JLS JOURNAL OF LIBERTARIAN STUDIES
VOLUME 21, NO. 3 (FALL 2007): 43–63

AN ALLEGED CONTRADICTION IN NOZICK'S ENTITLEMENT THEORY

ANNA-KARIN M. ANDERSSON

SUSAN MOLLER OKIN, IN her 1989 book *Justice, Gender, and the Family*, puts forth an objection to Nozick's entitlement theory. In short, Nozick's entitlement theory states that unowned material resources can be legitimately acquired by labor in a certain sense. Okin argues that an advocate of Nozick's entitlement theory must, on pain of contradiction, accept that a mother owns her offspring by virtue of being the creator, at least until the offspring has developed certain properties and capabilities.

Okin's argument in support of the claim that one is caught in a contradiction if one accepts Nozick's entitlement theory and also cherishes the claim that mothers do not own their offspring by virtue of being their creators is presented in section 1. It will be shown here that her position, in its present formulation, does not establish that the entitlement theory is contradictory, though it has morally repugnant implications. And in addition, that it is possible to formulate a slightly different version of her position that is actually stronger in two respects.

Section 2 is a discussion of two possible responses to the new stronger version of Okin's argument and it also establishes that even though the slightly revised, stronger version of her argument undermines Nozick's entitlement theory, there is a plausible version of the entitlement theory, which remains unaffected by her criticism.

ANNA-KARIN M. ANDERSSON received a Ph.D. in philosophy from the University of Stockholm and will be a post-doctoral fellow at Harvard University in 2008. The author gratefully acknowledges helpful comments from members of the philosophy seminar in the department of philosophy at Stockholm University, members of the M.A.T.T.I group at the department of linguistics and philosophy at Massachusetts Institute of Technology, members of the ethics seminar at Linköping University, and an anonymous referee of the *Journal of Libertarian Studies*.

The purpose of this paper is to add a new and unique dimension to Okin's position: that the acceptance of the moral importance of potentiality allows for the avoidance of Okin's charge of moral repugnance and that the solution brings some unexpected implications regarding parents' rights. These unexpected implications are that taking over the parents' role as the child's caretaker may be permissible in cases where forced change of custody traditionally has been considered impermissible, and that parents' entitlement to embryos used for stem cell research is weak, unless certain contracts have been established.

1. OKIN'S ARGUMENT

An Alleged Contradiction and a Morally Repugnant Implication of Nozick's Entitlement Theory

Okin argues that Nozick's entitlement theory is contradictory and brings about morally repugnant implications. First, let us see why she considers Nozick's entitlement theory contradictory. She claims that the central principle of the entitlement theory, the principle of justice in original acquisition, rests on the assumption that at least all moral subjects own themselves. Since they own themselves, they also own their talent and labor. Since they own their talent and labor, they also own what they produce by means of their talent and labor. But since all humans are, in a sense, the result of their mothers' labor, they are their mothers' property, at least until they have developed into actual moral subjects.

> The assumption that each person owns himself, however, can work only so long as one neglects two facts. First, persons are not only producers but also the *products* of human labor and human capacities. Anyone who subscribes to Nozick's principle of acquisition must explain how and why it is that persons come to own themselves, rather than being owned, as other things are, by whoever made them. Second, the natural ability to produce people is extremely unequally distributed among human beings. Only women have the natural ability to make people, and all human beings are necessarily, at birth (at least at the present stage of technological development) the products of specifically female capacities and female labor. When this one simple fact of human life is taken seriously, I will argue, it renders Nozick's entire theory contradictory to the point of absurdity at its pivotal point—the principle of just acquisition. (Okin 1989, pp. 79–80)

Even though Okin talks about "persons" being owned by their mothers, there is textual support in favor of the interpretation that she means that an advocate of the entitlement theory must accept that

mothers own their offspring only until they have developed into actual moral subjects (Okin 1989, pp. 84–85).

Hence, according to Okin, the entitlement theory implies that humans who are not yet moral subjects do not own themselves, their talent, labor, or the resources resulting from their labor. Where, then, is the alleged contradiction of the entitlement theory to be found?

In order for Okin to detect inconsistency in the aspects of the entitlement theory regulating self-ownership, the entitlement theory must be understood as saying that all humans own themselves from conception onward, or at least from birth onward. If the entitlement theory constituted such a claim, and also said that procreation and support of one's offspring is labor entitling the mother to the product of her labor, that is, her offspring, the theory would be contradictory. But Nozick's entitlement theory does not seem committed to the claim that humans own themselves before they have developed into actual moral subjects. Rather, it seems to imply that only humans possessing certain properties such as capacity to "[shape one's] life in accordance with some overall plan" have rights to self-ownership (Nozick 1974, p. 50).

True, Nozick does not claim that he accepts a principle of initial acquisition such that the ownership of children is possible. Neither does he claim that children are excluded from the group of individuals who are rights-bearers. There are also quotations that show that he includes children in this group; he writes that parents are not morally permitted to harm their children, since "once a person exists" he or she has claims that others abstain from treating him or her in certain ways: "An existing person has claims" (Nozick 1974, p. 38).[1] But he has not provided any *justification* for including them. Young children do clearly not possess the properties that he believes distinguish rights-bearers from individuals who are not rights-bearers. Claiming that children are rights-bearers, without showing how this claim *follows* from his discussion on what properties distinguish rights-bearers seems *ad hoc*.

It seems reasonable to understand the entitlement theory as also saying that only individuals possessing such a capacity are capable of producing resources in the morally relevant sense. Hence, even if all humans are owned by their mothers from conception or birth onward, those who are allowed to develop self-ownership are owners

[1]I am grateful to an anonymous reviewer of the *Journal of Libertarian Studies* for pointing this out to me.

of themselves, their talent, labor, and fruits of their labor. Okin's argument, therefore, has not established any inconsistency in any part of the entitlement theory, even though she may be right in saying that the implication that mothers own their offspring until they have developed into actual moral subjects is morally repugnant.

An Even More Convincing Version of Okin's Argument

Okin's argument can be made even stronger since it is possible to establish that not only the mother, but both parents, are producers of their offspring. It also seems possible to show that both parents own their offspring through the offspring's entire life.

Conception is, according to Okin, not labor which contributes to the production of a person. Once conception is complete, she argues, the mother's labor, that of her carrying the organism to full term, contributes to the production of a person, since she is the sole producer of the infant who then later develops into a person. Okin reasons that the mother is the sole producer of the infant.

> Once she is freely given a sperm (as usually happens) or buys one (as is becoming no longer very unusual)—in either case amounting to legitimacy in transfer—a fertile woman can make a baby with no other resources than her body and its nourishment. (Okin 1989, p. 83)

This is unconvincing, since it is highly dubious whether conception is most plausibly described as the woman being "given a sperm" by her sexual partner. Rather, it seems uncontroversial to describe sexual intercourse as two individuals mutually bringing an ovum and a sperm together. If the latter description is correct, and if we accept, for the sake of argument, that the offspring is "produced" in some sense, it seems that both parents are producers of their offspring (Hubin 2001, p. 8). Okin briefly mentions the possibility that both parents are producers, but does not attempt to respond to it (Okin 1989, p. 80).

Also, even though pregnancy is a female condition, it hardly qualifies as labor, since it requires no action on the part of the mother. It might be suggested that nourishment, which is necessary in order for the prenatal organism to survive, is the result of labor on the part of the mother.

It is, of course, possible to nourish the mother, and thereby the prenatal organism, by means other than maternal activity, for example, through a drip. But, assuming that nourishment is a result of action on the part of the mother, does she then, by partaking of nourishment, contribute to the production of a person? She may, but since nourishment is only part of the production, the production as a whole is not an exclusively female activity. Also, the nourishing of

the mother may be a result of the father's labor, and in that case, he may qualify as a producer of the infant after conception as well (Hubin 2001, p. 9).

Okin argues that even if we accept that pregnancy requires no or very small effort on the part of the mother, she may still be entitled to her offspring, since the development of it takes place within her body, which is her property (Okin 1989, p. 83). Even if this is granted, however, pregnancy is only part of the production of the offspring.

Is the mother the sole producer of the infant if she has purchased sperm, paid for the fertilization, and nourished her offspring during pregnancy and infancy without support from others? I believe it reasonable to give an affirmative answer to this question. Also, since the donor is not involved in the fertilization, he carries no moral responsibility for neglect of or harmful interventions by others against his offspring.

There may be a defense available to Okin against the claim that others laboring on the offspring before and after birth makes them part owners of it. She does not, however, take advantage of this possible defense. She could respond that even in the case where others chose to contribute to the development of her offspring, they are no more entitled to the offspring than friends who have helped to paint your house are entitled to your house. This is a strong argument, but it does not disqualify the biological father as being part owner of his offspring.

If the parents have agreed that some other agent's contribution to the development of their offspring renders the latter part owner of it, he or she is, of course, entitled to it. In such a case, however, it is not the labor as such, but rather the content of the contract whatever it may be, which entitles him or her to the offspring. A surrogate mother, for example, is not automatically entitled to the organism she carries, should she want to keep it.

Thus, it is possible to formulate a stronger version of Okin's argument, claiming that *both* parents are (in most cases) the producers of, and thereby entitled to, their offspring. One may also argue that the ownership lasts not only until their offspring has developed into an actual moral subject, but also through its *entire* life (Okin 1989, p. 86). Since the parents own their offspring from conception, they may also own the offspring once he or she has developed certain properties, in the same way as an employer owns the fruits of an employee's labor. If the latter claim is correct, the stronger version of Okin's argument may, after all, be able to accuse Nozick, but not the entitlement theory, of inconsistency: if all humans are owned by

their parents through their entire life, no humans own themselves or the fruits of their labor. *Nozick* would contradict himself if he claimed (as he does) that there exist persons who own themselves, and also claimed that all persons are owned by their mothers. But *the entitlement theory* as such does not claim that there *actually* exist individuals who own themselves. The implication that no humans actually own themselves is morally repugnant, however.

2. TWO POSSIBLE RESPONSES TO THE STRONGER VERSION OF OKIN'S ARGUMENT

There are two counterarguments available against this new stronger version of Okin's argument. The first of these aims at establishing that parents are not entitled to their offspring, since procreation and supporting one's offspring do not qualify as the kinds of labor which entitle someone to a resource according to the entitlement theory.

The second counterargument attempts to show that even though procreation and supporting one's offspring do qualify as the kinds of labor which entitle someone to a resource according to the entitlement theory, the offspring has properties that characterize it as a right-bearer, hence, it cannot be disposed of by others without his or her consent.

Parents do not Produce their Offspring

Some types of behavior that obviously entitle a moral subject to a certain resource according to the entitlement theory will be discussed in order to examine whether procreation and support qualify as labor which entitles the parents to their offspring. The explanation of the behavior's entitling the moral subject to a resource is similar to one that has appeared in the literature. Finally, is procreation similar in any relevant sense to labor, which entitles the laborer to a certain resource?

Paradigmatic examples of original acquisitions, which, according to the entitlement theory, entitle a moral subject to a certain resource, are: (1) producing something out of raw material, for example, growing crops, growing cattle, performing various kinds of handcraft on not previously worked up material, (2) producing something out of some previously worked up, though unowned, material, e.g., constructing a house out of unowned boards, (3) gaining control over a resource, e.g., building a fence around a field or putting one's mark on a tree, or simply picking up a previously unowned object, such as an acorn. The moral legitimacy of such original acquisitions is, of course, dependent on whether the original acquisition is in accordance with the Lockean proviso. Since the content of the proviso is

irrelevant to the argument advanced in this section, it will not be further discussed.

I believe that A. John Simmons, through his interpretation of the Lockean principles of just acquisition, has provided, in large part, a plausible explanation of what all these various kinds of morally permitted original acquisitions have in common: they are all, in Locke's words, examples of "mixing one's labour" with some previously unowned resource. This vague formulation is made more precise in Simmons's careful discussion.

The basic Lockean idea is that moral subjects are owners of themselves, including their talents and labor. To own something is to have a right to dispose of it as one pleases. In mixing what one already owns (e.g., one's labor) with something previously unowned, one has acquired the previously unowned resource in a morally permissible way.

The Lockean principle of just acquisition, interpreted in this way, has been severely criticized by Nozick among others. The most common criticism is: (1) the claim that one can literally mix one's labor with something rests on a category mistake; it does not make sense, since labor cannot be mixed with objects,[2] and, (2) if it makes sense to claim that one can mix one's labor with something, it also makes sense to claim that while doing so, one loses one's labor rather than acquiring the resource of one's labor.[3]

Simmons, in his 1998 article "Maker's Rights," claims that "any moderately sympathetic reading of Locke's labour-mixing argument should show us how Locke can easily address these difficulties" (Simmons 1998, p. 210). Regarding the first criticism above, Simmons suggests that the claim that one can mix one's labor with a resource, thereby becoming entitled to it, need not necessarily be understood literally, and therefore does make sense. In setting a purpose for oneself regarding how to "make productive use of the object," one performs "mental labor." The plan "is 'mixed' with the object through the purposive activity that constitutes [one's] physical labor."

> There is, then, a perfectly natural (and not unintelligible) sense that can be given to Locke's claim that on laboring on nature I mix my

[2]See Nozick (1974, pp. 174–75), Simmons (1992, pp. 267; 1998, p. 209), and Waldron 1983 (pp. 40–41).

[3]See Becker (1976, pp. 658–59; 1977, pp. 40–41), Fressola (1981, p. 315); Miller (1980, p. 6), Nozick (1974, pp. 174–75), Sartorius (1984, p. 204), Simmons (1992, p. 267), Waldron (1983, p. 42).

> property in myself with nature: I bring (part of) nature within my legitimate sphere of self-government by physically imposing my plan for its useful employment upon it. My plan, which is the product of my mental labor, is "mixed" with the object through the purposive activity that constitutes my physical labor. There is nothing incoherent about such account. Indeed, it seems to me broadly correct. (Simmons 1998, p. 210)

Even though Simmons seems to provide a plausible interpretation of *Locke's* idea, his characterization of behavior entitling someone to a resource, though a convincing explanation of what properties *some* original acquisitions have in common, is too restricted. In order to cover *all* behavior, that entitles someone to a resource according to the entitlement theory, the characterization cannot require that the plan in question is a plan for "*useful* employment" in any strict sense. Rather, it suffices to characterize behavior entitling someone to a resource as simply imposing one's plan on it. Hence, while accepting Simmons's idea that "mixing one's labour" with a resource is most plausibly understood as "imposing one's plan" on a resource, the requirement that the plan must be a plan of "useful employment" of a resource is rejected.

Does conception fall under the description of "imposing one's plan on a resource?" It certainly seems to; all that is required for conception to fall under such a description is the parents' deliberate involvement in it.

What if conception is not deliberate, being the result of rape, faulty contraceptives, or carelessness? In case of rape, the victim may be entitled to all resources "thrown" at her by the rapist, as one becomes the owner of seed thrown at one's property. Pregnancy due to faulty contraceptives or carelessness is not the result of imposing one's plan on a resource, and does not qualify as production in the morally relevant sense. Such behavior is morally on par with disposing of a can of tomato juice into the sea.

It might be objected that while engaging in conception, one does not labor on a resource in accordance with one's plans; rather, one initiates a process, which results in the offspring. John Locke, in his 1690 *Two Treatises of Government*, argues that parents do not produce their children in a sense that entitles them to their children, since, in order to do so, one must understand and control all parts of the process leading to the product (Locke 1960, chap. 1, sect. 53).

Excluding procreation from the category of behaviors entitling one to a resource would, however, result in exclusion of growing, for example, of crops and cattle from that category of behaviors as well (Nozick 1974, p. 288). It seems more reasonable to accept that such

initiations of processes are examples of mixing one's labor with a resource in the sense described above, rather than to exclude such behavior.

In summary, procreation seems similar in all morally relevant senses to behaviors that, according to the entitlement theory, entitle the agent to the resource. As will be clear in the following section, however, there are strong arguments in favor of the claim that the labor of procreation, pregnancy, and child-rearing does not entitle parents to their offspring.

Parents Produce their Offspring, but are not Entitled to Him or Her

Even if we accept that parents produce their offspring in the sense described above, there are strong arguments in favor of the claim that parents are not entitled to their offspring. Nozick mentions, but does not defend, the suggestion that "children, because of something about *their* nature, cannot be owned by their parents even if these make them" (Nozick 1974, pp. 288–89). Simmons has formulated a similar view:

> Some kinds of labor-mixing *cannot* create property in the object of labor, because that which is labored on is *itself* a being born to natural freedom/self-government and so is already owned (i.e., by itself [and/or by God]). Examples are cases in which I labor to save the life of an accident victim, the slaver labors to capture his victims, or parents labor to conceive, deliver, and raise their children. (Simmons 1998, p. 211)

Okin addresses this possible objection to her argument by claiming that prenatal organisms and infants do not possess properties which motivate their having moral rights. She seems willing to accept that *if* an organism possessed some property motivating his or her having moral rights, he or she could not be owned by another against his or her will (Okin 1989, pp. 84–85). It will be argued that even though, admittedly, prenatal organisms and infants are not actual moral subjects, they are potential moral subjects, and their potentiality entitles them to self-ownership.

Rights-ethicists have denied this claim. Michael Tooley, for example, has pointed out in *Abortion and Infanticide* (1983) that objections to abortion by saying that abortion is wrong because it destroys a potential person must rely on a precise and nonarbitrary characterization of the concept "potentiality" in order to possibly understand and evaluate. In addition, the characterization must apply to "normal human foetuses." Tooley uses the term "foetus" as including all prenatal organisms. Tooley claims that since any of several possible characterizations of potentiality necessarily are either arbitrary or

vague, or do not apply to normal human fetuses, this "raises doubts" regarding the moral importance of potentiality.

Tooley discusses three characterizations of potentiality for personhood: active potentiality, latent potentiality, and passive potentiality. He argues that the concepts "active potentiality" and "latent potentiality" do not apply to the prenatal organism, and that the concept "passive potentiality," though applying to the prenatal organism, is either arbitrary or vague.

Tooley characterizes "active potentiality" in the following way:

> An entity may be said to have an active potentiality for acquiring some property P if there are within it all the positive causal factors needed to bring it about that it will acquire property P, and there are no other factors present within it that will block the action of the positive ones. (Tooley 1983, p. 167)

Several difficulties are involved in attempts to formulate a sharp distinction between obstacles "within" and obstacles outside of the prenatal organism. One of them is determining whether only defects within the prenatal organism as such ought to be considered as internal obstacles, while defects in the umbilical cord, the placenta, or the circulation of the blood of the mother ought to be considered as external obstacles. It is reasonable to consider such defects as obstacles within the prenatal organism, since the umbilical cord and the placenta have the same genetic code as the prenatal organism. Since the circulation of the blood is part of the umbilical cord and the placenta, defects in it are defects within the prenatal organism as well.

Someone might object that cases of twinning, where two organisms share placenta, constitute counterexamples to the claim that the placenta is part of the organism, since it cannot be decided which part of the placenta belongs to which twin. But such cases do not undermine my conclusion; Siamese twins sometimes share certain organs, but there is no doubt regarding whether their shared organs are parts of them; the organs belong to both.

It seems, however, as if I have only moved the difficulties to another level. How ought the distinction be formulated between internal and external factors causing defects of the mother's blood, the umbilical cord, and the placenta? If the defects of the blood, the umbilical cord, and the placenta are caused by, for example, drugs, alcohol, or violence, I am inclined to classify such obstacles as internal obstacles of the prenatal organism, caused by external factors. My reason for doing so is the fact that the damage resulting from such factors is not the result of a normal development of the mother or of the prenatal organism. However, once the prenatal organism is harmed by such external factors, internal obstacles have occurred.

Tooley characterizes "latent potentiality" in the following way: "It has a latent potentiality if all of the positive factors are present within it, but there is some feature of it that will block the action of those factors" (Tooley 1983, p. 167).

Tooley characterizes "passive potentiality" in the following way: "Finally, it has a passive potentiality for acquiring property P if other things could act upon it in such a way as to bring it about that it acquires property P" (Tooley 1983, p. 167).

Having made these distinctions, Tooley suggests that the claim that a prenatal organism has active, latent, or passive potentiality is problematic. The prenatal organism cannot, according to Tooley, be considered as possessing active potentiality or even latent potentiality, since nourishing during pregnancy and childhood is necessary in order for it to develop into an actual person.

Tooley discusses the difficulties involved in characterizing potentiality in terms of the concept "passive potentiality," which he considers to be the remaining option once the applicability of the concepts "active potentiality" and "latent potentiality" has been rejected:

> Passive potentialities include cases ranging from, at the one end, "almost active" potentialities, where almost all of the positive factors are present in the entity, and very little has to be added, through to cases, at the other end, of almost totally passive potentialities, where nearly all of the relevant factors have to be added, and where there is little more than bare receptivity to change imposed from without. To characterize potential persons as entities that have a passive potentiality for becoming persons would have the consequence that random collections of matter that could, with sufficient knowledge and technological advances, be transformed into human organisms, would have to be classified as potential persons. (Tooley 1983, pp. 167–68)

Tooley concludes that an attempt to characterize potentiality in terms of the concept "passive potentiality" leaves us with two unattractive options: either we must arbitrarily "pick out a certain range of passive potentialities, toward the active potentiality end of the spectrum, and define the concept of a potential person in terms of that" (Tooley 1983, p. 168), or stay content with "a vague characterization of the range" (Tooley 1983, p. 168). Tooley leaves us with the following challenge: if a characterization of potentiality for being a person necessarily is either precise but arbitrary, or vague, "doesn't this raise doubts with regard to the contention that these notions are morally important?" (Tooley 1983, p. 168).

Agency, according to Tooley, is "sufficient to make something a person," however, "the claim that this property is necessary does not seem very plausible" (Tooley 1983, p. 142). Hence, his distinctions within the concept "potential person" seem to apply to potentiality for autonomous agency as well. I will assume, but not defend, that potentiality for autonomous agency is the morally relevant property. (Readers inclined to consider potentiality for other properties morally relevant should be able to proceed along with me, replacing "autonomous agency" with their preferred property.) Hence, the criticism above hits the concept "potentiality for autonomy" and the concept "potentiality for personhood" with equal force.

I agree that a precise and nonarbitrary characterization of potentiality is necessary in order for arguments relying on an idea of the moral value of potentiality to be comprehensible. I will, however, argue that Tooley is mistaken in claiming that a characterization of potentiality in terms of the concept "passive potentiality" is either arbitrary or vague. The arbitrariness, as well as the vagueness, can be avoided by formulating the *morally relevant* characterization of potentiality according to a normative theory. After defining what properties the normative theory of our choice considers as potentiality in the morally relevant sense, we can conclude that potentiality in the morally relevant sense occurs at the stage of development of the organism where the property in question occurs for the first time.

This procedure results in a precise characterization of potentiality, and, since it is motivated by a certain normative theory, it is no more arbitrary than is the choice of the normative theory itself.

The basic "normative" position of this paper provides part of such a morally relevant characterization. According to this normative outlook, certain properties of an entity give it rights (rights-ethicists differ regarding these). The existence of rights presupposes bearers of rights. What entities qualify as bearers of rights? Nozick's argument seems to suggest that a necessary, though not sufficient, criterion for being such a rights-bearer is being an organism (Nozick 1974, pp. 38–39). Potentiality for autonomous agency of an organism occurs at conception. Therefore, potentiality in the morally relevant sense occurs at conception.

Objections have been raised to the claim that a conceptus *is* an organism from conception rather than an entity that can *give rise* to an organism at a later stage of development. Also, it has been argued that potentiality in the morally relevant sense occurs before conception. I will, examining the objections above, argue that potentiality in the morally relevant sense occurs at conception.

It has been objected to by Eric Olson that before the conceptus has attained a certain level of maturity, it is not an organism, but rather material that can give rise to an organism (Olson 1997, pp. 89–93). His reason for this is that the organism "comes into being . . . when the cells that develop into the fetus (as opposed to the placenta) become specialized and begin to grow and function in a coordinated manner" (Olson 1997, p. 91). I believe it is reasonable to claim that the umbilical cord and the placenta are parts of the same organism since they carry the same genetic code.

Other objections have come from the extensive discussion surrounding the criteria for personal identity. These objections deny that the organism can ever possess properties characterizing a person, since the organism and the person are numerically different. These objections rely on metaphysical assumptions that are controversial. I will, in the remainder of the discussion, assume that an organism can possess properties for personhood, or can have potentiality for doing so.

Having argued that potentiality in the morally relevant sense occurs at, but no later than, conception, I will now argue that potentiality in the morally relevant sense does not occur before conception. The following questions have already been discussed thoroughly: couldn't *both* an unfertilized ovum and a sperm be considered as right bearers? Couldn't *either* the unfertilized ovum *or* the sperm be considered as a rights-bearer? Couldn't the *collection* of the unfertilized ovum and the sperm be considered as a rights-bearer?

Jim Stone argues in his 1987 article "Why Potentiality Matters" that an unfertilized ovum and a sperm cannot both be potential adult human animals, since "The sperm and egg cannot *each* be identical to the adult human being they produce, for then, by transitivity of identity, they are identical to each other, which is manifestly false" (Stone 1987, p. 816). I believe this is correct. Stone then examines the plausibility that either the sperm or the ovum is identical to the future adult human animal. Stone correctly notes that this claim faces severe problems, since

> *if* the sperm is identical to the zygote it in fact produces (as it must be if it is identical to the adult the zygote produces), then (by parity of reasoning) the sperm would have been identical to this other zygote too. It follows (again by the indiscernibility of identicals) that the zygote the sperm actually produces is the zygote the sperm would have produced if it had penetrated a different egg. Plainly this is false. It follows that the sperm is not identical to the zygote it produces, but then it is not identical to the adult human animal either. The same reasoning applies to the egg. (Stone 1987, p. 816)

Stone then examines the claim that the collection of unfertilized ovum and sperm is a potential human adult animal, and claims that it leads to far-fetched consequences:

> it follows that this animal would have existed if the egg and sperm had found different partners. Given two sperms and two eggs we have four animals, only two of which can survive their initial stages. We are committed to the absurdity that the planet sustains billions of additional animals, each existing in a divided form from beginning to end, its cells having nothing to do with one another ever, and each cell part of countless other animals of the same kind. Plainly the human animal does not exist before conception: my body was once a fetus but never a sperm or an egg. Both the sperm and the egg can produce something which has potential of becoming an adult human being, but neither the sperm nor the egg has that potential itself. (Stone 1987, p. 817)

The following objection could be raised against the claims put forth in the quotation above. One might argue that a collection of an ovum and of a sperm do have rights if isolated and intended for fertilization. The possibility of their finding different partners is then eliminated. This suggestion avoids the problem of multiplied individuals. If such an isolated collection can be considered as a potential agent, it might have rights to the same extent as does the zygote. However, until fertilization is complete, the collection only consists of genetic material that might be used to produce a potential agent. I conclude that there does not exist an entity that qualifies as a rights-bearer before conception.

Even if we accept that potentiality in the morally relevant sense occurs at conception, the existence of an organism is merely a necessary, not a sufficient, criterion for potentiality in the morally relevant sense. In addition, potentiality depends on the condition of the prenatal organism. In order for the prenatal organism to be considered as a potential agent, it must have the capacity for following a path of normal development.

How can we understand the concept "normal development"? I will try to provide some clarity by discussing a point put forth by Jim Stone in his 1987 article "Why Potentiality Matters." He characterizes "normal development" in the following way:

> Talk of normal development for an entity belonging to a biological kind presupposes the existence of a developmental path determined primarily by the biological natures of members of the kind to which the entity belongs, a path which leads to their adult stage. Further, talk of normal development presupposes that the particular entity in question has the nature sufficient to be the primary

> determinant of its following a path which leads to the adult stage of members of its kind. (Stone 1987, p. 819)

A sperm, an ovum, or a hair-cell (unless cloned) does not possess "strong" potentiality, and cannot develop normally in the sense described above, since they do not have "the nature sufficient to be the primary determinant" of its developing into an actual autonomous agent. None of them are "an instance of a human genetic code" that can be the primary determinant of the entity's developing into an agent. The collection of an ovum and of a sperm consists merely of the raw material for such instantiation.

The meaning of the term "primary determinant" is not obvious. A prenatal organism carries a certain genetic code which is a necessary, but not sufficient, factor for the organism's developing actual autonomy. What gives the genetic code the status of "primary "determinant" of the entity's developing autonomy? Nourishment and proper environment are necessary factors as well. It seems reasonable to interpret Stone as saying that the "primary determinant" is a distinguishing factor: nourishment and proper environment are necessary in order for any biological entity to develop while the genetic code determines at least some distinguishing features of the entity.

John Andrew Fisher argues in his 1994 article "Why Potentiality Does Not Matter—A Reply to Stone" that the paths of development of an organism are indeterminate, not necessarily leading to a "unique and common result" such as possession of autonomous agency. Stone replies in his 1994 article "Why Potentiality Still Matters" that even though it is "causally possible" for the organism to "follow a range of developmental paths," "one and only one goal-state is determined by the complete expression of the embryo's genetic code" (Stone 1994, p. 285). Hence, if the prenatal organism is genetically "preprogrammed" to develop autonomous agency, and it does develop autonomy because it is preprogrammed to do so, it develops normally.

Dean Stretton argues in his 2003 article "The Deprivation Argument Against Abortion" that a computer with a "certain internal instruction set" built into it, and provided with "certain external materials," will, if no intervention occurs, be self-aware and classified as a mechanical nature possessing rights. If this is correct, being an organism would not be necessary in order to be a rights bearer. In order to be a rights-bearer, it would merely be necessary to be an entity that is a carrier of a primary determinant for developing autonomy. I see no reason to dispute this admittedly counterintuitive implication, but will limit my discussion to organisms from here on.

Identical twins might pose a challenge to the claim that potentiality in the morally relevant sense exists from conception onward because there then exists an entity carrying a genetic code that is the primary determinant of the entity's developing autonomous agency. In a case where the conceptus develops into identical twins, is it not reasonable then to claim that potentiality in the morally relevant sense, of each twin, does not exist until the ovum is split? Before the split of the ovum, nothing of the identical twins exists. Hence, the objection continues, it is morally permissible to abort the prenatal organism before the split. It seems as if the conceptus merely provides the genetic material to two or more individuals, as do the ovum and sperm before conception. Does it then not follow that the rights of the conceptus are nonexistent if it will then split into identical twins? The answer to this question depends on whether the unprovoked split is predeterminate in the genetic code of the conceptus or not. If it is not, the conceptus has rights until the split is initiated. When the split is complete, the original organism is dead, and replaced with two new organisms. If the unprovoked split is predeterminate in the genetic code of the conceptus, it merely consists of genetic material to the future twins, and holds the same moral status as sperm or an unfertilized ovum. A provoked split is always equivalent to killing the organism, hence a violation of its rights.

I have argued that the prenatal organism's being an entity with a capacity for normal development toward autonomous agency is a necessary criterion for a prenatal organism's being a rights-bearer. Is this criterion sufficient? I have shown that nourishment and lack of harmful intervention are necessary in order for the prenatal organism to develop actual autonomous agency. Nonintervention and nourishment ought not to be considered as being necessarily present in order for the prenatal organism to *be* a potential agent in the morally relevant sense. Provided that it *would* develop autonomy, were it not intervened with and were it provided nourishment, it *is* a potential agent in the morally relevant sense. The prenatal organism nevertheless has negative *rights* to self-ownership in virtue of being a carrier of morally relevant properties.

I will now posit that sleepers, or in other ways temporarily unconscious adults, have rights by virtue of their potentiality, and that, since prenatal organisms are similar to such adults in all relevant respects, prenatal organisms too have rights by virtue of their potentiality.[4] Tooley denies that prenatal organisms, as well as sleeping or

[4]Robert Howell has suggested that prenatal organisms, sleepers, and in other ways temporarily unconscious adults, are similar regarding their possession

temporarily unconscious adults, possess a property that justifies their having rights to an equal extent. He has argued that adult humans who are "temporarily unconscious," in an "emotionally unbalanced state," or have "been conditioned not to want the thing [e.g., survival] in question" (Tooley 1973, p. 419) are exceptions to the principle that only individuals actually possessing the morally relevant properties ought not to be killed. He argues that the rationale for this exception is the fact that the temporarily unconscious person

> had a desire to go on living during the interval immediately prior to that in which he is unconscious that makes it a violation of his rights to kill him while he is unconscious. It is this feature that constitutes the central difference between a temporarily unconscious adult on the one hand, and a fetus or newborn baby on the other. (Tooley 1973, p. 421)

Tooley qualifies this claim further by adding that it is also morally impermissible to violate certain future preferences of an individual who has, in the past, been an actual person. One may not expose such an individual to certain behaviors that he or she, in the future, will wish not to have been exposed to. It is also, according to Tooley, morally impermissible to harm a potential agent in a way that causes him or her harm in the future, *if he or she survives and develops personality*. Killing a potential agent is, however, permissible at all times. He does not provide any argument for the claim that the property of having had certain capacities is more valuable than the property of having potentiality for the same capacity. Hence, he has not successfully argued that the property of having had certain capacities constitutes a morally relevant difference between sleepers and in other ways temporarily unconscious adults and prenatal organisms.

Someone might argue that a morally relevant difference between sleepers and in other ways temporarily unconscious agents and prenatal organisms is that if made awake or conscious, the agent would possess the morally valuable property. This is not true of the prenatal organism. Since the sleeping agent could, in Tooley's words, be considered as possessing passive potentiality "toward the active potentiality end of the spectrum" his or her rights might be more extensive than the rights of the prenatal organism. This argument assumes that potentiality can occur to a higher or lesser degree. It also assumes that a higher degree of potentiality in an

---

of capacities. He argues that it is equally permissible or impermissible to kill a prenatal organism and a sleeping adult. See Howell (1973, pp. 407–10).

individual justifies him or her having rights to a greater extent than does an individual possessing potentiality to a lesser extent.

Potentiality in the morally relevant sense exists when the entity develops toward actual autonomy along a path predetermined by the genetic code of the entity in question, given normal circumstances. It is reasonable to claim that as the entity attains full autonomy, it acquires, gradually, actual autonomy. It does not make sense to talk about an entity's having more or less potentiality; rather, either it has potentiality, or it does not.

An argument that might support the claim that a sleeping or in other ways temporarily unconscious person has rights to a greater degree than a prenatal organism is available. One might claim that the sleeper or in other ways temporarily unconscious person possesses a greater amount of *actual* autonomy than does the prenatal organism.

Alan Gewirth has suggested there is a morally relevant difference between sleepers and prenatal organisms/infants by claiming that "A potential agent is not the same as a prospective agent, for the latter already has the proximate abilities of the generic features of action even if he is not currently acting" (Gewirth 1978, p. 141). This claim faces severe difficulties. What does this claim mean? In what sense do prospective agents *have* capacities? It cannot be that prospective agents, while sleeping or unconscious, have capacity for agency, since they could not, while sleeping or unconscious, demonstrate agency even in the absence of external obstacles. In this sense, they are similar to prenatal organisms. Gewirth must, then, mean that sleepers and in other ways temporarily unconscious individuals will become actual agents. In this, too, they are similar to prenatal organisms following a normal path of development.

One might argue that prospective agents, though not potential agents, have a dispositional capacity for agency. Such dispositional capacity could be considered as potentiality at a different level than the potentiality possessed by the potential agent; the potential agent has potentiality for acquiring dispositional capacities, while the prospective agent has potentiality for actualizing his or her dispositional capacities.[5]

This difference, however, does not constitute a morally relevant difference between potential and prospective agents, since they are both carriers of the morally relevant property. The fact that they possess the property at different levels lacks moral importance.

---

[5]I thank Bo Petersson for this suggestion.

There may be an objection to my argument claiming that the distinction between levels of potentiality lacks moral importance begs the question at issue. I admit that no satisfactory explanation has been provided for the distinction's lack of moral importance, but neither have the supporters provided an adequate explanation that the distinction *is* morally relevant. Since the burden of proof cannot be assumed to fall on either camp, my argument is no more question-begging than is the argument in support of the claim that the distinction is morally relevant.

Provided Simmons's claim is correct, and provided that potential autonomous agents are "born to natural freedom/self-government," potential autonomous agents cannot be owned by their parents or anyone else except themselves, due to their being carriers of certain properties.

We have seen that Nozick's claim that children cannot be owned by their parents cannot be justified by referring to the properties he believes distinguish rights-bearers. It seems, then, that he needs to justify children's right to self-ownership by saying that even though there is something intrinsic about children that prevents parents from owning them, this is a property different from the property claiming that an adult cannot be owned by another against his or her will. *If* he were, instead, to say that children are their parents' property, he could claim that parents' entitlement to their child lasts only until the offspring has developed the properties that characterize rights-bearers.

This claim can be supported in either of two ways. First, one could argue that the offspring has developed the morally relevant properties, at least partly, through his or her own labor, thereby becoming owner of him- or herself. If this is accepted, however, we are forced to admit that an employer does not own what his or her employee produces. The argument also rests on a highly dubious premise: the premise that the physical and mental development of children is the result of their laboring on themselves is too controversial to bear any moral weight.

A more plausible response is possible. The offspring possesses the morally relevant properties, regardless of whether they result from the offspring's own labor or not, that awards him or her self-ownership. As argued, these morally relevant properties occur at conception.

Would it be contradictory to claim that potential autonomous agents, and actual autonomous agents, own themselves by virtue of being carriers of morally relevant properties, and to also claim that at least actual autonomous agents may sell themselves into slavery,

thereby transferring part or all of their rights of self-ownership to another? The claims do not contradict one another. As noted above, "owning oneself" is most plausibly interpreted as "having the right that others do not dispose oneself in certain ways *without one's consent*." The seller voluntarily permits another to dispose over him or her. He or she remains a rights-bearer through the whole process. Since all interventions with the agent are consensual, neither are his or her rights violated, nor has he or she lost his or her rights to self-ownership, even though he or she has accepted terms that would qualify as a rights-violation if not consented to (Hubin 2001, p. 7).

The argument defended in this paper has controversial implications regarding parents' presumed rights "not to have the job of parenting stolen or usurped by others" (Simmons 1992, p. 178). Since parents do not own their children, other agents are morally permitted to confiscate other's offspring, provided they offer the child at least the same opportunities to develop autonomous agency as would the biological parents. If kidnappers provide greater opportunities than the biological parents, the parents may even violate their offspring's rights by intervening. These conclusions are, in principle, correct. But since most, or all, kidnappings, even of infants, would cause the child, once reaching a certain age, severe mental anguish, such behavior is morally impermissible in most, if not all, cases.

The argument also states that, if parents inflict harm on their offspring once he or she is a potential moral subject, thereby causing him or her to lose all properties leading to having rights, they have violated their offspring's rights. But once the violation is complete, they are the owners of their offspring. An example would be producing embryos and destroying them in order to grow stem cells. Such treatment of the embryos consists as a rights-violation, but once the destruction is complete, the violator is entitled to the resulting cells, unless he or she is committed to an agreement with the parents, which entitles the latter to the cells.

REFERENCES

Becker, Lawrence. 1976. "The Labor Theory of Property Acquisition." *Journal of Philosophy* 73 (18): 653–64.

——. 1977. *Property Rights*. London: Routledge and Kegan Paul.

Fisher, John A. 1994. "Why Potentiality Does Not Matter: A Reply to Stone." *Canadian Journal of Philosophy* 24 (2): 261–79.

Fressola, Anthony. 1981. "Liberty and Property: Reflections on the Right of Appropriation in the State of Nature." *American Philosophical Quarterly* 18: 315–22.

Gewirth, Alan. 1978. *Reason and Morality*. Chicago: University of Chicago Press.

Howell, Robert. 1973. "Correspondence." *Philosophy and Public Affairs* 2 (4).

Hubin, Donald. 2001. Online at: people.cohums.ohiostate.edu/hubin1/ classes /830SP2001/830SP2001in dex.html.

Locke, John. 1967. *Two Treatises of Government*. Ed. Peter Laslett. 2nd. Cambridge: Cambridge University Press.

Miller, David. 1980. "Justice and Property." *Ratio* 22: 1–14.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Blackwell.

Okin, Susan Moller. 1989. *Justice, Gender, and the Family*. New York: Basic Books.

Sartorius, Rolf. 1984. "Persons and Property." In Utility and Rights. Ed. R. Frey. Minneapolis: University of Minnesota Press.

Simmons, A. John. 1998. "Maker's Rights." *Journal of Ethics* 2.

——. 1992. *The Lockean Theory of Rights*. Princeton, N.J.: Princeton University Press.

Stone, Jim. 1994. "Why Potentiality Still Matters." *Canadian Journal of Philosophy* 24 (2): 281–93.

——. 1987. "Why Potentiality Matters." *Canadian Journal of Philosophy* 17 (4): 815–30.

Stretton, Dean. 2003. "The Deprivation Argument Against Abortion." Online at: www.pcug.org.au/~dean/dep-arg.html.

Tooley, Michael. 1983. *Abortion and Infanticide*. New York: Oxford University Press.

——. 1973. "Correspondence." *Philosophy and Public Affairs* 2 (4).

Waldron, Jeremy. 1983. "Two Worries about Mixing one's Labor." *Philosophical Quarterly* 33: 37–44.