of social *disorder*; the suggestion which was demonstrated in the previous section. Therefore, 'the *need* for authoritative institutions does not of itself *legitimate* institutions claiming authority, nor, if we are to assert that values beyond the most basic are incommensurable, does it give us an indication of its content.'<sup>166</sup> Rather the claim is based around,

The starting point for the dispute about the concept of law is the idea that the *Legal Enterprise* concerns the subjection of human conduct to the governance of rules. The starting point is the idea that the human social condition presents a problem of social order, of social life being conflictual. These ideas presuppose that human social beings inhabit a social world of limited resources, in which they are resolved to press their personal interests. Law is a strategy for handling this

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<sup>162</sup> Ibid, 160.

<sup>163</sup> Olsen and Toddington, n 3, 8.

<sup>164</sup> Beyleveld and Brownsword, n 19, 156.

<sup>165</sup> Ibid, 160. See also: Olsen and Toddington, n 3, 158 and Olsen and Toddington, n 133, 44.

<sup>166</sup> Olsen and Toddington, n 133, 45.

situation: it sets out to contain the conflict within a legitimate regulatory framework. Now, the legitimacy of the scheme of regulation necessitates that conformity to the scheme of regulation be a matter of obligation if the scheme of regulation is to demand patterning of behaviour contrary to particular-occurrent wishes.<sup>167</sup>

This not only links the related ideas of legitimacy, authority and the correlative obligation to obey, which will be discussed in the next section, but emphasises that *justification* for social ordering through the institutionalisation of ‘law’ be done through the commitments of moral principle. It has already been recognised that the existence of legal and moral reasoning within the continuum of practical reason is demonstrative of *some* connection between the two, beyond this the claim here is that law and morality are *necessarily* connected as a source of legitimacy of the prior by the latter.

The legitimacy of a system of *institutionalised* practical reasoning, then, is expressed through an expansion of the *PGC*. It is through a reincorporation of the *rational moral* concerns which we as PPAs are to accept *because* of our nature as PPAs that the system is able to ground its claim to legitimacy and authority (with the implication of a correlative obligation to obey). This is *because*, ‘the PGC is presupposed by all practical reason, and law is an affair of practical reason, the PGC is the supreme principle of all practical, Legal, and Moral Reason.’<sup>168</sup> This approach, ‘provides an universalisable logic of a *natural hierarchy of goods* that enables the *content* of [generic] right to function in legal reasoning.’<sup>169</sup> The effect of this assertion to moral legitimacy, here, is two-part: firstly, that the rule is posited by an authoritative institution and, secondly, that the norm posited is not immoral; both of which are to be judged by reference to the demands of the *PGC*.<sup>170</sup> The moral legitimacy of law is derived from the ‘positor’ and the ‘posited’ in relation to their consistency with the *PGC*.<sup>171</sup> In a basic sense, the *PGC* here is a constitutional norm of any legal order.<sup>172</sup>

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<sup>167</sup> Beyleveld and Brownsword, n 19, 170. See also: 444.

<sup>168</sup> Beyleveld and Brownsword, n 19, 189.

<sup>169</sup> Olsen and Toddington, n 133, 10.

<sup>170</sup> See: Olsen and Toddington, n 133, 64 and Beyleveld and Brownsword, n 19, 160.

<sup>171</sup> Beyleveld and Brownsword, n 19, 162.

<sup>172</sup> Ibid.

Morally legitimate 'laws' then are those rules which, in their content, and by their norm creation, are adherent to the requirements of the *PGC*.<sup>173</sup> This may be either through *direct* or *indirect* application of the *PGC*. The *direct* application of the *PGC* is used in situations where rules can be derived from the generic rights to freedom and well-being of agents within the Hierarchy of Generic Goods as either obligatory, prohibited, or optional. As such, '[w]hen behaviour is obligatory a rule requiring this behaviour must be posited: when behaviour is prohibited a rule prohibiting this behaviour must be posited: [and] when behaviour is optional a rule permitting this behaviour must be posited.'<sup>174</sup> The *indirect* application of the *PGC* arises where two or more behaviours are optional under the *PGC* but to allow both would lead to a violation of it. In these circumstances, it is not possible for the *PGC* to resolve the problem directly but it requires that it is resolved.<sup>175</sup> For instance, the *PGC* has no preference as to whether cars drive on the left or right side of the road, but it does require that cars drive on *one* side of the road in order to avoid a risk to agents' well-being.<sup>176</sup> It thereby delegates authority to those empowered to make societal decisions to make such a decision and, in turn, posit that one option as obligatory and others prohibited. In this way, rules of *permission* may be transformed into rules of *obligation* or *prohibition*.

Morally legitimate 'law-makers', then, are those whom hold authority to posit a rule for enforcement. This stems from the requirement that rules be posited by an authorised source.<sup>177</sup> This, again, may be direct or indirect.<sup>178</sup> Direct title to posit laws would exist when enforcement of posited rules is logically deducible from the *PGC*. Indirect title would, on the other hand, exist where the *PGC* requires or permits 'X' to posit rules for enforcement; whomever X may be acted by where the *PGC* requires that *someone* promulgate rules and settle disputes but is silent as to who that might be. As we have already seen, the problem of social (dis)order creates a *need* for 'artificial' reasoning which

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<sup>173</sup> Olsen and Toddington, n 133, 208.

<sup>174</sup> Ibid, 178.

<sup>175</sup> Ibid, 179 and Beyleveld and Brownsword, n 98, 147-8.

<sup>176</sup> Beyleveld and Brownsword, n 98, 147.

<sup>177</sup> Beyleveld and Brownsword, n 19, 160.

<sup>178</sup> Ibid, 160-1.



can authoritatively settle disputes. Therefore, '[t]he reasons why Gewirthians are bound by their procedural turn is because they are not omniscient super-beings and this is their best practical strategy for defending and promoting the values of the PGC.'<sup>179</sup> Indirect title may be derived from, for instance, democratic election on the basis that norms posited by the elected X be morally legitimate under the PGC.<sup>180</sup> The PGC, on this basis, requires that there is *a* procedural turn, but limits the power of an authorised source by acting as a *constitutional norm*.

In this way, the need for *a* social order, here 'Law', provides, under the PGC, the sufficient reason for *a* procedural turn which supplies the 'lawmaker', or the State, with indirect title to posit those rules which are *directly* in accordance with the PGC and to apply it *indirectly* to those circumstances where rules of *permission* must be transformed in either rules of *obligation* or of *prohibition*. The social order must be morally legitimated *because* of its relation to practical reason which *entails* the PGC.

### **3.5.7 Legitimacy entails Authority entails Obligation to Obey**

Broadly speaking, the aim here is to link the ideas of legitimacy, authority and the correlative obligation to obey through the criteria of the PGC. This process, '...employs the familiar and circular dependence of the notion of legality on the idea of *legitimacy* as it relates to the *authority* of an institutional system to posit and enforce valid norms, and, hence, alludes to a reciprocally justified obligation to obey.'<sup>181</sup> Here, it is claimed that a PPA might recognise the *necessity* for a system of institutionalised reasoning to be premised on *transparent autonomy* from the social disorder which has – in this process – led to incorporation. That transparent autonomy must take the form of omnilateral public morality which provides the system with an *objective* and *unified* scheme of public reasoning as an incorporation of the PGC as a constitutional norm. On this basis,

...rules posited as laws *ought* to meet certain demands of morality *if* they are to achieve validity as laws. Legal validity, in this sense, and when ascribed to a rule or a system of rules, implies a *moral justification to promulgate and enforce*, and consequently implies the existence of an obligation to obey. Moral rationality,

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<sup>179</sup> Beyleveld and Brownsword, n 98, 154.

<sup>180</sup> Ibid, 147-154.

<sup>181</sup> Olsen and Toddington, n 3, 3.

legal validity and legal obligation are, therefore, held to be conceptually inseparable.<sup>182</sup>

It is for these reasons that we hold that transparent autonomy (TA) entails the need for omnilateral public morality (OPM), which is the PGC, and becomes the criteria of legitimacy for an institutional reasoning (IR) for a PPA. This is expressed as:

$$[TA \rightarrow OPM(PGC)] \rightarrow L$$

When expanded, the claim is that this legitimacy criteria entails authority of institutional reasoning which, in turn, entails, on the basis of correlativity, an obligation to obey those norms posited. This, then claims that, ‘Criteria of Legitimacy =  $[TA \rightarrow OPM(PGC)]$  and Legitimacy entails Authority and is Authority is *logically correlative* to Obligation to Obey (OtO).’ The substance then is:

$$[TA \rightarrow OPM(PGC)] \rightarrow L \rightarrow [Auth] \rightarrow [OtO]$$

So, the following assertion is necessary for a PPA,

I (as a PPA) will only recognise the Legitimacy of IR if  $[TA \rightarrow OPM(PGC)]$ .

The assertion is that  $[TA \rightarrow OPM(PGC)]$  is a sufficient criteria of legitimacy. If this is accepted, which for PPAs it seems it must at pain of contradiction, this logically entails: firstly, that the ‘artificial’ reasoning holds Authority (to enact and enforce norms by the imposition of exclusionary reasons) and, secondly, this Authority is *logically correlative* to an Obligation to Obey. That is, the *moral* criteria of legitimacy logically entails an Obligation to Obey.

It is worth, at this point, retracing the claim that has been made. As noted in the previous section, the *need* for social order is presupposed by social *disorder*. In institutional reasoning, as an attempt at achieving social order, this is attained through a practically reasonable effort to posit *other’s* reasons in place of our own. As practical reason *presupposes* agency and agency *presupposes* both moral reason and a supreme moral principle (here the PGC), institutional reasoning, ought, in an effort to achieve *transparent autonomy*, be

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<sup>182</sup> Ibid, 12-3. (*my emphasis*)

based on the moral legitimacy of the *PGC*. The *PGC* acts to legitimate institutional reasoning in two ways: first, that rules be posited by an *authorised source* and, second, that rules posited be *moral* in content. The broad legitimacy criteria of the *PGC* then can be seen as split into two familiar concepts. This first, the requirement for *authorised source*, relates to the notion of Law's *Authority* and the second, the requirement for moral content, relates to the notion of Law's *Validity*. Each of these concepts stem directly from the *PGC*, even though the *PGC* may be applicable *indirectly* to their incorporation. For present purposes, we are concerned with the move from *Legitimacy* to *Authority*.

The claim in the previous section was that the *PGC* will *indirectly* authorise a source with title to posit norms through some procedure in accordance with the *PGC* itself. This may be through democratically elected representatives or by some other means, providing it adheres to the requirements of the *PGC*.<sup>183</sup> On this basis, the *PGC* requires that X, whomever X may be acted by, posit rules for enforcement; simply, the *PGC* requires that *someone* promulgate rules and settle disputes but is silent as to who that might be.<sup>184</sup> Even as an authorised source, X may only posit those rules which are in accordance with the *PGC* – in this way, framing the reciprocal nature of the State/agent dynamic<sup>185</sup> – how then are we to adjudicate the authority to posit rules? Beyleveld and Brownsword claim that given that human reasoning is inherently fallible it would not be rational to require that a mistake is *never* made.<sup>186</sup> As Toddington notes,

It would, however, be foolish, given the complexity of the task, to imagine that we could always succeed in producing infallible and plausibly unchallengeable judgements in this regard. But there is no requirement to meet this condition; the requirement is to recognise that one necessarily ought to try.<sup>187</sup>

As a result, the title to posit rules under the *PGC* is a right to make a *good faith* attempt to act in accordance with its requirements. This is so where a positor is *sincere*, makes a

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<sup>183</sup> On this basis, a dictatorship is unlikely to be an authorised source, even if the norms posited are in accordance with the *PGC*.

<sup>184</sup> Unless, there were an omnipotent super being, such as Hercules J, who would never err in application of the *PGC* to conflict situations. In this case, Hercules J would have *direct* title to enforce rules.

<sup>185</sup> Beyleveld and Brownsword, n 19, 163.

<sup>186</sup> Ibid, 183.

<sup>187</sup> Olsen and Toddington, n 105, 306.

*committed attempt*, expends *commensurate effort* and the attempt is *rationally defensible*.<sup>188</sup>

The de minimis requirement then is that there ought to be a good case for believing that the rule posited is not in violation of the *PGC* based on the evidence available.<sup>189</sup>

What then of delegated power? In complex modern societies, it is unfeasible (and indeed unwise) for power to be held in a single actor. Rather, it is necessary for certain power's to be delegated. In this way, the formation of the arms of State are *indirectly* justified. Here we find, 'there is the basic institutional structure of public governance (the constitution and the primary organs of governance);...[and] there are the officials, the legislators and the judges, who are the principal authorised players in that structure.'<sup>190</sup> In this way, the transformation from the multitude into the State,<sup>191</sup> or from the state of nature into incorporation, consists of establishing power in a central organisation which consists of organs for carrying out legal functions.<sup>192</sup> For instance, Parliament maintains the power to posit rules, whilst Courts and the Police apply and enforce those rules and so on. In this way, the delegation of power in State regulation is justified by (adherence to) the *PGC* when it is framed around it as a constitutional norm of that State. Indeed, delegation of power, as necessitated by the *PGC*, across *a* delegated structure may be necessary to ensure the balance of power and the opportunity for critical reflection of posited rules is capable of taking place. This, however, is not to suggest that *all* delegation will be justified; it will be so when subjected to the requirements and limitations of moral legitimacy.

On this basis, we have an outline of how moral legitimacy criteria enables the *source(s)* of institutional reasoning to claim authority on the basis of *title* (or right) to posit and enforce 'artificial' norms. The claim to legitimacy is the source of authority which, in turn it is claimed, creates a correlative obligation to obey.

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<sup>188</sup> Beyleveld and Brownsword, n 19, 183-4.

<sup>189</sup> Beyleveld and Brownsword, n 98, 154-6.

<sup>190</sup> Ibid, 151.

<sup>191</sup> Hobbes, n 118, 119-28.

<sup>192</sup> Beyleveld and Brownsword, n 19, 207.

Here, the claim is that the obligation to obey is entailed by authority on the basis of its correlativity or reciprocity. As we have seen, *a* valid rule is one which is posited by an authorised source and is moral in content, the obligation to obey *that* rule derives from the *PGC*.<sup>193</sup> Any obligation to obey a morally invalid rule cannot derive from the *PGC*, but instead it must derive from a collateral obligation. As Olsen and Toddington note, 'If one allows subjective moral considerations to overrule positive enacted laws, then social life suffers damage infinitely worse than what might result from the acceptance of the 'validity', and hence the enforcement, of *some* allegedly 'immoral' rules.'<sup>194</sup> The moral obligation to obey *the* law, then, is also seen to derive from the *PGC* where those requirements are met; that is, where it is *the* Legal order is legitimised by the constitutional norm of the *PGC*.

The effect of these claims is that legitimacy is withdrawn from a purely formal interpretation where 'procedure, codification or official institutional structure'<sup>195</sup> are not necessary criteria *directly* (they are of importance to us with regards to the *indirect* application of our moral criteria).<sup>196</sup> Instead, our focus is on egalitarian concerns for PPAs as the focal point of the system. The system, in this way, begins to become tailored to the participant. Simultaneously, we find ourselves closer to the conception of 'association of principle' which,

...make these responsibilities fully personal: it commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall... Its rationale tends toward equality...its command of integrity assumes that each person is as worth as any other, that each must be treated with equal concern according to some coherent conception of what that means.<sup>197</sup>

In this way, the legal system is one where *substance* is prioritised over form. A social order, based on the moral legitimacy of the *PGC*, seeks to bring together the ideas of community and right.<sup>198</sup> It does so on the basis that the concept of generic rights brings together a

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<sup>193</sup> Ibid, 212.

<sup>194</sup> Olsen and Toddington, n 3, 13 (*my emphasis*).

<sup>195</sup> Toddington, n 139.

<sup>196</sup> Olsen and Toddington, n 133, 8.

<sup>197</sup> Dworkin, n 37, 213.

<sup>198</sup> See: Gewirth, n 74, 31.

mutualist and egalitarian universality.<sup>199</sup> In this way, there is a mutual sharing of the benefits of rights and the burdens of duties.<sup>200</sup> This ‘*Community of Rights*’ is formed by the ‘mutualist structural patterns of society’ which affect the possession and enforcement of legal rights to the generic features of agency.<sup>201</sup> As a social order, it seeks to mutually further agent-related needs and interests by ensuring contributions to education, health, safety and other social and economic goods.<sup>202</sup> As a result, ‘the community has a collective right to an institutionalised system of support from those it has benefitted.’<sup>203</sup> In this way, a morally legitimate State social order is one which seeks to guarantee the generic rights of *all* agents of that society; it seeks to empower productive agency and remove economic and political dependence; it seeks to *transparently* institutionalise a framework for mutual assistance and reciprocal standing.

### **3.5.8 PGC entails Obligation to Obey *if and only if* Legitimacy**

The end result of this argument to the legitimacy of a system of *institutionalised* practical reasoning through an expansion of the PGC, is that through a reincorporation of the *rational moral* concerns which we as PPAs are to accept *because* of our nature as PPAs that the system is able to ground its claim to legitimacy and authority (with the implication of a correlative obligation to obey). For this reason we might note,

Intuitively, one can sufficiently *explain* one’s behaviour simply by giving a good reason for one’s actions, this, however, is also the key to understanding the more difficult question of how and why an autonomous and responsible person might submit their will to another.<sup>204</sup>

It is the inherent features, and needs, of agency which imposes the criteria on institutionalised reasoning and allows us to determine the justified use of that power. But a concise legal idealism does not hold any institutionalised reasoning to unobtainable standards; its requirement is to make a ‘good faith’ attempt to secure those features of

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<sup>199</sup> Ibid, 351.

<sup>200</sup> Ibid, 6.

<sup>201</sup> Ibid, 71.

<sup>202</sup> Ibid, 83.

<sup>203</sup> Ibid.

<sup>204</sup> Stuart Toddington, “Power, Authority and Legal Validity, Part 2: Authority, Autonomy and Practical Reason” (2012) 67 *Student Law Review* 48-50, 48.

agency for all agents. Mistakes may be made, but for so long as the attempt is made the legitimacy criteria continues to hold and the obligation to obey remains. ‘Immoral’, ‘Irrational’ or ‘Anti-*PGC*’ rules do not become non-rules,<sup>205</sup> the obligation to obey remains, provided the legitimacy criteria on the whole is met, but we are directed to seek change through reform.<sup>206</sup> Ultimately, the agents grant the power to institutionalised reasoning in exchange for the vow that said institutionalised reasoning will try to secure the freedom and well-being in an egalitarian manner for all agents under that system as a whole.

The system of reasoning sought by legal idealism is one which maintains both a horizontal and vertical structure simultaneously. Every subject or ‘contractor’ is treated equally, by reason of the *PGC*, as agents. The horizontal structure is clear. However, a vertical system is necessitated by the imposition of *artificial* reasoning which requires an impartial arbiter.<sup>207</sup> The arbiter then takes on this role, but they remain an agent as any other PPA. This role then provides them with the authority or title to enforce norms. As the ‘sovereign’ holds the title to create norms and settle rules.<sup>208</sup> But they do so ‘artificially’, they do so for the *necessity* of the system because of agency.<sup>209</sup> The ‘sovereign’ may exist perennially but will not be *one* agent,<sup>210</sup> the actor changes but the part remains constant. When we speak of the ‘state’ and the ‘sovereign’ we do not speak of a person, but rather collections of people.<sup>211</sup> This bears a distinctly Hobbesian note; the structure upon institutionalisation resembles, to some degree, the multitude-state-sovereign dichotomy.

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<sup>205</sup> Unless they are so unjust as to cancel the obligation to the system in its entirety: Dworkin, n 37, 204.

<sup>206</sup> Joseph Raz, “The Problem of Authority: Revisiting the Service Conception” (2006) 90 *Minnesota Law Review* 1003, 1018.

<sup>207</sup> Beyleveld and Brownsword, n 112, 310.

<sup>208</sup> Hobbes, n 118, 119: ‘One Person, of whose Acts a great Multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.’

<sup>209</sup> Gewirth, n 74, 353.

<sup>210</sup> It is, instead, the role of ‘representative’ to the collective agents rationally within the system; *ibid*, 120.

<sup>211</sup> Dworkin, n 37, 187.

Whilst we will return to consider the notion of how these ‘roles’ are played and the effect this has on the vertical-horizontal structures of the institution in the follow section, some further points ought to be noted as to the structure on the whole now. It is through the fusion of legal and moral reasoning which establishes the governance of agents. The institution established and legitimated by it is one of equality, where no man is to be used as the means to an end,<sup>212</sup> where all ought to respect the generic features of agency of any other<sup>213</sup> and where all are directed to a common scheme of justice by reason of their citizenship.<sup>214</sup> In this way, transparent institutional reasoning ‘...can claim the authority of a genuine associative community and can therefore claim moral legitimacy – that its collective decisions are matters of obligation and not bare power.’<sup>215</sup> The reasoning of the institution is concerned with coherence in respect of moral rationality on the assumption that it is created by a single author.<sup>216</sup> The legal idealist thesis, then, is ultimately concerned with doing our very best to rationally and morally create and enforce norms as an institution premised on our individuality, egalitarianism and a collective authorship.

### **3.6 The Community of Rights**

The rights held within a *Community of Rights* then will be grounded (or ought to be for legitimacy) on both protecting interests and empowering choices, and indeed a number of other relations – in some cases utilitarian social goods. They stem from, and are justified by, the commitments of the *PGC*. Simply, rights stem from the features of agency and the rational concerns for other agents deduced from the argument to the *PGC*. This is hardly surprising given that, ‘...agents...are the only intelligible subjects and objects of practical prescriptions (only for agents does the question arise as to what they may or ought to do, and only to agents is it rational to address a prescription of what they may

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<sup>212</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 421.

<sup>213</sup> Gewirth, n 1, 138.

<sup>214</sup> Dworkin, n 37, 189-90.

<sup>215</sup> Ibid, 214.

<sup>216</sup> Ibid, 225



or ought to do)...<sup>217</sup> Agency, itself, is enough to both explain and justify the imposition of *institutionalised* practical reasoning on this basis. Agency is the basis for the capacity to exercise choice. It, by definition, creates a categorical need for and interest in the generic features of agency. It allows for the rational deduction to those other-regarding behaviours that agents *ought* to do at pain of contradiction. It premises those determinate commitments which, when incorporated into a system of institutionalised reasoning, justify the exercise of a power to create and enforce norms.<sup>218</sup>

The *Community of Rights* envisaged seeks to unify ‘persons by virtue of their society’s fulfilment of important needs of agency and persons’ mutual contributions thereto.’<sup>219</sup> It is, ‘the formation of a state as the institutional guardian of the rights of those involved and as an agency capable of limiting greed and violations of property and person.’<sup>220</sup> The problem of the free rider<sup>221</sup> is countered by the need for personal responsibility to help oneself if at all possible before seeking help from others.<sup>222</sup> It is the complex matrix of rights that entails support but also enables agents to fulfil their own purposive actions and goals. So,

In thinking of himself as a duty bearer as well as a rights-holder, the agent cannot think of himself as purely an isolated monad, but rather as an agent who exists within a necessary social relationship with other agents, even if that relationship is restricted to one where all the participants agree to ‘leave each other alone’.<sup>223</sup>

The community recognises human agents as ‘inherently social beings’<sup>224</sup>, at least, partly defined by the cultural and historical locatedness. It also recognises that the institution of such a community is likely to be shaped by this locatedness. The need for this approach stems from,

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<sup>217</sup> Beyleveld and Brownsword, n 98, 144 (*my emphasis*).

<sup>218</sup> Ibid, 149-54.

<sup>219</sup> Gewirth, n 74, 88.

<sup>220</sup> Gareth Jones, “Introduction” in Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin, 1967), 169.

<sup>221</sup> Ibid, 93-5.

<sup>222</sup> Ibid, 42. See also: Brown, n 82, 520.

<sup>223</sup> Brown, n 82, 520.

<sup>224</sup> Gewirth, n 74, 91.

...the deprivations represented by poverty, dependence, lack of education, unemployment, economic insecurity, and other economic and social ills have especially harmful effects on the possibility of successful action; and indeed, if not remedied, they may threaten the continued stability of the political and civil rights themselves... [The] effectuation of rights should not be left to optional arrangements but rather must be guaranteed by the state as the community of right insofar as deprived persons cannot [fulfil]...them by their own efforts.<sup>225</sup>

The *Community of Rights* seeks to cure these deprivations, not solely by welfarism and paternalism, but through the cohesion needed to develop and exercise individual autonomy and productive agency such that a sense of personal responsibility may be attained and maintained. It seeks to recognise the two-fold nature of the role of officeholders; that is to, on the one hand, respond to and represent the interests of individual constituents but also, on the other, to advocate and enforce the morally rational commitments which those vulnerable persons require in order to gain a sense of personal responsibility and productive agency. Deprivations such as these may well survive a societal transformation into the *Community of Rights*, but the attitude towards them will shift; the other-regarding nature of the community is such as to effectuate – through the institutionalised framework – the attainment of the necessary conditions of, at least, generally successful action.

Grounding the institutional framework in this way, and the move from individualism and egoism, towards collectivism and mutuality, assures that agent-State is tethered to a system of artificial reasoning which best fulfils their mutual, rational and moral commitments. Yet, as we have already noted, such a system is best described as a project or an experiment. Its continued ability to allow moral rationality to ‘shine through’ is realised by the rapidly changing world within and without it will challenge the existing interpretation of the community’s commitment to the *PGC*. The articulations of these commitments must be viewed as ‘provisional’ and reviewable in the face of new evidence.<sup>226</sup> The result is that the agent-state is required to remain in and engage in an

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<sup>225</sup> Ibid, 349 (my correction).

<sup>226</sup> Beyleveld and Brownsword, n 98, 155.

active politico-legal discourse in order to best unpack the generic *PGC* to form the regulatory framework.<sup>227</sup>

Case law in the *PGC*-institution may be prime for this ‘provisional’ perception. The role of judges may be to flesh out their interpretation of the right answer in relation to the reasoning of fit and justification but their decisions must also be subjected to active public discourse. There is a rational acceptance that, in the absence of an actual Hercules J empowered by moral omniscience, that this is a necessary aspect of the interpretative and reflective community.

...the Judge has no more than weak discretion, for the conflicting interpretations must be arbitrated by referring to the critical cultural morality of the community, or the *PGC*, as the case may be. If these guiding moral standards regarding the choice between the rival interpretations as optional, then the Judge, it is true, does have a kind of strong discretion.<sup>228</sup>

In this context, the judge’s responsibility is to provide the best answer to resolve the case before them taking into account *both* the legal rule(s) and the moral grounding for the law itself. It is then for the community to debate and come to a reasonable resolution if the decision is disagreed with.

The *PGC* is a guide for institutionalised reasoning. It allows for rational and reasonable discourse around the imposition of norms whilst providing criteria of weight based on the necessity for action of the generic features of agency. It provides a non-definitive point of reference for the resolution of disputes and creation of norms. As Olsen and Toddington note,

In Gewirthian terms, Justice appears at the level of individual practical reason as an adherence to the Principle of Generic Consistency, in our collective arrangements it is an ethical principle and, in co-ordinatory and regulatory terms, it must also function as a *legal* principle.<sup>229</sup>

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<sup>227</sup> Stuart Toddington “The Moral Truth About Discourse Theory” (2006) 19(2) *Ratio Juris* 217-29.

<sup>228</sup> Beyleveld and Brownsword, n 19, 437.

<sup>229</sup> Olsen and Toddington, n 133, 207.

The *PGC* is the regulation of moral reasoning as transposed into *omnilateral* public morality as necessarily connected to legal reasoning. Through an incorporation of the *PGC* into legal reasoning it serves to *justify* and, therein, legitimise the use of power by the relation to moral rationality. It is the incorporation of the *PGC* into legal reasoning that allows the *rational* (as opposed to contractual) loop between legitimacy, authority and the obligation to obey to be maintained and justified.

### 3.7 Summary

The notion of the *autonomy of law* was the starting point for our ideas about the role of morality and the aims of a theory of legal idealism. As we have seen, Postema's attempt to establish the 'pure' autonomy thesis and the critique of the Limited Domain raised forthwith forces us to attempt to integrate political morality into legal reasoning. In essence, legal idealism is concerned with both the structures and procedures of institutionalised practical reasoning but, especially, with the notion of the 'final arbiter'. The autonomy of law must be admitted as an organised system of reasoning different from political morality as an attempt to allow moral reasoning to function in a viable and *justifiable* way. The obligation to be under the system is, then, an implication of morality itself. But morality cannot be reinstated as a final arbiter – this would merely reproduce the regulatory problem of Kant's 'unilateral moral will'.<sup>230</sup> Morality itself must become 'omnilateral' and establish *self* as the basis in public reason.<sup>231</sup> The key is to allow morality to 'shine through'<sup>232</sup> the *artificial* reasoning of the law. In this way, the seeming paradox between legal reasoning and moral reasoning is overcome. The aim of a legitimate legal order is to strive to do justice in the faith that moral reasoners invest when subordinating *selves* to legality. This is what is meant by 'legal idealism' and transparent autonomy. This was shown by working through the presuppositions of social order and practical reason. In so doing, it was claimed that a social order of institutional reasoning *must* ensure

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<sup>230</sup> Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996) [6:224], 16.

<sup>231</sup> Olsen and Toddington, n 3, 34.

<sup>232</sup> *Ibid*, 158.

legitimacy through the *PGC* and, in this way, is able to claim a correlative *moral* obligation to obey from its citizens.

Institutionalised reasoning exists within a continuum of practical reason incorporating aspects of the instrumental, the prudential and the morally rational in its direction through norm creation and exclusion. It must, necessarily and transparently, allow moral rationality to ‘shine through’ throughout its domain or empire. It is through the transparency which we are able to pin the notions of legitimacy, authority and the obligation to obey. When held as a sufficient and justificatory reason for legitimacy, moral rationality (specifically, the argument to the *PGC*) demonstrates that the determinate precepts of categorical necessity call for a minimum level of protection for those features of agency which allow agents to act purposively. However, it takes us further still, we are directed towards a regime which is necessarily egalitarian, where subjective viewpoints of ‘good’ are excluded from the ambit of adjudication, where those agents who are *logically* (rather than contractually) tied to the system become a collective authorship of the law’s reasoning. Authority (or rather validity) resides not in ‘officialdom’ but in the attainment of and meeting of the legitimacy criteria (which justifies the systems holding of power).<sup>233</sup> It is this account of legal idealism which forms the basis of the rest of this thesis.

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<sup>233</sup> Toddington, n 139.

## Chapter 4      A Theory of Legal Rights

Up to this point, I have been concerned with arguing in favour of a legal system premised on the artificial transformation of *moral* commitments (in the form of the *PGC*) into a complex matrix of *institutionalised* rights collectively and distributively interpreted in the good faith attempt to satisfy those moral commitments in a complex, modern society. It is to that complex matrix of rights which I now turn my attention. The aim of this is to understand how rights are to function within such a system and, importantly, how the rights to reproduction, considered in later chapters, may be conceptualised. In order to achieve a full understanding of the rights discourse represented within an *institutional* scheme of rights it is necessary to consider the conceptual and normative dimensions of rights.

Central to this investigation is the response to three questions: Firstly, ‘What are rights?; secondly, ‘What do rights do?; and thirdly, ‘Who holds rights?’. I will attempt to show that when we speak of ‘rights’ we are referring to one of the Hohfeldian incidents which perform a given function – of protection, promotion, performance, of exemption, discretion, or authorisation – and are held, in an institutional setting, by any being who, by rational precaution, ought to be treated as an agent.

The discussion will begin, in section 4.1, by considering Hohfeld’s scheme of correlative rights (or ‘incidents’ as they are often termed) as a conceptual framework for the lucid expression of those interpersonal interactions encompassed by the notion of right. From this, I seek to investigate normative theories of rights with the aim of elucidating an understanding of what rights *do*, in section 4.2, and, in section 4.3, who can hold rights in an institutional setting. This will, in turn, become the framework for understanding and analysing the proposed ‘right(s)’ to reproductive autonomy. In summary, I will seek

to emphasise the interconnectedness of and importance in discussions around the typology, function and justification in rights discourse.

#### **4.1 The Hohfeldian Typology of Rights**

The starting point for this is to consider what is meant (or what might be meant) by the assertion: "*I have a right to  $\phi$* ". To do so we turn to the Hohfeldian schema of rights. As Hohfeld noted,

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties", and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.<sup>1</sup>

It has been suggested that overuse has led to the term 'right' to become criterionless and the language surrounding assertions to rights debased.<sup>2</sup> This is undoubtedly a result of the utility of 'rights-talk', however this utility leads it to be degraded by wanton excess - asserting a violation of a right to  $\phi$  (or preclusion of  $\phi$ ) does not make it so.<sup>3</sup> It is encapsulated by Campbell,

Rights currently enjoy a highly favourable reputation. The discourse of rights is pervasive and popular in politics, law and morality. There is scarcely any position, opinion, claim, criticism or aspiration relating to social and political life that is not asserted and affirmed using the term 'rights'. Indeed, there is little chance that any cause will be taken seriously in the contemporary world that cannot be expressed as a demand for the recognition or enforcement of rights of one sort or another. It is not enough to hold that a proposal will lead to an improvement in wellbeing or reduction in suffering, unless it can also be presented as a recognition

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<sup>1</sup> Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964), 35.

<sup>2</sup> James Griffin, *On Human Rights* (OUP, 2008), 14-15; 'The term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly... The language of human rights has, in this way, become debased.'

<sup>3</sup> Alan White, *Rights* (OUP, 1984), 130.

of someone's rights, preferably their human rights. We live in 'The Age of Rights'.<sup>4</sup>

As a result, we must attempt to clarify and identify the parameters of that assertion. As Coleman argues, the purpose of conceptual analysis is 'to retrieve, determine, or capture the content of a concept in the hopes that by doing so, we will learn something interesting, important or essential about the nature of the thing the concept denotes.'<sup>5</sup> Gewirth's outline of the structure of rights is indicative of the task at hand,

A complete rights-statement has the following structure: 'A has a right to X against B by virtue of Y.' There are five variables here: first, the subject of the right, that is, the person who is said to have the right (A); second, the nature of the right that is had, including its modality or stringency and the meaning of the statement that someone has the right; third, the object of the right, what it is a right to (X); fourth, the respondent of the right, the person or persons against whom the subject has the right (B); fifth, the justifying reason or ground of the right, that by virtue of which the right is had (Y).<sup>6</sup>

It is this rights structure which I seek to incorporate into any of the work examples presented in this chapter subject to one minor addendum: 'A has a *H*-right to X against B by virtue of Y', where (H) refers to the relevant Hohfeldian incident as alluded to by Gewirth in variable two. So, for instance, our complete rights statement may be expressible as: 'John (A) has a privilege-right (H) to drink coffee (X) against Jane (B) by virtue of his autonomy (Y)'.

It is at this point that it is necessary to turn to the 'Hohfeldian incidents'.<sup>7</sup> These four basic incidents – *claim*-right; *privilege*-right; *power*-right; and *immunity*-right; examined fully below - are all referred to as 'rights' but should, due to their distinct individual and logical forms, be separated and narrowly defined. It is the ordered arrangement of these individual incidents which may form a complex internal structure of the more familiar rights - such as the right to bodily integrity or the right to private property - and combine

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<sup>4</sup> Tom Campbell, *Rights: A Critical Introduction* (Routledge, 2006), 3.

<sup>5</sup> Jules Coleman, *The Practice of Principle* (OUP, 2001), 179.

<sup>6</sup> Alan Gewirth, *Reason and Morality*, (University of Chicago Press, 1978) 65.

<sup>7</sup> See, for example: Leif Wenar, "The Nature of Rights" (2005) 33 *Philosophy & Public Affairs* 223-252, 224.



to form what has been termed a 'molecular right'.<sup>8</sup> When we isolate the jural relationship between A and B or X and Y we are simply demarcating one strand of the complex matrix of rights existing in social institutions.<sup>9</sup> We, also, may be demarcating one strand of that molecular right for investigation. The following examples may give a brief insight into what is essentially meant by each of these incidents:

- *Y is under a duty to allow X to do  $\phi$ ; thus X has a claim as against Y*: this is a **Claim-right**.
- *X is free to do or not do something; Y owes no duty to X nor X to Y*: this is a **Privilege-right**.
- *X has a power (or freedom) to do  $\phi$ ; X is free to do an act that alters the legal position of Y*: this is a **Power-right**.
- *X is not subject to Y's power to change another's legal position*: this is an **Immunity-right**.

For each of these incidents there exists both an opposite and a correlative:

<i>Hohfeldian Incident</i>	Claim	Privilege	Power	Immunity
<i>Jural Opposite</i>	No-Claim	Duty	Disability	Liability
<i>Jural Correlative</i>	Duty	No-Claim	Liability	Disability

**Figure 1: Scheme of Jural Relations<sup>10</sup>**

This in part offers a purely conceptual understanding of the interpersonal interactions that are governed by rights. As Stone notes,

Hohfeld sufficiently justified his painstaking and sometimes brilliant performance, when he claimed for it (1) the practical value of facilitating comparison of complex legal relations by reducing them so far as possible to common terms; (2) the practical value of permitting a fruitful resort to analogy even in legal situations superficially quite dissimilar; and thus (3) of making available for use as persuasive authorities “judicial precedents which might otherwise seem altogether irrelevant”.<sup>11</sup>

I will now begin by outlining each of the Hohfeldian incidents, beginning with claim-rights before moving through privilege-, power- and immunity-rights respectively. I will

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<sup>8</sup> This term can also be found in Wenar, *ibid*.

<sup>9</sup> Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), 65.

<sup>10</sup> Adapted from Hohfeld, n 1, 36 and 65.

<sup>11</sup> Julius Stone, *Legal System and Lawyers' Reasoning* (Stevens and Sons, 1964), 161.

then seek to develop the Hohfeldian framework further by considering the typological features – beyond correlative and opposite alone – as a means of understanding each of the incidents. Finally, I consider how these incidents can be bound together to form ‘molecular’ rights governing complex situations.

#### **4.1.1 Claim-Rights**

It is this first incident which is perhaps most closely associated with the ‘traditional’ idea of a ‘right’, hence why it is sometimes termed as a right ‘*stricto sensu*’.<sup>12</sup> The claim-right is the most distinctly notable in terms of rights assertions given its logical correlativity to the notion of duty.<sup>13</sup> As such it is expressible as:

*X has a claim that Y  $\phi$  if, and only if, Y has a duty to X to  $\phi$ .*

The relationship is essentially, ‘A duty...is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.’<sup>14</sup> It was, however, recognised that it may be desirable to adopt a synonym in this regard. Hohfeld found that “claim” would be the most apt.<sup>15</sup> Thus, as an employer has a duty to his employee to pay her wages, the employee has a claim that the employer pays those wages. Therefore, it can be seen that every *claim* has a correlative duty in, at the very least, one obligation-holder.<sup>16</sup>

#### **4.1.2 Privilege-Rights**

A privilege exists opposite to, and is definable by the absence of, a duty and correlative to a ‘No Claim’:<sup>17</sup>

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<sup>12</sup> Phillip Veerman, *The Rights of the Child and the Changing Image of Childhood* (Kluwer Academic Publishers, 1992), 14.

<sup>13</sup> Hohfeld, n 1, 38.

<sup>14</sup> *Lake Shore & MSR Co v. Kurtz* (1894) 10 Ind App, 60; 37 NE 303, 304.

<sup>15</sup> Hohfeld, n 1, 38. See, for example: *Studd v. Cook* (1883) 8 App Cas, at 597 (Lord Watson): “Any words which in a settlement of movables would be recognised by the law of Scotland as sufficient to create a right *or claim* in favour of an executor...must receive effect if used with reference to lands in Scotland.” See also: *Mellinger v. City of Houston* (1887) 68 Tex, 45, 3 SW 249, 253 (Stayton J): “A right has been well defined to be a well-founded *claim*, and a well-founded claim mean nothing more nor less than a claim recognised or secured by law.”

<sup>16</sup> Hohfeld, n 1, 39.

<sup>17</sup> *Ibid*, 38-9.

*X has a privilege to  $\phi$  if and only if X has no duty not to  $\phi$ .*

It will be noted that the expression of this incident is reliant upon the jural opposite, unlike a claim, which relies upon the jural correlative.<sup>18</sup> Therefore, if X is a landowner with a claim that Y will stay off of his land, he himself will have a privilege of entering onto the land. In other words, X has no duty to stay off the land. As Hohfeld noted, "The privilege of entering is the negation of a duty to stay off."<sup>19</sup> He goes on,

More than this, the dominant specific connotation of the term as used in popular speech seems to be mere *negation of duty*. This is manifest in the terse and oft-repeated expression, "That is your privilege," - meaning, of course, "You are under no duty to do otherwise."<sup>20</sup>

This is referring solely to a duty which has the content precisely opposite to the privilege that is concerned. It is, therefore, entirely possible for X to have both a privilege to do  $\phi$  and a duty to do  $\phi$ . For example, if X, in the above scenario, were to contract with Y that the latter will enter the land, Y would then have both a privilege of entering the land and a duty to do so as well. This is consistent with the above definition because the privilege and the duty have the same content - it is true that X has a privilege to do  $\phi$  but it is not true that X has a duty not to do  $\phi$ .

#### **4.1.3 Power-Rights**

As we saw in the above scheme of jural relations, a power-right is the correlative of a liability and the opposite of a disability.<sup>21</sup> A power right is expressible as:

*X has a power to  $\phi$  if and only if X is able to alter his own, or another's, Hohfeldian incident(s).*

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<sup>18</sup> Ibid, 39.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 45. Compare this with the rather curiously and confusingly worded expression of Lord Atkinson in *Adam v. Ward* [1917] AC 309, at 334: 'a privileged occasion is...an occasion where the person who makes a communication has an interest or a *duty*, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or *duty* to receive it. This reciprocity is essential.' (*My emphasis*)

<sup>21</sup> Hohfeld, n 1, 50.

A power therefore enables the bearer to alter their own or other's incidents.<sup>22</sup> For example, it is possible to waive one's own claim to bodily integrity for a specific purpose, to allow a nurse to give you an injection. Words which may be indicative of the exercise of a power include, but are not limited to: ordering; promising; waiving; sentencing; buying; selling; and abandoning.<sup>23</sup> The exercise of a power-right is, by definition, the exercise of the will to affirm control of a particular legal relationship.<sup>24</sup> This will, therefore, generally presuppose that the holder of a power-right will be capable of exercising choice; that is, in effecting the right.<sup>25</sup>

If the essence of a power is the ability to alter some legal position, then the jural opposite, a disability, indicates the inability to alter some incident.<sup>26</sup> Likewise, the jural correlative, a liability, indicates that the person is prone to have his legal position altered by another bearing a corresponding power.<sup>27</sup> For the sake of clarity and owing to its common, unconnected, legal usage, it may be of assistance to consider some examples of liabilities.<sup>28</sup> Enlistment on the jurors register creates, in those present upon it, the possibility of being summoned.<sup>29</sup> This is a liability that, if called upon to serve, will subsequently place a duty upon that individual. The duty arises, if and only if, those bearing the power do what is necessary to place that specific duty - to fulfil the functions of a juror - upon that individual. Similarly, a liability exists to have one's freedom taken away if sentenced to prison for committing a criminal offence. In this way, the judge holds a legal power to alter the criminal's privilege to free movement.

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<sup>22</sup> See: *Beeb v. Law Society* [1914] 1 Ch 286, 293, per Cozens-Hardy MR: '...anything in the Act of 1843 which destroyed or removed an existing *disability*, and, in my opinion, all we have to consider is whether, at the date of passing of this Act, a woman was under a disability to become an attorney or a solicitor.'

<sup>23</sup> Wenar, n 7, 231.

<sup>24</sup> Beyleveld and Brownsword, n 9, 71.

<sup>25</sup> *Ibid*, 73.

<sup>26</sup> *Ibid*, 232.

<sup>27</sup> Hohfeld, n 1, 57.

<sup>28</sup> Campbell, n 4, 32. See also: Beyleveld and Brownsword, n 9, 69.

<sup>29</sup> See: Hohfeld, n 1, 59 referring to *Booth v Commonwealth* (1861) 16 Grat., 519, 525, "...that all free white male persons who are twenty-one years of age and not over sixty, shall be *liable* to serve as jurors, except as hereinafter provided."

#### 4.1.4 Immunity-Rights

An immunity-right is essentially the inability of others to alter the normative situation of the immunity-holder.<sup>30</sup> So, if A lacks the power to alter the structure of B's Hohfeldian incidents then B has an immunity against A.<sup>31</sup> The opposite of an immunity is a liability (to have one's normative situation altered) and the correlative is a disability (from changing the normative situation of the immunity-bearer).<sup>32</sup> An immunity can be described as follows:

*X has an immunity from  $\phi$  if and only if Y lacks the ability to alter X's Hohfeldian incidents.*

The bearer of an immunity is protected from others by prohibiting the alteration of his normative situation, based on the absence of power (disability) in some other party.<sup>33</sup> An immunity, then, is designed to retain a given legal relationship just as it is.<sup>34</sup> For Wenar, this is the essential function of an immunity; it *protects* the bearer from harm or paternalism.<sup>35</sup> Quigley, citing the example of the immunity-right to absence of term, notes, 'This is the owner's right to an indeterminate length of ownership. It is an *immunity* from the expiration, without justifiable reasons, of one's rights regarding the property.'<sup>36</sup> Furthermore, by example, citizens may have immunities as against the Government whenever the Government lacks the ability to impose certain duties against those citizens. An immunity is the fundamental aspect of the right to religious freedom and the right to free thought.

#### 4.1.5 The Modified Hohfeldian Framework<sup>37</sup>

It is possible to further develop Hohfeld's original scheme of jural relations by considering how these incidents work – that is by considering their operation in relation to those other

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<sup>30</sup> Beyleveld and Brownsword, n 9, 74.

<sup>31</sup> Campbell, n 4, 33.

<sup>32</sup> Hohfeld, n 1, 60.

<sup>33</sup> Ibid.

<sup>34</sup> Beyleveld and Brownsword, n 9, 74.

<sup>35</sup> Wenar, n 7, 232

<sup>36</sup> Muireann Quigley, 'Property and the body: Applying Honoré' (2007) 33 *Journal of Medical Ethics* 631-4, 634.

<sup>37</sup> Wenar, n 7, 224.

incidents in the Hohfeldian schema. This is to be done by separating the incidents into two tiers. In the first order we find Claim-rights and Privilege-rights. The first order incidents are held over *objects*; that is the relative thing governed by the right.<sup>38</sup> As Wenar notes:

On the first order, the paired privilege endows you with the discretion to move your body, or not to move your body, as you see fit. The claim on the first order affords you protection; it correlates to a duty in each other person not to touch your body.<sup>39</sup>

For instance: in the claim that Y not enter onto X's land, we find that the object which the right is held over is the land. This is a first order incident. Similarly, X's claim that Y not strike him is a claim-right over X's body. The same can be seen in privilege-rights, such as X's privilege of using his land or moving his body.

In the second order, we find Power-rights and Immunity-rights, the foundation being that these are incidents which are held over other incidents.<sup>40</sup> The incident applies to some other incident whether held by the individual or by some other person. As Wenar notes:

On the second order are your rights regarding the alteration of these first-order rights. Here we see the paired power that gives you the discretionary authority to waive your claim against others touching your body: your right, that is, to authorize others to touch your body. Also on the second order is your protective immunity against other people waiving your claim not to be touched: your right, that is, against anyone else authorizing others to touch your body.<sup>41</sup>

For instance: X's power to allow others to touch him, thereby altering his claim right, or Y's immunity from X altering his claim that X not enter onto Y's land. The following diagram therefore highlights our developed scheme:

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<sup>38</sup> Ibid, 233.

<sup>39</sup> Ibid, 232.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

Second order	POWERS	IMMUNITIES	Rights over <u>rights</u>
First order	PRIVILEGES	CLAIMS	Rights over <u>objects</u>

**Figure 2: Tier Structure of Hohfeldian Incidents**

The scheme can be further divided if we are to recognise a separation between those Hohfeldian incidents which exist ‘actively’ and those which exist ‘passively’.<sup>42</sup> That is to say, some incidents can be enjoyed without the need to act upon them (the bearer needs not perform some act or behaviour to enjoy them) whereas others require the exercise of will by the bearer to be effected.<sup>43</sup> Active incidents, expressed as “*X has a right to  $\phi$* ”, therefore can be seen as the Power-right and the Privilege-right. Meanwhile, Immunity-rights and Claim-rights are passive incidents, expressed as “*X has a right that Y (not)  $\phi$* ”.<sup>44</sup>

The effect is that each of the Hohfeldian incidents has a unique tier and ‘activity’ combination but also shares common features with other incidents.<sup>45</sup> Similarly, each of these incidents has a juxtaposed right. A Power-right is a second order, active incident; a Privilege-right is a first order, active incident; a Claim-right a first order, passive incident; and an Immunity-right a second order, passive incident. By further developing the original Hohfeldian scheme we give ourselves a supplementary analytic device for understanding the assertion “*X has a right*”, beyond simply looking at the opposite and correlative. Our further developed scheme of incidents can therefore be outlined as follows:

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<sup>42</sup> Wenar, n 7, 233.

<sup>43</sup> See: Beyleveld and Brownsword, n 9, 66-73.

<sup>44</sup> Wenar, n 7, 234.

<sup>45</sup> Ibid.

	Active Incidents	Passive Incidents	
Second order	POWERS	IMMUNITIES	Rights over <u>rights</u> <i>rules to introduce, dissipate or alter first order incidents</i>
First order	PRIVILEGES	CLAIMS	Rights over <u>objects</u> <i>rules for all physical actions</i>
	Exercised Rights “X has a right to (not) $\varphi$ ”	Enjoyed Rights “X has a right that Y (not) $\varphi$ ”	

**Figure 3: Basic Order of Hohfeldian Incidents**<sup>46</sup>

On the basis of this basic order of incidents and the preliminary investigation into each of the Hohfeldian incidents or rights, I have begun to set out the *modus operandi* of the schema. As Wenar claims,

The Hohfeldian framework shows that the unity of rights is not a simple Thalesian monism; it is the unity of molecules composed of the atoms of the periodic table. Privilege-rights and claim-rights share the concept of duty, and range over physical objects. Power-rights and immunity-rights share the concept of authority, and range over lower order incidents. Privilege-rights and power-rights are actively exercised, and overlap in their functions. Claim-rights and immunity-rights are passively enjoyed, and their functions also mesh.<sup>47</sup>

It is now necessary to develop this further and consider how these individual incidents can be joined together, as indeed they commonly are, to form Molecular or Complex rights. It is these Molecular rights which are of importance to our investigation into those reproductive rights in later chapters.

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<sup>46</sup> Adapted from Wenar, n 7, 233. These features will be considered more fully in the following sections.

<sup>47</sup> Ibid, 237.



#### 4.1.6 Molecular or Complex 'Rights'

Each of these Hohfeldian incidents can be described as 'rights' in isolation; it is also possible for the individual incidents to bond together to create complex rights.<sup>48</sup> In this way they are sometimes referred to as Molecular Rights comprised of numerous *atomistic* incidents.<sup>49</sup> The 'rights' to certain things more often asserted (to property, body, etc.) will generally be of this complex type.<sup>50</sup> As Campbell notes, '...in reality any actual situation will be covered by a number of these rights-relationships at the same time, so that an actual normative relationship between two people is often a complex combination of these types of right.'<sup>51</sup> This molecular structure of a complex right can be seen in the following diagram:<sup>52</sup>

X HAS:		
POWERS <i>(not) to waive, transfer, annul, etc., your incidents</i>	IMMUNITIES <i>against others waiving, transferring, annulling, etc., your incidents</i>	Second order incidents: <i>rules to introduce, dissipate or alter first order incidents</i>
PRIVILEGES <i>(not) to <math>\phi</math></i>	CLAIMS <i>against Y to (not) do <math>\phi</math></i>	First order incidents: <i>rules for all physical actions</i>
"X has a right to $\phi$ "	"X has a right that Y $\phi$ "	

**Figure 4: Molecular Structure of Hohfeldian Incidents<sup>53</sup>**

As noted in the previous section, the first order incidents are rules which govern objects (such as physical actions or states). This is to say that they are 'rights' over certain objects.

<sup>48</sup> See: *ibid*, 232-4. See also: Leif Wenar, "Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2011/entries/rights/>>. (Accessed 10.1.13) and Campbell, n 4, 33.

<sup>49</sup> See: William Edmundson, *An Introduction to Rights* 2<sup>nd</sup> Ed (Cambridge University Press, 2012), 100 and Wenar, n 48.

<sup>50</sup> Carl Wellman, "Upholding Legal Rights" (1975) 86 *Ethics* 49-60, 52.

<sup>51</sup> Campbell, n 4, 33.

<sup>52</sup> Note: there may be numerous different individual incidents.

<sup>53</sup> Adapted from Wenar, n 7, at 233

For instance, over your body or your property and the physical interactions with those things. In the second order are those rules which concern the alteration, dissipation or introduction of first order incidents (or first order correlatives). They are, therefore, rights over rights and might either allow the right-bearer to, in some way, change his own or the position of another or might protect that right-bearer from others changing his position.

Having considered the notion of complex right in abstraction,<sup>54</sup> I will now consider the right over one's body (or the right to bodily integrity). Having done so, I will then go on to look at the qualification of these various individual incidents. Beginning in the first order, X has a claim against other's touching his body - that is A, B, C, D etc. owe X a duty not to touch his body. Equally, X has a privilege over moving, or not moving, his body as he so pleases. In the second order are X's rights over his other incidents. First is X's power to (not) authorise others to touch his body. By the same token, X might transfer onto another the power to authorise others to touch his body. This incident gives the bearer discretion over whether to waive his claim against obligation-holders in respect of touching his body. Second is X's immunity from others waiving his claim against others touching his body (or, equally, against others creating a duty not to move his body - that is nullifying his privilege).<sup>55</sup> This complex right therefore creates in X a freedom from having his body interfered with by others as well as a freedom to move his body and to allow others to touch his body as he so wishes. It can also be seen that the incidents on the left-hand side of the above Figure require the right-bearer, X, to actively perform some action (moving or waiving his claim). Meanwhile, the incidents on the right-hand side of the above table do not require the right-bearer to perform an action for the rights to be enjoyed; they are therefore 'passive' rights which are enjoyed solely based upon possession

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<sup>54</sup> Campbell, n 4, 33, provides the following example: "In any actual situation the right to freedom of movement, for instance, will be a formal liberty(privilege)-right (asserting the absence of a rule forbidding me to travel), a substantive liberty or claim right (asserting the negative duty of all others not to interfere with my movement and maybe the positive duty to assist me in moving around). The right to freedom of movement may also be a power right (to alter my legal status as a resident), or an immunity right (against anyone introducing laws that prevent me travelling). In other words, travel is an institution that is defined by a complex set of rights, duties, powers and immunities and like all institutions can be changed by making modifications under any of these headings."

<sup>55</sup> See also: Campbell, n 4, 33-4, and Wenar, n 7, 233.

of the right. This ‘Molecular’ Right to Bodily Integrity can therefore be mapped out, including the relevant *legitimate expectation* of Y,<sup>56</sup> as follows:

<b>X’s Molecular Right to Bodily Integrity:</b>			<b>Y has:</b>
<b>First order</b>	CLAIM	Other’s not touch his body	Duty not to touch X’s body
	PRIVILEGE	Freedom to (not) touch his body	No Claim-right that X (not) touch his own body
<b>Second order</b>	POWER	Ability to (not) authorise others to touch his body	Liability to be allowed to touch X’s body
	IMMUNITY	Protection that others not (allow themselves to) touch his body	Inability to allow himself to touch X’s body

**Figure 5: Example of a Basic Molecular Right**

Finally, it is necessary to determine how other rights interact with the right in question. That is, we must evaluate how the rights of others limit the extent of the right in question and, once more, draw the conception of the right away from an abstract individualist notion and toward the matrix of rights existing across the community.<sup>57</sup> To this end, the ‘*if and only if*’ contained within each formulation – above - would suggest that the existence of one would prohibit the other. This appears to be a fallacy of Hohfeldian thought.<sup>58</sup> These qualifications leave the basic structure of your right to bodily integrity intact but shape the contours of the right<sup>59</sup> - in this sense they are the limitations to the

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<sup>56</sup> Campbell, n 4, 204.

<sup>57</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996).

<sup>58</sup> Grant Keeter, *Conflicting Rights: A Hohfeld Analysis of the Right to Life and the Right to Abort* (2011) available at <http://blog.abolishhumanabortion.com/2011/08/conflicting-rights-hohfeld-analysis-of.html> (accessed 15.07.2014).

<sup>59</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 184, ‘Where the conflicting considerations override those on which the right is based on some but not on all occasions, the general

exercise or enjoyment of your right.<sup>60</sup> That is, if right (a) and right (b) are mutually exclusive then the theoretical approach does not intuitively hold. But as Gewirth notes,

...few if any rights are absolute. There cannot be universal or completely unrestricted freedom because the freedom of potential interferers with freedom must be restricted if the freedom of noninterferers is to be preserved. More generally, the freedom to harm other persons must be prohibited...<sup>61</sup>

Rights are necessarily qualified and their “*absolute*” status is subject to conditional derogations.<sup>62</sup> So it may well be plausible and rational that (a) and (b) are viable incidents existing within a single regulatory system. Or, to put it another way, the ‘*if and only if*’ is only determinative when the right in question is *operating*; few rights, after all, are held absolutely or inalienably.<sup>63</sup>

The importance of these Molecular Rights stems from the interconnectedness of how each of these incidents may operate over a specific relationship.<sup>64</sup> This is most apparent when the assertion in question is a right to ‘a thing’ (or ‘indeterminate rights’<sup>65</sup>) – for instance to a piece of property, to free speech, or to the body –, in these cases what is being asserted is a complex molecular right which in a number of ways will protect and legitimise that object.<sup>66</sup> For example, Wenar asks,

...should a controversial author assert that his right to free expression has been violated by a bookstore refusing to carry his book, a Hohfeldian explication will show that the author is not asserting the (usual) privilege-rights to expression insulated by protective claims and immunities. He is rather asserting a (tendentious) claim-right that others abet the spread of his expression.<sup>67</sup>

By analysing these complex incidents through the Modified Hohfeldian Framework and the possibility of holding Molecular Rights we are enabled to consider clearly and

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core right exists but the conflicting considerations may show that some of its possible derivations do not.’

<sup>60</sup> Raz, *ibid*, gives the example of the ‘right to free speech’ being limited to not include the ‘right to libel’.

<sup>61</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 47.

<sup>62</sup> Campbell, n 4, 33.

<sup>63</sup> *Ibid*, 51.

<sup>64</sup> See: Beyleveld and Brownsword, n 9, 64-5.

<sup>65</sup> Wenar, n 7, 235.

<sup>66</sup> Campbell, n 4, 33.

<sup>67</sup> *Ibid*.

rigorously to determine the substance of the asserted right. This is particularly poignant in relation to the considered right to reproductive autonomy, which is, it ought to now be clear, likely to be relatively substanceless.<sup>68</sup> For example, in the oft-asserted ‘right to abortion’ is the suggestion that one ought to be free to have an abortion<sup>69</sup> – and hence hold a privilege-right to terminate a pregnancy – or is it that another is duty-bound to provide a termination – and hence hold a claim-right to termination. If so, how is this right to be subjected to a consent proviso – and thereby tethered to a power-right – in order to allow the right-holder to determine whether or not to terminate the pregnancy?<sup>70</sup> It is the task in subsequent chapters to outline the plausible substance of such a claim using the Hohfeldian method.

## **4.2 Normativity and the Function of Rights**

This section sets out to consider how each of these Hohfeldian incidents function when held by agents. In order to do so I will begin by outlining two of the present approaches to the normativity of rights – specifically here, the function of rights – namely, choice and interest theories. Having done so, I will go on to consider whether the typology of rights outlined is itself enough to define whether a right is held. Finally, I claim that the Function Argument offers the most concise elucidation of the normativity of rights in this regard. Fundamentally, my claim is that each of the Hohfeldian incidents holds specified functions which are key to defining whether an incident is *recognisably* held. The importance of this consideration allows for the analysis of the queries: ‘What is a Right?’ and ‘What do Rights do?’. Underlining this approach is the relevance of both Freedom and Well-Being to both the *PGC* and the normativity of rights discourse. As Gewirth notes,

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<sup>68</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013), 11.

<sup>69</sup> *Ibid*, 157.

<sup>70</sup> It should be noted that the approach adopted in this regard is akin to Option (1) offered by Beyleveld and Brownsword, n 9, 75, whereby the alteration of rights-based incidents is through the exercise of some connected power-right. The alternate option offered is to include a ‘consent proviso’ in the definition of each incident. This latter option is less attractive and will be considered in more detail below.

The rights have certain objects, consisting ultimately in freedom and well-being. That the rights have these objects is an important part of the rights' value. But the value of the rights cannot be completely reduced to the value of the interests that are their objects, or even to the value of the right-holders' having these interests fulfilled, for at least three reasons that derive from the nature of moral rights. First, in A's having a right to X, A is justified in having X, as against his merely having X without any justification. Second, this justification is of a special kind in that X is A's due, something that belongs to him and that he is entitled to have for his own sake and not for the sake of maximizing utility. Third, A's right to X involves that he can rightly control X and can rightly control the conduct of other persons insofar as it bears on his having X.<sup>71</sup>

On this basis, rights may be derived from an agent's freedom, from his well-being or for some other reason. Functionally, it is held that it is the importance of both these generic goods which defines the ambit of *recognisable* rights-holding. That is, on occasion rights will empower choice, and in so doing provide agents with certain freedoms, and on other occasions rights will protect an agent's interests, and seek to guarantee well-being.

Ancillary to this investigation is a demarcation between the normative concerns of function and justification.<sup>72</sup> That is, between the questions of 'What do rights do?' and 'What are the reasons for holding a right?'. On this basis, this section focuses specifically on the prior question and the issue of *function*. In the following section I will go on to consider the other aspect of the normativity of rights - namely, the issues of *justification* - as part of an attempt to offer a complete theory of rights. For each of the present approaches, it is the merging of these two aspects which has posed significant problems - and has led to certain counter-intuitive conclusions - to the normativity of rights. The approach advocated seeks to avoid these problems. At this point, it is necessary to begin by outlining the positions of the Choice and Interest theorists before mounting the challenge to these interpretations.

#### **4.2.1 Choice and Interest Theory**

In this section, I will begin by examining the principal theories of rights which seek to bridge our conceptual and normative understanding of rights. These approaches seek to provide answers to questions surrounding rights; such as, 'Who has Rights?', 'What are

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<sup>71</sup> Gewirth, n 61, 37-8.

<sup>72</sup> Edmundson, n 49, 98.

Rights?’, ‘What Rights do people have?’ and ‘What Rights should people have?’. However, as noted the section is concerned primarily with the *function* of rights and issues of *justification* are to be dealt with later. The first of these theories is Choice theory and the other is Interest Theory. Wenar defines each of these approaches as *single-function* theories of rights.<sup>73</sup> The distinction between these approaches is well summarised by MacCormick,

Legal theorists have traditionally divided into two camps on the issue of the proper explanation of rights. One line of thought, which may be called the ‘[choice] theory’, asserts that an individual’s having a right of some kind depends upon the legal (or, *mutatis mutandis*, moral) recognition of his will, his choice, as being preeminent over that of others in relation to a given subject matter and within a given relationship. The ‘interest theory’, by contrast, contends that what is essential to the constitution of a right is the legal (or moral) protection or promotion of one person’s interest as against some other person or the world at large, by the imposition on the latter of duties, disabilities, or liabilities in respect of the party favoured.<sup>74</sup>

I will begin by outlining Choice Theory and some of the limitations of this approach before moving onto Interest Theory. Finally, I will move on to consider some of the reasons in favour of an alternate approach.

Choice Theory is principally concerned with the capacity for choice through action of the will.<sup>75</sup> It often explains rights in terms of the manifestation of choice which is afforded to the right-holder.<sup>76</sup> That is, rights may hold the *single-function* of giving the right-holder discretion over the duty of another.<sup>77</sup> As Campbell notes,

According to the [Choice] Theory, a right exists when a person (the right-bearer) can choose that another person fulfil an obligation or release her from that obligation. On this view, rights talk is a language of claims that generates the capacity to control the actions of others by requiring that these others act towards them in a certain way, usually by not interfering with what they want to do but also sometimes by empowering them to achieve their objectives.<sup>78</sup>

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<sup>73</sup> Wenar, n 7, 237.

<sup>74</sup> Neil MacCormick, ‘Rights in Legislation’ in Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society* (Clarendon Press, 1977), 189-209, 192.

<sup>75</sup> Campbell, n 4, 43.

<sup>76</sup> See: Beyleveld and Brownsword, n 9, 85-8.

<sup>77</sup> Wenar, n 7, 238.

<sup>78</sup> Campbell, n 4, 44.

This may mean that the holder is empowered to *control* how others – specifically obligation-bearer(s) – may act towards him through the existence of correlative obligations to do (or not do)  $\phi$  in C. Thus, a right exists when the right-holder (A) is able to exercise control (Y) over the obligation-holder's (B) fulfilment of the object of the right (X). For Beyleveld and Brownsword, this is through the incorporation of a 'consent proviso' into each of the Hohfeldian incidents. In this way, the definition of the right itself is amended to incorporate the necessary choice element.<sup>79</sup> For the choice theorist, the importance of rights stems from their potential to generate a capacity to control the conduct of others by, not only requiring that Conduct  $\phi$  is (or is not) fulfilled, but also by the choosing whether it is fulfilled, requiring them to act in a certain way in relation to the rights-holder.<sup>80</sup> As Sumner notes,

The proposal to adopt the choice conception is therefore based on two conceptions: that the concept of a right is sufficiently important to be assigned a distinctive normative function, and that autonomy is sufficiently important to be safeguarded by a distinctive normative concept.<sup>81</sup>

Hence, rather than *directly* conferring a benefit upon the rights-holder, what matters is that the right affords the holder the power to choose and control the fulfilment of correlative obligations by the exercise of their will.<sup>82</sup>

The choice theorists' focus on *autonomous* freedom leads, however, to an implausible restraint on the range of *incidents* accepted as *rights*.<sup>83</sup> The requisite condition of choice leads the choice theorist to reject as non-rights, for instance, non-waiverable claims against enslavement or torture.<sup>84</sup> This leads to a decidedly odd conclusion that petty incidents – such as the waiverable molecular right<sup>85</sup> against someone not touching your ear lobes – are classed as *rights* whereas those non-waiverable instances – such as to be free of torture

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<sup>79</sup> See: Beyleveld and Brownsword, n 9, 74-85.

<sup>80</sup> Campbell, n 4, 46-7.

<sup>81</sup> Leonard Sumner, *The Moral Foundation of Rights* (Clarendon Press, 1987), 98.

<sup>82</sup> Beyleveld and Brownsword, n 9, 87.

<sup>83</sup> Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982), 163.

<sup>84</sup> Michael Freeman, *Lloyd's Introduction to Jurisprudence* 8th ed (Sweet & Maxwell, 2008), 394. See also; Wenar, n 7, 239 and Thomas Hobbes *Leviathan* (Elibron Classics, 2005).

<sup>85</sup> Where the claim is combined with a power to choose whether to enforce the right or not.



- discussed are not '*rights*'.<sup>86</sup> Furthermore, the necessary inclusion of choice narrows the class of actors who are potential rights-holders – this leads to the exclusion of incapacitated adults and children, arguably those who are most deserving of and most in need of rights-based protection.<sup>87</sup> As Campbell argues,

Even if we do not value autonomy above all else, claim rights are a useful device for enhancing this goal. However, independent grounds have to be given for making this the sole basis for ascribing rights, especially when to do so would appear to exclude from the categories of rights-bearers, children, mentally handicapped and otherwise incapacitated persons who cannot exercise the capacities of an autonomous being, the very groups that some rights theorists are concerned to protect against the selfishness of the more able sections of the population.<sup>88</sup>

The result is that the choice theory of rights appears to provide only an explanation of those rights which are *potentially* of less importance – than the inalienable rights against slavery and torture or to life<sup>89</sup> – and for those who are less in need of rights-based protection.

On the other hand, Interest Theory is concerned with the capacity for and entitlement to given interests. The correlative obligation, then, is aimed at *protecting* or *furthering* the interests of the right-holder.<sup>90</sup> That is, the *single-function* of rights is to further the interest(s) of the right-holder.<sup>91</sup> Therefore, a right exists when the right-holder (A) interest is *protected by* or is *furthered by* (Y) the obligation-holder's (B) fulfilment of the correlative obligation (X). MacCormick asserts that the function of rights is through,

...some act or omission...performance of which in the case of each and every member of the class will satisfy, protect, or advance some need, interest, or desire of each such individual; and...satisfaction of that need, interest, or desire is of such importance that it would be wrong to deny it to any such individual regardless of ulterior advantages in so doing.<sup>92</sup>

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<sup>86</sup> See: Campbell, n 4, 47-9.

<sup>87</sup> Ibid, 48. This issue will be considered in greater detail in the following section as connected with the issue of *justification*.

<sup>88</sup> Ibid, 49.

<sup>89</sup> See: Beyleveld and Brownsword, n 9, 86-7.

<sup>90</sup> MacCormick, n 74, 192.

<sup>91</sup> Wenar, n 7, 240.

<sup>92</sup> MacCormick, n 83, 160.

Barzun, meanwhile, claims that only ‘some interest be marked out’<sup>93</sup> by the right; for Raz, this required the interest in question providing a ‘sufficient reason’ upon which the imposition of a duty may be grounded or justified, “X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (*an interest*) is a sufficient reason for holding some other person(s) to be under a duty.”<sup>94</sup> Here the focus is on conferring a *direct* benefit to the right-holder and, unlike Choice Theory, the element of control is not *necessary*.<sup>95</sup> Thus, ‘To ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C.’<sup>96</sup> Since the holding of the right turns, not on choice but, on the interests protected, interest theory is capable of sustaining rights to unwaiverable objects or conditions.<sup>97</sup> This is shown most aptly in regard to rights against enslavement or torture and rights to life. Furthermore, the interest theorist is capable of recognising that incompetent adults and children are capable of rights-holding since they are capable of having interests which rights can protect.<sup>98</sup> Finally, the interest theory can accept those choice-empowering rights which are central to the choice theorist, since in many circumstances an interest will be held in one’s autonomy, whilst offering an endorsement of a wider spectrum of rights-based relations emanating in interests of well-being as well as autonomy.<sup>99</sup>

Nonetheless, interest theory faces difficulties when attempting to identify what is meant by ‘interest’. MacCormick summarises the perceived aim of rights as ‘the protection or achievement of individual interests or goods.’<sup>100</sup> As Barzun argues,

Given that people [argue] about how those resources ought to be allocated and which interests ought to be protected, an account of rights that bakes into the very

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<sup>93</sup> Charles Barzun, “Legal Rights and the Limits of Conceptual Analysis: A Case Study” (2013) 26(2) *Ratio Juris* 215-34, 232.

<sup>94</sup> Raz, n 59, 166.

<sup>95</sup> Campbell, n 4, 45.

<sup>96</sup> Neil MacCormick, “Children’s Rights: A Test-Case for Theories of Rights,” (1976) 62 *Archiv für Rechtsund Sozialphilosophie* 305-17, 311.

<sup>97</sup> MacCormick, n 74, 192-6.

<sup>98</sup> MacCormick, n 96, 313.

<sup>99</sup> Campbell, n 4, 47.

<sup>100</sup> MacCormick, n 74, 192.

concept of a right certain normative judgments on those issues unfairly begs the question against other, competing normative theories.<sup>101</sup>

How are we to determine these individual interests? Is this to be outlined in terms of what persons *generally* hold to be in their interest? If so, might this not be seen as somewhat paternalistic? For instance, is it to be held that because life is generally in the interest of most persons that my life must also be in my interest no matter how poor and undignified my life has become? Is it to be determined on the basis of each individual's actual interest in the object of the right? If so, does this not take us more closely to the range of rights held by the choice theory?<sup>102</sup> These questions will produce different answers from different interest theorists, from the perspective of this thesis – one that advocates ethical rationalism – the determination of interest would require a developed theory of agentic interest similar to that offered by the *PGC*.

In addition to the problems involved with an attempt to define what is meant by interest, we also find that interest theory faces further difficulties when attempting to account for those rights which are not for the benefit of the right-holder.<sup>103</sup> This is most clearly demonstrated by role-defined rights, that is, those rights which are held for the reason that one holds an occupational position, e.g. as a judge, police officer, Secretary of State.<sup>104</sup> The interest theorist here is left with two choices: either she can suggest that these are not rights at all<sup>105</sup> or that the interest in these rights is a communal one.<sup>106</sup> In either event, the theory results in propounding rights which fit only within a narrow 'stricto sensu' dialogue of rights.

It is the juxtaposition between the two conceptions as to the *function* of and *sufficient ground* for the attribution of rights which forms the basis for the debate. For 'choice' theory this is grounded in the aspect of control, whilst for interest theory this is in the protection of some aspect of the right-holder's welfare.<sup>107</sup> However, both theories suffer

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<sup>101</sup> Barzun, n 93, 229.

<sup>102</sup> Campbell, n 4, 204.

<sup>103</sup> Wenar, n 7, 241-2.

<sup>104</sup> Ibid.

<sup>105</sup> Matthew Kramer, Nigel Simmonds and Hillel Steiner, *A Debate over Rights* (OUP, 1998), 9-14.

<sup>106</sup> Joseph Raz, *Ethics in the Public Domain* (OUP, 1994), 149-51.

<sup>107</sup> MacCormick, n 74, 192.

from inherent flaws. Choice theory is criticised for its inability to provide sufficient rights-based protection for those that do not have the capacity sufficient to exercise their will and narrow range of prospective rights.<sup>108</sup> On the other hand, interest theory is criticised for the (potentially) broad interpretation of ‘interest’ and the absence of a criteria by which ‘protected-interests’ and ‘non-protected-interests’ can be identified.<sup>109</sup> Whilst the choice theorist offers a more concise definition of the function of rights than the interest theorist, the latter allows for a broader class of rights, including many of those unwaiverable rights which many would consider to be of vital importance of protection for the vulnerable.<sup>110</sup> One issue which has become clear with each of these approaches is that the restraint to one *single function* of rights rejects certain rights which we would intuitively accept as meritorious.<sup>111</sup> It is now necessary to consider an alternate approach to the issue of normative function which allow for the *multitude of functions* of rights to be incorporated.

#### **4.2.2 The Function Argument**

In seeking an alternative to the present approaches in relation to the function of rights, my concern is primarily with offering a complete explanation of the multitude of purposes of rights. It is necessary to offer an alternate structure of the normative function of rights which feeds into the conception of legal relations maintained later in this thesis. The reasons for this are aptly summarised by Wenar,

Despite the appeal of freedom and well-being as organizing ideas, each of these theories is clearly too narrow. We accept rights, which do not (as the [choice] theory holds) define domains of freedom; and we affirm rights whose aim is not (as the interest theory claims) to further the interests of the rightholder.<sup>112</sup>

It seems that the appropriate starting point for an alternate explanation is to recognise that the function of rights *may* be to empower *choice* or to protect some *interest* or it may be for *some other reason*. The function of rights then is not limited to any one *single*

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<sup>108</sup> Campbell, n 4, 45-7.

<sup>109</sup> Ibid, 45.

<sup>110</sup> See also: Rosamund Scott, ‘Choosing Between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis’ (2006) 26(1) *Oxford Journal of Legal Studies* 153-178, 156 and Rosamund Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Hart Publishing, 2002), 15-20.

<sup>111</sup> Gewirth, n 61, 37-8.

<sup>112</sup> Wenar, n 7, 224.

function.<sup>113</sup> The approach advocated begins from the development of the Hohfeldian conceptual framework to a normative theory of the several functions of rights. Fundamentally, I suggest that each of the Hohfeldian incidents hold specified functions and it is this which provides the functional normative structure of rights. Unlike the approaches of choice and interest theory, which embrace normative judgment in the very concept of rights-holding, this approach subtracts the contention and counter-intuitivism and instead holds that incidents are rights when they offer one of the given functions of rights.

Each of Hohfeld's incidents holds its own functions (as seen in Figure 6: Functions of Incidents, below) that are determinative of whether the incident exists as a 'right'. The result is that an incident will appropriately be termed as a right when it either marks out an *exemption* (from a general duty), a *discretion* (as to how to act) or an *authorisation* (to act in some way) or it entitles the right-bearer to *protection* (from harm), *provision* (in cases of need) or *performance* (of some specified action)<sup>114</sup> or as some molecular combination of the above. This in turn provides a bridge from the conceptual understanding to the normative function of rights.

As Figure 6: Functions of Incidents shows, the Hohfeldian incidents can be positioned on the basic order of rights according to their roles as either active or passive and first or second order status. In addition to this, their respective roles / functions can now be allocated accordingly:

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<sup>113</sup> Ibid, 246-51.

<sup>114</sup> Ibid, 246.

	<b>Active Incidents</b> <i>Exercised rights</i>	<b>Passive Incidents</b> <i>Enjoyed rights</i>
<b>Second order</b> Rights over <i>rights</i>	POWERS Function: <i>Authorisation</i> <i>Discretion</i>	IMMUNITIES Function: <i>Protection</i>
<b>First order</b> Rights over <i>objects</i>	PRIVILEGES Function: <i>Exemption</i> <i>Discretion</i>	CLAIMS Function: <i>Protection</i> <i>Provision</i> <i>Performance</i>

**Figure 6: Functions of Incidents**

It is now essential to outline the functions of each of the Hohfeldian incidents. A claim-right may *protect*, *provide* or ensure *performance* for its holder. A claim-right can entitle its bearer to *protection* from harm or paternalism; for instance, the claim that Y not strike X. It may entitle the bearer to *provision* in cases of need. For instance, a child's claim-right to education would correlate to a duty to provide education.<sup>115</sup> Finally, it may entitle the bearer to the *performance* of some action by the duty-holder. For example, an employer has a duty to his employee to pay her wages; the employee has a claim that the employer pays those wages.<sup>116</sup> The oft-asserted separation between *positive* and *negative* rights can be seen in the distinction between the functions of claim-rights.<sup>117</sup> Under this approach, *positive* rights - which require a duty-bearer to refrain from interference - are covered by *protection* claim rights. Meanwhile, *negative* rights - which require a duty-bearer to provide assistance through some act - are covered by both claims of *provision* and of *performance*.

The two functions of a privilege are of *exemption* and of *discretion*. An *exemption*-privilege confers an exemption on the bearer from some general duty. For example, if ordinary

<sup>115</sup> MacCormick, n 83, 163.

<sup>116</sup> Wenar, n 7, 229.

<sup>117</sup> Gewirth, n 61, 38. See also: Stephen Brown, "The Problem with Marx on Rights" (2003) 2(4) *Journal of Human Rights* 517-22, 521.

citizens, or members of a class of persons, are under a duty not to do  $\phi$ ; if A is able to do  $\phi$ , it is said that he has an exemption-privilege to do  $\phi$ .<sup>118</sup> To put it another way, if A, B, C and D are under Y's duty to refrain from entering onto his land, whilst E has a privilege to enter the land, she is then exempted from the general duty.<sup>119</sup> Similarly, the right to drive with a full, valid driving licence is an *exemption-privilege*. It exempts the bearer from the general duty not to operate a dangerous vehicle at speed. A *discretion-privilege* entitles the bearer to either perform or not perform that which he is under no duty not to perform.<sup>120</sup> So, the bearer has a privilege to  $\phi$  and a privilege not to  $\phi$ ; or, rather, the bearer is under no duty to  $\phi$  and no duty not to  $\phi$ .<sup>121</sup> The person possessing a *discretion-privilege* is therefore entitled to either perform some action or not perform it at *his own discretion*.<sup>122</sup> For instance, a patient has a discretionary privilege to visit his GP when he is suffering from some ailment. This is because he is neither under a duty, so has a privilege, to visit the doctor, nor under a duty not to visit the doctor. Privileges therefore mark out the contours of the exercise of one's liberty in given circumstances in either a capacity to do  $\phi$  or the choice to do or not do  $\phi$ .

As we have already seen, Powers allow for the holder to alter the rights of himself or another. Powers, therefore, may hold one of two functions; of *authorisation* or of *discretion*.<sup>123</sup> An *authorisation-power* confers on the bearer a nondiscretionary authority. That is, the bearer has the ability to alter another's, or his own, Hohfeldian incident(s) but lacks any discretion as to how this alteration takes place.<sup>124</sup> For example, a judge may have the power to annul the criminal's free movement but may lack any discretion as to the length of the sentence, for instance if that sentence is specified by statute, or may lack the authority *not* to sentence once a guilty verdict has been returned.<sup>125</sup> *Discretionary-powers* will give the bearer choice over how the authorisation is exercised or whether it is

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<sup>118</sup> Wenar, n 7, 246-7.

<sup>119</sup> Hohfeld, n 1, 39.

<sup>120</sup> Ibid, 41.

<sup>121</sup> Wenar, n 7, 227.

<sup>122</sup> Beyleveld and Brownsword, n 9, 68.

<sup>123</sup> Hohfeld, n 1, 50-3.

<sup>124</sup> Wenar, n 7, 231.

<sup>125</sup> See also: Beyleveld and Brownsword, n 9, 70-1.

exercised.<sup>126</sup> The bearer may therefore choose (not) to alter his or another's Hohfeldian incident and/or choose how to alter it.<sup>127</sup> For example, the patient above may choose to waive his claim-right to bodily integrity by allowing the nurse to perform the injection or he may not allow her to do so, thus not waiving his claim.

Finally, the essential function of an immunity is *protection* from harm or paternalism.<sup>128</sup> An immunity is designed to protect its holder by retaining the legal relationship as it is.<sup>129</sup> For example, X has a claim that Y not touch him; he equally has an immunity as against Y because Y is unable to alter X's claim. These are the different ways in which the Hohfeldian incidents may operate.

Determining the normative function of rights based on the developed basic order of Hohfeldian incidents enables an understanding beyond the choice or interest functions and onto a more complete explanation. On this basis, the function of rights can be tied to the generic features of agency which are to be protected under the *PGC*.<sup>130</sup> This is important because the various levels of goods are secured by the varying functions of rights.<sup>131</sup> In this way, claim-rights which *protect* the right-holding from interference or harm can be seen as operating to protect the agent's *basic well-being*, for instance to one's physical integrity or life.<sup>132</sup> Similarly, claim-rights to the *provision* of some good act so as to supply the agent right-holder with an *additive good*, for instance for a child's education<sup>133</sup> or a drug addict's rehabilitation are supplemented by the increased chances of their purpose-fulfilment.<sup>134</sup> Equally, as Gewirth notes, do certain rights enable the holder to exercise control over the normative situation,

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<sup>126</sup> Wenar, n 7, 231.

<sup>127</sup> Beyleveld and Brownsword, n 9, 70-2.

<sup>128</sup> Wenar, n 7, 232 and Hohfeld, n 1, 60.

<sup>129</sup> Beyleveld and Brownsword, n 9, 74.

<sup>130</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (London, 1991), 45 and Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007), 207.

<sup>131</sup> Gewirth, n 61, 37.

<sup>132</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 54.

<sup>133</sup> Gewirth, n 61, 36.

<sup>134</sup> Gewirth, n 132, 55-6.



A's right to X invokes that he can rightly control X and can rightly control the conduct of other persons insofar as it bears on his having X. This third point, however, does not apply to all rights; the right to basic well-being is mandatory and thus not subject to optional choices on the right-holders part.<sup>135</sup>

In this way, as we have seen, both privilege- and power-rights may enable the right-holder to exercise control over the conduct of another person.<sup>136</sup> Privilege-rights which *exempt* the right-holder from some general duty also serve the agent as the means to achieving his ends.<sup>137</sup> On this basis, our conceptual understanding of rights supplements the conception of *need* derived from the generic features of agency, where 'the rational necessity for [agents] to accept a complex structure of rights correspond[s] to the hierarchy in which components of freedom and well-being are arranged.'<sup>138</sup> If there is to be a prerequisite it is not 'choice' or 'interest', it is that the 'right' in question is a Hohfeldian incident *and* for it conform to one of the related functions.<sup>139</sup>

I now turn to the tools for evaluating conflict under the *PGC*. This is not an exact science when there are intra-variable conflicts. These conflicts are posed when the balance to be struck is not between two agents' claims to, for instance, varying levels of basic well-being.<sup>140</sup> As the harm posed becomes speculative, we are forced to consider the probability of the harm occurring. Further to this we may be faced with circumstances where there is rational doubt as to the agency status of the being involved in the conflict.<sup>141</sup> The attempt here is to elucidate the necessary considerations raised by intra-variable conflict.

Resolution requires consideration of the *likelihood* of some harm will be suffered within a conflict situation. This, however, is made more difficult by the nature of these *intra-variable* conflicts and it is for this reason that we must consider both the *Hierarchy of Generic Goods* and the *Criterion for the Avoidance of More Probable Harm* as well as the *Principle of the Rational Precautionary Reasoning*.<sup>142</sup> This is due to the tri-fold problem

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<sup>135</sup> Gewirth, n 61, 38.

<sup>136</sup> Beyleveld and Brownsword, n 9, 66-74.

<sup>137</sup> Gewirth, n 132, 52.

<sup>138</sup> Beyleveld, n 130, 20-1.

<sup>139</sup> Wenar, n 7, 252.

<sup>140</sup> Pattinson, n 164, 68.

<sup>141</sup> Beyleveld and Pattinson, n 163, 43.

<sup>142</sup> Pattinson, n 164, 68-78.

posed by these conflicts where a balance must be struck between: (1) the weight given to the relevant generic features of agency; (2) the likelihood of harm occurring; and, (3) the weight of moral status of a *potential* agent, respectively.<sup>143</sup>

It is necessary to begin by outlining what is meant by the *Hierarchy of Generic Goods* and the *Criterion for the Avoidance of More Probable Harm* in order to prefix the reasoning of this section. As we have already seen, both freedom and well-being are comprised of those considerations which are fundamental to the very nature of the agent himself; that is, they are the requisite conditions of the agent's ability to act *as an agent*. These generic features of action 'fall into a hierarchy determined by the degree of their indispensability for purposive action.'<sup>144</sup> It is this *Hierarchy of Generic Goods* that creates a complex structure of rights which allows for claims to freedom and well-being to be cross-weighted against one another in order to resolve conflicts.<sup>145</sup> In intra-variable conflicts the *Hierarchy of Generic Goods* affords the possibility of weighing claims where there are two or more potential infringements with two or more agents' generic rights based on the *degree* of harm. As Pattinson notes, the *Hierarchy*, 'gives greater weight to those generic features whose hindrance or removal will more probably interfere (or tend to interfere) with an agent's ability to achieve its purposes'.<sup>146</sup> Simply put, it allocates greater weight to those interferences that affect an agent's ability to act as an agent.<sup>147</sup> The *Hierarchy* therefore allocates greater moral concern to interferences with an agent's life than to an agent's property and to an agent's *dispositional* freedom over an agent's *occurent* freedom.<sup>148</sup> On this basis, as we have seen from the Function Argument, claim-rights of protection (or, in some cases, provision<sup>149</sup>) may, all things being equal, trump, for example, privilege-rights of discretion.

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<sup>143</sup> Ibid, 72.

<sup>144</sup> Gewirth, n 132, 62-3.

<sup>145</sup> Beyleveld, n 130, 20-1.

<sup>146</sup> Pattinson, n 164, 72.

<sup>147</sup> Gewirth, n 132, 61-3.

<sup>148</sup> Ibid, 52. Gewirth refers to this as the '*continuum of necessity*'.

<sup>149</sup> See: Ibid, 217-230 on principles of assistance.

The *Criterion for the Avoidance of More Probable Harm* builds upon this by introducing a measure of the probability that harm will occur. It, therefore, introduces an extra dimension to the resolution of conflicts. Beyleveld and Pattinson express it as follows,

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

Where y = failing to observe a particular duty of protection, and h = mistakenly denying a being the status of an agent, we can infer by this criterion that, "If my failing to observe a particular duty of protection to Z is more likely to mistakenly deny Z the status of an agent than is my failing to observe this duty of protection to X (and I cannot avoid failing to observe this duty to one of Z or X) then I ought to fail to observe my duty to X rather than to Z."<sup>150</sup>

In conflicts, the criterion allows for the possibility of balancing between different forms of harm and the likelihood of those harms occurring.<sup>151</sup> This extra dimension affords a more refined measure of agency interference. It is a means of limiting or avoiding *PGC* violations.<sup>152</sup> The effect of this is that life no longer *necessarily* trumps property (though it generally will). Rather the measure is dependent on the balance between the likelihood of the interference occurring and the level of harm involved.

In addition to the balance between the *Hierarchy* and the *Criterion*, it is also necessary to consider the determinable status of the agent(s) involved in the conflict. That is, in these intra-variable conflicts, the balance is not always simply between two or more PPAs but rather, it may include considerations of *potential* agency, *ostensible* agency and non-agency. Given that both the *Hierarchy* and the *Criterion* provide a viable means of balancing (potential) interferences between *actual* agents it is necessary to add another dimension to the balance. This raises the necessity of considering the moral or agency status as a third variable in conflict situations. This will be returned to in the next section.

The debate itself centres on the meaning behind what rights are and the role that rights play in our lives but becomes preoccupied by emphasizing the counter-intuitive nature of

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<sup>150</sup> Beyleveld and Pattinson, n 163, 44.

<sup>151</sup> Pattinson, n 164, 25.

<sup>152</sup> Ibid, 72.

the other approach.<sup>153</sup> Yet neither offers an explanation of rights which does not raise, at least, some counter-intuitive results. By separating the *function* of rights from the *justification* of those rights it becomes clear that purely in terms of functionality the single-function theories are insufficient for the explanation of the prior. Indeed,

The rights have certain objects, consisting ultimately in freedom and well-being. That the rights have these objects is an important part of the rights' value. But the value of the rights cannot be completely reduced to the value of the interests that are their objects, or even to the value of the right-holders' having these interests fulfilled...<sup>154</sup>

This approach makes no commitment to how these rights *ought* to be held. That is, it makes no commitment as to the role of molecular rights, whether power-rights must be joined to other rights molecularly to empower choice.<sup>155</sup>

Indeed, the Function Argument of rights is not mutually exclusive of either choice or interest theories, it may operate in support of either of these theories.<sup>156</sup> Tethered to the *PGC*, it offers a grounded derivation of what is sufficiently in an agent's interest; or what needs to be controlled; or because A requires special assistance of some kind, so as to ground the right in question.<sup>157</sup> Similarly, it provides an explanation of how rights function and may be molecularly held to empower choice.<sup>158</sup> The Function Argument, thus, can be seen to either supplement or juxtapose the current approaches.

In summary of the points made, it is the *dispositional* necessity of both freedom and well-being which counters the proposition that it could be *either* of these theories alone which explain the *sole* function for right-bearing. As Wenar notes,

Those theorists whose normative commitments entail that rights should be distributed so as to create equal domains of freedom – mostly Kantians like Steiner – champion the will theory as an analysis of the nature of rights. Their welfarist opponents like Raz, who hold that the point of morality or the law is to further individual well-being, fight for the interest theory. Each side attempts to portray

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<sup>153</sup> Ibid, 250.

<sup>154</sup> Gewirth, n 61, 37-8.

<sup>155</sup> Ibid, 38.

<sup>156</sup> Either in terms of *function* or of *justification*.

<sup>157</sup> See: McCormick, n 83, 163-6.

<sup>158</sup> See: Beylveld and Brownsword, n 9, 66-74.

that part of the ordinary concept that is most congruent with their normative theory as the whole concept.<sup>159</sup>

The normative commitments of the Function Argument surround the several ways in which rights may function for the right-holder. These may be of protection, provision or performance in relation to passive rights (namely, claim- and immunity-rights) and of discretion, exemption or authorisation in relation to active rights (namely, privilege- and power-rights). The functions outlined are tied to the generic features of agency as necessary for the potential attainment of purposive action.

Whilst the Function Argument does not provide us with the *justificatory reasons* for bearing rights in given situations it opens the debate up to those questions. Rather than, being restrained by the alleged conditions it allows the debate to move forward and respond to those questions. The proverbial shackles are lifted and the discourse can move beyond the limitations which have held it back for so long. As Gewirth claims,

The need for positive rights, however, occurs not only in the case of threats but also to promote the affirmative development of freedom and well-being as necessary goods of successful action, and as reflecting the mutuality of concern for one another's needs that is required by the principle of human rights. In these ways, the human rights also bear on social structures that affect and reflect the comparative degrees to which different groups or classes attain these necessary goods.<sup>160</sup>

The question now is, what are the *justificatory* reasons for the award of rights? It is notable that the approach tethers the holding of *moral* rights to the generic features of agency. The argument contained within the opening chapters sought to emphasise that this determinate, objective morality was such that it can logically establish a legal order which is simultaneously welfarist and choice-offering. Questions surrounding the *justificatory* reason for legal right-holding, then, are more sensibly directed as questions which concern the nature of the legal system itself and the transformation of moral rights into legal rights. After all, it is a legal order premised on the *PGC* which is capable of instilling a *Community of Rights* which distributes the benefits and burdens of rights-holding based on the need

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<sup>159</sup> Wenar, n 7, 250.

<sup>160</sup> Gewirth, n 61, 41-2.

to promote choice, to protect individual well-being and to maintain social order.<sup>161</sup> It is these considerations which I turn my attention to in the next sections.

### **4.3 Rights, Justification and Precautionary Reasoning**

As noted in the previous section, I have sought to demarcate the issues of *function* and *justification* within the normativity of rights discourse. Having outlined an approach which claims that the holding of rights is *recognisable* on the basis of the specific functions that those rights perform (and how these relate to the generic features of agency), it is now necessary to consider what the *justifications* for rights-holding may be. Key to this is to consider the criteria set out to ascertain *who* or *what* may legitimately be a right-holder.

Under the *PGC*, any agent legitimately holds *moral* rights to their generic features of agency: that is, to their freedom and well-being. However, in transforming the *PGC* into a constitutional guide for institutional reasoning,<sup>162</sup> it is necessary to recognise that those enforcing or deriving specific rules from the *PGC* will suffer from a lack of moral omniscience in applying it.<sup>163</sup> With this human fallibility in mind, an issue arises as to whether a being is or is not an agent – especially if that being is not from the same species as those enforcing the *PGC*.<sup>164</sup> Take, for example, the plausible invention of synthetic humanoid beings which are able to demonstrate the ‘illusion’ of consciousness.<sup>165</sup> Are these beings to be ‘given’ agentic status or are they to be treated as akin to a computer that is able to respond to given commands?<sup>166</sup> Is *humanistic* consciousness sufficient to align with agency? If so, what is humanistic consciousness if all human consciousness is subjective and driven by individual experience? It is on this basis that I seek to tie the *justification* for rights holding to *rational precautionary reasoning* when transforming the

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<sup>161</sup> Ibid, 348-57.

<sup>162</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 162.

<sup>163</sup> Deryck Beyleveld and Shaun Pattinson, ‘Precautionary Reasoning as a Link to Moral Action’ In Michael Boylan (ed) *Medical Ethics*, (Prentice-Hall, 2000), 39-53, 43.

<sup>164</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 26-7 and 73.

<sup>165</sup> See, for example: *Humans* (Channel 4/AMC, 2015) Accessible at: <http://www.channel4.com/programmes/humans> (12/08/2015).

<sup>166</sup> See, for example: <https://www.eviebot.com/en/> (12/08/2015).

*PGC* into a principle of institutional reasoning. My claim is that *actual* agency is no longer the *only* condition for providing rights to beings within a system of institutional reasoning<sup>167</sup> and, therefore, the holding of rights is not justified *solely* because of choice (or the ability to choose).<sup>168</sup>

#### **4.3.1 Principle of Rational Precautionary Reasoning**

The exercise of the *Principle of Rational Precautionary Reasoning* is relevant to the considerations of moral status. This operates on the basis that in order to avoid violating the *PGC*, where agency status is unknown, unclear or dubious, precaution ought to favour deeming the apparent (non-)agent as an agent in order to avoid risking the violation of the *PGC*.<sup>169</sup> Simply the *Principle* is stated as,

If there is no way of knowing whether or not X has property P, then, insofar as it is possible to do so, X must be assumed to have property P if the consequences (as measured by the Principle of Generic Consistency) of erring in presuming that X does not have P are worse than those of erring in presuming that X has P (and X must be assumed to not have P if the consequences of erring in presuming that X has P are worse than those of assuming that X does not have P).<sup>170</sup>

The effect is that if X shows some signs of agency then X is to be treated as if X were an agent – and ascribed corresponding generic rights – unless to do so would threaten to the generic rights of an actual agent.<sup>171</sup> As Beyleveld and Pattinson note,

In other words, suppose the evidence is sufficient to infer only that X is a *partial agent* – a being that has some characteristics needed to be an agent to at least some degree, without having sufficient of these to the degree needed to be an agent. In such a case, although X is apparently only a partial agent, *precisely because the proposition that an other is an agent is a metaphysical one and human reason is limited in such matters*, I cannot infer that X *is not* an agent.<sup>172</sup>

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<sup>167</sup> Because of the Principle of Rational Precautionary Reasoning put forward by Beyleveld and Pattinson, n 163, 39-53.

<sup>168</sup> As other Gewirthians do; see: Pattinson, n 164, 12 and Beyleveld and Brownsword, n 9, 64-89.

<sup>169</sup> Deryck Beyleveld and Shaun Pattinson, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon' (2010) 23(3) *Ratio Juris* 258-73, 260.

<sup>170</sup> Beyleveld and Pattinson, n 163, 43.

<sup>171</sup> Pattinson, n 164, 24.

<sup>172</sup> Beyleveld and Pattinson, n 169, 43 (*original emphasis*).

To put it another way, we might note the resemblance to Schrödinger's cat in relation to X's agency.<sup>173</sup> X is, in this way, both an agent and not an agent simultaneously. But is not definitively one over the other until the box is opened - or the relevant empirical evidence (if possible) is attained. In the absence of such omniscience, the Principle favours a 'good faith' attempt to adhere to the moral requirements of the *PGC*.<sup>174</sup>

It has been suggested that the consequences of rational precaution are favourable to alternate attempts to derive moral status from beings that demonstrate minimal or no signs of agency.<sup>175</sup> The *Principle of Proportionality*, for instance, allocates moral worth proportionally on the basis of the level of agency which is demonstrated.<sup>176</sup> The effect is that,

When some quality Q justifies having certain rights R, and the possession of Q varies in degree in the respect that is relevant to Q's justifying the having of R, the degree to which R is had is proportional to or varies with the degree to which Q is had)... Thus, if x units of Q justify that one have x units of R, then y units of Q justify that one have y units of R.<sup>177</sup>

Proportionality attempts to allocate moral worth directly in relation to the level of demonstrative agency, this in turn justifies right-holding on the basis of those signs of agency which are apparent.<sup>178</sup> Hence, young children may be allocated generic rights to protect their basic well-being (i.e. life) and to the provision of developmental resources as necessary to acquire full agency. 'Partial' agents are thereby ascribed proportional rights that protect those signs of agency which are demonstrated.<sup>179</sup> 'Partial' agents, such as foetuses, young children or the mentally handicapped, have generic rights that protect

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<sup>173</sup> Erwin Schrödinger, "Die gegenwärtige Situation in der Quantenmechanik" (1935) 23(48) *Naturwissenschaften* 807-812. English version accessed at: [http://hermes.ffn.ub.es/luisnavarro/nuevo\\_maletin/Schrodinger\\_1935\\_cat.pdf](http://hermes.ffn.ub.es/luisnavarro/nuevo_maletin/Schrodinger_1935_cat.pdf) (19/08/2015) as John Trimmer (tr) "The Present Situation In Quantum Mechanics: A Translation Of Schrödinger's "Cat Paradox Paper" (1980) 124 *Proceedings of the American Philosophical Society* 323-38.

<sup>174</sup> Pattinson, n 164, 70-1.

<sup>175</sup> Beyleveld and Pattinson, n 169, 260.

<sup>176</sup> Beyleveld and Pattinson, n 163, 45. See also: Philip Bielby, *Competence and Vulnerability in Biomedical Research* (Springer, 2008), 96-103.

<sup>177</sup> Gewirth, n 132, 121.

<sup>178</sup> Ibid, 121-3.

<sup>179</sup> Pattinson, n 164, 20.



those features of agency which they are capable of being demonstrated.<sup>180</sup> The problem with this approach, exemplified by Pattinson, is that - by definition - 'partial' or 'potential' agents are non-agents.<sup>181</sup> They might demonstrate either some signs of agency or the propensity – for instance, by their species - in the future or in some situations to act as agents but at the point of attempt to ascribe moral status they are non-agents and beyond the scope of the *PGC*.<sup>182</sup>

The *Principle of the Rational Precautionary Reasoning*, holds that where there is a possibility of agency that being ought to be treated as if it were an agent so as to avoid conflicting the *PGC*.<sup>183</sup> Therefore,

Since the *PGC* is categorically binding on *A*, *A* must avoid violating the *PGC* at all costs whenever this is meaningful and possible. Since it is possible that *B* is an agent and *B* behaves like an agent, it is both meaningful and possible for *A* to treat *B* as an agent, in consequence of which *A* must treat *B* as an agent, on pain of being willing to violate the *PGC*, which *A* categorically may not entertain. *A* errs in thinking that in order to show that the *PGC* has practical application with categorically binding force it is necessary to demonstrate that *A* contradicts that *A* is an agent by denying that those who behave like agents actually are agents. In fact, it is only necessary to show that *A* fails to treat the *PGC* as categorically binding on agents (and, thereby contradicts that *A* is an agent) by failing to treat those who behave like agents as agents; and this the precautionary argument establishes.<sup>184</sup>

This holds unless there is conflict between a possible agent and an ostensible or actual agent.<sup>185</sup> The Principle then holds a default position of allocating moral worth to any being who *could* (by precautionary reasoning) be an agent. Precaution, therefore, allows us to consider conflicts between levels of possible agents whereby the greater the signs of agency shown the greater the moral status allocated to the possible agent *in conflicts*.<sup>186</sup> So,

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<sup>180</sup> See: Gewirth, n 132, 121 and Beyleveld and Pattinson, n 163, 42.

<sup>181</sup> Pattinson, n 164, 20-2.

<sup>182</sup> Beyleveld and Pattinson, n 169, 264.

<sup>183</sup> Pattinson, n 164, 23 and Beyleveld and Pattinson, n 163, 42.

<sup>184</sup> Beyleveld and Pattinson, n 169, 260.

<sup>185</sup> Pattinson, n 164, 74. Cf: Søren Hølm and John Coggon, "A Cautionary Note against "Precautionary Reasoning" in Action Guiding Morality" (2009) 22(2) *Ratio Juris* 295–309, 305.

<sup>186</sup> Beyleveld and Pattinson, n 163, 47-8.

a foetus would hold greater moral status than a table or rock but an adult rat would hold greater moral status than an early embryo.<sup>187</sup> As Beyleveld and Pattinson claim,

In other words, where X is an ostensible agent, the probability that X is an agent must be taken to be 1, and where X is apparently only a partial agent, the probability that X is an agent must be taken to be >0 but <1 in proportion to the capacities of agency that X displays.<sup>188</sup>

The result is that the Precautionary Principle grants moral worth to would-be agents *proportionally* in relation to the likelihood that they are agents.

The Principle does require the presentation of the different types of agency which may be encountered in order to determine how conflict situations can be resolved. This can be further exemplified by the problems associated with allocating generic rights to entities which show little to no signs of agency. In these situations, it becomes impossible to differentiate between acts which inhibit or further the 'agent's' agency.<sup>189</sup> This becomes apparent when we attempt to determine what would be in the interests of a being that does not behave like an agent nor does it demonstrate any behavioural capacities of agency, such as a table.<sup>190</sup> Against such beings, we cannot meaningfully seek to protect the generic interest of such beings. Beyleveld and Pattinson present four qualitative levels of agency:<sup>191</sup>

1. Beings who behave as though they are agents; e.g. 'normal' adult human beings, sophisticated robots, hypothetical non-human animals or plants that behave like agents.
2. Beings who we are uncertain as to their demonstrations of agency; e.g. human children (at early stages of communicative competence), dolphins, whales, non-human primates, etc.
3. Beings that do not behave quite as agents but who have some behavioural capacities which apparent agents display; e.g. dogs, cats, pigs, horses, plants, bacteria, computers with some self-regulating functions.
4. Beings that do not behave like agents and show no signs of agency related behavioural capacity; e.g. rocks, doughnuts and other inanimate objects.

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<sup>187</sup> Pattinson, n 164, 74.

<sup>188</sup> Beyleveld and Pattinson, n 163, 44.

<sup>189</sup> Pattinson, n 164, 73.

<sup>190</sup> Beyleveld and Pattinson, n 169, 264.

<sup>191</sup> Ibid, 263-4.

Furthermore, we can recognise a further three classes: living beings who *previously* displayed the behavioural capacity of agency; those with the *potential* to display these capacities; and, *deceased previous* ostensible agents.<sup>192</sup> These classifications provide, at least minimally, a representative hierarchy for determining the *proportional probability* of agency; so,

Ostensible agents<sup>193</sup> → Potential agents<sup>194</sup> → Partial agents<sup>195</sup> → ‘Metaphysical’ agents.<sup>196</sup>

Rational precaution in this regard requires us to treat all other beings, regardless of their position within the hierarchy as an agent for practical purposes. This is because our precaution is driven by adherence to a categorical imperative that favours a determination of ostensible agency over the denial of agency.<sup>197</sup> This remains so up until the point of conflict with a ‘full’ agent or an ostensible agent at a different position in the hierarchy of agency.<sup>198</sup> Hence,

Because precaution driven by a categorical imperative requires us to treat ostensible agents as agents (to regard sufficient evidence for ostensible agency as sufficient evidence of agency for practical purposes). Consequently it requires us to regard those items that are jointly sufficient evidence of ostensible agency (hence agency), but individually not sufficient evidence, as some (albeit insufficient) evidence of ostensible agency (hence agency). At the same time, insufficient evidence does not preclude the possibility that the being in question is an agent. In other words, insufficient evidence for ostensible agency (hence agency) is not sufficient evidence of non-agency, even though it is sufficient evidence of ostensible non-agency. The crucial claim now is that, in this context, agents must think of potential ostensible agency as providing some (though clearly insufficient) evidence, not for ostensible agency, but for agency.<sup>199</sup>

Given that the *PGC* ‘protect[s] the generic conditions/capacities of agency of agents, and possession of the generic capacities (though not of the generic rights) is a matter of

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<sup>192</sup> Ibid, 264.

<sup>193</sup> Those who appear to act for purposes which constitute reasons for action.

<sup>194</sup> Those who have the potential to become full agents.

<sup>195</sup> Those who hold *some* of the characteristics of agency.

<sup>196</sup> Non-living creatures whom show no signs of agency.

<sup>197</sup> Pattinson, n 164, 25.

<sup>198</sup> Beyleveld and Pattinson, n 163, 50-1.

<sup>199</sup> Beyleveld and Pattinson, n 169, 265.

degree',<sup>200</sup> agents ought, provided it does not excessively impede upon their own generic features, to *practically* respect the generic features of ostensible agents. Ultimately, the result of rational precaution is to direct the behaviour of agents towards ostensible agents in favour of adherence to the duties under the *PGC* in non-conflict situations.<sup>201</sup> In *single-variable* conflicts – i.e. between varying degrees of agency where the same harm is threatened and the likelihood of that harm occurring is equal<sup>202</sup> – between the same interest is resolved in favour of Level 1 over Level 2 or Level 3 over Level 4.

The result is that any being is deserving of some moral status on the simple grounds that it may be an agent *for practical purposes*.<sup>203</sup> The threat of violating the *PGC* is enough to suggest that rational precaution directs us to recognise moral status.<sup>204</sup> However, in situations where there is a conflict between the generic features of agency of a 'possible' agent and an actual agent the rights of the latter must be measured against the prior. As Pattinson notes,

Where there is empirical evidence capable of supporting the hypothesis of agency that is (at most) marginal in the case of very simple organisms displaying only patterned life-sustaining behaviour the probability of agency is so low that it can never coherently be given priority in the case of conflict with an ostensible agent. Even though precautionary reasoning will not allow a possible agent to be treated as a non-agent, in these circumstances the likelihood of agency is weighted firmly in the favour of the ostensible agent and granting more than extremely marginal duties of protection to such possible agents would require prohibitive, purpose undermining caution.<sup>205</sup>

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<sup>200</sup> Ibid, 266.

<sup>201</sup> Pattinson, n 164, 25. Cf: Hølm and Coggon, n 185, 304: "Agency is all or nothing...it is not something that an entity is given by a Gewirthian; it is intrinsic. And the chances of an entity being an agent are not affected by the assessment of ostensible characteristics and their relationship to commensurate levels of protection."

<sup>202</sup> Pattinson, n 164, 75: "Indeed, since this is a relatively simple conflict where the same level of prospective harm will be suffered by either the pregnant woman or the gestational embryo-fetus, the pregnant woman's greater moral status is conclusive."

<sup>203</sup> Beyleveld and Pattinson, n 169, 266: "In this context, "agency" is assignable to ostensible agents for practical purposes (i.e., for practical purposes, ostensible agents are to be thought of as agents), because while it is not within the power of precaution to either make something an agent or even to provide us with knowledge that it is an agent, it is open to us to treat or mistreat what is or is not an agent in a morally relevant way, and the epistemic and moral considerations that interplay in the precautionary argument have a direct bearing on the rationality of our actions here."

<sup>204</sup> Beyleveld and Pattinson, n 163, 45.

<sup>205</sup> Pattinson, n 164, 73.

The effect is that, excluding the mere whims of an actual agent, any impact on an agent's generic features of agency will override even the most basic features (life) of marginal characteristic possible agents.<sup>206</sup> But as beings demonstrate greater levels of agency, as happens through a child's development towards full maturity, the result will be that duties towards that would-be agent will shift in their nature, from primarily protective, interest-based to also encompass empowering, choice-based rights.

This can be most clearly expressed through the right to education. For children, the claim-right to education is a provision right based on the child's interest (paternalistically defined) in developing understanding and qualifications for later life. It is also a means of educating children about the society in which they live. As they reach adolescence, in the UK, they may choose to attend 'further education' (College or Sixth Form), they now have a power-right to initiate the claim-right to education. Equally, they may choose to go out to work or take on an apprenticeship. That is, they may be required at this stage to continue *some* form education, but this may not necessarily be school-based. Similarly, at 18 years old, the now adult may choose to go into 'higher education' (University). This may be as of right, whereby the power-right would create a duty in another, or it may be subject to paying tuition fees or achieving the requisite qualifications for entry. Throughout this transformation of 'right', the 'claim-right' involved remains a provision based relation. Yet, the inclusion of the power-right in adolescence and adulthood shifts the right from an *interest* right to a *choice* right. The question now is how this strand of argument bears on the *justification* of rights-holding.

#### **4.3.2 The Justification for Right-Holding**

The basis for my claim in this section is that the *Principle of Rational Precautionary Reasoning* is the source for justifying the holding of rights within a system of institutionalised practical reason legitimised by the *PGC*. That is, in transforming our

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<sup>206</sup> Ibid: "After all the precautionary argument is subject to the proviso that all things must be equal, and level of caution that would be required to protect bacteria, body cells, and other creatures displaying only minimal evidence of agency renders all things far from equal. Living cells are killed when we scratch, bacteria are killed when we wash, insects are killed by our vehicles, etc. Thus, I suggest that any *generic need* of an ostensible agent should be able to override even the most basic harm (i.e., death) to such an entity."

moral commitments under the *PGC* into an institutionalised setting it is this guiding principle that, in a ‘good faith’ attempt to codify those commitments, determines *who* or *what* will hold rights, and which rights will be held. In order to frame this claim, I will begin by considering the options offered by the choice and interest theories.

The choice theorist – generally - allocates, and thereby justifies, rights-holding on the basis of the ability to exercise choice. Since,

agents...are the only intelligible subjects and objects of practical prescriptions (*only for agents does the question arise as to what they may or ought to do, and only to agents is it rational to address a prescription of what they may or ought to do*) and the argument is most fundamentally addressing the question of what actions may or ought to be performed.<sup>207</sup>

The result is that those who *can* possess rights are those rational beings capable of freedom of action.<sup>208</sup> In this way, the *justificatory* aspect of choice theory is that rights protect and foster individual autonomy by empowering right-holders to exercise discretion and this can only be meaningfully exercised by, in this case, full agents.<sup>209</sup> Rights, under this approach, are seen as a device to protect and express autonomy foremost.

For the interest theorist, on the other hand, rights are allocated on the basis that they protect some interest or confer a benefit to the right-holder. It follows that the right-holder must be capable of having interests, seemingly excluding inanimate beings but including children, higher functioning animals and unconscious adult humans.<sup>210</sup> The justifying ground then is that the would-be right-holder has needs and capacities to command respect.<sup>211</sup> However, little is presented in the way of distinguishing those *sufficient* interests worthy of protection from those which are not.<sup>212</sup> Rights, under this approach, are more broadly defined and protect a range of factors beyond, but including, autonomy alone.

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<sup>207</sup> Deryck Beyleveld and Roger Brownsword, “Principle, Proceduralism, and Precaution in a Community of Rights” (2006) 19(2) *Ratio Juris* 141-68, 144 (*my emphasis*).

<sup>208</sup> Campbell, n 4, 47.

<sup>209</sup> Edmundson, n 49, 98.

<sup>210</sup> Campbell, n 4, 48-9.

<sup>211</sup> MacCormick, n 83, 160.

<sup>212</sup> Edmundson, n 49, 98.

Roughly, interest theory is concerned with justifying individual rights on the basis of interests, whilst choice theory is concerned to justify these rights through individual autonomy.<sup>213</sup> In conceptual, or functional, terms, interest theory can better explain those *passive* rights under the Hohfeldian order (claim- and immunity-rights) whilst choice theory requires the addition of *active* rights (privilege- and power-rights) to enable the exercise of autonomy.<sup>214</sup> In justificatory terms, choice theory narrows the class of right-holders to full agents capable of exercising those active rights – to the expense of children, animals and incapacitated adults, though not necessarily *unprotected*<sup>215</sup> – whilst interest theory broadens the class to any being capable of having interests or needs – at the expense of clarity as to what that interest might be.

My suggestion is that the *justification* for rights-holding is better explained by the precautionary principle, *especially* when moral commitments are transformed into legal commitments through the institutionalisation of practical reason. Crucial is the separation between the internal viewpoint of an agent under the *PGC* and the external viewpoint of applying the *PGC* to others. Simply, my internal reasoning leads to the categorical imperative of the *PGC* – that I ought to respect my own and any other agents' generic features of agency *because* of our agency – but as the categorisation of *another* as an agent depends on metaphysical assumptions it cannot be definitively proved that anyone other than myself is an *actual* agent, merely an *ostensible* agent.<sup>216</sup> As the *Principle of Rational Precautionary Reasoning* has shown, the likelihood of any other being but myself will be between  $>0$  and  $<1$  but I am required, by my commitments to the moral principle, to treat any other being that *could be* an agent as if they were an actual agent for practical purposes. The effect is that the duties I hold as an agent to others are grounded not on *actual* agency but on the *possibility of agency* proportionally to the likelihood that that other is an agent.<sup>217</sup> After all,

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<sup>213</sup> Ibid, 106.

<sup>214</sup> Wenar, n 7, 241.

<sup>215</sup> Since these individuals may be protected in law through some other means than rights, i.e. by prohibitory or mandatory rules.

<sup>216</sup> Beyleveld and Pattinson, n 163, 40-1.

<sup>217</sup> Ibid, 48.

Generic rights must be claimed and are claimed validly *because* one is an agent: Gewirth calls this the...Argument from the Sufficiency of Agency...that states that the agent's description of him/herself as a prospective, purposive agent (PPA) is a *sufficient condition of the justifying reason* he must adduce for his having the *generic rights*.<sup>218</sup>

In an institutionalised setting, where actors make a 'good faith' evidence-based attempt to codify those commitments,<sup>219</sup> the allocation of rights is on the basis of this precautionary principle (rather than, on the basis of *actual* agency, i.e. the ability to exercise autonomous choice).<sup>220</sup> The anchoring justification of rights-holding *post-transformation* then is this principle and those rights will be allocated *proportionally* on the basis of evidence to suggest where a given agent is between 0 and 1.

In transforming these moral commitments into institutional reasoning some measure of how the various degrees of agency are to be respected, and in turn allocated rights, must be derived. The levels of agency discussed above are determinative of this allocation.<sup>221</sup> The following levels behaviour are relevant:<sup>222</sup>

1. Behaviour that exhibits *rationality*.
2. Behaviour that displays *intelligence*.
3. Behaviour that evinces *purposivity*.
4. Patterned behaviours produced by all living organisms.

In binary terms those at level 1 will be closer to 1 whereas those at level 4 will be closer to 0. In addition to this, there are *living previous* 'agents', *deceased previous* 'agents', and *potential* 'agents'. In turn, the rights allocated to those levels (and classes) will be differentiated accordingly. Rights will *proportionally* represent the degree of ostensible (behavioural) agency. As Beyleveld and Pattinson note,

...in practice, we can say that we have shown that agents owe duties of protection to partial agents in proportion to their approach to being agents. If we do this,

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<sup>218</sup> Stuart Toddington, "The Moral Truth About Discourse Theory" (2006) 19(2) *Ratio Juris* 217-29, 222 (*my emphasis*).

<sup>219</sup> Pattinson, n 164, 71.

<sup>220</sup> Beyleveld and Pattinson, n 163, 52.

<sup>221</sup> Beyleveld and Pattinson, n 169, 263-4.

<sup>222</sup> Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001), 124.



however, it must not be forgotten that this is only a shorthand, and that the duties are actually owed to beings that are apparently only partial agents on the basis of their possible status as agents, by virtue of which they are owed not in proportion to the degree of approach to being an agent but in proportion to the degree to which what is apparently only a partial agent approaches being an ostensible agent.<sup>223</sup>

So, capable adult humans are likely to hold rights which both empower choice and that protect interests, as both molecular and single incidents – for instance, rights to vote, to bodily integrity, to drive (with a license) and so on. Children, on the other hand, are likely to be allocated passive rights to protection from harm and to the provision of services which aid their development to full agency.<sup>224</sup> Animals, meanwhile, may hold rights of protection from (*unnecessary*) harm; that is, where their interest in basic well-being is not in conflict with a ‘*full*’ agent’s generic features of agency.<sup>225</sup> Whilst I do not suggest that this provides a full determinate legislative code for the allocation of rights, it provides a measure for the ‘good faith’ incorporation of rights within such a system.

Key to this system is the recognition that rights are not *absolute*. Rights may be allocated - for instance, the right to basic well-being of a foetus – but are subject to qualification by other conflicting rights.<sup>226</sup> This is important to our understanding of rights<sup>227</sup> - as rights do not occur in isolation (others will have rights which overlap the issue covered by your right).<sup>228</sup> It is the overlapping nature which helps us to understand the boundaries of acceptable conduct.<sup>229</sup> As Gewirth notes,

...few if any rights are absolute. There cannot be universal or completely unrestricted freedom because the freedom of potential interferers with freedom must be restricted if the freedom of noninterferers is to be preserved. More generally, the freedom to harm other persons must be prohibited...<sup>230</sup>

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<sup>223</sup> Beyleveld and Pattinson, n 163, 52.

<sup>224</sup> Gewirth, n 132, 141.

<sup>225</sup> Ibid, 144-5.

<sup>226</sup> Pattinson, n 164, 75.

<sup>227</sup> This appears to be a fallacy of Hohfeldian thought: Grant Keeter, *Conflicting Rights: A Hohfeld Analysis of the Right to Life and the Right to Abort* (2011) available at <<http://blog.abolishhumanabortion.com/2011/08/conflicting-rights-hohfeld-analysis-of.html>> (accessed 15.07.2014).

<sup>228</sup> Campbell, n 4, 33.

<sup>229</sup> Raz, n 59, 183.

<sup>230</sup> Gewirth, n 61, 47.

These conflicts are to be resolved by tri-fold devices discussed above. This claim simply maintains that our moral (and, in turn, legal) obligations are dependent on the options available to us in situations where conflict with the generic rights of two or more agents is threatened. Thus, '[w]here the conflicting considerations override those on which the right is based on some but not on all occasions, the general core right exists but the conflicting considerations may show that some of its possible derivations do not.'<sup>231</sup> This approach insists that rights are subjected to a 'threshold' (or to a 'qualification') which accounts for possible countervailing considerations which may outweigh the interests held in a given right.<sup>232</sup> This approach can be exemplified in response to the 'Trolley Problem',<sup>233</sup> which is framed as,

Suppose you are the driver of a trolley. The trolley rounds a bend, and there come into view ahead five track workmen, who have been repairing the track. The track goes through a bit of a valley at that point, and the sides are steep, so you must stop the trolley if you are to avoid running the five men down. You step on the brakes, but alas they don't work. Now you suddenly see a spur of track leading off to the right. You can turn the trolley onto it, and thus save the five men on the straight track ahead. Unfortunately,...there is one track workman on that spur of track. He can no more get off the track in time than the five can, so you will kill him if you turn the trolley onto him. Is it morally permissible for you to turn the trolley?<sup>234</sup>

In a situation such as this the approach maintained would place greater weight on the rights to basic well-being of the five men than that of the one track workman and so it would be morally permissible to turn the trolley. Yet this would not suggest that the workman's right to life is no longer present rather that the countervailing considerations outweigh that right in these circumstances.<sup>235</sup> In this way, rights are balanced throughout the community, with the effect that no one individual can over claim their generic features of agency.<sup>236</sup>

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<sup>231</sup> Raz, n 59, 184.

<sup>232</sup> Edmundson, n 49, 120-1.

<sup>233</sup> Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect" (1967) 5 *Oxford Review* 1-7, 3.

<sup>234</sup> Judith Jarvis Thomson, "The Trolley Problem" (1985) 94(5) *The Yale Law Journal* 1395-1415, 1395.

<sup>235</sup> Beyleveld, n 130, 410-1.

<sup>236</sup> Gewirth, n 61, 82-3.

In envisaging the Community of Rights we must begin by departing from the ‘traditional’ abstraction involved in rights talk – that is, by distancing ourselves from the archetype elucidation of rights as ‘X has a right that Y  $\phi$ ’. Whilst as a conceptual statement this may well be true it ignores the vast matrix of mutual jural relations existing within a community. It is simultaneously the case that ‘Y has a right that X  $\phi$ ’ as it is that ‘Y has a right that J  $\phi$ ’ as it is that ‘A has a right that Q  $\phi$ ’ and ‘F has a right the L  $\phi$ ’ and so on. The importance of this reimagining ought not to be underemphasised. For it is in the mutual and equal grounding of rights (and, indeed, obligations) stemming from the objective criterion of the *PGC* that such a complex matrix can be justly and fairly established. The effect is,

In the first instance, this is a matter of institutional arrangements focused in the society’s legally enforced policies, so that they serve to secure legal rights. But these arrangements already mark a departure from egoism and individualism, because the positive obligations they require through taxation and other means involve that persons must mutually further the agency-related needs and interests of other persons besides themselves, especially those who are more deprived. In these ways society through its institutional arrangements makes indispensable contributions to its members’ education, health, safety, and various other social and economic goods that comprise the necessary conditions of action and of generally successful action, and thereby it helps them to attain a position of personal responsibility.<sup>237</sup>

When incorporating at a base level into institutionalised practical reason the moral commitments of the *PGC*, which as I demonstrated in Chapter 3 is a logical consequence of incorporation, the justification of the make-up of that very system is *justified* and *legitimised* by those very commitments. As this legitimating criteria shifts into the policies of that institution it acts so as to shift from the bare individualism commonly associated with ‘rights-talk’ and instead the conception becomes one of an interrelated, mutually-dependant and inclusive attempt at regulating and fostering individual and collective action fulfilment and responsibility. Simply put, the collective (as state and multitude) holds a right to an institutionalised system support its members. As Beyleveld and Brownsword note,

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<sup>237</sup> Gewirth, n 61, 82.

In a community of rights, it is the moral commitments of the community that structure regulatory discourse and that guide both regulators and regulatees through both the substance of their public disputes and the manner and form of their peaceful resolution.<sup>238</sup>

It is, as Gewirth puts it, ‘a morally superior mode of human association’<sup>239</sup> which runs counter to the prudence and divisiveness of alienated individualism.

#### **4.4 Summary**

The applicatory framework adopted in the following chapters builds on the legal and moral-legal evaluatory schemas outlined in this section. In order to understand and examine the viability of a right to reproductive autonomy in England and Wales it is necessary to deconstruct the existing legal position into the Hohfeldian language of rights. This enables us to determine whether a given rights-based relation exists but also *importantly* the contours and qualification of those rights alongside whom those rights are directed against. This deconstruction will feed into the determination of the moral legitimacy of the legal position on the basis of the commitments to *PGC* analysed through the intra-variable conflict determination. From this I offer my interpretation of what an institutionalised-*PGC* would require, thus opening a discourse as to the optimum means of regulation.

The three stage deconstruction of legal incidents based on the developed Hohfeldian framework provides a means of understanding complex legal relations according to the concise language of jural incidents whilst also taking ‘rights talk’ out of the abstraction of the ‘single incident’ approach. By so doing, we step away from Hohfeld’s abstract theory of rights, towards a more complete understanding of how *communities of rights* are formed.<sup>240</sup> It is the point at which rights conflict and overlap that we are able to take the conceptualisation to its fullest and gain a truer understanding of the nature of the entire community. This allows for the jigsaw that is constructed by a *universal* account of rights-

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<sup>238</sup> Beyleveld and Brownsword, n 162, 166-7.

<sup>239</sup> Gewirth, n 61, 82.

<sup>240</sup> Gareth Jones, “Introduction” in Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin, 1967), 168-9.

based relations within a given regulatory regime to be imagined. Amongst a backdrop of legal misnomers it is by doing this that we might find ourselves better placed to determine the scope of (and existence of) a right to reproductive autonomy.

In complex intra-variable conflicts, especially as the conflict is to be determined by greater factors, determination of the application of the *PGC* becomes more strained. Unless each variable can be allocated some precise cardinal value and so evaluation might take place in purely mathematical terms, we are forced to face this moral determination as an incommensurable process. The result is that what is required is a ‘good faith, transparent and accountable judgment’ preferably by those ‘persons authorised under the *PGC* to make such judgments.’<sup>241</sup> This ought not to be surprising given the generic nature of the conditions of agency, the hierarchical continuum of agency and the varying levels of speculative harm. This does not, however, necessitate that we, as agents, must be morally paralysed by the determination of whether to scratch the bacteria from our arms (even if we were to perceive the action in this way) or whether to drive our automobiles to the risk of small bugs.<sup>242</sup> Rational precaution does not provide an easy or obvious means to resolving intra-variable agency based conflicts but it does allow for the use of a hierarchical schema to weigh the interests of (non-)ostensible agents. The combination of the *Hierarchy of Generic Goods*; the *Criterion for the Avoidance of More Probable Harm*; and the *Principle of Rational Precautionary Reasoning* provide generic, yet imprecise, tools for evaluating *PGC*-based conflict, which at the very least offer a framework for opening an honest and other-regarding discourse as to how public conflict might be resolved.

The proposed theory of rights seeks to demonstrate that concerns for autonomy and the interests of agency are the considerations that run to the heart of the *morally rational* concerns and the incorporation of those concerns in legal reasoning. When conceived as notions which relate to the function of legal enterprise itself, and therein as the justifying criteria for the use of power, it becomes clear that the emphasis on the necessity of these considerations for the function and normative nature of rights is rather an assertion as to

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<sup>241</sup> Ibid, 269.

<sup>242</sup> Hølm and Coggon, n 185, 308. See, Beyleveld and Pattinson, n 169, 269-70.

the connection of law and morality. Concerns for autonomy and the interests of agency are relevant to the nature of rights *because* they are concerns for the moral rationality that necessarily underpins legal reasoning.

## Chapter 5      Rational Autonomy and Reproduction

In this chapter, I seek to propose a model of autonomy based around the moral and legal commitments derived from the Principle of Generic Consistency (*PGC*) over the previous chapters. This is a model of *Rational Autonomy* and seeks to base its approach to public and private issues of autonomy around this framework in order to derive a rights-based legal framework for evaluating reproductive autonomy in situations where agents wish to control their fertility or to terminate an existing pregnancy. It attempts to understand the issues surrounding abortion and contraception in the UK and how this relates to ideas around our reproductive autonomy.

The approach proposed relies on the interconnectedness of law and morality in rights-based reasoning in order to derive a system of autonomy which demonstrates respect, and emphasises its meaningfulness by balancing it against other competing interests. It seeks to build upon both the bioethical and feminist approaches to the concept of autonomy by evaluating the individual exercise and the relationship between the State and the decision made. It relies on the rights-based moral-legal framework advocated throughout this thesis in order to offer a balanced model of the concept which provides tools for demonstration of respect and for the support of agency. The analysis of issues surrounding abortion and contraception will provide a platform for the development of this approach whilst also allowing for the consideration of how ‘rights to reproductive autonomy’ could be sustained within a Community of Rights committed to the *PGC*.

I will begin by providing an overview of the historical development of family planning in the UK to provide context for the later analysis. I will then revisit the outline of reproductive autonomy provided in the opening discussion before moving on to consider the issues surrounding abortion. In doing so, I set out to frame the model of Rational Autonomy around some of the more contentious issues and the developing technologies

which change the way in which we most approach these issues. Finally, I consider the provision and use of contraceptives in the UK as a means for evaluating the dual role of the autonomy discourse to expose issues of private decision making and public policy and provision.

## **5.1 Historical Overview of Family Planning**

In this section we will consider the historical-legal development of the use and availability of contraceptives and family planning in the UK. This will form the basis of the legal analysis and subsequent conceptualisation. In 1921, Marie Stopes opened the first birth control clinic and in 1930, following the formation of five separate birth control societies, the National Birth Control Council (NBCC) was formed which later became the National Birth Control Association (NBCA).<sup>1</sup> In 1932, the NBCA was offered the use of the Maternity and Child Welfare Clinic in Plymouth and this set the trend for the future with most clinics being run on council premises. In 1939, the NBCA became the Family Planning Association (FPA) with 65 clinics operating nationwide. The provision of family planning services was not included in the establishment of the NHS in the National Health Services Act 1946. By 1958, the number of clinics operating nationwide had increased to 292. However, it was not until 1960 that contraceptive advice and family planning services were offered to unmarried women.<sup>2</sup>

A year later, in 1961, the FPA approved the use of oral contraceptive in its clinics and in 1965 the use of Intrauterine Devices (IUDs) were approved for use. The National Health Service (Family Planning) Act 1967<sup>3</sup> enabled Local Health Authorities (LHAs) to give birth control advice, regardless of marital status, on both social and medical grounds through voluntary organisations such as the FPA. In 1968, the FPA opened vasectomy clinics in Cardiff, West Bromwich, Glasgow and London - the National Health Service

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<sup>1</sup> Family Planning Association, "A History of Family Planning Services" (October 2011) <[http://www.fpa.org.uk/sites/default/files/a-history-of-family\\_planning-services-october-2011.pdf](http://www.fpa.org.uk/sites/default/files/a-history-of-family_planning-services-october-2011.pdf)> (accessed 08/09/2015).

<sup>2</sup> Ibid.

<sup>3</sup> This was replicated in Scotland by Section 15, Health Services and Public Health Act 1968.



(Family Planning) Amendment Act 1972 allowed LHAs to provide free vasectomies - and in 1969 formal training was given to doctors and nurses in contraceptive techniques.

Family planning was incorporated in the NHS under the s4 NHS Reorganisation Act 1974 and FPA clinics were handed over to Area Health Authorities (AHAs) and GPs agreed to join NHS family planning services from 1975. Under s5(1)(b) National Health Service Act 1977 a duty was imposed on the Secretary of State to ensure that a full range of contraceptive services was provided free of charge. In 1980 the Department of Health and Social Services issued guidelines for providing services to young people<sup>4</sup> and these were approved by the House of Lords in *Gillick*<sup>5</sup> in 1985.

In 2000, the Medicines Act 1968 was amended to allow the supply and/or administration of prescription-only medicine by a designated health professional which meant an increased provision of contraception by nurses and pharmacists. In 2002, the Nurse Prescribers' Extended Formulary authorised independent nurse prescribers, following the completion of specialist training, to issue contraception and emergency contraception.

It is now necessary to return to the conception of Rational Autonomy which is adopted to examine reproductive autonomy in relation to abortion and the use of contraceptives later in this chapter. Having done so, I will begin by focusing on abortion and the legal framework adopted in England and Wales for legalising the procedure. I then go on to consider some of the issues which might affect the *legitimate* exercise of autonomy in these situations, thus presenting a contextual and rational account of reproductive autonomy in relation to abortion.

## **5.2 Revisiting Reproductive Autonomy**

At the beginning of this thesis, I sought to demonstrate that autonomy and reproductive autonomy, more specifically, comprised two important elements: namely, issues of

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<sup>4</sup> Department of Health and Social Security, *Family Planning Services for Young People* (1981) HN (81)15.

<sup>5</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

personal and public autonomy. I claimed that autonomy, at a personal level, could be understood, as Beauchamp and Childress<sup>6</sup> claim, to comprise conditions of *intent*, *voluntariness* and *sufficiency of information*. But importantly, this must be expanded, in terms of the *legitimacy* of autonomous choice to include considerations as to the rational implications of autonomy and practical reason. This was initially met through Kant's argument to the first Categorical Imperative<sup>7</sup> but has now been surpassed and broadened by Gewirth's argument to the *PGC*.<sup>8</sup> This provided the means for understanding the importance of and assessing the legitimacy of a *rational* account of autonomy.

In narrowing the focus to reproductive autonomy I found this to relate to, 'the ability to be self-determining and to act on one's own values in making decisions about reproduction'<sup>9</sup> and that, 'Full Procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses.'<sup>10</sup> The importance of the concept stems from its relationship 'to personal identity, to dignity, and to the meaning of one's life.'<sup>11</sup> Yet it goes beyond, simply, being free to make reproductive choices.<sup>12</sup> Beyond this, I found that notions of *public* reproductive autonomy required 'positive provision of resources and services [that] may be necessary in order to assist people both to work out their own priorities and to realise them.'<sup>13</sup> This requires a broader consideration of the role that reproductive autonomy has on the interplay between the Self and the State. Therein, it requires a broader consideration of the framework for assessing the *legitimacy* of interference upon individual autonomy by the collective or the State. As Purdy argues,

Autonomy is not simply about the rights and ability of an individual to assert his or her interests against the rest of the world. Rather, it is more nuanced, more

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<sup>6</sup> Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 6<sup>th</sup> ed (Oxford University Press, 2009).

<sup>7</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 31, [4:421].

<sup>8</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978).

<sup>9</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013), 2.

<sup>10</sup> John Robertson, 'Procreative Liberty and the Control of Contraception, Pregnancy and Childbirth' (1983) 69 *Virginia Law Review* 405, 406.

<sup>11</sup> *Ibid*, 24.

<sup>12</sup> *ibid*, 48.

<sup>13</sup> Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001), 7-8.

relational. It is about the ways that our desires, dreams and interests may be expressed within the rich, complex and unruly tangle of relationships that are part of life in modern society. Without this understanding, autonomy remains just an empty shell.<sup>14</sup>

This seeks to allow the expression of an individual's autonomy to be situated amongst a range of other, potentially competing interests. In order to understand the broader notion of State interference and the relationship between the agent(s) and the State, it was necessary to develop an understanding of the quality of *PGC*-based regulation and legitimacy.

How, on this basis, are we to begin to frame a discussion of the Right to Reproductive Autonomy? For Dworkin, 'people have the moral right – and the moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions.'<sup>15</sup> Whilst this introduces us to the plausible, though somewhat self-explanatory, nature of the Right to Reproductive Autonomy, we lack a sufficient understanding of both the public and private implications of an assertion to that right. It is, similarly self-explanatorily, held as a complex or molecular right within the understanding of the Hohfeldian schema advocated. The description then of its reference to control over one's procreative sphere may be apt for this umbrella terminology. The derivations from the umbrella right and the nature of the various rights-based relations (the Hohfeldian incidents) existing under it must be suitably identified, aligned and justified. It seems straightforward to assert that for anyone to control their procreative spheres they must have, at least, *prima facie* choices which can legitimately and/or legally be made and some degree of understanding as to the consequences of those choices.

The *de minimis* expression of the model of Rational Autonomy is found in the affirmation of the ability to, at the most basic level, exercise a choice, in some context, between procreating and not, provided this does not impact on another agent in a way contrary to the *PGC*. It is this qualification that I take as the second condition in Dworkin's

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<sup>14</sup> Laura Purdy, "Are Pregnant Women Fetal Containers?" (1990) 4(4) *Bioethics* 273-91, 273.

<sup>15</sup> *Ibid*, 166.

definition. For Dworkin, the right to procreative autonomy refers to one's '...control [over] their own role in procreation unless the state has a compelling reason for denying them that control.'<sup>16</sup> That is, rather than searching for compelling reasons for the state to deny them such control, what is important is the negative impact in accordance with the *PGC* and, therein, the issue of *legitimate* interference with choices.<sup>17</sup> As Gewirth notes,

...autonomy must be rational, in that the rules or laws one sets for oneself have been arrived at by, or at least compatible with, a correct use of reason so that one recognises that all other prospective agents have the same rights one necessarily ascribes to oneself: an inference that culminates in the *PGC* as the principle of human rights.<sup>18</sup>

The effect is that, 'In choosing to comply with the *PGC* the agent is rationally autonomous in the strict sense.'<sup>19</sup> This model of Rational Autonomy seeks to emphasise the cooperative and mutual nature of the principle of autonomy as a tenet of freedom.<sup>20</sup> As Hale notes, '[t]here [can] be limits placed on liberty, for it must not become licentiousness.'<sup>21</sup> It emphasises agents' 'corresponding rights and obligations whereby they mutually help one another to develop as autonomous and cooperative persons through the policies and institutions of the Community of Rights.'<sup>22</sup> From this simplistic affirmation of control in the basic, abstract setting, we are enabled to begin to focus on the tangible manifestation of this right in situation-specific contexts where this right may be enacted – for instance, through access to family planning services, to safe and legal abortions, to fertility control, to procreative education, to contraceptive methods and to the security of these over other persons.

I claim that autonomy must be modelled rationally as a public and private good. This requires subjecting the exercise of autonomy to the Tools for the Resolution of Intra-

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<sup>16</sup> Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, And Individual Freedom* (New York: Knopf, 1993), p 148.

<sup>17</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1997), 55, [4:449].

<sup>18</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 117.

<sup>19</sup> Gewirth, n 8, 139.

<sup>20</sup> Kant, n 17, 57, [4:452-3].

<sup>21</sup> Baroness Hale, "Magna Carta: Did She Die in Vain?" (19 October 2015) Speech given at Gray's Inn, available at <https://www.supremecourt.uk/docs/speech-151019.pdf> (accessed 4.11.2015), 8.

<sup>22</sup> Gewirth, n 8, 348.

Variable Conflict in order to determine the legitimate exercise of choice (and to balance this interest across the community). Equally, I claim that it is necessary for the State to hold duties to empower *productive* agency through autonomy by means of research, funding, etc., so that individuals are enabled to make 'real' choices as to how to live their lives. In this way, the bioethical notion of informed consent alongside the Tools for the Resolution of Intra-Variable Conflict provide a platform for determining the exercise of private *Rational Autonomy*. The relational model of autonomy and the notion of *productive* agency is used to evaluate public rational autonomy.

The focus of this thesis is on the manifestation of those rights-based relations that are concerned with the *avoidance* of conception or child-birth. Yet the issue is not restrained to this alone; further expansion of the argument can be made into issues of positive attempts to conceive (i.e. through IVF), the manner of reproduction (i.e. issues around new technologies enabling foetal selection, influencing traits and so forth) and issues of alternatives to traditional parenthood and reproduction (i.e. through surrogacy and human cloning). In this way, we can begin to ground the right more lucidly and better understand the specific rights-based relations of a molecular Right to Reproductive Autonomy. Key to this is the interplay between technical advances which enable the choice to be made and the legal and moral issues associated with the empowerment of choice and, therein, the ability to effect one's autonomy.

### **5.3 Abortion**

In this section, I will begin by outlining the legal framework (and its development) governing abortion in England and Wales before evaluating this alongside the model of Rational Autonomy adopted in this thesis. In so doing, it is necessary to consider the legitimate exercise of reproductive autonomy in relation other concerned parties, such as the foetus, the father and the medical professionals involved, before considering how the model of autonomy fits publically with the current legal position. Finally, I will consider how this is impacted by technological and medical developments, specifically in this case through the Early Medical Abortion procedure and its regulation.

### **5.3.1 History and Legal Framework**

Abortion became subject to the death penalty by the assent of the Ellenborough Act 1803 when an abortion was performed after ‘quickening’ occurred.<sup>23</sup> At this time, it was believed that the soul entered the body at the point of ‘quickening’. Prior to this the offence carried a more lenient sentence. This was, however, removed in 1837 and the death penalty applied before or after ‘quickening’. Later the Offences Against the Person Act 1861 (OAPA) provided that performing an abortion (by the mother or another person) carried life imprisonment by the creation of two separate offences. The offences of ‘Administering drugs or using instruments to procure abortion’<sup>24</sup> and ‘Procuring drugs to cause abortion’<sup>25</sup> were introduced. Both of these remain law today and, as such, abortion – by the mother or another person – remains a criminal offence.<sup>26</sup> The Infant Life Preservation Act 1929 (ILPA) later introduced the offence of ‘destroy[ing] the life of a child capable of being born alive’ (post-28 weeks) except where the woman’s life was at risk.<sup>27</sup>

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<sup>23</sup> This refers to the first fetal movement during pregnancy and usually occurs between the sixteenth and eighteenth week.

<sup>24</sup> s58 Offences Against the Person Act 1861: “Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .”

<sup>25</sup> s59 Offences Against the Person Act 1861: “Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .”

<sup>26</sup> Law Commission, *Reform of Offences Against The Person* (Law Com No 361, 2015).

<sup>27</sup> s1 Infant Life Preservation Act 1929: “(1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.”

In 1938, in the case of *R v Bourne*<sup>28</sup>, a doctor was acquitted of performing an abortion on a young girl who had been raped by a group of soldiers on the grounds that it was expected she would suffer serious mental harm as a result of giving birth to the child. The effect of this was to open the doors for a 'legal' route by which women could obtain safe abortions. However, uncertainty remained; it was necessary for a psychiatrist to approve the abortion on the grounds that it would threaten the life of the pregnant woman and was restricted to those who could afford to pay for a compliant psychiatrist. This led to growing support and the establishment of the Birkett Committee for the legalisation of abortion in the UK, but changes were delayed due to the Second World War

As the promotion of family planning began to grow in the 1960s the topic was revisited and the Abortion Act 1967 was created.<sup>29</sup> This was later amended by the Human Fertilisation and Embryology Act 1990. The effect of this was to establish the current legal regime concerning abortion by providing defences to ss58 and 59 OAPA and s1 ILPA. This requires that the abortion is conducted within an NHS hospital or a place approved by the Secretary of State, subject to the approval, in good faith, by two registered medical professionals – except in cases where termination is *immediately* necessary to save the life of or prevent grave permanent injury to the pregnant woman.<sup>30</sup> The amendment also provides four potential grounds on which abortions may be performed under s1(1).<sup>31</sup>

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<sup>28</sup> *R v Bourne* [1938] 3 All ER 615.

<sup>29</sup> When enacted the Abortion Act 1967 provided two grounds for legal abortions:

‘(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.’

<sup>30</sup> s1 Abortion Act 1967 as amended by Human Fertilisation and Embryology Act 1990.

<sup>31</sup> s1(1) Abortion Act 1967:

‘(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.’

The effect of this is to set the time limit at 24 weeks only for terminations performed under s1(1)(a) with no time limit applicable to the other grounds – s1(1)(b),(c) and (d). Nevertheless, in 2014 the first ground accounted for 98.2% of all abortions performed in England and Wales<sup>32</sup> – leading to a perception that it is (or is treated as) a ‘catch all’ ground<sup>33</sup> – and only <0.1% (211) of abortions were performed after the 24<sup>th</sup> week.<sup>34</sup> It was also found that around 80% of abortions were performed in the first 10 weeks.<sup>35</sup>

### **5.3.2 Abortion and Reproductive Autonomy**

In this section, I begin to unravel the notion of Reproductive Autonomy in relation to abortion. The importance of so doing is two-fold. Firstly, it allows us to consider the role of the legitimate exercise of reproductive autonomy in relation to the decision to abort. Secondly, it allows us to offer a more sophisticated and grounded assessment of the abortion dichotomy premised around the rational moral commitments of the *PGC*. This allows, ultimately, the avoidance of counter-intuitive assertions as to the respective value of reproductive autonomy over and above many other considerations. Afterall, ‘[it] is inadequate to only consider restrictions on abortion through the lens of particular fundamental right as such, a one-dimensional approach invariably results in...oversimplification’.<sup>36</sup> The key for the purposes of this thesis, however, is to seek to further elucidate the notion of *public* reproductive autonomy. In order to do so, it is important to begin by briefly recapping the tools for evaluating *intra-variable* conflict in

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<sup>32</sup> Department of Health, *Abortion Statistics England and Wales: 2014* (June 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/433437/2014\\_Commentary\\_\\_5\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433437/2014_Commentary__5_.pdf) (accessed 08.09.2015), 10. See also: Department of Health, *Abortion Statistics England and Wales: 2013* (June 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319460/Abortion\\_Statistics\\_\\_England\\_and\\_Wales\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319460/Abortion_Statistics__England_and_Wales_2013.pdf) (accessed 11.08.2014), 19, this figure was 98.4% in 2013.

<sup>33</sup> Kenyon Mason and Alexander McCall Smith, *Law and Medical Ethics* 5<sup>th</sup> Ed (London, 1999), 116: ‘It is arguable that the risks of an abortion to the health of the woman are always less than those of full-term pregnancy – particularly if the termination is carried out in the first trimester.’

<sup>34</sup> Department of Health, *Abortion Statistics England and Wales: 2014* (June 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/433437/2014\\_Commentary\\_\\_5\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433437/2014_Commentary__5_.pdf) (accessed 08.09.2015), 15.

<sup>35</sup> *Ibid.*

<sup>36</sup> Ronli Sifris, ‘Restrictive Regulation of Abortion and the Right to Health’ (2010) 18 *Medical Law Review* 185-212, 189.



accordance with the *PGC*. Having done so, we will then look to evaluate some of these conflicts which occur in relation to abortion.

In order to understand how the resolution of intra-variable conflict might take place. This requires us to consider the *Hierarchy of Generic Goods*; the *Criterion for the Avoidance of More Probable Harm*; and the *Principle of Rational Precautionary Reasoning*. Beginning with the *Hierarchy of Generic Goods*, it will be remembered that this refers to the weighting of the generic goods – freedom and well-being – according to ‘the degree of their indispensability for purposive action.’<sup>37</sup> This hierarchy creates a complex structure of rights which can be cross-weighted against one another. In this way, where the greater the needfulness of a given generic good will outweigh (and therein ‘trump’) an opposing claim to generic good, we are able to ‘[give] greater weight to those generic features whose hindrance or removal will more probably interfere (or tend to interfere) with an agent’s ability to achieve its purposes’.<sup>38</sup> Simply put, it allocates greater moral concern to interferences which affect, for instance, an agent’s life than an agent’s concern for acquiring more money.

The *Criterion for the Avoidance of More Probable Harm* builds on this by adding a further dimension of consideration based on the likelihood of that harm occurring, when this differs. It states that, ‘If my doing y to Z is more likely to cause harm h to Z than my doing y to X (and I cannot avoid doing y to one of Z or X) then I ought to do y to X rather than to Z.’<sup>39</sup> It seeks to develop the evaluation of intra-variable conflict by further considering the likelihood that harm will manifest, in addition to the degrees of harm involved.<sup>40</sup> This means that when, ‘Faced with a conflict between different degrees of probability with regard to the occurrence of harm, a reformulated *Criterion for the Avoidance of More Probable Harm* provides a structure for priority.’<sup>41</sup> In situations where

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<sup>37</sup> Gewirth, n 8, 62.

<sup>38</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 72.

<sup>39</sup> Deryck Beyleveld and Shaun Pattinson, ‘Precautionary Reasoning as a Link to Moral Action’, in Michael Boylan (ed), *Medical Ethics* (Prentice-Hall, 2000), 39-53, 44.

<sup>40</sup> Pattinson, n 38, 72.

<sup>41</sup> Ibid, 68.

both the *degrees* of harm and *probabilities* of harm differ, the two must be weighted in order to avoid the greater violation of the *PGC*.

The *criterion* is further developed in relation to the *Principle of Rational Precautionary Reasoning* which seeks to introduce the concern of moral status of the agent into intra-variable conflicts. This Principle states that,

If there is no way of knowing whether or not X has property P, then, insofar as it is possible to do so, X must be assumed *to have* property P if the consequences (as measured by the Principle of Generic Consistency) of erring in presuming that X *does not have* P are worse than those of erring in presuming that X *has* P (and X must be assumed *to not have* P if the consequences of erring in presuming that X *has* P are worse than those of assuming that X *does not have* P).<sup>42</sup>

Generally speaking, the effect of the Principle is that (unless it can be conclusively shown to be otherwise) whenever X *may* be an agent, X is to be treated *as an agent* for practical purposes *unless* to do so would threaten the generic rights of an actual agent – or an ‘agent’ showing greater signs of agency. Beyleveld and Pattinson present four levels of agency:<sup>43</sup>

1. Beings who behave as though they are agents;<sup>44</sup>
2. Beings who we are uncertain as to their demonstrations of agency;<sup>45</sup>
3. Beings that do not behave quite as agents but who have some behavioural capacities which apparent agents display;<sup>46</sup>
4. Beings that do not behave like agents and show no signs of agency related behavioural capacity;<sup>47</sup>

Simply, X, provided there is a possibility of violating the *PGC*, is to be treated as an agent unless doing so will pose a violation to Y, who holds a greater demonstration of agency.

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<sup>42</sup> Beyleveld and Pattinson, n 39, 24.

<sup>43</sup> Deryck Beyleveld and Shaun Pattinson, ‘Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon’ (2010) 23(2) *Ratio Juris* 258-73, 263-4.

<sup>44</sup> E.g. ‘normal’ adult human beings, sophisticated robots, sentient non-human animals or plants.

<sup>45</sup> E.g. human children (at early stages of communicative competence), dolphins, whales, non-human primates, etc.

<sup>46</sup> E.g. dogs, cats, pigs, horses, plants, bacteria, computers with some self-regulating functions.

<sup>47</sup> E.g. rocks, doughnuts and other inanimate objects. Pattinson, n 38, 73, notes: ‘Where the probability of agency is entirely metaphysical, lacking *any* supportive empirical evidence (as is the case of just about all non-living objects, such as tables), *any* straight conflict between its possession of possible generic rights and those of a being displaying evidence of agency, must be determined in favour of the latter.’

It is at this point that we are able to develop the Principle in accordance with the *Criterion*, by allowing the consideration of the *likelihood* of violating the *PGC* by acting in a way which risks harming X or Y. In this situation, where the generic rights of X and Y are in conflict, the *Criterion* instructs that an agent respect the rights of whomever is more probably an agent. As Pattinson notes,

Even though precautionary reasoning will not allow a possible agent to be treated as a non-agent, in these circumstances the likelihood of agency is firmly weighted in the favour of the ostensible agent and granting more than extremely marginal duties of protection to such possible agents would require prohibitive, purpose-undermining caution. After all the precautionary argument is subject to the proviso that all things must be equal, and level of caution would be required to protect bacteria, body cells, and other creatures displaying only minimal evidence of agency renders all things far from equal.<sup>48</sup>

The *Principle* then holds the four levels of agency as most probable to conflict with the *PGC* in relation to Ostensible agents<sup>49</sup> over Potential agents<sup>50</sup> over Partial agents<sup>51</sup> over ‘Metaphysical’ agents.<sup>52</sup>

As I claimed in the previous chapter, rights are normatively connected to these tools for resolving intra-variable conflict both in terms of function and of justification. The primacy of rights is determinable by reference to the *Hierarchy of Generic Goods* and the *Criterion for the Avoidance of More Probable Harm* which sets out to protect the agent more likely to suffer the more serious harm. Within this, it should be remembered that the generic features of agency include freedom, well-being and autonomy. Meanwhile, rights are justified on the basis that a being *might* – by the *Principle of Rational Precautionary Reasoning* – be an agent. The determination of which rights are to achieve primacy and to be respected within a system of institutional reasoning is through a good faith attempt to balance these factors.

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<sup>48</sup> Pattinson, n 38, 73.

<sup>49</sup> Those who appear to act for purposes which constitute reasons for action.

<sup>50</sup> Those who have the potential to become full agents.

<sup>51</sup> Those who hold *some* of the characteristics of agency.

<sup>52</sup> Non-living creatures whom show no signs of agency.

***a. The Moral Status of the Foetus***

It is at this juncture we must return our focus to the issue of abortion and consider, directly, the moral status of foetuses. The *Principle of Rational Precautionary Reasoning* recognises the moral status of unborn foetuses, throughout the stages of their development, on the basis of, both, their demonstration of the characteristics of agency and the potential for full agency.<sup>53</sup> Therefore, the moral status of all foetuses is not equal. As Gewirth notes,

...the fetus approaches having the generic rights to the extent to which it approaches having the generic practical abilities and the corresponding purposes or desires. Hence, a six-month fetus has the right to well-being to a greater degree than does a three-month fetus, and the latter more than a four-week fetus, and so forth, so that there is correspondingly less justification for abortion the greater the approach to maturation.<sup>54</sup>

The moral status of the foetus increases as it develops and becomes capable of demonstrating greater signs of agency. Similarly, factors on the foetus' actual propensity for agency are relevant to the ascription of moral status; for example,

...an anencephalic child (i.e., one born without all or most of the brain) will manifest very little evidence of agency. It cannot display any significant stimulus response or any cognitive potential and, even with artificial aid, it is unlikely to survive after birth. Its limited moral status will thereby greatly increase the strength of any claim in favour of its abortion.<sup>55</sup>

This is an important consideration. On the approach taken, the ascription of moral status is not simple on the basis of being a (potential) member of the human race, but also on the demonstration of the relevant characteristics of agency.<sup>56</sup> The anencephalic child then is to be ascribed equal or even less moral significance as the bacteria found on the surface

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<sup>53</sup> Pattinson, n 38, 78.

<sup>54</sup> Gewirth, n 8, 143.

<sup>55</sup> Pattinson, n 38, 78.

<sup>56</sup> Gewirth, n 8, 143. See also: Sheila McLean, *Autonomy, Consent and the Law* (Routledge-Cavendish, 2010), 129.

of the skin.<sup>57</sup> The effect is that those traits which effect the potential agency of the foetus will be relevant to the determination of that foetus's moral status.<sup>58</sup>

The moral status of the foetus increases alongside its development towards full agency.<sup>59</sup> As such, the degree of respect necessarily shown towards it will also increase incrementally throughout its development.<sup>60</sup> This is similar to the *gradualist* approach to determining the moral status of the foetus.<sup>61</sup> As Little notes,

Even at early stages of pregnancy, developing human life has an important value worthy of respect; its status grows as it does, increasing gradually until, at some point late in pregnancy, the foetus is deserving of very strong moral protection due to newborns.<sup>62</sup>

This, 'nuanced perspective embraced by the gradualist view is likely consistent with the majority view, given that many view abortion as permissible in at least some circumstances.'<sup>63</sup> Similarly, many will view the circumstances of some abortions as impermissible.<sup>64</sup> The effect of this is that what is acceptable in the early stages of a pregnancy may not be acceptable in later stages.<sup>65</sup> This appears to fit with the realities of human conception,

It seems unreal to equate humanity, with its attendant rights, to the conceptus or zygote, first, because countless zygotes are formed but are lost naturally and unmourned and, second, because the early human embryo has had no human contact from which to derive its humanity.<sup>66</sup>

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<sup>57</sup> Abortions on the grounds of anencephaly accounted for 8% of the abortions performed under s1(1)(d) in 2011: Department of Health, *Abortion Statistics England and Wales: 2013* (June 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319460/Abortion\\_Statistics\\_\\_England\\_and\\_Wales\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319460/Abortion_Statistics__England_and_Wales_2013.pdf) (accessed 02.06.2014), page 27.

<sup>58</sup> This is not to suggest that the child is *worthless* and that the conception of an anencephalic child of no incidence, rather that its worth is an emotional one ascribed to it by those around it.

<sup>59</sup> This is not necessarily at birth. See: Judith Jarvis Thomson, "A Defense of Abortion" in Michael Boylan (ed), *Medical Ethics*, (Prentice-Hall, 2000), 273-88.

<sup>60</sup> Pattinson, n 38, 74.

<sup>61</sup> Jonathan Herring, *Medical Law and Ethics* 5<sup>th</sup> ed (Oxford University Press, 2014).

<sup>62</sup> Margaret Little, 'Abortion and the Margins of Personhood' (2007/08) 39 *Rutgers Law Journal* 331, 332.

<sup>63</sup> Nelson, n 9, 115.

<sup>64</sup> Cf: Nelson, n 9, 157.

<sup>65</sup> McLean, n 56, 130.

<sup>66</sup> Ken Mason, 'Abortion and the law' in Sheila McLean (ed) *Legal Issues in Human Reproduction* (Dartmouth Publishing, 1990), 45-79, 57.

Though the full agent's rights will usually trump the foetus', the margin for which interferences may justifiably override the foetus' most basic well-being (life) will become narrower.<sup>67</sup> It is for this reason that unless there are strong justifications for so doing, the termination of a late stage foetus appears to run contrary to the *PGC*.<sup>68</sup> Nevertheless, where it is the same prospective harm which is threatened to both the mother and the foetus - that is, a threat to the life - it is the lower moral status of the foetus (even at the very end of the pregnancy) which justifies termination on the moral grounding of the *PGC*.<sup>69</sup> Simply put, where the degree of harm suffered and probability of harm being suffered is similar it is determinative that the moral status of one party within the conflict is greater.

As a result, generally speaking, the moral status of the mother will be greater than the foetus' (supposing the mother is a full agent) and any threats to the mother's basic well-being will be sufficient to trump the life of the foetus.<sup>70</sup> To do otherwise would be 'a monumental misunderstanding of the concept of respect and of a perverse interpretation of the value of human rights.'<sup>71</sup> This is not to suggest that the foetus has no moral status (as even the anencephalic child will hold some moral status) but nor is it to suggest that it holds 'full' moral status sufficient to trump the generic rights of an actual agent.<sup>72</sup> As Pattinson claims, '...all the ostensible agent's basic generic features are to be presumptively treated as at least as valuable as the other's most basic generic feature (i.e., its life).'<sup>73</sup> This leads to the *prima facie* proposition that where the difference between the agents' moral status is large and the harm involved is similar - i.e. where these are both interferences to the basic well-being - the mother's generic rights will trump those of the foetus.<sup>74</sup> It is important to note the requirement that the interferences be of the same nature. The effect

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<sup>67</sup> Pattinson, n 38, 74.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, 75.

<sup>70</sup> Sifris, n 36, 189: '...restricting a woman's right to bodily autonomy clearly has the potential to damage a woman's health and wellbeing and the understanding that every person has a right to make decision relating to his or her health is widespread.'

<sup>71</sup> Sheila McLean, *Old Law, New Medicine* (Pandora, 1999), 69.

<sup>72</sup> Mason, n 66, 57.

<sup>73</sup> Ibid, 74.

<sup>74</sup> Gewirth, n 8, 142.

being that an assertion to interferences with the mother's occurrent freedom - e.g. to go on holiday in six months or fit into a dress at a friend's wedding<sup>75</sup> - would not necessarily be sufficient to justify terminating the foetus' life, as most would seemingly agree.<sup>76</sup>

The following points have been made and ought to be highlighted before moving on: 1) precautionary reasoning indicates that all beings must be respected as possible agents and ascribed moral status proportional to their demonstration of agency; 2) the foetus is ascribed moral status in accord with its development and potential for full agency (not *solely* because of its humanity); 3) as the foetus nears full agency, interferences to the mother's basic well-being which justify termination will become lesser; and 4) the mother's greater moral status leads to the *prima facie* proposition that, all things being equal, termination will be justified.<sup>77</sup> This is, in no small part, due to the far greater risk to the mother's well-being in continuing the pregnancy to childbirth as opposed to terminating the pregnancy.<sup>78</sup> This is referred to as the 'statistical argument'.<sup>79</sup> Rowlands suggests that the risk of death in childbirth is 18 times higher than with abortion<sup>80</sup> The effect is that the foetus holds moral status which will increase through its development towards full agency but will not be equal to the mother's moral status until birth (or close to birth or after birth<sup>81</sup>). Therefore, when the threat of harm is of a broadly similar nature there is a presumption towards termination being justified. This presumption will also be stronger, in favour of termination, the earlier it is sought. What then does this mean for reproductive autonomy? I suggest that, all things being equal, the legitimate exercise of reproductive autonomy, judged according to the *PGC*, justifies termination (it would also

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<sup>75</sup> Though, Nelson, n 9, 157, seemingly does not.

<sup>76</sup> Gewirth, n 8, 143.

<sup>77</sup> This appears to also endorse the view of the Royal College of Obstetricians and Gynaecologists (RCOG) that 'health' refers to the World Health Organisation definition as a 'state of physical and mental well-being, not merely an absence of disease or infirmity', see: RCOG, *The Care of Women Requesting Induced Abortion: Guideline* (London, 2000), Ch. 2.

<sup>78</sup> See: Jackson, n 13, 79.

<sup>79</sup> Rosamund Scott, 'Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law' (2015) 0(0) *Medical Law Review* 1-33, doi: 10.1093/medlaw/fwv020, 3.

<sup>80</sup> Sam Rowlands, 'The Policing of Abortion Services in England' (2013) 39 *Journal of Family Planning and Reproductive Health Care* 121-6, 123.

<sup>81</sup> Alberto Giubilini and Francesca Minerva, "After-birth abortion: why should the baby live?" (2012) *J Med Ethics* doi:10.1136/medethics-2011-100411.

justify a decision not to terminate). It does not, however, offer a blanket legitimising of any or all abortions, especially those which are late in the pregnancy or where there is (*hypothetically*) no threat to the basic well-being of the mother.

It is necessary to consider whether any other concerns might hold an influence over the legitimacy of this presumption. In doing so, it is relevant to consider the notion of (possible) fault associated with conception and the implications this might hold on the legitimacy of a termination. It has been suggested that, except in cases of rape, the voluntarily assumed risk of pregnancy associated with sexual intercourse may be sufficient to preclude the mother from seeking a termination.<sup>82</sup> Whilst the issues surrounding the use of contraceptive techniques will be visited in the following section, for the time being it is necessary to consider their relevance in relation to the claim made. The exclusion of rape, where 'fault' is clearly absent, would also seemingly preclude any instance where the conception is due to a failure of the contraceptive.<sup>83</sup>

The effect is that in any situation where some form of contraceptive technique has been used unsuccessfully, based on the previous presumptions, and allows for the legitimate termination of the foetus. The result then is that provided that some form of contraceptive is used (even if less effective than to guarantee the avoidance of pregnancy) then the termination of an unwanted pregnancy is legitimate.<sup>84</sup> What then of cases where contraceptives have not been used? Pattinson claims that given that the most likely means of avoiding an unwanted conception is to remove one's fertility altogether or to abstain from sexual intercourse and, as these pose a threat to an agent's basic well-being, would be an unjustifiable (to the agent) cost of pregnancy avoidance.<sup>85</sup> Yet, he goes on to caveat his presumption in favour of termination with 'and attempted to avoid getting pregnant.'<sup>86</sup> This, however, seems difficult to maintain if we consider that 'sex is no longer

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<sup>82</sup> Pattinson, n 38, 76.

<sup>83</sup> This is visited in more detail in the Chapter 6.

<sup>84</sup> Pattinson, n 38, 76

<sup>85</sup> Ibid, 77.

<sup>86</sup> Ibid.



inevitably tied to procreation<sup>87</sup> and the possibility of avoiding pregnancy occurs sometime before the point at which a decision might be made. If this is so, then why should the fault be borne by *one* of the parties to the sexual contact (given that the father is often excluded from the discussion as to the legitimacy of termination - see below) at least insofar as the presumption rests? It seems dubious to allay fault on the sole shoulders of the mother for the failure to use contraceptive methods. This is also somewhat exacerbated by the use of post-coital emergency contraceptives, by which the distinction between abortion and contraceptive is blurred.<sup>88</sup> Ultimately, it is suggested that this notion of 'fault' is not an appropriate consideration for the restriction of reproductive autonomy and the decision to abort. In doing so, this approach seeks to recognise 'the context of women's lives and the situations in which they find themselves.'<sup>89</sup>

***b. The Father's Right to be Informed***

The current legal position in England and Wales excludes the possession of any rights on the behalf of the father<sup>90</sup> to be consulted or to influence the decision.<sup>91</sup> What then of the father's rights under the *PGC*? It appears straightforward to suggest that a father may be negatively interfered with by a failure to be consulted; or made aware of; or to discover that his potential progeny has been terminated.<sup>92</sup> The effect may be sufficient to be categorised as an interference with the father's psychological well-being.<sup>93</sup> But this, in and

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<sup>87</sup> Nicolette Priaux, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters?" (2008) 16 *Medical Law Review* 169-200, 169.

<sup>88</sup> See: *British Pregnancy Advisory Service v Secretary of State for Health* [2011] EWHC 235 (Admin).

<sup>89</sup> Nelson, n 9, 116.

<sup>90</sup> I use the term 'father' admittedly imperfectly. Whilst generally 'fathers' will be men and 'mothers' women, I ought to emphasise that this is not always the case. On this basis, whilst I use the masculine pronoun in this section my arguments are equally held to be valid for the non-pregnant woman in a same sex relationship. 'Father' for this purpose then denotes the parent of the fetus who is not carrying it. Ezio Di Nucci, below, n 92, 447, uses a similar device for framing the argument. I would also say that there are notable problems with the use of terms such as 'mother' and/or 'father' in the context of the abortion discourse more broadly. Unfortunately, there is not, to my knowledge, an appropriate term for a person who does not wish to continue pregnancy. Especially in the case of the 'father', where 'pregnant woman' might suffice.

<sup>91</sup> See: *Paton v Trustees of British Pregnancy Advisory Service* [1979] QB 276 and *Paton v United Kingdom* (1980) 3 EHRR 408.

<sup>92</sup> Ezio Di Nucci, 'Fathers and Abortion' (2014) 39 *Journal of Medicine and Philosophy* 444-56.

<sup>93</sup> Margaret Atwood, *The Edible Woman* (Virago Press, 1969), 158-9: 'You involved me psychologically. I'll have to think of myself as a father now, it's indecent.'

of itself, is not conclusive of the legitimacy of his interest in having his autonomous choice protected.<sup>94</sup> After all,

To undertake a pregnancy is a serious investment of a woman's bodily and psychological resources – an undertaking that is not similarly possible for a man. The fetus then is a threat to the mother's autonomy in a way that it is not to the father's.<sup>95</sup>

In order for this to be rationally grounded on the *PGC*, it must be shown, *in some circumstances*, to outweigh the mother's corresponding claim to her basic well-being. I am also keen to note that what I am discussing here is not a right to *veto* the decision of the mother in anyway, rather a right to be *informed* and, so far as is possible, to be *involved* with the decision making process.

This attempts to demonstrate the potential for the concerns for male reproductive autonomy to be considered on, at least *prima facie*, equal footing.<sup>96</sup> For this reason, I do not discount male reproductive autonomy on the grounds that, 'although problematic for women and men alike, it is particularly troubling for women. Reproduction takes place in a context within which women's bodies, needs and interests have a central role.'<sup>97</sup> Yet it is the uniquely central role which women's bodies play in reproduction which removes from the father the potential for exercising his autonomy.<sup>98</sup> Rather, in recognising the potential which conception, pregnancy and decisions around reproduction holds in harming the generic rights of agents (and indeed the need for support in adding to their generic goods), it frames the consideration of *legitimate* exercise of that autonomy around an egalitarian criteria (considering within that the necessary fact that this will take place

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<sup>94</sup> Di Nucci, n 92, 454.

<sup>95</sup> George W. Harris, 'Fathers and Fetuses' (1986) 96(3) *Ethics* 594-603, 599.

<sup>96</sup> See: Nelson, n 7, 55-7.

<sup>97</sup> *Ibid*, 56.

<sup>98</sup> Di Nucci, n 92, 445. See also: Marshall B. Kapp, 'The Father's (Lack Of) Right and Responsibilities in the Abortion Decision: An Examination of Legal-Ethical Implications' (1982) 9(3) *Ohio Northern University Law Review* 369-83, 376-7: 'the father played an initial physical role in the creation of the fetus, he no longer has any control over the process which converts his biological act into personhood. The father's participation in the procreative process begins and ends with the sexual act; from the moment of conception on, all control and authority concerning the fate of the pregnancy rests with the mother. The father's role, in terms of decision making power, is reduced to impotent bystander.'

within women's bodies).<sup>99</sup> As Harris argues, 'in some cases it would be morally impermissible for a woman to have an abortion because it would be a wrongful harm to the father and a violation of his autonomy.'<sup>100</sup> Unlike the conflict between mother and foetus, here the balance (usually) is to be struck between two full agents. With admittedly a likely range of interests, desires and ambitions. And it is *this* which is particularly poignant to this discussion.<sup>101</sup> The conflict, then, must be weighed between the degree of harm suffered and the probability of that harm being suffered.

On this basis, any claim to psychological harm by the father will be outweighed by threats to the life or serious physical or psychological injury of the mother.<sup>102</sup> This appears to be a straightforward application of the *Hierarchy* in conflict resolution. Similarly, if the father is unlikely to suffer any harm from a failure to inform then there can be no valid claim under the *Criterion*. Furthermore, where the threat of, say, psychological harm is broadly similar the *PGC* also appears to weigh the balance in favour of the mother. This is because

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<sup>99</sup> Jackson, n 13, 83.

<sup>100</sup> Harris, n 95, 594.

<sup>101</sup> Take for example the scenarios devised by Harris, *ibid*, 595: '3. Susan and Charles, both in perfect health, are in the fifth year of their marriage. Aside from his love for Susan, the prospect of raising a family is the most important thing in Charles's life-more important than career, possessions, sports, or any of the other things thought to be of the utmost importance to men. Susan, on the other hand, is secretly ambivalent about having children due to her indecisiveness between having a career and having a family. But because of her love for Charles and the fear of causing him what she believes might be unnecessary anxiety, she allows him to believe that her reluctance is only with when rather than with whether to have children. And despite reasonable efforts at birth control, Susan becomes pregnant just at a point at which her career takes a significant turn for the better. In the situation, it is a career rather than children that she wants, and she decides to have an abortion. Distraught, Charles tries to dissuade her by offering to forgo his own career and to take on the role traditionally reserved for mothers. But to no avail.

'4. Michelle and Steve, like Susan and Charles, are also in the fifth year of their marriage. And Steve, like Charles, is equally and similarly desirous of a family. Michelle, however, knows all along that she does not want children but avoids discussing the issue with Steve, allowing him to think that the beginning of their family is just a matter of time. She believes that eventually she can disabuse him of the values of family life in favor of a simple life together. But due to the unpleasantness of broaching the subject, Michelle procrastinates and accidentally becomes pregnant. And despite Steve's expectations, his pleas, and his offer to take on the major responsibilities of raising the child, Michelle decides to abort.'

<sup>102</sup> *Paton v UK* [1980] 3 EHRR 408. Unless, perhaps we were to recognise the psychological harm suffered as 'wrongful harm' as per Harris, n 95, 596 – that is harm which could reasonably have been avoided – which he does in the examples above, which might shift the balance.

of the *comparable cost proviso*,<sup>103</sup> whereby rights to positive assistance are only justifiable where they can be provided at a comparable cost, as the cost to the mother *may* increase the harm suffered it cannot be offered.<sup>104</sup> The effect of these initial observation suggest that the weight is, all things being equal, in favour of the mother. This is intuitive on account of the graver threat of harm to the mother on account of the physical intrusion of pregnancy.<sup>105</sup>

On balance, the *PGC* appears to only support the father's claim if the threat of harm is greater to him than it is to the mother. In such cases a right to know appears to be sustainable and conforms to the *PGC*. The presumption is that, all things being equal, the mother is under *no duty* to inform the father of the termination. But this is not to suggest that *post*-conception the father should lose *all* control or autonomy over the situation.<sup>106</sup> When all things are *not* equal and the threat of harm is greater to the father, a claim may be made, at least, to be *involved* in the decision making process.<sup>107</sup> After all, 'The husband could suffer real injury of a particularly agonising kind.'<sup>108</sup> That is, where the mother is capable of providing positive assistance to the father without undue cost then the father may be seen as having a positive right to be informed. Pattinson outlines four conditions for duties to assist,<sup>109</sup>

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<sup>103</sup> Deryck Beyleveld and Shaun Pattinson, "Moral Interests, Privacy and Medical Research" (2008) 42 *International Library of Ethics, Law, and the New Medicine* 45-57.

<sup>104</sup> Deryck Beyleveld and Shaun Pattinson, "Individual Rights, Social Justice and the Allocation of Advances in Biotechnology" in Michael Boylan (ed), *Public Health Policy and Ethics* (Springer, 2004), 59-74, 61.

<sup>105</sup> John Kenyon Mason and Alexander McCall Smith, *Law and Medical Ethics* (Butterworth's, 1999), 116.

<sup>106</sup> Di Nucci, n 92, 449-50. In order to avoid procreating against one's wishes there is a stark contrast in what steps men and women are able to take. For both men and women, pre-conception contraceptives are the best means of engaging in pleasurable sexual relationship whilst reducing the unwanted consequences of those relationships. If that fails, a woman might use emergency contraceptives – the 'morning after pill' – or procure a termination. For the man on the other hand, at this stage he has no means of avoiding parenthood by *his own choice*. His only guarantee to avoid procreating then is to abstain from sexual intercourse, seek permanent infertility through sterilisation

<sup>107</sup> Jackson, n 13, 83.

<sup>108</sup> *Medhurst v Medhurst* (1984) 9 DLR (4<sup>th</sup>) 252, 259 per Reid J.

<sup>109</sup> Shaun Pattinson, "Consent and Informational Responsibility" (2009) 35(3) *Journal of Medical Ethics* 176-179, 5.

- 1) *Important Interests*: the assistance is required because important interests are at stake.
- 2) *Position to Assist*: the potential duty-bearer is able to assist and realises that this assistance is required to protect those interests.
- 3) *Reasonable Burden*: the assistance does not place an unreasonable burden on the duty-bearer relative to those interests.
- 4) *Self-Assistance*: the potential right-holder is not in a position to protect their own interests.

Key to the determination here are conditions 1) and 3). This ensures that, firstly, the father is not asserting to be informed in situations where trivial interests are at stake, and, secondly, that the potential duty-bearer, the mother, is not unduly burdened at the expense of their own interests.<sup>110</sup> It is therefore, in these situations where it cannot be said that a women's exercise of her reproductive autonomy is legitimate and as such *respect* for reproductive autonomy – which Nelson is at pains to point out the importance of<sup>111</sup> – requires that the father be involved in the decision making process.<sup>112</sup> As Jackson notes, 'The uneven natural distribution of fertility means that there are some people whose reproductive options are, absent the provision of resources and services, extremely impoverished.'<sup>113</sup> If this is so, then it is conceivable that *some* circumstances may plausibly exist in which a father may validly claim moral legitimacy to be informed and/or involved in the decision. And it is only if this accepted that the interest in procreation and in reproductive autonomy can be dealt with equally.<sup>114</sup>

If reproductive autonomy is to play a *meaningful* role in our understanding of the interactions between agents and between individual agents and the State, then it must be recognised as being equally important for men and women alike and not discounted simply on the basis that women physically carry the pregnancy. As Nelson also notes, reproductive autonomy is as much about negative rights of exclusion as it is positive rights

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<sup>110</sup> Ibid.

<sup>111</sup> Nelson, n 9, 157-8.

<sup>112</sup> David Nolan, 'Abortion: Should Men Have a Say?' in Ellie Lee (ed) *Abortion Law and Politics Today* (Macmillan, 1998), 216-31, 220, suggests that 84% of men thought that the decision to terminate was a 'joint resolution of the matter'.

<sup>113</sup> Jackson, n 13, 318-9.

<sup>114</sup> Harris, n 95, 602.

of assistance and support.<sup>115</sup> If support is to be deemed vital to respecting the concept, whether this is by the father or family members or professionals, the need exists to frame the discourse around both female and male reproductive autonomy. Therefore, Rational Autonomy proposes a model which asserts the meaningfulness of respecting the autonomy of both sexes and does so framed by the hierarchical importance of the generic features of agency.

***c. Conscientious Objection***

Having considered the role of the father, it is now necessary to consider the exercise of medical professionals' own autonomy in relation to abortion. This attempts to understand whether, and if so in what circumstances, conscientious objection - as an expression of autonomy - might shape our understanding of the legitimate exercise of autonomy. The Abortion Act 1967 defines conscientious objection as,

...no person shall be under any duty, whether by contract, or by any statutory or other legal requirement, to participate in any treatment authorised by the Act to which he has a conscientious objection...<sup>116</sup>

Generally, this allows for medical professionals, on account of their own beliefs and values, to refuse to participate in the treatment for abortion.<sup>117</sup> What is less clear is whether the provision can be used to deny referral to another professional.<sup>118</sup> Dickens claims that,

The equilibrium between physicians' rights and those of patients is maintained through objecting physicians' legal and ethical duty to refer their patients who request lawful services to physicians who do not object. Religiously based claims

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<sup>115</sup> Nelson, n 9, 158.

<sup>116</sup> S4(1) Abortion Act 1967; it cannot be applied, however, by reason of s4(2), in situations where there is a grave threat to life or permanent injury.

<sup>117</sup> There has been some debate in the UK as to the scope of this provision and what types of treatment could be refused. In *Doogan v Greater Glasgow and Clyde Health Board* [2012] CSOH 32, the court was keen to restrain the breadth of this provision and exclude the refusal to work with or supervise those involved with treatments for the purpose of terminating a pregnancy. It appears on the back of this case, then, that the provision allows for the refusal to directly be involved with the termination of a pregnancy.

<sup>118</sup> College of Physicians and Surgeons of Alberta, 'Health Professions Act Standards of Practice' (2010), at <[http://www.cpsa.ab.ca/Libraries/Res\\_Standards\\_of\\_Practice/HPA\\_Standards\\_of\\_Practice\\_Consolidation\\_Issued\\_Jan\\_1\\_2010.pdf](http://www.cpsa.ab.ca/Libraries/Res_Standards_of_Practice/HPA_Standards_of_Practice_Consolidation_Issued_Jan_1_2010.pdf)> (accessed 10/09/2015), 26(4).

of complicity in procedures, conducted by physicians to whom patients are referred, have neither legal nor ethical substance.<sup>119</sup>

It appears that the balance must be struck between the potential interference with the professional's basic well-being, as the psychological effects of contradicting one's autonomy would be based, with the potential physical (and, indeed, psychological) interference with the woman's basic well-being. In striking such a balance, it is important to maintain recognition of the importance of both parties' ability to exercise their own autonomy, whether in the realms of their belief system or their reproduction.<sup>120</sup> It would appear, on the face of things, that the *PGC* would require the medical professional to, at least, refer the patient to another practitioner in order to discuss the termination (given that this may not necessarily lead to a termination and the conscientious objector is unable to facilitate this discussion). Except in extreme cases such as those where it is necessary to save the life of the patient (and potentially to prevent grave permanent injury), an objector cannot be expected to actively take part in the termination.<sup>121</sup> In terms of the legitimacy of both autonomy and reproductive autonomy, more narrowly, this appears to be a justified balance.

***d. The European Convention on Human Rights and Abortion***

The European Convention on Human Rights (ECHR) is incorporated in UK law through the Human Rights Act 1998 (HRA). At a European level, there is great divergence in the approaches of the states within the Council of Europe.<sup>122</sup> These variations depend less on the incorporation of the ECHR in national law, but more on societal/moral attitudes to foetal interests.<sup>123</sup> As a result, the European Court of Human

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<sup>119</sup> Bernard Dickens, 'Conscientious Objection and Professionalism' (2009) 4 *Expert Review of Obstetrics and Gynaecology* 97, 97.

<sup>120</sup> Jackson, n 13, 6.

<sup>121</sup> Such as when to do so is the only option in order to save the life of the mother. Pattinson, n 109, 5-6.

<sup>122</sup> The Law Library of Congress, *Abortion Legislation in Europe* (January 2015) available at: <<http://loc.gov/law/help/abortion-legislation/abortion-legislation.pdf>> (accessed 18.04.2016).

<sup>123</sup> Graeme Laurie, Shawn Harmon and Gerard Porter, *Mason & McCall Smith's Law and Medical Ethics* 10<sup>th</sup> Ed (Oxford University Press, 2016), 352.

Rights (ECtHR) has adopted a fairly neutral stance towards the provision of abortion services by the various states.<sup>124</sup>

Whilst the ECtHR has recognised that the foetus has no *absolute* right to life under Article 2,<sup>125</sup> it has equally noted that ‘pregnancy cannot be said to pertain uniquely to the sphere of private life [within the context of Article 8]. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus.’<sup>126</sup> Nevertheless, more recently there appears to be a shift in the reasoning of the ECtHR<sup>127</sup> in recognising that ‘the regulation of abortion *does* constitute an interference with private life and, accordingly, must be justified under Article 8(2).’<sup>128</sup> This is notable from the Court’s observation in *A, B & C*,

...having regard to the broad concept of private life within the meaning of Article 8 including the right to personal autonomy and to physical and psychological integrity..., the Court finds that the prohibition of termination of the...applicants’ pregnancies sought for reasons of health and/or well being amounted to an interference with their right to respect for their private lives.<sup>129</sup>

Elsewhere, the Court has emphasised the positive obligation on the State to ensure a woman’s physical and psychological integrity.<sup>130</sup> Thus, whilst Signatory States hold ‘a certain discretion’<sup>131</sup> as to the scope of and limits to abortion laws,<sup>132</sup> the margin of appreciation will *narrow* once a State has established a legal regime to ensure that its

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<sup>124</sup> See: Daniel Fenwick, ‘Abortion Jurisprudence’ at Strasbourg: Deferential, Avoidant and Normatively Neutral?’ (2014) 34(2) *Legal Studies* 214-241. See also: *Paton v United Kingdom* (1980) 3 EHRR 408; *Brüggemann and Scheuten v Germany* (1981) 3 EHRR 244; *Vo v France* (2005) 10 EHRR 12; *Tysiac v Poland* (2007) 45 EHRR 42; *Evans v United Kingdom* (2008) 46 EHRR 34; *A, B & C v Ireland* (2011) 53 EHRR 13; and *RR v Poland* (2011) 53 EHRR 31.

<sup>125</sup> *Paton*, n 102, para 38. See also; *Vo v France*, n 124. For discussion see: Kenyon Mason, ‘What’s in a Name? The Vagaries of *Vo v France*’ (2005) 17 *Child and Family Law Quarterly* 97-112.

<sup>126</sup> *Brüggemann and Scheuten*, n 124, para 59.

<sup>127</sup> See: Chiara Cosentino, ‘Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence’ (2015) 15 *Human Rights Law Review* 569-89, 584-6.

<sup>128</sup> Rosamund Scott, ‘Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law’ (2015) 0(0) *Medical Law Review* 1-33, doi: 10.1093/medlaw/fwv020, 5.

<sup>129</sup> *A, B & C*, n 124, para 216. See also: *RR v Poland*, n 124, para 181: ‘the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy.’

<sup>130</sup> *Tysiac v Poland*, n 124, para 107.

<sup>131</sup> *Paton*, n 102, para 408.

<sup>132</sup> Aurora Plomer, ‘A Foetal Right to Life? The Case of *Vo v France*’ (2005) 5(2) *Human Rights Law Review* 311-38, 318-9.



obligations are fulfilled by that regime.<sup>133</sup> Simply, a State holds discretion as to *when* it will allow abortions to take place but once it has done so any limits to the *real possibilities* of attaining an abortion will be subject to scrutiny.<sup>134</sup>

Whilst the legal framework in the UK is sometimes perceived as being fairly ‘liberal’,<sup>135</sup> there may be the possibility for legal challenges to be raised against procedural aspects. Stauch has argued that as the grounds of termination under the Abortion Act 1967 provide, ‘only in barest outline the factors to which the doctor should have regard, and leaving the latter a vast discretion to interpret them as they see fit’ the ‘arbitrariness’ of these grounds could be challenged under the ECHR/HRA.<sup>136</sup> Prialux also recognises that this level of discretion on the part of medical practitioners may need to be reviewed considering the absence of independent review.<sup>137</sup> She does, however, go on to recognise that the ECtHR’s exercise of scrutiny to this point has been to ‘*facilitate wider access*’ to abortion services within strict frameworks.<sup>138</sup> Scott also argues that the legal requirement for two doctors to approve of the termination under s1(1)(a) during the first trimester may also be contrary to Article 8(2).<sup>139</sup> This is on the basis that it cannot be shown as a *necessary* measure on the basis that the s1(1)(a) criteria will almost always be satisfied, as such doctors will simply *confirm* that the ground applies. Given that the Act applies as a defence to a criminal offence, Scott argues this is ‘not a justifiable interference with a woman’s right to respect for her private life under Article 8.’<sup>140</sup> The requirements may also pose a greater risk to the woman’s physical well-being if they cause her to undergo

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<sup>133</sup> Scott, n 128, 8. See: *A, B & C*, n 124, para 249: ‘Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.’

<sup>134</sup> Fenwick, n 124, 227. Also: Laurie, Harmon and Porter, n 123, 354.

<sup>135</sup> Scott, n 128, 2.

<sup>136</sup> Marc Stauch, ‘Pregnancy and the Human Rights Act’ in Austen Garwood-Gowers, John Tingle and Tom Lewis (eds) *Healthcare Law: The Impact of the Human Rights Act 1998* (Cavendish, 2001), 263.

<sup>137</sup> Nicolette Prialux, ‘Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive Rights and the Intriguing Case of *Tysiac v Poland*’ (2008) 15 *European Journal of Health Law* 361-79, 377-8. A point also recognised by Scott, n 128, 15-27.

<sup>138</sup> Ibid, 378.

<sup>139</sup> Scott, n 128, 22-3.

<sup>140</sup> Ibid, 22.

surgical termination.<sup>141</sup> It may well be that the UK's legal framework is subject to a challenge under the ECHR in the future for any of these reasons.<sup>142</sup>

***e. The UK and the Right to Reproductive Autonomy***

It is now necessary to consider how these initial presumptions might be aligned into a coherent structure of rights-based relations. In doing so, it is necessary to examine the existing legal governance of abortion against those presumptions. In each of the legal and moral positions there exists a general presumption: for the legal, this appears to be in favour of the foetus; for the moral, this is in favour of termination (all things being equal). To both of these general presumptions there are derogations. The legal provides those conditions precedent where termination will be justified - based around the well-being and life of the mother and the health of the foetus. For the moral, this revolves around the balance of threats to the basic well-being of either party, the probability of this occurring and the different moral status of the parties. Simply put, the lower the moral status of the foetus (in its developmental progress) and the greater threat of harm to the mother, the more easily termination will be justifiable under the *PGC*. Given that the broad scope of s1(1)(a) Abortion Act 1967 appears, on the face of things, to endorse abortion on demand (or, at least, some position close to this) it may be argued that the provisions are more closely aligned with the *PGC* than initially thought.

Furthermore, at the present time, the rates of uptake in the first nine weeks suggest that *PGC*-compliance is generally met.<sup>143</sup> This is further enforced given the allowance for abortions to save the life of the mother at later stages. Similarly, if we interpret the initial starting point - the general duty in favour of the foetus - as a means of highlighting the (*precautionary*) moral status of any *potential* agent and this duty is subject to derogations

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<sup>141</sup> Ibid, 29.

<sup>142</sup> As other Gewirthians have suggested, the acceptance of the ECHR *presupposes* the validity of the *PGC*; see: Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007), 7 and Deryck Beyleveld, "Dialectically Contingent Justifications for the Principle of Generic Consistency and Legal Theory" (1996) 9(1) *Ratio Juris* 15-41.

<sup>143</sup> Department of Health, *Abortion Statistics England and Wales: 2011* (May 2012) and Department of Health, *Abortion Statistics England and Wales: 2013* (June 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319460/Abortion\\_Statistics\\_\\_England\\_and\\_Wales\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319460/Abortion_Statistics__England_and_Wales_2013.pdf) (accessed 11.08.2014), page 12 and 19

of acceptable 'outweighing' by the interests of an *actual* agent, then the conceptualisation may be more closely aligned to the position endorsed by the *PGC*.

Against this, Pattinson argues that the UK legal position may be too liberal in allowing - without investigation - women to terminate their pregnancy whom have not taken precaution against the possibility of conceiving. The potential threat this could *equally* pose to the mother's well-being - i.e. an investigation into the circumstances of conception - may nullify the plausible *PGC*-conflict.<sup>144</sup> Further to this, we may also note that the 'on demand' abortion provision of s1(1)(a) allows for termination on the balance of interests up to 24 weeks.<sup>145</sup> It may be suggested that this provision allows for termination too late into the pregnancy on the 'catch-all' ground. This is a difficult position to argue either way.<sup>146</sup> On the one hand, the time-limit threshold will always equate to an arbitrary line drawn in the sand;<sup>147</sup> though it may be suggested that on the reasoning regarding the moral status of the foetus and its progression to full agency this might be more appropriately situated earlier in the pregnancy.<sup>148</sup> On the other hand, if we recognise the *PGC* as non-determinative either way, in and of itself, then it is to be enforced by the official arbiters in a good faith way.<sup>149</sup> If an arbitrary line has to be drawn, it must be done so as a good faith attempt to adhere to the presumptions raised by the *PGC*.<sup>150</sup> Albeit notably caveated by the condition that continued attempts - based on empirical evidence - are made to ensure that this line continues to be the best means of institutionalising *PGC*-reasoning.<sup>151</sup> The current legal position, all things considered, may not be the perfect expression of the *PGC* in institutionalised reasoning but so long as it is a good faith

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<sup>144</sup> Pattinson, n 38, 83.

<sup>145</sup> Scott, n 128, 31.

<sup>146</sup> Ibid.

<sup>147</sup> Laurence McCulloch and Frank Chervenak, *Ethics in Obstetrics and Gynecology* (Oxford University Press, 1994), 100-1.

<sup>148</sup> Ibid, 83-4.

<sup>149</sup> See: Deryck Beyleveld and Roger Brownsword, 'Principle, Proceduralism, and Precaution in a Community of Rights' (2006) 19(2) *Ratio Juris* 141-68.

<sup>150</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 178-9.

<sup>151</sup> Beyleveld and Brownsword, n 149, 151.

attempt to make such an expression and is *broadly* PGC-compliant then it arguably remains a legitimate means of regulating abortion.

There are two aspects of this which I believe merit further attention and where some scholars have raised criticism of the present approach. The first will look at the nature of the restrictions which are put in place and the second the role of doctors in the provision of and access to abortion.

Turning firstly to the role of the restrictions placed upon abortion, I seek to show that restrictions ought to be held over the access to abortion. To put it another way, my claim is that the legitimate exercise of reproductive autonomy does not allow for complete freedom to decide as to whether to abort and, therein, that any right to abort should not be *absolute*.<sup>152</sup> Against this position, Nelson argues,

As I see it, meaningful respect for reproductive autonomy rules out legal restrictions on abortion for specific reasons, such as sex selection or disability selection. In fact, it rules out most restrictions on abortion. There is no way to respect reproductive autonomy fully and at the same time bracket that respect by prohibiting abortion in some circumstances or for some reasons.<sup>153</sup>

As I have already argued, my concern is not simply with the value of (or, indeed, respect for) reproductive autonomy as an ultimate overriding good.<sup>154</sup> Rather, I suggest that the inherent value of reproductive autonomy is manifested as a generic feature of agency and in its legitimate exercise as against other agents.<sup>155</sup> As Scott argues, whilst reproductive autonomy is of value, ‘the difficult question always concerns its limits.’<sup>156</sup> Similarly, Beyleveld and Brownsword note, ‘the State will succeed in defending the constitutionality of its statute provided only that the statutory curtailment of liberty can be shown to be *rationaly related to a legitimate State interest*.’<sup>157</sup> Any right to reproductive autonomy

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<sup>152</sup> Gewirth, n 18, 47.

<sup>153</sup> Nelson, n 9, 157.

<sup>154</sup> Which Nelson, n 9, appears to be in favour of in this and other passages.

<sup>155</sup> Onora O’Niell, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2002), 65.

<sup>156</sup> Rosamund Scott, ‘Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth’ (2003) 11 *Med L Rev* 265-325, 300.

<sup>157</sup> Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), 273 (*my emphasis*).

cannot, then, be absolute in the sense maintained by Nelson given that there are invariably other generic goods which will, from time to time, supersede the respect for autonomy.<sup>158</sup>

In direct response to the above extract, and to refer back to Nelson's other claim that genuine respect for (reproductive) autonomy requires the provision of support,<sup>159</sup> the collective good of attempting to eliminate disability discrimination may well be better served by rejecting the freedom to abort on this ground (save in circumstances where the quality of life would be so poor as to justify terminating for this reason<sup>160</sup>) and offering *support* services to those who raise children with disabilities.<sup>161</sup> As Jackson notes there are problems with 'society's attitudes to physical disability, and by its failure to provide adequate services to accommodate...special needs.'<sup>162</sup> The current regime allows for termination, at any stage of the pregnancy, on the grounds of 'substantial risk of serious handicap'.<sup>163</sup> Yet, in *Jepson v Chief Constable of West Mercia Police Constabulary*<sup>164</sup> the court was asked to determine whether a doctor who had authorised an abortion for a bilateral cleft lip and palate at 28 weeks had done so in good faith within the meaning of the section. The Crown Prosecution Service announced that it would not prosecute the doctors involved.<sup>165</sup> At present, RCOG guidelines suggest that if the 'abnormality' is untreatable or would lead to the death of the child termination is permissible.<sup>166</sup> Further

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<sup>158</sup> Jackson, n 13, 318.

<sup>159</sup> See, among others, Nelson, n 9, 158 and Keith Sharp and Sarah Earle, 'Feminism, Abortion and Disability: Irreconcilable Differences?' (2002) 17(2) *Disability & Society* 137-45.

<sup>160</sup> For discussion, see: Sally Sheldon and Stephen Wilkinson, 'Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds for a Special Exception in Law?' (2001) 9 *Medical Law Review* 85-109.

<sup>161</sup> Rosamund Scott, 'Interpreting The Disability Ground of the Abortion Act' (2005) 64(2) *Cambridge Law Journal* 388-412, 412. Also: Tom Shakespeare 'Choices and Rights: Eugenics, Genetics and Disability Equality' (1998) 13(5) *Disability & Society* 665-681 and Alicia Ouellette, 'Selection Against Disability: Abortion, ART, and Access' (2015) 43(2) *Journal of Law, Medicine & Ethics* 211-23.

<sup>162</sup> Jackson, n 13, 97.

<sup>163</sup> S1(1)(d) Abortion Act 1967 (amended).

<sup>164</sup> *Jepson v Chief Constable of West Mercia Police Constabulary* [2003] EWHC 3318.

<sup>165</sup> Crown Prosecution Service, Press Release of 16 March 2005, 'CPS decides not to prosecute doctors following complaint by Rev Joanna Jepson', available at <[http://www.cps.gov.uk/news/latest\\_news/117\\_05/](http://www.cps.gov.uk/news/latest_news/117_05/)> (accessed: 20.04.2016)

<sup>166</sup> RCOG, *Termination of Pregnancy for Fetal Abnormality* (May 2010) available at: <<https://www.rcog.org.uk/globalassets/documents/guidelines/terminationpregnancyreport18may2010.pdf>> (accessed 20.04.2016), 8-10.

to this, consideration should be made for the level of suffering of the child were it to be born.<sup>167</sup> Importantly, it is the further liberalisation of the legal framework proposed which, in part, justifies the restraint of this ground. That is, if women have greater freedom to *choose* to access services then the extension of a disability ground is unnecessary.<sup>168</sup> In this way, the same principle applies, save in cases of serious foetal handicap, to all terminations and all foetuses.

Similarly, if the issue of sex selection is prevalent in society then that too ought not to be catered for by allowing abortions *for that reason*. Nelson maintains that respect for reproductive autonomy requires ‘society (and law) to trust women’s capacity to make their own procreative decisions.’<sup>169</sup> Similarly, McLean complains, ‘Women’s choices about when, whether, where and how to breed continue to be circumscribed and delimited by prejudices and interests of others.’<sup>170</sup> Yet, we are left wondering why in ‘respecting’, ultimately women’s, reproductive autonomy we must ignore all other values and goods which exist in the make-up of the relationship between the individual and the State.<sup>171</sup> We ought not to, ‘attach too much weight to the particular-occurrent exercise of agent autonomy and to pay too little attention to the sustainability of the context of a community of rights on which Gewirthian thinking is predicated.’<sup>172</sup> Truly respecting the notion of reproductive autonomy requires that in some situations restrictions are placed over the ability to access abortion and that if the concept is to have any *meaningful* value it must be susceptible to be outweighed by other considerations.

The only restrictions which Nelson does endorse are those based on the timing of the abortion. She notes that the protection due to a late gestation foetus is approaching that of a neonate.<sup>173</sup> But she goes on to recognise the necessity of permitting abortion of the

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<sup>167</sup> Ibid, 9. See also: Scott, n 161, 395-6, giving the example of Tay-Sachs disease (TSD).

<sup>168</sup> Sheldon and Wilkinson, n 160, 109.

<sup>169</sup> Nelson, n 9, 157.

<sup>170</sup> Sheila McLean, “Women, Rights and Reproduction” in Sheila McLean (ed) *Legal Issues in Human Reproduction* (Dartmouth Publishing, 1990) 213-32, 227.

<sup>171</sup> Belinda Bennett, *Health Law's Kaleidoscope: Health Law Rights in a Global Age* (Ashgate, 2008), 105.

<sup>172</sup> Beyleveld and Brownsword, n 157, 271.

<sup>173</sup> Ibid.

late gestation foetus on the grounds of risk to the pregnant woman's life or health. This perspective seems far more in keeping with the legitimacy criteria of the *PGC* based approach, which would permit late stage abortions only where the threat to the mother's well-being outweighs that of the foetus on the grounds of degree and/or probability. Rational Autonomy does not endorse the blanket support for choice above all else, where except in extremely late pregnancies the decision to terminate should always be supported. Rather, it emphasises the need for agents to balance their rights to the generic goods against other competing claims whether that is against a fellow agent or against the State. If a contextual account of autonomy requires that we focus on how the State can support and empower the decision making process for women (and indeed men), then so too must the State be able to restrict that decision making process where to do otherwise poses a threat to the collective good.

The second issue which ought to be addressed is the role in which doctors' play in the abortion process (and, as an aside, the criminalisation of abortion). The Abortion Act 1967 operates so as to provide a defence for what would otherwise be a crime under the Offences Against the Person Act 1861. In order for the defence to operate it is necessary for 'two registered medical practitioners...in good faith'<sup>174</sup> to agree that termination is necessary to avoid injury to the woman's physical or mental well-being. As noted in *Paton*, 'The great social responsibility [of supervising the Act] is firmly placed by the law on the shoulders of the medical profession.'<sup>175</sup> Yet, doctors are, 'at once performing a crime and judging (or relying on one (or two) other doctors' judgment) in 'good faith', that one or more of the lawful grounds under the Abortion Act is made out.'<sup>176</sup> The UK position then falls short of providing a 'full' right to abortion<sup>177</sup> (by this, I mean a Hohfeldian claim-right, with the implication of correlative duty), instead it provides a lawful defence to what would otherwise be a crime.<sup>178</sup> This raises two points which are criticised by

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<sup>174</sup> S1(1) Abortion Act 1967.

<sup>175</sup> *Paton*, n 102.

<sup>176</sup> Scott, n 128, 16 and 31.

<sup>177</sup> Grant Keeter, *Conflicting Rights: A Hohfeld Analysis of the Right to Life and the Right to Abort* (2011) available at <http://blog.abolishhumanabortion.com/2011/08/conflicting-rights-hohfeld-analysis-of.html> (accessed 15.07.2014).

<sup>178</sup> Nevertheless, access to abortion in practice appears to be 'as of' right in many cases.

commentators. The first relates to the role of the doctor as final arbiter in the decision to abort. The second refers to the criminalisation of abortion *generally*.

On the first point, a common theme in the discourse around reproductive autonomy is premised on the imposition of a need for doctors to have a say in the abortion decision. As Jackson notes,

Yet, as we have seen, women have no right to terminate an unwanted pregnancy, and must instead depend upon the *beneficent exercise of medical discretion*. While this would be comparatively unimportant if the statute was generally working satisfactorily, it is clear that the practical impact of abortion's continued medicalisation is to restrict the reproductive choices of disadvantaged women.<sup>179</sup>

The problem with this, Nelson suggests, is that 'laws that mediate women's decision making through practitioners are unquestionably a flawed way to demonstrate respect for women's reproductive autonomy.'<sup>180</sup> The extent to which this medicalisation and deference to medical opinion is clear when one notes that the grounds of abortion need not actually be made out provided that the doctors involved are of the opinion, *in good faith*,<sup>181</sup> that the case fits within the statutory regime.<sup>182</sup> Sheldon argues that this does nothing to empower women's autonomy but rather seeks to subtly control women's fertility.<sup>183</sup> It is through this medicalization that the principle barrier to access exists, that is through the need to, at all times, convince two doctors that the decision to abort ought to be vindicated.<sup>184</sup> Yet, in spite of these formal requirements, it appears that abortion is *practically* available 'on demand',<sup>185</sup> and as doctors would not, without request from the women, exercise their medical discretion to authorise an abortion,<sup>186</sup> it may be that the issue is one of 'legal fiction'.<sup>187</sup>

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<sup>179</sup> Jackson, n 13, 111.

<sup>180</sup> Nelson, n 9, 135.

<sup>181</sup> See: *R v Smith* [1974] 1 All ER 376.

<sup>182</sup> Jackson, n 13, 78.

<sup>183</sup> Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto, 1997), 30

<sup>184</sup> Jackson, n 13, 80. See also: Ann Furedi *Abortion: A Provider's Perspective* (2000) paper presented at Strategic Thinking for the Millennium: Women and Law University of Westminster, 23 June 2000.

<sup>185</sup> *RCN v DHSS* [1981] 1 All ER 545, 554, per Lord Denning.

<sup>186</sup> Jackson, n 13, 80-1.

<sup>187</sup> Ibid.



It has been suggested that the requirement to seek approval by a registered medical professional is an undue restraint on the woman's free choice.<sup>188</sup> This may, indeed, be exacerbated by the controlling role which the doctor is perceived to hold to alter his own and the mother's normative situation. Unlike the feminist relational model of autonomy, the *PGC* points to the need for conditions precedent to be upheld in order to decide whether the termination is premised on legitimate grounds.<sup>189</sup> The question, then, is whether this position ought to be held by a medical professional or some other arbiter.<sup>190</sup> The *PGC* itself is silent as to its enforcement provided that institutionalisation is a good faith attempt to come to the most appropriate interpretation of its requirements.<sup>191</sup> The *PGC* does require that a decision is made *unless* it can be shown that the role the doctor(s) currently holds poses a greater risk to the generic goods of the woman than having no role holder.<sup>192</sup> This appears to be claim that Nelson is making,

I can reach no other conclusion but that respect for reproductive autonomy requires that we respect women's decisions to terminate pregnancies, regardless of their reasons. Women must be trusted to make their own 'mortal choices' and respect for reproductive autonomy demands that they be given the space to do so... [M]eaningful respect for reproductive autonomy rules out legal restrictions on abortion for specific reasons.<sup>193</sup>

The problem is that some justificatory reason must be given in support beyond simply suggesting that *this* is to demonstrate *meaningful* respect for reproductive autonomy. I have already suggested that the requirement for a doctor to 'approve' the termination in the early stages of pregnancy - for instance in the first trimester or the first ten weeks, when early medical abortion is a viable treatment - appears to be contrary to the *PGC*. For the legal requirement to be legitimate at later stages it must be shown that the medical professional is best placed to decide whether the conditions are satisfied and, if necessary, that seeking a decision from an alternate arbiter would unduly interfere with the relevant mother's generic features of agency or vice-versa.

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<sup>188</sup> Nelson, n 9, 134.

<sup>189</sup> McLean, n 56, 151.

<sup>190</sup> Jackson, n 13, 111.

<sup>191</sup> Pattinson, n 38, 69-70.

<sup>192</sup> Gewirth, n 8, 143-4.

<sup>193</sup> Nelson, n 9, 157.

Given that the provision for setting the conditions precedent remains with the institution, where the decision making authority for whether these are satisfied is delegated, it appears that the position is more easily evaluated. This affords the institution the power to amend the conditions if they are being enforced in a way which is contrary to the intention.<sup>194</sup> The residual control held by the institution combined with the expertise held by the medical professional suggest that it is appropriate for doctor to hold the power-right of authorisation where the presumption in favour of the mother begins to gradually shift toward the foetus. Further, the need to seek approval from an alternate source - for example, by the court – would be likely to cause greater psychological harm (and delay, hence running contrary to the moral requirements of the *PGC*) to the mother. On the face of things, the *PGC* appears to support *a* role for the doctor in the termination process whether this is in the capacity of authoriser, counsellor or otherwise.

As noted, there is a general presumption in favour of termination during the early stages of pregnancy. This general presumption becomes weaker as the pregnancy continues but the greater moral status of the woman will generally, all things being equal, remain in favour of termination. Similarly, we noted that some restrictions to access to abortion are required by the legitimate exercise of reproductive autonomy. The question here is whether the requirement for two doctors to consent to the abortion is necessary. The problem with this is that it requires women to demonstrate and to *prove* they meet the requirements even in the early stages of pregnancy when the presumption is in their favour. As Cornell notes, ‘access to abortion, however liberal, will remain inadequate while women can only experience it through this sort of ‘stereotype-like grid’ of what having an abortion should mean.’<sup>195</sup> Whilst there *may* be a requirement for some form of medicalisation in cases of serious threats to the woman’s basic well-being later on in the pregnancy or for reasons of serious foetal abnormality – and by this I mean those which are likely to prevent the existence of an agent, such as anencephaly – and in these cases consultation, and agreement, by a doctor may be legitimate. The decision, even one which

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<sup>194</sup> Beyleveld and Brownsword, n 149, 160.

<sup>195</sup> Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 1995), 68.

is medicalised, ought to rest firmly in the autonomy of the woman (and those around her) making it. But as Nelson notes,

Women need to have authentic choices about pregnancy and abortion. Although leaving the decision in women's hands is necessary to demonstrate respect for reproductive autonomy, it is not sufficient to tell women that the decision is theirs and leave it at that. Good pre-natal, perinatal, and post-natal care must be available, as must support services for women who choose to bear children in difficult circumstances. Only then will women be able to exercise genuine autonomy in reproductive decision making.<sup>196</sup>

By reframing the dynamic from one which focuses on proving the need for an abortion and therein for doctors to play the role of judge to one where the role of the doctor is to support women through the process of deciding, as with other relevant professionals and family members, the dynamic is one which seeks to empower autonomous choice as with other forms of medical treatment.

Returning to termination in the early stages of pregnancy, it appears that the requirement of 'proof' is staggeringly at odds with the conception of legitimate exercise of reproductive autonomy.<sup>197</sup> It would appear, at least in the very early stages of pregnancy,<sup>198</sup> that the general presumption favours access to abortion by choice and without the need for approval by a practitioner.<sup>199</sup> However, it is also necessary to recognise the need to offer support in the access to legal abortion and this would appear to be a more appropriate role for the doctor.<sup>200</sup> On this basis, I would partly disagree with the claim that decision making in conjunction with practitioners is always contrary to the respect for reproductive autonomy.<sup>201</sup> Instead, what appears to be required is (a) a general presumption in favour of early abortion without the need for approval, (b) a lesser presumption in favour of mid-term abortion without the need for approval, (c) a lesser presumption in favour of mid-term abortion without the need for two doctors to authorise the termination<sup>202</sup> and (c) a

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<sup>196</sup> Nelson, n 9, 158.

<sup>197</sup> Gewirth, n 152, 117.

<sup>198</sup> For instance, in the first nine weeks, where Early Medical Abortion (EMA) – which will be considered in more detail below – is available and appropriate as a means of terminating the pregnancy.

<sup>199</sup> Department of Health, *Abortion Statistics England and Wales: 2014* (June 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/433437/2014\\_Commentary\\_\\_5\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433437/2014_Commentary__5_.pdf) (accessed 08.09.2015).

<sup>200</sup> Nelson, n 9, 159.

<sup>201</sup> See: Nelson, n 9, 135.

<sup>202</sup> At this stage, one doctor would appear to be sufficient and appropriate.

presumption in favour of late stage terminations where strong justificatory reasons are present which a doctor (or another arbiter) judges to exist.<sup>203</sup> As Mason claims,

As a *quid pro quo*, but also on the basis of moral principle, I believe that terminations between the twelfth and twenty-fourth weeks of pregnancy should be legally available only on the grounds of a *grave* effect on the health of the mother or by reason of the likelihood of severe fetal defect. Termination after the twenty-fourth week should be limited by the acceptance of equality of fetal and maternal rights to life, subject only to the need to destroy the fetus in order to save the life of the mother or, again, by reason of the likelihood of severe fetal defect.<sup>204</sup>

This would appear to generate support from the gradualist view of termination and seeks to recognise the need for late stage terminations to meet *some* criteria with appropriate barriers to access.

The final point to consider in this section before reviewing the presumptions that have been raised is the criminalisation of abortion. I claim that, generally speaking, some criminalisation is necessary, the scope of which must, however, be refined. The problem with criminalisation, Nelson notes, is that,

Even where there is only a very small chance of a conviction for abortion-related offences, the fact that the risk exists at all is difficult to accept from the perspective of respect for reproductive autonomy. The very fact that abortion remains on the books as a criminal offence perpetuates the idea that seeking to terminate a pregnancy is something of which to be ashamed, or something that rightly brings social disapprobation.<sup>205</sup>

There are two facets to this, however. The first relates to the provision of safe, legal abortion services and therein outlawing unsafe and illegal abortion services. The second relates to the counter point of reproductive autonomy to which Nelson refers, namely those who wish to *keep* the pregnancy. As noted above, I advocate the position that some criminalisation of abortion is *necessary* and is derived from respect for reproductive

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<sup>203</sup> To develop these with regards to the time frames existing medically and legally, we might suggest that (a) can apply, as above, up to nine/ten weeks into the pregnancy or during the first trimester, (b) from ten weeks to twenty-four weeks – depending on the medical evidence of *viability* around those weeks, and (c) would apply after those points. At this stage, if the conditions are made out it is likely that a doctor will already be involved.

<sup>204</sup> Kenyon Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Ashgate, 1998), 135.

<sup>205</sup> Nelson, n 9, 135

autonomy. The point ought to be clear, if a person terminates a woman's pregnancy contrary to her wishes<sup>206</sup> – and the expression of her reproductive autonomy – then this ought to be punishable criminally.<sup>207</sup> As Sheldon argues, 'the destruction of fetal life would no longer provide an independent justification for criminal sanction, though some sanction should remain available to recognise the important harm done to a woman who is subject to a non-consensual abortion.'<sup>208</sup> On this basis, a new offence of causing a woman to suffer miscarriage without her consent or legal justification<sup>209</sup> would be a more appropriate and autonomy-based criminal sanction than the present regime or by substituting it for existing offences.<sup>210</sup>

One would expect that under the current regime a doctor who sought to terminate a woman's pregnancy contrary to her wishes would have no valid defence under the Abortion Act 1967.<sup>211</sup> Similarly, if safe, legal abortions are provided by the State there appears to be justifiable reasons for criminalising women who attempt to self-abort.<sup>212</sup> Yet, at present it is also true that 'the offences...*potentially* capture healthcare professionals who fail to comply with the bureaucratic requirements imposed by the AA and those women who are unable or unwilling to access legal services.'<sup>213</sup> The focus is on respecting the reproductive autonomy of those who choose to keep the child and, due to the actions of another, are unable to do so. Keeping some form of criminal sanction then appears to be unquestionably valid as a means of respecting reproductive autonomy.<sup>214</sup> However, it should also be noted that the presumptions raised in favour of broadening the respect for

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<sup>206</sup> Indeed, we might even consider the harm caused to the prospective father as well: George W. Harris, 'Fathers and Fetuses' (1986) 96(3) *Ethics* 594-603, 596.

<sup>207</sup> Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2015) *Oxford Journal of Legal Studies* 1-32, 4.

<sup>208</sup> Sheldon, n 207, 26.

<sup>209</sup> I have purposely opened this up from consent alone to recognise that *consent* may not in and of itself by a total justification for abortion.

<sup>210</sup> For instance by s18 (Intentional Wounding) or s20 (Malicious Wounding) Offences Against the Person Act 1861. As suggested by Sheldon, n 207, 27: 'Given the harm to women involved, such actions should continue to be chargeable and would be so under general offences relating to the causing of actual and grievous body harm.'

<sup>211</sup> This point does, however, demonstrate the need to revise parts of the Act.

<sup>212</sup> *A, B and C v Ireland* [2011] 53 EHRR 13.

<sup>213</sup> Sheldon, n 207, 16.

<sup>214</sup> This is not withstanding the question as to *how* that criminalisation ought to be framed. See: *ibid*, 15.

legitimate exercises of reproductive autonomy which have been outlined would require a reframing of the laws which criminalise abortion (and indeed the defences under Abortion Act 1967) so that they are aligned more closely with those presumptions. For instance, given the general presumption in favour of early pregnancy termination it would be counter intuitive for this to be generally criminalised except where to terminate would be *contrary to the woman's choice* and by illegal means.

In this section, I have considered the legitimacy (according to the commitments of the *PGC*) of reproductive autonomy in relation to abortion in general in order to build the model of Rational Autonomy presented. A number of *prima facie* presumptions have been made:

1. The foetus is deserving of an increasing moral status as a potential agent as it nears full agency;
2. Conflicts are resolvable by reference to the Hierarchy of Generic Goods, the Criterion for the Avoidance of More Probable Harm, and the Principle of Rational Precautionary Reasoning;
3. All things being equal, conflicts between full agents and potential agents are weighed in favour of the full agent;
4. All things being equal, early abortion is justified by the interference with the mother's basic well-being;
5. Attempts to avoid pregnancy further justify the legitimacy of early termination;
6. Late stage terminations will be justifiable by more serious threats to the mother's basic well-being and a lack of potential moral status (serious disability) only;
7. The father may have a right to be informed where his important interests are at stake and the mother is not under an unreasonable burden (at the expense of her own interests) in being required to inform him;
8. The role of the doctor appears to be broadly in line with the requirements of the *PGC* (except in early stages where this burden appears to be unreasonable) but the requirement for two doctors is unduly excessive; and,
9. The criminalisation of abortion is necessary to demonstrate respect for the reproductive autonomy of those who wish to remain pregnant.

I have claimed that the current legal regime in the UK is a *partially* legitimate means of institutionalising the requirements of the *PGC*, subject to the requirement that it is

developed when new evidence suggests a more appropriate interpretation is available. It is legitimate provided institutionalisation of the *PGC* remains a good faith attempt to offer the right answer to the moral commitments derived.

Given that these presumptions are derived from the moral rights-based commitments of the *PGC*, they favour rights in accordance with the scope outlined. The effect is that there would appear to be a justifiable ‘right to termination’<sup>215</sup> in the first trimester (at least where there is no overwhelming fault on the part of the would-be parents,<sup>216</sup> provided that this condition does not unduly risk interference with the parents’ well-being which it might) simply on the basis of the mother’s greater moral status without a need to consider the potential harm.<sup>217</sup> In the second trimester, the presumption is lessened and any ‘right to termination’ would have to be premised on the threat to the mother’s generic features of agency.<sup>218</sup> This is because the mother’s greater moral status favours her where the threats to the generic features are of the same kind or similar degrees. Finally, any ‘right to termination’ in the third trimester or post-‘viability’ is only valid where the potential harm to be suffered by the mother is equal to or greater than the potential harm to be suffered by the foetus or where the foetus holds a lower moral status because it is incapable of attaining agency.<sup>219</sup>

The father may hold a ‘right to be informed’ if his important interests are at stake and, ultimately, the mother is not placed under an unreasonable burden by informing him. The doctors role ought to be one of providing positive assistance in order for a decision to be made rather than one of gatekeeper<sup>220</sup> and the ‘right to conscientious objection’ may

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<sup>215</sup> The ‘right to termination’, it would appear, is a power-right allowing the mother to enforce a duty (correlative to her own claim-right) against a medical practitioner consulted for treatment.

<sup>216</sup> I say ‘parents’ rather than mother here as the responsibility in this situation must fall on both parents.

<sup>217</sup> A similar conclusion is drawn by Scott, n 128, 30 and British Medical Association, *First Trimester Abortion: A Briefing Paper by the BMA’s Medical Ethics Committee* (ARM, 2007), 2.

<sup>218</sup> An inability to terminate during the first trimester may justify an abortion during the first few weeks of the second trimester.

<sup>219</sup> Jarvis Thomson, n 59, 274.

<sup>220</sup> Especially where termination is sought in the first trimester. See: Fran Amery, ‘Social Questions, Medical Answers: Contesting British Abortion Law’ (2013) 0(0) *Social Politics* 1-24, doi:10.1093/sp/jxt003, 17.

only go so far as to excuse the doctor from performing or being directly involved with the termination. The requirement to provide positive assistance in cases where this privilege-right<sup>221</sup> is exercised requires referral to another medical practitioner if the right to conscientious objection is exercised.

Yet, these rights may legitimately be restrained by the collective interests a community has in promoting certain values deemed necessary under the *PGC*, such as in producing tolerance towards disability, sex, and so on. Beyond these ethically individualist rights,<sup>222</sup> an important part of the incorporation of rational reproductive autonomy is to enable agents to make informed choices as to their reproductive well-being.<sup>223</sup> This requires and enforces rights to good pre-, peri, and post-natal care and to support services which empower productive agency. As well as an improvement in and access to 'sexual and reproductive education, information and advice and to the availability of contraception, in ways helpfully stressed.'<sup>224</sup> Respect for reproductive autonomy requires that interests are protected and that support is provided in order for agency to flourish. Nevertheless, a model of Rational Autonomy demands that the interest in exercising one's free choice is not unduly elevated above other, competing, interests; that a balance is struck between individualism and mutualism; and that choices are both available and supported.

#### ***f. Access to Services, Information and Delay in Family Planning***

In spite of the importance of the ethical implications of the legal position, in many cases it is the factual circumstances which may determine the practical effects of the right to reproductive autonomy. As such, in this section I set out to consider how the realities of accessing abortion services in the UK. This is particularly important in relation to the thesis developed as it will impact on both the public and private aspects of reproductive autonomy. As Nelson notes,

...the notion of reproductive autonomy as simply a negative liberty is, for many women, woefully inadequate. It is of little use to tell a woman that she is free to

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<sup>221</sup> This would be a privilege as a *negation of the general duty* on medical practitioners to perform the termination as a means of positive assistance.

<sup>222</sup> Gewirth, n 152, 96-7.

<sup>223</sup> Gewirth, n 8, 138.

<sup>224</sup> Scott, n 128, 33.



terminate her pregnancy if she cannot afford to pay for the abortion procedure, or if she is required to travel not once but twice to a distant clinic in order to have the procedure, and her job, or her child or her elder-care responsibilities make that travel impossible.<sup>225</sup>

The realities of practical access include but are not limited to issues of: availability, delay, location, funding and attitudes of medical professionals involved. I will work through the issues involved with each of these.

In relation to the availability of abortion services, there ought to be little problem here. As we have seen the practical effect of the wording of s1(1)(a) is to allow abortion ‘on demand’ because of the ‘statistical argument’<sup>226</sup> where the ground is inherently made out during the first trimester as ‘the risks associated with carrying a pregnancy to term’<sup>227</sup> will outweigh those of termination. The British Medical Association (BMA) adds that, ‘few, if any, women will fail to meet the medical criteria in the first trimester.’<sup>228</sup> The Royal College of Obstetricians and Gynaecologists (RCOG) have also noted, ‘This means that women in the first trimester could be seen as automatically fulfilling the criteria of the Abortion Act. Although this was not the original intention of the Act, in practice it facilitates access to induced abortion within the current law.’<sup>229</sup> Yet, in spite of this it has been suggested that outside of the first three months of pregnancy there may be difficulties with access due to a lesser number of NHS facilities offering termination (in turn creating a problem with the location of those facilities which will consider in more detail shortly).<sup>230</sup> This is of particular concern given that the availability of termination is subject to wide regional variation.<sup>231</sup> A Department of Health report notes that, ‘Over three quarters (80%) of NHS funded abortions took place at under 10 weeks, ranging from

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<sup>225</sup> Nelson, n 9, 38.

<sup>226</sup> Ibid, 3.

<sup>227</sup> British Medical Association, n 217, 2.

<sup>228</sup> Ibid, 3.

<sup>229</sup> House of Commons Science and Technology Committee, *Scientific Developments Relating to the Abortion Act 1967*, Twelfth Report of Session 2006–07, Vol I, 29 October 2007, para 94.

<sup>230</sup> Jonathan Herring, *Medical Law and Ethics* 6<sup>th</sup> ed (Oxford University Press, 2016), 324.

<sup>231</sup> Jackson, n 13, 85.

54% in the Vale of Glamorgan to 89% in North Staffordshire.<sup>232</sup> Nationally, around 80% of abortions were performed in the first 10 weeks.<sup>233</sup> As a result, despite the views of the professional bodies and academics, there are problems still with practical access to available services.

Even where these services are accessed, women may still suffer from considerable delays.<sup>234</sup> Delays may be incurred for any number of reasons, most commonly though it appears to be due to pressure on services in high-proportion sites and the use of agency services.<sup>235</sup> There has been reports of delays of up to seven weeks.<sup>236</sup> The Government's recommendation is that termination should be provided within three weeks.<sup>237</sup> The suggestion is,

To minimise delay, service arrangements should be such that:

- Referral to an abortion provider should be made within 2 working days.
- Abortion services must offer assessment within 5 working days of referral or selfreferral.
- Services should offer women the abortion procedure within 5 working days of the decision to proceed.
- The total time from seeing the abortion provider to the procedure should not exceed 10 working days.

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<sup>232</sup> Department of Health, *Abortion Statistics England and Wales: 2013* (June 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319460/Abortion\\_Statistics\\_England\\_and\\_Wales\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319460/Abortion_Statistics_England_and_Wales_2013.pdf) (accessed 15.04.2016), 15.

<sup>233</sup> Department of Health, *Abortion Statistics England and Wales: 2014* (June 2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/433437/2014\\_Commentary\\_\\_5\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433437/2014_Commentary__5_.pdf) (accessed 08.09.2015), 15.

<sup>234</sup> Sam Rowlands, 'The Policing of Abortion Services in England' (2013) 39 *Journal of Family Planning and Reproductive Health Care* 121-6, 122.

<sup>235</sup> Ellie Lee, Steve Clements, Roger Ingham and Nicole Stone, *A Matter of Choice? Explaining National Variation in Teenage Abortion and Motherhood* (Joseph Rowntree Foundation, 2004), 31-2.

<sup>236</sup> BBC, 'Seven week wait for NHS abortion' (22 January 2007), available at: <http://news.bbc.co.uk/1/hi/health/6287291.stm> (accessed 15.04.2016).

<sup>237</sup> Royal College Of Gynaecologists, *Abortion Care* (February 2012) available at: <https://www.rcog.org.uk/globalassets/documents/patients/patient-information-leaflets/pregnancy/pi-abortion-care.pdf> (accessed 15.04.2016) see also: RCOG, n 258, 8.

- Women requiring abortion for urgent medical reasons should be seen as soon as possible.<sup>238</sup>

Best practice dictates that abortion is safer the sooner it is performed;<sup>239</sup> as such, any significant delays may pose a risk to the mother's physical or mental health. Similarly, the suggestion by RCOG is that termination should take place on the same day as assessment.<sup>240</sup> Further to this, another cause for delays is the requirement that two doctors sign the HSA1 form<sup>241</sup> certifying that the grounds for abortion has been made out. The BMA has suggested,

The requirement for two signatures in these circumstances has *the potential to create delays and unnecessary barriers to access*, where earlier termination is medically preferable... The BMA's policy is clear that any changes in relation to first trimester abortion should not adversely impact upon the availability of later abortions.<sup>242</sup>

Similarly, the House of Commons Science and Technology Committee recognise that,

We are concerned that the requirement for two signatures may be causing delays in access to abortion services. If a goal of public policy is to encourage early as opposed to later abortion, we believe there is a strong case for removing the requirement for two doctors' signatures. We would like...[to] see the requirement for two doctors' signatures removed.<sup>243</sup>

Given that the large majority of abortions are carried out within the first trimester, and the legal ground, on the face of it, inherently will pre-determine the legal balance in favour of termination, it is difficult to justify the *necessity* of this requirement at this stage of gestation.<sup>244</sup> It appears then, as we have already seen with reference to the presumptions

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<sup>238</sup> Royal College Of Gynaecologists, *The Care of Women Requesting Induced Abortion* (September 2004) available at: [www.rcog.org.uk/files/rcog\\_corp/uploaded-files/NEBInducedAbortionfull.pdf](http://www.rcog.org.uk/files/rcog_corp/uploaded-files/NEBInducedAbortionfull.pdf) (accessed 11.07.2014), 8.

<sup>239</sup> Royal College Of Gynaecologists, *Best Practice in Comprehensive Abortion Care* (June 2015) available at: <https://www.rcog.org.uk/globalassets/documents/guidelines/best-practice-papers/best-practice-paper-2.pdf> (accessed 11.07.2014)

<sup>240</sup> Ibid, 11.

<sup>241</sup> Abortion Regulations 1991, SI 1991/499 and Abortion (Amended) Regulations (England) 2002.

<sup>242</sup> British Medical Association, *The Law and Ethics of Abortion* (London, 2014), 7 (*my emphasis*).

<sup>243</sup> House of Commons Science and Technology Committee, n 229, para 99.

<sup>244</sup> Scott, n 128, 15.

raised in the previous section, that this source of delay is an unnecessary inclusion in the regulation of abortion.

In regards to the location of services, a problem may be incurred if women are required to travel some distance for care. Research has suggested that in cases where services were provided through NHS contracts the provider clinic may be located further away from the patient's home causing travel difficulties.<sup>245</sup> The current legal regime requires that abortion be conducted in an NHS hospital or a place approved by the Secretary of State. This was due to the fact that at the time abortion was largely provided by surgical procedure.<sup>246</sup> Today, the development of medical technology allows for the provision of medical abortion whereby termination is induced using pharmaceuticals. This poses a further problem for the legal position whereby the place of administration is restricted by the outdated wording of the section. This will be considered in more detail in the following section.

In the vast majority of cases abortion services are funded by the NHS. The Department of Health statistics record that,

...in 2014, 32% of abortions were performed in NHS hospitals and 67% in approved independent sector places under NHS contract..., making a total of 98% of abortions funded by the NHS. The remaining 2% were privately funded.<sup>247</sup>

There has been a notable increase in the funding of abortion services by the NHS over the past 30 years,<sup>248</sup> and concerns raised in the past over the 'somewhat patchy' state funding has been largely assuaged.<sup>249</sup> This is vital in achieving equality in the provision of services and eliminating any discrimination against those incapable of affording private care.<sup>250</sup> However, if the provision of services through NHS contracts causes travel problems for patients this may be an undue and unnecessary inconvenience to the woman.

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<sup>245</sup> Lee, Clements, Ingram and Stone, n 235, 33.

<sup>246</sup> House of Commons Science and Technology Committee, n 229, para 110.

<sup>247</sup> Department of Health, n 232, 12.

<sup>248</sup> Ibid, 13.

<sup>249</sup> Jackson, n 13, 85.

<sup>250</sup> See: Lee, Clements, Ingram and Stone, n 235, 27.

Finally, the attitudes of medical professionals involved with the proceed may pose a barrier to access. The problem stems from the gatekeeper role placed on the ‘permitting’ doctors.<sup>251</sup> This may take effect if a woman is unable to find a doctor satisfied to agree to her request for an abortion. If this is the case, doctors may restrict access to abortion.<sup>252</sup> Whilst the right to conscientious objection requires doctors to exercising it to make a referral to another practitioner, in the absence of knowledge of the legal position women<sup>253</sup> may face the burden of needing to perserver in order to find someone willing to approve of the termination.<sup>254</sup> As Sheldon notes, ‘if the law aims to protect and entrench any rights it is not those of the woman (nor indeed those of the foetus) but rather those of the doctor.’<sup>255</sup> It is also notable that this role means that doctors are, ‘at once performing a crime and judging (or relying on one (or two) other doctors’ judgment) in ‘good faith’, that one or more of the lawful grounds under the Abortion Act is made out.<sup>256</sup> In the absence of an independent review procedure, a heavy burden is placed on women to keep ‘shopping around’ for approval.<sup>257</sup> This could be largely eliminated by redress the current flaws in the legislation and recognising that s1(1)(a) will inherently be made out during the first trimester, as recognised in the presumptions in the previous section.

Each of these practical difficulties with accessing services poses a direct threat to both public and private reproductive autonomy. In addition to providing a satisfactory regulatory framework for abortion, it is required of the State to ensure that the demands for these services are met without undue inconvenience or harm. In particular, delays and outright barriers to access may cause harm to the woman and indeed threaten her basic well-being. Even if the current regime *were* to grant a right to terminate at any stage, these practical impediments would also need to be rectified in order to ensure that this right is

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<sup>251</sup> Linda Clarke, ‘Abortion: A Rights Issue?’ in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginning of Life* (Routledge, 1989), 155-71.

<sup>252</sup> Lee, Clements, Ingram and Stone, n 235, 27.

<sup>253</sup> Scott, n 128, 25.

<sup>254</sup> House of Commons Science and Technology Committee, n 229, para 102.

<sup>255</sup> Sheldon, n 183, 42.

<sup>256</sup> Scott, n 128, 16 and 31.

<sup>257</sup> Ibid, 25.

actually experienced as such. It is now necessary to consider more narrow and developing field of Early Medical Abortions and evaluate the presumption raises for both public and private reproductive autonomy within the model of Rational Autonomy developed thusfar.

***g. Early Medical Abortion***

This section develops from the presumptions raised and considers the legitimacy of autonomy surrounding Early Medical Abortions (EMAs). This affords the opportunity to test the applicability and usefulness of *Rational Autonomy* amidst technological advances which test the pre-existing legal and moral foundations. It also provides an opportunity to re-examine, and refine, the rights-based framework.

It is useful at this point to outline the technique involved in EMAs and the legal background. EMAs are performing using Mifepristone (known as RU486), as an abortifacient, followed by Misoprostol one-three days later, used to procure the explosion of the dead foetus, this occurs in a manner akin to a miscarriage.<sup>258</sup> Whilst Mifepristone is delivered by a medical practitioner, at present Misoprostol is often self-administer in the clinic. It was the discovery of Misoprostol which has led to the legal problems associated with EMAs. Prior to this, a Gemeprost pessary was used and was required to be stored in a refrigerator and carried unpleasant side effects as a result it was unsuitable for home use. The EMA procedure is viable for termination up to 63 days (nine weeks) into the pregnancy and is administered in accordance with the Abortion Act 1967. At present, the requirement that the ‘treatment’ take place in an ‘authorised location’ requires that Misoprostol also be taken in a Hospital/Clinic.<sup>259</sup> This allows women to leave immediately after taking the suppository and expel the foetus at home – it does, however, run the risk that the miscarriage may take place during the journey.<sup>260</sup> In *BPAS v. Secretary of State for Health*,<sup>261</sup> the court declined to reinterpret s1(3) to allow Misoprostol to be taken outside of the approved location as it constituted ‘treatment’ within the definition

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<sup>258</sup> RCOG, n 238, 13.

<sup>259</sup> See: *BPAS v Secretary of State for Health* [2011] EWHC 235 (Admin).

<sup>260</sup> Abortion Review *Misoprostol and the transformation of the ‘abortion pill’* (26 January 2001) available at: [www.abortionreview.org.uk/index.php/site/article/908/](http://www.abortionreview.org.uk/index.php/site/article/908/) (accessed 11.07.2014)

<sup>261</sup> *BPAS*, n 259.

of the Act. Supperstone J was apprehensive that an extension to partially include EMA at home risked the prescription and administration of the drug at any stage of the pregnancy and the administration of *any* abortifacient drug (including Mifepristone). The terms of the Abortion Act therefore remain such that they prohibit home administration of the drug – though curiously the issue of self-administration in clinic was not dealt with.

In this section, my considerations focus on the legitimacy of allowing the Misoprostol dose to be taken at any location – e.g. so that women may take the drug at home or some other location they feel comfortable – with appropriate safeguards established. The presumptions raised in the previous section point towards the legitimacy of early terminations where the lower moral status of the foetus in comparison with the commitments to full agents is sufficient to resolve conflict in favour of the mother. This is partially mirrored by the conditions precedent set by s1(1)(a).<sup>262</sup> The *PGC* appears to favour, on the face of things, the use of EMAs where possible, on the basis that it is the least emotionally distressing of the procedural options and encourages early termination.<sup>263</sup> The focus of this section, then, must consider whether the decision to allow Misoprostol to be administered by the mother outside of the clinic and the effect that prohibition has on the legitimacy of the legal position according to the *PGC*.

If the legal position is aimed at resolving the balance between competing moral agents and/or at allowing the safe abortions to take place then consideration must be as to how this is best achieved in light of developing technologies.<sup>264</sup> As Winikoff and Davis note,

The development of accessible and simple methods of early abortion is a social and humanitarian good from almost every point of view. Expansion of access to early medical abortion is a humane approach that benefits both women and their societies. In some places, such treatment allows women to access abortion services that are otherwise not available. In all places, improved technology will allow more women to have abortions earlier in pregnancy.<sup>265</sup>

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<sup>262</sup> Subject to the caveat that the time limits may be questioned.

<sup>263</sup> Kate Greasley, “Medical Abortion and the ‘Golden Rule’ of Statutory Interpretation” (2011) *Medical Law Review* 1-12.

<sup>264</sup> *Ibid*, 4.

<sup>265</sup> Beverly Winikoff and Anne Rachel Davis, ‘Comment: Abortion is for Women’ (2007) 369 *The Lancet* 1904, 1905.

What then of the implications which home and in-clinic administration of Misoprostol hold for the mother's basic well-being? On the face of things, the comparison is whether a) the option to choose between home and in clinic administration would be contribute to additive well-being and protect basic well-being; and b) home administration itself poses less of an interference to the generic features of agency. As some women may prefer to return to the clinic it is important to remember that the option to administer at home may not be taken. The option to choose, however, may increase the *dispositionally*-interpreted occurrent freedom of women and therein expand their actual options in the exercise of reproductive autonomy, empowering more meaningful choice.

Firstly, it is necessary to consider the effects on agency that simply having options would offer. Provided that evidence suggests that home administration is, at least, equally safe and provides, potentially, a more comfortable experience for some women, it is justifiable to argue that it *ought* to be considered as an option.<sup>266</sup> A recent World Health Organisation (WHO) study found that, with adequate safeguards and a consultation at the first appointment,

There is no evidence that home-based medical abortion is less effective, safe or acceptable than clinic-based medical abortion. Simplified protocols could give greater access to medical abortion to women living in restrictive and/or resource-limited settings where mortality related to unsafe abortion remains high.<sup>267</sup>

On this basis, given that at present some women self-administer Misoprostol during the second visit to the clinic and are able to leave immediately thereafter it would appear that the option to self-administer *at home* presents a viable, and equally effective, means of completing the termination.<sup>268</sup> The alternative would allow women to be consulted and directed as to the administration of the Misoprostol dose at their first visit and this stage of 'treatment' would be comprised of prescription of Misoprostol. The 'treatment' would continue with follow-ups, by telephone or in person, which remains a requirement with

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<sup>266</sup> Nelson, n 9, 145.

<sup>267</sup> Thoai D. Ngo *et al*, "Comparative Effectiveness, safety and acceptability of medical abortion at home and in a clinic: a systematic review" (2011) 89 *Bull World Health Organisation* 360-70.

<sup>268</sup> Greasley, n 264, 11.



in clinic administration. The effectiveness of 'telemedicine'<sup>269</sup> has been advocated by Grossman<sup>270</sup> and Cameron.<sup>271</sup> In these studies, it has been found that overall effectiveness is at similar levels,<sup>272</sup> a preference is apparent for removing the need to revisit a clinic,<sup>273</sup> waiting times were reduced<sup>274</sup> and more women using the telemedicine service would recommend to a friend.<sup>275</sup> Interestingly, there is a suggestion that a number of participants expressed their desire to be able to choose the method of their treatment regime.<sup>276</sup> This represents the understandable wish to hold greater control over one's reproductive choices and providing the opportunity to make a meaningful reproductive decision which suits them.<sup>277</sup> If the provision of 'telemedicine' and home- and clinic-based treatment options are demonstrated to be, at least, equally effective and safe then there is a *prima facie* case for choice to be offered.<sup>278</sup>

The sticking point for the courts has been the interpretation of the 'treatment' where it is suggested that it cannot amount to the prescription of Misoprostol *for the purpose of* attaining a termination. Greasley emphasises,

Construing termination as a process—and even a process of *treatment*—does not require that *every* step in that process be individually defined as an instance of treatment. As we have already seen, the judge did not regard the miscarriage itself as part of the treatment, but a consequence of it. However, this did not prevent the court from seeing the event of miscarriage as part of the process of termination, regardless of whether it independently counts as an instance of *treatment*.<sup>279</sup>

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<sup>269</sup> 'Telemedicine' uses communication technology to convey healthcare information at a distance. It is already utilised to some extent in the UK with services such as NHS Direct.

<sup>270</sup> Daniel Grossman *et al*, "Effectiveness and Acceptability of Medical Abortion Provided Through Telemedicine" (2011) 118(2) *Obstetrics & Gynaecology* 296-303.

<sup>271</sup> Sharon T. Cameron *et al*, "Telephone follow-up and self-performed urine pregnancy testing after early medical abortion: a service evaluation" (2012) 86 *Contraception* 67-73.

<sup>272</sup> Grossman, n 270, 299.

<sup>273</sup> Cameron, n 271, 69.

<sup>274</sup> Grossman, n 270, 300.

<sup>275</sup> *Ibid*, 299.

<sup>276</sup> *Ibid*, 300 and Cameron, n 271, 68.

<sup>277</sup> Nelson, n 9, 145.

<sup>278</sup> Kate Levine and Sharon T. Cameron, "Women's preferences for method of abortion and management of miscarriage" (2009) 35(4) *Journal of Family Planning and Reproductive Health Care* 233-5, 235.

<sup>279</sup> Greasley, n 264, 9 (original emphasis).

Instead, we must consider the relevance of how new technologies alter the way in which we think about conventional procedures. As Supperstone J noted, ‘The position of medical science and the process for early medical abortion is *now* entirely different.’<sup>280</sup> To do so, imagine a synthetic humanoid being whose immune system is computerised.<sup>281</sup> This computer runs diagnosis and when finding an anomaly sets out to ‘fix’ it. Now, imagine that on occasion these computers malfunction, in which case it is necessary to visit a ‘doctor’ - who is more akin to a computer technician - who runs her own diagnosis and is able to instruct the system to ‘repair’ its malfunctions or ‘fix’ any anomalies which are found to be present. ‘Treatment’ here is technically self-administered, yet it is still a form of treating the ailment. Just as the law would have to progress in its understanding of the meaning of words in relation to cybernetic immune systems so too must it in relation to new technologies which allow for existing procedures to be conducted differently.

Secondly, it is necessary to consider whether clinic-based ‘treatment’ might be more detrimental than home-based ‘treatment’, to do so is to further mount the claim that, all things being equal, the viability of home administration is sufficient if empirical evidence demonstrates equal safety. It has been suggested that the current provision of clinic-based EMA is ‘*less* safe and significantly more distressing’<sup>282</sup> than the home-based alternative. Given that, ‘If a woman is permitted to leave the clinic after taking Misoprostol, then whatever stage of gestation she happens to be at, it is surely preferable – and indeed safer – that miscarriage begins at home rather than at a bus stop.’<sup>283</sup> In the WHO study, which looked at the effectiveness of EMA at home and in clinic in a range of countries including France, Sweden, India and the USA, results demonstrated that the effectiveness of achieving complete abortion was roughly equal.<sup>284</sup> This would suggest a *prima facie*

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<sup>280</sup> *BPAS v SSH*, n 259, [13], (*my emphasis*).

<sup>281</sup> See, for example: *Humans* (Channel 4/AMC, 2015) Accessible at: <http://www.channel4.com/programmes/humans> (12/08/2015).

<sup>282</sup> Greasley, n 264, 4.

<sup>283</sup> *Ibid*, 10.

<sup>284</sup> Ngo, n 267.

preference to the option of home-based ‘treatment’, because it excludes the possibility of well-being being harmed by a miscarriage ‘on-the-move’.

The option to complete home-based EMA removes the possibility of miscarrying whilst on-the-move and thereby reducing the risk of to the woman’s basic well-being and may supplement freedom and autonomy. As Supperstone J recognises, the current scheme ‘...puts women in the position where they may be *very worried* about whether the miscarriage will commence on the way home.’<sup>285</sup> It also reduces both cost and inconvenience of reattending the clinic – a cost benefit which would also apply equally to the healthcare provider.<sup>286</sup> With these considerations in mind and the possibility of experiencing the miscarriage at home (with telephone and administrative support) rather than whilst travelling, it would appear that home-based EMA is *safer* and therein less likely to constitute an interference with the woman’s basic well-being and, by providing the option, dispositionally-interpreted occurent freedom. It would appear then that the *PGC*, at least, offers a *prima facie* case for the availability of EMA at home to be offered. This additionally supports the legitimate exercise of reproductive autonomy as a means of exercising choice, as the public scheme whereby the State must offer choices and empower decision making, and as a means of encouraging early termination where the general presumption is in favour of doing so. The State is required to encourage safe access to developing means of abortion which enable further choice and alter our understandings of control, an imposition to this is especially unfounded, and indeed illegitimate, if it is done so on the basis that it fails to fit with the current legal regime. The law must reflexively adapt to developing technologies and do so on the basis of furthering the generic rights of agents.

Even were there nothing significant in favour of home administration, this would still raise the need for considerations as to the viability of the existing legal position. As new empirical evidence becomes available through technological developments which challenge the meaning of relevant provisions the law offers and the *PGC* requires - indeed

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<sup>285</sup> *BPAS v SSH*, n 259, [11]

<sup>286</sup> Nelson, n 9, 145.

demands - that the provisions are reconsidered to understand whether it remains the right answer and represents a good faith attempt to relate the normative possibilities through institutional reasoning. That is, the law is required to reconsider the meaning of '*administration by a medical professional*' and the point at which the 'termination' occurs. It is the failure to do so and the decision to focus on pre-existing wording of the statute rather than to focus on the well-being and freedoms of the woman which is the most disturbing and ostensibly non-*PGC*-compliant aspect of the legal position. Rational Autonomy would appear to justify the use of EMAs to satisfy the right to termination in the early stages of pregnancy and, equally, would support the provision of both home- and clinic-based administration options with a view to protect the generic features of agency and to improve accessibility to these options. Indeed, home-based EMAs appear to be the most compliant method of termination for these reasons. Having considered the concerns for reproductive autonomy in the termination of a pregnancy, it is now necessary to consider the control of fertility prior to conception through the use of contraceptives.

## **5.4 Contraception**

This section seeks to deal with the exercise of reproductive autonomy in relation to the use of contraceptives according to the model of Rational Autonomy. Whilst the use of contraceptives dates back throughout human history,<sup>287</sup> its development in recent history has led to a huge change in the perception of fertility control. Only as recently as 1925, the description of contraception as 'monstrous and revolting to human nature' was held to be "fair comment" for the purposes of a libel action.<sup>288</sup> Lord Denning, in 1954, suggested that a sterilisation performed with the purpose of enabling a man to experience the pleasure of sexual intercourse was contrary to public policy and degrading to the man.<sup>289</sup> More recently, however, the courts have appeared to be more accepting of contraceptive use with Mumby J noting,

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<sup>287</sup> See: John Riddle, *Eve's Herbs: A History of Contraception and Abortion in the West* (Harvard University Press, 1997)

<sup>288</sup> *Sutherland v Stopes* [1925] AC 45.

<sup>289</sup> *Bravery v Bravery* [1954] 1 WLR 1169, 1173.

It is, as it seems to me, for individual men and women, acting in what they believe to be good conscience, applying those standards which they think appropriate, and in consultation with appropriate professional (and, if they wish, spiritual) advisers, to decide whether or not to use IUDs, the pill, the mini-pill and the morning-after pill. It is no business of government, judges or the law.<sup>290</sup>

Yet, all things considered, it appears that the State does have a role to play in these matters, and as we have already seen throughout this chapter, it ought to seek to empower the exercise of choice in reproductive matters and hold a role in legitimately measuring the exercise of reproductive autonomy.

The use of contraceptives as a means of fertility control is widespread with 76% of women under 50 using some form of contraception in England and Wales.<sup>291</sup> In 2013-14, 14,813 women were sterilised and 14,142 men underwent the vasectomy procedure in England.<sup>292</sup> Over the same period, 7.2 million prescriptions for the contraceptive pill were dispensed<sup>293</sup> and a further 1.32 million Long Acting Reversible Contraceptives (LARCs) were prescribed.<sup>294</sup> The Emergency Contraceptive was issued in clinics and in the community 332,660 times in 2013-14.<sup>295</sup> Yet the development of new techniques and technologies has stagnated in recent years.<sup>296</sup> The suggestion is that, 'there is a real need for new methods of contraception to be developed that are more effective, easier to use, and safer than existing methods.'<sup>297</sup> A major concern of contraception is its reliability, with one study suggesting that of those using the contraceptive pill approximately 9%

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<sup>290</sup> *R (Smeaton on behalf of SPUC) v Secretary of State for Health* [2002] 2 FCR 193, [396].

<sup>291</sup> Health & Social Care Information Centre, *NHS Contraceptive Services: England, 2012/13* (2013) available at <http://www.hscic.gov.uk/catalogue/PUB12548/nhs-cont-serv-comm-cont-clin-eng-12-13-tab1.xls> (accessed 02.06.2014), Table 1.

<sup>292</sup> Health and Social Care Information Centre, *NHS Contraceptive Services: England, Community Contraceptive Clinics Statistics for 2013-14* (2014) available at <http://www.hscic.gov.uk/catalogue/PUB15746/nhs-cont-serv-comm-cont-clin-eng-13-14-rep.pdf> (accessed 16.09.2015), 19.

<sup>293</sup> Health and Social Care Information Centre, *NHS Contraceptive Services: England, 2013/14* (2014) available at <http://www.hscic.gov.uk/catalogue/PUB15746/nhs-cont-serv-comm-cont-clin-eng-13-14-tab.xlsx> (accessed 16.09.2015), Table 1.

<sup>294</sup> Health and Social Care Information Centre, n 292, 20.

<sup>295</sup> *ibid*, 18.

<sup>296</sup> Constance Holden, 'News: Research on Contraception Still in the Doldrums' (2002) 296 *Science* 2172.

<sup>297</sup> David Baird and Anna Glasier, 'The Science, Medicine and Future of Contraception' (2000) 172(5) *Western Journal of Medicine* 321-4, 321.

became pregnant in the first year of use.<sup>298</sup> With approximately half of all pregnancies being unintended in the UK<sup>299</sup> and three-quarters of all abortions taking place in spite the use of some form of contraception,<sup>300</sup> the complaint is to a lack of development of contraceptive technologies and greater education as to the use of those technologies.<sup>301</sup> Concerns for reproductive autonomy stem from barriers to access (including financial and accessibility), reliability, education and development.

In spite of these concerns, the UK offers a wide range of contraceptives and sterilisation procedures (though there is a waiting list) free of charge through the NHS.<sup>302</sup> With approximately 52% of all contraceptives currently offered, the UK provides one of the broadest range of fertility control measures.<sup>303</sup> In 1961, combined oral contraceptives which contained high doses of oestrogen and progestogen were approved for use in the UK and in 1969 the first progestogen-only pill was developed.<sup>304</sup> In 2002 the combined pill (the 'Yasmin') and the progestogen-only pill (Cerazette) were made available.<sup>305</sup> In 2009 the combined pill (Qlaira) was made available, this involved a regime which decreased oestrogen supply and increased progestogen dose over a 26 'active' pill cycle followed by two 'passive' or placebo tablets.<sup>306</sup> These are available through General Practitioners and family planning clinics.<sup>307</sup> The decision in *Gillick*<sup>308</sup> has also open these services up to minors, if they are capable of demonstrating an understanding of the provision, without their parents' consent. It has, however, been suggested that more is

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<sup>298</sup> Alan Guttmacher Institute, *Contraceptive Use in the United States* (2014) available at [http://www.guttmacher.org/pubs/fb\\_contr\\_use.html](http://www.guttmacher.org/pubs/fb_contr_use.html) (accessed 06.03.2015)

<sup>299</sup> Louise Bury and Thoai D Ngo, *The Condom Broke! Why do Women in the UK Have Unintended Pregnancies?* (Marie Stopes, 2009), 5

<sup>300</sup> *Smeaton*, n 290, [215].

<sup>301</sup> See: Melissa Hobbs *et al* 'Pharmacy Access to the Emergency Contraceptive Pill: A National Survey of a Random Sample of Australian Women' (2011) 83 *Contraception* 151; Nelson, n 9, 78-9.

<sup>302</sup> National Health Service (Family Planning) Amendment Act 1972.

<sup>303</sup> Dianne Azzarello and John Collins, 'Canadian Access to Hormonal Contraceptive Drug Choices' (2004) 26 *Journal of Obstetrics and Gynecology* 489, 490.

<sup>304</sup> Family Planning Association, "Contraception: Past, Present and Future" (November 2010) <<http://www.fpa.org.uk/sites/default/files/contraception-past-present-and-future-factsheet-november-2010.pdf>> (accessed 16.09.2015).

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> Health Service Circular (I.S.) 32 (1974). Mason, n 204, 45-7.

<sup>308</sup> *Gillick*, n 5.

required than simply legalising access to contraceptives by minors in order to improve the practical access to these services.<sup>309</sup> Whilst this would suggest a stable grounding for reproductive autonomy,<sup>310</sup> it is important to differentiate the ‘rather fuzzy distinction’ between improving access to fertility control and paternalistic attempts to control people’s choices.<sup>311</sup>

Despite this broad access to a variety of contraceptives, there appears to be widespread dissatisfaction with these methods.<sup>312</sup> Yet, the development of new techniques and technologies has been slow.<sup>313</sup> Whilst sterilisation remains a common method of fertility control,<sup>314</sup> the permanency<sup>315</sup> and psychological harm<sup>316</sup> impedes its usefulness to a broader audience. The development of Long Acting Reversible Contraceptives (LARCs) has seen a dramatic downward trend in the use of sterilisation procedures in the UK.<sup>317</sup> These methods, including IUDs and the ‘implant’, provide long-term fertility control and blurs the line between contraception and sterilisation somewhat.<sup>318</sup> The use of IUDs dates back as far as the ancient Greeks. In the modern form, Cervico-uterine stems were developed in 1868, and in 1909 the first specifically designed IUD (a ring of silk-worm gut) was made. In the 1960s, Plastic IUDs (Lippes Loop, Marguilles Spiral, and Saf-T-Coil) and Cooper IUDs were developed and approved for use in the UK by the Family Planning Association. In 1996, hormonal-releasing Intrauterine Systems were introduced and in 1997 the Copper frameless IUD – Gynefix – was introduced. The development of contraceptive implants began in 1967 and the first – Norplant – was introduced in the UK in 1993 and consisted of six progestogen-releasing rods. In 1999 Norplant was replaced by Implanon, a single rod implant. Nexplanon replaced Implanon in 2010 which

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<sup>309</sup> Jackson, n 13, 18-9.

<sup>310</sup> Nelson, n 9, 86.

<sup>311</sup> Jackson, n 13, 19.

<sup>312</sup> Rachel Snow et al, *Investigating Women’s Preferences for Contraceptive Technology: Focus Group Data From Seven Countries* (Harvard, 1996), 8.

<sup>313</sup> Holden, n 296.

<sup>314</sup> Health and Social Care Information Centre, n 292, 19.

<sup>315</sup> Nelson, n 9, 86.

<sup>316</sup> Jackson, n 13, 302.

<sup>317</sup> Health and Social Care Information Centre, n 292, 16.

<sup>318</sup> Jackson, n 13, 20.

is largely similar to Implanon with a revised insertion method and radio-opacity. In 2003 the contraceptive patch Ortho Evra became available, users wear one patch per week for three weeks followed by seven hormone-free days. In 2009 the NuvaRing, a combined oestrogen and progestogen vaginal ring became available in the UK, it is used for three weeks followed by seven hormone-free days.<sup>319</sup> Scientific interest in LARCs appears to be concentrated upon the avoidance of ‘user failure’.<sup>320</sup> LARCs offer women, and indeed couples, a further level of control over their fertility on a semi-permanent basis. The importance of this is in allowing individuals to choose whether they have a preference for semi-permanence or a more flexible method.<sup>321</sup>

In the UK, emergency contraceptives are available over-the-counter, without a prescription, from a chemist. The first emergency contraceptives, in the 1960s, involved hormonal preparations using high doses of oestrogen alone taken over five days. In the 1970s, this became combined preparations of oestrogen and progestogen and the use of IUDs postcoitally was found to be effective. In 1984 the first licenced product was released in the UK – the Schering PC4. In 2000, the progestogen-only emergency contraceptive was launched in the UK – the Levonelle-2 – and in 2001 was made available to buy in pharmacies. Levonelle 1500 or Levonelle ‘One Step’ was made available in 2005 and reduced the dosage from two pills to one. In 2009, ‘ellaOne’ was licensed for use in the UK for up to 120 hours after unprotected sex.<sup>322</sup> Key in the authorisation of access without prescription is due to the relatively limited time-frame in which emergency contraceptives can be used, and the notable decline in success rates over this period. However, it has been claimed,

The tragedy of the provision of [emergency contraceptives]...in the United Kingdom is that the extension of access into pharmacies did not become a means to normalise its use. It did not lead to a situation where it was marketed effectively

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<sup>319</sup> Family Planning Association, n 304. See also: Mason, n 204, 43-4.

<sup>320</sup> Abi Berger, “‘Kits’ for Male Contraceptive Pill” (2000) 320 *British Medical Journal* 468.

<sup>321</sup> Snow, n 312, 12.

<sup>322</sup> Family Planning Association, n 304.



by a maker keen to maximise its use. Instead it remained shrouded in stigma, a product that women really ‘shouldn’t’ need.<sup>323</sup>

It therefore appears as though the social stigma surrounding emergency contraceptives – or as it is more commonly known the ‘morning-after pill’ – may be posing a barrier to access as a norm. This may also be influenced by anti-abortion groups and the suggestion that use of emergency contraceptives is akin to abortion.<sup>324</sup> Whilst the provision of and relative ease of access to emergency contraceptives is demonstrative of empowering reproductive autonomy, it is also true that more could be done to normalise its use and to reduce the cost which may pose a significant barrier.

The model of Rational Autonomy proposed in this thesis seeks to consider the importance of the social conditions in which a decision is made and the role of the State in maximising the safe access to choices around reproductive matters. Whilst the UK appears to offer a wide variety of choice over methods of fertility control ranging from permanent, semi-permanent and flexible, which are all available free of charge, little is being done to further develop the techniques and technologies which are presently available. This is where more could be done to encourage and develop the provision of adequate, effective and desirable forms of contraception. It also requires that more is done in terms of sexual education to further enable people to make meaningful and informed choices. Contraception is unlikely to ever offer the perfect solution to fertility control but reproductive autonomy requires that the best efforts are made to develop the position. This is vital, ‘to maintain a context in which individuals conceive of themselves as having the capacity for choice’.<sup>325</sup> This model presupposes that the availability of a variety of contraceptives is a social and individual good by affording control over one’s fertility. It is a means to achieving productive agency. As O’Neill notes,

These rights gave them a greater control of reproductive health and family commitments, and consequently a greater prospect of choosing the sorts of lives they wished to lead. Having these choices they might then lead lives manifested

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<sup>323</sup> Ann Furedi, ‘Britain: Contradictory Messages about Sexual Responsibility’ in Lisa Wynn and Angel Foster (eds) *Emergency Contraception: The Story of a Global Reproductive Health Technology* (Palgrave, 2012), 136.

<sup>324</sup> *Smeaton*, n 290.

<sup>325</sup> Beyleveld and Brownsword, n 157, 296.

greater individual autonomy than lives that they could otherwise have led. What they gained was perhaps not *reproductive autonomy*, but rather greater individual autonomy in many aspects of life, achieved by better control of the timing and amount of reproduction.<sup>326</sup>

As such it is encompassed by the general right to productive agency against the State. The ‘right to fertility control’ subsumes both positive elements to offer a wide range of contraceptive methods but also to fund the development of these techniques to improve the options available. It is further supported as a means to avoid moral conflict between agents. An ethically individualist perspective requires that individuals are informed so as to make a decision as to the control of their own fertility and are provided with options so that they are able to make a genuine choice. From a contextual perspective, the State must set about to develop and support productive agency through education and provision of these services by effectuating these by the principle of human rights.

## **5.5 Summary**

This chapter has sought to outline a model of Rational Autonomy in relation to the desire to avoid reproduction or to exercise control over one’s fertility. It has, in line with the theoretical framework adopted in this thesis, attempted to understand the issues surrounding abortion and contraception in the UK and how this relates to ideas around our reproductive autonomy. It has responded to the discourse around a ‘right to abortion’ and the complex matrix of rights-based relations which surround the decision to terminate. I have attempted to develop a broad contextual (or public) understanding of reproductive autonomy in relation to these issues. In so doing I have been keen to emphasise that reproductive autonomy is a multifaceted concept and the importance and satisfaction of choice will depend on the values of the individual(s) involved. Key to this understanding was the dynamic inter-agent relations which make up and cause (potential and reasonable) conflict. This is because,

To be one’s own productive agent, so far as possible, rather than being a passive recipient of the agency of other persons, is required by the *PGC* as the principle

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<sup>326</sup> O’Neill, n 155, 52.

that aims to secure effective rights of purposive agency and autonomy for all persons, and with them the ethical goods of dignity and self-respect. In these ways rights and community are brought together, because the community helps persons to secure and exercise those rights.<sup>327</sup>

In order to develop our understanding of the morally legitimate exercise of reproductive autonomy, I turned to the need for intra-variable conflict resolution devices under the *PGC*. By maintaining an analysis on the issues which focused on the harm to the generic goods of the agent(s), the probability of that harm occurring and the moral status of the 'agent' involved, I was able to consider the terms of the argument based on the rational morality of the *PGC* which sought to create an egalitarian and mutualist approach to the abortion debate.

The approach proposed relies on the interconnectedness of law and morality based around rights in order to derive a system of autonomy which demonstrates respect and emphasises its meaningfulness by balancing it against other competing interests. I sought to build upon the bioethical approach to autonomy which looks principally at how an individual can be empowered to exercise free choice in a given situation to one which looks more broadly at the contextual setting that decision is made. This feminist approach to the notion of autonomy and, more narrowly, reproductive autonomy seeks to draw focus onto the social structures in which choices are provided and agents are supported in making their decisions. However, it was found to unduly elevate the 'worth' of reproductive autonomy over and above other competing values and also overemphasising the importance of women's reproductive autonomy as a matter of fact. Nevertheless, the model proposed sought to develop from these underpinnings (considering both private and public autonomy perspectives) but to do so based on the balancing of the generic features of agency under the *PGC*.

On this basis, I presented a number of moral presumptions which might be used as the starting point for sustaining legal rights over one's reproductive autonomy in relation to both abortion and the provision of contraceptives. The presumptions included the claim to favour early stage terminations of pregnancy and the requirement for some conditions

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<sup>327</sup> Gewirth, n 5, 201.

to be satisfied in justification of late stage terminations. On this basis, the 'right to terminate' was justifiable in the early stages of pregnancy – the suggestion was that this was encompassed up to the tenth week – and that EMAs were an ideal way to achieve this end with options provided for either home- or clinic-based administration of Misoprostol. In latter stages of pregnancy it was suggested that this right is determinable by the existence of some given criteria – namely that there is a genuine risk to the mother's basic well-being. Part of the viability of these rights, must be achieved through the provision of services which support the decision making exercise and it was suggested that the role of the doctor ought to shift from one of 'gatekeeper' to one of support. Further to this, I sought to demonstrate the viability of a father's 'right to be informed' in situations where his important interests are at stake and the mother is not unreasonably burdened by the requirement to inform. It was also suggested that given the propensity of contraceptives to contribute to Productive Agency and the avoidance of moral conflict these ought to be readily provided, with appropriate education given and that research is proactive in the development of these techniques. Whilst these presumptions have led to the assertion as to corresponding rights it is vital to remember that under this approach rights are rarely, if ever, 'absolute' and derogations from these general points will be necessary in order to balance the shares of interest across the Community of Rights. This was most starkly demonstrated by the conflict between the right to terminate and the social value of value of promoting disabled person's rights and the rights of the sexes. I claimed that grounds for termination on the basis of disability ought to be restricted to cases where the disability is such as to preclude the possibility of achieving agency. Having considered the viability of the model of Rational Autonomy in relation to attempts to avoid reproduction and to control one's fertility, in the next chapter we must consider what happens when these choices fail because of the actions of another agent.

## Chapter 6      Liability for Pre-Natal Torts

*I, for one, protest...against arguing too strongly upon public policy; - it is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*<sup>1</sup>

In this chapter I will be considering how the Right to Reproductive Autonomy can be secured in an institutional setting that is regulated by and in accordance with the determinate moral commitments of the Principle of Generic Consistency (*PGC*). The focus in doing so will be on the ‘Reproductive Torts’ – that is: Wrongful Conception, Wrongful Birth and Wrongful Life<sup>2</sup> – and how these are to be understood in terms of the rights-based conception of Legal Idealism presented thus far. Each of these distinct yet interrelated torts respond to ways in which our reproductive choices are given legal security in relation to the points at which those choices are to be made. That is, in relation to Wrongful Conception the claim investigates how choices made prior to the conception or pregnancy – that is, choices around issues of fertility and/or contraception – whilst the Wrongful Birth claim investigates choices around whether or not to terminate the pregnancy and the manner in which the *opportunity* to do so may manifest a protected right.

I claim that in order for these claims to be appropriately resolved what is needed is a system for determining *objective value* in this area. This, I suggest, is achievable using the tools set out in relation to the model of *Rational Autonomy*. In these cases is a demarcation between the idea of value (as in *cost*) and the idea of dignity (as in *worth*) is required.<sup>3</sup> In so doing, I hold that the individual and collective good of respecting autonomy outweighs

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<sup>1</sup> *Richardson v Mellish* (1824) 2 Bing 229, 130 ER 294, at 303, per Burrough J.

<sup>2</sup> The Wrongful Life claim considers the manifestation of a right arising out of another’s decision not to terminate and, specifically, investigates the potential for a right to exist in ‘not being born’.

<sup>3</sup> See: Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998), 42, [4:434-435].

that of the dignity of abstract reproduction. As such, these claims must be treated according to the normal rules of negligence so that reproductive autonomy is meaningfully respected.

In order to develop on this claim, I will begin by considering the approach of the courts in these cases and how the law has developed so far. In so doing, I seek to raise the principle concerns in this area. I will then go on to evaluate the connection between *Rational Autonomy* and considerations of value which are seen to implicate the concept of dignity. I then show how this model of autonomy might respond to some of the problematic issues in these cases. Finally, I attempt to set out a model of how the obligation of reparation might be seen as a 'reactive' duty necessary in cases such as these.

## **6.1 Wrongful Conception and the Uncovenanted Child**

Women and men may choose to be sterilised when, or if, they wish to forego the possibility of parenthood and their fertility more generally. Yet sterilisations may also be performed on those who the consequences of pregnancy and childbirth would be disastrous on the grounds of their mental incapacity.<sup>4</sup> In these situations, known as non-voluntary sterilisation, the patient is sterilised in their best interests, without consent, yet to do so in most situations would be considered an affront to women's reproductive autonomy. Whilst these cases are of relevance to the overall scope of this thesis they are beyond the ambit of discussion for present purposes. Instead the focus is to be drawn on those cases in which there has been a failure in the provision of sterilisation services and on the locatedness of this claim.

### **6.1.1 The Claim**

A claim for negligent sterilisation, or as it is known 'Wrongful Conception', is affected by the performance of surgery on either a man or a woman within or without a partnership. Negligence may occur in the performance of the sterilisation itself or in the provision of

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<sup>4</sup> See: *Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Provisions for Adults who Lack Capacity)* [2001] 2 FLR 158.

post-surgical advice. For males, the vasectomy operation consists of division of the *vas deferens* on each side and negligence in the performance of the procedure itself is rare.<sup>5</sup> However, there are natural pitfalls; most commonly, the residual trace of sperm in the distal genital tract – giving rise to the requirement that two successive sperm-free ejaculates are provided before unprotected intercourse can be resumed – and recanalisation of the vas. The risk of this natural reversal is estimated at approximately 1:2500 but accounts for a number of claims that are heard by the courts. For females, the tubal occlusion operation is achieved through obstruction of the Fallopian tubes by either clipping or sectioning. Surgical error is more common in relation to female sterilisation than of vasectomy.<sup>6</sup> With the medical locatedness of this action outlined it is now also necessary to consider the legal locatedness of it.

Although given a distinct nomenclature the Wrongful Conception claim is essentially an action in the tort of negligence. It is, in essence, a claim on the basis of the imposition on reproductive autonomy and the costs associated with the pregnancy and childbirth arising from the medical practitioner's negligence.<sup>7</sup> It exists alongside a class of 'Reproductive Torts' – including Wrongful Birth and Wrongful Life – which are broadly encompassed by the 'unwanted pregnancy' tag. Whilst Wrongful Conception<sup>8</sup> is essentially concerned with the conception of and, often, birth of an 'uncovenanted child',<sup>9</sup> Wrongful Birth is focused upon the birth of an unwanted, and uncovenanted, *disabled* (or, liberally, otherwise unwanted for reasons of sex, for instance) child. Wrongful Life, meanwhile, is the claim by a disabled child that life itself is the injury. Unsurprisingly this final claim is particularly controversial and the courts have been unwilling to entertain the consideration that life itself may be injurious. The distinct terminology used in these cases appears to suggest the judicial and academic discomfort and, ultimately, uncertainty

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<sup>5</sup> Kenyon Mason, *The Troubled Pregnancy* (Cambridge University Press, 2007), 100.

<sup>6</sup> *Ibid*, 101.

<sup>7</sup> *Ibid*, 8.

<sup>8</sup> Sometimes termed as 'Wrongful Pregnancy'.

<sup>9</sup> The term "Uncovenanted Child" is preferred by the author for the same reasons given by J.K. Mason and G.T. Laurie, *Mason and McCall Smith's Law and Medical Ethics* 8<sup>th</sup> Ed (OUP, 2011), 338. For legal use of the term, see: *Richardson v. LRC Products Ltd* (2001) 59 BMLR 185, 195, per Kennedy J.

around the nature of these claims.<sup>10</sup> These actions are demonstrative of an ‘unsettled, variable and fundamentally resistant jurisprudential’ framework<sup>11</sup> and represent a ‘disservice...[by] focusing attention on factors other than the negligent action and the resulting harm.’<sup>12</sup> It is argued that,

These labels are not instructive. Any ‘wrongfulness’ lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician. The harm, if any, is not the birth itself but the effect of the defendant's negligence on the parents' physical, emotional, and financial well-being resulting from the denial to the parents of their right, as the case may be, to decide whether to bear a child or whether to bear a child with a genetic or other defect.<sup>13</sup>

At best, the claim would be better understood as arising from its cause, that is negligent sterilisation, with the subtenets – which will be considered later –, such as claims arising from faulty contraceptives or through the negligent provision of Long Acting Reversible Contraceptives (LARCs), arising from the precedents of these cases. In spite of this, I adopt the terminology, specifically Wrongful Conception, for matters of clarity.

In order to frame our understanding of the problems of the claim, and from where the judicial ‘discomfort’ towards it arises, we must begin by considering the question of damages in these actions. Primarily this issue is set around whether the parent, or the couple, can recover the ‘full’ costs associated with raising the child. Before considering the various approaches to the matter of damages it is worth setting out the interpretations of the harm suffered in these cases. It may be a matter of economic damage suffered as a result of the physical ‘injury’ of pregnancy – namely the costs of raising the child –, or it may be on the basis of the interference with the bodily integrity of the woman, or it may be as a result of the interference with the reproductive autonomy of the parent or couple.

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<sup>10</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013), 206.

<sup>11</sup> Sanda Rodgers, ‘A Mother’s Loss Is The Price Of Parenthood: The Failure Of Tort Law To Recognise Birth As Compensable Reproductive Injury’ in Sanda Rodgers, Rakhi Ruparelia and Louise Belanger-Hardy (eds) *Critical Torts* (LexisNexis Canada, 2009), 161, 162.

<sup>12</sup> Mark Strasser, “Yes, Virginia, There Can Be Wrongful Life: On Consistency, Public Policy and the Birth-Related Torts” (2004) 4 *Georgetown Journal of Gender and Law* 821-61, 823.

<sup>13</sup> *Viccaro v Milunsky*, 551 NE 2d 8 (Mass., 1990), 9.



The economic damage interpretation is set around the admission that, ‘every baby has a belly to be filled and body to be clothed’.<sup>14</sup> It seeks to recognise that sterilisation may be sought for economic reasons alone in which case, ‘it was not the child as revealed that was unwanted. Nor is the child’s existence the damage in the action... It is the economic damage which is the principal unwanted element, rather than the birth or existence of the child as such.’<sup>15</sup> By accepting this we are able to see that the claim is not regarding the uncovenanted child per se, rather it is simply a matter of the financial burden that caring for that child carries.<sup>16</sup>

An interpretation which rests on the interference with and invasion of the woman’s bodily integrity focuses on a characterisation of injury based on the exposure to physical and financial harm. It seeks to frame the claim, not around the pregnancy and birth of the child, but on the imposition to the woman’s body.<sup>17</sup> As Beever notes,

An injury in the eyes of the law includes the invasion of the claimant’s right to bodily integrity. Hence, whether or not pregnancy is usually desired, whether or not we are inclined to describe pregnancy as an injury in non-legal contexts, if the claimant did not desire to become pregnant but became so because of the negligence of the defendant, then her right to bodily integrity was violated.<sup>18</sup>

It is the cost of raising the child which flows from the violation of bodily integrity – and in the language of tort law is consequential economic loss. This approach, however, ignores the father’s claim, on the basis that no bodily harm is or can be suffered, and leaves him without redress.

The final interpretation stems from the interference with the parent or couples’ reproductive autonomy. As was noted in *Rees*,

To speak of losing the freedom to limit the size of one’s family is to mask the real loss suffered in a situation of this kind. This is that the parent, particularly (even

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<sup>14</sup> *Thake v Maurice* [1985] 2 WLR 215, 230, per Peter Pain J.

<sup>15</sup> *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, at 75.

<sup>16</sup> Mason, n 3, 123.

<sup>17</sup> See: *McFarlane v Tayside Health Board* (1997) SLT 211 (OH), per Lord Gill, at 214: “In my view, a pregnancy occurring in the circumstances of this case cannot be equated with a personal injury. Pregnancy and labour are natural processes resulting in a happy outcome...”

<sup>18</sup> Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2009), at 389.

today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way she wished and planned.<sup>19</sup>

Simply allowing them the means to limit their reproductive possibilities is not enough; we must also recognise that they are entitled to act upon it and that we should protect. It is strange to allow a person to exercise their autonomy for a particular means or end but refuse to repair because others do not agree with that exercise of autonomy. As Beever notes:

Whether children are a gain or a loss to us is, at least in part, determined by deep seated understandings of who we are, our life goals and the place of children within them. For some people, asking them to regard having children as a benefit to them is asking them to change the people they are.<sup>20</sup>

After all, 'Even if society does hold the assumption that a healthy child is a good thing, it seems unlikely that many...would be quick to assume that the parents have suffered no harm in this factual setting.'<sup>21</sup> One might believe that the prevalence of means by which to limit the size of our families and exercise our reproductive choice, their legality and availability from the publicly funded health service is evidence that this view is *not* universally held.<sup>22</sup> It is around this notion that the interpretation is framed. We will return to these interpretations later in the discussion.

There are four potential approaches to the quantification of damages in the Wrongful Conception claim. These are:<sup>23</sup>

1. *No Recovery*. This is generally on the basis that pregnancy and child birth cannot be termed as an injury and, in any case, the birth of the child is a 'blessing' for the family.<sup>24</sup>

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<sup>19</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (HL), [8] (Lord Bingham).

<sup>20</sup> Beever, n. 18, at 391.

<sup>21</sup> Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, 2007), 6

<sup>22</sup> *Thake v Maurice* [1985] 2 WLR 215, at 230: 'By 1975, family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal but available under the National Health Service. It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing.'

<sup>23</sup> See: *Cattanach v Melchior* [2003] HCA 38 (Aus), [138], per Kirby J.

<sup>24</sup> *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522,531, per Jupp J.

2. *Total Recovery*. The full costs associated with raising the child are recoverable without any reduction.<sup>25</sup>
3. *Offset Damages*. The damages for the full costs are reduced on the basis of any benefits accrued by the parents.<sup>26</sup>
4. *Limited Damages*. This approach allows for only the costs associated with the pregnancy and childbirth itself, with some initial adjustments for the child.<sup>27</sup>

The current approach adopted in the UK is a version of the *limited* damages approach where the costs of pregnancy and childbirth are available but a further ‘conventional award’ of £15,000 is available which represents the interference with the mother’s (reproductive) autonomy.<sup>28</sup> It is to this which we must now turn.

### **6.1.2 The Conventional Award and the Damages Claim**

The turn towards the limited damages approach was heralded in *McFarlane* where the House of Lords set aside fifteen years of established precedent in favour of the full damages approach and held that the post-birth costs were not recoverable. Instead they chose to award, by a 4:1 majority (Lord Millett dissented and favoured an award of £5,000), only the costs suffered prior to birth. It was *McFarlane* which set in motion a succession of cases that stumbled from one set of facts to the next,<sup>29</sup> with no clear ratio offered and

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<sup>25</sup> See: *Emeh v Kensington and Chelsea and Westminster AHA* [1985] QB 1012. For a more extreme version, where the costs of private schooling were also awarded, see: *Benarr v Kettering Health Authority* [1988] NLJR 179.

<sup>26</sup> Although this was rejected, see: *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL), 74-5, per Lord Slynn: ‘Of course judges have to evaluate claims which are difficult to evaluate, including assessments as to the value of the loss of a life, loss of society or consortium, loss of a limb or a function. But to do so and to get it even approximately right if little is known of the baby or its future at the time the valuation has to be made is very difficult. It may not be impossible to make a rough assessment of the possible costs of feeding, clothing and even housing a child during the likely period of the child’s life up to the age of 17 or 18 or 25 or for whatever period a parent is responsible by statute for the support of a child. But even that can only be rough... Of course there should be joy at the birth of a healthy child, at the baby’s smile and the teenager’s enthusiasms but how can these be put in money terms and trimmed to allow for sleepless nights and teenage disobedience.’

<sup>27</sup> See: *McFarlane*, *ibid*.

<sup>28</sup> See: *McFarlane*, n 26, and *Rees*, n 19, respectively.

<sup>29</sup> Peter Cane, “Another Failed Sterilisation” (2004) 120 *Law Quarterly Review* 189-93, 190-1: “What this sequence of cases shows is that if the Law Lords...are to take their law making function seriously...they must, at least, be prepared to contemplate the possibility that it may be dangerous to consider individual cases too much in isolation... Stumbling from one set of facts to the next is, as *Rees* shows, a formula for confusion and instability...”

conclusions that were supported by tenuous and nebulous appeals to the spectre of public policy.

The facts of the case itself are relatively typical in Wrongful Conception: Mr McFarlane was sterilised and, later, informed that his sperm count was negative and, as a result, he and Mrs McFarlane did away with contraceptives. Mrs McFarlane later conceived and gave birth to their fifth child, Catherine. At first instance, in the Outer House<sup>30</sup>, Lord Gill adamantly rejected *both* the pre- and post-birth claims for damages. His Lordship reasoned ‘pregnancy and labour are natural processes resulting in a happy outcome’<sup>31</sup> and ‘the benefits of parenthood transcend patrimonial loss’;<sup>32</sup> as such pregnancy in these circumstances could not amount to a personal injury and no ‘harm’ was suffered. On appeal the Inner House of the Court of Session<sup>33</sup> reversed the judgment; confirming that damages were available under both heads. It appeared that the decision of the Outer House was nothing more than a blip on the radar of an established legal principle and ‘justice was done’ by the Inner House. However, there was one final twist in the tale in a referral to the House of Lords based on the need to harmonise the laws of England and Scotland on such a contentious matter.

All five members of the House reached the same conclusion, that the full damages were not available, each however took a different route in reaching that conclusion, with one member later noting he did ‘not propose to undertake the *gruesome* task of discussing the judgments’<sup>34</sup> and Brooke LJ noted, ‘Our task has been made more difficult because the five members of the House of Lords spoke with five different voices’.<sup>35</sup> The decision can be broadly summarised as framed around the following approaches: (1) Fair, just and reasonableness (Lord Hope);<sup>36</sup> (2) Distributive Justice (Lord Steyn);<sup>37</sup> (3)

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<sup>30</sup> *McFarlane v Tayside Health Board* [1997] SLT 211, OH.

<sup>31</sup> *Ibid*, at 216, per Lord Gill.

<sup>32</sup> *Ibid*, at 214, per Lord Gill.

<sup>33</sup> *McFarlane v Tayside Health Board* (1998) 44 BMLR 140, IH.

<sup>34</sup> *Rees*, n 19, [28], per Lord Steyn.

<sup>35</sup> *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, at para. [30], per Brooke LJ.

<sup>36</sup> *McFarlane*, n 26, 89-91 and 97.

<sup>37</sup> *Ibid*, 82.

Disproportionate loss (Lord Clyde);<sup>38</sup> (4) Assumption of Responsibility (Lord Slynn);<sup>39</sup> and, (5) Impossibility of offsetting the benefits and burdens (Lord Millett).<sup>40</sup> Unsurprisingly, academic commentary arising from the case has been overwhelmingly negative.<sup>41</sup> The, broadly, settled and established jurisprudence<sup>42</sup> had made way to a seemingly policy driven approach framed around talk of children as ‘blessings’ and giving rise to an unclear scope for future application.

In spite of this, some years later the House reaffirmed its decision in *Rees*, suggesting that it was ‘wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as 4 years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted.’<sup>43</sup> In that case, Ms Rees suffered from Retinitis Pigmentosa, a severe degenerative visual disability, and feeling incapable of raising a child she elected to be sterilised at the age of 23. The procedure, unfortunately, was performed negligent in that there was a failure to completely occlude her fallopian tubes. A year later she conceived a child and later gave birth to Anthony. Her claim for full costs was rejected in the High Court on the basis of *McFarlane*. The Court of Appeal, following its own precedent in *Parkinson v St James and Seacroft University Hospital NHS Trust*<sup>44</sup> - which had allowed for the *extra* costs of raising

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<sup>38</sup> Ibid, 105-6.

<sup>39</sup> Ibid, 75-6.

<sup>40</sup> Ibid, 111-4.

<sup>41</sup> See: J Thomson, “Abandoning the law of delict?” (2000) *Scots Law Times* 43; Laura Hoyano, “Misconceptions about Wrongful Conception” (2002) 65 *Modern Law Review* 883-906; Cane, n 29; J Ellis Cameron-Perry, “Return of the Burden of the ‘Blessing’” (1999) 149 *New Law Journal* 1887; Penny Booth, “A Child is a Blessing – Heavily in Disguise, Right?” (2001) 151 *New Law Journal* 1738; Nicolette Priaux, “That’s One Heck of an ‘Unruly Horse’! Riding Roughshod over Autonomy in Wrongful Conception” (2004) 12 *Feminist Legal Studies* 317-31; Nicolette Priaux “Damages for the ‘Unwanted’ Child: Time for a Rethink?” (2005) 73 *Medico-Legal Journal* 152-163; Priaux, n 21; Kenyon Mason, “Wrongful Pregnancy, Wrongful Birth and Wrongful Termination” (2002) 6 *Edinburgh Law Review* 46-66; Mason, n 16. See also, for support of the pre-McFarlane position: Alastair Mullis, “Wrongful Conception Unravelled” (1993) 1 *Medical Law Review* 320-335. For US support, see; Patricia Baugher, “Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy” (2000) 75 *Washington Law Review* 1205-1236.

<sup>42</sup> *Emeh*, n 25, 1025, per Slade LJ: ‘So if a woman wants to be sterilised, and in a legal way causes herself to be operated upon for that purpose, I can, for my part, see no reason why under public policy she should not recover such financial damage as she...has suffered by the surgeon’s [negligence].’

<sup>43</sup> *Rees*, n 19, [7], per Lord Bingham.

<sup>44</sup> *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 WLR 376.

a disabled child to be recoverable –, held that Ms Rees could be awarded ‘the extra costs involved in a disabled parent discharging that responsibility towards a healthy child’ just as ‘the extra costs involved in discharging that responsibility towards a disabled child can be recovered’.<sup>45</sup> By a majority of 4:3, the House of Lords held that Ms Rees could not be distinguished from *McFarlane* and so the additional costs could not be recovered – the mother’s disability did not alter this. Yet this was to subject to one significant ‘gloss’.<sup>46</sup>

The idea of a conventional award had been touted before – Lord Millett in *McFarlane* suggested a sum of £5,000 – the majority suggested that the real harm which was suffered in these cases was the ‘denial of an important aspect of...personal autonomy, viz the right to limit the size of their family.’<sup>47</sup> This, it was said, justified the ‘gloss’ of £15,000 by way of general damages as a non-derisory, non-compensatory, non-nominal, ‘conventional’ award which would recognise the infringement to the parents’ autonomy.<sup>48</sup> Unfortunately, as Mason notes, ‘it is hard to find a commentator who does not, at this point, start to scratch his or her head.’<sup>49</sup> The law, having ‘found the “answer” in more nebulous concepts of benefits, blessings, and of course, our trusty commuter, the oracle of distributive justice,’<sup>50</sup> was accused of coming ‘adrift from principle’<sup>51</sup> and ‘served as a warning for commonwealth jurisdictions against following the same course.’<sup>52</sup> Despite being described as ‘a form of conscience money or as a charity designed to offset the sense of injustice’,<sup>53</sup> it appears that the consensus was to, in some one, and seemingly without *directly* overruling *McFarlane*, recognise the interference with the parent(s’) autonomy and the legal *wrong* suffered therein, amidst the backdrop of public policy arguments used to subvert this previously.

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<sup>45</sup> *Rees v. Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2003] QB 20, [23].

<sup>46</sup> *Rees*, n 19, [7], per Lord Bingham

<sup>47</sup> *Ibid*, [123], per Lord Millett.

<sup>48</sup> *Ibid*, [8], per Lord Bingham.

<sup>49</sup> Mason, n 5, 176.

<sup>50</sup> Priaulx, n 21, 72.

<sup>51</sup> Hoyano, n 41, 900.

<sup>52</sup> *Cattanach*, n 23, [128], per Kirby J.

<sup>53</sup> Mason, n 5, 178.

In other jurisdictions, courts have been more critical of the conventional award. In the Canadian Supreme Court it was argued,

It appears to me that the decision to award “conventional damages” is a substantial retreat from the approach taken in *McFarlane*... I see these variations as recognition that the Limited Damages approach, whatever its merits, does not succeed in adequately compensating parents in wrongful...[conception] actions.<sup>54</sup>

Meanwhile, in *Cattanach v Melchior* the Australian High Court held that the full costs of raising the child were available. Disregarding the arguments of policy which had been so persuasive in *McFarlane*, Kirby J noted,

In short, if the application of ordinary legal principles is to be denied on the basis of public policy, it is essential that such policy be spelt out as to be susceptible of analysis and criticism. Desirably, it should be founded on empirical evidence, not mere judicial assertion. Yet this was not attempted...<sup>55</sup>

Amidst the discomfort, disagreement and discord found across these cases, and the attempt to find the ‘answer’, there is a striking tussle between those who value the child and those who value the parents’ autonomy.<sup>56</sup> The result is that,

Those against recovery are likely to argue that children are precious and cannot be regarded as a loss, while those in favour are inclined to maintain that adults have a right to determine their own lives and, if they choose not to have, or to have only a certain number of, children, they should not be told that that choice is unworthy of recognition because other people believe that children are priceless.<sup>57</sup>

In recognising that this politico-moral problem is always likely to leave one side unsatisfied, the approach seen elsewhere – which focuses on applying a legal solution to the problem – attempts to sidestep the contradictions in the British case law. What is intended in the remainder of this chapter is to challenge these contradictions, as was done in the previous chapter with the statutory framework around abortion, in line with the approach to reproductive autonomy which has been developed thus far.

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<sup>54</sup> *Bevilacqua v. Altenkirk*, 2004 BCSC 945 (Can (SC)) , 63, per Groberman J.

<sup>55</sup> *Cattanach*, n 23, [152]

<sup>56</sup> *Beever*, n 18, 388.

<sup>57</sup> *Ibid.*

## **6.2 Dignity, Value and Rational Autonomy**

As noted in the previous section, three interpretations to the issue of harm are apparent in relation to these claims; namely, the economic loss as a result of caring for the child, the interference with bodily integrity and the interference with reproductive autonomy. In this section I seek to investigate, principally, the interference with reproductive autonomy as the cause for the subsequent harms (yet simultaneously as a standalone issue in and of itself, so as to not exclude the father's claim from the ambit of this discussion) to bodily integrity and economic wellbeing. In so doing I seek to develop a deeper understanding of the rational approach to reproductive autonomy advocated thus far by furthering the discussion in areas of liability and the right to reparation.

At its core, a claim in Wrongful Conception, and indeed Wrongful Birth, is premised on seeking compensation for the effects of having one's reproductive choices denied through another's negligence. When the negligence of a medical professional, either in the performance of a sterilisation procedure or in the provision of post-operative advice, precludes the agent from utilising their choice to forego their fertility and to avoid conceiving a child, the agent(s) will inevitably suffer losses beyond the interference with and frustration of their autonomous decision making. For women, this will include the violation of their bodily integrity. For both men and women, they will suffer the burdens of providing childcare (and the further interference this places on their autonomy) as well as the economic burdens attached therewith. As noted, a purely legal response to these claims, arguably, would allow for full recovery.<sup>58</sup> The stumbling point for the courts appears to be the juxtaposition between placing value upon the (life of the) child and the value attached to autonomy.

### **6.2.1 An Outline of Objective Value**

In order to begin to understand and analyse the conflation between counter posed values, it necessary first to understand how the law of negligence, traditionally, assess value and in turn how this assessment may lead to contradiction. As Chico notes,

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<sup>58</sup> See: Nelson, n 10, 230; Beever, n 18, 388-9; and, *Cattanach*, n 23.



Given that the notion of value rationality is being considered here from the perspective of its function as an aspect of the interpretation of autonomy within English negligence law, it might be argued that the English negligence system holds an intrinsic notion of value, which could be relied on to pour content into the conception of rationality, which might form an aspect of autonomy. English negligence law is deeply imbued with an objective notion of value based on the perception of the position of the ordinary or reasonable person.<sup>59</sup>

She goes on,

...the notion of the values of the ordinary or reasonable man pervades the whole of negligence law. This notion of value is often applied to the question of whether the interest which is interfered with is of sufficient value to warrant legal recognition.<sup>60</sup>

In *McFarlane*, this attempt to assess the *objective* valuing was done in reference to Lord Steyn's version of the reasonable man; the traveller on the London Underground. He asked,

If the matter is approached in this way, it may become relevant to ask commuters on the Underground the following question: Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years? My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic "No." And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not... Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.<sup>61</sup>

In spite of the numerous arguments raised contrary to this,<sup>62</sup> typically centred around the notion that if children are inherently a 'valuable and good thing', the argument seeks to emphasise the priceless nature of the child. However, if what is required is an *objective* pouring in of value content, as Chico claims, this does not appear to be it. The present

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<sup>59</sup> Victoria Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Routledge-Cavendish, 2011), 57.

<sup>60</sup> *Ibid*, 58.

<sup>61</sup> *McFarlane*, n 26, 82, per Lord Steyn.

<sup>62</sup> Priaulx, n 21, 4: 'It is undeniable that some might regard a healthy child as a joy, but what does this perspective miss? If one decides to undergo invasive medical procedures to remove the prospect of parenting responsibilities, can the failure of that procedure be properly described as a 'joy' or 'good thing'...even when that 'joy' is thrust upon them[?]'

task then is to assess how the argument to rational reproductive autonomy, as supported by the Principle of Generic Consistency (*PGC*), can do this.

The first place to begin with this assessment is to consider what these cases say about the value of the child given that this is the point of challenge for the courts in terms of their arguments over public policy. The key to this task is the claim that, '[t]he claimant's position is not that her child lacks value in [the] sense [that they are objects of value rather than sources of value]..., but that he causes a loss *to her*.'<sup>63</sup> Rather, the claim says nothing of the child's *objective* value – that is, its value as a human life – but of the value (or rather cost) of one life to another person.<sup>64</sup> As I have stated elsewhere,<sup>65</sup> the crux of this succession of cases appears to place a monetary value on the child (the £15,000 conventional award) rather than to demonstrate respect for it as a source of value. Returning to the issue of value, as Beever claims,

Whether children are a gain or a loss to us is, at least in part, determined by deep seated understandings of who we are, our life goals and the place of children within them. For some people, asking them to regard having children as a benefit to them is like asking them to change the people they are.<sup>66</sup>

The view of autonomy advocated thus far seeks to encompass, as Jackson notes, 'not just the right to pursue ends that one already has, but also to live in an environment which enables one to form one's own value system and to have it treated with respect.'<sup>67</sup> If true value is to be placed on the value of autonomy, this 'requires respect for an individual's right to make choices, and to take actions based upon their personal values and beliefs.'<sup>68</sup> Provided, as I have outlined thus far, this viewpoint – and subsequently any actions autonomously conducted as a result of the viewpoint – does not infringe with the belief system and autonomy of another agent it is *prima facie* legitimate.

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<sup>63</sup> Beever, n 18, 390.

<sup>64</sup> *Ibid*, 391.

<sup>65</sup> Jack Clayton Thompson, "You Should Never Look a Gift Horse in the Mouth: One-Size-Fits-All Compensation in Wrongful Conception" (2012) 2(1) *Wmin Law Rev* 73-96, 93-4.

<sup>66</sup> Beever, n 18, 391.

<sup>67</sup> Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001), 6.

<sup>68</sup> Priaulx, n 21, 9.

What then needs to be considered is whether, objectively and abstractly, the value of children outweighs the value of reproductive autonomy. The reason for the consideration at a level of abstraction relates to the need to determine the value of a child as an empty, metaphysical construct. This is because the 'child' does not exist at the time of any decision made by the parent, but similarly the decision does not necessarily exist at this point either. In objectively assessing value we are forced to determine a clear line of policy which is to either consider children as 'universal and unwaiverable' goods or whether this is factually determinate. In the language adopted thus far, this is to assess the importance of children as a source of value as a *collective good* for all agents against the value of respecting and empowering reproductive autonomy as *both* a collective and individual good.

As was noted in the previous chapter, consideration of *PGC* applicability to these multivariable issues requires a balancing and evidence based assessment of the following criteria: (1) Hierarchy of Generic Goods, (2) Criterion for the Avoidance of More Probable Harm, and (3) Principle of Precautionary Reasoning. The Hierarchy of Generic Goods balances the generic features of agents based on their necessity to action and the prospective of successful action fulfilment. This places *basic* well-being above *nonsubtractive* well-being which is above *additive* well-being; similarly, this places *dispositional* freedom above *occurent* freedom. The Criterion for the Avoidance of More Probable Harm allocates greater moral weight to those harms which are more likely to occur both in terms of the prospective harm coming to fruition but also in metaphysical terms of harming an actual agent. This then ties in with the Principle of Rational Precautionary Reasoning which holds that an agent out to treat any ostensible agent, probable agent or partial agent as an agent whenever this does not threaten equal or greater interference with an actual agent. It is according to these criteria that we are able to consider the balance between the collective good of the objective value of children against the collective and individual goods of reproductive autonomy.

In relation to the value of children as a collective good, this may be seen as encompassed by Lord Millett's claim that, 'it is morally offensive to regard a normal, healthy baby as

more trouble and expense that it is worth.<sup>69</sup> This view appears to be centred around the ideal that as a society we must not perceive the birth of a child as bringing *disvalue* on balance.<sup>70</sup> Yet as Chico notes, ‘Indeed, the view appears to be growing that life must have certain critical qualities before it can be regarded as being of ultimate value, rather than it being sacred and inviolable in and of itself.’<sup>71</sup> Beever argues that, whilst it is true that society must ‘regard the birth of every person as a valuable event’, these cases say nothing of the child as a *source of value* but of their *cost* to the claimant.<sup>72</sup> For the courts, the value of children *abstractly* stems from the value of living children.

### 6.2.2 Dignity as Objective Value

How then are we to determine the conflation between abstract value in the potential for life and the actual value of life? In this section I claim that dignity may be constructed in order to be a measure of objective value.

When we speak of dignity, we speak in terms both of a thing’s dignity in and of itself, as an agent, but also in terms of that thing’s interactions with other things, as an agent rationally required to act according to its own and others’ rights. Kant maintains the separation between the *price* of a thing and the *dignity* of a thing, where dignity is due to, here, the child because it is ‘raised above all price and therefore admits of no equivalent’.<sup>73</sup> Dignity, then, is the inner worth of a thing; in humanity (or, rather, *agency*<sup>74</sup>) it is morality which is the basis for dignity.<sup>75</sup> So, ‘the dignity of man consists just in this capacity to give universal law, though with the condition of also being itself subject to this very lawgiving.’<sup>76</sup> Later, Kant claims, ‘[h]umanity itself is a dignity; for a human being cannot be used merely as a means by any human being... Hence there rests on him a duty

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<sup>69</sup> *McFarlane*, n 26, 114, per Lord Millett.

<sup>70</sup> Beever, n 18, 392.

<sup>71</sup> Chico, n 59, 76.

<sup>72</sup> Beever, n 18, 392.

<sup>73</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998), 42, [4:434-435].

<sup>74</sup> When Kant refers to ‘humanity’, I take it that he infers it to be ‘agency’ given his focus on reason. See: *ibid*, 37, [4:427-434].

<sup>75</sup> *Ibid*, 42, [4:434-435].

<sup>76</sup> *Ibid*, 46-7, [4:440].

regarding the respect that must be shown to every other human being.<sup>77</sup> In this way, a thing has dignity if and when it is an agent subject to the moral law, which under my approach is the *PGC*. According to the *contingent* argument raised, a being will have dignity proportionally according to level of agency which is demonstrated.<sup>78</sup> For Beyleveld and Brownsword, ‘dignified conduct is action in accordance with the moral law performed out of commitment to obey the moral law.’<sup>79</sup> Thus, dignity may denote one’s moral worth *per se* or it may denote one’s commitment to one’s moral obligations.

As noted in the previous chapter, adherence to the requirements of the *PGC* requires a demonstration of respect to all agents and, under the Principle of Rational Precautionary Reasoning, moral status is allocated according to evidence of agency supplied by a being. On this basis, a child is allocated equal respect as any other adult human agent (unless to do so poses a greater threat to the requirements of the *PGC*). The *PGC* does not, however, recognise moral status in speculative, possible agency; that is, a non-being is not valuable because of its potential existence as an agent, especially not so where this might threaten the generic features of agency of an actual agent. As Harris argues,

...if the potentiality argument suggests that we have to regard as morally significant anything which had the potential to become a fully fledged human being, and hence have some *moral duty to protect and actualize* all human potential, then we are in for a very exhausting time of it indeed.<sup>80</sup>

The requirement, it seems, is not to ‘protect it no matter what consequences this has for those with greater moral status.’<sup>81</sup> On this basis, whilst *living* human children are due respect, given their moral status as actual agents, prospective potential human children (those yet to be conceived) ought not to hold moral status.

To argue otherwise, as the courts have done, is to conflate between the two separate notions of value. That is, on the back of this idea of moral status, the courts are suggesting

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<sup>77</sup> Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996), 209, [6:462].

<sup>78</sup> Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001), 128.

<sup>79</sup> Ibid, 138.

<sup>80</sup> John Harris, *Clones, Genes and Immortality* (Oxford University Press, 1998), 50 (*my emphasis*).

<sup>81</sup> Shaun Pattinson, *Influencing Traits Before Birth* (Ashgate, 2002), 16.

a contradiction in the choice that has been made *and* in the provision of services for that choice to be made. For this reason Beever argues,

Those who argue that a child cannot be a loss to its parents insist that this decision must have been a mistake as children are always, on balance, valuable to their parents. If this argument were right, then it would follow that family planning would be irrational. Barring health problems and similar issues, we should all seek to have as many children as possible because in doing so we would be maximising our utility functions. But this is not plausible.<sup>82</sup>

Simply, *if* children as a matter of *principle* must be seen as a blessing both in existence and in prospect then the provision of family planning services and abortions must be contradictory. But as Beever notes, this surely cannot be the case. What appears, then, is that the contradiction is made by the courts themselves.

### **6.2.3 Objective Goods in Autonomy and Dignity**

It is now necessary to begin to conclude the observations raised in this section. In this regard, I assert that a balance must be struck between competing values of autonomy and dignity and suggest that this balance must favour, in these cases, autonomy.

In relation to the value of reproductive autonomy as a collective *and* individual good, this seeks to at 'a minimum,...[require] respect for an individual's right to make choices, and to take actions based upon their personal values and beliefs.'<sup>83</sup> At an abstract level, as we have already seen, autonomy and reproductive autonomy more narrowly are vital for an agent to be able to successfully fulfil their prudential ends. Therefore, reproductive autonomy is an individual good which ought to be respected whenever the exercise of it is legitimate – that is, it does not threaten the freedom or well-being of another agent. Similarly, collectively agency benefits, and indeed flourishes, when choice is empowered in a community. As Gewirth claims,

...where utilitarian benefits may be any kinds of goods associated with persons' desires or preferences, the objects of collective rights are especially important kinds

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<sup>82</sup> Beever, n 18, 391.

<sup>83</sup> Priaulx, n 21, 9.

of goods, identified both with individuals' needs of agency and with institutional arrangements that help the society fulfil its individual members' rights of agency.<sup>84</sup>

Autonomy is both occurrent and dispositional – it may relate to single choices but also to long-ranging, principle and reflective control of our lives –, as with freedom more generally, and it is this dispositional-autonomy which is of importance as a collective good. Simply, 'To the extent that one lacks autonomy so that what happens to one is controlled by other persons, one has no assurance that one will succeed in achieving the purposes for which one wants to act.'<sup>85</sup> This, by extension, impedes the purposivity of all agents in the community when the threat to our autonomy threatens our ability to act.

It would appear then that the good of reproductive autonomy in these claims outweighs that of the good of children. This is because the latter is framed around the conflation between the value, and *moral status* of, actual agents (here, living children) and prospective-potential agents (here, children that *might* come into existence), which attempts to artificially supply the latter with moral status, or worth, based on the moral status of agents. Meanwhile, as we have seen, the value of reproductive autonomy (and indeed autonomy more broadly) stems from its necessity for successful action to any agent. Simply put, 'autonomy as thus conceived, like freedom and well-being, must be regarded as a necessary good by every actual or prospective agent.'<sup>86</sup> This can be framed in one of two ways:

- 1) The balance is to be struck – artificially – between the non-existent agent and the agent at the point that the exercise of autonomy takes place – in these cases when the decision is made to be sterilised – at which point the agent's moral status alone would trump the non-agent's in addition to the fact that there can be no harm for the non-agent compared with the threat to the agent's freedom and well-being (through the imposition against effecting their autonomy).
- 2) The balance is to be struck between the collective values of autonomy and agent creation. In this case, it is again autonomy which must trump given that it is a central

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<sup>84</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 48.

<sup>85</sup> Ibid, 117.

<sup>86</sup> Ibid.

feature of any prospective purposive action of an actual agent within the community as opposed to the creation of an agent for the *benefit* of that community. In this way, it is the *basic* well-being which trumps the *additive* well-being of the community.

Regardless of the manner in which the balance is framed, it is clear that the *PGC* requires, first and foremost, respect to be shown for (reproductive) autonomy. Only when there is no prospective threat to an actual agent can the value of agent creation be seen as a collective good for that community.<sup>87</sup> Institutionally the balance ought to be struck so as to empower choice around reproductive matters, such that a decision to procreate is done so, all things being equal, autonomously.

Whilst the balance between two different types of value may be a difficult one to strike, it must be done so on a rational basis. That is where the courts have struggled in these cases. If the general position of the law, as we saw in the last chapter, is to provide for choices to be made around our reproduction, even allowing for the termination of an actual-potential agent (as opposed to a prospective-potential agent), and therein outweighing the value of potential agency, then that choice ought to be protected as a matter of legal principle. To do otherwise, suggests a need to reconsider a myriad of issues across the legal spectrum which supports the notion that the value of children outweighs and will *always* outweigh the value of autonomy. In the absence of embarking upon the Herculean task of changing legal focus, from one of individualistic autonomy to one of collectivistic dignity, the decisions will always sit uneasily with the rest of the law and it will appear that justice is not being done.

### **6.3 Revisiting Rees and McFarlane**

It is necessary to return to the cases which set forth the barrier to these claims having considered the moral consideration of the balance between dignity and autonomy. I will now turn to a number of other considerations posed by these cases which attempt to frame the injury suffered and how the courts have reacted to these complex issues. Given that

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<sup>87</sup> Kant, n 73, 57, [4:452-3].



the courts appear to have found difficulty in the need to ‘offset’ the clash of interests<sup>88</sup> outlined in the previous section, this allows for a broadening of the discussion around the *legitimate* limitation of the our reproductive autonomy.

### **6.3.1 The Injury and Public Policy**

The first issue to consider is how the courts have (attempted) to frame the injury suffered in light of the public policy arguments raised in countenance to this. As we have already noted, three interpretations of the injury suffered can be found: the damage is economic, the injury is the result of frustrating the claimants’ autonomy, or the injury is to the bodily integrity of the mother. To demarcate each interpretation is, admittedly, somewhat artificial; rather, it is the combination, and transformation, through each of these which more appropriately encompasses the harm suffered in this claim. For the courts, however, the view that the claim is one which denigrates the value of the child by placing a value upon it as a harm *in itself*.<sup>89</sup> This section endeavours to evaluate the conflict between these perspectives and reconcile, so far as is possible, the impasse faced by the courts when attempting to avoid the latter finding through the use of public policy.

Claimants have attempted, against this perspective of the courts, to frame their claims so as to emphasise that,

In most cases, it was not the child as revealed that was unwanted. Nor is the child’s existence the *damage* in the action... It is the economic damage which is the principal unwanted element, rather than the birth or existence of the child as such.<sup>90</sup>

As a result, a number of cases have attempted to highlight and to emphasise the *wrong* suffered as something related not to the child itself but the frustration of one’s goals and (reasonable) expectations. In *Greenfield v Irwin*<sup>91</sup>, the claimant framed her claim in a slightly different manner. Rather than claiming the post-birth losses for the cost incurred

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<sup>88</sup> Mason, n 5, 122.

<sup>89</sup> This is most starkly demonstrated in *Dioron v. Orr* (1978) 86 DLR (3d) 719, at 722, per Garrett J: “...the effect upon [the child’s] thinking, upon its mind when it realised that there has been a case of this kind, that it is an unwanted mistake and that its rearing is being paid for by someone other than its parents, is just simply grotesque.”

<sup>90</sup> *CES*, n 15, 75, per Kirby CJ.

<sup>91</sup> *Greenfield v Irwin* [2001] 1 WLR 1279.

through rearing the child, the claimant sought to recover lost earnings incurred as a result of having to leave work to care for the uncovenanted child. The court held that these costs fell within the scope of *McFarlane* and were therefore not recoverable: lost earnings were indistinguishable from the costs of rearing the child. In *AD v East Kent Community NHS Trust*,<sup>92</sup> the claimant, a mentally disabled woman, had become pregnant whilst on a mixed psychiatric ward in the defendant's care. The child was born and the claimant's mother agreed to take care of the child for the foreseeable future. The Court of Appeal dismissed the claim for costs associated with the child's upbringing on the grounds that she had suffered no loss. As the claimant's mother was voluntarily taking care of the child she could not bring a claim of her own; even if she were able to claim, Judge LJ opined that it would be invidious to balance the monetary value of providing care with the joys of having her healthy granddaughter living with her. In spite of these attempts to circumvent the harshness of the *McFarlane* rule by emphasizing the true *damage* suffered by parents of uncovenanted children, it appears clear that 'the "breadth" of the *McFarlane* decision can be used to close any "narrow" chink in its armour.'<sup>93</sup>

In determining the loss suffered by the claimants, the courts have been fairly limiting in their considerations. This is important as it, 'is not about the resultant child but is simply a matter of *the costs of* the resultant child.'<sup>94</sup> If, as a starting point, we were to take the statement of principle from Slade LJ that,

...if a woman wants to be sterilised, and in a legal way causes herself to be operated upon for that purpose, I can, for my part, see no reason why under public policy she should not recover such financial damage as she...has suffered by the surgeon's [negligence]...<sup>95</sup>

Following this, the task is to establish the true value of the costs of that resultant child. This may include, the cost of layette, accommodation, any schooling, etc., yet would necessarily be based on the *needs* of that child (rather than the *wants* or *extravagances* of the parents) and so, '...account [can] be taken of the parents' means in the sense that it

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<sup>92</sup> *AD v East Kent Community NHS Trust* [2002] EWCA Civ 1872.

<sup>93</sup> Mason, n 5, 145.

<sup>94</sup> Ibid, 123.

<sup>95</sup> *Emeh*, n 25, 1025, per Slade LJ.

will be *unreasonable* to compensate the well-to-do parents to any substantially greater level than the parents of more modest means.<sup>96</sup> By focusing on the *needs* of the child and the *duties* of the parents to provide for that child, the unseemly issue of, for instance, parents claiming the costs of private schooling that child<sup>97</sup> is excluded. Decisions of this nature, that is those which relate not to the *needs* or *duties* are more appropriately termed as choices of the parents, and as such are beyond the scope of recompense.<sup>98</sup> Framed around the notion of *need*, it is unsurprising that the cost of the child then will increase on account of factors such as disability,

Why, in the case of a handicapped child, for instance, should not a parent who requires to give up employment or the like to care for the child, sue for the loss so occasioned? I see nothing in principle to prevent this. If that be so, why should a healthy child be dealt with differently in regard to a similar loss?<sup>99</sup>

Whether it is deemed, solely or partly, to be an economic loss or a loss arising from the need to care for the consequence of a legal wrong, these consequences ‘flow inexorably from...the invasion of bodily integrity and personal autonomy involved in every pregnancy.’<sup>100</sup> The true cost of the child then is determined by account for those *needs* of the child and on account of the *duties* that the parent owes to that child. This, I suggest, offers a simple but honest expression of the consequential harm suffered in these cases.

The courts unwillingness (or apprehension) to evaluate the emotional advantages of parenthood with the financial disadvantages of it and the frustration of one’s autonomous choice as lead to a keen avoidance of the issue of ‘offsetting’ damages. As Lord Millett argued, ‘I cannot accept that the solution lies in requiring the costs of maintaining the child to be offset by the benefits derived from the child’s existence.’<sup>101</sup> To do so, it was suggested, was either superfluous or morally repugnant.<sup>102</sup> Yet, as Mason argues,

The net costs to the parents of rearing the child are the gross costs less the beneficial ‘offsets’. Admittedly, the [benefits] cannot be assessed in the same terms

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<sup>96</sup> *Allan v Greater Glasgow Health Board* (1993) 17 BMLR 135, 1998 SLT 580, 585.

<sup>97</sup> See: *Benarr v. Kettering Health Authority* [1988] NLJR 179.

<sup>98</sup> Beever, n 18, 400.

<sup>99</sup> *Allan*, n 96, 584.

<sup>100</sup> *Parkinson*, n 35, [73].

<sup>101</sup> *McFarlane*, n 26, 111.

<sup>102</sup> *Ibid.*

as the [costs] and the arithmetic is going to be difficult – but there is no logical basis for saying that, *because* of this, the costs have been wished out of existence.<sup>103</sup>

The task of the courts is to determinate an appropriate level of compensation in situations where it is difficult to do so. For instance, the difficulty in establishing an apt sum to award for loss of a limb does not justify the award of nothing. Yet Lord Slynn's argument<sup>104</sup> would apply to and prohibit any recovery for non-pecuniary loss.<sup>105</sup> To do so is to knowingly undercompensate the victim of negligence. It is to combat the vagaries of non-pecuniary losses that the tariff system was established and why Beever argues it would have been beneficial to establish the £15,000 award in *Rees* not as a 'conventional award' but as a tariff to act as the starting point for establishing the loss suffered by the parents.<sup>106</sup> In this way, the award becomes the beginning point for the assessment of the loss suffered rather than an end to it.

It was from the irreconcilable nature of the conflict of interest (and therein the offset calculus) that the court in *Rees* turned to the loss of autonomy as a *separate* harm on which to pin the 'conventional award'. Whilst it is remarkable that 'their Lordships accepted that the claimant suffered a loss in having an unwanted child but refused to compensate

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<sup>103</sup> Mason, n 5, 123.

<sup>104</sup> *McFarlane*, n 26, 74-5: "The discussion in the American cases of the "Benefits Rule" to which I have referred persuades me that it should not be adopted here and it is significant that it has not been adopted in many American states. Of course judges have to evaluate claims which are difficult to evaluate, including assessments as to the value of the loss of a life, loss of society or consortium, loss of a limb or a function. But to do so and to get it even approximately right if little is known of the baby or its future at the time the valuation has to be made is very difficult. It may not be impossible to make a rough assessment of the possible costs of feeding, clothing and even housing a child during the likely period of the child's life up to the age of 17 or 18 or 25 or for whatever period a parent is responsible by statute for the support of a child. But even that can only be rough. To reduce the costs by anything resembling a realistic or reliable figure for the benefit to the parents is well nigh impossible unless it is assumed that the benefit of a child must always outweigh the cost which, like many judges in the cases I have referred to, I am not prepared to assume. Of course there should be joy at the birth of a healthy child, at the baby's smile and the teenager's enthusiasms but how can these put in money terms and trimmed to allow for sleepless nights and teenage disobedience? If the valuation is made early how can it be known whether the baby will grow up strong or weak, clever or stupid, successful or a failure both personally and careerwise, honest or a crook? It is not impossible to make a stab at finding a figure for the benefits to reduce the costs of rearing a child but the difficulties of finding a reliable figure are sufficient to discourage the acceptance of this approach."

<sup>105</sup> Beever, n 18, 398.

<sup>106</sup> *Ibid*, 399-402.

for that loss',<sup>107</sup> the decision has been said to go some way towards unifying the quantification issue between *no recovery* and *full recovery*. Partial, or limited, recovery allows for some recognition of wrongdoing to occur without, seemingly, awarding damages for the birth of a child. As Mason claims,

By concentrating on an award for breach of autonomy – and by leaving open the door for true compensation to be paid – *Rees* may have furthered this aim and, indeed, may also have, in principle, bridged the seemingly unbridgeable gap between *McFarlane* and *Cattanach*.<sup>108</sup>

The problem with this, however, is in the fact that, 'the rejection of claims for the costs of child-rearing largely relieves the defendant physician of the consequences of his or her negligence.'<sup>109</sup> It remains that the courts unwillingness to see the claim as anything other than a claim for the birth of a (healthy) child impedes their ability to treat these cases according to the 'normal' principles of tort law. These decisions, then, are imbued with, '...reasons of a 'legal policy' which, stripped of all linguistic embroidery, boils down to protecting the NHS...from expensive claims when 'nothing worse' happened than the birth of a healthy if unwanted child.'<sup>110</sup> In so doing, the courts have effectively removed the responsibility of one group of medical professionals leaving them not subject to external, legal regulation on the basis of the inability to see beyond the blinding perspective towards the child. One is forced to wonder what the policy arguments against this *deregulation* might have been.

The courts assessment of the injury suffered in these cases is notoriously self-limiting. In so vehemently apprehending to 'place a monetary value on a child's head',<sup>111</sup> the courts have struggled with public policy arguments framed to assert that there is *no loss* in these cases. As Priaulx notes, 'The current approach suggests that negligence resulting in the birth of a healthy child is an inevitable and harm/less part of life, for which individuals must now be prepared to bear the costs.'<sup>112</sup> Yet the irony of this is, in removing the

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<sup>107</sup> Ibid, 402.

<sup>108</sup> Mason, n 5, 181.

<sup>109</sup> Nelson, n 10, 230.

<sup>110</sup> Antje Pedain, "Unconventional Justice in the House of Lords" (2004) 63 *CLJ* 19.

<sup>111</sup> Priaulx, n 21, 107.

<sup>112</sup> Ibid, 11.

protection for our reproductive autonomy, that the courts may have risked the lives of the child they were at odds to show dignity to,

The reality of many women's lives is that contraceptive failure will leave them reliant upon abortion as the remaining means of regaining control. Yet here, too, the idea that women are presented with unlimited choice is equally troublesome; while for some, abortion decisions are exercised without difficulty, for other abortion is not perceived as a choice at all.<sup>113</sup>

The unwillingness to perceive these claims as anything other than denigrating the dignity of the child poses for victims in the difficult situation of having to 'choose' between raising the child without the compensatory support or terminating that child. For some, this will not even be a choice. For others, this choice will be incredibly real and without the ability to recover the costs may find that the only choice available to them is to terminate. If this is to be the resultant legacy of *McFarlane* and *Rees* then it is one which sits uneasily with the law more broadly seen and the conception of morality so keenly advocated.

### **6.3.2 The Loss of Autonomy**

The injury suffered, as outlined in the previous section, is consequential upon *both* the frustration of autonomy and the interference with bodily integrity. The frustration of autonomy manifests in the negligence (or the 'wrongful' act/omission) of the medical professional and this is *crystallised* at the point of conception as an interference with bodily integrity. Yet, the frustration of autonomy has repercussions far beyond the one point in time. It will continue to purvey the manner in which the claimant(s) are able to choose how to live their lives. As noted previously, the courts, keen to avoid commodification of the child, set about recognising the harm suffered as an interference with reproductive autonomy for which the 'conventional award' but, beyond this, it is unclear *how* the courts maintain respect for autonomy in these cases. Looking beyond the injury as the *cost of* the child, this section seeks to develop an argument around the loss of autonomy in these claims.

The courts struggled with the moral question in these cases requiring a balancing of the conflicting values of *autonomy* and *dignity*. Favouring dignity it is difficult to evaluate how

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<sup>113</sup> Ibid, 182.

exclusion of post-birth losses demonstrates respect for autonomy. The *PGC*, as we have seen, justifies, and indeed requires, that the value of autonomy is treated with greater respect than *abstract* dignity. Whilst the court had claimed ‘the law does and must respect these decisions of parents which are so closely tied to their basic freedoms and rights of autonomy’<sup>114</sup> and ‘the law will respect the right of men and women to take steps to limit the size of their family’,<sup>115</sup> the award in *Rees* applies only to ‘the moment of the failure of the prospective parent’s initial choice.’<sup>116</sup> It is grounded,

...not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz, the right to limit their family. This is an important aspect of human dignity, which is increasingly being regarded as an *important human right which* should be protected by law. The parents have lost the opportunity to live their lives in the way that they wished and planned to do.<sup>117</sup>

Yet its recognition as an ‘*important human right*’ comes, not in affording adequate compensation according to legal principle, but in attributing a one-size-fits-all concession to the value of autonomy. Whilst it may not make an ‘unjustly arbitrary distinction between the claimants’,<sup>118</sup> it appears to assume that ‘*all* parents are *identically* situated’<sup>119</sup> in relation to the impact of the negligence and the child.

The restriction in recognising the frustration of autonomy in the sole instance when the parent(s) discovered the pregnancy fails to reflect ‘the financial consequences of the birth of a normal, healthy child’<sup>120</sup> and the true interference with autonomy. It is then *derisory* both in an economic sense and in its respect for reproductive autonomy.<sup>121</sup> This has worrying consequences for, ‘a society that promotes the benefits of family planning, such a message communicates dangerous signals and serves to demean the importance of choice and control within women’s reproductive lives.’<sup>122</sup> The treatment of autonomy in these

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<sup>114</sup> *McFarlane*, n 26, 165, per Lord Steyn.

<sup>115</sup> *Ibid*, 167, per Lord Hope.

<sup>116</sup> *Priaultx*, n 21, 74.

<sup>117</sup> *Rees*, n 19, [123] (*my emphasis*).

<sup>118</sup> Alastair Maclean, “Distributing the Burden of the Blessing” (2004) *Journal of Obligation and Remedies* 23-45, at 41.

<sup>119</sup> *Priaultx*, n 21, 76.

<sup>120</sup> *Rees*, n 19, [125].

<sup>121</sup> *Priaultx*, n 21, 78.

<sup>122</sup> *Ibid*, 78.

claims and in particular in *Rees* is incomplete and inconsistent. The courts attempt to recognise the loss of autonomy as a single event, consequenceless and without continuation, and identically felt by all, yet simultaneously it is a loss of autonomy which brings with it the joys and blessings of a child.

What then is the true value of reproductive autonomy in these circumstances? As Priaulx eloquently puts it,

...these cases pay mere lip service to the value of autonomy in the field of reproduction. What is meant by autonomy in this context is a commitment to recognising the *diverse* situations of individuals, the varying degrees that individuals may be harmed through the negligent frustration of their reproductive choices. Such an approach entails responding to what the harm of unsolicited parenthood consists of in 'individual' circumstances by reference to the relationship of dependency created through negligence. If the law is to provide a convincing account of the loss in these cases, then clearly it must encompass an understanding inclusive of women's perspectives of pregnancy and childbirth and of men and women's experiences of parenthood.... If the law is truly to respect individual autonomy, then it must be recognised that a 'self' is always implicated in that concept – whether the harm is founded in disability, or indeed located in isolation, poverty and hardship – the experience of unsolicited parenthood will be different in each situation, based on differential experience, lives, and aspirations. If 'autonomy' is ever to play a meaningful role in the reproductive torts, then the law must display a commitment to recognising and embracing the diversity of individuals.<sup>123</sup>

If, then, we are to demonstrate respect for reproductive autonomy such as to recognise it as an individual concept with communal implications, which is to sit with our broader common goals to promote family planning and abortion as a means of allowing these kinds of choices to be made, then when this fails due to the fault of another, reparation should occur. The value of reproductive autonomy is found in empowering individuals to make real choices for themselves and for their lives, this requires that the State provide those options which are viable under the *PGC* and, in turn, allow for those choosers to hold others accountable when these choices are frustrated by that person's negligence. Whilst these claims challenge the value of reproductive autonomy by placing it at odds with, what is easily misinterpreted as, the commodification and devaluing of human

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<sup>123</sup> Priaulx, n 21, 78.



(agentic) life, it is in this *real* threat to the generic features of agency that we are able to find resolution that priority must be given to our reproductive choices.

### **6.3.3 Mitigation**

The notion of mitigation in these cases arises in two ways. The first, which has already been discussed, revolves around the separation between the *needs* of the child and the *wants* of the parents. The suggestion has been that where parents exercise a *choice* to incur the (additional) costs, for instance through private schooling tuition, those costs are freely incurred and, as such, are beyond *reasonable* recompense. The second, however, has been more contentious and relates to whether parents can be said to have exercised a *choice* in not terminating the pregnancy or giving the child up for adoption. In this section, I will attempt to outline the court's position in this regard and consider whether this latter '*choice*' can be said to be real as to affect the claim.

The courts have been adamant to reject that defendants have a reasonable expectation that the parents will minimise their losses through abortion or adoption. In *Emeh*, Slade LJ considered that the mother 'had the right to expect that she would not be faced with this very difficult choice'.<sup>124</sup> He went on,

Save in the most exceptional circumstances, I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion in a case where there is no evidence that there were any medical or psychiatric grounds for terminating the particular pregnancy.<sup>125</sup>

Similarly, Gaudron J, in Australia, noted, '...that would be about the cruellest and most inhumane submission I have heard put in this Court since I have been here. I must say, it took my breath away when I read the judgments below suggesting that that was a proper form of mitigation.'<sup>126</sup> With the exception of *Sabri-Tabrizi v Lothian Health Board*,<sup>127</sup> where the claimant knowing that the sterilisation had failed and chose to remain pregnant was deemed to constitute an intervening act, and the suggestion that failing to abort with

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<sup>124</sup> *Emeh*, n. 25, 1024.

<sup>125</sup> *Ibid*, 1024.

<sup>126</sup> *Nafte v CES* (11 Sept 1996), S91/1996.

<sup>127</sup> *Sabri-Tabrizi v Lothian Health Board* (1997) 43 BMLR 190.

the intention of obtaining damages aside,<sup>128</sup> the courts have been consistently keen to avoid this question of mitigation.

This ought not to be surprising given that to opine otherwise would be to suggest on the one hand a *legal right* to abortion and on the other a *legal duty* to arrange for adoption of the uncovenanted child. After all, it may be the very reason that the parents sought sterilisation. As Rogers argues, ‘It would be foolish to ignore the fact that many people who see no ethical objection whatever to sterilisation...might have the strongest possible objections to abortion of a healthy foetus’.<sup>129</sup> Yet it may well be that in the future, as attitudes towards abortion change, it becomes more acceptable to, at least, consider the reasonableness of the ‘decision’ not to abort. As Callaghan J considered,

It may be that because of the possibility of changed views in society about reproductivity, the Court may be forced to confront an argument that a decision not to abort, or not to offer for adoption, should be regarded as a failure on the part of the parents to act reasonably.<sup>130</sup>

For the time being the question of reasonableness in this regard remains beyond the judicial spectrum,<sup>131</sup> and may continue to be given the nullifying effect of *Rees* on future litigation.

In spite of this, a Catch-22 has been established in these cases - which has been termed as the ‘Harm Paradox’<sup>132</sup> – whereby were the claimants to have *really* been harmed they would have mitigated their loss and chosen to terminate or put up for adoption, had they not done so there could not have been compensable harm. As Priaux notes, ‘On this

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<sup>128</sup> Andrew Grubb, “Failure of Sterilisation – Damages for Wrongful Conception” (1985) 44 *CLJ* 30-2, 31: “...if the plaintiff resolved the dilemma in favour of keeping the baby because of the prospect of obtaining damages, the court might be disposed to deny her expectations.”

<sup>129</sup> W.V. Horton Rogers, “Legal Implications of Ineffective Sterilisation” (1985) *Legal Studies* 296-313, 302.

<sup>130</sup> *Cattanach*, n 23, [294].

<sup>131</sup> On ‘reasonableness’ in this regard, Kenneth Norrie, *Compensation for Wrongful Birth: An Examination of the Principles Governing a Physician’s Liability in Scots Law for the Failure of a Family Planning Procedure* (1988) unpublished PhD thesis, University of Aberdeen, 96, notes: “The real question is whether the refusal is unreasonable, not whether an acceptance of abortion is reasonable. Just because an act is reasonable, does not make the refusal to undertake the act unreasonable, for both decision may be reasonable: otherwise the law would be compulsory rather than permissive.”

<sup>132</sup> Priaux, n 21, 109.

view, the consequences that result from the birth of an unwanted child can *never* form the subject matter of damages, no matter what way the claim is put.<sup>133</sup> This view is not aided by the use of ‘analogy’ by Lord Scott in *Rees* between the uncovenanted child and an unwanted foal. This analogy concerned the negligent performance by a vet of a gelding procedure on a two year old colt; the result being that the colt succeeds in getting a mare in foal whose condition ‘is not discovered until it is too late to do anything about it and in due time the mare gives birth to a healthy foal’.<sup>134</sup> Though, the mare (rather fortunately) is undamaged by these events, the owner sues the vet for damages. Lord Scott admitted, with ease, that the veterinary costs associated with the unwanted pregnancy and birth would be recoverable but, leaving special claims aside, found it less straightforward to accept the cost of rearing the foal to majority,

The proposition that the defendant vet would be liable for such costs seems absurd. It is instructive to ask oneself why that is so. It is absurd, in my opinion, because the owner of the foal does not have to keep it. Its unexpected and originally unwanted arrival would present him with a number of choices. He could have the foal destroyed as soon as it was born. But this would be an unlikely choice for the foal would be likely to have some value and it would cost very little to leave it with its dam until it could be weaned. Or the owner could decide to keep the foal until it could be weaned and then to sell it. Or he could decide to keep it until, as a yearling or a two year old, it had reached a little more maturity and then sell it. Or he could try and add value to it by breaking it in, schooling it and then selling it. Or he could keep it for his own use. Each of these choices, bar the first, would have involved the owner in some expense in rearing the foal. But the expense would be the result of his choice to keep the foal. Moreover, the expense of rearing the foal would have to be set against the value of the foal. The owner could not claim as damages reimbursement of the expenses without bringing into account the benefit.<sup>135</sup>

Yet having embarked upon his analogy it culminates in the admission that unlike the owner of the foal, who exercises a ‘true choice’, the parents are unlikely to find that their decision represents a choice and as such it may hold ‘no parallel in the case of the unwanted foal’.<sup>136</sup> This did not, however, explain why the economic consequences should

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<sup>133</sup> Ibid.

<sup>134</sup> *Rees*, n 19, [134], per Lord Scott.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid, [136].

be borne by the defendants when the decision to keep the child was the parents.<sup>137</sup> Whilst at no point does his Lordship mention the notion of mitigation, it is difficult to understand how otherwise there can be such a misconstruction of the idea of choice. After all, the only true choice which we are sure has been made – that is a choice which is informed and freely given – was the decision to be sterilised.<sup>138</sup> Beyond this, we can merely speculate as to the *reasonableness* of the ‘decision’ – for it may not have been a ‘decision’ – to keep the child. This can only be understood by reference to the facts of a given case.

In the previous chapter, it was established that there exists in the early stages of pregnancy a *prima facie* presumption in favour of termination under the ethical rationalism of the *PGC*. How, then, might this presumption affect the evaluation of reasonableness in this regard? The presumption favours termination where it is desired. In these circumstances, it may well be that the decision *not* to terminate is made for reasons separate from the agent’s best interests: for instance religious, altruistic, compassionate, etc., reasons. In these circumstances, the prospective parent may indeed feel *duty* bound to keep and care for that child. In this case, the parent(s) make the ‘decision’ on the basis of their autonomous viewpoint, which, given that its effect on other agents is – at best – negligible, appears on the face of things a legitimate exercise of autonomy. On this basis, it would appear that – whilst it may be appropriate to at least question the sincerity of those reasons in favour of keeping the uncovenanted child<sup>139</sup> – the decision *against* terminating the child

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<sup>137</sup> Ibid, [137].

<sup>138</sup> *Marciniak v. Lundborg*, 1990 153 Wis 2d 59, 450 NW 2d 243 (Wisc SC), Wis 73-4, NW 2d 249: “The parents made a decision not to have a child. It was precisely to avoid that “benefit” that the parents went to the physician in the first place. Any “benefits” that were conferred upon them as a result of having a new child in their lives were not asked for and were sought to be avoided. With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that might accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails.”

<sup>139</sup> Priaulx, n 21, 95.

will be prima facie unreasonable when the parent is in knowledge of their remaining fertility<sup>140</sup> or where the decision is vexatiously motivated.<sup>141</sup>

This in turn raises a contra argument, namely whether a claim could be brought on the grounds of the bereavement suffered by placing the child for adoption or in terminating the pregnancy? It may well be that, in spite, of ridding oneself of the *extended* financial losses associated with the *needs* of the child that the parent remains injured as a result of their ‘decision’ to mitigate.<sup>142</sup> As Beever claims,

...this reply is open to the claimant because the issue concerns, not whether the defendant violated the claimant’s rights, but whether the claimant chose to suffer a loss as a result of the defendant’s violation of rights... Her assertion is that, in choosing to keep the child, she chooses the lesser harm to herself, and that means that we cannot regard her as having chosen to harm herself... If the claimant chooses to give up her child for adoption, then she is entitled to recover for her bereavement from the defendant, as long as that loss to her was less than the loss she would have suffered had she kept the child.<sup>143</sup>

In these circumstances, it would appear that that decision *must* be legally recognised as caused by the negligent sterilisation and, as such, duly compensated.

## **6.4 The Obligation of Reparation**

The model of autonomy advocated in this thesis seeks to frame the discussion around a conception that maintains its inherent mutualist and individual notion. It is held out as a tenet of freedom and, in this way, fundamentally necessary for the engagement in successful action of any agent. Yet, because of this it is a mutual construct that requires an evaluation of legitimacy in its justified exercise. In particular, I have been concerned with reproductive autonomy and decisions to prevent the possibility of conception and child birth. In this section, I have been concerned with the determination of the

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<sup>140</sup> See, for example, *Sabri-Tabrizi*, n 127.

<sup>141</sup> John Seymour, *Childbirth and the Law* (Oxford University Press, 2000), 80: “The suggestion that the unwanted birth is the result of the woman’s choice to allow the pregnancy to continue need be taken seriously only when there is *nothing* to prevent a woman who would otherwise have an abortion from doing so.”

<sup>142</sup> See: Beever, n 18, 393-6.

<sup>143</sup> *Ibid*, 395-6.

protection of one's reproductive choices. This, it has been maintained, is a vital and crystallising aspect of the ability to make choices as to how one lives their life. In this section, it must be determined how this model of autonomy will support that protective function and outline the importance of both empowering and guaranteeing choice in these circumstances.

Broadly, the obligation of reparation outlines the need to, having harmed another, make good that harm. This is generally through the payment of damages or by 'righting the wrong' in some more practical way, for instance by apologising or by retracting a defamatory statement.<sup>144</sup> This obligation, under the *PGC*, would be manifested when the actions of one agent interfere with the generic rights of another. As a requirement it seeks to, so far as is possible, redress the morally impermissible conduct. As MacCormick notes, this obligation 'may be independent of anterior moral fault, and that their primary moral foundation may be respect for the rights of the person hurt or harmed in a given case.'<sup>145</sup> So, if *A* interferes with the occurrent freedom of *B*, *A* must in some way reasonable rectify that wrong. What is of concern here is the interference with *B*'s generic rights. It is in this occurrence that there is a manifestation of the obligation of reparation.

This obligation of reparation would, to use Hohfeld's language, and if we assume the procedural turn to institutionalise the *PGC* has occurred, be a 'judgment duty'.<sup>146</sup> By this it is meant a duty (as correlative to claim-right) by an arbiter for the redress of some wrong. To put it another way, in passing judgment the effect is to place the conflicting parties under a *new* right-duty correlation whereby the wrongdoer is under a duty to repair, in some decided way, that wrong. So, if *A* has interfered with *B* and is judged (or by operation of the law, held) to have done so; *B* will have a claim-right against *A* for the reparation of any damage caused. Correlatively, *A* will now have a duty to repair any

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<sup>144</sup> I do notably wish to remain somewhat silent throughout this section as to the manner in which violation of or interference with a right is to be repaired. In relation to the actual legal position on a subject this will involve assessing the question in the terms of the tort law system; i.e. through damages. The validity of this manner of reparation however is not necessarily that which is required under the *PGC*. This question, however, is beyond the scope of this thesis.

<sup>145</sup> Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982), 220.

<sup>146</sup> Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964), 108.

damage caused. The alignment of rights to (or obligations of) reparation with 'judgment rights' however causes a problem for this approach. On this basis, rights to reparation are *only* so on the basis of the decision of some final arbiter. That would suggest, the right is tethered *not* to the wrongdoing itself – as was suggested above – but on the decision of a court. In the present context, this problem is particularly vivid. For, the courts have altered the manner in which the right to reparation manifests, under *Rees* in the 'conventional award', but if the wrongdoing causes loss beyond that then the loss suffered has not been rectified fully.

Instead, the obligation of reparation must be framed and manifested *directly* from the interference with (agent) *B*'s generic rights (or generic features of agency). For Gewirth, the obligation of reparation is a 'reactive' duty.<sup>147</sup> Thus,

These, then, are not 'original' duties, but arise from preceding actions that violate a duty... The ground for holding according to the *PGC* that reparation is a duty is in general the same as in the case of punishment: an antecedent occurrent equality of generic rights, which the *PGC* requires, has been disrupted, and reparation is required in order to restore that equality.<sup>148</sup>

Given that reparation is a requirement of the *PGC* in situations where there has been morally impermissible conduct, it is key that the obligation of reparation is seen as crystallising from the point at which the disruption of the generic rights has occurred. Whilst the general framing of Hohfeld's 'judgment right' is accurate it is the manner of manifestation which is inaccurate. So the 'reactive' duty to repair would operate as follows: *A* interferes with *B*'s basic well-being. *A* becomes duty-bound to rectify this in a reasonable manner. Correlatively, *B* gains a claim-right that *A* rectify the wrongdoing. It is this framework of the obligation to reparation which is to be adopted in relation to reproductive autonomy.

As noted in the previous section, the Wrongful Conception claim is interpreted as consisting of three separate harms: firstly, the interference with and frustration of the exercise of (reproductive) autonomy; secondly, the interference with the bodily integrity

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<sup>147</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 328.

<sup>148</sup> *Ibid*, 329.

of the mother; and, thirdly, the economic losses incurred as a result of the child's *needs* and the parent's *duties* to that child (or the bereavement of terminating the pregnancy or giving the child for adoption). Autonomy, as a tenet of freedom, is subsumed within an agent's generic rights and, provided the autonomous decision is a legitimate one, within the protective schema of the *PGC*.<sup>149</sup> Autonomy, also, gives rise to those claims to one's bodily integrity and to one's economic well-being. This, as we have seen, requires both positive and negative obligations towards another agent's (generic) right to autonomy.<sup>150</sup> The manifestation of these rights according to the Hohfeldian schema are in Privilege-rights to (not) make a certain reproductive decision; i.e. the paired privilege (or liberty) to terminate a pregnancy or to not terminate the pregnancy. Vital to the empowerment of autonomous choosing here is the *pairing* of the Privilege-rights to opt for and against a certain course.<sup>151</sup> In holding these Privileges, it will be remembered, the Hohfeldian correlative is the absence of any claim right by another agent. These Privilege-rights (or liberties or freedoms) allow us to frame the decision-making process and determine the validity of the options (not) available to the choosing agent. It is the interference with these Privilege-rights which lays the foundations for the claim in Wrongful Conception through the manifestation of this harm in the body and in the child. As Beyleveld and Brownsword note, 'In a flourishing community of rights, it will be accepted that there is a collective responsibility to make compensatory provision for those who are disabled, through no fault of their own, from functioning as agents.'<sup>152</sup> The manifestation of harm in these ways provides for the duty of reparation (as correlative to a Claim-right for reparation).

The rights advocated then are derivations of the generic right to freedom held by all agents by reason of their agency. It is premised on the notion that we are mutually and

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<sup>149</sup> Gewirth, n 147, 138-9.

<sup>150</sup> Nelson, n 10, 47.

<sup>151</sup> I have admittedly simplified this abstraction somewhat and in practice the rights-based relation will concern more the two Privileges for and against. For each option available, there will be a paired Privilege as more options become available more Privileges will be held, further empowering autonomous choice.

<sup>152</sup> Deryck Beyleveld and Roger Brownsword, "Principle, Proceduralism, and Precaution in a Community of Rights" (2006) 19(2) *Ratio Juris* 141-68, 164.



individually better off when we are ‘left in control of [our] behaviour by [our] unforced choice.’<sup>153</sup> By tethering the notion of egalitarianism through the *PGC* with the (notoriously) individualist concept of autonomy, I have attempted to present an account of reproductive autonomy which frames a Community of Rights through the institutionalisation of mutuality and cooperation. It seeks to determine the legitimate exercise of reproductive autonomy on the basis of ethical rationalism as distinct from the complex moral questions leading the courts to contradiction. The Wrongful Conception claim has been deconstructed in order to understand its unique and novel position in relation to both the law of tort and the regulation of reproduction more broadly. In doing so, it has become clear that the impact of these appeals to public policy in these claims are self-limiting a fail to demonstrate the appropriate respect for individual and collective reproductive autonomy. These decisions are made not in a vacuum where only those litigating these claims are effected, rather these decision relate to the legitimate exercise of legal power established to institutionalise the resolution of individual conflicts. What is required is the drive towards and support of institutional policies which (*genuinely*) uphold these human rights and, in so doing, demonstrate respect for and protection of reproductive autonomy.

## **6.5 Summary**

In this chapter, I began by setting out the problems with the current legal position in relation to the tortious claim for Wrongful Conception. I suggested that the decision to create a ‘conventional award’ in these cases created an issue in regards to access to justice and to the respect for autonomy by treating all claimants as equivalently injured. Against this, I have suggested that what is required to resolve this claims is a system for determining objective value. This system, I claim, is derivable from the *PGC*, specifically the contingent argument as modelled in the previous chapters, and an understanding of dignity within that framework. On this approach, dignity is a value which is to be allocated to those beings who *may* be agents according to the *Principle of Rational*

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<sup>153</sup> Gewirth, n 147, 138.

*Precautionary Reasoning.* As a result, I suggest that prospective, not-yet-conceived children are not to be allocated dignity – especially not such that their interests might outweigh those of a full adult agent. The individual and collective good of a society respecting the autonomy of its members will outweigh any collective interest in abstract reproduction.

## Chapter 7      Conclusion

The reproductive choices that are made whether to keep or conceive a child inevitably invokes a moral and legal discourse around the value of children and of autonomy. This thesis has attempted to analyse that moral-legal discourse through a theoretical framework developed from Gewirth's argument to the Principle of Generic Consistency (*PGC*). It has explored the provision of services for avoiding pregnancy and childbirth and the potential for reparations when these services fail. It has attempted, foremost, to emphasise the importance of objective public morality in determining these issues and to situate autonomy within a liberal democratic system of legal reasoning premised on morality. In so doing, I have attempted to frame those moral questions raised in this thesis – in relation to reproduction, rights and law, more generally – according to the framework of the *PGC*. Ultimately, I have sought to answer the research question: *Does moral rationality dictate that there ought to be legal rights over reproductive autonomy?*

In the preceding chapters, I have argued that ethical rationalism – based around those determinate commitments we owe to one another on the basis of agency – is the foundation for understanding the operation and legitimacy of law itself but also in locating the manner and means of regulation of our reproductive autonomy. In particular, I have argued that respect for reproductive autonomy should be framed by reference to a model of *Rational Autonomy* and, as such, holds a value as both an individual and communal good, but it is necessarily subjected to derogations based on conflicting interests. I have sought to demonstrate that in our reproductive choices there is an important role for the State (or, rather, the institution) to play in both empowering our choices and in protecting them but this does not manifest in *absolute* rights. My arguments throughout this thesis have attempted to build towards this realisation on the basis that without an understanding of the relationship between law, morality and rights, the question as to regulation of ethico-legal issues, such as reproductive choice, is left

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wanting. Similarly, an account of autonomy which does not take into consideration the limitations of it as a concept is left absent of moral substance.

As my original contribution to knowledge I have presented a model of *Rational Autonomy* built from the *PGC* which has been used to evaluate those areas of confusion and contradiction within the realms of reproduction. It, importantly, has sought to move away from the traditional focus of liberalism and feminism respectively. In relation to liberalism, it has attempted to retreat from the individualistic concerns for single incident choice – merging autonomy with conceptions of informed consent. In relation to feminism, it has sought to use moral legitimacy as a social and individual ground for curtailing the exercise of autonomy whilst building on the contextualised account proposed. Ultimately, in stating the importance of autonomy I have attempted to show that it ought not to be elevated to a position above its state. Yet it has accepted the merits of these approaches where it is due. The Gewirthian model of *Rational Autonomy* incorporates concerns at both individual and community-State levels, as a result it is able to analyse those choices which are made whilst simultaneously accepting the importance of autonomy as a collective device within a Community of Rights. I have been keen to emphasise the interconnectedness of autonomy with agency, law and rights and to use these notions as points of movement to take the *PGC* through as part of its metamorphosis beyond the ambit of moral practical reason alone. It is in this conceptual metamorphosis that the true value of Gewirth's (and fellow Gewirthians') argument(s) can be appreciated. The continuum of practical reason has been vital in demonstrating how law, morality and rights are fundamentally interdependent and interconnected. Any model of autonomy must present an account of the way in which these relations are grounded within a legitimate system of institutionalised reasoning. I do not, however, hold that this thesis contains the 'right answer' to the resolution of these problems and ethics more broadly. Instead, it is hoped that it offers the beginnings for a discourse built around and from the model adopted. I hope for more, illuminating interpretations of this model that will help to build a collective understanding and aid in the search for the answer.

## 7.1 The Legitimacy of Law

In relation to questions around the legitimacy, authority and validity of law, I have argued in favour of an account of legitimacy premised on the determinate commitments of the *PGC*. This, I suggested, is what is meant by ‘legal idealism’ and transparent autonomy. Beginning by considering the Positivist claim to law’s *autonomy* (separation) from morality, I argued that a complete theory of legal authority required valid claims to both *fit* and *justification*. In order to develop a coherent concept of law it was necessary to present a transparently autonomous system, one which was guaranteed by some determinate (at least, artificial) moral code. This moral code, I believe, is manifested in the commitments of the *PGC* and when incorporated into legal reasoning as a constitutional principle for that system it becomes what Gewirth termed a *Community of Rights*.

The Obligation to Obey under the system is implicated by morality itself. But morality cannot be reinstated as a final arbiter – this would merely reproduce the regulatory problem of Kant’s ‘unilateral moral will’.<sup>1</sup> Morality itself must become ‘omnilateral’ and establish the *self* as the basis in public reason.<sup>2</sup> The key is to allow morality to ‘shine through’<sup>3</sup> the *artificial* reasoning of the law. This is encompassed by the trifold nature of the *PGC* in this context,

In Gewirthian terms, Justice appears at the level of individual practical reason as an adherence to the Principle of Generic Consistency, in our collective arrangements it is an ethical principle and, in co-ordinatory and regulatory terms, it must also function as a *legal* principle.<sup>4</sup>

In this way, the test for establishing whether an institution is exercising a *morally legitimate power* is by reference to the demands of the *PGC* and not by reference to the vagaries of consent or some other device. A morally legitimate State social order is one which seeks to guarantee the generic rights of *all* agents of that society; it seeks to empower productive

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<sup>1</sup> Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996).

<sup>2</sup> Henrik Palmer Olsen and Stuart Toddington, *Law in its Own Right*. (Hart Publishing, 1999), 34.

<sup>3</sup> Ibid, 158.

<sup>4</sup> Henrik Palmer Olsen and Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Ashgate Publishing, 2007), 207.

## Conclusion

agency and remove economic and political dependence; it seeks to *transparently* institutionalise a framework for mutual assistance and reciprocal standing. This is *because* of its relation to practical reason which *entails* the PGC.

When held as a sufficient and justificatory reason for legitimacy, ethical rationalism demonstrates that the determinate precepts of categorical necessity call for a minimum level of protection for the generic features of agency. This requires a level of non-interference with the generic features and for positive assistance to empower the attainment of productive agency. In this way,

Community and rights are brought together here because persons' vital interests in freedom and well-being are protected through an institutionalized framework of mutual assistance whereby persons are helped to develop their abilities of productive agency and to find suitable employment for those abilities. The freedom and voluntariness of civil society are thereby given a stable grounding.<sup>5</sup>

However, it takes us further still, we are directed towards a regime which is necessarily egalitarian, where subjective viewpoints of 'good' are excluded from the ambit of adjudication (unilateral value disparity), where those agents are *logically* (rather than contractually) tied to the system become part of a collective authorship of the law's reasoning. And so a question of authority (or rather validity) resides not in 'officialdom' but in the attainment of and meeting of the legitimacy criteria (which justifies the system's power).<sup>6</sup> As a result, the institutionalisation of the generic rights helps to provide an answer,

For it lays on courts and governments the responsibility for fulfilling these rights, by making legally determinate provisions for fulfilling them. In these ways, as we have seen, the society whose government makes such provisions is a community of rights.<sup>7</sup>

It is in this way that the commitment to the *value* of individual autonomy, freedom and well-being is demonstrated as respected by the State and the mutual relationship between the institutional and the citizen(s) is realised. The law, in this sense, is underpinned as

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<sup>5</sup> Alan Gewirth, *The Community of Rights* (Chicago University Press, 1996), 351.

<sup>6</sup> Stuart Toddington, Power, Authority and Legal Validity; Part 1: *The Ambiguous Role of Authority in Legal Orders* (2012) 66 *Student Law Review*

<sup>7</sup> Gewirth, n 5, 353.

legitimate by its ability (and, indeed, propensity to) enforce those *goods* – the generic features of agency - that underpins *all our* aspirations as means to the *successful* pursuit of those goals and the attainment of productive agency.<sup>8</sup>

On this approach, institutionalised reasoning exists within a continuum of practical reason incorporating aspects of the instrumental, the prudential and the morally rational in its direction through norm creation and exclusion. It must, necessarily and transparently, allow moral rationality to ‘shine through’ throughout its domain. It is through this transparency which we are able to pin the notions of legitimacy, authority and the obligation to obey. When held as a sufficient and justificatory reason for legitimacy, moral rationality demonstrates that the determinate precepts of categorical necessity calls for a minimum level of protection for those features of agency which allow agents to act as agents. It is in such a legitimate system of institutionalised reasoning that there is a manifestation of the *Community of Rights*.

## 7.2 The Community of Rights

I went on to argue in favour of a revision of the rights-based framework, both conceptually and normatively, which departed from the notorious individualism of ‘rights talk’ and towards a manifestation of the *Community of Rights*. The conceptual framework began by presenting an understanding of rights as existing within the Hohfeldian schema.<sup>9</sup> When making an assertion to a right it was argued that this meant the holding of either a Claim-right, Privilege-Right, Power-right, Immunity-Right or a combination of the above - a Molecular or Complex Right. This conceptualisation, it was argued, provides the basis for a normative understanding of the *function* of rights, whereby each of these ‘rights’ provides a given, determinate function to the right-holder. The result is that an incident will appropriately be termed as a right when it either marks out an *exemption* (from a general duty), a *discretion* (as to how to act) or an *authorisation* (to act in some way) or it

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<sup>8</sup> Olsen and Toddington, n 2, 156.

<sup>9</sup> Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964).

entitles the right-bearer to *protection* (from harm), *provision* (in cases of need) or *performance* (of some specified action)<sup>10</sup> or as some molecular combination of the above. Tethered to the *PGC* and the *Hierarchy of Generic Goods*, the Function Argument offers a grounded derivation of what is sufficiently in an agent's interest; or what needs to be controlled; or because the subject of the right requires special assistance of some kind, so as to ground the right in question.<sup>11</sup> This aimed to provide a more broadly encompassing argument for the different types of functions which rights may provide and, importantly, sought to move away from the debate between choice and interest conceptions of rights.

From this framework, I argued that the determinate commitments of the *PGC* helped to explain the justificatory reasons for the holding of rights. Building from Gewirth's statement of rights,

A complete rights-statement has the following structure: 'A has a right to X against B by virtue of Y.' There are five variables here: first, the subject of the right, that is, the person who is said to have the right (A); second, the nature of the right that is had, including its modality or stringency and the meaning of the statement that someone has the right; third, the object of the right, what it is a right to (X); fourth, the respondent of the right, the person or persons against whom the subject has the right (B); fifth, the justifying reason or ground of the right, that by virtue of which the right is had (Y).<sup>12</sup>

I sought to demonstrate that it was the protection or exercise of the generic features of agency which helped to secure the justification for right-holding. In this way, and through the egalitarian schema developed as part of the moral legitimacy in legal power, I argued in favour of the *Community of Rights*. This, it was argued, provides for the mutual holding of rights and obligations derived from the generic rights of the *PGC*. It is in the agentic and equalising grounding of rights (and, indeed, obligations) that such a complex matrix can be mutually and cooperatively established. This means,

By the mutuality of human rights, all persons have obligations to help see to it that their societies function as such communities through appropriate governmental policies and institutions. The persons who contribute such help will not only exercise their own Rational Autonomy but also further their dignity as

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<sup>10</sup> Leif Wenar, "The Nature of Rights" (2005) 33 *Philosophy & Public Affairs* 223-252, 246.

<sup>11</sup> See: Neil MacCormick, *Legal Right and Social Democracy* (Clarendon Press, 1982), 163-6.

<sup>12</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 65.



rational and cooperative agents who fulfil their rights within a community that protects and fosters them.<sup>13</sup>

This, I argue, moves ‘rights talk’ beyond its individualist and egoist criticisms and onto the realm of universal interpersonal regulation. Rights, in the sense advocated, are always beyond ‘A has a right to  $\phi$  against B’ and span societies in order to support and develop the productive agency of citizens.

Further to this, I argued that the commitments of the *PGC* were transformed by the move from moral to institutional reasoning such as to effect the justificatory framework adopted. This alteration was the result of the fallibility of human-agent reasoning and the lack of moral omniscience. When moving to institutional reasoning, the justification for rights holding is derived from the *Principle of Rational Precautionary Reasoning*. In practical terms, this means that any being who *might* be an agent must be treated as an agent for practical purposes. In incorporating the *PGC* into legal reasoning it requires that agents respect and protect beings who may be agents. The result is that ‘right-holders’ within a *Community of Rights* must go beyond human-agents alone and this class will extend to any being who can be practically protected provided this does not risk the generic rights of a being more likely to be a full agent. Rights of children and the mentally incapacitated are explained within this rights analytic. This is key to the transformation of the *PGC* from moral to moral-legal reasoning, from the abstract to the practical.

This framework builds on the moral-legal evaluatory schema of the *PGC* and presents a theory of rights that focuses on the complex matrix of interpersonal relationships maintained and promoted by these legitimate expectations. I sought to draw on both public and private conceptions of rights and on the interplay between rights in an institutionalised setting. This matrix of rights exists throughout a *Community of Rights* and in locating this approach counter to the notion of *absolutism* in rights discourse, emphasised how the qualification of individual rights shapes the contours of legitimate behaviour and expectations and how the manner in which rights may conflict, overlap and interrelate. In order to offer a communal account of these rights-based relations, I

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<sup>13</sup> Gewirth, n 5, 201.

focused upon the conceptual tools for understanding rights and on the tools for the resolution of intra-variable conflicts. The combination of the *Hierarchy of Generic Goods*; the *Criterion for the Avoidance of More Probable Harm*; and the *Principle of Rational Precautionary Reasoning* provide these tools. This requires a ‘good faith, transparent and accountable judgment’ preferably by those ‘persons authorised under the *PGC* to make such judgments’<sup>14</sup> when incorporated into a legal system supporting and maintaining this complex matrix. At the heart of this are the *morally rational* concerns for the generic features of agency and how these must be balanced across a social order to foster egalitarianism and mutualism.

### 7.3 Rational (Reproductive) Autonomy

I then went on to argue in favour of a model of *Rational Autonomy* in relation to reproduction. This model of *Rational Autonomy* sought to consider the social and political conditions involved in the exercise of choice and in the choices available, and therein the legitimate restriction of it. It involves, ultimately, cultivating the conditions of the exercise of autonomy with an aim to further productive agency. I sought to argue that *Rational Autonomy*, determined through the commitments of the *PGC*, was capable of responding to the legal, moral and quasi-moral questions surrounding the personal choices and public regulation of reproduction and fertility.

I attempted to build from and, where appropriate, incorporate considerations from the feminist model of *relational* autonomy and the bioethical model of the conditions of autonomy (as connected to informed consent). In particular, concern for others and the interconnectivity of persons was brought to the fore in the account of *Rational Autonomy*.<sup>15</sup> The aim was to offer, ‘[a] contextualised understanding of reproductive autonomy [which] lends itself to recognising this important connection between reproductive health and reproductive autonomy, and to seeking solutions that will

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<sup>14</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgement* (Sheffield Academic Press, 1994), 269.

<sup>15</sup> Gewirth, n 5, 117.

improve both.’<sup>16</sup> This dual understanding of reproductive autonomy based on both private (personal) and public (political) factors provided the foundation for this approach. There is a need for positive requirements in order to nurture one’s reproductive autonomy which go beyond simply refraining from interfering with an agent’s generic features. Simply put, the obligation to enable choice to take place requires that the choices are made *realistically* available and will include positive rights. This Gewirthian model of autonomy sought to recognise that ‘persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex intersecting of social determinants’<sup>17</sup> but that in doing so it was necessary for there to be limitations to the exercise of one’s autonomy on account of either a conflict with another agent or with the community more broadly.

More importantly the approach seeks to advocate the State’s role in respecting reproductive autonomy. As Nelson notes, ‘the State’s obligations go beyond simply allowing women to continue or terminate pregnancies, to demanding the provision of support that makes both choice realistically available.’<sup>18</sup> The *Community of Rights* is brought together in a way which pursues the mutual drive to autonomy of every agent. The State is obliged, indeed *duty bound*, and to the provision of services, viable choices and systems of support, which allow for the legitimate exercise of reproductive autonomy. This is because,

To be one’s own productive agent, so far as possible, rather than being a passive recipient of the agency of other persons, is required by the *PGC* as the principle that aims to secure effective rights of purposive agency and autonomy for all persons, and with them the ethical goods of dignity and self-respect. In these ways rights and community are brought together, because the community helps persons to secure and exercise those rights.<sup>19</sup>

This model of *Rational Autonomy* emphasises the cooperative and mutual nature of the principle of autonomy as a tenet of freedom. It emphasises agent’s ‘corresponding rights

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<sup>16</sup> Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013), 54.

<sup>17</sup> Catriona Mackenzie and Natalie Stoljar, ‘Introduction: Autonomy Refigured’ in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), 4.

<sup>18</sup> Nelson, n 16, 46.

<sup>19</sup> Gewirth, n 5, 201.

and obligations whereby they mutually help one another to develop as autonomous and cooperative persons through the policies and institutions of the community of rights.<sup>20</sup> This accentuates the institutional relationship between agents and the State and how the generic rights are capable of fostering autonomous life as a means to achieving productive agency.

It maintains the interplay between individualistic and communal concepts of autonomy which are key to the *relational* model of autonomy but seeks to avoid overstating the value of the concept.<sup>21</sup> As Beyleveld and Brownsword note this may, ‘...attach too much weight to the particular-occurrent exercise of agent autonomy and to pay too little attention to the sustainability of the context of a Community of Rights on which Gewirthian thinking is predicated.’<sup>22</sup> It maintains that, as with all generic features of agency, it must be balanced against competing interests and competing agents. Given that autonomy runs to the heart of our being as prospective purposive agents, it is a concept of vital importance in the *Community of Rights* and one supported by the generic rights. It is not, however, beyond interference. Whilst it may take ‘compelling reasons’ to justifiably interfere with autonomy,<sup>23</sup> where there is (intra-variable) conflict those opposing agentic interests may outweigh it.

The *Obligation of Reparation*, under the *PGC*, I claimed was manifested by an interference with the generic and/or institutional rights. For Gewirth, this obligation is a ‘reactive’ duty.<sup>24</sup> Thus,

These, then, are not ‘original’ duties, but arise from preceding actions that violate a duty... The ground for holding according to the *PGC* that reparation is a duty is in general the same as in the case of punishment: an antecedent occurrent equality of generic rights, which the *PGC* requires, has been disrupted, and reparation is required in order to restore that equality.<sup>25</sup>

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<sup>20</sup> Ibid, 348.

<sup>21</sup> Ibid.

<sup>22</sup> Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing, 2007), 271.

<sup>23</sup> Ibid, 357.

<sup>24</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press, 1978), 328.

<sup>25</sup> Ibid, 329.

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Given that reparation is a requirement of the *PGC* in situations where there has been morally impermissible conduct, it is key that the *Obligation of Reparation* is seen as crystallising from the point at which the disruption of the generic rights has occurred. Under the model of *Rational Autonomy*, this obligation is vital to the protection of agentic interest when the choices of an agent are not respected. As discussed, this obligation is central to the discussion around liability for pre-natal harm given the potentially boundless repercussions of uncovenanted pregnancy and childbirth. The Wrongful Conception claim was interpreted as consisting of three separate harms: firstly, the interference with and frustration of the exercise of (reproductive) autonomy; secondly, the interference with the bodily integrity of the mother; and, thirdly, the economic losses incurred as a result of the child's *needs* and the parent's *duties* to that child (or the bereavement of terminating the pregnancy or giving the child for adoption). The *PGC*, in response to this type of harm, requires there to be social structures set up for the purpose of either compensating injured agents or for those agents to seek compensation from those who injured them.

To sum up, *Rational Autonomy* strives to unify our understanding of the legitimacy of law and the *Community of Rights* through a discussion of the choices which can be made (or ought to be allowed) within an ideal legal system. What is required is the drive towards and support of institutional policies which (*genuinely*) uphold these agentic rights and, in so doing, demonstrate respect for and protection of reproductive autonomy. This exhibits the full conceptual metamorphosis of the *PGC* from a rational moral principle, to an ethical collective principle, to constitutional principle of legal reason, to a basis for rights discourse, and to a model of autonomy. In the context of reproductive autonomy, I have demonstrated that the current legal, social and political regime falls short of these ideals. The current legal position offers a minimal level of choice and protection of that choice to those who depart from the 'norm' familial model of child rearing. In so doing, the law subjects those who find themselves beyond this norm to illegitimate restraint of their possible prospective choices. Consequently, the law must (appropriately) compensate those who suffer losses associated with an uncovenanted child. Similarly, the law regulating the availability of abortion must be reformed to reflect the greater moral status

### *Conclusion*

of the mother (in the early stages of pregnancy, at least) and to allow for 'rights to terminate' proportionate to the presumptions raised in chapter 5. This must also require that the new approach is allowed to be reinterpreted as technology develops.

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