SEVEN

To Be Willing to Kill What for All One Knows Is a Person Is to be Willing to Kill a Person

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Arguments about the morality of research on human embryonic stem cells have centered on a number of recurrent themes, among them the moral status of the embryonic stem cells themselves, the nature of the consent given by those who donate embryos for research, the risks associated with potential clinical applications, the propriety of public funding for this research, the dangers of the commodification of human life, the just distribution of the benefits of the research, and the questionably necessary use of embryonic stem cells if adult stem cells are able to achieve the same results. Beyond doubt, however, the most controversial issue has been that of the moral status of the embryo from which the stem cells are taken.[1] Because the extraction of stem cells from the inner cell mass at the blastocyst stage leads to the destruction of the embryo from which they are taken, the question of the ontological status of the embryo—whether it should be regarded as what I shall call, for the sake of argument, a "person"—is critical.

Of course, this is only likely to be the decisive moral concern for those who take the view that, from the time of fertilization, embryos should be given the same protection from lethal harm as that afforded to children or adults. But even those on the other side, who reject this view, cannot entirely neglect the issue, for any answer to the question of the morality of embryonic stem cell research will incorporate an implicit account of the status of the embryo. And that account, if it denies personhood to the embryo, will be required to determine, among other things, whether the embryo should be

treated with respect and, if so, what practical difference such respect might make: in particular, it will need to clarify whether showing respect to an embryo is compatible with destroying it.

For these reasons, the question of the ontology of the early embryo remains crucial, and not only for those who believe that embryos should be treated as if they are persons. This is especially important to remember at a time when siren voices assure us that the matter has been "settled" or "resolved," so we are free to move onto other things. It was only proper therefore that the House of Lords Select Committee on Stem Cell Research should address this issue in its report on the issues raised by human cloning and stem cell research. This was of particular significance in the British context, because, for the previous decade and more, the matter had been regarded by official bodies as settled under the terms of the Human Fertilisation and Embryology Act 1990.[2] That statute, drawing on the recommendations made in 1984 by the government-appointed Warnock Committee, enshrined the view that the early embryo until fourteen days after fertilization (about the time of the appearance of the primitive streak) was entitled to a special status, albeit not one that gave it absolute protection. The Select Committee, however, rightly aware of the question's centrality to the ethics of stem cell research, devoted a chapter of its report to revisiting the matter. That the noble Lords felt obliged to do so, despite the embryo's status having previously been settled in law, is arguably evidence of some continuing willingness to attend to fundamental moral questions in the British public debate.

Regrettably, however, the committee's treatment of the issue was rather less satisfactory. In this chapter, I will focus on one kind of argument that it considered and leave analysis of its other claims aside. The argument I will examine, which the committee describes in terms of whether the embryo should be given the "benefit of the doubt," is one whose significance I shall maintain has been misunderstood by both its advocates and its critics.[3] Once it is correctly understood, it significantly restructures the nature of the debate and indeed imposes requirements on the arguments against the personhood of the embryo that are considerably stiffer than is usually recognized.

Persons, Doubts, and Benefits

Advocates who invoke the benefit of the doubt usually introduce the argument as a kind of tiebreaker, as a way of reaching a solution if the scores are level. If all the substantive arguments (over twinning, the notion of personhood

as developmental, the relevance of the capacity for consciousness, and so on) have failed to produce a decisive conclusion one way or the other, the embryo should be given the benefit of the doubt. Indeed, the special habitat of the argument seems to be at the end of lists of reasons for attributing personhood to the embryo, where it is pressed into service in order to clinch a case that the earlier arguments may not have settled. The implicit model behind the appeal to the benefit of the doubt is of a balance of probabilities, where the evenly balanced scales will be tipped in favor of the embryo once this argument is added to the pan.

Critics of the argument often also use an unspoken picture of a pair of scales. As an example of this, consider the Select Committee's observations on the subject: "Burden of proof arguments are notoriously hard to resolve. If there were no morally serious reasons for undertaking research, then the mere possibility that the early embryo is a person would be sufficient reason not to do such research. However, if there are morally weighty reasons for doing such research a decision must be reached on the basis of arguments that fall short of proof."[4] They then note that therapies for serious diseases count as morally weighty reasons and that the idea of respect for persons can be invoked on that side of the argument as well. Here also items are being balanced against each other, the "morally weighty" reasons for undertaking research evidently being deemed sufficient to outweigh the "mere possibility" that the early embryo is a person.

It is not entirely easy to reconstruct these brief remarks in the report, but its line of reasoning appears to turn on two claims. The first seems to be that, because burden-of-proof arguments are inconclusive—though the reasons for this are unspecified—we must resort to a balance of probabilities. The second is that, in weighing the different reasons in this balance of probabilities, the mere possibility of the embryo being a person acts as a kind of reducing factor, such that the *possibility* of killing someone should be given a fraction of the weight that would be attributed to *actually* killing someone. Once that is accepted, the possibility of developing therapies for serious and common diseases then outweighs the now rather abstract notion of destroying a possible person.

Both of these claims made by the report are unfounded, for reasons that have a common cause. Moreover, for the same underlying reason, advocates who appeal to the benefit of the doubt also fail to see the force of their own argument. On both sides the force of the possibility that someone might be *killed* is lost, and the consequence is that the standard of proof required is

wrongly calibrated. Both sides assume that the standard of proof required is that of a simple balance of probabilities: for advocates, the benefit of the doubt is used to tip the balance in favor of the embryo, whereas for critics the alleged problems with benefit of the doubt reasoning are used to exclude it as a consideration from the calculation of the balance of probabilities.

If what is at stake is possibly killing a person, three things immediately follow. First, a simple balance of this kind is too low a standard of proof. To see this, consider the kind of proof we would require in other situations when we are not sure if a person is present who might be killed. The supervisor of a demolition team called in to demolish a decaying factory building in which children sometimes played would not be satisfied if he were informed after a search that on the balance of probabilities no child was present. A surgical team trying to resuscitate a patient whose cardiac arrest during surgery left it unclear whether she was dead would not cease from their efforts because on a balance of probabilities she probably was dead. In each case, what would be required would be something like proof beyond reasonable doubt. Similarly, in the case of destructive research on embryos, the standard of proof required is much higher than a mere balance of probabilities: it must be shown beyond reasonable doubt (or something like this) that the embryo is not a person.

Second, in addition to there being the requirement of a heightened standard of proof, the burden of proof also falls on one side, namely, on those who would deny that there is a person present. In each of the two examples just given, the onus is on those who would deny that there is a person present to demonstrate their case. This also applies in the case of research using embryos. Of course, there are morally weighty reasons for wishing to undertake such research, notably the hope of treatments for painful and debilitating illnesses; and given the enormous benefits that allegedly could be gained from it, the temptation is naturally great to want to put the burden of proof on its opponents. Nevertheless, the burden of proof still falls on those who would deny that the embryo is a person. The reason for this is that the embryo has possibly so much more at stake, namely, its life. The value of life may not be put in a balance against the value of developing therapies for serious diseases, because life is protected by the prohibition against killing, a negative prohibition that is always binding, and it cannot be set in a balance against or outweighed by any set of positive goods, however morally desirable they may be. When therefore the Select Committee suggests that the idea of respect for persons includes respect for their health and not just respect

for their (possible) life, it attempts a doctrine of equivalence that is morally untenable.

This point turns on a third, crucial consideration. The fact that the personhood of the embryo is a mere possibility cannot be used as grounds for diminishing, qualifying, or factoring down the weight to be attributed to it when considering the balance of arguments. The reason for this is that, in the words of moral theologian Germain Grisez, "to be willing to kill what for all one knows is a person is to be willing to kill a person."[5] To be willing to participate in the project of destroying an entity for whose personal status some arguments can reasonably be sustained is to be willing to participate in a project that involves killing. Rather than factoring down the moral weight to be given to embryos because of the mere possibility of their personhood, their moral weight should be factored up such that they are regarded as full persons: if, for all one knows, they are persons, they should be treated as persons. The merely possible personhood of the embryo may *seem* abstract or theoretical in comparison with the ostensibly concrete hopes for clinical treatments derived from embryonic stem cell research. But that should not be allowed to mask the true nature of the intention involved in embryo destruction.

Two clarifications of this argument must be made. First, although the proof required is of the order of proof beyond reasonable doubt, it is important to recognize that this is not proof beyond any doubt at all. To say that *for all one knows* an embryo is a person is not to concede that any remote argument, however implausible, is sufficient to require one to treat an embryo as if it is a person. Indeed, to claim that there must be no doubt at all, that it must be absolutely certain that the embryo is not a person before one could conduct research on it, would require a level of certainty that is arguably not even in principle attainable by human beings. Moreover, it would have some bizarre implications. To see this, consider the question whether scientists may carry out lethal research on animals. With regard to apes and other higher primates, there is at least some case (though I do not present the case here) for thinking that they are endowed with sufficient capacities to engender a doubt whether such research on them is justified: on this view, it is not proven beyond doubt that they are not worthy of protection. But if one were to accept that research on apes should be prohibited because we may harbor some uncertainty about their status, why not extend this prohibition to research on dogs? And if dogs, why not rabbits, mice, flies, worms, single-celled bacteria? That is, if absolute certainty beyond any doubt at all is required, perhaps even *Drosophila melanogaster* and *Caenorhabditis elegans* should be set free from the laboratories.

On the other hand, if one believes that the fruit fly and nematode worm may justifiably be experimented on, it is not because no doubt *at all* could be raised about their status (think of the quandaries that might face a Jain biologist), but because one is satisfied beyond *reasonable* doubt that they do not have a status that should protect them from lethal harm and that any substantive arguments for obligations toward them are exceptionally improbable, and therefore may be discounted. That is, doubts must be reasonable, even if it is possible life that is at stake. The alternative, requiring obligations toward life to be upheld even in cases of exceptional unlikelihood, would, as Lisa Sowle Cahill puts it, "require all suburbanites parked in locked garages to check for derelicts under their cars before they leave for work in the morning; and all parents to have every jar of baby food chemically investigated immediately prior to serving."[6]

This shows that the substantive arguments concerning the status of the embryo are not irrelevant. Recognizing the proper standard of proof required in relation to the status of the embryo is not a means of trumping the discussions about embryonic twinning and recombination, the developmental nature of personhood, and so on. Rather, the role of these substantive arguments remains: on the one side, the aim is to demonstrate that beyond reasonable doubt the embryo is not a person; on the other, to show that reasonable doubt does obtain.[7]

The second clarification is that this argument, which claims that the appropriate standard is proof beyond reasonable doubt, should not be confused with the "precautionary principle." This principle, which is widely discussed in relation to environmental planning and other public policy decisions, is invoked with a view to providing tighter safeguards against potentially bad consequences than would be obtained through conventional risk-benefit or cost-benefit analyses. Because the possible adverse consequences of, say, building a nuclear reactor or planting genetically modified crops are so severe, the principle maintains, we should not act unless we can be sure that no harm will be done.

The two approaches do of course bear a superficial similarity: the one presses for a standard of proof beyond reasonable doubt instead of proof on a balance of probabilities, and the other invokes the precautionary principle of not taking action unless no harm will be done in preference to a conventional cost-benefit analysis. This similarity is often thought to license use of the latter approach to model the former. An example of this might be a comparison of the embryo research case with a hypothetical decision whether

to build a road transport system. Those who defend the analogy claim that refusing to research on embryos because of the possibility that embryonic persons might be killed would be like refusing to have a road system because of the possibility that people might be killed. Life involves risk, they urge: without being willing to undergo risk, one will never achieve anything. Moreover, risks have to be quantified, and this involves attributing values to the lives of those who will die. On an ordinary cost-benefit analysis, the expectation that people will be killed is outweighed by the prospective benefits brought by a road system. By contrast, the adoption of a precautionary principle would be inappropriate, inasmuch as it would likely be a "recipe for stasis."[8] By analogy, holding up scientific and medical research because of concerns about proving beyond reasonable doubt the nonpersonhood of the embryo is a way of ensuring that important medical advances will be significantly and unnecessarily hindered.

The analogy, however, does not hold. Aside from its ready empirical assumption that embryonic stem cell research is a necessary means to the desired therapeutic end, it also factors down the deaths of possible embryo persons, failing to recognize that to be willing to kill what for all one knows is a person is to be willing to kill a person, in the way we have already discussed. Perhaps most importantly, it fails to notice the different kind of logic each approach has. The precautionary principle is set within a consequentialist matrix, in which different outcomes are each assigned a value and probabilities are attached to their occurring. Rather than a simple net utility being the criterion, as would be the case in a straightforward cost-benefit analysis, the precautionary principle proposes that, even if a simple overall calculus on balance favored a project, it should be rejected if the disutility of the bad outcomes (however small their probability) were sufficiently great. Equally, rebuttal of the precautionary principle is likely to appeal to consequences, typically taking the form of showing that its adoption would lead to worse outcomes than adopting a standard cost-benefit approach.

The balance of probabilities that I have discussed in relation to the morality of embryo research has a different set of concerns. Here it is not the consequences of different actions that are being weighed against each other, but rather the quality of different arguments. Although superficially it could seem as if a utilitarian calculus lay behind the picture of the weighing scales, the issue is of discerning how much intellectual weight to give to different moral arguments. The beyond-reasonable-doubt standard of proof, together with its corollaries I discussed above, is an effort to determine the level of cogency

arguments on each side must possess if they are to carry the day. Equally, rebutting it requires moral argument, not just a demonstration of the (allegedly) bad consequences of adopting it.

It is also worth noting that, even if one did wish to press the analogy, there is a substantial moral difference between the two cases. To return to the example of the road system, the deaths of road users are at no point directly intended or desired by the planners. Moreover, in no sense can their deaths be said to be necessary to the good functioning of the roads. It would be quite conceivable that one could have a road system in which no one ever died, and indeed engineers go to (greater or lesser) lengths to try to achieve this. In the case of embryo research, by contrast, destroying embryos is the necessary and unavoidable means to the end of obtaining stem cells or doing embryo research. There is no "risk" that they will die. Rather, their deaths are an intrinsic part of the process. Or at least, if their deaths are avoidable, then the objection to embryo research on the grounds of the possible personhood of the embryo falls! The proper analogy would be with designing a road transport system in which an indefinite number of people would be deliberately and unavoidably killed as an intrinsic part of the process of building and operating it.

As should be clear, none of the above considerations determines whether embryos should be treated as if they are persons. The substantive arguments in favor of embryo research may not be able to demonstrate embryonic nonpersonhood beyond reasonable doubt, and the substantive arguments against it may not be able to show that their scruples on behalf of embryos are reasonable. I cannot review here the range of arguments deployed on either side, beyond making some preliminary comments.

First, it is my conviction that the arguments in favor of the personhood of the early embryo certainly are strong enough to sustain a reasonable doubt whether embryos may ever be subjected to lethal research. Indeed, there are good grounds for believing that they are at least as cogent as those favoring a later start for personhood than fertilization, if not more so.[9]

Second, the public determination of whether the case is proven beyond reasonable doubt must make use of some conception of public reasoning.[10] This should not be regarded as something that by definition excludes religious convictions from the public realm. Public reason is not a matter of abstract appeals to putative canons of "full rationality" as constructed by secular norms, but instead the embodied disputation of historical communities

whose commitments sometimes overlap, sometimes diverge. Some arguments that are made from within particular traditions may be readily accessible and appealing to those outside of those traditions, whereas others are only likely to be attractive to those who share the same fundamental vision of the good. What is regarded as beyond reasonable doubt in relation to embryo research is therefore inevitably likely to be contested, but at all events those whose judgments of the matter are informed by religious commitments may not be dismissed as speaking merely "private" languages of no public relevance. Of course, for legal and practical purposes, the issue will need to be finally settled by the procedures a political society lays down for itself, and it may be that conscientious citizens find themselves in fundamental moral opposition to provisions made by the law. In such circumstances, they will do well to recall the traditional natural law declaration that an unjust law is not a law and does not of itself have the power of binding the conscience.

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Notes

1. On the moral issues surrounding embryonic stem cell research, see in general Suzanne Holland, Karen Lebacqz, and Laurie Zoloth, eds., *The Human Embryonic Stem Cell Debate: Science, Ethics and Public Policy* (Cambridge, Mass.: MIT Press, 2001), though note that this book does little to analyze the significance of recent developments in adult and primitive nonembryonic stem cell research.

2. House of Lords Select Committee on Stem Cell Research, *Report from the Select Committee*, HL 83 (London: HMSO, 2002) (available at www.publications.parliament.uk/pa/ld/ldstem.htm) [accessed 10 January 2003]. The committee was set up under the terms of the Human Fertilisation and Embryology (Research Purposes) Regulations 2001. These regulations extended the Human Fertilisation and Embryology Act 1990, the principal U.K. legislation related to infertility treatment and research, so as to permit embryonic stem cell research. In an effort to address the moral concerns raised during the House of Lords debate on the bill, the regulations also required that a committee be established to consider and report on the issues raised by human cloning and stem cell research. That

the committee was set up to consider the morality of the legislation *after* the legislation had been passed raised unavoidable questions about its credibility.

3. The argument is discussed in paragraphs 4.15–17 of the report.

4. Ibid., paragraph 4.16.

5. Germain Grisez, *The Way of the Lord Jesus*, vol. 2: *Living a Christian Life* (Quincy, Ill.: Franciscan Press, 1993), 497.

6. Lisa Sowle Cahill, "The Embryo and the Fetus: New Moral Contexts," *Theological Studies* 54 (1993): 124–42, at 131.

7. The same considerations in principle apply in the case of animals. Although this chapter does not attend to these questions, we should note (1) the implications of the beyond-reasonable-doubt principle may end up encompassing a wider range of nonhuman animals than we may initially find comfortable; (2) the fact that we may be morally required to extend protection beyond the human species is not as such an argument for denying that protection to those entities that are unquestionably of the human species, even if they are not children or full-grown adults.

8. Julian Morris, ed., *Rethinking Risk and the Precautionary Principle* (Oxford: Butterworth-Heinemann, 2000), viii.

9. See further my treatment of stem cell research and the moral status of the embryo in *Human Genetics: Fabricating the Future* (Cleveland: Pilgrim Press, 2002), 30–40. For a recent statement to which I am sympathetic, see David Jones, *Cloning and Stem Cell Research* (London: Linacre Centre, 2001); available at www.linacre.org/stemcell.html [accessed 10 January 2003]. See also the literature cited there.

10. On public reason in a pluralist society, see my *Christianity and Liberal Society* (Oxford: Clarendon Press, 1997), 213–33.