

Chapter 3

Gewirth's Theory of Agency Rights

Moral philosophy is essential to conceptualising decisional competence in two ways. First, the substance of the particular moral theory to which one is committed determines how one chooses to understand the value of a judgment of decisional competence or incompetence. Second, to echo Jeffrie Murphy's observation in the introduction to this book, how one chooses to err in cases of doubtful competence – in favour of preserving decisional competence for as long as possible, or making a judgment of decisional incompetence at the earliest opportunity – is guided by the importance one's chosen moral theory attaches to maximising or minimising prospects for self-determination.

This chapter explains the structure of the Alan Gewirth's argument to the Principle of Generic Consistency (PGC) and the foundation of his theory of agency rights. I also consider the significance of consent and assistance in decision-making under the PGC, in order to explore the implications endorsing the PGC has for our understanding of competence and consent. This will facilitate my objective to present an argument from the PGC in relation to judgments of decisional competence in Chapters 4 and 5.²³⁹ I end this chapter by illustrating how the PGC provides a cogent account of morality in its own right, by briefly contrasting its epistemological foundations with John Rawls's theory of justice as fairness and David Gauthier's rational contractarianism. I have chosen Rawls and Gauthier as comparators with the PGC because, like Gewirth, they both detail the steps of their arguments carefully and seek to provide an explicit foundation for moral action. Curiously, neither Rawls nor Gauthier address the argument to the PGC in their work, whereas Gewirth discusses the work of both philosophers.²⁴⁰ However, I do not propose to

²³⁹ Beyleveld (1991) distinguishes the argument *to* the PGC and arguments *from* the PGC in the following terms. The argument to the PGC consists of the arguments propounded in *Reason and Morality (RM)* that seek to demonstrate the dialectical necessity of the PGC from the internal viewpoint of any agent. Arguments from the PGC, alternatively, "are arguments applying the PGC to the resolution of familiar moral dilemmas". Beyleveld (1991: 398, n. 10).

²⁴⁰ See *RM* (19–20, 108–109 and 340–341) for discussion of Rawls and Gewirth (1996: 11–12, n. 9) for discussion of Gauthier.

analyse or refute counter-arguments to the PGC here, as Deryck Beyleveld has already undertaken this comprehensively.²⁴¹ The primary purpose of the chapter is to serve as an introduction to Gewirth's theory and the scope of its application, with particular reference to consent and decision-making.

The Argument to the PGC

In *Reason and Morality (RM)* and subsequent works,²⁴² Gewirth argues that two fundamental qualities characterize the action of any agent.²⁴³ The ability of the agent to control her behaviour through her own volition whilst in possession of circumstantially relevant knowledge is voluntariness or freedom.²⁴⁴ The reason an agent has for acting *at all*, which manifests in the agent's objective to fulfil a particular end, is purposiveness or intentionality.²⁴⁵ The end in question could be either the action itself (e.g. dancing) or its consequences (e.g. to become more fit).²⁴⁶

Gewirth then relates this to the experience of a hypothetical moral agent. For any entity to qualify as an agent, he/she/it must be able to act for freely chosen purposes,²⁴⁷ either currently or prospectively. This meshes with the account of agency competence proposed in Chapter 1. Agents need not necessarily be *human* beings – they could just as well be androids – as human beings do not exhaust the possible class of beings who could display the generic features of action.²⁴⁸ For the purposes of this discussion, however, assume that an agent who is also human being – let us call her Elsa – is reflecting on her own action. Elsa is an individual in her own right, but she could represent *any* agent – including you or me – at anytime, anywhere, in any place. The steps of her reflection are contained in speech marks. When she performs an action, Elsa intends:

- (i) "I do X for end or purpose E."

²⁴¹ Beyleveld (1991). See also, n. 21, above.

²⁴² *RM*: 22–198. The argument to the PGC as presented in this chapter closely follows the more concise structure presented in Gewirth (1982a, 1984a).

²⁴³ Gewirth (1984a: 14).

²⁴⁴ Gewirth (1984a: 14).

²⁴⁵ Gewirth (1984a: 14).

²⁴⁶ Gewirth (1984a: 14).

²⁴⁷ *RM*: 44, Beyleveld (1991: xxxvi). By 'entity', I denote any human, animal, android or object that may conceivably possess agency. I prefer 'entity' to 'being' in order to avoid the association with 'having a life' or 'being alive', which is a contingent rather than a necessary feature of an agent's existence.

²⁴⁸ This explains why we understand Gewirth's theory more accurately as a theory of agency rights (hence the title of this chapter), rather than a theory of human rights (Beyleveld, 1991: 447, see also Gewirth's acceptance of this in 1982a: 77).

X constitutes the means required in order to attain end or purpose E. Examples of this statement could be the reading of a book (X) in order to gain knowledge (E) or diving into a lake (X) in order to rescue a drowning child (E). Given the pursuit of E is the result of a freely expressed choice, Elsa attaches an importance to E such that she is motivated to act to bring it about.²⁴⁹ Therefore, from *her* standpoint, this entails:

(ii) “E is good”

Two things are important here. First, the value that Elsa attaches to E does not necessarily need to be a moral value and will depend upon her particular choice.²⁵⁰ Elsa may equally well intend to act to pursue a morally relevant end as much as a morally irrelevant end. However, common to any end or purpose E is the idea that Elsa must value the means employed to achieve E. Therefore, for her to will the end of her action, she must also will the means.²⁵¹ Second, in order for Elsa to succeed in achieving E, she must have the “proximate necessary conditions of action”.²⁵² These proximate necessary conditions include the generic features of action broadened to include well-being.²⁵³ According to Gewirth, well-being is:

having the various substantive conditions and abilities, ranging from life and physical integrity to self-esteem and education, that are required if a person is to act either at all or with general chance of success in achieving the purposes for which he acts.²⁵⁴

Voluntariness, freedom, purposiveness, intentionality and well-being are the necessary conditions of *any* successful action, which Gewirth summarises as freedom and well-being.²⁵⁵ Therefore, Elsa must hold:

(iii) “My freedom and well-being are necessary goods.”

This means Elsa values freedom and well-being in a categorically instrumental way. Elsa may also express this as:

(iv) “I must have freedom and well-being.”

‘Must’ in this context is a “practical-prescriptive requirement”.²⁵⁶ This means that it concerns what the agent is logically required to accept in order to avoid self-contradiction.²⁵⁷

²⁴⁹ Gewirth (1984a: 14).

²⁵⁰ Gewirth (1984a: 15).

²⁵¹ This is similar to Kant, who formulates means-ends rationality in similar terms: “Whoever wills the end, so far as reason has decisive influence on his action, wills also the indispensable necessary means to it that lie in his power” (quoted in Wood, 1999: 62).

²⁵² Gewirth (1984a: 15).

²⁵³ Gewirth (1984a: 15).

²⁵⁴ Gewirth (1984a: 15).

²⁵⁵ Gewirth (1984a: 15).

²⁵⁶ Gewirth (1984a: 15).

²⁵⁷ *RM*: 193–195.

Mindful of this, Elsa acknowledges that:

(v) "I have rights to freedom and well-being."

Gewirth calls these rights 'generic rights' (GR).²⁵⁸ But this, understandably, is a controversial move. In order to prove that (v) is the logical progression from (iv), imagine that Elsa rejects (v). Given the correlative duties of other individuals to act or refrain from acting in order to protect the object of the right to which Elsa makes a claim,²⁵⁹ it follows that Elsa would also have to reject:

(vi) "All other agents ought at least to refrain from violating or eliminating my freedom and well-being."

In rejecting (vi), Elsa must hold:

(vii) "It is *not* the case that all other agents ought at least to refrain from violating or eliminating my freedom and well-being."

Elsa's commitment to (vii) entails:

(viii) "It is permissible for other agents to violate or eliminate my freedom and well-being."

So, by virtue of Elsa's commitment to (viii), Elsa must then hold:

(ix) "It is permissible that I may not have freedom and well-being."

However, it is clear that (ix) contradicts (iv), in which Elsa recognises the necessity of freedom and well-being for action.²⁶⁰ In other words, Elsa (and all other agents) must reject (ix) because she must acknowledge (iv) as a condition of her acting for any freely chosen purpose *at all*. Therefore, acceptance of (v) is a matter of logical consistency for any agent.²⁶¹

The rights claimed at this stage in the argument are prudential and not moral.²⁶² In order to elicit the transition from a prudential to a moral right claim, Gewirth appends several additional steps to the argument.

That Elsa is an agent, capable of both current and prospective purposivity, is the sufficient and necessary ground upon which she (and every other agent) affirms her rights to freedom and well-being.²⁶³ Gewirth calls this "prospective purposive agency", abbreviated by Beyleveld to 'PPA'.²⁶⁴ Elsa must therefore acknowledge:

²⁵⁸ Gewirth (1984a: 16).

²⁵⁹ Gewirth (1984a: 15). According to analytical jurist Hohfeld, human rights are primarily claim-rights. This idea is accepted by Gewirth in the context of the rights bestowed by the *PGC*. See Hohfeld (2001) and Gewirth (1978).

²⁶⁰ Gewirth (1984a: 16).

²⁶¹ Gewirth (1984a: 16).

²⁶² Gewirth (1984a: 16).

²⁶³ Gewirth (1984a: 16).

²⁶⁴ Gewirth (1984a: 16).

(x) “I have rights to freedom and well-being simply because I am an agent (PPA)”²⁶⁵

We can demonstrate the validity of (x) by the Argument for the Sufficiency of Agency (ASA).²⁶⁶ Imagine Elsa rejects (x) and instead insists that the only reason she has the generic rights of agency was due to the fact that she has blue eyes.²⁶⁷ Consequently, Elsa would have to acknowledge:

(xi) “I have rights to freedom and well-being only because I have blue eyes”

In making this claim, Elsa is compelled to accept that, were it not for her having blue eyes, she would not have the generic rights. As such, Elsa contradicts herself.²⁶⁸ This is because, if her eyes were a different colour, she would have to acknowledge:

(xii) “Because I do not have blue eyes, I do not have rights to freedom and well-being.”

The acceptance of (xii) would conflict with the need for Elsa to hold necessarily that she has rights to freedom and well-being for no other reason than because she is an agent. Accordingly, Elsa must reject the notion that her having blue eyes is the sufficient and necessary justifying criterion of her having the generic rights and commit herself to (x).²⁶⁹

At this point, we move from the realm of prudential right claims to moral right claims. Now that Elsa has accepted (x), Elsa must also accept:

(xiii) “All agents have rights to freedom and well-being.”

Gewirth derives (xiii) from (x) by a logical principle of universalization (LPU).²⁷⁰ This requires, as a matter of logical consistency, the application of the PGC to all those other beings and entities who are agents. Gewirth explains this principle in the following terms:

If some predicate *P* belongs to some subject *S* because *S* has a certain quality *Q* (where the ‘because’ is that of sufficient condition) then *P* must logically belong to all other subjects *S_j* to *S_n* that also have *Q*.²⁷¹

Elsa must therefore logically concede that all other agents have the generic rights for the same reason she has – simply because they, like her, are agents.²⁷² On that

²⁶⁵ I use this abbreviation interchangeably with ‘agent’, although agent will be used predominately in this book to minimize the use of abbreviations.

²⁶⁶ *RM*: 109–119, Beyleveld (1991: 43–45).

²⁶⁷ This could be any contingent factor.

²⁶⁸ Gewirth (1984a: 16).

²⁶⁹ Gewirth (1984a: 17).

²⁷⁰ Gewirth (1984a: 17), *RM*: 104–107. See also Beyleveld (1991: 44–45).

²⁷¹ Gewirth (1996: 18).

²⁷² Gewirth (1984a: 17).

basis, Elsa must accept that she should recognise and respect the generic rights of all other agents simply because, they, like her, are agents.²⁷³

Elsa now has a moral context for whatever action she envisaged in (i). This context is the agency rights claims of all other agents which her action may affect.²⁷⁴ In order to avoid self-contradiction, Elsa along with all other agents are compelled to accept:

(xiv) "I ought to act in accord with the generic rights of my recipients as well as of myself."

We can restate this as the moral maxim of the PGC, which is to act in accord with the generic rights of one's recipients as well as of oneself.

It helps to clarify the structure of the argument to the PGC if we separate it into three stages.²⁷⁵ The first consists of steps (i) to (iv). Here the agent must accept that she needs freedom and well-being in order to act for any freely chosen purpose. The second stage consists of steps (v) to (x). Here the agent is required to accept that she has a claim right to freedom and well-being (the generic rights), simply by virtue of being an agent. The third stage consists of steps (x) to (xiv). Here the agent must recognise out of logical consistency that every other agent, like herself, also has a claim right to freedom and well-being.

Gewirth calls this the 'Principle of Generic Consistency' because the argument unites logical consistency with the necessary conditions of any freely chosen action.²⁷⁶

Since Gewirth locates the sufficient and necessary justification of the existence the generic rights in the nature of free and purposive action, we may ascribe them to all beings or entities apparently capable of such action.²⁷⁷ Although he conceives of the PGC as the justifying ground of *human* rights,²⁷⁸ its responsibilities and protections clearly extend beyond human agents. As such, it is preferable to think of the generic rights as agency rights.²⁷⁹ Insofar as the PGC obviates 'speciesist' objections levelled at conventional attempts to ground human rights as distinct from animal rights,²⁸⁰ it is an egalitarian moral principle in the strongest sense.

The Methodology of the PGC

Gewirth refers to the philosophical method which the PGC uses as a *dialectically necessary* method, which is important to our correct understanding of it. The dialectical dimension of the method reveals itself in the "first person conative

²⁷³ Gewirth (1984a: 17).

²⁷⁴ Gewirth (1984a: 17).

²⁷⁵ Beyleveld (1991: 13–14, 21–46).

²⁷⁶ Gewirth (1984a: 17).

²⁷⁷ The methodology I will use to identify of the moral community under the PGC is set out in Chapter 4.

²⁷⁸ Most notably, in *RM* and in Gewirth (1982a), (1984a) and (1996).

²⁷⁹ Beyleveld (1991: 447).

²⁸⁰ See Singer (1995) for a discussion of speciesism.

perspective” of the agent, which is instantiated by Elsa’s assertions (i)–(xiv) above, framed (“I do/I must/I need ...” etc.).²⁸¹ The dialectic nature of the method also allows for reflection upon the logical implications of the agent’s statements.²⁸²

The dialectical *necessity* of the method derives from the fact that the PGC prescribes what all agents must logically claim and accept.²⁸³ In other words, Gewirth draws the provisions of the PGC from the necessary claims of an agent. The opposite of this is an *assertoric* method, where the agent considers claims that she does not make from her own agential perspective to have the status of an objective truth.²⁸⁴ Although the argument proceeds from the prudential rights-claims any agent must make, Gewirth argues that this does not compromise the force of the rights-claims or the categorical nature of the PGC.²⁸⁵ According to Gewirth, “whatever is necessarily justified within the context of agency is also necessary for morality”, which follows from the premise that agency constitutes the context of all moral action.²⁸⁶ Correlatively, that which “logically must be accepted by every agent is necessarily justified within the context of agency”.²⁸⁷ This means that, notwithstanding the dialectically necessary method, we can describe the PGC assertorically.²⁸⁸

Gewirth offers two justifications for using the dialectical method.²⁸⁹ First, “certain inferences that would not be valid apart from the conative first-person perspective of the agent *are valid within that perspective*”.²⁹⁰ To illustrate this, Gewirth analyses the terms in which he frames the argument to the PGC, contrasting the move from:

(i) “I do X for end or purpose E”

to

(ii) “E is good”.

with:

(ia) “Some agent A does X for end or purpose E”

to

(ii) “E is good”²⁹¹

Gewirth claims that (ii) does not follow from (ia) but (ii) does follow from (i).²⁹² We understand the difference between these two inferences that gives the former its

²⁸¹ Gewirth (1984a: 20).

²⁸² Gewirth (1984a: 20).

²⁸³ Gewirth (1984a: 20–21), *RM*: 44.

²⁸⁴ Gewirth (1984a: 21).

²⁸⁵ Gewirth (1984a: 21).

²⁸⁶ Gewirth (1984a: 21).

²⁸⁷ Gewirth (1984a: 21).

²⁸⁸ Gewirth (1984a: 21).

²⁸⁹ *RM*: 42–47 and Gewirth (1984a: 21).

²⁹⁰ Gewirth (1984a: 21).

²⁹¹ Gewirth (1984a: 21).

²⁹² Gewirth (1984a: 21).

validity if we recall the example of Elsa. In the inference from (i) to (ii), "E is good" is a claim made by Elsa (the agent herself) in the context her own purposive action.²⁹³ Conversely, in the inference from (ia) to (ii), the claim "E is good" is made assertorically, as if it were being stated about an agent and her action by another person.²⁹⁴ However, Gewirth points out that an agent's purpose is not good just because it is her chosen purpose – it could of course be very bad.²⁹⁵ The important recognition captured by the use of the dialectically necessary method is that the agent considers her purpose to be good.²⁹⁶ According to Gewirth, the proper meaning of (ii) is only conveyed if the agent herself makes the claim.²⁹⁷ The "evaluative endorsement" of claim (ii) follows from the statement of action contained in (i) because the purpose in question is that of the individual agent which she accepts.²⁹⁸

Second, the dialectically necessary method "restricts the argument to what every agent is logically or rationally justified in claiming from within his conative relative standpoint in purposive action".²⁹⁹ In taking a non-arbitrary starting point, Gewirth obviates accusations of speciousness or question-begging premises. A non-arbitrary starting point is one which logically binds all agents in action of some kind³⁰⁰ – even that which seeks to bring about an end to one's agency, such as suicide. That there are logically irrefutable claims all agents must make about their action (irrespective of the *content* of that action) serves to ground the nature of action *per se*.³⁰¹ When the argument is followed through to its third stage (the move from self-interested to moral judgments), we are presented with a logically irrefutable benchmark against which to assess the moral acceptability of action.³⁰²

What dialectical necessity amounts to in practice is a heuristic for critical self-reflection whereby an agent is able to scrutinize the array of practical and moral judgments that she endorses, affirming those which are consistent with the PGC and rejecting those which are not.³⁰³ This illustrates that all morally impermissible action is by definition rationally unjustifiable; it does not, as Gewirth observes, reduce ethics to logic.³⁰⁴ From the claim that an agent requires the generic rights in order to engage in action of any kind, then, we are logically committed to accepting these tenets of the dialectically necessary method.

²⁹³ Gewirth (1984a: 21).

²⁹⁴ Gewirth (1984a: 21).

²⁹⁵ Gewirth (1984a: 21).

²⁹⁶ Gewirth (1984a: 21).

²⁹⁷ Gewirth (1984a: 21).

²⁹⁸ Gewirth (1984a: 22).

²⁹⁹ Gewirth (1984a: 22).

³⁰⁰ Gewirth (1984a: 22).

³⁰¹ Gewirth (1984a: 22).

³⁰² Gewirth (1984a: 22).

³⁰³ Gewirth (1984a: 22), *RM*: 45–47.

³⁰⁴ Gewirth (1984a: 22).

Defining the Content of Agency Rights

We saw earlier that in order for an agent to have the necessary means to pursue her freely chosen purposes, she must make a rights claim over the generic features of action, namely freedom and well-being. Although we can define freedom and well-being at a general level, they also have a specific content.³⁰⁵ It is important to clarify them to understand the practical ramifications of Gewirth's argument.

For Gewirth, well-being is constitutive of three different elements. These are basic, non-subtractive and additive goods.³⁰⁶ Interferences with these three types of good correspond respectively to three types of harm. Basic harm occurs when the right of an agent to basic well-being is infringed. Specific harm occurs when the right of an agent to non-subtractive or additive well-being is infringed.³⁰⁷

Basic goods represent the *sine qua non* of agency, and include "life, physical integrity and mental equilibrium".³⁰⁸ An agent's right to basic goods is infringed when, amongst other things, she is killed, starved, tortured or unwillingly intoxicated.³⁰⁹ These rights are further undermined where an agent is experiencing an infringement of their right to basic goods and another agent who could provide assistance without incurring similar hardships herself chooses not to do so.³¹⁰

The second element of well-being, non-subtractive goods, "are the abilities and conditions required for maintaining undiminished one's level of purpose fulfilment and one's capabilities for particular actions".³¹¹ Rights to these goods are infringed when the agent has her scope restricted for making plans and projects, when important information relevant to the context of her intended action is withheld or where some factor operates to frustrate the use of her own resources for the achievement of an end consistent with the PGC.³¹² Lying, cheating, theft (assuming property arrangements that are themselves consistent with the PGC), deception and exploitation undermine rights to non-subtractive goods.³¹³

The third element, additive goods, "are the abilities and conditions required for increasing one's level of purpose fulfilment and one's capabilities for particular actions".³¹⁴ Humiliation, denial of access to beneficial educational opportunities or discrimination on morally irrelevant grounds such as gender, sexuality, ethnicity, conscience, nationality or socio-economic background infringes rights to these

³⁰⁵ Gewirth (1982a: 55).

³⁰⁶ Gewirth (1982a: 55).

³⁰⁷ Gewirth (1982a: 56).

³⁰⁸ Gewirth (1982a: 55–56).

³⁰⁹ Gewirth (1982a: 56).

³¹⁰ Gewirth (1982a: 56).

³¹¹ Gewirth (1982a: 56).

³¹² Gewirth (1982a: 56).

³¹³ Gewirth (1982a: 56).

³¹⁴ Gewirth (1982a: 56).

goods.³¹⁵ Actions that foster a climate of anxiety, mistrust or resentment (such as the curtailment of civil liberties) or activities that would ill-dispose agents to acting in accordance with the PGC, interfering with the development of wisdom, self-respect and other “self-regarding virtues”, further infringe this right.³¹⁶ Gewirth identifies circumstances of ignorance, misunderstanding or superstition as liable to exacerbate this.³¹⁷

Gewirth defines freedom as:

a person's controlling his actions and his participation in transactions by his own unforced choice or consent and with the knowledge of relevant circumstances, so that his behaviour is neither compelled nor prevented by the actions of other persons.³¹⁸

The converse of this – Gewirthian unfreedom – arises when an agent is exposed to violence of any kind, psychological or emotional abuse, coercion (of a type that is not permissible under the PGC), manipulation and deception “or any other procedures that restrict or remove his informed control of his behaviour by his own unforced choice”.³¹⁹ The right to freedom under the PGC entails a right to autonomy and privacy which ensures that the agent may never have the will of others imposed on her unless it is with her fully informed consent.³²⁰

A Gewirthian moral wrong occurs when any action contravenes at least one of these dimensions of freedom and well-being.³²¹ The extent to which an action is morally wrong is dependent upon the degree of harm and the extent of encroachment on freedom that an agent would suffer were the action to occur. The infringement of the right of one agent by another agent is tantamount to accepting that a right claimed by the individual for herself insofar as she is an agent may be denied to another agent, despite the fact that she also has a claim to this right because she is an agent.³²² Immoral action is therefore an expression of irrationality. Whilst this does not necessarily foreclose ascriptions of responsibility for immoral action under the PGC, there are grounds for suggesting that if an agent consistently acts contrary to the PGC, or is incapable of guiding her action so that it conforms with the PGC, or infringes the PGC particularly gravely, then her societal competence diminishes and so too her level of responsibility.

The clearest absolute right, according to Gewirth, is the right of an innocent agent to life.³²³ As such, it can be easily envisaged that there will be occasions on which the rights to freedom and well being will conflict. This could occur in three ways³²⁴:

³¹⁵ Gewirth only mentions three types of discrimination; however, it is clear that the PGC would accommodate a prohibition on all the additional forms of discrimination mentioned above.

³¹⁶ Gewirth (1982a: 56).

³¹⁷ Gewirth (1982a: 56).

³¹⁸ Gewirth (1982a: 56).

³¹⁹ Gewirth (1982a: 56–57).

³²⁰ Gewirth (1982a: 57).

³²¹ Gewirth (1982a: 57).

³²² Gewirth (1982a: 57).

³²³ Gewirth (1981).

³²⁴ Gewirth (1982a: 57).

1. The freedom of agent A may conflict with the well-being of agent B when A uses his freedom to inflict some basic or specific harm against B.
2. The rights of different agents to well-being may conflict, as in the example where L must deceive M to prevent the torture of N.
3. The right of an agent to freedom and her right to well-being may conflict. Instances of this include suicide, sado-masochistic sexual practices or even excessive work when it interferes with one's health.

That we can envisage conflicts between competing agency rights suggests alternative approaches to their resolution. One way of doing this is to claim that the realisation of agency rights is conditional upon circumstance. This seems to be an unpromising response. It does not give us grounds for identifying which agency rights are engaged in which circumstances and what authority the circumstances have to attenuate their force. Another way that is more promising is to view rights as occupying levels of a hierarchy, similar to Ronald Dworkin's idea of 'rights as trumps'.³²⁵ This admission, however, does not detract from the necessity of the agency rights themselves as guarantors of the generic needs of agency. It simply means that agency rights, framed as mere descriptions of what they are rather than accounting for the circumstances in which they are applied, do not generate their own criteria for resolution when two or more may be in conflict. Gewirth appends three grounds of resolution to his theory of agency rights, which he orders in terms of their importance for preserving agency.³²⁶

Resolving Conflicts of Rights Under the PGC

The first and most important strategy seeks to prevent or remove "transactional inconsistency", which circumscribes the right to freedom.³²⁷ Where an agent intends to use her freedom in order to violate the freedom or well-being of other agents then the freedom of the violating agent can be curtailed in the relevant respect.³²⁸ This curtailment follows from the maxim that the argument to the PGC yields – that each agent must act in accordance with the generic rights of all other agents.³²⁹

There are two main approaches to resolving transactional inconsistency, the applicability of which depends upon the nature of the inconsistency and the appropriateness of the responsive measure. The first is where agent A may coerce or harm another agent B in order to prevent B from coercing or harming either A or

³²⁵ Dworkin (1984).

³²⁶ Gewirth (1982a: 58).

³²⁷ Gewirth (1982a: 58).

³²⁸ Gewirth (1982a: 58).

³²⁹ Gewirth (1982a: 58).

some other agent C.³³⁰ The second approach justifies the imposition of state coercion designed to remove, avert or abate the original harm consistent with PGC-compliant legal rules, institutions and procedures.³³¹ In each case, the PGC requires that the nature and extent of the coercion or harm should be no more than is necessary for the purposes of resistance, removal or prevention. This amounts to a principle which states that in cases where there is an actual or intended infringement of one agent's generic rights by another, the PGC provides that the beleaguered agent or the state can take action in order to prevent this violation, provided the responsive measure is itself justified by the PGC.³³²

The second strategy looks to the degree to which the objects of the conflicting rights are necessary for the possibility of acting at all.³³³ A more important right in this regard must be upheld over a lesser right where it is not possible to uphold one without infringing the other.³³⁴ The example Gewirth uses to illustrate this is where agent A's right not to be deceived is overridden by agent B's right not to be murdered.³³⁵ The third strategy bears similarities to this: one's right to freedom *may* be similarly restricted when the agent intends to infringe her own basic well-being, but only where there is doubt over her ability to fulfil the "emotional and cognitive conditions of freedom or voluntariness".³³⁶ In these cases, we may use appropriate interventions, including reasonable force, in order to prevent an agent from causing unintended basic harm to herself. However, this paternalistic interference with an agent's freedom can only be licensed to prevent unintended basic harm, since the correlative basic goods are fundamental preconditions of action required if she is to maintain her status as an agent at all.³³⁷ If one were to interfere with her freedom in order to prevent her causing harm to her own non-subtractive or additive well-being, then this would be unjustifiable under the PGC, unless her freedom was apparently compromised in the relevant respect. This is because these other two elements of her well-being are less central to her action than is her freedom.³³⁸

We can derive two conclusions from this. First, an agent intent on self-harm must ultimately be allowed to pursue her purpose if the emotional and cognitive prerequisites of voluntary action are met. Second, no-one has a right to restrict other agents from making choices that some agents may see as being misguidedly

³³⁰ Gewirth (1982a: 58). Gewirth gives the following example: "If B physically assaults A or C, A may physically assault [i.e. use physical force against] B in order to resist or prevent the assault" (*ibid.*).

³³¹ Gewirth (1982a: 59).

³³² Gewirth (1982a: 58–59).

³³³ Gewirth (1982a: 59).

³³⁴ Gewirth (1982a: 59).

³³⁵ Gewirth (1982a: 59).

³³⁶ Gewirth (1982a: 59).

³³⁷ Gewirth (1982a: 59).

³³⁸ Gewirth (1982a: 59).

self-destructive, such as indolence or gluttony, where those actions do not impinge upon the generic rights of those other agents themselves.³³⁹ As Gewirth observes:

[The PGC] does not justify wholesale interference in the lives of others; it does not apply to projects that may lead only to decreased physical or mental efficiency... Persons must be left free to live their lives as they please and to make and perhaps profit from their own mistakes³⁴⁰

This leads us to the following distinction. Conflicts of rights can be resolved under the PGC where they exist between agents or in relation to one agent whose reflexive capacities are more likely to be seriously impaired. The PGC gives us no authority, however, to impose a resolution upon an agent where the conflict exists between her own rights and she has the decisional competence to waive the benefit of one of the affected rights. If cases of the latter type trouble us, it is more likely to be because we are ourselves uncertain about the decisional competence of this agent, rather than by what her choices entail.

Direct and Indirect Applications of the PGC

Before we establish the viability of an argument from the PGC, we need to consider the modalities of its application. These are direct and indirect methods.³⁴¹ The direct application of the PGC places a requirement that the actions of each agent are in conformity with what is morally permissible under the PGC.³⁴² The indirect application of the PGC requires the creation of PGC-compliant social rules and institutions. In order for these rules and institutions to be valid, they must uphold the equality of freedom and well-being of all agents.³⁴³ Any agent who acts in such a way that these rules and institutions permit will by definition discharge their moral duties towards other agents.³⁴⁴ As we have seen, the indirect application may provide for agents to be coerced *without* infringing their rights to freedom and well-being, in such cases where the PGC justifies coercive rules and institutions in order to protect the generic rights of other agents, and in the case of apparently involuntary self-harm, the agent herself.³⁴⁵

³³⁹ We should remember that whilst agents are free to choose purposes of this nature, the potential social costs incurred warrant extensive educational initiatives that would offer those individuals greater information upon which to decide whether to pursue more conscientiously their additive well-being. See *RM*: 240–248 and 265.

³⁴⁰ *RM*: 265.

³⁴¹ Gewirth (1982a: 60).

³⁴² Gewirth (1982a: 60).

³⁴³ Gewirth (1982a: 60).

³⁴⁴ Gewirth (1982a: 60).

³⁴⁵ Gewirth (1982a: 60). An example of PGC-compliant coercion is the indefinite detention of a psychopathic serial killer in a psychiatric hospital or other therapeutic environment.

Gewirth subdivides the indirect applications of the PGC into two distinct forms. Procedural applications ensure the moral justifiability of social rules and institutions which are the product of agents' consent.³⁴⁶ These follow from the PGC's inherent concern with freedom and resemble arguments present in established social contractarian theories.³⁴⁷ According to Gewirth, procedural applications have optional or necessary dimensions. Optional procedural applications pertain to the consent required for voluntary associations.³⁴⁸ Necessary procedural applications pertain to the consent that is required as part of the decision-making that mandates democratic bodies and their legislative powers, such as elections for political representatives.³⁴⁹

Instrumental applications, on the other hand, ensure the moral justifiability of social rules and institutions which uphold the well-being of agents and follow from the PGC's inherent concern with well-being.³⁵⁰ Instrumental applications of the PGC take either a static or a dynamic form.³⁵¹ Static instrumental applications protect agents from infractions of their generic rights and sanction those who violate these rights.³⁵² The closest approximation to this in existing institutional arrangements is the criminal law, although this does not mean that the PGC would endorse the array of punitive sanctions that such systems commonly employ.³⁵³ Dynamic instrumental applications uphold access to and preservation of basic, non-subtractive and certain additive goods over time that the agent cannot achieve alone.³⁵⁴ An expansive and properly resourced welfare state, which ensures at the very least equality of opportunity in the conditions necessary for successful action, embodies these protections.

Although the PGC does clearly prescribe what must be fulfilled both by the actions of individuals and by the role of the state, legal enforcement of all agency rights is not necessary.³⁵⁵ However, all legally enforceable rights justified by the

³⁴⁶ Gewirth (1982a: 61).

³⁴⁷ Gewirth (1982a: 61). For a comprehensive overview of such theories, see Boucher and Kelly (1994).

³⁴⁸ Gewirth (1982a: 61).

³⁴⁹ Gewirth (1982a: 61).

³⁵⁰ Gewirth (1982a: 61).

³⁵¹ Gewirth (1982a: 61).

³⁵² Gewirth (1982a: 61).

³⁵³ The PGC does have an important compassionate dimension manifest in both its interpersonal and institutional application (Gewirth, 1996: xv, 21–22, 83, 1998: 71, 87). This extends to inform Gewirthian criminal justice ethics. Brown (1998) proposes a theory of punishment derived from the PGC, though does not intend for this to specify what the precise content of the sanction would be in certain types of cases. All things considered, it is highly likely that any criminal justice system founded on the PGC would favour restorative justice practices and rehabilitation rather than punitive incarceration, because of the primacy of well-being and the absence of any place in the PGC for vengefulness. Commentators tend to overlook this dimension of the PGC, given the fixation with the structure of the argument rather than its application.

³⁵⁴ Gewirth (1982a: 61).

³⁵⁵ Gewirth (1982a: 61).

PGC are species of agency rights. This amounts to a claim that, in a PGC-compliant polity, not all moral rights should become legal rights but that all legal rights are moral rights. Those rights that should receive legal protection in a PGC-compliant polity are those whose breach has a seriously impact upon the agent's generic goods (e.g. bodily and psychological integrity, education, privacy) but not those whose violation results in a minimal impact on the agent's interests (e.g. there can be no right against trivial promise breaking).³⁵⁶

Using the framework delineated above, Gewirth identifies three different methods to enshrine in law the applications of the PGC that warrant legal protection³⁵⁷:

1. The *static-instrumental* justification of legal protection.³⁵⁸ This ensures fundamental agency rights are not violated by other agents, corporate entities and the state and is manifest in the coercive or prohibitive aspects of the law (such as the criminal law).³⁵⁹
2. The *dynamic-instrumental* justification of legal protection.³⁶⁰ It is a fact of life that agents are, through no fault of their own, positioned unequally in terms of their ability to secure and maintain their generic rights. The rules that emanate from this justification seek to dissipate such inequalities, through the provision of healthcare, education, housing and monetary benefits on behalf of the state to all who need them.³⁶¹ The dynamic-instrumental protection also comprises the regulatory function of the state to ensure that the standards of services and utilities are maintained at a level commensurate with respect for the rights of all agents under the PGC.³⁶²
3. The *necessary-procedural* justification of legal protection.³⁶³ This requires that all laws, officials and governmental action are informed by consensual procedures and comprises civil liberties enshrined through constitutional provisions and institutional design.³⁶⁴ The significance of this is extensive. The protection provides for fundamental civil liberties such as freedom of association, movement, assembly, expression and political participation, and a form of social libertarianism whereby the state refrains from interfering in the freely chosen actions of any agent provided that they do not interfere with the generic rights of others.³⁶⁵ A vast sphere of social activity should therefore be beyond the reach of official regulation and the right to engage in these activities should receive state protection.³⁶⁶

³⁵⁶ Gewirth (1982a: 61).

³⁵⁷ Gewirth (1982a: 61–62).

³⁵⁸ Gewirth (1982a: 61–62).

³⁵⁹ Gewirth (1982a: 61–62).

³⁶⁰ Gewirth (1982a: 62).

³⁶¹ Gewirth (1982a: 62).

³⁶² Gewirth (1982a: 62).

³⁶³ Gewirth (1982a: 62).

³⁶⁴ Gewirth (1982a: 62). Gewirth refers to this as “the methods of consent”.

³⁶⁵ Gewirth (1982a: 63).

³⁶⁶ Gewirth (1982a: 63).

When applying the PGC to issues of decisional competence, and the moral justification for ascribing FPCLC to consent or to refuse research participation, it is the dynamic-instrumental and necessary-procedural justifications of legal protection with which we are primarily concerned. The levels of education and information necessary to make such a choice can only be provided by state action that is designed to support individual autonomy, which goes to the first of these justifications. Whether the state has a moral justification to interfere with the content of an individual's choice is a matter of civil liberties and goes to the second of these justifications.

Consent and the PGC

Consent serves a twofold function under the PGC. First, it protects the individual from an unwilled interference in her life where there is no overriding human rights-based justification for doing so. Second, the right of choice that consent offers gives expression to human dignity,³⁶⁷ as being a dignity-holder is derivative from being an agent.³⁶⁸ As Brownsword acknowledges, consent is not itself a human right but instead "parasitic upon" a morally prior framework of rights and duties.³⁶⁹ The role of consent is as a procedural justification to grant or withhold authority for interference with the object of the right (e.g. not to have one's bodily or psychological integrity interfered with) where no over-riding human rights-based justification is engaged.³⁷⁰ Consent is therefore a process that legitimises the waiver of the benefits of the rights at stake on the sufficient and necessary condition that (a) the individual concerned can understand the full implications of waiver and (b) this does not jeopardize the rights of other agents. The placing of consent as a procedural value in Gewirthian theory allows us to avoid the pitfalls of viewing it as an end in itself, which as Brownsword argues, can lead to a problematic fixation with consent.³⁷¹

In the context of biomedical research, consent is invoked at the level of defining biomedical research with human participants and gives it its ethical character.³⁷² Consent performs a similar function in defining biomedical research as it does in forming part of the definition of sexual intercourse, without which the definition of the act would become that of another, namely rape. The implicit presence of consent in the definition of biomedical research separates it from a notion of physical or

³⁶⁷ Beyleveld and Brownsword (2001: 242).

³⁶⁸ Gewirth (1998: 208).

³⁶⁹ Brownsword (2004: 229).

³⁷⁰ Brownsword (2004: 225, 228). Beyleveld and Brownsword (2007a: 335–336).

³⁷¹ Brownsword (2004).

³⁷² On the inseparability of moral judgments from concept formation in the social sciences more generally, see Toddington (1993).

psychological violation in the name of medical progress.³⁷³ Unlike sexual intercourse, however, the scope of consent in biomedical research is not limited to the person who is to participate (i.e. first-person contemporaneous legal competence (FPCLC) consent), but extends to proxy consent if the potential participant is decisionally incompetent.

Nonetheless, the PGC goes much further than simply justifying consent as the conduit for the legitimate waiver of a negative right. The generation of a positive rights claim from the structure of the argument means that consent – as a procedural justification behind the modification or waiver of a substantive right – places a duty of assistance on the part of others to help the person understand the implications of waiving the benefit of that right. This is a corollary of the positive rights-claim to the object of the right itself. It follows from the PGC-protected right to have knowledge of circumstances relevant to the particular context of action.³⁷⁴ To deny this amounts to a breach of the ethical duty that follows from the positive dimension to the right. This duty of assistance requires responsiveness to the needs of the agent in question if we are to make a sincere effort to assist her to understand, even if it transpires that she apparently cannot understand, due to decisional incompetence. Common forms of assistance include education and information provision that is appropriate to the developmental stage that the person has reached. This makes the processes leading up to offering or withholding consent sensitive to the psychological needs and dispositions that accompany the experience of cognitive vulnerability in particular and of baseline vulnerability in general.

The consequences of this for consent in biomedical research are wide-ranging. There is an ethical duty incumbent upon anyone undertaking research and those responsible for its oversight to be mindful of the cognitive and/or circumstantial vulnerabilities of the individuals approached to participate.³⁷⁵ The ethos therefore shifts from obtaining consent to empowering the potential participant to decide.³⁷⁶ On a practical level, this involves putting in place mechanisms to assist actively the potential participant's understanding and appreciation of the research process. As a minimum, this includes explanation of its objectives; the nature and consequences of participation and the rationale upon which she is being approached to have her consent sought in the first place. Where an individual has a questionable ability to make decisions about participation, further and more specialised assistance is warranted, ideally from someone who does not have a direct interest in the research going ahead.

³⁷³ Bielby (2005a: 222). This ethos underpins consent provisions in the earliest codes of research ethics of the post-Second World War period, such as the Nuremberg Code and the World Medical Association Declaration of Helsinki.

³⁷⁴ Gewirth (1978: 250–52, 258, 260).

³⁷⁵ This should not be seen as mere compliance with 'best practice' in ethical review, but amounts to a duty to seek out new ways to be responsive to these vulnerabilities as far as possible.

³⁷⁶ See McMillan and Gillett (2002: 225) for a discussion of the empowering potential of consent and Feenan (1997) for a discussion of empowerment in relation to assessment of competence to consent to treatment.

The case of individuals with cognitive vulnerability epitomises the importance of appropriate assistance. For them, the mere provision of simplified consent forms, greater explanation of research procedures, or provision of information in alternative formats alone, may not offer an improved decision-making situation relevant to their needs. If we accept the importance that Gewirthian theory attaches to the justification of consent and the way in which it should be sought, then we have a reason for preserving the decisional competence of potential research participants as far as possible.

On a more theoretical level, the Gewirthian view on consent moves the bioethical debate away from unhelpfully bifurcated thinking about autonomy and paternalism. Instead, it recognises that individuals should receive assistance in making decisions for themselves and that this is not something that is likely to happen without active interpersonal support. Such interventions are best articulated as duties which attach to particular roles (e.g. physician, researcher or counsellor), although we can also imagine them arising in everyday contexts that do not involve the seeking of consent, such as where a person reads out the bus times to a partially sighted person in order to help her plan her journey. These represent interventions that seek to promote the autonomy interests of the individual concerned, and elicit her decisional independence, motivated by a sincere concern for her dignity and capability as an agent. We will return to this in Chapters 5 and 6.

An Evaluation of the PGC Against Two Alternative Rationalist Ethical Theories

John Rawls

One of the most well-known and widely debated theories to emerge in moral and political philosophy during the last century is in the work of John Rawls.³⁷⁷ In *A Theory of Justice*,³⁷⁸ Rawls established what he considered the integral elements of a theory of justice as fairness. Justice in this sense is only possible if social institutions do not operate to allow individuals to benefit from talents and endowments arbitrarily bestowed at birth, unless in doing so, the exercise of these talents benefits the worst off.

³⁷⁷ In this section, my concern is with the 'early' Rawls of *A Theory of Justice* (1972, rev. ed. 1999) rather than the 'later' Rawls of *Political Liberalism* (1993). In *A Theory of Justice*, Rawls undertakes an attempt to construct a moral theory of rights (his account of 'justice as fairness'), as contrasted with the concern of *Political Liberalism*, which is to theorize justice as fairness in a way that is (supposedly) acceptable to all citizens in a democracy (the idea of an 'overlapping consensus'). Insofar as Gewirth's aim in *Reason and Morality* is to argue for a rights-based moral epistemology, *A Theory of Justice* is therefore the better comparator.

³⁷⁸ Rawls (1972, rev. ed. 1999).

The central stages of Rawls's account take the following form. In order to create the framework for a just society, we must first construct a thought experiment. We should imagine ourselves in the 'original position' – a position of strict equality in which nobody has antecedent knowledge of her eventual human traits (e.g. gender, ethnicity, sexuality, religion, intelligence (dis)abilities, etc.). This, Rawls claims, is known as the 'veil of ignorance',³⁷⁹ which occludes all foresight of these socially significant facts. Behind this 'veil', we are to construct principles of justice that would benefit all to an equal extent, irrespective of whatever human form or situation we actually come to occupy. In this way, Rawls believes, we are motivated to adopt the same concern for the fate of everyone in society.

The principles we would devise under this fictitious ignorance amount to a hierarchy of importance or a "lexical order of priority",³⁸⁰ with the first taking precedence over the second, the second over the third and so forth. Rawls states the content of these principles as follows:

- (i) Each person is to have a right to the greatest equal share of liberties compatible with a similar right for all.
- (ii) (a) Social and economic inequalities are to be attached to offices and positions open to all according to fair equality of opportunity.
- (b) Such inequalities are justified if and only if they benefit the least advantaged in society. Rawls refers to this as the "difference principle".³⁸¹

The first principle is commensurate with the notion of equal liberty. This means that everyone would be free from prejudice, oppression or persecution of any kind. The second principle prescribes that equality of opportunity should allow anyone with sufficient skill and ability to flourish, irrespective of socio-economic background. The difference principle (iib) affects the principle of the distribution of inequalities (iia) as it provides for differential outcomes only insofar as this improves the position of the most deprived.

Rawls's theory of justice is essentially an attempt to use rational choice theory as the first principle of liberal-egalitarian thinking.³⁸² When placed in the 'original position' of equality in respect of the distribution of freedom, power and wealth, and unaware of one's human characteristics when concealed by 'veil of ignorance', Rawls believes that individuals will choose this egalitarian moral principle as a result of applying rational choice processes. However, as Gewirth identifies, there are two ways in which Rawls's attempt to justify this moral principle fails, both of which the argument PGC avoids.³⁸³

The first flaw arises in the inability to appeal to "independent rational justification" (using the canons of inductive and deductive logic) to endorse the use of the veil of

³⁷⁹ Rawls (1999: 118–123).

³⁸⁰ Rawls (1999: 37–38).

³⁸¹ Rawls (1999: 266–267).

³⁸² *RM*: 19.

³⁸³ *RM*: 19–20.

ignorance or the original position.³⁸⁴ In as much as Rawls is correct about the unequal distribution of abilities, talents and endowments, it follows that individuals are not similarly situated to undertake the thought experiment that the Rawlsian project requires of them. Even if we were to concede to Rawls that reasoning in the original position behind the veil of ignorance is a capacity exercisable by all, a problem remains. The demands that the processes of abstraction place on individuals, particularly the veil of ignorance, surpass that minimal level of ignorance that rational persons commonly accept when making choices under uncertain conditions.³⁸⁵ It is also questionable whether individuals could sufficiently alienate themselves from knowledge of their own selfhood (even if only temporarily) in order to eschew fully *all* their contingent human qualities, particularly the most embedded ones such as character and temperament, that comprise their existential position.³⁸⁶

One might counter that Rawls's argument is persuasive independent of whether an individual chooses to understand it or has the capacity to follow it. However, the methodology Rawls uses generates its own limitations on how far this line of defence extends. The methodology involves a dialectically contingent process that requires evaluation on its own merits.³⁸⁷ Unlike Gewirth's argument to the PGC, nothing about it is rationally ineluctable. To claim that the argument is forceful presupposes that the person making this claim considers it to represent a persuasive basis on which to ground moral principles of justice. This inevitably requires the philosophical skill to scrutinize the argument and the intellectual capacity to understand counterfactual reasoning. The methodology also rests upon an understanding that risk-averseness is the most appropriate basis on which to go about decision-making under conditions of uncertainty. This is a contingent rather than a necessary claim that invites controversy.

The second flaw emerges in the criterion for arranging the principles of justice, which Rawls terms the "lexical order of priority". Rawls defines this as:

[A]n order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. .. [This] avoids ... having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.³⁸⁸

Whereas the criteria for resolving rights claims under the PGC is derived from a hierarchy of goods whose importance for action determines their weighting, Rawls's lexical order is not strictly determined by the principles of justice but instead by external factors that are separate from the principles.³⁸⁹ This amounts to Rawls's own presumption about the motives that would influence people to choose particular principles of justice over others in the original position behind the veil of

³⁸⁴ *RM*: 19.

³⁸⁵ *RM*: 20.

³⁸⁶ For a discussion of this point, see Sandel (1998).

³⁸⁷ Gewirth (1996: 27).

³⁸⁸ Rawls (1999: 38).

³⁸⁹ *RM*: 340–341.

ignorance.³⁹⁰ These motives themselves have no ineluctable rational foundation, unlike the motive of an agent to recognise her claim to the generic rights under the PGC. By comparison, Rawls's lexical ordering appears rather arbitrary, exhibiting, as Gewirth observes, the particular concerns of established liberal political philosophy without offering a rational justification for them.³⁹¹

As such, whilst Rawls's argument may be valid within its own terms of reference, it ultimately represents an arbitrary basis upon which to justify moral principles. Gewirth's argument to the PGC, alternatively, has premises grounded in the basic features of action that are dialectically necessary and rationally ineluctable for any agent. Although the argument itself operates at a similarly high level of abstraction, and requires the capacity for sustained logical reasoning if one is to follow it successfully, the PGC does not require that the agent understand the argument – or even agree with it – in order for it to have force. In other words, acceptance of the PGC is logically necessary irrespective of my capacity to know that this is the case, or my keenness to dispute this.³⁹² This does not apply to Rawls's theory of justice.

Rawls does present a meticulous and attractive proposal about how individuals can devise social and political arrangements to discharge their moral obligations along rational lines. However, this only provides us with a rational way to identify the individuals who are the recipients of our moral obligations and the interests of which we must take favourable account when discharging our moral obligations towards those individuals. What Rawls does not do is to provide a rationally compelling answer as to why one should be moral at all.³⁹³ In short, Rawls provides a rational way to be moral but does not explain why rationality *entails* morality.

David Gauthier

The moral contractarianism of David Gauthier is quite distinct from the liberal egalitarianism of either Rawls or Gewirth. In *Morals by Agreement*,³⁹⁴ Gauthier elaborates a basis for morality founded upon principles of rational choice. For Gauthier, rational choice represents the constrained maximization of self-interest.³⁹⁵ This notion of rational choice relies upon a distinction between two main types of choice situation. 'Parametric choice' situations are fixed choice scenarios where the rationality of the choice derives from the greatest anticipated utility.³⁹⁶ 'Strategic

³⁹⁰ *Ibid.*: 341.

³⁹¹ *Ibid.* Gewirth observes how this is particularly evident in the prioritising of individual liberty over economic security.

³⁹² See Beyleveld (1991: 149–150, 305–306, 477).

³⁹³ Beyleveld (1991: 310–311).

³⁹⁴ Gauthier (1986). The critique presented here draws upon Vallentyne (1991).

³⁹⁵ Vallentyne (1991: 2, 5–6).

³⁹⁶ Vallentyne (1991: 6), Gauthier (1986: 21, 85, 170–171, 183–184). By 'utility', Gauthier means the most effective manner through which the agent can achieve her goals.

choice' situations, alternatively, are those where a choice's rational value derives partly from what other individuals would rationally seek to choose.³⁹⁷

However, this is where any similarity with Rawls's theory ends. Gauthier defines a person as someone who selects what is likely to offer the greatest expectation of value or utility to herself.³⁹⁸ In doing so, Gauthier relies upon a highly egoistic model of human personality and motivation. This is reflected in how he explains the move from human isolation to co-operation. In the absence of conditions of perfect competition, any agent who maximizes her interests without constraint will undoubtedly disadvantage themselves and others.³⁹⁹ Morality functions so as to place rational limits upon self-interest to ensure that everyone can benefit equally through the actions of each other.⁴⁰⁰ Nevertheless, Gauthier is not seeking to devise a moral theory as such, but a theory of rational action. In particular, his concern is to justify limitations on human behaviour that are both rational and impartial.⁴⁰¹ Indeed, Vallentyne remarks of Gauthier that, "[i]t is not merely that his theory might fail to capture some traditional moral concerns, but rather that its connection with these traditional moral concerns is purely contingent."⁴⁰²

Gauthier's theory begins with an 'initial bargaining position', a fiction in which individuals neither interact nor co-operate, subject to the Lockean Proviso.⁴⁰³ In this position, no interaction of any kind takes place, a manifestly unsustainable state of affairs that benefits no-one.⁴⁰⁴ This impasse can be overcome, Gauthier argues, through adopting a co-operative bargaining position of constrained maximization that is ultimately more desirable from the perspective of long-term self-interest. This involves employing a strategy that will minimize anyone's maximum relative concession to the interests of others.⁴⁰⁵ Following Vallentyne, we can express an individual's relative concession for a particular option in ratio form:

(a) "the excess of (i) the utility for that person of his/her most favourable admissible option over (ii) the utility for that person of the given option

to:

(b) the excess of (i) the utility for that person of his/her most favourable admissible option over (ii) the utility for that person of the initial bargaining position option".⁴⁰⁶

³⁹⁷ Vallentyne (1991: 6), Gauthier (1986: 21, 24, 61, 68, 76–78, 157–158).

³⁹⁸ Gauthier (1986: 9).

³⁹⁹ Vallentyne (1991: 2) and Gauthier (1986: 2). This is epitomized by the tale of the Prisoner's Dilemma.

⁴⁰⁰ Vallentyne (1991: 2), Gauthier (1986: 9, 11).

⁴⁰¹ Vallentyne (1991: 2).

⁴⁰² Vallentyne (1991: 2).

⁴⁰³ Vallentyne (1991: 7). This is an idea derived from the political writings of John Locke that no-one should profit when in doing so someone else would experience a loss. The term originates in Nozick (1974: 175–182).

⁴⁰⁴ Vallentyne (1991: 7).

⁴⁰⁵ Vallentyne (1991: 8).

⁴⁰⁶ Vallentyne (1991: 8) and Gauthier (1986: 136–148).

Any possible option must offer every party to the co-operative bargaining position as a minimum the same utility as in the initial bargaining position, and must be realisable.⁴⁰⁷ Since a choice's rational permissibility is governed by its conformity with a rationally justifiable policy,⁴⁰⁸ Gauthier argues that constrained maximization is rational as it will ultimately maximize our self-interest.⁴⁰⁹ However, this arrangement will only function, according to Gauthier, provided we honour the rational agreements that we have made with others who are themselves disposed to honouring their rational agreements. Exclusion from the benefits of bargaining arrangements is the almost certain response if we were not to comply, as other rational agents would have no grounds to depend upon our integrity.⁴¹⁰ It is therefore in our own interests to adopt a character that is trustworthy and reliable and a policy, known as 'choice disposition', of complying with the terms of rational agreements.⁴¹¹ This contrasts with the ultimately disadvantageous position we would find ourselves in if we contrive a trustworthy and reliable character whilst in fact disregarding compliance with rational agreements.⁴¹²

Gauthier seeks to proceed from a starting point of moral neutrality in applying rational choice theory.⁴¹³ Insofar as Gewirth also begins from the neutral starting point of fundamental requirements for action, there is an ostensible affinity between Gauthier's contractarianism and the PGC. Nevertheless, this is where such affinities begin and end. Because Gauthier seeks to ground morality in rational agreement, he maintains that such agreement requires mutual advantage.⁴¹⁴ Gauthier defines the participants in the agreement as those individuals who are living and potential contributors to a co-operative arrangement.⁴¹⁵ As such, only these individuals have intrinsic moral status. For Gauthier, children, adults with profound intellectual or physical disabilities, animals and future generations may not enter into the agreement because they fail to offer benefits to the participants that they cannot secure already themselves.⁴¹⁶ These groups only have derivative moral status in the sense that they are of value to participants in the agreement.⁴¹⁷ Applying this principle to health care, Gauthier claims:

From a technology that made it possible for an ever-increasing proportion of persons to increase the average level of well-being, our society is passing to a technology, best exemplified by developments in medicine, that make possible an ever-increasing transfer of

⁴⁰⁷ Vallentyne (1991: 8).

⁴⁰⁸ Vallentyne (1991: 10).

⁴⁰⁹ Gauthier (1986: 167–170).

⁴¹⁰ Vallentyne (1991: 10).

⁴¹¹ Vallentyne (1991: 10), Gauthier (1986: 182–184, 186–187).

⁴¹² Gauthier (1986: 173).

⁴¹³ Vallentyne (1991: 2–3).

⁴¹⁴ Vallentyne (1991: 4).

⁴¹⁵ Vallentyne (1991: 4).

⁴¹⁶ Vallentyne (1991: 4), Gauthier (1986: 268).

⁴¹⁷ Vallentyne (1991: 4).

benefits to persons who decrease that average. Such persons are not party to the moral relationships grounded by a contractarian theory.⁴¹⁸

Gauthier's adoption of a social Darwinist position towards those who impede the initial bargaining position rather than one which would help disadvantaged groups pursue their interests and develop their autonomy, demonstrates that his theory is founded upon mutual unconcern, to an extent that many would find intuitively disturbing.⁴¹⁹

Even if Gauthier's uncompromising position on contractarian moral standing is set aside, the question still remains why constrained self-maximisation should ground moral principles. The identification of natural inequality amongst persons in Gauthier's moral contractarianism, as in Rawls's justice as fairness, represents a sensible starting point.⁴²⁰ However, following Gewirth, I believe that Gauthier fails to achieve the impartiality that he claims for his theory,⁴²¹ even in spite of his attempts to defend it.⁴²²

The problem arises when we begin to analyse why those who benefit from the distribution of natural inequalities should choose to enter into an impartial bargain with those who are disadvantaged by the distribution at all.⁴²³ Although disadvantaged individuals may have something to offer those who are advantaged, at a cost the naturally advantaged can afford, this itself does not constitute a necessary let alone a sufficient reason why individuals enter into bargaining arrangements.⁴²⁴ To accept this would commit one to a contingent and narrow view of human motivation, as opposed to the universal premise from which Gewirth starts, the need for freedom and well-being if one is to act with any chance of success at all. Gauthier appears to make the mistake of much classical liberalism insofar as he appears to conflate rationality with idealised decision-making in market economics and the model of the self it presupposes. Gauthier may purport to offer a rational explanation for morality (albeit a narrow one), but like Rawls, does not answer our question of *why* it is rational to be moral in the first place.

Summary

Gewirth's theory of agency rights provides a rationally ineluctable theory of morality which is compelling both as a purely abstract ethical principle and as the foundations of a political and bioethical theory which stresses universality, egalitarianism and

⁴¹⁸ Gauthier (1986: 18).

⁴¹⁹ Even though, Gauthier would retort, there is no place in this theory for moral intuitionism (1986: 269; Vallentyne, 1991: 2). Of course, the same applies to the PGC, although it gives rise to far fewer counter-intuitive moral conclusions.

⁴²⁰ Gewirth (1996: 11–12, n. 9).

⁴²¹ Gewirth (1996: 11–12, n. 9).

⁴²² Gauthier (1988, 1991).

⁴²³ Gewirth (1996: 11–12, n. 9).

⁴²⁴ Gewirth (1996: 11–12, n. 9).

care. In addition to providing an argument for agency rights, it also recognises the inherent dependence and vulnerability of all agents and suggests lines along which institutions and social practices could be designed in order to offer support for all agents in need of it. This may be countered as another visionary ‘grand narrative’, but if the argument to the PGC is accepted, then it is not possible to deny the existence of the generic rights without contradicting what I am implicitly committing myself to in the act of that denial.

Following Beyleveld and Brownsword, the proper place of consent is Gewirthian theory is as an important procedural safeguard of rights to bodily and psychological integrity.⁴²⁵ Consent may not constitute a substantive right in itself, but its ethical and legal value derives from its ability to create and modify relationships which the generic rights circumscribe. It follows that, in a PGC-compliant polity at least, all individuals require appropriate forms of education and empowerment to be able to engage in decision-making to the extent of their abilities. Difficulties arise when decision-making abilities are merely assumed to exist in an individual without an attempt to consider whether some decision-makers will require support to elicit their decision-making abilities. That some agents experience cognitive vulnerability in ways that could undermine their decisional competences illustrates these difficulties. Practices that support individual decision-making epitomize the positive rights to assistance under the PGC.

There is nothing in either Rawls or Gauthier’s theory which serves to undermine the argument to the PGC nor to offer a more compelling approach to the justification of morality. The comparison with Rawls and Gauthier has illustrated the superiority of grounding morality in the necessary features of action, rather than through screening out morally irrelevant characteristics of human existence as in Rawls, or presupposing that all human interaction is conducted from the perspective of self-interest, as in Gauthier.

One might object that to choose two theories of a similar kind with which to compare the PGC is selective and negates approaches generated from postmodernism, feminist theory and non-Western philosophy.⁴²⁶ To analyse the PGC in terms of the vast scholarship in this area would require a book in itself and, for present purposes, would not necessarily make Gewirth’s argument for agency rights any clearer than it has been presented here. As subsequent chapters will show, I do not wish to dismiss alternative insights but instead to draw upon them where appropriate in developing a theory of competence judgment that is consistent with the tenets of the PGC. Mindful of the ways in which it operates, the next chapter sets out the precautionary basis on which we must apply the PGC and on which the moral defensibility of judgments about decisional competence depend.

⁴²⁵ Beyleveld and Brownsword (2007a, Chapter 11).

⁴²⁶ For a discussion of these approaches as applied to bioethical issues, see Shildrick (1997), Wolf (1996) and Alora and Lumitao (2001) respectively.