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The Ethics of Fetal Tissue Transplant Research: A Review

by

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The latter part of the twentieth century has seen a marked acceleration in the rate of progress in the area of transplant research. The world of 1998 is one in which it is possible to transplant hearts, kidneys, lungs, livers, corneas and even neural cells from one human body to another. Transplants involving some organs from animals, and even synthetic organs, have also been achieved, with beneficial and sometimes spectacular results. It is therefore not surprising that, since Dr. Christiaan Barnard performed the world's first heart transplant operation just over 30 years ago and placed the issue firmly in the public eye, a great many questions concerning the ethics of such procedures have been raised and actively debated. From our perspective at the end of the twentieth century, it would appear that the first exultant acclamations of these life-saving and life-enhancing procedures have given way to a more circumspect examination of the potential disadvantages which might accompany their implementation. This clearly has significant implications for the rights of the donor to bodily integrity and respect, and the rights of the recipient to avail of the most advanced treatments for his or her particular condition. If the issue of adult human transplants has been a source of disagreement in ethical and medical circles in recent years, it is clearly overshadowed by the degree of controversy which surrounds the issue of fetal tissue

transplants. For here we are not dealing with the adult human person who is the proud possessor of long-recognized societal and legal rights but with a class of persons whose standing has been severely diminished by decades of legal and political indifference and hostility. Thus, although the issue of fetal tissue transplants may not appear to be related to the issue of abortion, this article will attempt to demonstrate how many aspects of the latter debate are perceptible in the former. A number of relevant opinions on the matter will be reviewed, many of which relate to the findings of the Human Fetal Tissue Transplantation Research (HFTTR) Panel, convened at the National Institutes of Health in 1988. In addition, we will investigate whether, in view of the substantial body of abortion-related research currently being conducted, there exists a morally acceptable and medically/economically viable method of using human fetal tissue to aid in transplant research.

HFTTR - The Report

The HFTTR panel first met in public session in September of 1988 to discuss the ethics of fetal tissue transplants, six months after the U.S. Assistant Secretary for Health, Robert Windom, had declared a moratorium on any federal funding of such transplants involving tissue obtained from induced abortions. Mr. Windom posed a number of questions to the panel, most of which concerned the relationship between the collection of fetal tissue and the abortion procedures from which that tissue was obtained. By December of that same year, after hearing legal, ethical and sociological testimony from invited speakers and public interest groups, the panel filed its report. One of its authors, James Childress, notes in his account of the proceedings that the panel advocated a lifting of the moratorium on federal funding for fetal tissue transplants and the implementation of a number of "safeguards" which it believed would "separate as much as possible the pregnant woman's decision to abort from her decision to donate fetal tissue following the abortion."¹ In addition, the panel believed that these regulations would prevent any complicity on the part of tissue collection agencies in the preceding act of abortion. Of the twenty-one panel members (ethicists, lawyers, biomedical researchers, clinical physicians, public policy experts and religious leaders), four filed dissents. This dissent was based on a belief in the immorality of abortion and in the related immorality of complicity with this moral evil. We must therefore examine in greater detail this question of complicity.

HFTTR - The Dissent

James Bopp, Jr., a dissenting member of the panel, describes in *The Fetal Tissue Issue* how the question of complicity with past abortions has arisen because of principles enunciated during the Nuremberg War Crimes Trial, concerning the doctors who used human remains obtained from concentration camps for their various experiments. These doctors were condemned for having "taken a consenting part"² in the crimes carried out at the camps inasmuch as they were fully aware of these atrocities and their research benefited as a result of these acts. By way of comparison, Bopp describes how, in 1988, Dr. Curt Freed spent four days in an abortion clinic searching for "acceptable" fetal tissue for what was to become the first fetal tissue transplant. During this time, Dr. Freed was "examining and reassembling fetal remains to be sure abortions were complete, a task normally performed by clinic personnel."³ For Bopp, such actions represent clear participation in and agreement with the abortion procedure itself, no different from the complicity of the German doctors in the death of camp prisoners.

Role of Intermediary

In his article, Childress refers to the finding of the Polkinghorne report (in the U.K.) which called for the introduction of an "intermediary" collector or processor as a "method to separate the **practice** of abortion from the use of fetal tissue."⁴ But Bopp contends that such a provision would not eliminate the complicity of the researcher. If the act itself is an immoral one, then the provision of a middle man does not create "a break in the chain of ethical responsibility"⁵ in the same way that the hiring of a "hit man" does not break the chain of ethical responsibility for the person who hires him for the purpose of murder.

Childress notes that James Burtchaell (another dissenting panel member) perceives moral complicity in an agent whose actions "involve an association that both yields benefits and conveys approval. Even if the agent expressly condemns the wrong actions, his or her association symbolically eviscerates those condemnations."⁶ Burtchaell holds that the researcher, in "entering into an institutionalized partnership with the abortion industry as a supplier of reference...becomes complicit, though after the fact, with the abortions that have expropriated the tissue for his or her purposes."⁷ For his part, Childress attempts to show the unworkability of this definition (in a kind of *reductio ad absurdum*) by widening the scope of this "institutionalized" symbolic association and speculating that, according to Bopp and Burtchaell, everyone from transplant recipients to

taxpayers would somehow be complicitous in the federally-funded practice of HFTTR. John Robertson (a majority report signatory) makes a similar claim by extending this "complicity" to the grocer who sells food to the abortionist. This argument patently ignores the all-important criterion of *proximate cause*. Bopp points out that there is a substantial difference between the grocer who accepts everyone's money (including the abortionist) and the researcher who is "logically proximate" to those performing the abortion. Moreover, it would be a more apt analogy if the grocer were the recipient of illegal liquor (e.g., moonshine) from a criminal via a middle man. The grocer would then be complicitous with criminal activity if he were to knowingly sell the liquor.

Robertson points to the example of body parts and organs which are obtained from murder and accident victims and attempts to outline a parallel with the researcher collecting fetal tissue from an aborted child.⁸ According to Bopp, this analogy is flawed since it does not imply any approval of murder for the doctor to use the organs of a murder victim. If the doctor had knowledge of the murder in advance or had some arrangement with a serial murderer to receive the bodies of his victims, then a clear charge of complicity would apply here. But as he is unaware of the actions of the murderer, he must surely be innocent of any cooperation with those actions. Unlike abortion, murder is not a regulated, approved and predictable practice. It remains a random, though brutal, action (accidents are similarly unpredictable and random). But, as Bopp theorizes, what if this were not so? What if one could know when and where a murder was about to occur and could arrange to collect the bodies afterwards? He asks: "What if the murderer were known, and an intermediary rented space in a building owned by the murderer in order to more efficiently collect and process human tissue?"⁹ In these cases (among others) the complicity would be clear and the analogy with abortion proven. Additionally, the law might declare murder to be legal, posing the troubling question: "Would the fact that the practice is not proscribed by law make it justifiable?"¹⁰

Legality and Morality

This excessive reliance on legality as the basis of morality is what led the authors of the majority report to deny that there was any valid analogy between the medical use of Holocaust victims' bodies and the practice of abortion for transplant purposes: "If the complicity claim is doubtful when the underlying immorality of the act is clear, as with Nazi-produced data or transplants from murder victims, it is considerably weakened when the act making the benefit possible is legal and its

immorality is vigorously debated, as is the case with abortion.”¹¹ Thus the mistake of elevating “legal” acts (in the “hierarchy” of morality) over those which are “vigorously debated” is painfully demonstrated when one considers that the Nazi regime considered all that it did to be in full accord with its own law. Nor is it the case that Nazi eugenic and social experiments are beyond “vigorous debate”, even today. The existence of those who adhere to anti-semitic, eugenic or neo-Nazi beliefs testifies to that regrettable fact.

The majority vigorously objected to comparisons between the Nazi death camp regime and the practice of fetal tissue transplantation. Dr. Moscona forcefully asserted: “The Holocaust was not a medical research project to help Parkinson patients and rescue infants from fatal diseases.”¹² In reply to this, one must remember that the Nazis themselves *did* believe that their actions would benefit German society through what Bopp calls “racial hygienics.” Thus it is far too simplistic to view those experiments as nothing more than an exercise in cruelty. Those German doctors, like the researchers of today, would have vehemently denied that they possessed anything other than altruistic motives, and this is perhaps the most chilling aspect of their crimes. Moscona also believes that the central objective of the Nazis was not the implementation of experimental “cruelties” but the ideology which “denied human freedom and enslaved it to medieval hatreds in the name of world conquest”¹³ and which “[denied] human rights to one class of citizens, unlocked oppression and provided the warrant for genocide.”¹⁴ But similarly no one would maintain that the objective of the abortion movement is the procuring of fresh tissue for transplantation. Rather, it is the realization of an ideology which denies human rights to a class of citizens (i.e., the unborn) and treats humans as expendable in the name of some greater societal “good.” The Nazi analogy is thus both accurate and appropriate. For Moscona, “Equating freely surrendered abortus cells with tormented people poisoned with lethal insecticides defies reason and outrages morality.”¹⁵ Here, he has confused the role of the subjects by asserting that the “cells” are freely surrendered. But by whom? Not by the unborn fetus, certainly, who is forcibly poisoned by lethal substances of another kind. Thus the denial of the analogy is once again in vain.

Effect of Fetal Tissue Transplants on Abortion Decisions

The panel also considered the possible effects of the availability of fetal tissue transplants on the decision of a woman to obtain an abortion. The majority believed that it was possible to separate these two factors through a system of legal sanctions and regulations which would remove

the incentives to seek an abortion for transplant purposes. Robertson argues that the provision of federal funding for fetal tissue harvesting would not convey an approval of abortion, any more than the funding of kidney transplants encourages the occurrence of murder, suicide or accidents. However, a critical distinction exists here: Whereas the above three phenomena are by no means approved of by society (recent legal changes in Oregon notwithstanding), the practice of abortion is not only tolerated but has been actively encouraged through the law since the *Roe v. Wade* decision of 1973. Therefore, as Bopp observes, the lack of legal restraints against the practice "makes the moral wrong of abortion susceptible to promotion."¹⁶ The panel seems to believe that federal funding of the tissue collection process would be the best way to insure the separation (what they call "a symbolic gulf") between the decision to abort and the decision to provide fetal tissue. Closely regulated, they argue, the HFTTR process is value-neutral. It neither approves nor disapproves of the practice of abortion but merely makes use of fetuses which were destined to be destroyed anyway. Under the panel's guidelines, a woman would not be asked for her consent to donate fetal tissue until she had decided to obtain an abortion: "no information about the donation and use of fetal tissue in research should be provided prior to the pregnant woman's decision to abort, unless she specifically requests that information."¹⁷ This provision, along with others which stipulate that "no fees [should] be paid to the woman to donate [fetal tissue]"¹⁸ is aimed at preventing abortions which would not have otherwise occurred. The naivete of this belief becomes evident when one considers both the difficulty of identifying any one "moment of decision" and the factors involved in the decision to abort. Bopp cites many studies which show that "most women are ambivalent about abortion...a large percentage of women end up changing their minds at least once, with five percent doing so after making the abortion appointment."¹⁹ A study by Kathleen Nolan has found that since "women do take the perceived needs of others into account, as a major and often determinative factor, the potential for influence on individual [elective abortion] decisions is real." Thus, the general knowledge of the existence of the procedure may well tip the balance in favor of abortion, a fact implicitly recognized by Childress when he accepts that HFTTR "may reduce feelings of guilt and tragedy"²⁰ associated with abortion. He relates the story of a phone call from a man whose wife was about to have an abortion. They wanted, he said, to donate fetal tissue in order to "reduce their troublesome thought about abortion."²¹ Though Childress is unclear as to the motives of the woman in question, it is not difficult to see how other women in the emotional upheaval of crisis pregnancy may well seek an "altruistic" solution as a way of lessening deep feelings of unease and

guilt. Substantial research on post-abortion patients, such as that conducted by David Reardon (author of the excellent *Aborted Women, Silent No More*) shows that many women do not feel that they were sufficiently informed or free of pressure when they made their abortion decision. In light of this, the panel's implied view of abortion as a clearly defined and emotionally uncomplicated choice strikes one as singularly ill-informed.

Parental Authority

In spite of the concerns raised by the dissent, the panel majority believed that the method of *express donation* (as opposed to "presumed" donation) enacted by the pregnant woman after the abortion decision was most appropriate to society's traditions and practices, e.g., the Uniform Anatomical Gift Act and other federal research stipulations. Bopp and Burtchaell opposed this finding, believing that when a pregnant woman "resolves to destroy her offspring, she has abdicated her office and duty as the guardian of her offspring, and thereby forfeits her tutelary powers."²² The majority objected that the decision to abort does not automatically invalidate the mother's moral standing "as the primary decisionmaker about the disposition of fetal remains, including the donation of fetal tissue for research."²³ Thus, despite the fact that she directly intends the death of her unborn child, "she still has a special connection with the fetus and she has a legitimate interest in its disposition and use."²⁴ The panel cited legal examples where parents who are suspected of or have admitted to the death of their child by abuse are permitted to make proxy decisions regarding use of that child's organs. Without addressing this latter claim (which is difficult to judge because of its unspecific nature) it seems difficult to justify the notion of "legitimate interest" in the case of a mother who has chosen to abort. The law (and moral law) clearly does not consider parenthood an absolute "right", independent of all other considerations. Rather, it is a sacred trust which depends for its legitimacy on the maxim (enunciated by Hadley Arkes in *The Fetal Tissue Issue*) that all "[parental] decisions are governed by an overriding concern for the health and well-being of the child."²⁵ Hence, the legal system can supersede parental authority to provide life-saving procedures when necessary and the moral law can declare illicit any attempt to conceive children outside of the marital act. Both underscore the belief that the rights of parenthood are contingent on the welfare of the child.

Hadley Arkes argues cogently that a mother who has decided to abort has weighed her personal interests against those of her child and determined that her interests have overridden any claim on the part of her child to preserve its life. According to Arkes, "it would seem to be clear

beyond shading that the woman has made a decision not to be a 'mother' in any sense that defines the office and the relation."²⁶ She will not allow the child to be born, sustained, nurtured or protected. Nor will she allow others to provide that care. Arkes finds it hard to imagine "a situation in which a woman would sever more decisively her connections to the child and the claim to stand, in the life of that child, in the position of a "mother" or even a guardian."²⁷ Yet this claim is precisely what the panel majority would uphold via the significance they attach to the "special connection" between the mother and the child she is about to destroy. On the contrary, Arkes maintains, the mother has the authority to make a "gift" of her miscarried child's tissue only because her intentions were always directed towards the health and well-being of that child while it was alive. Arkes notes that the conclusion that a mother can forfeit the right of donation through her abortion decision may seem "a bit jarringly out of line with the currents of our time"²⁸ but observes that the "currents of our time" are themselves somewhat bizarre. The era of *Roe v Wade*, euthanasia and organ transplant developments has seen the emergence of the notion of property rights over another's body and over its disposal. These rights, which were not recognized at the time of Blackstone (theft of a corpse was considered "no felony, unless some of the gravecloths be stolen with it"²⁹) are now widely debated and legislated for. Of significance in this debate is the person's reasonable rights of property over his own person, "which Locke regarded as the foundation of all other claims of property."³⁰ Neither are these rights lost at death, a fact which often escapes those who regard the deceased fetus as a "commodity." "The source of rights...must lie in principles that are not material in nature. Those rights do not vanish upon death because the principles themselves do not decompose."³¹

The Need for Fetal Tissue Transplant Research

In spite of the arguments outlined above, proponents of HFTTR justify its implementation on the basis that there simply exists too great a human need for such transplants for research to be halted. In truth, it cannot be denied that research (even of an immoral nature) may indeed give rise to medical cures and treatments (e.g. for Parkinson's and Alzheimer's diseases and certain spinal cord injuries) which are of benefit to society. Clearly, the panel believed that the risk that new abortions would be caused by the availability of HFTTR was acceptably low and that the promised medical benefits outweighed that risk. What exists here is an unfortunate example of proportionalist reasoning which attempts to measure the value of human lives lost against the promised benefits of HFTTR. The truth of this was grasped by the U.S. Assistant Secretary for

Health when he recognized that the risk that one more unborn life would be taken was too high a price to pay for such benefits: "If just one additional fetus were lost because of the allure of directly benefiting another life by the donation of fetal tissue, our department would still be against federal funding..."³² (Predictably, Childress rejects the "moral seriousness" of this claim and instead blames the increase in abortions on those who fail to provide sex education, contraceptive and psychosocial support for pregnant women.) Indeed, there is much to suggest that the risk to unborn life from abortion-related HFTTR is far greater than simply one more abortion. Despite the panel's high-minded aversion to the sale or purchase of fetal tissue, the indications are that trafficking in such tissue has already become widespread and can only increase as governments and ethical bodies confer approval on the process itself (albeit for "non-profit" purposes). Arkes remarks that even when state laws may forbid the explicit "sale" of tissue, "it will still be necessary to pay for the procedures and administration, and the transactions may be described...as 'renditions of service' "³³ with clinics offering cheaper abortions in exchange for much needed fetal material.

Former abortion doctor (turned pro-life activist) Bernard Nathanson has observed that "a mother may not sell her aborted fetus, but that will be no bar to other economic benefits disguised as part of the procedure (just as happens with 'free-market' adoptions now)."³⁴ Childress admits that under the National Organ Transplant Act (NOTA – which forbids the "sale" of fetuses under a 1988 amendment), provision is made for the reimbursement of abortion clinics for expenses incurred in collecting fetal tissue. This gives rise to "some uncertainty" as to whether the clinic "can then reduce the price of the abortion, thereby passing the earnings on to the pregnant woman."³⁵ In his autobiographical work *The Hand of God*, Nathanson reminds his readers that the cost of fetal tissue therapy (for Parkinson's disease to take but one example) would be far from cheap. Requisite procedures must include screening of patients for their suitability for the technique, carrying out of abortions, icing and transportation of freshly-aborted fetuses, examination of fetal tissues, procedures connected with the transplant operation itself, and follow-up diagnosis. The estimated cost of such a procedure would be at least \$50,000 and there could be as many as 5 million potential recipients on the waiting list, yielding a total cost of \$250 billion. He concludes that this is ample incentive for a massive increase in the marketing of human fetuses and that it would be "preposterous to believe that a ban on 'commercialization' of fetal tissue would (a.) remove the profit motive from this technology, (b.) reduce the demand for the technology, [or] (c.)...sanitize the technology ethically."³⁶ It is clear that this testimony, from a doctor who reaped substantial

financial rewards from the abortion industry himself, represents a more sanguine, realistic assessment of the potential hazards of fetal tissue transplants than the overly optimistic hopes of the HFTTR panel. In addition, Professor Ronald Munson points out that the 1988 amendment to NOTA, referred to above, could easily be repealed if further research into fetal cell therapy proves successful.³⁷ It should be noted that this unease does not come from pro-life circles alone. Kate Michaelman of the National Abortion Rights Action League has already declared that she sees "a potential for the abuse of women in this whole thing."³⁸ It remains clear that only strict legal and ethical disapproval of abortion-related HFTTR can prevent the specter of a worldwide market in the harvesting of fetuses. Unfortunately, the panel appeared singularly unwilling to convey this disapproval.

Morally Acceptable Methods of Tissue Collection?

In view of the danger posed to unborn life by the many illicit ways of collecting fetal tissue, is it possible to speak of alternative, morally justifiable ways of doing so? Dr. Maria Michejda, who has done extensive research on miscarried fetuses at Georgetown University, believes it is. She argues that, although the research so far has been disproportionately biased in favor of abortion-produced fetal tissue, there are clear reasons for using tissue from miscarriages. One of these is the fact that "tissue harvested from electively aborted fetuses [is] highly contaminated (75%) due to the methods of abortive intervention and the rapid expulsion of the fetus with the resulting rupture of the fetal abdominal wall and other surface areas."³⁹ Furthermore, because miscarriages can occur at any time during pregnancy, they provide better examples of tissue from all periods of gestation than cells from abortions, most of which are performed in the first trimester. Based on her studies conducted into fetal tissue procurement, Dr. Michejda also believes that tissue obtained from miscarriages will prove in the long run to be more medically viable than aborted tissue. Predicting that the advent of abortion drugs will diminish the availability of electively aborted tissue, she asserts that the time is right to establish a collection network devoted exclusively to harvesting fetal tissue from miscarriages. Moreover, President Clinton's 1993 lifting of the moratorium on fetal tissue research and the concomitant restoration of federal funding for such research would seem to highlight the need for a systematic development of a morally licit method of tissue collection as a way of reducing the demand for abortion-related tissue. While this collection may be morally permissible because of its non-reliance on the abortion procedure, it is evident that great caution must still be exercised in

the establishment and maintenance of fetal tissue "banks." Dr. Michejda believes that "fetal tissue transplantation offers many exciting, therapeutic prospects"⁴⁰ and the quest for morally acceptable alternatives to abortion-related transplants may indeed present to the scientist many fascinating avenues of research. Nevertheless, in a society and industry dominated by abortion advocates, stringent standards must regulate the approval of such tissue banks in order to prevent the semblance of a corresponding approval of a "harvesting" mentality. Dr. Michejda accepts the need for such controls on sound bioethical grounds which would regulate such practices. These controls would have to take account of the fact that the growth of tissue banks is not immune from the influence of market forces which tend to commercialize anything with a cost value. In addition, one would have to examine critically the potential of such storage to create a demand which may, because of some future shortage, seek its corresponding supply elsewhere in less ethical circumstances. Noted moral theologian Fr. Ronald Lawler poses this important question: "Is there much likelihood that...the demand for fetal tissue would be so great that there would be almost unanswerable demands for fetal tissue, far more than could be satisfied by miscarriages?"⁴¹ While accepting that the goods pursued in research are very great, he urges any prospective researcher to bear the following in mind: "the fact that great goods may be reached by such a project does not finally determine that it is a good one."⁴²

Conclusion

Dr. Michejda observes that "the recent rapid progress in biological sciences, and in the new therapies, which emerged from them, has moved ahead of the currently accepted ethical guidelines."⁴³ It is therefore imperative that the new ethical and moral guidelines do not merely attempt to "catch up" with new therapies but critically examine them, both for their immediate effects and the impressions of approval which they convey to society. In this respect the Church, with its deeply-rooted understanding of the integrity of the human body from conception until death (and after death), seems uniquely suited to the task of keeping in view before the medical and ethical communities the inestimable dignity of man and the respect which he deserves as they seek to formulate their guidelines. Fr. Ronald Lawler's observations are again insightful in this regard: "For love requires both that we act out of generous love, seeking to help others flourish in good, and also that we pursue what is good in ways that do not intrinsically evil deeds, nor bring about irresponsibly measures of harm that in the circumstances we have a duty not to bring about."⁴⁴ In this dual action, then, lies the essence of true Christian charity, which must of

necessity be the cornerstone of any ethical framework governing the use of fetal tissue transplants. Only in this way can these transplants truly serve the flourishing of human goods by respecting the intrinsic dignity of the donor while simultaneously demonstrating compassionate concern for the alleviation of human suffering. Failure to recognize this can only serve to reduce persons, both donor and recipient, to the humiliating status of "producer" and "consumer" and to ultimately degrade the nobility of scientific research itself.

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