Notre Dame Journal of Law, Ethics & Public Policy

Volume 17
Issue 1 *Symposium on Bioethics*

Article 2

1-1-2012

Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance

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ARTICLES

BIOETHICS TODAY, BIOETHICS TOMORROW: STEM CELL RESEARCH AND THE "DIGNITARIAN ALLIANCE"

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INTRODUCTION

If we take bioethics seriously, then we will think that it is right, indeed essential, to ask a question of the following kind: which (if any) of the technologies now being developed in the biosciences and biomedicine can be legitimately put into practice and with what limitations (if any)? We will think it worth debating the ethical credentials of, say, human cloning (reproductive and non-reproductive), gene therapy, pre-implantation diagnosis, stem cell research, and so on. Even those who think that there is little prospect of achieving a consensus on such questions, or who think that there is something of an inevitability about the advance of technology that promises to serve some perceived human need, will concede some purpose to such ethical reflections. For instance, in his recent book, *Redesigning Humans*,[1] Gregory Stock says:

> We would do well to explore the arguments for and against advanced reproductive technologies not with the extravagant hope of resolving our differences, but with the modest one of clarifying them. We will do well if we can figure out how to come to grips with these differences and balance the opportunities and dangers the technologies embody. The importance of our efforts does not lie in whether we decide to allow such technologies; they will

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1. GREGORY STOCK, REDESIGNING HUMANS (2002).

> arrive anyway. The point is how much they will rend our society in the process.[2]

Bioethics then, just like the law, must settle for something short of regulatory omnipotence. Nevertheless, it is more than a sideshow; and, if the law is to be (bio)ethically informed, there are questions to be asked about how we should proceed and by which principles or values we should be guided.

Speaking some ten years ago, at a symposium on the challenges (both ethical and legal)[3] presented by the rapid developments in modern genetics, Baroness Mary Warnock suggested that the general bioethical question might be put in more than one way:

> Technology has made all kinds of things possible that were impossible, or unimaginable in an earlier age. Ought all these things to be carried into practice? This is the most general ethical question to be asked about genetic engineering, whether of plants, animals or humans. The question may itself take two forms: in the first place, we may ask whether the benefits promised by the practice are outweighed by its possible harms. This is an ethical question posed in strictly utilitarian form . . . . It entails looking into the future, calculating probabilities, and of course evaluating outcomes. "Benefits" and "harm" are not self-evidently identifiable values. Secondly we may ask whether, even if the benefits of the practice seem to outweigh the dangers, it nevertheless so outrages our sense of justice or of rights or of human decency that it should be prohibited whatever the advantages.[4]

Generalising and simplifying this guidance, we might say that bioethics is presented with a choice of basic approaches. One approach, in line with utilitarianism, is to subject new developments (or proposed practices) to a harm-benefit assessment; if that assessment indicates a balance of harm over benefit, we should definitely not proceed (and the law should put in place

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2. *Id.* at 129.

3. Should this be taken to imply a separation of the ethical and the legal, let me note two correctives. First, as a conceptual matter, I would regard the legal as a species of the moral (ethical). *See* Deryck Beyleveld & Roger Brownsword, *Law as a Moral Judgment vs. Law as the Rules of the Powerful*, 28 AM. J. JURIS. 79 (1983) (quoting DERYCK BEYLEVELD, LAW AS A MORAL JUDGMENT (Sheffield Academic Press 1994) (1986)). Secondly, as an empirical matter, any positive law that is out of line with general ethical commitments is unlikely to be effective.

4. Baroness Mary Warnock, *Philosophy and Ethics, in* GENETIC ENGINEERING—THE NEW CHALLENGE 67 (C. Cookson et al. eds., 1993).

whatever prohibitions are appropriate); but if the assessment indicates a balance of benefit over harm, then the particular development or practice should be regarded as ethically clean (and the law should take up a permissive position). Alternatively, we should ask whether a new development (or proposed practice) "outrages our sense of justice or of rights or of human decency . . . ."[5] If it does not, we should pronounce the particular development or practice ethically clean; but, if we are so outraged, we should reject the proposal even if it means that we will have to forego certain perceived benefits. Such a bifurcation, however, might seem to be too stark. On the utilitarian side, there are important differences, for example, between those who operate with short-term rather than medium-term or long-term time-frames; and, on the non-utilitarian side, a number of quite different deontological theories might find a home somewhere in the realm of justice, rights, or human decency (each of which is a recognisable department of the Kingdom of Ends). Moreover, are there not theoretical strategies for blending utilitarian and deontological perspectives—for example, in the way that some interpret the hugely influential value framework for bioethics constructed by Tom Beauchamp and James Childress[6]—or pluralistic approaches that belie any simple bifurcation between utilitarian and deontological perspectives?

Allowing that bioethics is not bifurcated in quite such straightforward terms, there is nevertheless something in the idea that new technologies tend to provoke debates in which promoters of the particular technology implicitly appeal to utilitarian considerations (especially on the benefit side of the calculation) while their opponents invoke deontological criteria of the kind represented by respect for justice, rights, or human decency. Of course, where the harms associated with a technology transparently outweigh any possible benefits, the proposal will not get to first base—such is the case, for example, in the current state of the art, with human reproductive cloning. However, if the technology improved to the point where reproductive cloning in humans was perfectly safe and reliable, and where there were no discernible "harms" to offset the "benefits" (such as psychological harm in families), whatever opposition remained would come from the side of those concerned with justice, rights, or human decency.

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5. *Id.*

6. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (Oxford Univ. Press 2001) (1979). For an indication of the influence of this work, see, for example, RAANAN GILLON, PHILOSOPHICAL MEDICAL ETHICS (1985).

Now, while bioethics has been in its infancy, the overwhelming concern of the non-utilitarians has been to assert the importance of individual human rights, particularly individual rights to autonomy and privacy. Watershed declarations, such as those at Nuremburg and Helsinki, underline that the rights of individuals must not be subordinated to the supposed advance of science or medicine or to the interests of society; and, in both research and clinical settings, the importance of informed consent (reflecting the right of autonomous choice) has been loudly proclaimed.[7] For those who have grown up to take bioethics seriously, it will be natural enough to think that we should also take rights seriously. And, if we think that respect for human rights follows from respect for human dignity, then we will go back to this dignitarian premise when we make our last stand against the utilitarians. This leads us to the principal claim in this paper which is that the configuration of bioethics is undergoing a significant change; specifically, that, in place of a two-sided contest between utilitarian and human rights perspectives, we are moving towards a three-cornered contest in which these founding protagonists are joined by a new "dignitarian alliance." When the human rights perspective is underpinned by the principle of respect for human dignity, it might seem to be inappropriate to use the language of human dignity to describe this new alliance on the bioethical block. However, no other term will do; for, quite simply, the protection of human dignity is the unifying value within the alliance.

In Part I of the paper, I will sketch two accounts of human dignity, so to speak, two deontologies of human dignity. Whilst one account (human dignity as empowerment) underlies the human rights perspective, which has been so important in the formative years of bioethics, the other (human dignity as constraint) is the gathering point for the dignitarian alliance. The reason why the latter is an important entrant into the bioethical arena is that it challenges the wisdom of both utilitarianism and dignity-based human rights. Expressing the third perspective in communitarian terms, we would say that human dignity is a good which must not be compromised by our actions or practices and that any action or practice that compromises the good is unethical irrespective of welfare-maximising consequences (contrary to utilitarianism) and regardless of the informed consent of the participants (contrary to human rights thinking). Thus, even if, say, human reproductive cloning could be supported by utilitarians

7. *See, e.g.*, RUTH R. FADEN & TOM BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986).

and tolerated by human rights theorists, the dignitarian alliance might yet contend that this is off limits as compromising human dignity.

Perhaps the emergence of the dignitarian alliance owes something, as Gregory Stock puts it, to "European sensitivities,"[8] in which case it might be credible only within certain bioethical circles. Moreover, so long as bioethics is a secular discipline, this particular articulation of human dignity might yet fall away as quickly as it has asserted itself. After all, it is a mere thirty years since philosophers could write that human dignity "seems to have suffered the fate of notions such as virtue and honor, by simply fading into the past."[9] Nevertheless, there are at least two reasons for thinking otherwise. One reason is that neither utilitarian nor human rights perspectives give much support to the interests of conservatism, constancy, and stability. When human dignity as the underpinning of human rights has acted as such a dynamic and progressive force for change, it might seem incongruous to enlist this same idea in defence of the status quo. Yet, as the pace of biotechnology accelerates, we should not underrate the felt need to find a way of registering our concern that we should at least have the opportunity to hang on to those parts of the human condition that are familiar and reassuringly "human." Rather obviously, the notion of "human dignity" fits this particular bill. The other reason for thinking that the dignitarian alliance might be in for the longer run is that there are some forms of biotechnology that impact directly on humans but which are not readily engaged by the human rights perspective. One such example is research on human embryos; and, not surprisingly, therefore, we find the dignitarian alliance pitted against the utilitarians in the debates about stem cell research that are now reverberating around the world.

In Part II of the paper, I will focus specifically on the debate about human embryonic stem cell research that has recently taken place in the United Kingdom, culminating in a Report from a specially constituted House of Lords Select Committee.[10] Broadly speaking, the Select Committee endorsed the Government's approach to the regulated facilitation of stem cell research; and, not surprisingly, the Government has recently

8. *See* STOCK, *supra* note 1, at 13.

9. Michael Pritchard, *Human Dignity and Justice*, 82 ETHICS 299, 299 (1972).

10. HOUSE OF LORDS SELECT COMM., REPORT ON STEM CELL RESEARCH, H.L. PAPER 83(i) (Report), and 83(ii) (Evidence) (London: HMSO, Feb. 27, 2002) [hereinafter STEM CELL REPORT].

responded to the Report in positive terms.[11] In the event, the United Kingdom now has an explicitly permissive legal framework for licensing human embryonic stem cell research backed by a government that is committed to supporting the biosciences and by a broad band of public and bioethical opinion. Indeed, were it not for the emergence of the dignitarian alliance, it would be difficult for opponents of these permissive moves to find a peg on which to hang their objections.

I. Two Accounts of Human Dignity

Human dignity is an elusive concept, used in many senses by moral and political philosophers.[12] In bioethical debates as they are now shaping up, however, it is an idea that appears in two very different roles, in the one case acting in *support* of individual autonomy (human dignity as empowerment) and, in the other case, acting as a *constraint* on autonomy (human dignity as constraint).[13] For instance, in debates about "death with dignity," we find the need to respect human dignity being voiced on both sides of the argument, both by those who advocate more permissive legal frameworks as well as by those who oppose any relaxation in the law. As Mohammed Bedjaoui, President of the International Court of Justice, has commented:

> [A] legal framework for potential new practices or those already engaged in which concern the human body is absolutely essential in that it protects man in his freedom and dignity. But it is by no means an easy task . . . .
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> Take, for example, the concept of . . . "human dignity." It is an expression which seems simple: one immediately apprehends its prospective import, if not its exact meaning. But, paradoxically, it is also an expression full of fragility, for in the name of the same argument of "human dignity" some refute the legitimacy of euthanasia, whilst others claim it as the ultimate right of those who wish to "die in dignity"![14]

We can try to disentangle and clarify these two approaches to human dignity by taking one step at a time. First, we can identify

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11. Dep't of Health, Government Response to the House of Lords Select Committee Report on Stem Cell Research, 2002, Cm. 5561.

12. *See* Ronald Dworkin, Life's Dominion 233–37 (1993).

13. The terminology here comes from Deryck Beyleveld & Roger Brownsword, Human Dignity in Bioethics and Biolaw (2001).

14. Mohammed Bedjaoui, Address Before the International Bioethics Committee of UNESCO (Sept. 1995), *in* U.N. ESCOR Int'l Bioethics Comm., 3d Sess., vol. I, at 137, 144, U.N. Doc. DRG.96/WS/8 (1995).

the salient features of human dignity as empowerment; secondly, we can do the same with human dignity as constraint; thirdly we can point to the contrast between human dignity, on the one hand, as a distinctive characteristic of individual persons that speaks to their moral entitlement and obligation and, on the other hand, as a collective good to be respected by a community; fourthly, we can illustrate the obvious tension between these approaches by discussing the French dwarf-throwing case (lancer de nain); and, fifthly, before returning these approaches to the larger bioethical scene, we can consider the possibility of a degree of concord between the two deontologies.

A. *Human Dignity as Empowerment*

The conception of human dignity as empowerment is very closely linked with modern human rights thinking. In particular, human dignity is explicitly declared to be one of the foundational ideas in the Universal Declaration of Human Rights (1948), and its partner Covenants on Economic, Social and Cultural Rights (1966), and on Civil and Political Rights (1966). Thus, the Preamble to each of these instruments provides that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[;]"[15] and Article 1 of the Universal Declaration famously proclaims that "[a]ll human beings are born free and equal in dignity and rights."[16] That is to say, each and every human being has inherent dignity; it is this *inherent* dignity that grounds (or accounts for) the possession of *inalienable* human rights; and, because all humans have dignity, they hold rights equally. So understood, the injunction to respect human dignity is much more than a demand that we commonly make in contexts where we detect demeaning or degrading treatment, or where we are trying to give weight to an interest in privacy, it is the infrastructure on which the entire superstructure of human rights is constructed.[17]

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15. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., preamble, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, at preamble (opened for signature Dec. 16, 1966, entered into force Jan. 3, 1976); Covenant on Civil and Political Rights, 999 U.N.T.S. 171, at preamble (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976).

16. Universal Declaration, *supra* note 15, art. 1.

17. See ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 143–49 nn.22–39 (1993), for examples of the recurrent use of human dignity in international human rights declarations, covenants, conventions, and resolutions.

If the inherent dignity of humans is the justifying reason for the possession of human rights, what is it precisely that dignity connotes? To say that humans have dignity, meaning that humans have a value, simply by virtue of being members of the human species will not convince even fellow humans. For, any attempt to privilege the members of a particular species, including the members of the human species, merely by virtue of their species-membership will attract the charge of "speciesism"—such a response is arbitrary and it plainly will not do. If humans have a value, it must be for a better reason than this. But, if our ethics is strictly secular, what better reason can we offer? The English bioethicist, John Harris, has famously suggested that humans qua persons are distinctive in having the capacity to value their own existence.[18] This implies the following linkage between dignity as the basis of rights and, say, the right to life:

(i) Each person has dignity in the sense that he or she has the capacity to make a judgment about the value of his or her existence.
(ii) Exercising this capacity (as it were, expressing this dignity), at any particular time, he or she will have a view about whether life is preferable to death.
(iii) In order to respect the will or the preferences of such persons, we must respect the human right to life (meaning that we should not terminate human life where this would be contrary to the will or preference of the person concerned).

Writing about euthanasia, Harris generalises this in the language of autonomy:

> The point of autonomy, the point of choosing and having the freedom to choose between competing conceptions of how, and indeed why, to live, is simply that it is only thus that our lives become in any real sense our own. The value of our lives is the value we give to our lives. And we do this, so far as this is possible at all, by shaping our lives for ourselves. Our own choices, decisions and preferences help to make us what we are, for each helps us to confirm and modify our own character and enables us to develop and to understand ourselves. So autonomy, as the ability and the freedom to make the choices that shape our lives, is quite crucial in giving to each life its own special and peculiar value.[19]

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18. *See, e.g.*, JOHN HARRIS, THE VALUE OF LIFE (1985).

19. John Harris, *Euthanasia and the Value of Life*, *in* EUTHANASIA EXAMINED 6, 11 (John Keown ed., 1995).

With this kind of momentum, we can move rapidly from the underlying idea of respect for human dignity to the familiar claims made for autonomy and informed choice. Nevertheless, all is not well. Humans, let us concede, are different from rocks and stones; humans have the capacity to value their existence; they have preferences; and they have the capacity to make free and informed choices. When we are throwing pebbles on a beach, we need not worry whether we are acting against their preferences or interfering with their purposes, because quite simply they have none. When we hurl humans around, though, we might well be so interfering; and, if hurling gets to the point of being life-threatening, we might be jeopardising the very existence of these persons (when the continuation of their existence is something that they value). So, dignity, in the sense of such capacities, distinguishes humans from inanimate objects and, quite probably, from most other non-human living things. However, we are still some way short of seeing how human dignity justifies human rights in anything more than a limited way.

If the reason why I have a set of rights that (in the name of autonomy) protects my choices is because I have human dignity, and if human dignity simply refers to my capacity to make my own choices, then the form of this justification seems to be that if I have the capacity to do x, and I want to do x, then I have the right to do x. Fairly obviously, though, this does not look very promising—for, if this form of justification is valid, my capacity to do x, where x signifies my capacity (say) to kick or kill those whom I dislike (rather than my capacity to make my own decisions), entails a right to do so. A better bet perhaps is to say that, if we have the capacity to make our own choices, and if we value exercising that capacity, then human rights centred on the protection of autonomy fit the bill. Or, to put this slightly differently, if our disposition is to make our own choices then we will prefer a politico-legal framework that is geared towards respecting autonomous decision-makers and their decisions, which, broadly speaking, is precisely what human rights regimes aspire to do.

Let us suppose that there is a symbiosis between human dignity as empowerment and human rights such that, *if we accept* that human dignity should be respected, it follows that we should accept human rights. The former makes a triple underlying demand: that one's capacity for making one's own choices should be recognised; that the choices one freely makes should be respected; and that the need for a supportive context for autonomous decision-making should be appreciated and acted upon. The latter then translates these underlying demands into

entitlements that are due to each human as of right. Nevertheless, no matter how many times we repeat the mantra that human rights are based on human dignity, the latter is not yet a complete justification for the former and our problems are far from over. In particular, this model of human dignity is vulnerable in two respects.

First, the more that we emphasise that human dignity relates to the capacity to make one's own decisions or one's own informed choices or the like, the less compelling it becomes to present the rights built on this base as *human* rights. If the paradigm within this approach is a human with the relevant capacities in a developed form, including the capacity to operate the rights constructed on the dignity base, then many born humans (young and old alike) will be excluded; and the unborn will also be excluded. This does not mean that human dignity as empowerment has no resource to protect the interests of such excluded humans but the protection cannot be in the form of a direct right. In other words, any protective argument will have to be constructed indirectly and any "rights" held will be enjoyed only in a secondary sense.

Secondly, if human dignity justifies human rights *only if we accept that the decision-making capacity of others should be respected,* there is no answer to the amoralist who sees no reason, period, why favourable account should be taken of the interests of others. What can we say to the amoralist? To be sure, we can appeal to the amoralist's prudential interests, pointing out that we are alike in relevant respects; that we each have the capacity and desire to make our own choices and so on; and that there has to be mutual respect and some degree of co-operation otherwise a context for autonomous life will not be viable and available to either of us. However, although this might be true and persuasive in many places at many times, it is hardly an argument that meets the standards of rational necessity.[20] If we are to make any progress with this philosophical challenge, we need to fix on the internal logic of being an agent.[21] The amoralist can

20. But, for a particularly interesting argument running from self-interested longer term utility to moral reason, see DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

21. By an agent, I simply mean a being (whether human, modified human, or definitely non-human) having the developed capacity for free and purposive action. If we can believe anything, we can believe that adult humans generally fit this description but, in principle, the category of agency might be instantiated by others (provided that they are beings with the relevant capacities). It is the capacity for free and purposive action, for making one's own independent decisions and choices, that equates to the dignity of agents (and humans insofar as they are agents).

hardly deny being an agent because, ex hypothesi, a choice has been made to disengage from, or disbelieve in, the moral standpoint and the moral life. Elsewhere, relying on the work of the Chicago moral philosopher, Alan Gewirth, I have suggested that agency does entail moral reason and, with that, an obligation to take favourable account of the essential interests of fellow agents.[22] This is not the place to rehearse these complex and contested arguments. Suffice it to say that, in my view, if human dignity as empowerment is to justify a set of rights of the kind associated with human rights, its best chance of doing so is by changing the base to agency rather than humanity and then following the Gewirthian line of argument from agency.[23]

B. *Human Dignity as Constraint*

Philippe Séguin, President of the National Assembly of the French Republic, remarked in the mid-1990s that the trend towards the enactment of bioethics laws (such as the three French Acts on bioethics of July 1994), "illustrates a growing awareness around the world that legislators must, despite the difficulties, act to ensure that *science develops with respect for human dignity and fundamental human rights,* and in line with national democratic traditions."[24]

This trend is further illustrated by, for example, the Preamble to the Council of Europe's Convention on Human Rights and Biomedicine,[25] which requires its signatories to resolve "to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine."[26] Similarly,

22. Seminally, see ALAN GEWIRTH, REASON AND MORALITY (1978); and for my own reliance on Gewirthian theory, see, for example, Beyleveld & Brownsword, *supra* note 3, at 79.

23. For Gewirth's own most explicit account of the relationship between human dignity and his argument from agency, see Alan Gewirth, *Human Dignity as the Basis of Rights, in* THE CONSTITUTION OF RIGHTS 10 (Michael J. Meyer & William A. Parent eds., 1992).

24. Philippe Séguin, Address Before the International Bioethics Committee (Sept. 1995), *in* U.N. ESCOR Int'l Bioethics Comm., 3d Sess., vol. I, at 119, U.N. Doc. DRG.96/WS/8 (1995).

25. This Convention is sometimes referred to as "the Bioethics Convention." Its full title is Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, 36 I.L.M. 1051, *available at* http://conventions.coe.int/Treaty/EN/CadreListe Traites.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy) [hereinafter Bioethics Convention].

26. *Id.* at Preamble.

the Preamble to UNESCO's Universal Declaration on the Human Genome and Human Rights,[27] states that while

> research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole . . . [it is imperative] . . . that such research should fully respect human dignity, freedom and human rights.[28]

Even in the EC Directive on the Legal Protection of Biotechnological Inventions[29] (which deals *inter alia* with the vexed question of the patentability of biological material, including copies of human gene sequences), the need for patent law to respect dignity is emphasised—Recital 16, for example, proclaiming that "patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person."[30]

Insofar as these ringing declarations in favour of human dignity simply reinforce the demand that human rights should be respected, they say little that is new. However, it is in these most recent appeals to human dignity that we find the new turn in the rhetoric of bioethics, specifically by reliance on human dignity as constraint.

In modern European bioethics, human dignity is articulated in a way that appeals to a coalition of Kantians, Catholics, and communitarians.[31] In fact, both interpretations—human dignity as empowerment and human dignity as constraint—can claim to

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27. U.N. ESCO's Universal Declaration of the Human Genome and Human Rights, Nov. 11, 1997 [hereinafter Declaration of Human Rights]. This Declaration, adopted unanimously at the 29th Session of the General Conference on November 11, 1997, was the result of more than four years' work carried out by the International Bioethics Committee of UNESCO. On December 9, 1998, the United Nations General Assembly adopted Resolution A/RES/53/152 endorsing the Declaration. *See* G.A. Res. 53/152, U.N. GAOR, 53d Sess., U.N. Doc. A/RES/53/152 (1998).

28. Declaration of Human Rights, *supra* note 27.

29. Council Directive 98/44, art. 189b; 1998 O.J. (L 213), 30.7.98, 213.

30. *Id.* Recital 16; *see also id.* Recital 38, which provides:

> Whereas the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to *ordre public* and morality; whereas this list obviously cannot presume to be exhaustive; whereas processes, the uses of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability.

Id.

31. *See generally* 1 JACOB RENDTORFF & PETER KEMP, BASIC ETHICAL PRINCIPLES IN EUROPEAN BIOETHICS AND BIOLAW (1999).

be rooted in the seminal writing of Immanuel Kant. For, in Kant's work, we find not only the idea that humans have intrinsic dignity (which suggests a conception of human dignity as empowerment, albeit duty-driven rather than rights-driven)[32] but also that human dignity has no price and that humans owe themselves a duty of self-esteem (which might suggest a conception of human dignity as constraint). In *The Metaphysics of Morals*, Kant collects together the strands of his thinking as follows:

> Every human being has a legitimate claim to respect from his fellow human beings and is *in turn* bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being . . . but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all *things*. But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being.[33]

In these much-quoted remarks, modern writers can (and do purport to) find support for a variety of supposed applications of Kantian morality, not just in practical matters generally, but specifically within the fields of bio-science and bio-commerce.[34] For, Kant's remarks, if taken literally, are an open invitation to claim that commercialisation of the human body is an affront to dignity (by putting a price on something that is beyond price).

However, commodification of the human body—whether in the form of commerce in human organs or tissue, prostitution, surrogacy for profit, or patenting human genes—is just one of a number of practices that are regularly cited as instances of human dignity being compromised. Typically, human dignity as constraint also condemns sex selection and positive (eugenic)

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32. For the significance of this distinction, see Deryck Beyleveld & Roger Brownsword, *Human Dignity, Human Rights, and Human Genetics*, *in* HUMAN GENETICS AND THE LAW: REGULATING A REVOLUTION 69 (Roger Brownsword et al. eds., 1998), and BEYLEVELD & BROWNSWORD, *supra* note 13.

33. IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary Gregor ed., trans., Cambridge Univ. Press 1996) (1797).

34. *See, e.g.*, Werner Wolbert, *The Kantian Formula of Human Dignity and its Implications for Bioethics*, 4 HUM. REPROD. & GENETIC ETHICS 18 (1998).

gene selection, germ-line gene therapy, embryo research and abortion, euthanasia and assisted suicide, genetic discrimination, and (perhaps top of its current list) human reproductive cloning. The list, though, is hardly closed; and there surely will be additions as technology opens up new bio-options and opportunities.

If we think that human dignity as empowerment might have some difficulty with the amoralist, the same is true of human dignity as constraint. Putting non-secular arguments to one side, the dignitarian alliance effectively has only two moves that it can make. One move is to resurrect the Kantian transcendental argument for the categorical imperative. If this works, we arrive at a duty-driven moral theory, including duties to the self, which is centred on rational beings with a will as paradigmatic moral subjects.[35] The amoralist, especially if a professional philosopher, is unlikely to be impressed. The other move is to declare the constraints as the entry conditions for group membership—but the snag with this is that the amoralist is not interested in joining anyway.

C. *Two Reference Points for Human Dignity*

When we order our thinking about human dignity, we can fix on two different reference points. One reference point is the idea that human dignity speaks to what is special or specific about humans, that is to say, what is intrinsically and universally distinctive about humans. As Francis Fukuyama has recently put it, the demand made in the name of human dignity is one for equal recognition which implies "that when we strip all of a person's contingent and accidental characteristics away, there remains some essential human quality underneath that is worthy of a certain minimum level of respect . . . ."[36] This reference point is to be contrasted with the idea that human dignity speaks less to what is special about humans qua humans and more to what is special about a particular community's idea of civilised life and the concomitant commitments of its members. Here, appeals to human dignity draw on what is distinctively valued concerning human social existence in a particular community—indeed, on the values and vision that distinguish the community

35. By limiting moral agency to a particular class of humans (rational beings with a will) rather than humans as such, this view runs into the same difficulty as "human dignity as empowerment."

36. FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 149 (2002). According to Fukuyama, although "many would list human reason and human moral choice as the most important unique human characteristics that give our species dignity, [Fukuyama] would argue that possession of the full human emotional gamut is at least as important, if not more so." *Id.* at 169.

as the particular community that it is and relative to which the community's members take their collective and individual identity. In principle, each starting point has the scope for both human dignity as empowerment as well as human dignity as constraint. In practice, though, whereas the former tends to be closely associated with human rights movements aimed at giving individuals the opportunity to flourish as self-determining authors of their own destinies, the latter (as expressed by the dignitarian alliance) combines a (Kantian) view of what is distinctive about humans (their dignity) with views about what defines life as civilised (and, thus, respectful of human dignity) in a particular community.

D. *The Tension Between the Rival Approaches: The Case of the French Dwarfs*

We do not need to look very long to find examples of the potential tension between human dignity as empowerment and human dignity as constraint.[37] For instance, in the famous French dwarf-throwing ("lancer de nain") case,[38] the Conseil d'Etat, having affirmed that respect for human dignity is one of the constituents of ordre public, confirmed a municipal police power to prohibit any spectacle that represented a threat to such respect. Accordingly, it was held that, where police powers had been exercised in Morsang-sur-Orge and Aix-en-Provence to ban dwarf-throwing in local clubs, such steps were lawfully taken in order to secure respect for human dignity and ordre public. However, the legality of the bans was challenged by, among others, one of the dwarfs, who argued that he freely participated in the activity, that the work brought him a monthly wage (as well

37. *Compare* David Feldman, Human Dignity as a Legal Value: Part I, 16 Pub. L. 682, 685 (1999) (Eng.), where it is rightly observed that human dignity can cut both ways:

> [W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole . . . . The quest for human dignity may subvert rather than enhance choice . . . . Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword.

Id.

38. *Ville d'Aix-en-Provence*, 1996 Dalloz 177 (Conseil d'Etat) (with annotation by Gilles Lebreton); *Cne de Morsang-sur-Orge*, 1995 Dalloz 257 (Conseil d'Etat).

as allowing him to move in professional circles) and that, if dwarf-throwing was banned, he would find himself unemployed again. To this, the Conseil d'Etat responded that the dwarf compromised his own dignity by allowing himself to be used as a projectile, as a mere thing, and that no such concession could be allowed.[39]

On the one side, the dwarfs were relying on the conception of human dignity as empowerment. For the dwarfs, the central issue was whether others were acting against their (the dwarfs') will. Their argument was that they were *not* being treated as mere things; others were not disregarding their capacity to control the situation. It was only to the extent that the dwarfs freely chose to participate that the activities took place. Moreover, from the dwarfs' viewpoint, to be deprived of their status as employed persons was to undermine the conditions in which they experienced a sense of their own dignity. So interpreted, it was the well-meaning paternalism of the Conseil, rather than the actions of the dwarf-throwers, that represented a threat to the dignity of the dwarfs.

On the other side, the Conseil d'Etat was operating with a conception of human dignity as constraint. Central to this conception is the idea that the dwarfs might compromise *their own* dignity and/or, with that, the dignity of fellow humans as understood in contemporary France. This is the idea of human dignity as an overriding value (whether grounded in individual humans or in groups of humans), a value to be respected by all members of human society. On this view, the fact that the dwarf-throwers did not intend to demean or degrade the dwarfs, or that the dwarfs freely consented to their participation, is immaterial: ordre public (including respect for human dignity) sets limits to autonomy—certain expressions of free choice are, quite simply, out of bounds. As for undermining the conditions in which the dwarfs recovered a sense of self-esteem, presumably the Conseil judged that this must be a case of false consciousness; for, surely, no authentic sense of self-esteem could be derived from participation in dwarf-throwing when the activity could not stand alongside respect for human dignity.

39. *See* Marie-Christine Rouault, *L'interdiction Par un Maire de L'attraction Dite de Lancer de Nain*, 11 LES PETITES AFFICHES 30, 32 (Jan. 24, 1996). For reflections on the case, with dignity being interpreted as the essence of humanity, see B. Edelman, *La Dignité de la Personne Humaine, un Concept Nouveau*, RECUEIL DALLOZ, 23e CAHIER, CHRONIQUE, 185, 187–88 (1997).

E. *Might There Be a Concord?*

Human dignity as empowerment protects the making of choices. Exercising their dignity, in this sense, autonomous agents may decide upon a policy of individual or group restraint. They may choose, for example, not to take advantage of some or all of the available biotechnologies. Equally, they may decide that, say, dwarf-throwing, bull-fighting, and fox-hunting are not to their taste and they may agree that such "sports" should not be permitted in the zones over which they have control. If the zone in question amounts to a nation state, then the process by which such a choice is expressed and the terms on which majority choices can bind minority dissenters must be compliant with an autonomy-centred framework of human rights.

If a community guided by human dignity as empowerment makes choices that mimic another community's understanding of the requirements of human dignity as constraint, there will be some degree of practical correspondence between the bioethical standards that are accepted and applied in each society. For example, in both societies, it might be accepted that no steps should be taken to screen embryos in order to select for a desirable genetic make-up. Despite such surface similarity, however, there is a fundamental difference between these two communities. In the community guided by human dignity as empowerment, the background belief is that, other things being equal, screening embryos is ethically permissible and that a choice to screen is no more or less right than a choice not to screen, and vice versa. The fact that this particular community has elected not to screen is a particular expression of the dignity of its members for the time being, but it is a reversible decision. On at least three points, the background belief system of the community guided by human dignity as constraint is radically different. First, the function of human dignity is not to emphasise the availability of choice but the fact that, where human dignity comes into play, there is no choice—the conduct in question is not optional. Secondly, if human dignity dictates that embryos should not be screened, then those communities that permit screening have either misinterpreted what human dignity requires or (as in the empowerment communities) made a fundamental error as to the function and place of human dignity. In both cases, human dignity is being compromised. Thirdly, the standards set by human dignity are not reversible; the whole point is that human dignity constrains autonomy.

Allowing that there may be an occasional correspondence between communities that adhere to these different approaches

to human dignity, is there not also a deeper similarity in that it is "acceptance" that ultimately holds a particular approach in place? Certainly, if we reject the possibility of either approach being demonstrated to be correct as a matter of rational necessity (of the kind that Gewirthians on the one side and Kantians on the other might argue for), we are left with acceptance as the epistemological baseline. In the community guided by human dignity as empowerment, it is accepted that the capacity for individual choice matters and that it should be respected where this is compatible with respect for the like capacities of others. By contrast, in the community guided by human dignity as constraint, it is accepted that there is a duty to respect a set of values encapsulated by the notion of human dignity. In this sense, then, it is true that human dignity is important only so long as it is accepted as such; and, indeed, there could be fundamental conversions as communities switch their dignitarian belief systems. For our purposes, though, this is not a line of inquiry that need be pursued any further. It is enough to recognise that the two cultures of human dignity might converge from time to time, that there might be occasional concords, and that on practical bioethics they are not always destined to disagree. Having said this, the underlying differences between these approaches puts them on a course for conflict and it is this potential for disagreement that makes the emergence of the dignitarian alliance a significant event for bioethical debates.

F. *Taking Stock*

Briefly, let us take stock by putting these rival views about human dignity back into the larger picture. As indicated in my introductory remarks, current thinking in bioethics is dominated by three broad perspectives. These are:

- utilitarian cost/benefit thinking;
- the human rights perspective (grounded on human dignity and emphasising the importance of individual autonomy and choice); and
- various rights-restricting, duty-based, appeals to human dignity (as articulated by a "new dignitarian" alliance, especially so in Europe).

To the extent that the recent reassertion of the importance of respect for human dignity is simply a more pronounced articulation of the basis of human rights (as seems to be the case with human dignity as empowerment), bioethics remains a straight contest between the utilitarian and human rights perspectives. However, to the extent that a new dignitarian alliance is forming around the idea of the duty not to compromise human dignity,

an important new perspective is brought into play. Moreover, this third perspective creates a genuinely triangular contest because it is as much opposed to utilitarian consequentialism as it is to the prioritisation of individual autonomy. It is against this setting that we can turn to the debate about the law and ethics concerning human embryonic stem cell research.

II. HUMAN EMBRYONIC STEM CELLS

Great claims are being made for the therapeutic and drug development potential of human embryonic stem cells (hES cells) and their derivatives. We are told that we are standing on the cusp of a medical revolution—if only the law will permit the necessary research on human embryos to be carried out. Recently, the law relating to embryo research in the United Kingdom has been widened precisely in order to allow for hES cell research to be licensed. This extension of the law invites criticisms from most other parts of Europe and from many corners of the world. It has even been said by Lord Alton, one of the leading opponents of embryo research in England, that "it is impossible not to compare the seriousness with which cloning has been confronted in the USA with the shoddy efforts to allow it in by the back door in our country."[40] So, how did the United Kingdom arrive at its present regulatory position and does it have an ethically defensible view? In particular, how can it defend itself against the charge that the destruction of human embryos is unethical?

We can deal with these questions in five stages. First, the regulatory scene in the United Kingdom needs to be sketched, before going on to describe how the law has been extended. This will take us to the principal objections argued against extending the law, one of which is the fundamental ethical objection (that it is wrong to destroy an embryo) upon which we can then focus. Finally, we can review the position taken by the Select Committee with regard to this vexed ethical question.

A. *Setting the Scene*

The regulatory story begins in the United Kingdom with the Report of the Committee of Inquiry into Human Fertilisation and Embryology (the Warnock Report).[41] Controversially, Warnock took the view that research on human embryos was morally permissible; and some members of the Committee (in fact, just a

40. Lord Alton, *Immoral and Misguided*, HOUSE MAG., June 17, 2002, at 21.
41. 1984, Cmnd. 9314.

majority) were prepared, even then, to sanction the creation of embryos for research. However, as a counterweight, it was emphasised that the human embryo has a special status and should not be regarded as simply a ball of cells.

Despite considerable Parliamentary unease about licensing research on human embryos, the Government took forward the main thrust of Warnock's recommendations by enacting the Human Fertilisation and Embryology Act 1990.[42] The governing policy underlying the legislation is that, if embryos are to be available for research, it is better to regulate such research openly and effectively. This demands that the legislation declares quite explicitly (for the guidance of scientists and funders as well as for the re-assurance of the public) what is lawful and what is not; and it calls for a dedicated regulatory body (the HFEA) to license and monitor such research. So far as research on embryos is concerned, the three central principles are:

- that the HFEA should license such work only if it is necessary (the necessity principle);[43]
- that, if the HFEA is satisfied that such research is necessary (because it cannot be done in any other way), then a licence should be granted only if the particular activity is judged to be necessary or desirable in relation to one of the approved statutory purposes (this principle involves a sense of proportionality and good purpose);[44] and

42. 1990, c. 37, sched. 2 (Eng.). During the period between Warnock and the 1990 Act, attempts were made to prohibit all embryo research, including Enoch Powell's Unborn Children (Protection) Bill in 1985. *See* ROBERT G. LEE & DEREK MORGAN, HUMAN FERTILISATION AND EMBRYOLOGY: REGULATING THE REPRODUCTIVE REVOLUTION 57 (2001).

43. Human Fertilisation and Embryology Act, 1990, c. 37, sched. 2 (Eng.).

44. *Id.* ¶ 3(2). *Compare* Press Dossier, European Group on Ethics in Science and New Technologies, Adoption of the Opinion on Ethical Aspects of Human Stem Cell Research and Use ¶ 2.7 (Paris, November 14, 2000) (revised, January 2001).

> In the opinion of the Group, in such a highly sensitive matter, *the proportionality principle and a precautionary approach* must be applied: it is not sufficient to consider the legitimacy of the pursued aim of alleviating human sufferings, it is also essential to consider the means employed. In particular, the hopes of regenerative medicine are still very speculative and debated among scientists. Calling for prudence, the Group considers that, at present, *the creation of embryos by somatic cell nuclear transfer for research on stem cell therapy would be premature,* since there is a wide field of research to be carried out with alternative sources of human stem cells (from spare embryos, foetal tissues and adult stem cells).

Id.

- that, in no circumstances, should research on embryos run beyond 14 days or the appearance of the primitive streak.[45]

In the 1990 legislation, five purposes are listed as approved.[46] These are:

(a) promoting advances in the treatment of infertility,
(b) increasing knowledge about the causes of congenital disease,
(c) increasing knowledge about the causes of miscarriages,
(d) developing more effective techniques for contraception, [or]
(e) developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation.

The Act also provides that research may be licensed "for such other purposes as may be specified in regulations."[47] However, this enabling provision is limited: the said "other purposes" must be designed to "increase knowledge about the creation and development of embryos, or about disease, or enable such knowledge to be applied."[48]

B. *Extending the Purposes*

Because the five approved purposes in the 1990 legislation are mainly concerned with research that is aimed at improving (or disimproving) the chances of successful reproduction, they are too narrow to support the range of ends now contemplated by stem cell researchers. Accordingly, following a period of consultation,[49] the Government decided to extend the purposes in order to open the way for stem cell research to deliver on its apparent potential.

There were two ways in which the Government might have sought to extend the purposes: (i) by issuing Regulations drawing on the enabling provisions in the 1990 Act or (ii) by drafting a bespoke statutory amendment to the 1990 Act. Opening itself to Lord Alton's accusation of legislating through the back door,

45. Human Fertilisation and Embryology Act, § 3, ¶¶ 3(3)(a)–3(4).
46. *Id.*, sched. 2, ¶¶ 3(2)(a)–(e).
47. *Id.* ¶ 3(2).
48. *Id.* ¶ 3(3).
49. *See* HFEA AND HUMAN GENETICS ADVISORY COMM'N, CLONING ISSUES IN REPRODUCTION, SCIENCE AND MEDICINE (1998), *available at* http://www.doh.gov.uk (on file with the Notre Dame Journal of Law, Ethics & Public Policy); *see also* U.K. DEP'T OF HEALTH, STEM CELL RESEARCH: MEDICAL PROGRESS WITH RESPONSIBILITY (2000), *available at* http://www.doh.gov.uk/stemcellreport.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

the Government chose the first of these options. The new Regulations, the Human Fertilisation and Embryology (Research Purposes) Regulations 2001,[50] virtually "copy out" the terms of the enabling provisions adding the following three new purposes to the original five:

(a) increasing knowledge about the development of embryos,
(b) increasing knowledge about serious disease, or
(c) enabling any such knowledge to be applied in developing treatments for serious disease.

Coming to these Regulations without any explanation, one would be unlikely to appreciate that they were designed to facilitate stem cell research, nor would it be apparent that licences for embryonic research using cell nuclear replacement (CNR) techniques might be approved under these purposes.[51] Parliamentarians, however, were fully apprised as to the significance of these Regulations.[52] A lengthy, and extremely high quality debate ensued, particularly so in the Upper House where the debate on the Regulations ran for some seven hours and involved over forty speakers. On one side, Lord Alton and his supporters proposed that the Regulations should be rejected

50. (2001) SI 2001/188. When asked to justify the use of regulations rather than primary legislation, Yvette Cooper (the Parliamentary Under-Secretary of State for Health) simply responded that the 1990 Act gave the Government the power to extend the approved purposes by regulation. 356 PARL. DEB., H.C. (6th ser.) (2000) 1176.

51. Cell nuclear replacement (CNR), or somatic cell nuclear transfer (SNT), involves introducing the nucleus from an adult cell into an enucleated egg. The engineered egg, retaining its own mitochondrial DNA but otherwise drawing its DNA from the inserted nucleus, is then electronically stimulated to develop into a CNR-embryo.

52. *See, e.g.*, 621 H.L. JOUR. 16–17 (Jan. 22, 2001), *available at* http://www.publications.parliament.uk/pa/ld200001/ldhansrd/vo010122/text/10122-04.htm#10122-04_head2 (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Lord Hunt, introducing the debate on the Regulations in the House of Lords, said:

> The principle and law that were established in the 1990 Act are clear. Embryo research may be allowed now, but only for conditions such as infertility, contraception and congenital disease, including cystic fibrosis and haemophilia. The question before the House today is whether those purposes should be extended to include serious diseases such as Parkinson's disease, Alzheimer's disease, cancer and diabetes—a provision anticipated and included as a regulation-making power in the 1990 Act.
>
> That question arises because the late 1990s saw developments in cell nuclear replacement technology in animals and because of the announcement in the US of the extraction of stem cells from a human embryo.

Id.

until a Select Committee had the opportunity to examine the implications of what was now being brought forward. This amendment was defeated and, in the event, a compromise proposed by Lord Walton was accepted. Under this amendment, the Regulations were approved but a Select Committee was set up to consider their implications. When the Select Committee reported, it endorsed the spirit and intent of the new purposes. Almost at once the HFEA began to issue licences under the new purposes and funding bodies announced that money for hES cell research would now be released.[53]

C. *The Principal Objections*

The debate in the House of Lords foreshadowed the principal objections to the Regulations that were to be rehearsed in the voluminous evidence taken by the Select Committee. Essentially, there are four recurring objections: one scientific, one ethical, one practical, and one legal. Of these objections, it is the ethical one in which we are most keenly interested; and, indeed, the force of this objection is such that it can easily operate as an undercurrent in relation to the other objections. Quite simply, the ethical objection is that it cannot be right to destroy an embryo; and, concomitantly, those who purport to "respect" the embryo or take account of its "special status" while licensing its destruction do not understand the import of their own ethical commitments. Before focusing on this ethical question, we can rehearse very briefly the other objections.

First, the scientific objection. During the House of Lords' debate on the Regulations, it was forcibly suggested that new research was coming through to challenge the ruling view that adult stem cells have a relatively limited and specialised range. And, as the Select Committee sat, evidence was regularly adduced to add plausibility to the possibility that adult stem cells might be much more plastic than is generally assumed.[54] Nevertheless, the scientific evidence presented to the Committee (including evidence from a number of leading international *adult* stem cell researchers)[55] overwhelmingly supported a "dual track" complementary approach to stem cell research, with work being conducted on both adult and hES cells.[56] Given the regu-

53. James Meek, *Millions In Grants For Embryo Stem Cell Research*, GUARDIAN, Feb. 28, 2002, at 2.

54. *See* Memorandum from Dr. Elizabeth Allan, STEM CELL REPORT, *supra* note 10, at 306.

55. STEM CELL REPORT, *supra* note 10, ¶ 3.20.

56. *Id.* ¶ 3.16.

latory framework for embryo research in the United Kingdom, if the proponents of one-track adult stem cell work are right, it will soon become clear that research on embryos is unnecessary and the HFEA will decline to issue licences for such hES cell research. Not surprisingly, therefore, the Committee concluded that, whilst recent research on adult stem cells looks promising and should be strongly encouraged by funding bodies and Government, the dual track approach is essential if maximum medical benefit is to be obtained.[57]

Secondly, there is the practical concern that new purpose embryo research will lead to reproductive human cloning. The fear here arose from the possibility that the HFEA would draw on the new purposes to license CNR in order to create customised embryos.[58] Such research, if successful, would improve our understanding of what happens when an adult nucleus is placed in an enucleated egg and apparently returns to an embryonic state as well as aiding the development of so-called therapeutic cloning techniques and therapies delivered by this route. However, in its early stages, CNR is common to both non-reproductive (therapeutic) and reproductive cloning. In practice, it would be difficult to control the spread of this knowledge and prevent it from falling into the hands of scientists who might be tempted to implant CNR embryos and go on to attempt human reproductive cloning. During the Summer recess in 2001, this concern was significantly inflamed by the various declarations of intent issued by the Italian embryologist, Professor Severino Antinori, who is seemingly determined to be the first person to reproductively clone a human being.[59]

At the same time that Professor Antinori was in the headlines, a judicial review brought by the Pro-Life Alliance was waiting to be heard. Essentially, the purpose of the application was to question the regulatory jurisdiction of the HFEA in relation to CNR. At first instance the Alliance succeeded in its claim, the effect of the decision being that CNR work fell outwith the jurisdiction of the HFEA and, in effect, was entirely unregulated.[60]

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57. *Id.* ¶ 3.22.

58. Since the 1990 Act has been in force, a mere 118 embryos have been specially created for research (as against more than 50,000 donated from IVF programmes). *See id.* ¶ 4.26. It is quite likely that, with the new purposes now in play, considerably more embryos, including CNR-embryos, will be specially created for research.

59. *See, e.g.*, Julian Borger, *Maverick Scientists Promise A Human Clone*, GUARDIAN, Aug. 8, 2001, at 1.

60. R. (Quintavalle) v. Sec'y of State for Health, 2001 WL 1347031. The Government was successful in its appeal. R. (Quintavalle) v. Sec'y of State for Health, [2002] Q.B. 628 (Eng. C.A.). Judgment was given shortly before the

Professor Antinori, encouraged (paradoxically) by the Alliance's initial success, issued further declarations of intent involving his operation coming to England. The Government, on the back foot and perceiving a cloning crisis, rushed through the Human Reproductive Cloning Act 2001,[61] under which it is now a criminal offence to place in a woman "a human embryo which has been created otherwise than by fertilisation."[62]

This hardly assuages all practical concerns, for regulation, whether local or global, can only go so far. A number of points might be pleaded by way of practical reassurance—in particular, that cloning technology is still very primitive (even if Dolly is a story of success, by and large, the story of reproductive cloning in animals is one of massive failure) and that the demand for human eggs far outstrips supply. We might also remind ourselves that peer pressure within the scientific community will make life relatively difficult for would-be human reproductive cloners and that funding for such research is unlikely to be forthcoming from the principal backers of CNR-based work. Having said this, however, one suspects nevertheless that somewhere, some day, a cloned child will be born.[63] But, of course, whether or not we regard this as an occasion for slippery slope regret rather depends on the ethical view that we take.

Thirdly, there were a number of legal objections, largely boiling down to the claim that the Regulations were ultra vires relative to the enabling provisions in the 1990 Act. Certainly, the

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Select Committee reported. However, after the publication of the Stem Cell Report, the Alliance obtained leave for a final appeal to the House of Lords.

61. The Bill was introduced a mere six days after the High Court decision and it became law about two weeks later.

62. Human Reproductive Cloning Act, 2001, c.23, § 1(1) (Eng.). The Act, which comprises just two sections, does not define "fertilisation" but, presumably, it means human sperm fertilisation of a human egg.

63. We might recall the remarks of the United States Supreme Court in the landmark case of *Diamond v. Chakrabarty*, 447 U.S. 303 (1980):

> The grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides.

Id. at 317.

To similar effect, see the remarks by Yvette Cooper, Hansard (HC) Nov. 17, 2000, Col 1230. And, indeed, Professor Antinori has recently claimed that one of the women in his programme is eight weeks pregnant with a cloned embryo. *See* Tim Radford, *Italian Promises Cloned Human Baby in January*, GUARDIAN, Nov. 28, 2002, at 14; James Meek, *Woman 'Expecting First Cloned Baby'*, GUARDIAN, Apr. 6, 2002, at 1.

Regulations are much less transparent than they should be. However, these are somewhat ephemeral points[64] and we do not need to pursue them here. Suffice it to say that, as with the other objections, we need to be aware that what are ostensibly legal objections are sometimes, in reality, the surface articulations of deeper ethical concerns. We can debate the science, the practicalities and the law all day; but, in most cases, we cannot resolve our disagreements because they originate from fundamentally opposed ethical perspectives. It is in this context of deep division that the triangular nature of the emergent bioethics can assist our understanding of where the disagreements really lie and why.

D. *The Ethical Objection*

The fundamental ethical objection is that the creation or use of embryos for research is wrong and their destruction indefensible. This implies two things: first, that embryos have moral status; and, secondly, that in a moral calculation we must appreciate that we violate the protected interests of embryos by deploying them for research or destroying them. Of these two points, the first is critical; for, if this does not hold, the objection does not get to first base and it can only apply in an attenuated form.

The idea of a moral position (formally conceived) is not entirely unproblematic. However, most accounts of the moral standpoint include as one of its features that moral reason involves a commitment to recognising and respecting the legitimate interests of others. This leaves an awful lot to be argued about but at least, in moral reason, "others" do count. However, one of the key points for clarification is who counts as an "other," or who has moral status? Each of the three main constituencies in current bioethical debate has its own distinctive line on this question.

Utilitarians, as I have said, come in several varieties. Some emphasise the minimisation of distress or pain and suffering, others the maximisation of pleasure or welfare, yet others the optimisation of preferences, and so on. The particular emphasis will determine the criterion for having moral status, whether it be the capacity to suffer, to experience pleasure, or to have a preference. The most inclusive view is probably one that makes the capacity to suffer distress the test for moral status. Non-human animals qualify on this criterion as, of course, do

64. For discussion, see Roger Brownsword, *Stem Cells, Superman, and the Report of the Select Committee*, 65 MOD. L. REV. 568, 579–82 (2002).

humans. Even a human fetus might be included. However, the human embryo, lacking such a capacity a few days after fertilisation does not qualify. On the utilitarian view, therefore, the embryo does not itself have interests and, to this extent, it is no different from pebbles on a beach. We should not think, though, that this necessarily means that damage to the embryo can be left out of the moral calculation. If some persons are themselves distressed by the thought that embryos are to be committed for research and destroyed, this counts against embryo research—in just the way that it would count against the destruction of Stonehenge that some persons would be distressed at the prospect of the ancient stones (and all that they symbolise) being destroyed.

If we turn to the perspective of human dignity as empowerment, we are looking for capacities that mark out one as a bearer (or operator) of human rights. Coming from this perspective, it is often said that non-human animals cannot have rights because they cannot respond to duties; but, equally, it might be said that this is so because they cannot insist upon or waive the performance of a (claim) right or exercise a permission or an option.[65] Whichever way one looks at it, whether from the right or the duty side, the minimum requirement for moral status is that one can actively participate in a community regulated by respect for human rights. In short, one must have the capacity for making one's own choices and formulating one's own purposes in just the way celebrated by this understanding of human dignity. There is undoubtedly a tension between the logic of this view, which restricts moral status to agents, and the jurisprudence of human rights, which allows moral status to all born members of the human species.[66] *A fortiori*, there would be a tension between the logic of this view and any claim that an embryo has moral status. Unless we are to abandon reason, however, we cannot displace logic whenever it generates results that create difficulties. Like utilitarianism, therefore, human dignity as empowerment denies that the embryo has moral status. Also like utilitarianism,

65. It might also be said that operators of rights and duties, qua moral agents, will understand the nature of moral principles and restraints. As Carl Cohen puts it:

> To be a moral agent is to be able to grasp the generality of moral restrictions on our will. Humans understand that some acts may be in our interest and yet must not be willed because they are simply wrong. This capacity for moral judgment does not arise in the animal world; rats can neither exercise nor respond to moral claims.

CARL COHEN & TOM REGAN, THE ANIMAL RIGHTS DEBATE 35 (2001).

66. This is a tension that Cohen tries to avoid. However, Regan sees the fallacy of division being committed here. *Id.* at 277–79.

however, this is not necessarily the end of the story. For, there may be indirect arguments that operate to protect the embryo.

The third perspective, human dignity as constraint, is perfectly straightforward. The human embryo is to be directly respected. It matters not that it cannot experience distress or make its own choices. It is *not* like a rock or a stone. It is a living thing and a member of the human species. As such, it is protected by the overarching value of respect for human dignity. It has moral status and to treat it like a rock or a stone is to compromise human dignity. So contends the dignitarian alliance.

In the light of these rival views about moral status, what can we say about those proponents of embryo research who say that it is permissible to destroy embryos for research but who also insist that we must respect the embryo or recognise its special status? It is clear enough what respect for persons means in utilitarian and human rights perspectives, but what does it mean when we are dealing with a living thing that lacks moral status? According to Karen Lebacqz:

> Researchers show respect towards autonomous persons by engaging in careful practices of informed consent. They show respect toward sentient beings by limiting pain and fear. They can show respect toward early embryonic tissue by engaging in careful practices of research ethics that involve weighing the necessity of using *this* tissue, limiting the way it is to be handled and even spoken about, and honoring its potential to become a human person by choosing life over death where possible.[67]

This is a brave attempt to translate respect for human embryos into a reluctance to treat embryos as research objects coupled with a recognition that this is a potential person. But, so long as we are eschewing the direct protective argument of human dignity as constraint, how can we render such a version of respect plausible? In other words, what kind of contingent considerations might be drawn into the utilitarian and human rights perspectives?

First, as indicated already, negative utilitarians seek to minimise the sum total of distress. Whether the source of my distress is what I regard as inappropriate action in relation to myself, or in relation to others, it matters not. Nor does it matter that the "others" in relation to whom I am experiencing distress would not themselves figure directly in a utilitarian calculation. The crucial fact is that I do count; I am distressed; and this must be

67. Karen Lebacqz, *On the Elusive Nature of Respect*, *in* THE HUMAN EMBRYONIC STEM CELL DEBATE 149, 160 (Suzanne Holland et al. eds., 2001).

weighed. What this amounts to, therefore, is that utilitarians must respect the attitudes of its membership insofar as they hold negative views about embryo research. However, if we have no qualms about embryo research, and if there are no other negative utilities to be detected, we would have no problem with proceeding.

Secondly, in some contexts, the consequences of treating a human embryo as if it were no more than a rock or a stone might be damaging to the way in which we respond to the claims made by those who do have moral status. In other words, utilitarians might be concerned that lack of respect for human embryos tends towards lack of respect for those who are sentient; and rights theorists might worry that lack of respect for human embryos tends towards a weakening of respect for the entitlements of rights-holders. The fact that, in both utilitarian and human rights theories, there is a clear distinction between those, such as the human embryo, who do not have moral status and those who do is neither here nor there. If there is a reasonable belief that lack of concern for the one might lead to lack of respect for the other, there is a reason for acting with restraint in relation to human embryos.

Thirdly, there is the potentiality of the human embryo, mentioned by Lebacqz and argued about interminably in relation to both embryos and fetuses. On the one side, it is argued that potentiality is not actuality, that acorns are not yet oaks any more than students are already graduates or embryos already fetuses, let alone born humans. From this it follows that whatever respect or recognition attaches to actual or achieved status cannot be read across to those still in the category of potentiality; and, thus, there is no reason why potential humans, merely by virtue of their potentiality, should be treated as though they are already actual humans. To this the standard riposte is that we are dealing here, not with potentiality at large, but specifically with potential human life—and, this we are led to believe, is a special case. Clearly, this exchange is stuck in the mire. On the one side (the latter side as presented above), the potential for human life, the "radical" potential, is seen as giving the embryo moral status.[68] It is not a matter of treating the embryo "as if" it had moral status; quite simply, it already has what it takes to be accorded moral status in its own right. Such is the position struck by those who subscribe to human dignity as constraint. On the other side, whether under utilitarianism or under human dignity as empow-

68. *See, e.g.*, John Keown, *Restoring Moral and Intellectual Shape to the Law after* Bland, 113 L.Q. REV. 481 (1997).

erment, a more restrictive view of moral status is being taken. The embryo does not qualify and the question is why potential qualification should be treated as sufficient. From utilitarian and human rights perspectives, therefore, potentiality is a poor argument for moral status (which, itself, does not hinge on the potential for human life). Nevertheless, from such perspectives, is there anything more that can be said about potentiality as a contingent consideration?

The potentiality of the human embryo might figure as a factor in indirectly protective arguments of the kind already sketched. Over and above such considerations, the potentiality of the embryo might be linked into a precautionary approach that results in a degree of protection. In the case of utilitarianism, the relevant threshold is sentience. Quite where this threshold lies is moot. However, if there is any risk of inadvertently crossing the line, the utilitarian may think it right to err on the side of caution. By drawing the line on embryo research at fourteen days, the utilitarian might judge that English law takes an excessively cautious approach. Nevertheless, the fact that the embryo (all being well) is on the way to becoming a being with moral status must generate some caution unless we are entirely confident about the point at which that status is achieved. In the case of human dignity as empowerment, the human rights standard for moral status is so far beyond the level of development achieved by the embryo that potentiality coupled with precaution seemingly adds little to the argument for protection. Indeed, on this approach to potentiality, the logic of human rights based on human dignity as empowerment is that it is not until we are dealing with children that we approach the threshold for moral status. There is, however, a more systematically precautionary line of argument. We make certain assumptions about the level of development and capacities achieved by the embryo, the fetus, the young child, the teenager, the adult and so on. We make these assumptions in good faith and, provided that our particular assumptions about the embryo are correct, its potentiality for further development offers no argument against using it for research. However, what if our assumptions are wrong? Speaking of potentiality, we might be (we have the potential to be) wrong. If we take this thought seriously, we need to move carefully reminding ourselves, in the case of human embryos, that this might just be one who has moral status. In other words, precaution dictates that we operate in terms of possible and probable agents; and, within such a framework, the potentiality of the human embryo indicates that it (in contrast to rocks and stones) is at least a possible agent.

In the light of these comments, we can consider how the Select Committee tackled the objection, strenuously put to it by a number of witnesses, that research on human embryos is, quite simply, unethical; added to which any talk of "respect for the embryo" by those who are licensing the creation and use of human embryos for research is incoherent nonsense.

E. *The Select Committee's Response to the Ethical Objection*

Let us be clear about the ethical objection. In its stronger form, the objection has it that the use of human embryos for research is unjustifiable and should be prohibited. On this view, hES cell research, whatever its supposed benefits, is categorically wrong. In its weaker form, the objection is that supporters of embryo research cannot have it both ways; that is to say, they cannot claim that they respect the embryo (or recognise its special status) and, at the same time, claim that the creation or use of human embryos for research is justifiable—in other words, the weaker objection challenges the coherence of a position such as that taken by Warnock. What did the Select Committee have to say on these matters?

With regard to the objection in its stronger form, opponents of human embryo research can find significant support in Article 18 of the Convention on Human Rights and Biomedicine which, inter alia, categorically prohibits the *creation* of human embryos for research; and they can argue from the importance of human dignity (as constraint) which underpins Article 18. However, given that the United Kingdom has not yet committed itself to the Convention and (in view of the permissive state of its law) would have considerable difficulty in complying with the Convention, the Select Committee does not press for a fundamental change in policy.[69] As for arguments based explicitly on respect for human dignity, although the Select Committee notes that appeals to this idea increasingly feature in international frameworks designed to set ethical limits for science and medicine, they effectively reject it as an elusive notion which falls short of offering practical guidance when the aim of the exercise is to set limits to permissible research on human embryos.[70] From the perspective of human dignity as constraint, the Com-

69. *But cf.* HUMAN GENETICS COMM'N, INSIDE INFORMATION: BALANCING THE INTERESTS IN THE USE OF PERSONAL GENETIC DATA (2002) (urging the Government to sign and ratify the Convention).

70. STEM CELL REPORT, *supra* note 10, ¶¶ 7.3–7.7. Interestingly, whilst the Committee fully supports the ban on reproductive human cloning in the Human Reproductive Cloning Act 2001, it does not rest on human dignity—rather it is the risk of physical abnormality coupled with the ambiguity of a

mittee's thinking is unconvincing because this interpretation of human dignity actually gives perfectly clear and precise practical guidance as to the limits of permissible research on human embryos—quite simply, no such research is permissible. What the Committee's dismissive discussion signals, therefore, is that human dignity as constraint is not its starting point.

In fact, the Committee's starting point is to accept the essential position struck by Warnock and enshrined in the 1990 legislation. This not only serves to shut out human dignity as constraint, it excludes any serious engagement with the ethical objection in its stronger form and leads fairly rapidly to the Committee's central conclusion which it expresses as follows:

> Whilst respecting the deeply held views of those who regard any research involving the destruction of a human embryo as wrong and having weighed the ethical arguments carefully, the Committee is not persuaded, especially in the context of current law and social attitudes, that all research on human embryos should be prohibited.[71]

Unpacking this conclusion, the Committee is accepting not simply that the United Kingdom is a pluralistic society but that moralists hold very different views about the status of the embryo and, concomitantly, whether it has rights or protectable interests or whether it represents a protectable good, and so on. As with the abortion debate, where proponents of choice can respect that rival proponents of life are arguing from a moral viewpoint, and vice versa, there can be mutual respect between moralists who debate the legitimacy of conducting research on human embryos.[72] The differences, however, are irreconcilable and a public position has to be taken—which, for the Committee, signifies going with Warnock and the subsequent accretion of permissive regulation and social acceptance thereof.[73]

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cloned child's relationship with its parents that troubles the Committee. *Id.* ¶ 5.21 and Appx. 6.

71. *Id.* ¶ 4.21.

72. Compare the strategy in RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

73. It should be said that where it is already accepted that there will be surplus embryos from IVF programmes, and that these embryos will have to be destroyed, it is but a short step to accept their commitment to research. This kind of pragmatism is bluntly put in EMILY JACKSON, REGULATING REPRODUCTION (2001): "If the disposal of spare embryos is inevitable, it is difficult to see why washing an embryo down the drain would be morally preferable to using it in order to carry out valuable research." *Id.* at 230. See, too, the views put to the Select Committee on behalf of the Office of the Chief Rabbi, by Dayan Chanoch Ehrentreu, Memorandu by the Board for Social Responsibility of the Church of England, Office of Chief Rabbi and the Linacre Centre for Health-

Although it would have been startling, indeed, if the Select Committee had concluded that, current law and social attitudes notwithstanding, research on human embryos can in no circumstances be justified, this is precisely what the stronger ethical objection holds. For those who hold this view, premised on human dignity as constraint, the Committee's "respect" for its position barely compensates for the Committee having sidestepped the issue by favouring consistency with present practice over a fundamental re-evaluation of that practice. More importantly, though, if the Committee avoids engaging with the stronger ethical objection by rehearsing the position attacked by the weaker objection, what sense does the Committee give to its commitment to respect the special status of the human embryo?

As a measure of its respect for the human embryo, the Committee endorses the current fourteen day limit for embryo research,[74] it underlines the sensitivity that is required where human tissue is handled,[75] and it argues that embryos, whether standard or CNR, "should not be created specifically for research purposes unless there is a demonstrable and exceptional need which cannot be met by the use of surplus embryos."[76] The Report also makes a pair of mutually reinforcing recommendations the aim of which is to minimise the use of embryos in research, namely: (i) that, where the HFEA grants licences for hES cell research, it should impose a condition requiring that any ES cell line generated in the course of the research should be deposited in a national cell bank; coupled with (ii) that, before granting any new licence for hES cell line research, the HFEA should be satisfied that no suitable cell lines are already available in the cell bank.[77] What are we to make of these concessions to the embryo?

From a utilitarian perspective, the fourteen-day limit, as we have remarked, might seem a touch over-cautious—the embryo surely is still some way from being sentient. Nevertheless, if such a restriction serves to maintain public confidence in the integrity of embryo research and its regulation, this may well be a benefit

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care Ethics ¶¶ 162, 173, 189 (July 9, 2001), *available at* http://www.chiefrabbi.org/articles/other/stemcell2.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Of course, some may resist this pragmatic step, sensing that there is an important difference between creating embryos for reproductive purposes and using them for research. However, it is not obvious how such a position can be coherently placed within a utilitarian or rights perspective.

74. STEM CELL REPORT, *supra* note 10, ¶ 4.22.

75. *Id.* ¶ 4.25.

76. *Id.* ¶ 4.28 (standard embryos); *Id.* ¶ 5.14 (CNR embryos).

77. *Id.* ¶ 8.29.

worth taking. From a rights perspective, the attachment to a fourteen-day limit has no clear rationale. Even on a precautionary approach, the possibility that the embryo is already an agent does not markedly alter at this stage of what we understand to be its developmental path.

Why should the Committee emphasise the need for human tissue to be handled sensitively? At least three considerations spring to mind. First, the insensitive handling of such material can cause offence—one only has to recall the notorious *Kelly* case[78] where removed body parts were incorporated in so-called works of art. From a utilitarian standpoint, there is good reason to avoid occasioning such gratuitous distress. Secondly, if the way in which the tissue is handled deviates from the expectations of the donors, this will be a matter that concerns rights theorists (who will detect departures from the terms of the consent given)[79] but also to utilitarians who will fear that bad publicity might interfere with the donation of embryos needed for utility-yielding research. Thirdly, insofar as the tissue contains information about the genetic make-up of any individuals who do have moral status, then both utilitarians and rights theorists will be concerned, the former about the consequential disutility and the latter about breaches of privacy and confidentiality.

The Committee also insists that embryos should not be specifically created for research if surplus embryos are available and fit for the purpose; and it endorses the necessity principle written into the 1990 legislative framework. This amounts to the following two principles: (1) surplus human embryos are not to be used for research unless it is necessary (unless, in effect, the research cannot be carried out using animals); and (2) human embryos are not to be specifically created and used for research unless the research cannot be carried out using surplus embryos. But, why worry most about the creation of human embryos, then about the use of surplus human embryos, and least of all about non-human animals? Why this order of protective priorities? From a rights perspective, it is difficult to see the sense of favouring research on, say, developed chimpanzees rather than on

78. R. v. Kelly, 2 W.L.R. 384 (Eng. C.A. 1998).

79. Compare Loane Skene, *Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws*, 22 LEGAL STUDIES 102, 117–18 (2002), for the proposal that there should be a personal, but not a proprietary, right to permit our bodies, body parts, and tissue to be used for, inter alia, medical or scientific research. Consent for such use may be subject to express or implied conditions. Where conditions of this kind are flouted by researchers (or other recipients), it is suggested that, in principle, damages should be available. *Id.* at 123.

human embryos; and, unless "wasting" surplus embryos has some indirect impact on the protection and promotion of rights, there is no reason to prefer their use to the use of specially created human embryos. To the champions of utilitarian bioethics, such as Peter Singer, it will be unclear why the Committee should be more comfortable with the use of non-human animals than human embryos that are anyway destined for destruction—indeed, this might strike utilitarians as the latest manifestation of speciesism. By contrast, the preference for the use of surplus human embryos over specially created embryos might make good sense. After all, if resources have to be invested in the production of human embryos, then there is a good economic argument for making use of those embryos that are already available. And, similar thoughts would apply to the Committee's recommendations that are designed to minimise the commitment of further human embryos to research if researchers could make do without investing in further human embryos. Utilitarians might also pause over the Committee's implicit judgment that animal research, although increasingly controversial and politicised, is less problematic (relative to utilitarian criteria) than research on surplus human embryos; and that the latter is more likely to be accepted than ready use of specially created human embryos.

Finally, it is worth observing that, although the Committee is strongly opposed to those who are sources of human embryos treating their embryos as commodities to be sold, it does not relate its view on this matter to the question of respect for the human embryo.[80] Yet, it would have been perfectly plausible to have identified a stand against commodification as one aspect of the respect due to human embryos. Or, at any rate, this would have been a natural move to be made by a Committee guided by the perspective of human dignity as constraint. That the Committee was not so guided is overwhelmingly clear. And, its remarks on respect for human embryos fit best with a utilitarian bioethics shaped by a political sense of how far and how fast the public would be prepared to go with the latest technology.

CONCLUSION

What should we conclude about the shape of bioethics today and, particularly, the emergence of the dignitarian alliance? For some bioethicists, the rediscovery of the value (or virtue) of human dignity is a cause for concern. According, for instance, to Helga Kuhse:

80. *See* STEM CELL REPORT, *supra* note 10, ¶ 8.32.

> [T]he notion of human dignity plays a very dubious role in contemporary bioethical discourse. It is a slippery and inherently speciesist notion, it has a tendency to stifle argument and debate and encourages the drawing of moral boundaries in the wrong places. Even if the notion could have some use as a short-hand version to express principles such as "respect for persons", or "respect for autonomy", it might, given its history and the undoubtedly long-lasting connotations accompanying it, be better if it were for once and for all purged from bioethical discourse.[81]

Many (including the Select Committee) would agree with Kuhse that human dignity is a slippery idea best avoided by utilitarians; and, if we favour a human rights perspective (backed by human dignity as empowerment), we might be alarmed that the founding idea of human rights is being adopted to gather together the quite different agenda of the dignitarian alliance. The fact of the matter is, however, that human dignity is an extremely powerful idea and it is likely to seem even more important as technology races ahead to redefine what we hitherto took to be the limits of human finitude. In a rapidly changing world, driven by the biosciences backed by an optimistic utilitarian bioethics, the demand that human dignity be respected is an essential counterweight. However, what we are looking for is not dignitarian dogma but a rationally defensible conception of human dignity as the basis on which human rights and human virtue are founded.[82] To this extent, the approach of human dignity as

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81. Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, *in* BIOETHICS AND BIOLAW VOLUME II: FOUR ETHICAL PRINCIPLES 61, 74 (Peter Kemp et al. eds., 2000).

82. In this paper, I have said little about human dignity as a virtue. However, the virtue of living with dignity, as exemplified by the likes of Socrates and Nelson Mandela, is hard to deny. There is a positive to be accentuated here and, in a brave new genetic world, living with dignity might prove to be a virtue of the first importance. *Compare* FUKUYAMA, *supra* note 36, at 173, who, having opposed utilitarian thinking on a number of familiar grounds, adds the following objection:

> The utilitarian goal of minimizing suffering is itself very problematic. No one can make a brief in favor of pain and suffering, but the fact of the matter is that what we consider to be the highest and most admirable human qualities, both in ourselves and in others, are often related to the way that we react to, confront, overcome, and frequently succumb to pain, suffering, and death. In the absence of these human evils there would be no sympathy, compassion, courage, heroism, solidarity, or strength of character. A person who has not confronted suffering or death has no depth. Our ability to experience these emotions is what connects us potentially to all other human beings, both living and dead.

empowerment is on the right track; but a complete account of the way in which individual responsibility is immanent (perhaps, surprisingly so) within an autonomy-centred ethics placed in a context of vulnerable agency has yet to be written.[83] This, I suggest, is one of the major tasks for tomorrow's bioethics.

Id.

We might say that, in the absence of these negative features of the human condition, there would be little opportunity for the virtue of human dignity to develop.

83. This is a project on which Deryck Beyleveld and I have made a start in DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW (2001).