

BENEFITING FROM PAST WRONGDOING, HUMAN EMBRYONIC STEM CELL LINES, AND THE FRAGILITY OF THE GERMAN LEGAL POSITION

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ABSTRACT

This paper examines the logic and morality of the German Stem Cell Act of 2002. After a brief description of the law's scope and intent, its ethical dimensions are analysed in terms of symbolic threats, indirect consequences, and the encouragement of immorality. The conclusions are twofold. For those who want to accept the law, the arguments for its rationality and morality can be sound. For others, the emphasis on the uniqueness of the German experience, the combination of absolute and qualified value judgments, and the lingering questions of indirect encouragement of immoral activities will probably be too much.

INTRODUCTION

Embryonic stem cell research causes great ethical controversy, and it has provoked a variety of legislative responses around the world. A view shared by many Europeans seems to be that there is something unethical about embryonic stem cell research, but that the promises it holds are too great to be dismissed. There is, however, very little consensus on exactly how evil embryonic stem cell research is and why – and, consequently, under which conditions it should and should not be allowed. The current European responses vary from the liberal views of the United Kingdom, Belgium and Sweden, the only three countries in which the creation of embryos for research purposes is allowed, to the restrictive views of countries like Austria, Lithuania and Poland, which do not allow the procurement of human embryonic stem cells (even) from supernumerary

embryos.¹ Different justifications have been given to allow some types of stem cell research and to ban other types. Philosophically, the most interesting and most comprehensive solution to the problem of ‘benefiting from evil’ is the German legal position on human embryonic stem cell research.

On 25 April 2002, the German Parliament passed a new law concerning the use of imported stem cell lines in research, the Stem Cell Act, which took effect on 1 July 2002.² This complements the earlier legislation regulating the creation of embryonic

¹ European Consortium for Stem Cell Research (EuroStemCell). 2006. *Regulations in EU Member States regarding hES cell research*. Available at: http://www.eurostemcell.org/Documents/Outreach/stemcell_hesc_regulations_2006feb.pdf [Accessed 24 Nov 2006].

² Deutscher Bundestag. 2002. Entwurf eines Gesetzes zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (*Stammzellgesetz – StZG*). Berlin. Bundestagsdrucksache 14/8394.

stem cells from human blastocysts: the Embryo Protection Act³ and the German Basic Law.⁴ All three laws, and their framework and implications, have been extensively discussed in biolegal and bioethical literature.⁵

The most notable detail in the otherwise restrictive German set of regulations is that the Stem Cell Act *permits*, with qualifications, the use of human embryonic stem cell lines created outside Germany before the date stated in the Act, 1 January 2002.⁶ The Embryo Protection Act has *prohibited* the production of human embryonic stem cell lines in Germany since 1990, stating that this would violate the rights and dignity of embryos as human beings.⁷ The question is, how can the German legislative body condone, after the fact, foreign activities that it does not condone any more, and has not allowed in Germany to begin with? Is this a case of hypocrisy, or is there a rational justification for the distinction?

One answer, and quite possibly the correct one, is that the German law is the result of a political compromise, or an opaque process of political bargaining. Some support for this view is provided by the history of the implementation of the Stem Cell Act, where concerns about the freedom of research, also protected by the German Basic Law,⁸ were paraded against the concerns about the dignity of unborn human beings.⁹

Since this answer is, however, ethically and philosophically uninteresting, the starting point and hypothesis of this paper is that a morally sound and rationally acceptable justification for the German legal situation exists. The hypothesis will be tested by taking the following steps.

We shall first sketch, or reconstruct, the German position on human embryonic stem cell research in

terms that *we* can understand.¹⁰ We shall then go on to list some of the main reasons against using the results of immoral practices, as presented in a recent contribution by Ronald M. Green. This is by no means the only approach to the issue, but it is useful in two respects. It picks out some of the most important aspects of the debate. And it does this in a sufficiently incomplete, or open-ended, way, to allow certain further specifications. The next step will be to isolate for more detailed discussion two specific topics, namely the morally contaminating effect of benefiting from past or present wrongdoing, and the indirect encouragement of morally dubious activities. We shall then assess the impact of the ethical analysis on the German legal position, and argue that while it is not necessarily indefensible, it is nonetheless rather fragile. In conclusion, we shall apply the analysis to a possible future case, the import to Germany of therapies developed in other countries by stem cell research prohibited in Germany.

THE GERMAN LEGAL POSITION

The ethically interesting core of the German legislation concerning human embryonic stem cell research can be encapsulated in four observations. These observations make up a *legal* case for the position without necessarily raising too many controversial moral issues.¹¹

- (i) Germany does not want to allow the creation of human embryonic stem cell lines in the country. This would involve the destruction and violation of totipotent¹² human embryos who are, according to the Embryo Protection Act,

³ Deutscher Bundestag. 1990. Gesetz zum Schutz von Embryonen (*Embryonenschutzgesetz* – EschG). Berlin. Bundesgesetzblatt 8/2746.

⁴ *Grundgesetz*. 1949. The German Basic Law, The Constitution of the Federal Republic of Germany, 23 May.

⁵ An overview of the stem cell debate more generally is provided by S. Holm. Going to the Roots of the Stem Cell Controversy. *Bioethics* 2002; 16: 493–507.

⁶ *Stammzellgesetz*, section 4.

⁷ *Grundgesetz*, article 1; *Embryonenschutzgesetz*.

⁸ *Grundgesetz*, article 5:3.

⁹ T. Heinemann & L. Honnefelder. Principles of Ethical Decision Making Regarding Embryonic Stem Cell Research in Germany. *Bioethics* 2002; 16: 530–543, p. 534.

¹⁰ This comes close to applying the ‘principle of charity’ to the German view which is, to us, very difficult to understand if the original turns of phrase are used. Cf. R.P. Churchill. 1986. *Becoming Logical: An Introduction to Logic*. New York: St. Martin’s Press: p. 58. See also S. Holm. 2003. ‘Parity of reasoning’ arguments in bioethics – some methodological considerations. In *Scratching the surface of bioethics*. M. Häyry and T. Takala, eds. Amsterdam and New York: Rodopi: 47–56, pp. 53–55.

¹¹ Our description comes close to the one provided by Heinemann and Honnefelder, *op. cit.* note 9, but the terminology is, from time to time, different.

¹² Totipotent (or ‘omnipotent’) embryos and stem cells can, by definition, develop into fully-developed human beings, whereas embryos and stem cells which are not totipotent (or ‘omnipotent’) cannot. See Heinemann and Honnefelder, *op. cit.* note 9, pp. 532–533.

entitled to full protection against violations of their dignity and rights. The protection granted to them should be equal to the protection extended to fully-developed human beings. Embryo research is allowed, when it is possible that the particular embryo subjected to scrutiny can benefit from it, but it is not allowed for purely non-therapeutic purposes.

- (ii) Germany does not want to allow the use of human embryonic stem cell lines produced in the country (if any)¹³ while the Embryo Protection Act has been in force.¹⁴ This would mean condoning, after the fact, crimes committed in the past, on grounds of present or future utility. Doing so would be analogous to accepting the use of results of Nazi medicine in current research or practice, and this would evoke considerable symbolic concerns.
- (iii) Germany does not want to allow, in Germany, the use of human embryonic stem cell lines produced in other countries after the implementation of the Stem Cell Act, because this would encourage, in other countries, activities which would be illegal in Germany.
- (iv) Germany allows, in Germany, the use of human embryonic stem cell lines produced *in other countries before the implementation* of the Stem Cell Act, on grounds of present and future utility, and in the name of the freedom of research.

The permissive norm described in (iv) is, as far as we can tell, different from the restrictive norms described in (i)–(iii), insofar as the symbolism, domain, and implications of norm (iv) differ from those of the others in important respects. Let us briefly sketch these possible contrasts.

(iv) v. (i) The stem cells in the lines that can legitimately be used are not currently totipotent, and their utilisation does not therefore present a threat to the rights and dignity safeguarded by the

¹³ There are currently no known cases of human embryonic stem cell line creation in Germany. But illegal activities are always a logical possibility.

¹⁴ The first report on creating human embryonic stem cell lines appeared in 1998, and it is therefore highly improbable that any such activity would have preceded the Embryo Protection Act of 1990. See J.A. Thomson et. al. Embryonic Stem Cell Lines Derived from Human Blastocysts. *Science* 1998; 282: 1145–1147.

Embryo Protection Act. They are only pluripotent, and do not, as such, have the ability to develop into fully-developed human beings.¹⁵ Even if their totipotency could be restored, there would be no obligation to do so.¹⁶

(iv) v. (ii) Germany cannot claim validity for German law in other countries. Hence there is no crime to be condoned before or after the fact by utilising stem cell lines created elsewhere. Furthermore, since other nations do not share Germany's Nazi past, the symbolic aspects which prevent the use of 'evil science' there are not necessarily decisive anywhere else.

(iv) v. (iii) The permission to use previously created stem cell lines, when combined with a firm refusal to utilise any newer material, does not encourage the development of further lines in other countries.

This, in a nutshell, could be the case for current German legislation concerning human embryonic stem cell research. Let us now turn to the ethical dimensions of benefiting from activities which are seen as immoral, or wrong.

GREEN ON BENEFITING FROM EVIL

In his article 'Benefiting from 'evil': An incipient moral problem in human stem cell research', Ronald M. Green lists four reasons for thinking that people should not make use of the fruits of other people's past wrongdoing.¹⁷ These are *moral contagion*, *direct encouragement through agency*, *direct encouragement through the acceptance of benefit*, and *indirect encouragement through the legitimisation of*

¹⁵ By definition, pluripotent cells have the ability to develop into many types of specialised tissue, but they cannot, as such, develop into complete human beings.

¹⁶ It seems that the German legislator must here, surprisingly, agree with the view expressed by Michael Tooley in the abortion debate, according to which we have no obligation to turn potential persons (in Tooley's example, kittens) into actual persons (in Tooley's account, by administering them a wonder drug). The surprise (although by no means a discrepancy) is that a fragment of Tooley's pro-choice argument seems to occupy an indispensable role in the German legislature's pro-life view. See M. Tooley. Abortion and Infanticide. *Philos Public Aff* 1972; 2: 37–65, pp. 60–62.

¹⁷ R.M. Green. Benefiting from 'Evil': An Incipient Moral Problem in Human Stem Cell Research. *Bioethics* 2002; 16: 544–556.

a practice. If none of these reasons is present it is, according to Green, presumably acceptable to benefit from other people's actions even if those actions can be defined as immoral or evil.

By *moral contagion* Green means that some acts performed in the past are still capable of evoking strong feelings of repugnance in us. If we make use of the results of these acts, we cannot avoid a sense of 'being in touch' with evil. As an example, Green cites the case of the multi-volume anatomy text book published by SS doctors in Vienna in 1943 and 1944, in which murdered Jewish concentration camp inmates have most probably been depicted.¹⁸ Although moved by the book's origin into thinking that it must not be used, Green also finds himself repelled by the idea of having to suppress knowledge. Recognising this emotional conflict, he concludes that the moral contagion argument, while often personally impressive and unavoidable, is not a good basis for public recommendations.¹⁹

The other three reasons against benefiting from past evil deeds are related to the causal or conceptual connection between these deeds, or similar deeds in the future, and the party taking advantage of them.

In the case of *direct encouragement through agency*, the parties benefiting from wrongdoing have themselves commissioned the wrongdoing.²⁰ This makes them morally responsible for it, as if they had themselves committed the deed, and their responsibility is often also acknowledged by the law. People are not normally allowed to gain by performing immoral acts, or by inciting others to perform them.

By *direct encouragement through the acceptance of benefit* Green refers to cases where there is no agency relationship between the wrongdoing and the parties benefiting from it. The moral mistake in these cases is that instead of drawing attention to the deeds of the culprits, we silently condone these by ignoring the immorality and enjoying the advantages resulting from it. This is likely to embolden the culprits, and to increase directly the incidence of similar wrongs in the future.²¹

Green's final category is *indirect encouragement through the legitimisation of a practice*. His main example is unethical medical research conducted by Dr Mengele and other Nazis. These people are long gone, so the question of prompting them to further immoral action does not arise. But we may still feel that we do not want to absolve, however abstractly, practices like this in the past, present, or future. By doing so we would encourage a practice, or uphold a public rule, which could not be reasonably accepted by everyone.²²

BENEFITING FROM EVIL AND THE USE OF HUMAN EMBRYONIC STEM CELL LINES

How can Green's analysis be applied to the case of making use of human embryonic stem cell lines created in the past? Let us consider his four reasons against benefiting from evil one by one. (In the following, we shall assume, with Green and with the German legislature, that there is indeed something seriously wrong in attempts to produce embryonic stem cell lines from scratch, presumably because it is immoral to destroy embryos who might stand a chance of becoming fully-developed human beings. This view has been challenged in contemporary debates, but we shall make the assumption here for the argument's sake.)

As for the idea of moral contagion, Green believes that some people can be repelled by the idea of using stem cell lines, when they know that these lines have been initiated by destroying viable embryos. But he also believes that others, people who emphasise the beneficial effects of science, would like to see research into these lines go on despite the moral contamination.²³ Due to these conflicting emotional responses, it seems that at least at the level of individual choices we can legitimately decide to benefit from the past destruction of embryos. (Whether or not this result can be extended to legislative decisions is another matter.

¹⁸ F.B. Charatan. Anatomy Textbook Has Nazi Origins. *Br Med J* 1996; 313: 1422.

¹⁹ Green, *op. cit.* note 17, pp. 547–548.

²⁰ *Ibid*: 548–549.

²¹ *Ibid*: 549.

²² *Ibid*: 550–551. The idea of the critical evaluation of practice encouragement is more fully explained in R.M. Green, B. Gert & K.D. Clouser. The Method of Public Morality Versus the Method of Principlism. *J Med Philos* 1993; 18: 479–491.

²³ Green, *op. cit.* note 17, p. 556, p. 553.

We shall return to this question as soon as we have completed our account of Green's other conclusions.)

Green's assessment of the three arguments from encouragement is based on a presumption, or, as he prefers to call it, 'key insight', according to which embryo destruction and research into embryonic stem cell lines are two different and entirely separate activities.²⁴ Every year, fertility treatments create thousands of embryos, many of which are eventually destroyed. The creation of stem cell lines only involves the use of some of these already doomed embryos, and the reason for involving them is not destruction, but the global promotion of human health and well being.

The separation of embryo destruction and stem cell research enables Green to argue that those who benefit from stem cell therapies do not necessarily encourage immoral practices.²⁵ If they do not actually commission scientists to kill embryos, they cannot be accused of direct encouragement through agency. And if they do not condone fertility treatments, no indirect or practice encouragement takes place, either.²⁶

Accordingly, Green's valid conclusion (from his chosen premises) seems to be that individuals who have not provoked scientists to destroy embryos, and who do not support or vindicate fertility treatments, can justifiably benefit from the beneficial results of human embryonic stem cell research. This conclusion is, in and of itself, slightly paradoxical, as it states that only people who reject a certain practice they see as immoral, in this case fertility medicine, can legitimately benefit from it.²⁷ We shall come back to this point later. But the first critical issue in the context of this paper is the extension of the individual viewpoint to legislative decisions, which may be different in important respects.

²⁴ Ibid: 554.

²⁵ Provided that the stem cells come from 'surplus' embryos, and that the embryos are not created solely to be destroyed and utilised for their stem cells.

²⁶ Green, *op. cit.* note 17, pp. 554–555.

²⁷ If they approve fertility treatments, they encourage, however indirectly, embryo destruction. Green himself does not draw attention to this paradox in his article. It is possible that he has missed it altogether.

MORAL CONTAGION AND COMPLICITY

If Green's conclusions are valid, and if they can be extended to national legislation, then German legislators are right in allowing the use of certain embryonic stem cell lines in research, but perhaps only if they ban fertility treatments which produce excess embryos to be used in the creation of these lines. They are, however, in this case on shakier ground in prohibiting the use of newly developed lines, as the argument invoked by Green does not distinguish between past, present and future deeds.

But are his views on contagion sound, and is the extension legitimate? Some considerations related to the symbolism of moral contamination seem to indicate that they are not.

Referring to the case of unethical Nazi experiments on human beings in concentration camps, Stephen S. Post argues that they were an abomination with which no civilised person should want to be in contact.²⁸ Just as illegally obtained evidence is inadmissible in a court of law, unethically obtained data must benefit absolutely no one. Abomination as a concept draws the line between civilisation and moral abyss, and unless such a line is drawn between science and Nazi atrocities, ethical confusion and chaos will result.

In a more cautious, but also more detailed, contribution Robert S. Pozos considers the case of the infamous but widely referenced hypothermia experiments conducted by Nazi scientists in Dachau.²⁹ Many people were killed in these attempts to determine the conditions of survival before and after immersion leading to hypothermia. Pozos points out that the use of the results of these experiments seems to condone the practice of *selective dehumanisation*, where segments of society are defined as 'undesirable' and 'expendable'.³⁰ This can be seen to convey the message that science is more important than ethics. According to Pozos, this could lead to a debasing of humanity, and to the acceptance of a

²⁸ S.G. Post. The Echo of Nuremberg: Nazi Data and Ethics. *J Med Ethics* 1991; 17: 42–44.

²⁹ R.S. Pozos. 1992. Scientific Inquiry and Ethics: The Dachau Data. In A.L. Caplan, ed. *When Medicine Went Mad: Bioethics and the Holocaust*. New Jersey: Humana Press: 95–108.

³⁰ Ibid: 105.

utilitarian³¹ society where individuals do not have rights over and above the dictates of science and expediency.³²

To a certain extent, the abomination involved in the use of tainted results can be more serious in the case of nations than it is in the case of individuals. Green uses the example of Catholic parents who have to decide whether or not to allow stem cell therapy on their child who is seriously ill.³³ The interests of an individual are in this case balanced against the past wrong. But when the scientific community, or a nation, makes decisions which are superficially similar, they engage in a different weighing exercise, where it is more possible that the rights and interests of individuals are subjected to a more collective (or 'utilitarian') concept of welfare.

How relevant is the Nazi abomination argument, if sound, in the context of the German law concerning human embryonic stem cell lines? It is tempting to think that a moral wrong is a moral wrong, and that the use of the fruits of wrongdoing is always equally condemnable. If this route is taken, it is difficult to see how evil deeds committed in December 2001 could be radically different from evil deeds committed in January 2002.

But what if we proceed from the more nuanced idea that while evil deeds always cast a shadow over future choices, these choices can still legitimately differ depending on the *degree* of evil involved in the deeds? This could help the German legislators to distinguish between the use of stem cell lines created before and after the implementation of the new act.

COMPLICITY AND CONSEQUENCES

In an interesting analysis of the fetal tissue debate, Lynn Gillam argues that the use of analogy arguments is potentially misleading, if some of the key premises are not genuinely shared by the parties

³¹ Pozos uses here the word 'utilitarian' in the technical meaning defined by the latter part of the sentence. The connection between this usage and the doctrine of utilitarianism (as a moral theory) is not explained in his article.

³² Pozos, *op. cit.* note 29, pp. 105–106, cf. p. 96. A closely related, and even more cautious, view regarding the use (specifically, the publication) of 'tainted results' can be found in F. Luna. Vulnerable Populations and Morally Tainted Experiments. *Bioethics* 1997; 11: 256–264.

³³ Green, *op. cit.* note 17, pp. 544–546, 553–554.

involved in a debate.³⁴ Her example is the controversy over the use of fetal tissue, and more particularly the analogy between murder victims and aborted fetuses that some defenders of the use of fetal tissue have evoked.³⁵ They have argued that since physicians are allowed to save lives by using the organs of homicide victims, they should also be permitted to use tissue derived from aborted fetuses, even if fetuses, as persons, were entitled to the full protection of their human rights, including the right to life.

Gillam examines the issue of complicity in the crime that makes organs or tissue available to surgeons and scientists in terms of the direct and indirect consequences of policy choices.³⁶ Since murder is firmly and unequivocally condemned in most contemporary societies, she argues that the policy of utilising the organs of murder victims is not likely to increase homicide rates, or people's attitudes concerning the immorality of murdering adult human beings. Hence it is presumably safe to allow this practice. Abortion, however, is another matter. Views on its wrongness vary, and a policy of allowing the use of fetal tissue could more conceivably alter attitudes and choices in the future. The policy could be seen as an official approval to perform abortions, as people might reason that physicians and medical scientists would not participate in the exploitation of fetal tissue unless they were convinced that there is nothing seriously wrong with abortion. Hence it could be unsafe to permit this practice.

Gillam argues that the only way to escape this conclusion is to deny fetuses the full protection granted to (other) homicide victims, and to argue that increases in abortion rates are not a serious moral wrong, after all. But then the analogy between murder victims and aborted fetuses cannot be sustained, and the argument for the use of fetal tissue collapses.

In the context of restrictive laws like the German Embryo Protection Act, it is somehow natural to assume that they proceed from a very rigid

³⁴ L. Gillam. Arguing by Analogy in the Fetal Tissue Debate. *Bioethics* 1997; 11: 397–412.

³⁵ Gillam's article, *ibid.*, contains useful references to this discussion. These are not cited here, because they are peripheral to our argument.

³⁶ *Ibid.*: 403–408.

assumption, namely, that the destruction of human embryos is *always exactly as wrong as* killing innocent adult human beings. The rhetoric of the laws, with their references to ‘human dignity’ and ‘invulnerable rights’, often gives credibility to this notion. But it is quite possible that the assumption is flawed. Despite the rhetoric, the legal implications of destroying an embryo or terminating a pregnancy differ considerably from the legal implications of taking the life of an adult human being in these jurisdictions.³⁷ In the embryonic stem cell debate, one commentator has even suggested that there might be an official European ranking which places the interests of an individual embryo above collective interests but below the life and health of more developed human individuals.³⁸

If German legislators hold a qualified view on unborn human life, then the distinction between pre-Act and post-Act stem cell lines can again be defended.³⁹ All they need to say, and show, is that the consequences and implications of allowing the use of pre-Act lines are far less threatening than the consequences and implications of allowing the use of post-Act lines. The question, of course, is, can they find support for a statement like this?

THE ARGUMENT FROM PRACTICE ENCOURAGEMENT REVISITED

One of the four reasons Green cited against benefiting from past wrongdoing was that doing so can indirectly encourage immoralities through legitimising practices that cannot be reasonably accepted by everyone.⁴⁰ He argued that Catholic parents, who do not condone fertility treatments, can legitimately allow their child to be treated by human embryonic stem cell therapies, because the acceptance of fertility treatments, and the ensuing embryo destruction,

³⁷ The maximum penalty for ‘misusing’ human embryos is three years’ imprisonment. *Embryonenschutzgesetz*.

³⁸ C.M. Romeo-Casabona. Embryonic Stem Cell Research and Therapy: The Need for a Common European Legal Framework. *Bioethics* 2002; 16: 557–567, p. 562.

³⁹ By ‘pre-Act’ lines we mean those human embryonic stem cell lines created before 1 January 2002, and by ‘post-Act’ lines those created after that date.

⁴⁰ Green, *op. cit.* note 17, pp. 550–551.

can be kept apart from the choice of the parents. Due to the separation, no practice encouragement occurs.

The situation of German lawgivers is, however, significantly different, and the argument’s force in the case of permitting the use of imported stem cell lines must be reconsidered. Since Germany does not prohibit fertility treatments, the separation of the activities is not as complete as in the case of the parents. On the other hand, if the legislators, unlike the Catholic parents, hold a qualified view on the value of embryonic life, fertility treatments can possibly be seen to promote the reproductive health of childless individuals,⁴¹ in which case the use of surplus embryos is merely a necessary (albeit ethically dubious) side effect of a morally acceptable practice.⁴²

Even if, however, the German legislators do nothing wrong by condoning fertility treatments, there can be other questionable practices that the use of pre-Act as well as post-Act human embryonic stem cell lines could encourage. This encouragement could occur either through the consequences of accepting a particular policy, like Gillam suggests, or through legitimising unacceptable public rules, which was Green’s original concern.

The questionable practices and rules suggested in the literature include, most importantly, (a) the selective dehumanisation of the most vulnerable groups,⁴³ (b) the commodification of human beings and human body parts,⁴⁴ and (c) the instrumentalisation of women as egg producers.⁴⁵ Let us briefly discuss the probability and implications of these as regards the German Stem Cell Act.

⁴¹ Romeo-Casabona (*op. cit.* note 38, p. 564) makes this suggestion in the European context.

⁴² On the problems of the use of the concept of a ‘spare’ embryo in these debates, see S. Holm. The Spare Embryo – A Red Herring in the Embryo Experimentation Debate. *Health Care Anal* 1993; 1: 63–66.

⁴³ Pozos, *op. cit.* note 29, p. 105. See also F.S. Oduncu. Stem Cell Research in Germany: Ethics of Healing vs. Human Dignity. *Med Health Care Philos* 2003; 6: 5–16.

⁴⁴ On this phenomenon, see, e.g. L.S. Cahill. Genetics, Commodification, and Social Justice in the Globalization Era. *Kennedy Inst Ethics J* 2001; 11: 221–238; S. Holland. Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues. *Kennedy Inst Ethics J* 2001; 11: 263–284.

⁴⁵ Holm (*op. cit.* note 5, pp. 500–501) also discusses the ‘technical slippery slope towards reproductive cloning’. This argument is not analysed here, because, if valid, it would provide grounds for prohibiting stem cell research regardless of origin of the lines studied.

- (a) The case against *selective dehumanisation* states that we should not accept the division of human beings into the desirable and the undesirable, the expendable and the non-expendable. Yet this is exactly what we do if we destroy embryos in order to promote the health of other people, or use the results of embryo-destructive research conducted in the past. By doing so we send the message that human beings without voices can be sacrificed for the well-being of those who can get themselves heard in the political process.

This case is easily dismissed by those who do not grant equal rights to unborn human beings, especially not in the first stages of their development.⁴⁶ But this route is not open to the German legislators who are committed to defending the dignity and rights of embryos as well as adult human beings. The only way they can defend their position, as far as we can see, is to emphasise two points. They cannot allow, even hypothetically, the use of stem cell lines produced in Germany, because that would bear a dangerous resemblance to the utilisation of unethical Nazi medicine. And they cannot allow any future revisions to the demarcation date set in the Stem Cell Act.⁴⁷ If they do, they will indirectly encourage selectively dehumanising activities in other countries.

- (b) The case against the *commodification of human beings and human body parts* is that if people are allowed to buy and sell organs, gametes, or other vital or important tissues, they will eventually lose the sense of the priceless, absolute worth, and dignity of human persons. And

⁴⁶ They only have to say that embryos are not, by definition, similar to adult human beings, and that they do not, therefore, have all the rights that adults have. If they are then accused of 'selective dehumanisation' (by the use of restrictive definitions), they can argue that the burden of proof lies with their opponents. Rights are originally associated with fully-developed human beings, and they are connected with the features and abilities fully-developed human beings have. Since embryos do not have these, there are no good grounds to extend full protection to them. To claim that embryos have full human rights is about as intelligent as it would be to call the exclusion of trees from the sphere of human rights 'selective dehumanisation'.

⁴⁷ They cannot, in other words, decide in a few years' time to set a new, later date, which would enable German scientists to exploit the results of human embryonic stem cell lines created after 1 January 2002. Green (*op. cit.* note 17, pp. 552–553) warns about this in analysing President George W. Bush's decision to authorise the use of existing stem cell lines on the grounds that the life-and-death decision has already been made.

if this happens, then the basis of morality is presumably shattered and life in societies and communities becomes difficult.⁴⁸

The Stem Cell Act allows German scientists to buy foreign material, the origin of which is, by definition, human and embryonic. How, then, can they avoid charges of commodification? The German response seems to be to regulate tightly the use of this material. Scientists are only allowed to conduct studies which aim at progress in human diagnosis, prevention and therapy; preliminary studies for these must be extensive; and the import of cell lines is overseen by a separate ethics commission.⁴⁹ While this does nothing to correct the initial immorality of embryo destruction, it is an attempt to make the most ethical use of the past wrongdoing.⁵⁰

- (c) The *instrumentalisation of women as egg producers* is a future concern which has not been adequately addressed by any legislature so far. As Søren Holm has pointed out,⁵¹ therapies developed by stem cell research may, once completed, require the availability of vast numbers of eggs, which have to come from women. How will these be obtained, and how can problems of instrumentalisation be avoided, if this turns out to be the case?

A possible solution could be to use ova from other species, for instance, cows. But the technique has

⁴⁸ This type of thinking is usually associated with the philosophy of Immanuel Kant, who wrote on the topic: '[Man] as a person, i.e. as the subject of a morally-practical reason, is exalted above all price. For as such a one (*homo noumenon*) he is not to be valued merely as a means to the ends of other people, or even to his own ends, but is to be prized as an end in himself. This is to say, he possesses a dignity (an absolute inner worth) whereby he exacts the respect of all other rational beings in the world, can measure himself against each member of his species and can esteem himself on a footing of equality with them.' I. Kant. 1797. *The metaphysical principles of virtue (Metaphysische Anfangsgründe der Tugendlehre)*, pp. 434–435. In I. Kant. 1994. *Ethical Philosophy*. Second edition translated by J.W. Ellington and with an introduction by W.A. Wick. Indianapolis and Cambridge: Hackett Publishing Company: p. 97.

⁴⁹ Heinemann and Honnefelder, *op. cit.* note 9, p. 542.

⁵⁰ A recent study seems to indicate, however, that this is not enough for the German public, who are critical towards all kinds of human embryo research. Das Institut für Markt- und Politikforschung. 2002. *Beurteilung der neuen Möglichkeiten in der Biotechnologie. Bundesweite Erhebung*.

⁵¹ Holm, *op. cit.* note 5, p. 499.

not yet been perfected, and other kinds of ethical problems can be involved in the practice.

THE FRAGILITY OF THE GERMAN POSITION

Is it, in the light of the preceding observations, fair to say that a morally sound and rationally acceptable justification for the German legal situation exists? The answer to this question depends on the view taken on some of the principles, distinctions and definitions underlying the Stem Cell Act, and especially its qualified permission to import materials from other countries.

German legislators tackle the problem of moral contagion by drawing a line between Germany and the rest of the world. They seem to think that although the Nazi past of their own country would make the domestic production of human embryonic stem cell lines too symbolically laden, this concern is not equally momentous elsewhere. Is this a sign of becoming humility, or is it an expression of assuming self-importance? Interpretations are bound to vary.

By prohibiting the use of new foreign stem cell lines the lawgivers refuse to encourage the creation of such lines by economic incentives or legal approval. But by allowing the use and purchase of lines derived in 1998–2001, they condone, and economically encourage, the activities of research groups and companies which may continue to destroy embryos, possibly aided by payments coming from Germany. Is there a discrepancy here?

The insistence that human embryos are entitled to the equal protection of their rights and dignity conveys the message that human life is equally valuable whatever its stage of development. On the other hand, the production, in fertility treatments, of extra embryos destined for destruction can be seen to imply that there is a ranking of values in which human embryos exceed general scientific aims but succeed the reproductive needs of their parents. Can German legislators find a way to hold on to both models simultaneously?

Both during the preparation of the Stem Cell Act and after its implementation many Germans have been worried about the dehumanising, commodify-

ing, and instrumentalising effects of the law. The response of the legislators seems to be to ensure that foreign stem cell lines will only be used in research which directly promotes the health and welfare of individual human beings. Arguably this commitment, which does definitely not help the destroyed embryos, only encourages further research into human embryonic stem cells by highlighting its most successful aspects.

The causal connection between German legislation and the evils mentioned here are mostly unclear; and, at least at the level of law, some symbolic concerns can be addressed by the convenient formulation of the paragraphs. The disputes are, for the most part, verbal, and although paradoxes can be found, their ethical cash value remains contested.

If the legislature's views on the disputed questions can be melted into a coherent whole, then there is a morally and rationally acceptable justification for the Stem Cell Act. The legislators seem convinced that is the case. Since others can, however, feasibly disagree, the German legal position regarding human embryonic stem cell research remains ethically fragile.

THE FUTURE IMPORT OF TAINTED THERAPIES TO GERMANY

The fragility of the German position is especially clear in the case of possible future stem cell therapies which will possibly be developed in other countries by research which would be illegal in Germany. Could German legislators morally allow the import of such therapies?

The first reaction, based on the time limit for the creation of stem cell lines, has to be negative. If it is wrong to import cell lines derived after 1 January 2002, surely it must be wrong to import therapies which owe their existence to these forbidden lines.

On the other hand, however, if the German authorities are right in allowing fertility treatments and the limited use of human embryonic stem cells in research, they could also allow the use of tainted therapies. They could argue that it is more important, and hence more acceptable, to use embryos indirectly as a means, when the aim is concrete

human well being instead of abstract scientific progress.

The paradox of this solution is that, according to their own rules, German authorities cannot even consider this possibility beforehand – and they may only get to use it once, if at all. If they admit that Germany can, in the future, import therapies derived from forbidden stem cell research, they will, with this admittance, encourage current and future destruction of early human embryos. And, this, of course, is something that they expressly want to avoid. The only possibility open to them is not to consider the issue at all, and just wait. The time will come when the benefits of stem-cell-based therapies are too prominent to be ignored, and the legislators

can then decide to allow some of these therapies, maintaining that they have not provided any incentives to the evil activities leading to their creation. But if the logic used in the Stem Cell Act is adhered to, the law must then set a time limit, after which the import of therapies is again banned.

Moral integrity, as understood in individual ethics, would, no doubt, require the German legislators to anticipate the development of ‘forbidden’ therapies, and to foreclose the option of their use in Germany in advance. Political *nous* and the possibility of promoting human welfare in the future, however, demand a moratorium on hasty, irrevocable decisions. The ensuing legal compromise will, almost inevitably, have a hypocritical aftertaste.