



RECONCEIVING BIOETHICAL PROCEDURALISM: AN ONTOLOGICAL PERSPECTIVE

REPENSANDO EL PROCEDIMENTALISMO BIOÉTICO: UNA PERSPECTIVA ONTOLÓGICA

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ABSTRACT:

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This year marks the 40th anniversary of the Belmont Report that formally ushered in an era of principlism and proceduralism in the field of bioethics, an era which shaped the form of bioethical debate according to the combination of Enlightenment-inspired dualism and Liberal pragmatism characteristic of the United States. While ostensibly seeking to protect the vulnerable in a pluralistic society, in reality, recent critiques have argued, the development of bioethics has been directed at legitimizing the bureaucratization of ethics into a self-referential and isolated instrument for socio-political control. As a result, bioethical proceduralism often subverts the very values it is supposed to defend. These critiques, while valuable, do not reach the heart of the problem, which is rooted in the ontological level. The philosophical heritage of modern bioethics – the ontological presuppositions about human nature, freedom and the supposed “neutrality” towards any claims about the good, among others – must be rectified so bioethics may better achieve its stated goals and uphold its own principles. While recounting the entire ontological vision that would undergird such a renewal is beyond the scope of this paper, reconceiving the presuppositions behind the notions of freedom, consensus, and autonomy through an understanding of the human being as a person-in-community constitutively related to others opens a path through which principles and procedures can be preserved, not subverted, within bioethics today.

RESUMEN:

Palabras clave:

Procedimentalismo,
principlismo,
ontología, autonomía,
consenso.

Este año se cumple el 40º aniversario de la publicación del Informe Belmont que formalmente marcó el inicio de una época de principlismo y procedimentalismo en el campo de la bioética, una época que dio forma al debate bioético marcado tanto por el dualismo inspirado en la Ilustración como el pragmatismo Liberal característico en los Estados Unidos de América. Mientras ostensiblemente se buscaba proteger a los más vulnerables dentro de una sociedad pluralista, en realidad, críticas recientes han sostenido que el desarrollo de la bioética ha pretendido legitimar una burocratización de la ética, convirtiéndola en un instrumento aislado y autorreferencial para el control socio-político. Como consecuencia, el procedimentalismo bioético suele subvertir los mismísimos valores que debería defender. Estas críticas, aun siendo valiosas, no llegan al núcleo del problema, el cual está enraizado a nivel ontológico. La herencia filosófica de la bioética moderna – y los presupuestos ontológicos sobre la naturaleza humana, su libertad, y la supuesta “neutralidad” hacia toda afirmación sobre el bien, entre otras – deben ser rectificadas para que la bioética pueda lograr mejor sus objetivos declarados y defender sus propios principios. Aunque describir

la visión ontológica completa que afianzaría tal renovación supera el alcance de este trabajo, repensar los presupuestos que existen detrás de las nociones de libertad, consenso, y autonomía, a través de una comprensión del ser humano como persona-en-comunidad, relacionada constitutivamente a los demás, nos abre un camino por el cual los principios y procedimientos puedan ser preservados, no subvertidos, en la bioética de hoy.

1. Introduction

The fragmentation and disintegration that characterizes postmodernity has affected all aspects of our life, but it has hit bioethics particularly hard because it is a relatively new field with a great deal of power over human lives. While bioethics first sought to protect the vulnerable through reasoned debate and a consensus that would bridge the moral pluralism of societies, mainstream bioethics as practiced in the United States works diligently to relativize all moral claims, paradoxically becoming “amoral”.¹ Despite acknowledging many post-modern positions, much bioethical debate is still wedded to political liberalism’s embrace of the Enlightenment-inspired dualism between fact and value, such that what had been seen as common morality based on the reality of nature is now viewed as subjective, private, and even irrational, restricting the field to the procedural functions of the regulation of debates coupled with the relativization of any notion of the true or the good.

The two-tier morality that follows from public-versus-private, fact-versus-value dualism and a two-tier practical rationality between an internally coherent privatism and an empty proceduralism in the public sphere is still the most mainstream position. While this appears to be a solution – people can believe whatever they want privately but when they enter the public sphere they adopt “public reason” – in truth, “for anyone interested in ethical dialogue... the solution virtually reduces the whole task of ethics to a strategy of political co-existence”² that increasingly deforms the ideals it seeks to uphold. Bioethics as a field has only mirrored society as a whole as it has canonized the formal rationality at

the heart of the technological paradigm that dominates nearly every aspect of our lives.

When the abstraction of a strict procedural formalism is forced upon the realms of politics and bioethics as a solution to conflicts, the unintended consequences are inevitably lack of relation and of meaning, extrinsicism, commodification and monetization of every aspect of life, and, according to a socio-political critique, even violence in various forms of coercion. The concomitant uncoupling of ends and means reflects a detachment from a prior commitment to the good. The “freedom” ostensibly built into the principle of autonomy tends to become preapproved compulsion, the solidarity that ought to be expressed through mutual respect tends to become coercion labeled as “consensus,” and “reason” is truncated into a formalism devoid of content while vital principles are reduced to a hollow proceduralism.

If we are to overcome these failings, we must understand that they are deeply rooted in presuppositions at the ontological level expressed in the formal rationality used to construct modern bioethics, indeed modernity as a whole. As we will see, all of these errors stem from an ontological conception of man as an “isolated individual,” which, nevertheless, “is a pure fiction: one’s personal identity always develops through dialogue and intersubjectivity.”³

There is no denying the enormous successes and material gains formal rationality has brought about, but there is also no denying the repercussions when it replaces ontology, that is, when it is taken as the best way to approach reality. It might seem that ontology would be extraneous to contemporary society, and especially to any pragmatic field of study. However, ontology has seen

1 In the sense that ethical positions are seen as options in a cosmological order with no reference to moral truth.

2 Dell’Oro, R. “Theological Discourse and the Postmodern Condition: The Case of Bioethics.” *Medicine, Health Care and Philosophy*. 2002; 5:133.

3 Allodi, “Persona e società post-secolare.” In: *Verso una società post-secolare?*, Rubbettino, Soveria Mannelli, 2009, 24. Translation by author.

a widespread revival, albeit with very differing meanings, both in Anglo-American analytical philosophy and continental philosophy in their many forms as more and more thinkers become disenchanted with the deficiencies of positivistic or proceduralist calculation. In addition, though it seems that bioethical debates concern the spheres of technical efficiency, economic feasibility, political acceptability, and finally, some sort of moral consensus, and that there is no need to move to an ontological level, as David C. Schindler explains, questions of human action, including the moral questions dealt with in bioethical debates, “always turn out to be epistemological questions, which in turn are determined by ontological and metaphysical realities. The way one acts (virtue) is inevitably a function of what one takes to be real (knowledge), which depends on the various ways reality can present itself.”⁴ And so the aim of this analysis is to outline the scope, and especially the depth, of the bioethical project, through an ontological critique that appreciates but goes beyond a socio-political critique, providing an aperture through which a more adequate, more expansive understanding and dialogue might arise.

2. Formal rationality in classic liberal bioethics

In his classic analysis of economics, Max Weber defined *formal rationality* as that which concerns the quantitative calculation of means and procedures necessary to attain most efficiently a desired end. It is “formal” because of the non-necessity of any particular content; the process is the same no matter what end is sought. The commensurable unit that made this possible was money, but the formalization of rationality is not limited to economics; Weber believed that calculable logic of formal rationality, that is, the instrumentalization of reason, would inevitably spread to all areas of social life and institutions of the modern world.

However, it is not unique to modern times. D.C. Schindler discusses a powerful historical example when

writing about Socrates’ debates with the Sophists on the art of rhetoric. For Socrates, and Plato, speaking well meant *making the truth evident*; for the Sophists however, speaking well meant speaking *persuasively*, no matter what one was arguing for, which required a radical separation of means and ends:

The novelty of sophistry lay in the fact that it made efficiency a principal goal, and it was attractive because of its discovery of the power of purifying means, both in the sense of rationalizing them, excising inefficiencies so that they can be harnessed and controlled, and also in the sense of cleansing them of content and so rendering them neutral. In a word, sophistry represented in a decisive and symbolic way the absolutizing of instrumentality.⁵

Science in the modern era prided itself on bracketing out all but the experimentally quantifiable, regarding this as a *proper self-limitation of reason*. Ethics was one of the areas consciously excluded as non-quantifiable. Early bioethical debates were seen by some as “a mixture of religion, whimsy, exhortation, legal precedents, various traditions, philosophies of life, miscellaneous moral rules, and epithets.”⁶ In the interest of making these debates acceptable, they would need to concern universally accessible “commensurable units”; the *Principles of Biomedical Ethics* by Beauchamp and Childress⁷ (respect/autonomy, beneficence, nonmaleficence, justice) became, despite the great ambiguity in the meaning of the terms, the dominant paradigm for bioethical decision-making, institutionalized over time. As a Hastings Center Report admitted over twenty years ago,

In a certain sense, ethics has become part and parcel of the technological order. It has been pro-

⁴ Schindler, D.C. “Why Socrates Didn’t Charge: Plato and the Metaphysics of Money.” *Communio*. 2009; 36(3): 398. The distinction does not imply a strict division into areas of specialization. Instead it reflects different aspects of one acting person and the deep interconnection how we think, believe, and act.

⁵ Schindler, D.C. “Redeeming Work: On *Techn* as an Encounter between God, Man and the World.” Presentation given at the John Paul II Institute, Washington DC, 14 November 2015.

⁶ Clouser, K.D. “Bioethics and Philosophy.” *Hastings Center Report*. 1993; 23(6), 5-10.

⁷ Beauchamp, T. and J. Childress. *Principles of Biomedical Ethics*, 5th edition, Oxford University Press, New York, 2001.

fessionalized as an autonomous discipline external to medical practice. It is dominated by an engineering model of moral reasoning and impregnated with the idea of a technical rationality, applying principles to practices.⁸

M. Therese Lysaught draws on the metaphor of the principles as the “coin of the realm” in an apt comparison: “We cannot have real moral discourse between particular communities, it is claimed, absent a more overarching transactional system which can determine the moral ‘exchange rate.’ In other words, we will get nowhere as long as we bring francs and lire to the table; what we need is a moral Euro.”⁹

But just as so many traditions affirm that there is no exchange rate for a human life while so many technocrats continue presuming to be able to calculate one, the “moral Euro” of proceduralism is not a neutral coinage that all can deal in. The cost of a seat at the table is the abandonment of Plato’s interest in making the true and the good evident through dialogue, and an adoption of the Sophist’s instrumentalization of language in which, at best, one can hope for a utilitarian calculus of harms and benefits, and at worst, mere coercion.

3. Classical liberal proceduralism

A specific form of this reduction of ethics and philosophy to utility and the power of politics is most prevalent in the United States of America. Debate has been designed to proceed in the manner of the Sophists regarding neutrality toward the good (marginalization of content) and instrumentalization of language (a prioritization of form). American bioethicist Jonathan Moreno says, “Classical liberalism aims to construct a public space that is neutral in its conception of the good life, so individuals can pursue their preferences”¹⁰; that is,

they are independent of ontological and moral positions concerning ultimate goods. Bioethics committees, then, are “instruments for the construction of moral consensus... guided by certain *procedural values* that are widely embraced, at least in Western culture.”¹¹ The claim is that the unique conjunction of pragmatism, proceduralism, and the American founders’ Enlightenment philosophy, one that canonizes formal rationality, “will drive any *adequate account* of ethics consultation in a liberal society.”¹²

This conjunction – Liberal Proceduralism – has grown out of an often unarticulated ontology that parallels the western tradition of Liberalism stemming from the Enlightenment in both its “liberal” and “conservative” forms. It privileges a specific notion of what counts as legitimate in bioethical debate, marked by a public/private dualism, instrumentalized rationality, autonomous individualism, “choice” as the highest form of freedom, society as an aggregate of competitive individuals, etc.,¹³ all while claiming to be “neutral.” In a nutshell, under this view humans are essentially self-interested, isolated individuals, and as such enter into extrinsic or contractual relations with others in order to maximize their interests, comparable to “profits” even outside of economic domains.

Robert Dell’Oro has described this bioethical position as the “loophole solution” to the problems of postmodernity, in that it attempts to steer a neutral course between the public, procedural functions of regulation and the private, closed hermeneutics of various limited traditions in what he calls “a strategy of political co-existence.”¹⁴ But this supposed neutrality, with its hope of peaceful agreements rather than forcible impositions, is in reality a nonnegotiable claim about the nature of truth and goodness in themselves, specifically that for all essential purposes they are beyond reason, and hence must be excluded from debate as “meaningless.” In addition, as John Milbank and others have argued, this exclusion actually hardens the tensions between perspectives, unsatisfactory and often coercive results.

8 Ten Have, H. “Medical Technology Assessment and Ethics: Ambivalent Relations.” *Hastings Center Report*. 1995; 25(5): 17.

9 Lysaught, M.T. “And Power Corrupts: Religion and the Disciplinary Matrix of Bioethics.” In: *The Handbook of Bioethics and Religion*. Oxford University Press, New York, 2006, 114.

10 Moreno, J. “Can Ethics Consultation Be Saved? Ethics Consultation and Moral Consensus in a Democratic Society.” In: *Ethics Consultation: From Theory to Practice*. Johns Hopkins University Press, Baltimore, 2003, 24.

11 Ibid, 23-24. Emphasis added.

12 Ibid., 23. Emphasis added.

13 Cf. Lysaught, 2006, *op. cit.* 118.

14 Dell’Oro, *op. cit.*

According to both the socio-political and ontological critiques, the presuppositions that shape any debate under procedural liberalism are subversive of any claim for a neutral and nonviolent respect that leads to true consensus. The former occurs at the political level, the level of power, and the latter traces the problem back to the ontological level, the level of being. We will examine these critiques in turn.

4. Socio-political critiques

A number of bioethicists have criticized the entire program of procedural bioethics from the outside, so to speak. As an example of what we might call the “pre-ontological critique,” Lysaught has used the categories of Foucault¹⁵ and his mechanisms of governmentality – discourses, practices, institutions, and the disciplinary matrices – to critique what many see as either deliberately disingenuous, or at least naïve, about the function of ostensibly neutral debates in the current situation, arguing that rather than being an open deliberative process, bioethics serves to shape citizens in order to perpetuate the power structures of the current market/state binary.

According to Foucault, “discourses”¹⁶ are the concepts and statements that enable truth claims within specific fields of knowledge. They define what can be spoken about meaningfully and the rules that embody those discourses; the whole complex is then institutionalized and eventually guaranteed by the power of the State. The conjunction of discourses and institutionalized practices are not in fact neutral and apolitical, but are used

15 Lysaught mentions others who have also used Foucault in critiquing bioethics: McKenny, G. *To Relieve the Human Condition: Bioethics, Technology, and the Body*, SUNY Press, New York, 1997; Shuman, J. *The Body of Compassion: Ethics, Medicine, and the Church*, Westview Press, Boulder, 1999; and Finkelstein, J. (see below).

16 “Indeed, the inherent power and domination of the situation are disguised insofar as the monopoly created by specialist knowledge has been legitimated by the sanction of law and professionalism.... When knowledge becomes a source of power, as it does with technical or formal knowledge, it is the technocrat, the owner, the controller of knowledge, who gains social power. Significantly, when technical knowledge is the basis of power, the inequalities between provider and consumer are frequently concealed by the idea that a professional service is offered.” Finkelstein, J. “Biomedicine and Technocratic Power.” *Hastings Center Report*. 1990; 20(4): 14.

“to effect social and political ends, even while rhetorically claiming to be apolitical, neutral, and objective.”¹⁷ By taking a historical perspective, these theorists say, one can see the fall of one set of discourses (theological, philosophical, moral) and the rise of another (state-approved). This first required creating “a body of esoteric, technical, formal knowledge that would be portrayed as inaccessible to the common person while simultaneously constituting objects of knowledge and defining the acceptable parameters for discussion;”¹⁸ the discourse was then embodied into practices including the control of what was allowed in professional journals, and the State entered by being the major provider of funding and legitimacy.

In a detailed account of the history, players, documents, and events involved in the debates in the United States, John Evans debunks the myths that seek to explain how this paradigm came to dominate. According to one argument, it was a natural and necessary progression within pluralistic societies, but Evans recounts how scientists pushed *against* public involvement through legislative activity and instead pushed *for* bureaucratic control. He demonstrates that, “the growth and institutional embodiment of bioethics in the United States via government advisory commissions took shape precisely as a way to *circumvent pluralism, to avoid more direct democratic control,*” primarily out of fear of the loss of funding, “thus pointing to the hidden economic substrate of all these discussions.”¹⁹

The distrust in the U.S. of unelected officials – of bureaucrats who are not accountable to the public – is relatively high. Evans points to this as a reason for the initial reliance by government institutions on ostensibly quantifiable data; it was hoped that “neutral rules” would be trusted even if unelected officials were not.²⁰ The first government commission²¹ was told by Congress to construct a set of ends that “had to be portrayed as

17 Lysaught, 2006, *op. cit.* 100.

18 Lysaught, 2006, *op. cit.* 102.

19 Lysaught, 2006, *op. cit.* 101-102. Emphasis added.

20 Evans, J. *Playing God? Human Genetic Engineering and the Rationalization of Public Bioethical Debate*. The University of Chicago Press, Chicago, 2002, 85.

21 The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research

universally held by the citizens, but had to be applied *without a method of determining empirically what the ends of the citizens were.*"²² The subsequent task, Lysaught states, "was to establish these ends as truth, to diffuse them throughout the institutional infrastructure of research and patient care, and through the practices of bioethics to persuade the citizenry to adopt these as their own ends."²³ The ends had to be applicable to any problem, "since it would complicate decision-making to have different principles for different types research," and there had to be "one commensurable, universal scale for ends, such as utility."²⁴

The institutionalization of formal rationality as the acceptable form of argumentation is most relevant to the rise of the principles in bioethics: a bill was passed in the United States government that would establish the Belmont Report principles the criteria for federally funded research, overseen by IRBs (Institutional Review Boards) to insure compliance. "Since journals refuse to publish results from research not reviewed by IRBs, the principles became the standard not only for federally funded research, but for privately funded research as well."²⁵ In other words, there was an incestuous relationship between the scientists, commissions, and journals, such that the only way to join the debates at any point of entry was to speak the accepted language and follow the accepted rules, with the power of the State as guarantor of this disciplinary matrix. All of this has allowed for the creation of a system that is hidden from the public eye, deeply ambiguous and self-referential, while maintaining a justifiable rhetoric of neutrality. In what follows we present two examples of how, because of proceduralism's predetermined indifference towards the good, freedom can slip into coercion.

4.1. *The autonomous patient*

Proceduralism demands juridical freedom, a negative freedom marked by the absence of coercion, but it subverts its own ideal by virtue of its own constitution.

22 Ibid., 83. Emphasis added.

23 Lysaught, 2006, *op. cit.* 107-108.

24 Evans, *op. cit.* 85.

25 Ibid., 89.

This conception of freedom has very real consequences in the way it is bestowed by the State on the people. To take one example from a socio-historical perspective, Lysaught traces the devolution of the principle of "respect," which in the Belmont Principles began as substantive, inclusive of all persons, *both* promoting autonomy *and* protecting the vulnerable: "persons with diminished autonomy are entitled to protection."²⁶ However, under Beauchamp and Childress, respect for persons was dropped in favor of "respect for *autonomy*." That respect became "non-interference" and applied only to "autonomous" individuals: "Our obligations to respect autonomy do not extend to persons who cannot act in a sufficiently autonomous manner;" they excluded the "immature, incapacitated, ignorant," and specifically named infants as one such category.²⁷ This opened the door to the rejection of respect for many vulnerable people. Moreover, "autonomy" became problematic even for rational adults. "Informed consent" – the sine qua non of bioethics – is based on autonomy, but it too can be compromised:

The practice of informed consent constructs the patient as first and foremost, primarily, essen-

26 United States National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research.* U.S. Government Printing Office, Washington, D.C., 1979.

27 Beauchamp, T. and J. Childress. *Principles of Biomedical Ethics, 5th edition*, Oxford University Press, New York, 2001, 65. Alfie Evans' case is a devastating example of the cynicism of making autonomy mean whatever one wants: "For years we have been told that end-of-life decisions are the most intimate of all, and that as autonomous persons, we – or if incompetent, our families – must be free to decide when to refuse life support, to which I say, amen. Some, take the meme even farther, insisting that autonomy is so fundamental, patients ought to be able to direct doctors to provide a lethal prescription or jab if they wish termination to avoid suffering caused by illness, disability, or debilitation. But, *now* we are told that *when life is wanted*, when a patient or family *wish to fight for every breath*, or parents decide to give their children every chance to make it through a terrible health crisis, no matter how unlikely – well, autonomy has its limits... 'Best interests,' and all that. These cases are becoming more brazen. Some call it 'futile care,' or 'inappropriate care' – based on the utilitarian values of our technocratic 'expert' class, which is taking power onto itself to decide when a life is no longer worth living. They can call it 'professional standards,' all they want, but people understand what is really going on." Smith, W.J. [Online publication] "Alfie Evans: So much for 'your body, your choice'." May 7, 2018. <<https://www.lifesitenews.com/opinion/alfie-evans-so-much-for-your-body-your-choice>> [Consulted: 10/13/18].

tially an autonomous subject, even though the patient's autonomy may be severely compromised by illness or even though their own anthropology – should they hail from a nonwestern culture – provides no space for contemporary U.S. concepts of autonomy. The practice of informed consent shapes patients by persuading them (or coercing them, since most medical procedures will not be performed without a signed document) to locate themselves under the rubric of autonomous consent, to understand their relationship with the physician as somewhat contractual (based on a signed document, one which waives many of their rights), as consumers who are 'choosing' a particular course of medical treatment....²⁸

Respect is decoupled from persons and is reduced to an abstract notion. The patchwork of philosophical and moral views that had gone into what passed for bioethical rigor ultimately collapses into mere utility: "Under the rhetoric of the principle of respect for persons – wherein persons ought to be seen as ends only and never solely as a means to others' ends – we find instead the principle of utility."²⁹ Under proceduralism, a patient's freedom can easily be overturned simply by judging that freedom and the choices emanating from it to be irrational or "non-autonomous."³⁰ Again, the

²⁸ Lysaught, 2006, *op. cit.* 105.

²⁹ Lysaught, M.T. "Respect: Or, How Respect for Persons Became Respect for Autonomy." *Journal of Medicine and Philosophy*. 2004; 29(6): 677. Lysaught quotes Ruth Malone on the market metaphor in bioethics: "In markets, the relationship to the other is primarily, if not solely, instrumental: the other is necessary only as a means to the end of purchase or sale of products. Buyers' and sellers' relations are based in contractual obligations of business that do not extend to concern for or dependence on one another.... The product-market metaphor relies on the self-interested utility-maximizer view of human agents that is congruent with neoclassical economics, in which individuals make choices based on their perceptions of what will benefit them most. Agency is reduced to rational choices made to buy or to sell, a matter of exerting preferences rather than of acting in accordance with constitutive values or concerns." Malone, R. "Policy as Product: Morality and Metaphor in Health Policy Discourse." *Hastings Center Report*. 1999; 29(3): 18.

³⁰ "If one deems that a patient's refusal is irrational, claiming therefore it is non-autonomous one may over-rule it. Conversely one may reason that although the choice is irrational, the patient is competent and therefore autonomous. Both can claim they are respecting the principle of autonomy and therefore the principle of autonomy may encourage one to act with unjustified paternalism depriving a person of freedom without adequate justification."

ambiguity of the terms and their interpretation makes utilitarian concerns, as deemed by those in power, the final arbiter.³¹

4.2. An exclusive consensus

Another problematic aspect of bioethical proceduralism's notion of freedom is the instrumentalization of "consensus" in large-scale policy-setting debates.³² Consensus would seem to be the formalization of a much-needed solidarity, a unity in the midst of pluralism based on a mutual desire for open dialogue and cooperation. However, the consensus born of bioethical proceduralism is a far cry from this ideal and quickly degenerates into an exercise in coercion that demands a "reduction of one's cultural and narrative particularity to something fundamentally indifferent,"³³ that is asking the parties to divest themselves of their most deeply held beliefs. The resulting agreement is, at best, illusory.

While true consensus based in solidarity is a good thing to be pursued, when the clash is at the level of one's comprehensive worldview, debates become ideological power struggles. David Casarett is quite clear about the nature of "consensus-based" proceedings:

Consensus is fragile and is easily disrupted when one or more participants hold tenaciously to a principle or value. The fragility of consen-

Mallia, P. *The Nature of the Doctor-Patient Relationship: Health Care Principles Through the Phenomenology of Relationships with Patients*, Springer Publishing, New York, 2013, 12.

³¹ A perfect example of this is the IRB's statement that the human embryo is entitled to "profound respect," but could still be created or destroyed as needed. In response, Daniel Callahan said, "Those embryos that stand in the way of research are to be sacrificed — as nice a case of the ends justifying the means as can be found." Callahan, D. "The Puzzle of Profound Respect." *The Hastings Center Report*. 1995; 25(1): 40.

³² One of the United States' most esteemed bioethicists, Edmund Pellegrino, argued that the *patient's good*, not consensus, should be the primary concern. He discusses the medical good, the good of the patient as a human being, the patient's own perception of the good, and the spiritual good (whether understood religiously or not) in Pellegrino, E. "The Internal Morality of Clinical Medicine." In: *The Philosophy of Medicine Reborn: A Pellegrino Reader*. University of Notre Dame Press, Notre Dame, IN, 2008, 62-86.

³³ Hart, D.B. *The Beauty of the Infinite and the Aesthetics of Christian Truth*, Wm. B. Eerdmans Publishing Co., Grand Rapids, MI, 2003, 428.

sus requires that all participants, including the ethics consultant, be willing to reconsider their own normative claims.... Genuine understanding of the issues involved may threaten deeply held beliefs about the values that make collaborative social life possible.... Ethical deliberation requires participants to examine deeply held values such as the sanctity of life, the primacy of autonomy, and the commonly held view that lives do not have a dollar value.³⁴

This is riddled with assumptions, including the belief that one's most deeply held beliefs on an issue are just something one "tenaciously" and irrationally clings to. Note that Casarett's examples do not include among beliefs that that must be examined and cast aside those that reflect his *own* ideology, such as the *non*-sanctity of life.

Beyond Casarett's tyranny of the majority, the authors of a recent article in the prestigious *New England Journal Of Medicine* argue that those whose views are out of step with the ruling regime should leave the table entirely. Those professionals unwilling to accept the dominant position should either select an area "that will not put them in situations that conflict with their personal morality or, if there is no such area, *leave the profession*."³⁵ This argument is becoming more prevalent as a "solution" to the problem of moral disagreement: *conscientious objection on ethical issues, even if protected by law, would itself be declared "unethical,"*³⁶ and should have no place in debating ethics.³⁷ What had begun as a desire for some form of solidarity has devolved into a force for outright exile from the public sphere.³⁸

34 Casarett, D.J., F. Daskal, and J. Lantos. "Experts in Ethics? The Authority of the Clinical Ethicist." *Hastings Center Report*. 1998; 28(6): 9.

35 Stahl, R. and E. Emanuel. "Physicians, Not Conscripts – Conscientious Objection in Health Care." *New England Journal of Medicine*. 2017; 376(14): 1383.

36 *Ibid.*, 1384.

37 "Along these same lines, Edmund Pellegrino raises concerns about the policing of the medical profession. Questions are raised, he notes, about whether or not applicants who refuse to participate in certain practices – abortion, certain reproductive technologies, capital punishment – ought to be refused admission to medical school. What we see here is the placement of a binding set of norms and practices necessary to preserve our contemporary social order put forward as value-free." Lysaught, 2006, *op. cit.*, 123.

38 The use of bioethical positions to exclude unpopular ethical

5. Ontological perspective

The Foucauldian critique reveals the inadequacy of the liberal view in its collapse into power and coercion but does not provide an adequate way out of the morass. Instead, we find ourselves constrained to the political level, to questions of the *configuration of power* and thus, *regulation*.³⁹ Critiques of bioethics that stay within the terms set by proceduralism or within the notion of socio-political power, to borrow from Lysaught, "end up being little more than attempts to make a kinder and gentler Leviathan. But Leviathan it remains."⁴⁰

Those who defend a purely procedural stance towards bioethics do so out of a fear that the only alternative to its pragmatic approach built on a stated neutrality toward the good is some sort of dogmatic authoritarianism. Yet, as we've seen, it becomes its own sort of authoritarianism because of a faulty implicit ontology, the answer to which is necessarily a more adequate one. A full description of this more adequate ontology is beyond the scope of this paper but we will focus on one key element that lies at its heart: constitutive relationality.

The "isolated self" of proceduralism was originally hypothesized to resolve the apparent conflicts between the self-determination of the individual and the needs of the community. But according to its presuppositions, any relation can take place only in an *extrinsic* way; the self is conceived and experienced as *ontologically separate* from the other (even if socially or emotionally attached). The way such a self engages the other is primarily by acts of self-interest, either directly or indirectly. This

views is so much the norm that a peer-reviewed encyclopedia article says that: "Utilitarian approaches in bioethics... are less concerned with public welfare than other vital aspects, such as: (1) debunking the traditional religious views on the sacredness of human beings, the prohibition of abortion, infanticide, and euthanasia... (3) arguing against the use of human rights and human dignity in bioethical discourses..." Gordon, J.-S. [Online publication] "Bioethics." *The Internet Encyclopedia of Philosophy*. <<http://www.iep.utm.edu/bioethic/>> [Consulted: 10/13/2018].

39 If under procedural liberalism we (supposedly) can't say anything substantive about what freedom is (only that it is freedom from coercion), then we speak only about how it *functions*, and finally how it is *regulated*, because "a purely negative freedom will always be encroached upon by the now purely positive – that is, essentially arbitrary – apparatus of regulation." Schindler, D.C. *Freedom from Reality: the Diabolical Character of Modern Liberty*, Notre Dame University Press, Notre Dame, IN, 2017, 361.

40 Lysaught, 2006, *op. cit.*, 112.

is the fundamental reason why bioethical proceduralism tends toward a skepticism regarding moral duties to those who cannot enter into contractual relationships or are not rationally self-interested.

Conversely, to say that relations are *constitutive* means that they are *ontologically intrinsic*, reaching to the inmost depths of the being of the person, and implies that they are not first constructed or contracted but “given,” that they are presupposed in all of a person’s acts, and that he is structurally dependent on others to whom he is constitutively related “in the very independence (creativity, self-determinateness, and the like) of his actions as entailed by his individuality.”⁴¹ *Relationality* and *individuality*, then, are related as poles, not as antagonistic opponents. This classical observation is so elemental that, though rejected for a time by modernity, distinguished postmodern thinkers have come to recognize its unavoidable reality and its necessity for any reflection on human nature:

I think, rather, that there is an original relationship, like that which we have with our parents, with our family, with our neighborhood friends... Or, better said, there is a communal constitution to our existence that we cannot deny... This is a pre-conceptual, pre-theoretical fact and, for this very reason, it is impossible to deconstruct.⁴²

Failing to understand that “constitutive openness to the other is a primordial fact”⁴³ and failing to understand the person as an individual-in-community leads to a notion of autonomy that, Edmund Pellegrino observes, fostered the emergence of the negotiated contract model in which “the notion of a universally applicable set of principles beyond autonomy is irrelevant;” doctor and

patient, for example, “may pursue any course they wish, provided it is mutually agreed upon... It might include active euthanasia, assisted suicide or an advance directive that calls for involuntary or non-voluntary euthanasia.”⁴⁴ Believing that there is a Hobbesian opposition between persons responsive primarily to contractual relations that must be undergirded by the power of the State, rather than a mutual polarity that has its roots in the ontological level, means that relationality is understood only at its subsequent levels, in its social and political manifestations, and thus vulnerable to coercive power.

5.1. Seeking a better autonomy and consensus

The problems of both autonomy and consensus as discussed above emanate from proceduralism’s ontology of freedom: essentially, that one is free when one is untethered. “At the heart of all human action... and, analogously, all human institutions, [there] is a relation between means and ends,”⁴⁵ but proceduralism’s notion of freedom directly depends on the theoretical trivialization of this relationship, beginning with the Sophists, and later characteristic of all forms of utilitarianism. Take the example of a hospital that must reduce expenses to remain economically viable, so that it can remain open (a good end, from any perspective). The dissolution of the relation between ends and means would permit any means of achieving that goal, whether it be installing energy efficient light bulbs or euthanizing patients. The best option is the one that maximizes the desired result and the word “good” has no real meaning other than an “instrumental good” which quickly becomes a mere instrument, strictly *functional* in purpose. This functional regard toward the other is the root of utilitarianism, alienation, and commodification. Purely utilitarian calculation would often tell us that euthanizing patients is not the best means to reduce costs, not because it is inherently wrong or contrary to the concepts of care built into the (increasingly rejected) Hippocratic oath, but merely because it

41 Schindler, D.L. “Homelessness and Market Liberalism: Toward and Economic Culture of Gift and Gratitude.” In: *Wealth, Poverty, and Human Destiny*. ISI Books, Wilmington, DE, 2003, 354.

42 Vattimo, G. and C. Dotolo, *Dios: la posibilidad buena. Un coloquio en el umbral entre filosofía y teología*, Herder, Barcelona, 2012, 57. Translation by author.

43 Prades, J. and M. Cantos. “Postsecularism, Postmodernism and Pluralism. The Contribution of Christian Witness to the “Good Life” in Contemporary Society.” Presentation to be given at the Center for Ethics and Culture Fall Conference, 2018, University of Notre Dame, Notre Dame, IN., [not yet published].

44 Pellegrino, E. “The Four Principles and the Doctor-Patient Relationship.” In: *The Philosophy of Medicine Reborn: A Pellegrino Reader*. University of Notre Dame Press, Notre Dame, IN, 2008, 190.

45 Schindler, D.C. 2017, *op. cit.*, 195.

might bring about messy legal consequences or public backlash.

The inner logic of the procedural paradigm, in its efforts to increase efficiency and to produce materially-conceived “well-being,” fragments and extrinsicizes a person’s relations to others to achieve this false ideal of freedom. Any empirical facts presented within a bioethical debate end up oscillating between “a positivistic understanding of law (hence, what a legislature or court makes them to be) and the self-positing of the individual through freedom understood as abstract choice (and hence, what that individual makes them to be).”⁴⁶ In the above example, not one but two potential ends are mentioned: reducing-costs-by-improving-energy-efficiency and reducing-costs-by-killing-patients. The relationship between means and ends may seem obvious but apparently it is not obvious enough to many today. We must re-learn the truth that means have a determining effect on the end achieved. Regarding the means, there is an intrinsic, participatory relation to the ends; the various means point beyond themselves and in a sense are *pre-supposed* in the end, despite the end’s radical difference in its transcendence of the means.⁴⁷ Regarding the ends, proceduralism’s separation of the means from the end implies that human goods are seen not as actualities that are intrinsically bound both with the nature and destiny of persons, but as pure choices abstracted from the concrete reality of pre-existing relationships.

What does this mean for autonomy and consensus? True autonomy is a form of self-governance, an “internalization of a given *nomos*, a norm, law...[which] becomes an internal, ontological principle of the self (autonomos).”⁴⁸ In proceduralism, one’s autonomy is *ab-solutized*, abstracted from intrinsic participation in the

proper order of the whole and is rather an assertion of power against that order, indeed against all that which exists as other. But when one’s intrinsic constitutive relation to the other is ignored or rejected, maintaining agreement requires some means of extrinsic *control* as guarantor. The only way to maintain autonomy, as the socio-political critique notes, is through subjection to regulation of the State, the external enforceability of the law. David C. Schindler says:

The diabolical irony ought to be clear: autonomy as the rejection of heteronomy, as the self’s power over itself, requires subjection to law if it is to avoid collapsing into impotence. Moreover, law in this context becomes coercive of its very essence because...it ceases to have its roots in an ontological principle of order that can be internally appropriated, and instead can be only an actual rule in relation to which the self surrenders its autonomy;... autonomy and limitless subjection to the coercive force of law imply one another.⁴⁹

Carrying out actions that arise from a purely procedural consensus based on this version of the autonomy of participants almost always devolves into an exercise, not of ethics or justice, but of power. In this respect the only “consensus” that arises privileges the power of the isolated will relating to others extrinsically, rather than the whole person integrated into prior relationships suffused both with duties and responsibilities and with the attraction of truth, beauty, and goodness. Such a consensus is an uneasy, temporary, agreement formed by negotiations that generally leave at least one party feeling dissatisfied, if not victimized.

According to a profound analysis by Javier Prades and Marcos Cantos, “we must realize that human ideals and values do not appear... ‘in a pure state’”⁵⁰ but only as they are made manifest in lived human cultural and religious traditions, realities that were also forgotten when modernity did away with man’s constitutive relationality.

46 Crawford, D. “Recognizing the Roots of Society in the Family, Foundation of Justice.” *Communio* 2007; 34(3): 399.

47 Mahatma Gandhi provides a compelling example of the relation of ends and means: “If I want to deprive you of your watch, I shall certainly have to fight for it; if I want to buy your watch, I shall have to pay you for it; and if I want a gift, I shall have to plead for it, and, according to the means I employ, the watch is stolen property, my own property, or a donation. Thus we see three different results from three different means. Will you still say that means do not matter?” Gandhi, M. *Indian Home Rule*, The Floating Press, Auckland, 2014, 67.

48 Schindler, D.C. 2017, *op. cit.*, 211.

49 *Ibid.*, 213-214.

50 Prades, *op. cit.*

The recognition of one's own values as a natural growth from one's community and tradition become the basis for the recognition of other's values and a true dialogue:

In this way, the existence of other potential traditions of values within the same plural society can be respected and a space can emerge for legitimate debate about their greater or lesser suitability to express the fullness of human life. This approach avoids the imposition of one tradition over another and avoids falling into the relativism of mere cultural juxtaposition. What is promoted here is the virtuous exchange appropriate to a truly plural society in which democracy, as a universal value, is lived out...⁵¹

In the face of multiple claims to truth, the adequate response is not shutting down dialogue that comes from a different perspective, culture, religion, or moral view, through the constraints of formal rationality operating in a vacuum. The sharing of perspectives that constitutes the basis for consensus should indeed include formal rationality, but in order to be fruitful and generative of solidarity, it must be a defense of true freedom and a respect for common human values. True freedom is fundamentally connected to the good and to others, as the human person is intrinsically in relation to both. It is the *priority of the good* that makes freedom ontological: "a reality that is more than merely moral or voluntary insofar as it precedes the deliberate activity of the agent." Moreover, "this priority entails a subordination of the will to what is other, so that a recognition of otherness of a particular sort as *intrinsic* to freedom is a condition for the continuing affirmation of the priority of the good."⁵²

6. Conclusion

Bioethical proceduralism is not only inadequate with regard to freedom, but as we have seen, its methods often subvert the very freedom at which it ultimately aims,

undermining the very values and people that ought to be protected. Seeking to avoid every determinism, it collapses into determinism nonetheless. "Dignity" for an ill child devolves to power of the state and money; the "choice" of euthanasia devolves into a demand that others (objecting doctors and nurses) be deprived of their own rights not to take a life, and into a demand that the ill person allow himself to be killed for a "greater good".

Under bioethical proceduralism, what is good is ultimately what is useful, efficient, convenient and cost-effective. But the problem of the good cannot be confronted from the perspective of a socio-political critique, nor is it merely a moral problem. As Schindler said above, ethical questions, in the end, turn out to be ontological problems that must be dealt with on an ontological level. The reflection on the reality of the human person as a person-in-community, as ontologically related to others, provides a key to moving bioethics away from a coercive disciplinary matrix back to the task it originally sought to take up: building the solidarity necessary to uphold common human values and to protect all people, but especially those with little or no voice of their own, from abuses in the midst of pluralistic society.

In the end, there is no denying the value of procedures or of formal rationality, only a need to recognize their limits and to understand that they are always mediated by "deep, often unarticulated metaphysical assumptions about the ultimate natures of persons and things."⁵³ There is no denial of effective instrumentality, only a recognition that a moralistic or instrumentalist conception of human action is secondary to a fundamentally ontological conception. There is no denial of the aspirations of bioethical debate to a respect for pluralism and for the deepest freedoms of all; only the realization that the intention is not to oppose any of these things but to recover the presence of a richer, deeper notion of autonomy and the other principles, of consensus, of the good, and of freedom.

51 Ibid.

52 Schindler, D.C. 2017 *op. cit.*, 3-4.

53 Hanby, M. [Online publication] "Medicine After the Death of God." *Humanum*. 2013. <<http://humanumreview.com/articles/medicine-after-the-death-of-god>> [Consulted: 10/13/2018].

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