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The Prisoner Dis-Analogy as a Defense of Stem Cell Research on Spare Embryos

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Abstract

Under the premise that an embryo is a full person, the argument against using spare IVF embryos for stem cell research is the prisoner analogy. Namely, the analogy contends that just as we may not ravage a prisoner on death row for his body parts, likewise we may not harvest the embryo for its stem cells simply because it is destined for destruction. Here, I show that this comparison does not hold, for an immoral action is committed against the prisoner as a result of certain characteristics present in the prisoner but absent from the embryo. In particular, three wrongs – infliction of suffering, imposition of double punishment, and violation of human dignity – are perpetrated against the prisoner, but do not apply in the case of the embryo. Therefore, I conclude that the repudiation of the analogy implies that it is morally permissible to use spare IVF embryos for the purposes of stem cell research.

Introduction

According to the notion of “ethics of compromise,” it is acceptable to act in sinful ways in order to achieve a greater good, as long as certain absolutist standards are maintained

(Mendiola, 2001, p. 122). With regard to embryonic stem cell research, the destruction of the embryo is the sinful act, while the potential benefits the research may provide (including understanding cell differentiation, testing drug efficacies, and providing replacement tissues or organs without immune rejection) is the greater good. However, the clause “maintaining absolutist standards” implies that it is not sufficient to simply weigh the magnitude of the sin against that of the good and decide an outcome based on which we perceive as overriding. If the practice comprises an act regarded as an absolute wrong, then it is unjustifiable, in all circumstances, regardless of how great the good that may result.

The deontological framework of moral decision-making, based on Kantian principles that every person must be treated as an end in itself, asserts that it is an absolute wrong to sacrifice one person in order to save another (Alexander & Moore, 2007). In most cases, the harvesting of stem cells from an embryo requires the embryo’s destruction.¹ The deontological framework thus reduces the embryonic stem cell debate to determining whether embryos are persons. That is, if an embryo is a complete person, on a moral par with all other persons, then its sacrificial destruction for research purposes constitutes an intrinsic, absolute wrong, making the practice immoral regardless of its benefits.

However, the Kantian reasoning does not directly speak to how to treat those *already sacrificed*. As a result, auxiliary moral proposals have arisen to address the guidelines for determining ethical action under these circumstances. One such proposal is the “nothing is lost” principle, defined by Paul Ramsey (1961), which states it is acceptable to take an innocent human life if two conditions are met: 1) the subject’s death is inevitable; 2) other innocent human lives will be saved as a result.

Gene Outka (2002) applies this principle to justify stem cell research on “spare” embryos from in vitro fertilization (IVF) procedures. As a result of low success rates, multiple embryos are created per round of IVF, resulting in vast quantities of leftovers that never become implanted. Unless the parents express other wishes, these embryos become discarded. Thus, the application of the “nothing is lost” defense goes as follows: even if the embryo is a life, its certain destruction means that no harm is done in expediting this certainty in order to reap the potential benefits that stem cell research may provide.

However, the opposing viewpoint maintains that one wrong does not justify a second. Just because an innocent embryo was (wrongly) sentenced to death does not mean that we may inflict further wrongs upon it. Implicit in this argument, however, is the notion that harvesting an embryo for its stem cells is indeed a wrong. What is the basis for this claim?

The position is backed by analogy; specifically, the prisoner comparison points out that a criminal on death row cannot be ravaged for his body parts simply because his death is impending. As the United States Conference of Catholic Bishops (2008) asserts, “the idea of experimenting on human beings because they may die anyway poses a grave threat to convicted prisoners, terminally ill patients, and others” (para. 4). This stance is not strictly a religious one; Howell (2002) alleges that “this mentality is consistent with Nazi medicine. Taken to its logical conclusion, prisoners on death row... and others destined to die or be cast away from society could and should be used for experimentation in the name of furthering research to save others” (para. 23).

Thus, under the premise that an embryo is a human life, the argument against stem cell research on spare IVF embryos is analogy. However, in order for the analogy to stand, we must examine the rationale of *why* it is considered a wrong to take the body parts of a prisoner before

his unavoidable death. I propose three reasons for this belief: namely, infliction of suffering, double punishment, and violation of human dignity. Here, I examine each reason independently and conclude that all can be refuted when the embryo is the subject. That is, I assert that taking biological materials is not an unconditional immorality, but only constitutes an immorality when the subject possesses certain prerequisite traits. Thus, I reject the legitimacy of the analogy as an argumentative tool. As harvesting stem cells from embryos fated for destruction does not entail an absolute wrong, the implication is that we may use ethics of compromise to justify the utilization of these embryos in the worthy pursuit of research.

Basis of the Full Personhood Premise

The moral status of the embryo has long been and remains the subject of contentious debate. Some try to identify a distinct point at which life beings, such as conception, the formation of the primitive streak, or capacity for viability. Others assert that personhood is a gradient and life develops in degrees (Perring, 1997). Still others acknowledge the debate but believe it is irrelevant in the context of making ethical decisions. As Krauthammer (2002) writes, “Either you believe it [the personhood of the embryo] or you don’t. The discussion ends there” (p. 22).

For the purposes of this debate, I propose that it is ideal to proceed under the premise that embryos are complete human beings. There are two reasons for this proposal.

First, I subscribe to the view that the personhood of the embryo – and for that matter, the personhood of *any* phase of human development – is indeterminate. I defend the indeterminacy principle by drawing an analogy to the Sorites Paradox. In this paradox, we consider a heap as having a distinct identity, and we know it is composed of grains of wheat. However, one grain is not considered a heap, nor is two, nor is three, and thus following this logic it would seem no

amount of grain would make a heap – which we know to be false (Hyde, 1997). Similarly, we have a clear image of a person, but there is no distinct point at which the cells comprising it stop becoming “just cells” and become the person. As a human life is such a significant, worthy entity, we must err on the side of not violating it; as such, we should treat the embryo, at the moment of conception (analogous to the first grain in the heap) as a person for the purposes of moral decision-making.

However, a comprehensive analysis of the indeterminacy principle with regard to the embryo is beyond the scope of this paper, which leads to the second, more practical reason of why it is useful to debate under the full personhood premise. That is: even irrespective of one’s stance on the moral status of the embryo, if we can show that stem cell research on spare embryos is justifiable under the most conservative viewpoint, then clearly the practice is justifiable under *all* viewpoints.

The Prisoner Analogy

The existence of IVF as an established and legally permissible practice results in the creation of thousands of extra embryos whose fate is destruction. Regardless of one’s belief on the morality of this fact, these conditions are the reality, and we thus must make subsequent decisions operating within this reality.² Under the full personhood assumption, the argument against using spare embryos for stem cell research is analogy to a prisoner on death row.

Both instinctive revulsion and legal precedent assert that it is wrong to use the prisoner for his body parts, even for the noblest research purposes. I concur with this claim. However, in order for the analogy to hold, we must examine the basis for the assertion in order to resolve whether a comparable wrong is committed against the embryo. I propose that there are three

primary reasons it is immoral to ravage the prisoner for his limbs, each of which I will examine to determine if the logic applies in the case of the embryo as well.

Suffering

The suffering a person may experience can fall under two categories: physical pain, and mental anguish. The former is a direct result of the biology of a complete nervous system, encompassing pain receptors, nerve pathways to transmit the signals from the sensors, and a brain that converts the signals into feelings of pain. While some state laws require physicians to inform women considering abortions that fetuses can feel pain at twenty weeks (Grady, 2005), the exact time remains a matter of debate. The most conservative figures state that pain perception is possible at seven and a half weeks when reflex responses begin (Humphrey, 1964). Other research, however, draws a distinction between reflex response and conscious awareness of pain, with the latter developing at around twenty-six weeks when structures known as thalamocortical fibers penetrate the cortical plate (Mrzljak, Uylings, Kostovic, & van Eden, 1988; Derbyshire, 2006). Still, the debate is over the point at which a *fetus* can process pain; it is a scientifically established, uncontroversial fact that the early *embryo* in the first few weeks of development is devoid of the necessary sensory components required to experience pain.

It requires no sophisticated argument to show that the infliction of physical pain on prisoners is morally problematic; however, this alone is not sufficient reason to defend the immorality of taking limbs, as we could easily imagine a situation in which the prisoner were given an anesthetic numbing his sensation. In this scenario, however, the prisoner remains capable of suffering via mental anguish. Humans possess not only consciousness, but *self*-consciousness, referring to an awareness of one's own mental states – “knowing that one knows” (Eccles, 1982, p. 1386). Unlike other animals, people do not simply feel pain, but interpret and

experience it as “*my pain*” (Lewis, 1940; Pence, 2008). It is not difficult to imagine that an awareness of being harvested for limbs – having one’s body used by another as if it were an object unattached to a living, emotionally invested owner – would bring about psychological distress in a prisoner. And yet, as consciousness develops at around twenty-six weeks after conception, self-consciousness certainly cannot develop before that.

Thus, the notion of suffering – encompassing both physical pain and mental anguish – as a rationale for the immorality of ravaging a prisoner for his limbs does not hold for the embryo, as the latter is biologically incapable of either experience.

Double Punishment

The idea of double punishment says this: the prisoner’s punishment was the death sentence, so it is therefore unjust to condemn him to an additional penalty with no additional reasons to warrant it. However, this argument is based on the premise that having limbs removed is, in fact, punishment. Yet why is this so?

The definition of punishment insists that an individual is subjected to treatment that causes physical pain or emotional distress. Thus, punishment is inextricably linked to reason one, the notion of suffering. Cutting off a prisoner’s limbs is only punishment in the sense that it causes the subject to undergo an unpleasant experience. If the embryo is incapable of such an experience, we can deduce that harvesting its stem cells is not actually a second “punishment” at all.

Human Dignity

Within the “nothing is lost” framework, and based solely on the reasons elucidated, we can imagine the prisoner instead as a coma patient on her deathbed. Supposing it could be proven, beyond any doubt, that the patient could experience neither physical pain nor

psychological torment, then the previous two reasons against her sacrifice would be invalidated, meaning we could justifiably take her limbs if the research prospects were substantially auspicious in their potential to save others. However, the idea of ravaging the coma patient for her body parts seems like a proposal that would abhor us, one that we would immediately reject just as we would in the prisoner example. What is the basis for this instinctive revulsion? Is there something beyond the notions of suffering and punishment that protects a person's right to remain intact before an inevitable death? And if there is, does it apply to the embryo as well? I propose that an explanation requires us to invoke the concept of "human dignity."

The notion of human dignity is one much cited, yet often weakly defined, in a range of bioethical debates, including abortion, cloning, human-animal hybridism, assisted suicide, and offspring selection. In the context of the stem cell debate, Pope Benedict XVI declared that embryonic stem cell research has "shattered" human dignity (Pullella, 2008). Leon Kass, former chair of the President's Council on Bioethics, advocates for the protection of the "dignity of nascent human life, threatened by treating embryonic human beings as mere raw material for exploitation and use in research" (2008, p. 298). The phrase has even made its way into legislation. For example, the United Nations Universal Declaration of Human Rights (1948) states that all individuals have it, and the United Nations Declaration on Cloning (2005) prohibits genetic engineering procedures that act contrary to it.

So what *is* dignity? Kant (1785) proposed that the world could be divided into two categories: entities with a price, and entities with a dignity, meaning that the latter implies inherent worth not subject to measurement by appraisal. The Judeo-Christian viewpoint similarly contends that dignity is synonymous with innate value (Cole-Turner, 1999; Novak,

1998). Kass (2008) defends dignity as belonging to something “elevated” that is “deserving of respect,” pointing to the existence of the soul as central to the dignity of humans (p. 308).

If embryos are considered humans, then, is it self-evident that they are automatically worthy of “human dignity”? In order to answer this question, it would be useful to first address two foundational questions. First: what is the basis for human dignity? That is, why do humans have it and, say, chairs do not? Second: how is dignity obtained? As Peters (2001) asks, is it “intrinsic or conferred?” (p. 133).

In terms of the first question, one notion is that *human* dignity is based on the sum of factors that distinguish people from animals, namely reasoning, morality, language, appreciation, religious beliefs, and love of beauty (Fukuyama, 2003). The Kantian conception of human dignity points to rationality as its foundation, in that this quality equips individuals to behave as moral agents (Hill, 1992). Similarly, others point to characteristics such as “emotions, language, sociality” as the basis for dignity (Hill, 2004). Religious arguments, particularly Judeo-Christian ones, contend that human dignity stems from “Imago Dei,” or being created by God, in His Image, so that people may relate to other people and ultimately to Him (Soulén & Woodhead, 2006; Peters, 2001; Resnik, 2007). Nuance aside, every definition of human dignity shares one focal idea: all, in one way or another, encapsulate the idea that humans have an effect on others. As essence of humanity is our ability to relate to one another, to share ideas, thought, and emotions, and to use reasoned thought to treat one another and the world in a moral way.

This answer segues directly into the second question of how dignity is obtained. As dignity is characterized by how humans treat, influence, and interact with others, it is, as Peters (2001) suggests, “not simply inborn, [but] rather, it is the fruit of a relationship, a continuing, loving relationship.... Phenomenologically dignity is relational” (p. 134). Human dignity is

fostered in individuals as they are both influenced *by* others and in turn exert influence *on* others. It is a product of our social world. It makes no sense to speak of an innate dignity that humans would have if, in some hypothetical realm, they passed their existences as standalone entities, completely independent of one another. Dignity only exists *because* of our interpersonal reality.

Thus, perhaps answering the intrinsic versus conferred question is a matter of semantics. The two are not necessarily mutually exclusive. Indeed, dignity is intrinsic – meaning it is present in all individuals – but only *because* it is conferred, either from one person to another, or from a divine Creator to a person. That is, people have an innate dignity, but not arbitrarily so. By intrinsic, we mean that it is universally granted – not that there is no rhyme or reason behind its being granted.

We can now attempt to address the question at hand, which is: do embryos – if considered complete persons – have human dignity? I have claimed that dignity is not arbitrarily conferred; rather, it is existent only because of certain characteristics that humans possess as a direct result of living in a social climate. As a result, even if the embryo is human, it does not follow that it is naturally endowed with this perhaps incorrectly named “human dignity,” for the concept is defined only within our relational world – a world that the embryo is not part of.

This claim – that something human does not automatically possess dignity – is perhaps an unsavory one to recognize. We invoke the idea of universal human dignity precisely to prevent potential abuses in which individuals with unfortunate traits, such as the poor or weak or disabled, are viewed as less worthy than any other individuals. And yet, we need not worry, as the definition I have outlined does not change this protection. I do not deny the existence of universal human dignity in living people in our living environment. My proposal of human

dignity simply asserts that this environment is a prerequisite for its realization. If the appropriate social context is not defined, then neither can the foundationally social conception exist within it.

Let us bring back the idea of the coma patient; however, let us now perform a thought experiment, imagining that the individual was never able to think or feel, never achieved self-awareness, and was somehow technologically created without relatives, never coming in contact with another human, such that she had absolutely zero inter-relational effect on the world. Does this being have that “innate dignity” that all others humans have? She is, in essence, missing every quality that we have identified as comprising human dignity. Still, we may be loath to answer this question in the negative, but perhaps only because it is so difficult to separate the thought-experiment patient from the real patient – the one with a home and family, the one lying in a hospital bed under physician care, the one who – by mere virtue of being alive – has made some impact, good or bad, on her fellow human beings. Yet, if the thought-experiment coma patient could exist, it follows that such a being would not have human dignity because then it would be arbitrarily conferred, disconnected from the domain in which we have delineated it.

Likewise, the spare embryo from IVF has not forged an identity, has not affected other individuals, and has made no mark on the world. Here is where the embryo is fundamentally different from a prisoner, from a terminally ill patient, and from the coma patient. By virtue of having lived already, the latter individuals have made some impact – large or small, positive or negative – in the social world, and thereby have obtained human dignity. The embryo has not.

Conclusion

Under the most conservative viewpoint that an embryo is a complete human being, the rationale against using destruction-bound embryos from IVF for stem cell research is the prisoner analogy. In this paper, I reject the analogy: spare embryos harvested for stem cells do

not undergo additional punishment because they lack the ability to suffer, and they do not possess a dignity capable of being violated because they have not influenced other beings in a social world. Thus, the reasons we deem it immoral to ravage a prisoner for his limbs only hold as a result of specific traits that the prisoner has but the embryo lacks. As this analogy – the reason behind opposition to stem cell research on spare embryos – does not stand, I therefore find it morally acceptable to use spare IVF embryos for the purposes of stem cell research.

Endnotes

¹ In January 2008, a peer-reviewed paper announced that it had created five embryonic stem cell lines without the destruction of embryos. The researchers removed single cells from embryos and then cultured the cells in environments optimally engineered to maximize growth and development (Chung et al., 2008). While this development provides promise that perhaps embryonic stem cell research may eventually proceed without the controversial embryo destruction, significant additional testing is needed to confirm the procedure's safety and efficacy. Moreover, even if the new procedure is shown successful, the issue of embryonic destruction to harvest stem cells remains unlikely to escape public consciousness anytime soon simply because of the abundance of spare embryos created each year as a result of IVF.

² The creation of spare embryos for IVF could be claimed to constitute a wrong because: 1) the procedure entails a higher than normal risk of producing deformities, meaning that the embryos may be considered subjects of an experimentation of sorts; 2) it is known that the majority of embryos will never come to fruition, meaning embryos are created with their foreseen destruction. On the other hand, even those who believe embryos are human life may still contend the procedure is justifiable in that each embryo is created with the intent of becoming a child, an end in itself, so that any embryo loss is comparable to embryo loss occurring in natural procreation (President's Council, 2002). Still, as IVF is an accepted practice and will likely remain so, our position on the morality of the practice is irrelevant in the context of the embryonic stem cell debate. We are not deciding whether the embryos should have been created in the first place; we are deciding how to proceed with the spare ones already in existence.

References

- Alexander, A. & Moore, M. (2007, November 21). Deontological Ethics. *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Zalta, E.N. (ed.), Retrieved from <http://plato.stanford.edu/entries/ethics-deontological/>.
- Chung, Y., Klimanskaya, I., Becker, S., Li, T., Maserati, M., Lu, S.J., et al. (2008). Human Embryonic Stem Cell Lines Generated without Embryo Destruction. *Cell Stem Cell*, 2(2), 113-117.

- Cole-Turner, R. (1999). Cloning humans from the perspective of the Christian churches. *Science and Engineering Ethics*, 5, 33–46.
- Derbyshire, S.W.G. (2006). Can fetuses feel pain? *British Medical Journal*, 332, 909-912.
- Eccles, J.C (1982). Animals consciousness and human self-consciousness. *Experientia*, 38(12), 1384-91.
- Fukuyama, F. (2003) *Our posthuman future*. New York: Picador.
- Grady, D. (2005, August 23). Report Finds Fetuses Feel Pain Later Than Thought. *The New York Times*. Retrieved from <http://www.nytimes.com>.
- Hill, T. (1992) *Dignity and practical reason in Kant's moral theory*. Ithica, NY: Cornell University Press.
- Hill, T. (2004). *The philosophy of the good life*. Lewiston, NY: The Edwin Mellen Press.
- Howell, K.J. (2002, March 2). Nobel Laureates' Letter to President Bush Contains Misinformation and Omissions. *Do No Harm: The Coalition of Americans for Research Ethics Press Release*. Retrieved from <http://www.stemcellresearch.org/facts/laureates.htm>.
- Humphrey T. (1964). Some correlations between the appearance of fetal reflexes and the development of the nervous system. *Progress in Brain Research*, 4, 93-135.
- Hyde, D. (1997, January 17). Sorites Paradox. *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Zalta, E.N. (ed.), Retrieved from <http://plato.stanford.edu/archives/fall2008/entries/sorites-paradox>.
- Kant, I. (1981) [1785]. *Groundwork of the Metaphysic of Morals*, Ellington, J. (trans.). Hackett Publishing Company, Indianapolis.
- Kass, L.R. (2008). Defending Human Dignity. In *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (297-331). Washington, D.C.: The President's Council on Bioethics.
- Krauthammer, C. (2002, April 29). Crossing Lines; A secular argument against research cloning. *The New Republic*, 20-24.
- Lewis, C.S. (1940). *How Human Suffering Raises Almost Intolerable Intellectual Problems*. New York: Macmillan, pp. 131-133.
- Mendiola, M.M. (2001). Human Embryonic Stem Cells: Possible Approaches from a Catholic Perspective. In S. Holland, K. Lebacqz & L. Zoloth, eds, *Human Embryonic Stem Cell Debate* (119-125). Cambridge, MA: MIT Press.

- Mrzljak, L., Uylings, H.B.M., Kostovic, I., & van Eden, C.G (1988). Prenatal development of neurons in prefrontal cortex: a qualitative Golgi study. *Journal of Comparative Neurology*, 271, 355-386.
- Novak, M. (1998) The Judeo-Christian foundation of human dignity, personal liberty, and the concept of the person. *The Journal of Markets and Morality*, 1,2 (October 1998). Retrieved from: http://www.acton.org/publications/mandm/publicat_m_and_m_1998_oct_novak.php.
- Outka, G. (2002). The ethics of human stem cell research. *Kennedy Institute of Ethics Journal*, 12(2), 175-213.
- Pence, G. E (2008). *Classic Cases in Medical Ethics* (fifth ed.). New York: McGraw-Hill.
- Perring, C. (1997). Degrees of personhood. *Journal of Medicine and Philosophy*, 22(2), 173-197.
- Peters, T. (2001). Embryonic Stem Cells and the Theology of Dignity. In S. Holland, K. Lebacqz & L. Zoloth, eds, *Human Embryonic Stem Cell Debate* (127-139). Cambridge, MA: MIT Press.
- President's Council on Bioethics (2002). *Human Cloning and Human Dignity: The Report of the President's Council on Bioethics*. Washington, D.C.: The President's Council on Bioethics. Repr. New York: Public Affairs.
- Pullella, P. (2008, January 31). Pope says some science shatters human dignity. *Reuters*. Retrieved from <http://www.reuters.com>.
- Ramsey, P. (1961). *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* Durham, NC: Duke University Press.
- Resnik, D.B. (2007). Embryonic Stem Cell Patents and Human Dignity. *Health Care Analysis*, 15, 211-222.
- Soulen, R.K., & Woodhead, L. (2006). *God and Human Dignity*. Grand Rapids, Michigan, Cambridge, UK: William B. Eerdmans.
- United Nations General Assembly (1948). *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71.
- United Nations General Assembly (8 Mar. 2005). General Assembly Adopts United Nations Declaration on Human Cloning by Vote of 84-34-37. *Fifty-Ninth General Assembly Press Release*. Retrieved from <http://www.un.org/News/Press/docs/2005/ga10333.doc.htm>

USCCB Secretariat of Pro-Life Activities (2008). *Stem Cell Research and Human Cloning: Questions and Answers*. Washington, DC: United States Conference of Catholic Bishops. Retrieved from <http://www.usccb.org/prolife/stemcellQ&A.pdf>.