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Sharon M. Parker

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BRINGING THE "GOSPEL OF LIFE" TO AMERICAN JURISPRUDENCE: A RELIGIOUS, ETHICAL AND PHILOSOPHICAL CRITIQUE OF FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH

*Sharon M. Parker**

INTRODUCTION

The "biological revolution" of the twentieth century has forever changed the course of human history. Our newfound ability to create and manipulate the very matter of which we are made has enormous potential for both good and evil. What was once confined to the pages of literature and science fiction has now become an everyday reality.[1] With it has come the temptation to embrace "a certain Promethean attitude"[2] that denies any limits to what humans can and should do in striving for knowledge and improvement.[3] This is nowhere more evident than in the

* J.D. Candidate 2001, Columbus School of Law, The Catholic University of America; J.C.L. 1996, Pontifical Gregorian University; S.T.B. 1994, Pontifical University of St. Thomas Aquinas; B.A. 1990, University of San Francisco. The author thanks Michael Moses and Richard Doerflinger for their guidance, and her parents, Bill and Carol Parker, for the gift of life.

1. *See, e.g.*, JOHANN WOLFGANG GOETHE, FAUST (New Directions, 1941) (1805); MARY WOLLSTONECRAFT SHELLEY, FRANKENSTEIN: OR, THE MODERN PROMETHEUS (Signet Books, 1983) (1816).

2. *See* JOHN PAUL II, *EVANGELIUM VITAE* ("*THE GOSPEL OF LIFE*"), ¶ 15 (1995) [hereinafter *Evangelium Vitae*]. For ease of reference, papal encyclicals are cited by paragraph numbers rather than page numbers.

3. According to legend, Prometheus was a Titan who stole fire from Olympus and gave it to mankind. For this, the gods punished him by chaining him to a rock, where an eagle came each day and ate his liver. "The Promethean figure may be described as one who is constantly striving to unlock the secrets of nature and who refuses to acknowledge any limits to the human mind's capacity to understand them. Such an individual might even covet the knowledge of God." RAYMOND DENNEHY, THE BIOLOGICAL REVOUTION AND THE MYTH OF PROMETHEUS, in POPE JOHN PAUL II LECTURE SERIES IN BIOETHICS, VOL. II, BIOETHICAL ISSUES 7, 8 (Francis J. Lescoe and David Q. Liptak eds., 1986). The author is indebted to Dr. Dennehy for the opening thoughts in this article.

ethical debates surrounding current scientific research and experimentation with human embryos.

While theologians, ethicists and scientists are at the forefront of the debates on bioethics, legislators and judges are not far behind. Where legislators have not yet passed laws to deal with these new situations, very often judges must create solutions to resolve new disputes.[4] In particular, Supreme Court decisions have the potential to bind Congress to judicial solutions, as illustrated by the seminal American decision on the constitutional status of unborn life, *Roe v. Wade*.[5]

It may surprise some, however, that the Supreme Court's abortion jurisprudence has not been dispositive of the issues surrounding early human life.[6] In fact, the legal status of unborn human life remains uncertain because it is treated differently depending upon the context. Abortion, *in vitro* fertilization (IVF), embryo research, tort law and criminal law have each generated separate legal theories backed by varying moral criteria and public policies.[7] In addition, where case law has followed the reasoning of *Roe* in not recognizing any legal protection for early human life, both federal and state legislatures have enacted statutes and regulations to limit the harm done to the unborn by the Supreme Court's abortion jurisprudence.

These issues have loomed large in the background of the current controversy over federal funding for research involving the creation and destruction of human embryos. Although biomedical research in America has used fetal tissue since the 1930s,[8] the advent of IVF in the 1970s first gave rise to the widespread possibility of research on embryos. This is because IVF typically involves the creation of more embryos than are necessary for implantation in the womb.[9] While federal law has never

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4. *See, e.g.*, Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 133 (1993).

5. 410 U.S. 113 (1973).

6. *See* Christine L. Feiler, Note, *Human Embryo Experimentation: Regulation and Relative Rights,* 66 FORDHAM L. REV. 2435, 2439-40 (1998). "Roe and its progeny . . . do not, however, dispose of the embryo research debate. The Supreme Court's jurisprudence does not prohibit the government from granting rights to fetuses or embryos; it merely holds that the Constitution does not obligate the government to do so." *Id.*

7. *Id.* at 2438. "The scholarly disagreement over the moral worth and legal status of the embryo is mirrored in our nation's courts, which currently afford disparate treatment to embryos in a variety of reproductive contexts." *Id.*

8. THE NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH 29 (1999) [hereinafter "THE NBAC REPORT"].

9. Feiler, *supra* note 6, at 2435-36.

prohibited the use or destruction of embryos in such research projects, for more than twenty years federal laws and regulations have banned the use of federal funds for experiments considered harmful to the human embryo.[10]

Recent scientific discoveries regarding stem cells have reopened the issue of federal funding for stem cell research. Announcements from the scientific community in November 1998 reported the success "in isolating and culturing stem cells obtained from human embryos and fetuses."[11] Stem cells are cells from which all tissues in the adult body develop.[12] Since scientists thought, until recently, that adult cells were not convertible into other types of cells, they considered use of embryonic cells or fetal tissue to be the only source for harvesting these undifferentiated stem cells.[13] This research is of great significance because it holds the potential to cure diseases such as Parkinson's, Alzheimer's and diabetes, each of which attacks a certain type of cells within the body

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10. Letter from Christopher Smith, Congressman, to Donna E. Shalala, Secretary of Health and Human Services (Feb. 11, 1999) (on file with author).

11. THE CENTER FOR BIOETHICS AND HUMAN DIGNITY, ON HUMAN EMBRYOS AND STEM CELL RESEARCH: AN APPEAL FOR LEGALLY AND ETHICALLY RESPONSIBLE SCIENCE AND PUBLIC POLICY, ¶ 2, *available at* http://www.stemcellresearch.org/statement.htm (last visited Oct. 14, 1999); Kevin Wm. Wildes, S.J., *The Stem Cell Report*, AMERICA, Oct. 16, 1999, at 12.

12. The NBAC defines stem cells as "cells that have the ability to divide indefinitely and to give rise to specialized cells as well as to new stems cells with identical potential." THE NBAC REPORT, *supra* note 8, at 86. In addition to embryonic stem (ES) cells, embryonic germ (EG) cells have similar properties and have been the subject of the same types of experiments. *See id.* at 7. For ease of reference, both types of research are included in the discussion of ES cells.

13. Recent work by a team of Italian and Canadian scientists has challenged this assumption. A team led by Dr. Angelo Vescovi of the National Neurological Institute in Milan has succeeded in converting adult mouse brain cells into blood cells. *See, e.g.*, Nicolas Wade, *Cell Experiment Offers Hope for Tissue Repair*, N.Y. TIMES, Jan. 22, 1999, at A21; Deborah Josefson, *Adult Cells May be Redefinable,* 318 BRIT. MED. J. 282, 282 (1999); Laura Johannes, *Adult Stem Cells Have Advantage Battling Disease,* WALL. ST. J., Apr. 13, 1999, at B1. "This transformation [of brain cells into blood cells] has medical significance because if the human body's tissues should prove to be as interconvertible, patients' tissues might be repaired from their own cells." Wade, *supra*, at A21. The potential to use adult stem (AS) cells has not lessened the demand for embryonic stem cells, however. It is not certain that AS cells will prove as reliable a source; and furthermore, NBAC thinks AS cells are difficult and risky to obtain. THE NBAC REPORT, *supra* note 8, at 57.

and destroys otherwise irreplaceable cells.[14]

In early 1999, the Department of Health and Human Services (HHS) issued an advisory opinion to the National Institutes of Health (NIH) on the availability of federal funding for embryonic stem cell research.[15] The HHS memorandum stated that, in its understanding of Congress' directives, such research would fit within the norms established for federally funded embryo research.[16] This novel interpretation sparked a storm of controversy between NIH and HHS and many members of Congress. An advisory opinion issued in September 1999 by the National Bioethics Advisory Commission (NBAC) continued the controversy by recommending, among other things, that Congress should fund research involving both the derivation and the use of embryonic stem cells from embryos remaining after infertility treatments.[17] The NIH issued new guidelines in August 2000.[18] These guidelines permit the use of federal funding for research involving stem cells derived from human embryos, although the derivation process must be accomplished prior to the NIH research.[19] A failed congressional initiative, the Stem Cell Research Act of 2000, would have extended federal funding to the derivation of stem cells as well.[20]

The difficulties in resolving these questions are numerous. The problems arise from the fact that in American jurisprudence there is no uniformity of opinion on the legal status of unborn human life, whether *in* or *ex utero*. This is in part due to the decentralized nature of our political

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14. THE CENTER FOR BIOETHICS AND HUMAN DIGNITY, *supra* note 11, ¶ 2. *See* articles cited *supra* note 13.

15. Memorandum from Harriet Rabb, General Counsel of the Department of Health and Human Services, to Dr. Harold Varmus, Director of the National Institutes of Health (Jan. 15, 1999) (on file with author) [hereinafter "Rabb Memorandum"].

16. *Id.* at 1.

17. THE NBAC REPORT, *supra* note 8, at 70. *See* Wildes, *supra* note 11, at 12. The N.B.A.C. was created by presidential executive order in 1995. The commission makes recommendations to the National Science and Technology Council on issues in bioethics, public policy and federal research. It has already done reports on human cloning, the use of human biological materials and treating persons with mental disorders.
Id.

18. Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976 (Aug. 25, 2000).

19. *Id.* at 51,979.

20. S. 2015, 106th Cong. (2000), *available at* http://thomas.loc.gov/cgi-bin/query (last visited Mar. 7, 2001).

and judicial system.[21] It is also due to the lack of consensus in our pluralistic society regarding the underlying philosophies or rationales that drive our value judgments in this realm of human life and activity.

Most of the arguments advanced on both sides regarding stem cell research and government funding thereof have, for obvious reasons, been secular in nature. The United States was founded on the premise of religious liberty. Accordingly, the First Amendment, as construed by the Supreme Court, generally proscribes churches and civil government from interfering in each other's proper spheres.[22] Furthermore, our society is composed of people of many different religious faiths and denominations, as well as people who do not subscribe to any religious belief. Nonetheless, religious arguments can and have contributed to American public debates on political matters throughout the course of our nation's history. However, given the premises of religious liberty and differing spheres of church and state, it is appropriate to ground political choices in plausible secular arguments.[23]

One of the most important contemporary religious thinkers on the status of unborn life is Pope John Paul II (John Paul). Trained as a philosopher as well as a theologian,[24] John Paul has contributed

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21. The system of common law is premised on the fact that judges may create law when there is a gap in the statutory law on a particular issue. *See, e.g.*, BLACK'S LAW DICTIONARY 276 (6th ed. 1990). Furthermore, the federalist nature of the Union necessarily entails a lack of uniformity on issues that are within the purview of the individual States.

22. *See, e.g.*, People ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948). "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Id.* However, the Court recognizes that "[n]o perfect or absolute separation is really possible." Walz v. Tax Commission, 397 U.S. 664, 670 (1970).

23. MICHAEL J. PERRY, RELIGION IN POLITICS 6 (1997). Perry argues that it is not a violation of the Establishment Clause of the Constitution to make religious arguments in public debate, but concludes that "a political choice would violate the norm [of non-establishment] if no plausible secular argument supported it." *Id.* The validity of this argument is assumed in the present article.

24. John Paul II (1920 -), born Karol Wojtyla, completed his doctoral studies in spirituality at the University of St. Thomas Aquinas (the "Angelicum"), in Rome, Italy. GEORGE WEIGEL, WITNESS TO HOPE – THE BIOGRAPHY OF JOHN PAUL II 87 (1999). He earned a second doctorate from the faculty of theology at the Jagiellonian University in Poland. *Id.* at 130. The topic of his second dissertation was Max Scheler's philosophy as a possible basis for Christian ethics. *Id.* at 129. He was a professor of philosophical ethics at the University of Lublin, and Chair of Ethics in the philosophy faculty for twenty-two years, before being

significantly to discussion of the meaning and dignity of human life through his writings and speeches.[25] In particular, he has set forth his ideas on bioethics in his 1995 encyclical *Evangelium Vitae* (*"The Gospel of Life"*).[26] As a Catholic, he bases his thought on the premise that human beings are created by God and that only in becoming aware of this fact can the human person understand him or herself.[27] However, he is well aware that modern society is marked by a pluralism of religious thought and practice, and therefore he also appeals to what all people can learn by the light of reason alone.[28]

This Comment examines the ethical and policy issues surrounding human embryonic stem cell research and evaluates the opinions in support and opposition in light of the philosophical and theological beliefs which underlie such opinions. Part I discusses the background of the current controversy and explicates the diverging opinions on the issue. Part II explains the unified approach of John Paul as set forth in *Evangelium Vitae.* This part analyzes the various arguments set forth in Part I in light of John Paul's thought. It also evaluates certain secular arguments which come to the same general conclusions as John Paul but which do not rely on any specific religious convictions or presuppositions. Part III critiques John Paul's thought and offers some criticisms on the limitations therein, as well as some concluding reflections on possible solutions that respect both human dignity and American law.

I. BACKGROUND

A. The Dispute Over Federal Funding for Stem Cell Research

1. The dispute between HHS and Congress over the interpretation of the statutory ban

Since 1995, Congress consistently attached riders to its annual

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elected pope in 1978. *Id.* at 133, 135.

25. "Andre Frossard, a French author and friend of the pope . . . summarized his grand design as 'the defense of humanity . . . [E]very one of John Paul II's encyclicals has to do with some aspect of human life or human activity, and in the same way, all his addresses . . . plead for social justice and sincere goodwill among men.'" MARVIN L. KRIER-MICH, CATHOLIC SOCIAL TEACHING AND MOVEMENTS 225 (1998) (citing ANDRE FROSSARD, PORTRAITS OF JOHN PAUL II 9 (1990)).

26. *Evangelium Vitae*, *supra* note 2.

27. "[W]hen the sense of God is lost, there is also a tendency to lose the sense of man, of his dignity and his life[.]" *Evangelium Vitae*, *supra* note 2, ¶ 21.

28. *See, e.g.*, *Evangelium Vitae*, *supra* note 2, ¶¶ 53, 68, 101.

appropriations bills funding HHS, blocking the use of federal funds for research involving at any stage the destruction or discarding of human embryos.[29] The language of the 1999 bill provides that federal funds may not be used for:

> (1) the creation of a human embryo or embryos for research purposes; or
>
> (2) research in which a human embryo or embryos are destroyed, discarded or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. § 46.208(a)(2) and section 498(b) of the Public Health Service Act (42 U.S.C. § 289g(b)).[30]

According to its supporters in Congress, this bill was intended to ban federal funding not only for research involving the direct destruction of human embryos, but also for research "which follows or depends upon the destruction of or injury to a human embryo."[31]

However, in January 1999, Harriet Rabb, the General Counsel of HHS, issued a memorandum to Dr. Harold Varmus, the Director of the NIH, in which she expressed the opinion that the statutory prohibition did not extend to research using human pluripotent stem cells.[32] Rabb's memorandum was a response to Varmus' request for a legal opinion on "whether federal funds may be used for research conducted with human pluripotent stem cells derived from embryos created by *in vitro* fertilization or from primordial germ cells isolated from the tissue of non-living fetuses."[33]

Rabb reasoned that the ban would not extend to such research because human pluripotent cells "are not a human embryo within the statutory definition."[34] She cited the statutory definition of a human embryo as "any organism ... that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human

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29. Richard M. Doerflinger, *The political 'science' of embryo research*, THE TIDINGS, Sept. 17, 1999, at 13.

30. Pub. L. No. 105-277, Section 511 (1999).

31. Letter from Christopher Smith to Donna E. Shalala, *supra* note 10. The letter was signed by seventy members of Congress.

32. Rabb Memorandum, *supra* note 15. The term "pluripotent" describes cells that "can give rise to many types of cells but not all types of cells necessary for fetal development." NATIONAL INSTITUTES OF HEALTH, STEM CELLS: A Primer, *at* http://www.nih.gov/news/stemcell/primer.htm (last visited May 2000). In contrast, "totipotent" cells have the potential to develop into an entire organism. *Id.*

33. Rabb Memorandum, *supra* note 15, at 1.

34. *Id.*

diploid cells,"[35] and then turned to scientific sources for the meaning of "organism": "[a]n individual constituted to carry out all life functions."[36] Since pluripotent stem cells (presumably she meant once they have been excised from an embryo) do not have the capacity to develop into human beings, Rabb concluded, they are mere cells and do not fall under the acts banned from federal funding.[37] Upon receipt of this memorandum, Dr. Varmus announced that NIH planned to prepare new guidelines for embryonic stem cell research in accordance with the interpretation of the HHS memorandum.[38]

Congressman Christopher Smith (R-NJ) responded to HHS's memorandum, expressing "in the strongest possible terms," Congress' objection to Rabb's memorandum and to Varmus' decision. He stated unequivocally that such action on the part of NIH "would violate both the letter and spirit of the federal law banning federal support for research in which human embryos are harmed or destroyed."[39]

Smith criticized Rabb's memorandum on three grounds. First, the memo impermissibly narrowed the meaning of the federal funding bill. The bill bans funding for "research *in which* a human embryo or embryos are destroyed,"[40] yet Rabb construed it to prohibit only "direct federal funding of the specific act of destroying the embryo."[41] In this way, Rabb would allow federal funding for research which depended upon the destruction of the embryo, as long as the funded research itself did not cause such destruction. Smith pointed out that the second clause of the bill (on destroying embryos) was deliberately written in broader language than the first (on creating embryos), so as to preclude a construction such as Rabb proposed.[42]

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35. *Id.* at 2. Rabb does not cite the statute from which she quotes this definition, but the context would suggest it is in the funding bill: Pub. L. No. 105-277, Section 511.

36. Rabb Memorandum, *supra* note 15, at 2 (citing MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1408 (5th ed. 1994)).

37. *Id.* at 2-3.

38. Letter from Christopher Smith to Donna E. Shalala, *supra* note 10.

39. *Id.* at 1.

40. Pub. L. No. 105-227, Section 511 (1999).

41. Letter from Christopher Smith to Donna E. Shalala, *supra* note 10, at 2.

42. *Id.* Smith notes that established rules of statutory construction require that "[w]hen a law has two parallel clauses, one of which is deliberately written in broader terms than the other, it may not be interpreted to have the same meaning as the narrower clause." *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983), and cases cited therein). Richard Doerflinger, in his public comment before the National Bioethics Advisory Commission, added that Rabb's

Second, Smith noted that Rabb's memo ignored the policy reflected in the current law on the use of federal funds for research on fetal tissue transplantation.[43] Smith admitted that this law was itself open to criticism, but argued that nonetheless it was clear that Congress endeavored to restrict permissive abortion by disallowing federal funds for fetal tissue transplantation research if such research in any way influences a woman's decision to procure an abortion or determining the timing or manner of an abortion.[44] Despite the policy set forth by Congress, Rabb's memo, and the NIH's proposal, would allow for federal funding of research which determined the timing, method and procedures for destroying the embryo based solely on the researcher's needs.[45]

Third, Smith claimed that both Rabb's memorandum and Varmus' testimony before a Senate subcommittee relied on a new definition of "human embryo" which thwarted the congressional rider on embryo research.[46] Rather than being any product of fertilization, or of other novel scientific means of creating human life, Rabb and Varmus tried to narrow the definition to include only those entities which "one can show [are] capable, if implanted in the womb, of becoming a born 'human being'."[47] Smith rejected this definition as an attempt by the NIH to evade the obvious meaning of the federal law and to begin research that clearly violated the legal protections that Congress had placed on all

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memorandum had violated a second principle of statutory construction; namely, that "a statue [*sic*] must be construed to avoid rendering any of its words superfluous" (citing Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 209-10 (1997)). According to Doerflinger, "HHS's interpretation renders the words 'research in which' superfluous." Richard M. Doerflinger, Public Comment before the National Bioethics Advisory Commission 4, n.7 (Apr. 16, 1999) (transcript available from the National Conference of Catholic Bishops).

43. Letter from Christopher Smith to Donna E. Shalala, *supra* note 10, at 2.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* The danger of this type of definition is, of course, that any embryo which is defective would not be considered an embryo at all, and therefore would not be afforded any protection by the statute. Rabb did not directly state that an embryo must be capable of becoming a human being, but she did begin to hedge toward this interpretation by implication. "Moreover," she wrote, "a human embryo, as that term is virtually universally understood, has the potential to develop *in the normal course of events* into a living human being." Rabb Memorandum, *supra* note 15, at 3 (emphasis added). The inference that Rabb draws is that human pluripotent stem cells have no such capacity, and therefore they are not embryos within the protection of the rider. *Id.*

human embryos.[48]

Although Smith's letter demanded a correction and reversal of Rabb's interpretation and Varmus's decision,[49] the response from HHS Secretary Donna Shalala accepted the new interpretation as a given. She assured Smith that "Dr. Varmus and his colleagues at the [NIH would] proceed with great caution to ensure that the highest standards [would be] set before moving forward in this area."[50] Shalala pointed out that Rabb's memorandum relied on the statutory definition of "embryo," rather than any new definition thereof,[51] and supported Rabb's analysis by noting that "[t]he plain language of the statute supports the opinion issued by the General Counsel. The law applies by its terms to research in which 'a human embryo or embryos *are* destroyed' . . . , and not to research *preceding* or *following* such research projects."[52]

2. *The Report of the National Bioethics Advisory Commission*

Several months prior to Rabb's memorandum and the exchange of letters between Smith and Shalala, President Clinton asked the NBAC to review all issues involved in human embryonic stem cell research, "balancing all ethical and medical considerations."[53] In September 1999, NBAC released its report, which consisted of five chapters covering the scientific, legal and ethical aspects of human embryo research and concluding with thirteen recommendations regarding the appropriateness or inappropriateness of current research.[54] NBAC recommended that the

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48. Letter from Christopher Smith to Donna E. Shalala, *supra* note 10, at 3. Richard Doerflinger commented: "The [Clinton] Administration is not sure it could win a vote in Congress to reverse the current funding ban on embryo research. So it has done an end run around the law instead." Doerflinger, *supra* note 29, at 13. Having interpreted the ban as not applying to stem cell research, ". . . the NIH can achieve its goal without having to change the law." *Id.*

49. "We call upon you to correct the General Counsel's interpretation and to reverse Dr. Varmus's decision." Letter from Christopher Smith to Donna E. Shalala, *supra* note 10, at 1.

50. Letter from Donna E. Shalala, Secretary of Health and Human Services, to Christopher H. Smith, Congressman, 1 (Feb. 23, 1999) (on file with author).

51. *Id.*

52. Letter from Donna E. Shalala to Christopher H. Smith, *supra* note 50, at 2.

53. THE NBAC REPORT, *supra* note 8, at 2. President Clinton's request came in November 1998, the same month in which two teams of scientists reported their success in culturing embryonic stem cells.

54. *See generally* THE NBAC REPORT, *supra* note 8.

federal government fund research on stem cells derived from "leftover" IVF embryos, as well as research in deriving the cells from embryos, by way of exception to the present ban.[55]

The NBAC report began with an explanation of stem cell research, its importance and its potential for curing injuries and disease.[56] The NBAC distinguished between the research potential of adult stem cells and embryonic stem cells, noting that important differences between the two types preclude adult cells from being an alternative to research on embryonic cells.[57]

The report then turned to ethical and policy considerations. The NBAC noted the difficulties of formulating coherent policy recommendations in the face of such profound disagreement in the United States regarding the legal and moral status of unborn life.[58] The report referred to some of the varying theories of the embryo: the embryo as a form of human life deserving respect; the embryo as a person; the embryo as "a mere cluster of cells."[59] The NBAC took the "intermediate position" that embryos are a form of human life which deserve respect.[60] However, it is unclear from the report how this position had any differing results than the position that the embryo is a mere cluster of cells. The NBAC opined that although many of these issues were contested, "they co-exist within a broad area of consensus upon which public policy can, at least in part, be constructed."[61]

The report recommended that federal funding for research on tissue derived from aborted fetuses be extended to research on stem cells from aborted fetuses. In addition, the NBAC recommended extending funding to tissue derived from leftover IVF embryos which would be "discarded"

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55. *Id.* at 70. It is worth noting that in the language of the recommendation, NBAC assumes that the ban extends to research on stem cells derived from living IVF embryos. However, in the body of the text following the recommendation and explaining it, NBAC sides with HHS and NIH in arguing that the ban, by its plain terms, does not extend to these embryos because only the stem cells derived therefrom will be the subjects of the funded research. *Id.*

56. *Id.* at 1, 17-23.

57. THE NATIONAL BIOETHICS ADVISORY COMMISSION, EXECUTIVE SUMMARY OF ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH, at 2 (hereinafter "EXECUTIVE SUMMARY"). *See* THE NBAC REPORT, *supra* note 8, at 12-13, 45, 57 (discussion of the preliminary studies on AS cells and reaffirmation of the importance of continuing research on both types of cells).

58. EXECUTIVE SUMMARY, *supra* note 57, at 2.

59. *Id. See* THE NBAC REPORT, *supra* note 8, at 49-50.

60. THE NBAC REPORT, *supra* note 8, at 50.

61. EXECUTIVE SUMMARY, *supra* note 57, at 2.

in any event.[62] In a sentence, the NBAC justified this by virtue of its goal: "[a] principal ethical justification for public sponsorship of research with human ES [embryonic stem] or EG [embryonic germ] cells is that this research has the potential to produce health benefits for individuals who are suffering from serious and often fatal diseases."[63] The NBAC also observed that the current ban on such research reflected either a "moral point of view" that embryos are persons and therefore must be protected, or that there was "sufficient controversy" on the matter to preclude federal funding at present.[64] The NBAC concluded that this policy conflicted with the "beneficent" goals of medicine, namely "healing, prevention and research,"[65] and therefore should be reconsidered.

The report also argued that there was no significant ethical distinction between *deriving* the cells from embryos and *using* them in scientific research.[66] In other words, if federal funding is available for research that uses such cells, federal funding should be available for research that initially derives the cells. This argument presumes the statutory interpretation of Rabb's memorandum, rather than the interpretation of Smith and the other members of Congress. Smith argued that *neither* type of research could be funded under the present law.[67] Again, the NBAC appealed to the value of scientific progress as the justification for federal funding.[68]

The report went on to recommend that Congress not extend federal funding to the creation of embryos solely for research purposes.[69] The NBAC argued the existence of a morally relevant difference between creating an embryo for research and using an embryo that had already been created for another purpose but was no longer needed.[70] The NBAC noted that some who object do so on the grounds that human

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62. *Id.* at 2-3.

63. *Id.* at 3.

64. *Id.* at 4.

65. *Id.*

66. *Id.* at 3.

67. *See* discussion above; Letter from Christopher Smith to Donna E. Shalala, *supra* note 10.

68. EXECUTIVE SUMMARY, *supra* note 57, at 4. "[W]e believe that it is important that federal funding be made available for protocols that also derive such cells. Relying on cell lines that might be derived exclusively by a subset of privately funded researchers who are interested in this area could severely limit scientific and clinical progress." *Id.*

69. *Id.* at 5.

70. *Id.*

dignity precludes such activity,[71] but the NBAC itself declined to pursue specifically creating embryos because *at present* there is no compelling scientific or clinical reason to do so.[72]

3. *NIH's new guidelines*

On December 2, 1999, NIH published draft guidelines for federally funded research on human embryos.[73] After a period of public comment ending February 22, 2000, NIH revised the draft and issued its new Guidelines for Research Using Human Pluripotent Stem Cells (Guidelines) on August 25, 2000, effective immediately.[74] The summary states that the Guidelines "establish procedures to help ensure that NIH-funded research in this area is conducted in an ethical and legal manner."[75]

The Guidelines apply to research involving stem cells derived from either human fetal tissue or excess IVF embryos that have not formed a mesoderm.[76] They provide that NIH funds may not be used to derive the cells from human embryos, and that the derivation process must be accomplished prior to the NIH research, without federal funding.[77]

To ensure that the stem cells used are derived from IVF embryos in excess of clinical need, NIH listed certain hortatory guidelines.[78] Since the donation of the embryos must be voluntary, "no inducements (monetary or otherwise) should have been offered" for the embryos.[79] There also "should have been a clear separation" between the couple's decision to create embryos for the purpose of having children, and its decision to

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71. *Id.* "Those who object to creating embryos for research often appeal to arguments about respecting human dignity by avoiding instrumental use of human embryos (*i.e.*, using embryos merely as a means to some other goal does not treat them with appropriate respect or concern as a form of human life)." *Id.*

72. *Id.* at 6.

73. Draft National Institutes of Health Guidelines for Research Involving Human Pluripotent Stem Cells, 64 Fed. Reg. 67,576 (Dec. 2, 1999).

74. 65 Fed. Reg. 51,976, (Aug. 25, 2000).

75. *Id.*

76. *Id.* at 51,979. The mesoderm is "the middle of the three primary germ layers of the embryo[.]" THE NBAC REPORT, *supra* note 9, app. B at 86.

77. Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. at 51,979.

78. *Id.* With the exception of the prohibition on derivation, the other guidelines are all written as exhortations rather than commands (*e.g.*, "informed consent *should have been* obtained").

79. *Id.*

donate the 'leftovers' for scientific research.[80] To this end, the physician treating the couple for infertility should not be the same person seeking the embryonic stem cells for research.[81] Also, to ensure the embryos are truly in excess, they should be frozen.[82] Finally, parents should give their informed consent to the donation of their embryos for research. This includes "a statement that embryos donated will not be transferred to a woman's uterus and will not survive the human pluripotent stem cell derivation process."[83]

The Guidelines establish documentary requirements to ensure that researchers have complied with these norms. The NIH Pluripotent Stem Cell Review Group is charged with reviewing such documentation, as well as reviewing new and continuing applications for research grants.[84]

4. Recent Legislative Initiatives

Congress has not passed legislation in response to NIH's interpretation of the ban on federal funding for embryonic stem cell research, but there have been several initiatives. Senator Arlen Specter (R-PA) noted that an attempt in 1999 to eliminate the ban from the appropriations bill was dropped to avoid a filibuster.[85] Senator Specter chairs the Senate Appropriations Subcommittee on Labor, Health, Human Services and Education, which originated the funding ban. He explained that the prohibition was imposed at a time when no one "really knew the miraculous potential of stem cells."[86] Since the scientific breakthrough was reported in November 1998, this appropriations subcommittee has held seven hearings on the issue.[87]

In January 2000, during the period of public comment on the NIH draft guidelines, Senator Specter introduced the Stem Cell Research Act of 2000 into Congress.[88] This proposed bill would extend federal funding to the actual derivation of stem cells from human embryos. Like the NIH Guidelines, the proposed Act would permit only the use of "excess" IVF

80. Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. at 51,979.

81. *Id.* at 51,980.

82. *Id.*

83. *Id.*

84. *Id.* at 51,981.

85. 146 Cong. Rec. S9447-S9448 (Sept. 28, 2000).

86. *Id.* at S9448.

87. *Id.*

88. S. 2015, 106th Cong. (2000), *available at* http://thomas.loc.gov/cgi-bin/query (last visited Mar. 7, 2001).

embryos with the informed consent of their "progenitors."[89] Consistent with the NIH Guidelines, the legislation would prohibit federal funding for cloning and for the creation of human embryos for research purposes.[90] In addition, it would make unlawful the transfer of human gametes or embryos for valuable consideration by a federally funded researcher.[91]

B. *American Jurisprudence on the Legal Status of Unborn Life*

1. *The legal status of human embryos in the research context: Doe v. Shalala*[92]

Understandably, there is a scarcity of case law on embryo research. At least in the abortion context, embryos are not recognized as human persons, and therefore lack standing to bring suit against aggressors or would-be aggressors. The 1994 case *Doe v. Shalala* presented the federal district court in Maryland a rare opportunity to examine this issue.

The plaintiffs in *Doe* were "Mary Doe," an unspecified embryo whom the Complaint described as "a pre-born child in being as a human embryo;" Michael Policastro, an adult suffering from Down Syndrome; and The Michael Fund, a non-profit organization which sponsors research concerning Down Syndrome and related disorders.[93] The plaintiffs brought suit against HHS and NIH and their directors individually, as well as the NIH Human Embryo Research Panel (the Panel) and the individual members thereof.[94]

The plaintiffs sought to enjoin the Panel from issuing a report to HHS containing recommendations concerning federal funding for embryo

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89. *Id.* § 498C(b).

90. *Id.* § 498C(c)(1).

91. *Id.* § 498C(c)(2).

92. Doe v. Shalala, 862 F. Supp. 1421 (D.Md. 1994).

93. *Id.* at 1423-24. The Michael Fund was named for plaintiff Michael Policastro. *Id.*

94. *Id.* at 1424. The Panel was created following the passage of the NIH Revitalization Act of 1993, which provided that:

> [t]he Secretary of HHS may not withhold federal funds for clinical research 'because of ethical considerations' unless she first convenes an ethics advisory board" which either recommends that HHS not fund the particular research, or which recommends that HHS fund the research, but for such reasons that the Secretary finds to be "arbitrary or capricious.

Id.

research, contending that the Panel was stacked in favor of "unfettered human embryo research."[95] The plaintiffs argued that at least ten of the nineteen Panel members were current or former NIH grantees who strongly favored such research and, by implication, stood to gain by making recommendations in their own interest.[96]

The district court dismissed the suit because "Mary Doe" could not be a proper plaintiff,[97] and because Michael Policastro and The Michael Fund did not present a real case or controversy under the U.S. Constitution[98] and did not demonstrate a real injury.[99] Policastro and The Michael Fund argued that if HHS granted federal funds to embryo research, it would injure them by diverting federal funds away from Down Syndrome research.[100] They further argued that the NIH report, and the federal funding which would result therefrom, endangered Policastro's life by "hav[ing] the effect of making socially acceptable, and ultimately fully legal, the destruction of people with Down's Syndrome."[101]

The district court's dismissal of "Mary Doe" as a plaintiff derived from the Supreme Court's ruling in the abortion context of *Roe*.[102] The district court stated:

> First, *philosophical and religious considerations aside,* the Supreme Court has made it clear that the word "person," as used in the Fourteenth Amendment, does not include the unborn. It has thus been held that embryos are not persons with legally protectable interests .... *The Court sees no distinction between fetuses in utero or ex utero.*[103]

This conclusion has been criticized, however, for assuming that the holding in *Roe* can and must apply to all forms of pre-born human life.[104] *Roe*'s reasoning was based on the adversarial context of maternal rights

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95. *Id.* at 1425.

96. *Id.*

97. *Id.*

98. *See* U.S. CONST. art. III, § 2.

99. *Doe*, 862 F.Supp. at 1427.

100. *Id.* at 1428.

101. *Id.* It is unclear from the court's opinion whether Policastro argued that such destruction would occur because embryos with Down Syndrome would be the subjects of research, or whether Policastro was making a "thin edge of the wedge" argument that this would ultimately lead society to the point of destructive experiments on those already born with Down Syndrome.

102. *See Doe*, 862 F. Supp. at 1426.

103. *Id.* (citing Roe v. Wade, 410 U.S. 113, 158 (1973) (emphasis added).

104. *See* Feiler, *supra* note 6, at 2445.

versus fetal rights.[105] Therefore, it is possible that when no "right to privacy" is infringed upon by the presence of the embryo or fetus, the legal outcome could be different.

2. *The legal status of human embryos in the IVF context: Davis v. Davis*[106]

The legal status of the embryo may be viewed in three other ways, all of which have arisen in the context of IVF disputes. Courts have treated the embryo as a human person, as property, and as an entity deserving "special respect."[107] As the *Davis* case worked its way through the Tennessee court system, all three theories were relied upon.

Davis began as a divorce action between Junior Lewis Davis and Mary Sue Davis, a couple who had participated in an IVF program during their marriage.[108] During the course of the program, seven embryos were created and cryogenically preserved for later use.[109] During the divorce proceedings, the parties were unable to agree on the disposition of the frozen embryos. Mary Sue wanted custody of the embryos in order to continue the IVF process, but Junior Lewis wished to keep them frozen until he decided whether he wanted to become a father outside of marriage.[110] Eventually, both parties remarried and changed their positions in the litigation.[111] Mary Sue decided she wished to donate the embryos to another couple attempting to have children through IVF, while Junior Lewis preferred that the embryos be discarded.[112]

The trial court, having no statutory law nor precedent in common law upon which to base its decision, held that *Roe* and *Webster v. Reproduction Health Services*[113] did not apply because they were limited to

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105. *See id.* ("Commentators have noted, however, that 'the discussion of the embryo's status [as the subject of scientific procedures] must necessarily stand on a different legal footing than that of the discussion of fetal abortion.'") (citing Dan L. Burt, *Patenting Transgenic Human Embryos: A Nonuse Cost Perspective*, 30 HOUS. L. REV. 1597, 1652 (1993)).

106. 842 S.W.2d 588 (Tenn. 1992), *cert denied sub nom.* Stone v. Davis, 507 U.S. 911 (1993).

107. *See id.*; *see also* Davidoff, *supra* note 4, at 137-139.

108. 842 S.W.2d at 589.

109. *Id.* at 592.

110. *Id.* at 589.

111. *Id.* at 590.

112. *Id.*

113. 109 S. Ct. 3040 (1989).

the adversarial context of abortion.[114] The trial judge, relying on testimony that human life begins at conception, decided that the embryos were human persons, and as such the doctrine of *parens patriae* afforded them protection.[115]

The court of appeals reversed the trial court's holding, and implicitly treated the embryos as property.[116] The court of appeals held that the Davises should share a joint interest in the embryos. The court based its opinion on Supreme Court precedent in the area of procreative choice. Since the decision to have a child or not is a constitutionally protected choice, the appeals court held that neither Junior nor Mary Sue could be forced into parenthood against his or her will.[117] To support its position, the court cited *York v. Jones*,[118] a Virginia case also involving a dispute over frozen embryos in the IVF context. *York* based its holding on a theory that embryos are property.[119]

The Tennessee Supreme Court affirmed the holding of the court of appeals, but on different grounds. The supreme court criticized the theories of both the trial court and the court of appeals, and decided upon a *via media* between the "embryo-as-person" and "embryo-as-property" theories. The supreme court decided that the best path to follow was not the "minuscule number of legal opinions that have involved 'frozen embryos,'"[120] but rather the ethical standards proposed by The American Fertility Society:

> the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons.

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114. Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641, at *31-33 (Cir. Ct. Sept. 21, 1989).

115. *Id.* at *35.

116. Davis v. Davis, No. 180, 1990 Tenn. App. LEXIS 642 (Tenn. Ct. App. Sept. 13, 1990) at 9. *See* Davidoff, *supra* note 4, at 142.

117. 1990 Tenn. App. LEXIS 642 at 5-6. "We have carefully analyzed Tennessee's legislative Acts and case decisions and conclude there is no compelling state interest to justify our ordering implantation against the will of either party." *Id.* at 6.

118. 717 F. Supp. 421 (E.D. Va. 1989).

119. *Id.* at 425. *York* involved a custody dispute between the Yorks, a couple participating in an IVF program, and the IVF clinic, the Jones Institute. The *York* court held that the Cryopreservation Agreement which the Yorks had signed created a bailor-bailee relationship, noting that "all that is needed 'is the element of *lawful possession* however created, and duty to account for the *thing* as the *property* of another that creates the bailment[.]'" *Id.* (internal citation omitted) (emphasis added).

120. 842 S.W.2d at 596.

> The preembryo is due greater respect than other human tissue because of its *potential to become a person* and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has *not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.*[121]

The court accepted this theory, without any indication as to what "special respect" meant or required. While the court concluded that Mary Sue and Junior Lewis did not have a "true property interest" in the embryos, they had "an interest *in the nature of ownership*" because they had decision-making authority over the disposition of the embryos.[122] It is difficult to decipher how this conclusion is any different in practice from the embryo-as-property theory. Even if the court intended to establish a sort of fiduciary relationship between the embryos and their parents, in actuality it seems to be a meaningless distinction.

3. *The legal status of human embryos in the context of tort law*

While the *Davis* trial court's holding did not prevail on appeal, its holding that nonviable embryos were human persons was not unprecedented in American law. In the context of tort law, unborn human beings are considered legal persons by a majority of jurisdictions, many of which hold that there is no legal distinction between viability and nonviability at the time of injury for purposes of standing.[123] In other words, a child who has sustained injuries prior to birth may bring, through his guardian *ad litem,* a personal injury or wrongful death suit against the tortfeasor who caused the injuries or death.[124]

In the last half century, tort law underwent a significant change in this regard. Early twentieth century cases uniformly rejected a right to sue in tort for prenatal injuries or wrongful death.[125] Courts reasoned that a child in the womb was not yet in existence, and therefore no duty of care could be owed to the child.[126] Beginning in 1946, however, a series of

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121. *Id.* (emphasis added).

122. *Id.* at 597.

123. *See, e.g.*, Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 47-58 (1993); Lynch v. Scheininger, 744 A.2d 113, 120 (N.J. 2000).

124. *See* Linton, *supra* note 123, at 47-49.

125. PROSSER & KEATON, PROSSER & KEATON ON THE LAW OF TORTS 367 (5th ed. 1984).

126. *See, e.g.*, Justice Holmes's opinion in *Dietrich v. Inhabitants of*

cases throughout the United States reversed this trend. Every jurisdiction now recognizes an action in tort for both prenatal injuries (if the child survives) and wrongful death (if he or she does not).[127]

An example of current tort law is New Jersey's decision in *Smith v. Brennan*.[128] Two and a half months before he was born, Sean Smith was injured in an automobile collision, resulting in deformities to his legs and feet. After Sean's birth, his father brought suit on his behalf, arguing that the defendants owed a duty of care to Sean even before his birth.

The lower court granted the defendants' motion to dismiss for failure to state a claim, based on a precedent set in 1942 by the New Jersey Court of Errors and Appeals in *Stemmer v. Kline*.[129] The court in *Stemmer* had relied on the fact that there was no statutory basis for a cause of action for prenatal injury, and at the time there was no American case law in any court of last resort that would support such an action.[130] Due to advancements in law and medicine, the New Jersey Supreme Court in *Smith* agreed to revisit the issue.

The court in *Smith* expressly overruled *Stemmer*, holding that a surviving child should have a cause of action in tort for prenatal injuries, whether or not the child was viable at the time of the injury.[131] The court first surveyed the current state of the law, noting that there had been a marked change since the time of the *Stemmer* decision. No court refused to recognize this cause of action since 1942, and at least four of the states recognizing this right had overruled prior decisions denying liability.[132]

The court in *Smith* then rejected the premise of the prior rule: that an unborn child was part of his mother and therefore not a person to whom a duty of care could be owed.[133] Both medical and legal authorities had recognized that the child was a separate being from the mother from the time of conception, even if dependent upon her for sustenance.[134] Further, other areas of law recognized the separate existence and rights of

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Northhampton, 138 Mass. 14 (1884), in which the court denied recovery to a child who died at birth resulting from prenatal injuries. The court based its decision on the lack of precedent and on the assumption that a child in the womb was merely a part of his or her mother. *Id.* at 17.

127. PROSSER & KEATON, *supra* note 125, at 368.

128. 157 A.2d 497 (N.J. 1960).

129. 26 A.2d 489 (N.J. Ct. Err. & App. 1942).

130. *See Smith*, 157 A.2d at 498.

131. *Id.* at 504-05.

132. *Id.* at 501.

133. *Id.* at 502.

134. *Id.* (citing medical and legal authorities).

unborn children. The court in *Smith* noted that criminal law regarded the unborn child as separate from his mother; the law of property and decedent's estates considered the unborn child a "life in being" for purposes of inheritance; and that the Workmen's Compensation Act allowed the unborn child the ability to recover monies as a dependent of his deceased father.[135] The court concluded that since the child was injured, and he clearly had rights in other areas of law prior to his birth, he should be able to recover for prenatal injuries. The court dismissed the argument that an unborn child is not a "person in being."

There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being.[136]

In a case such as this, justice requires that the child have a "legal right to begin life with a sound mind and body."[137]

Finally, the court in *Smith* rejected the distinction between unborn children who were viable at the time of the injury and those who were not. Such a rule was impossible to apply in practice, because there is no way to draw a bright-line distinction in borderline cases.[138] More importantly, the injury is the same whether the child is viable or not, and it would be unjust to permit only viable unborn children to recover for tortiously inflicted prenatal injuries.[139]

II. ANALYSIS OF EMBRYO RESEARCH IN THE CONTEXT OF JOHN PAUL II'S *EVANGELIUM VITAE*, "THE GOSPEL OF LIFE"

A. The Role of Religious Arguments in Public Debate

What can a religious perspective contribute to our understanding of political and social issues, especially concerning the current treatment of unborn human life? One answer to that question is that religious perspectives give us a fuller perspective on the issues at hand. After all, many Americans identify themselves with some form of organized faith, including legislators and judges, and there is no reason why we should try

135. *Id.*
136. *Id.* at 503.
137. *Id.*
138. *Id.* at 504.
139. *Id.*

to "sanitize" our public debates from the sources of our values.[140] "Such was the vision of our Founding Fathers: The First Amendment was not intended to impose limits on religious discourse, but rather to ensure the possibility of a truly robust public forum in which all opinions would be respected and heard."[141] Politicians and lawyers of religious faith need not leave their consciences in the cloakroom along with their coats when entering our nation's statehouses and courtrooms.[142]

A second important contribution that religious perspectives make is that they act as a type of leavening[143] to help transform society, hopefully for the better. By way of example, the current demeanor of American law and politics has become dominated by a concern for individual rights and liberties. However, our rights talk has acquired certain peculiarities that distinguish it from the rights talk in other countries.[144] In American discourse, rights tend to assume an absolutist character and a "relentless individualism" which overlooks our corresponding civic responsibilities.[145] Those who belong to churches and other faith communities can help to

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140. The NBAC acknowledged the importance of considering religious positions on the moral status of embryos and the permissibility and boundaries of embryo research. THE NBAC REPORT, *supra* note 8, at 99. In Appendix E of its report, it provided a summary of presentations on religious perspectives given at Georgetown University on May 7, 1999. *Id.* The Committee noted that

> [a]lthough it would be inappropriate for religious views to determine public policy in our country, such views are the products of long traditions of ethical reflection, and they often overlap with secular views. Thus, the Commission believed that testimony from scholars of religious ethics was crucial to its goal of informing itself about the range, content, and rationale of various ethical positions regarding research in this area.

Id.

141. Adam Maida, Shaping Culture and Law: Religion's Voice, Address at the University of Detroit Mercy Law School for the McElroy Lecture (Mar. 16, 1999), *in* ORIGINS, Apr. 8, 1999, at 723.

142. The author was given this insight by Bishop Raymond Boland during his homily at the Red Mass in Washington, D.C. on October 3, 1999.

143. When teaching people about the kingdom of God, Jesus used this analogy. "To what shall I compare the reign of God? It is like yeast which a woman took to knead into three measures of flour until the whole mass of dough began to rise." *Luke* 13:20-21. Once added, leaven by its very nature transforms the mixture.

144. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 7 (1991).

145. *Id.* at 14. Glendon identifies the distinguishing characteristics of American rights talk as absoluteness, silence concerning responsibilities, relentless individualism, neglect of civil society and insularity. *Id.*

balance this political posture by refocusing attention on the responsibilities all people bear toward the common good.[146]

Having said this, it is important to reiterate that religious beliefs cannot be the sole motivation for our policy or legislation on any given issue. The Free Exercise Clause of the First Amendment recognizes the right of religious believers to enter the public arena with their ideas, but the Establishment Clause prevents the government from passing laws which show preference to one religious group over another.[147] Valid secular arguments must be made as well - arguments based on reason alone and not on any specifically religious premises. In this way, public policy and legislation will not be based on specific religious premises that only some accept.

B. Evangelium Vitae: John Paul's Approach to the Human Person and to Bioethics

1. John Paul's approach

John Paul wrote *Evangelium Vitae* in 1995 as an encyclical letter addressed to the Catholic Church and to all people of good will.[148] In the encyclical, he addressed certain present-day threats to human life, which manifest what John Paul called the "culture of death."[149] He contrasted the culture of death with the "gospel of life," a term he coined to describe the overall message of the dignity of the human person and the sacredness of life as taught in the gospels.[150] He discussed the Biblical commandment "You shall not kill," focusing particularly on euthanasia and abortion.[151] He then discussed how Christians, and all "people of good will," are called to confront the culture of death with the gospel of life, both in word

146. *See* Maida, *supra* note 141, at 724-725.

147. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another[.]" Everson v. Board of Education, 330 U.S. 1, 15 (1947). This does not mean that any law that reflects the position of a particular religious group is by that very fact invalid. Such a view would result in a total paralysis of our legal system, since many of our laws reflect moral positions held by religious believers as part of their faith.

148. *Evangelium Vitae*, *supra* note 2, at title page.

149. *Id.* ¶ 12.

150. *Id.* ¶ 2.

151. Abortion is discussed in detail in *Evangelium Vitae*, *supra* note 2, ¶¶ 58-63, and euthanasia is discussed in ¶¶ 64-67.

and example.[152]

John Paul was well aware of the fact that he was addressing many people living in pluralistic societies, where the gospel - and indeed religious belief altogether - is not considered normative.[153] However, as a religious leader, he wished to establish and meditate upon the religious nature of our obligation to respect life, an obligation that is rooted in an understanding of the human being as a creature of God.[154] John Paul, therefore, based his approach on both reason and revelation.[155] He maintains that every human person is sacred and inviolable, and that this sacredness is knowable, both by the light of reason and by cultivation of a relationship with God the creator.[156]

2. *John Paul's critique of modern trends in law and ethics*

John Paul began his critique of the modern trends against life by describing the culture of death. This culture is fueled by a habit of viewing everything - including human life - in terms of what is "efficient."[157] Thus a human life which would require more care and acceptance (*e.g.*, because of physical or mental impairments) is "considered useless, or held to be an intolerable burden, and therefore rejected in one way or another."[158]

He considered a wide panorama of the current trends against life, including contraception, abortion, non-therapeutic embryo research, prenatal diagnosis leading to eugenic abortion and infanticide and euthanasia,[159] and then examined both the causes and the consequences.

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152. *See id.* ¶¶ 78-79.

153. *See id.* ¶ 2.

154. *See id.* ("Man is called to a fullness of life which far exceeds the dimensions of his earthly existence, because it consists in sharing the very life of God.") *Id.*

155. This is typical of neo-scholasticism, a modern application of medieval scholasticism, which was a system of philosophical and theological reasoning based on the writings of church fathers and Aristotle and his commentators. The "twin traits of neo-scholasticism" have been identified as "a simultaneous appeal to the power of reason to propose precise moral propositions and an appeal to the authority of the Church's magisterium... to fix a particular point of moral doctrine." John J. Conley, S.J., *Narrative, Act, Structure: John Paul II's Method of Moral Analysis*, *in* CHOOSING LIFE, A DIALOGUE ON *EVANGELIUM VITAE* 3, 8 (Kevin Wm. Wildes, S.J. & Alan C. Mitchell eds., 1997) (citing Avery Dulles).

156. *Evangelium Vitae*, *supra* note 2, ¶ 2.

157. *Id.* ¶ 12.

158. *Id.*

159. *Id.* ¶¶ 13-15.

He noted a marked contradiction between these trends against life and the trends in favor of human rights. He observed that the very idea of "human rights" is that they are "rights inherent in every person and prior to any Constitution and State legislation."[160]

At the roots of this contradiction, John Paul notes a number of trends in modern thinking which reflect an extreme form of subjectivism.[161] While the theory of human rights is predicated on the affirmation that the human person can neither be used, nor subjected to domination by others, there is a widespread mentality that recognizes human rights only in those who are no longer "dependent" upon others.[162] This is coupled with a mentality that equates human dignity with the capacity for communication.[163] These are not *ontological* criteria (*e.g.*, "who am I?"), but rather *functional* criteria which determine who is a human person on the basis of developed capacities (*e.g.*, "what am I able to do?").[164]

Closely linked with subjectivism is a "notion of freedom which exalts

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160. *Id.* ¶ 18.

161. *Id.* ¶ 19.

162. *Id.*

163. *Id.*

164. An example of this can be found in the thought of Mary Anne Warren, a philosophy professor at San Francisco State University. In an article in support of abortion, she defines the "human person" as one belonging to the "moral community." Mary Anne Warren, *On the Moral and Legal Status of Abortion*, *in* ETHICAL ISSUES IN MODERN MEDICINE 276, 281 (John D. Arras & Nancy K. Rhoden eds., 1989). She suggests that "the moral community consists of all and only *people*, rather than human beings . . . ," refusing to rely on the criteria of genetics alone to establish who warrants the protection of our laws. *Id.* She offers five concepts which are "most central" to our concept of personhood: (1) consciousness, particularly the capacity to feel pain; (2) reasoning; (3) self-motivated activity; (4) the capacity to communicate; and (5) the presence of self-concepts and self-awareness. *Id.* at 282. On this basis, she concludes that "[a]ll we need to claim, to demonstrate that a fetus is not a person, is that any being which satisfies *none* of (1) - (5) is certainly not a person." *Id.* By the same token, she argues,

> A man or woman whose consciousness has been permanently obliterated but who remains alive is a human being which is no longer a person; defective human beings, with no appreciable mental capacity, are not and presumably never will be people; and a fetus is a human being which is not yet a person and which therefore cannot coherently be said to have full moral rights.

Id. at 282-283. Thus, in the thought of Mary Ann Warren, a human *being* can slip in and out of *personhood* depending solely upon his or her capacities at any given time.

the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them."[165] Such a concept of freedom is really *license,* a negation of any limitations placed on the individual by society. Moreover, this "freedom negates and destroys itself . . . when it no longer recognizes and respects *its essential link with the truth.*"[166] No longer is *truth* the reference point for our choices about good and evil, but only the individual's "subjective and changeable opinion or, indeed, his selfish interest and whim."[167]

This view of freedom and absolute autonomy leads to a distortion of the individual's relationship to the community.[168]

While each person wishes to assert his own interests as against others, such a view requires compromises to be made in order to ensure the maximum possible freedom for each individual.[169]

In this way, any reference to common values and to a truth absolutely binding on everyone is lost, and social life ventures on to the shifting sands of complete relativism. At that point, *everything is negotiable, everything is open to bargaining:* even the first of the fundamental rights, the right to life.[170]

Essentially, such a theory leads to a denial that "rights" are based on human nature, but instead treats rights as a sort of social contract which we agree upon for convenience. If this is the case, the powerful can easily bargain to keep and increase their own "rights," while diminishing or removing altogether the "rights" of the weak and defenseless.

This denial of rights has reached the level of government as well, leading to what John Paul considered false notions of democracy.[171] No longer do democracies recognize the inalienable rights belonging to all people. Instead, democracy has come to mean merely the will of the majority,[172] or "Might makes Right." Thus, the State is transformed into a tyrant, "which arrogates to itself the right to dispose of the life of the

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165. *Evangelium Vitae, supra* note 2, ¶ 19.

166. *Id.*; *see also* Richard Neuhaus, *The Splendor of Truth: A Symposium,* FIRST THINGS, Jan. 1994, at 15. "When truth itself is democratized—when truth is no more than the will of each individual or a majority of individuals—democracy, deprived of the claim to truth, stands naked to its enemies. Thus does freedom, when it is not 'ordered to truth,' undo freedom." *Id.*

167. *Evangelium Vitae, supra* note 2, ¶ 19.

168. *Id.* ¶ 20.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

weakest and most defenseless members, from the unborn child to the elderly, in the name of a public interest which is really nothing but the interest of one part."[173] This is no longer true democracy, in John Paul's view, because the democratic ideal must necessarily acknowledge and protect the rights of every human being, not just the strongest.[174]

John Paul discerned an "*eclipse of the sense of God and of man*" at the heart of this modern tragedy.[175]

> *[W]hen the sense of God is lost, there is also a tendency to lose the sense of man*, of his dignity and his life; in turn, the systematic violation of the moral law, especially in the serious matter of respect for human life and its dignity, produces a kind of progressive darkening of the capacity to discern God's living and saving presence.[176]

John Paul argued in this passage that there is an inherent danger in the secularization of any society, because discarding a belief in God as our creator leads to a progressive deterioration of our understanding of ourselves as his creatures.

Once human beings abandon a belief in God, a temptation exists to see

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173. *Id.*

174. *Id. But see* Justice Scalia's remarks during a question and answer session following his address at a symposium entitled "Left, Right and the Common Good," held at the Gregorian University in Rome in 1996. In response to a question about natural law and what is due to man by his very nature, Scalia responded,

> It just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt the democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion, the state should permit abortion in a democracy. If the people do not want it, the state should be able to prohibit it as well.

Antonin Scalia, *Of Democracy, Morality and the Majority*, ORIGINS, June 27, 1999, at 81, 87. Later, he pushed the point even further:

> You protect minorities only because the majority determines that there are certain minorities or certain minority positions that deserve protection. Thus in the U.S. Constitution we have removed from the majoritarian system of democracy the freedom of speech, the freedom of religion and a few other freedoms that are named in the Bill of Rights. The whole purpose of that is that the people themselves, that is to say, the majority, agree to the rights of the minority on those subjects - but not on other subjects.

Id. at 88.

175. *Evangelium Vitae*, *supra* note 2, ¶ 21.

176. *Id.*

ourselves as merely one among the animals, even if at the high end of the evolutionary scale.[177] If humans are not the creatures of a higher spiritual Being (God), then there is little reason to suppose that humans themselves have any real "spiritual" aspect. The human being, in this viewpoint, is thus reduced to the sum total of his or her physical nature: "[man] is somehow reduced to being 'a thing,' and no longer grasps the 'transcendent' character of his 'existence as man.'"[178] Instead, "[l]ife itself become[s] a mere 'thing,' which man claims as his exclusive property, completely subject to his control and manipulation."[179] Thus birth and death become "things to be merely 'possessed' or 'rejected'" - and manipulated by technology - rather than experiences to be lived.[180]

John Paul argued that this failure to understand the very nature of the human person and the meaning of human life leads to individualism, utilitarianism and hedonism.[181] "The values of *being* are replaced with those of *having*," [182] John Paul observed. Rather than human life being a good in and of itself, the modern mentality has identified the value of life as dependent upon its ability to bring us pleasure or efficiency.[183] This is the argument of utilitarianism: all our actions are motivated by seeking pleasure and avoiding pain, and therefore what is good is what is useful in achieving pleasure and avoiding pain.[184] In such a cultural climate, the values of the marketplace - efficiency and consumerism - spill over into our understanding of the human person and especially the human body. The body is reduced to its material nature, as noted above; "it is simply a complex of organs, functions and energies to be used according to the sole criteria of pleasure and efficiency."[185]

Against this moral and cultural climate, John Paul posited that "[l]ife is

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177. *Id.* ¶ 22.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* ¶ 23.

182. *Id.*

183. *Id.*

184. *See, e.g.*, SAMUEL ENOCH STUMPF, SOCRATES TO SARTRE: A HISTORY OF PHILOSOPHY 362 (Stephanie K. Harper & James R. Belser eds., McGraw Hill, Inc., 1988) (1966). The utilitarians, chiefly identified with Jeremy Bentham and John Stuart Mill, thought that human actions should be ordered to "'the greatest good of the greatest number,' and by which they meant that 'good' is achieved when the aggregate of pleasure is greater than the aggregate of pain. An act is good, therefore, if it is useful in achieving pleasure and diminishing pain." *Id.*

185. *Evangelium Vitae*, *supra* note 2, ¶ 23.

always a good."[186] This is because life comes from God the creator, who created human beings with a unique rational and spiritual nature, as a "*manifestation of God in the world, a sign of his presence, a trace of his glory.*"[187] Because humans are the summit of creation, made in the image of God, humans cannot be reduced to the level of "things."[188] The sacred and inviolable character of human life reflects the inviolable character of God, who alone has the right over human life and death.[189]

John Paul argued that from this sacredness of human life, it necessarily follows that certain moral norms protecting life are absolute and cannot be compromised in any way.[190] This includes the injunction against the deliberate taking of innocent human life, at any stage or condition of existence.[191] The sacredness of the human person means that "[t]he deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end."[192] John Paul rejected any attempt to justify such transgressions by means of proportionalism, which holds that certain human lives (typically, those of the unborn and the disabled, the weakest and most defenseless humans) are only a relative good.[193] "[A]ccording to a proportionalist approach, or one of sheer calculation, this good should be compared with and balanced against other goods."[194] In dealing with exceptionless moral norms - and John Paul does not hold that all moral norms are absolute or exceptionless - balancing acts are totally inappropriate because they reduce the value of the human person to a relative good which can be negotiated or bargained away.[195]

John Paul's view of bioethics, and embryo research in particular, is in accord with the view of the dignity of the human person set forth in *Evangelium Vitae.* Science and technology are goods that must be put at the service of human persons and their integral development.[196] He praised the efforts of medical science in finding ever more effective

186. *Id.* ¶ 34.
187. *Id.*
188. *Id.*
189. *Id.* ¶ 53.
190. *Id.* ¶ 57.
191. *Id.*
192. *Id.*
193. *Id.* ¶ 68.
194. *Id.*
195. *See id.* ¶ 20.
196. *Id.* ¶ 81.

treatments,[197] yet argues that scientific progress cannot be pursued in such a way as to put humans at the service of science rather than science at the service of humans.

Because human life originates from God and is sacred from the very beginning, embryos must be treated with the dignity owed to all human persons.[198] John Paul argued for the licitness of medical procedures carried out for the benefit of the embryos themselves, respecting their life and integrity and not subjecting them to any disproportionate risks. However, he strongly condemned the use and destruction of embryos for research purposes, which is done under the pretext of "progress," but in fact "reduces human life to the level of simple 'biological material' to be freely disposed of."[199] Human beings cannot be used as a mere means to an end, no matter how good that end is; the price is too heavy to pay.

3. Analysis of the arguments surrounding federal funding for embryonic stem cell research in light of Evangelium Vitae

John Paul begins with the proposition that human life is sacred from the moment of conception to its natural end. This fact alone dictates his approach to the permissibility of harmful, non-therapeutic research on embryos: it is a "crime against their dignity as human beings."[200] Because embryonic stem cell research necessarily entails not only the use of embryos as a mere means to an end, but also their destruction, in John Paul's view, it constitutes "an absolutely unacceptable act."[201]

As a preliminary observation, it may seem misplaced to focus on federal funding, when in John Paul's view permitting such research at all is an illicit exercise of political power. However, John Paul maintains that when it is not possible to overturn a law that permits such activity, the elected official whose opposition to such practices is well known may licitly support legislation or policy which would limit the harm done by the law.[202] Since research on human embryos, and even the creation of research embryos, is legal in most of the United States, the focus of the debate has been primarily on the advisability of extending public funds to this activity.[203]

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197. *See id.* ¶ 26.

198. *Id.* ¶ 60.

199. *Id.* ¶ 14, 63.

200. *Id.* ¶ 63.

201. *Id.*

202. *Id.* ¶ 73.

203. THE NBAC REPORT, *supra* note 8, at 3. Nine states have proscribed such research, however. *See, e.g.*, LA. REV. STAT. ANN. § 14:87.2 (West 1986 &

Congress placed a moratorium on federal funding for embryo research in 1975 in a patent attempt to limit the harmfulness of the state laws that permit it.[204] HHS' memorandum and NIH's revision of its norms are disingenuous at best. The fact that NIH had abided by the moratorium for the previous five years should be sufficient evidence that it knew such research was not permitted with federal tax dollars. The HHS memorandum and letter to Christopher Smith do not fairly deal with ethics or policy, but rather assume the research is ethically sound on the grounds of usefulness, and work to find (or create) a loophole in the federal law.

The NBAC's report manifests the utilitarianism and proportionalism that John Paul condemned as unbefitting the inherent dignity of the human person. This is evident not only in the language of the report, but indeed from the very task with which President Clinton entrusted the NBAC. President Clinton's letter to Harold Shapiro noted that at the time Clinton banned the use of federal funds for creation of research embryos, "the benefits of human stem cell research were hypothetical, while the ethical concerns were immediate."[205] President Clinton then observed that the progress of science had now changed the situation:

> Although the ethical issues have not diminished, it now appears that this research may have real potential for treating such devastating illnesses as cancer, heart disease, diabetes, and Parkinson's disease. With this in mind, I am also requesting that the Commission undertake a thorough review of the issues . . . , *balancing all ethical and medical considerations.*[206]

Having been commissioned to make a utilitarian calculus of the burdens versus the benefits of embryo research, the NBAC took this philosophical approach to ethics as normative to its task.

From the very beginning of the report, the NBAC recounts with palpable excitement the potential benefits of human embryonic stem cell

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Supp. 2001); ME. REV. STAT. ANN. tit. 22, § 1593 (West 1992 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 112, § 12J(a)I (West 1996 & Supp. 2000); MICH. COMP. LAWS ANN. § 333.2685 (West 1992 & Supp. 2000); MINN. STAT. ANN. § 145.422 subd. 1 (West 1998 & Supp. 2001); N.D. CENT. CODE §§ 14-02.2-01 and -02 (1997 & Supp. 1999); 18 PA. CONS. STAT. ANN. § 3216(a) (West 2000); R.I. GEN. LAWS § 11-54-1(a) (1994 & Supp. 1999); UTAH CODE ANN. § 76-7-310 (1999 & Supp. 2000).

204. THE CENTER FOR BIOETHICS AND HUMAN DIGNITY, *supra* note 11, at 2.

205. Letter from President Bill Clinton to Dr. Harold Shapiro, Chair, National Bioethics Advisory Commission 1 (Nov. 14, 1998) *reprinted in* THE NBAC REPORT, *supra* note 8, at 89.

206. *Id.* (emphasis added).

research. The Executive Summary notes that "scientists regard these cells as an important - perhaps essential - means for understanding the earliest stages of human development and as an important tool in the development of life-saving drugs[.]"[207] From considering the embryonic cells as "means" or "tools," it is a short step to considering the embryos themselves to be means or tools in a scientific race to gain knowledge and cure disease. Although the NBAC acknowledges at one point that there may be a "concern about instrumentalization," it never addresses the issue.[208] Instead, it concluded that once the scientific goal is urgent or laudable enough, and the offense to public morals is low enough, such instrumentalization of embryos and their cells is permissible; or perhaps politically expedient.

The NBAC's report is obviously a compromise document, written by a panel who had to make recommendations in the face of widespread public disagreement over the status of embryos, and whether and in what ways they should be used for research. NBAC makes obligatory references to the varying theories which have been proposed (the embryo as property, person or "entity deserving special respect"),[209] but after claiming to adopt the theory that the embryo is an entity deserving respect, the Committee continues to engage in utilitarian calculations and proportionalist balancing. The proposed justification for funding such research is, of course, the potential for health benefits for those who are suffering. While this is certainly a laudable goal, John Paul's critique is that human beings can never be used as a mere means to an end, nor reduced to their biological or material existence alone. "The killing of innocent human creatures, even if carried out to help others, constitutes an absolutely unacceptable act."[210] In other words, John Paul holds that no matter what benefits might come of such research, the ends can never justify an immoral means.[211]

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207. EXECUTIVE SUMMARY, *supra* note 57, at 1. It is interesting to note that in the body of the report itself, very similar language is used but the words "means" and "tools" drop out: "In addition, scientists regard these cells as important - perhaps essential - in understanding the earliest stages of human development and in developing life-saving drugs[.]" THE NBAC REPORT, *supra* note 8, at 65.

208. THE NBAC REPORT, *supra* note 8, at 56.

209. EXECUTIVE SUMMARY, *supra* note 57, at 2.

210. *Evangelium Vitae*, *supra* note 2, ¶ 63.

211. A mirror image to John Paul's approach can be found in the work of Ronald Green, the chief ethicist on the NIH Human Embryo Research Panel. Green holds that all decisions about "personhood" are social conventions, based on enlightened self-interest. If respecting an individual human being as a

A similar critique can be made of much of the case law on unborn life. The *Doe* case was riddled with standing problems, and on that count alone could not have succeeded. It may be that the plaintiffs knew that, but hoped for nothing more than to raise the questions in people's minds. However, the *Doe* court did not need to see *Roe* and its progeny as dispositive of the status of embryos outside the womb. First, as noted earlier, the Supreme Court's abortion opinions have been decided in an adversarial context (maternal interests vs. fetal interests). When the mother's right to privacy is no longer a factor, judges could remain faithful to *Roe*, and still decide these cases differently in an effort to limit the harm done by *Roe*. Second, outside the context of abortion, the unborn child has been recognized as a person or a "life in being" with a wide range of rights, including the right to sue for injuries sustained before viability.[212]

Instead, the *Doe* court chose to put "philosophical and religious considerations aside"[213] and hold the Supreme Court's abortion jurisprudence was controlling. One could certainly make the argument that *Doe* is logically consistent with *Roe*: if embryos and fetuses have no right to life (or no absolute right to life) in the abortion context, why would they in any other context? However, John Paul's approach[214] would be to limit the harm done by distinguishing the cases by presence or absence of the adversarial context, and by pointing to the many other areas of law that do recognize embryos as subjects with rights.

This is exactly what the trial court in *Davis* did. It distinguished abortion jurisprudence and concluded that embryos are human lives and deserve a chance to be born. The approach of the appeals court, however, was to treat embryos as property, a conclusion which John Paul rejects as degrading the dignity and sacredness of the human person.[215] The

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"person" would prevent research that could help those humans who are already accepted as persons, that in itself is a valid reason to deny such human being the status of person. Thus, not only does the end justify the means, but the end even determines which human beings may be treated as means. *See* Ronald M. Green, *Toward a Copernican Revolution in Our Thinking About Life's Beginning and Life's End*, 66 SOUNDINGS 152 (1983).

212. In Maryland, where *Doe* was decided, Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198 (Md. 1983) was controlling authority in the tort context (rejecting viability as an appropriate cutoff point in the context of a wrongful death action).

213. Doe v. Shalala, 862 F. Supp. 1421, 1426 (D. Md. 1994).

214. This assumes, of course, that it is not possible to overturn or abrogate laws permitting abortion. *See Evangelium Vitae*, *supra* note 2, ¶ 73.

215. *Id.* ¶ 22.

members of the state supreme court were obviously troubled by this reduction of the embryo to mere property. However, after soothing their consciences with nicer terms ("the embryo is an entity deserving respect"), the supreme court justices did not in any way change the appeal court's treatment of the embryos.

The failed Stem Cell Research Act of 2000 would have expanded the flawed logic of NBAC, *Doe*, and the *Davis* appellate courts. Upon introducing the bill, Senator Specter dismissed any ethical concerns about destroying living human embryos by pointing out that only discarded IVF embryos would be used in such experimentation.[216] Yet the argument that these embryos would "die anyway" proves too much: every human being "will die anyway."[217] The fact that a human being will die soon—because of old age, disease, capital punishment, or abortion — does not lessen the moral obligation to refrain from performing life - threatening nontherapeutic experimentation on him or her. John Paul maintains that human life, even that of the dying, is sacred and inviolable.[218] "Respect for life requires that science and technology should always be at the service of man and his integral development."[219]

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216. Senator Arlen Specter, Statements on Introduced Bills and Joint Resolutions (Jan. 30, 2000), *available at* http://thomas.loc.gov/cgi-bin/queryD?r106:2:./temp/~r106Ac3z5z:e): (last visited Mar. 7, 2001). "It is not a matter of using a human embryo which has the potentiality for life to extract the stem cells because these are embryos which have been discarded." *Id.*

217. David W. Louisell, *The Dissenting Statement of Commissioner David W. Louisell, in* Symposium, *On the Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*, 22 VILL. L. REV. 297 (1976-1977). Commissioner Louisell dissented from the commission's recommendation to allow nontherapeutic research on fetuses in anticipation of abortion. "The argument that the fetus-to-be-aborted 'will die anyway' proves too much. All of us 'will die anyway.' A woman's decision to have an abortion . . . does not change the nature or quality of fetal life." *Id.* at 317.

218. *See Evangelium Vitae*, *supra* note 2, ¶ 81.

219. *Id.* Commissioner Louisell expressed the same principle in his dissenting statement:

> I would, therefore, turn aside any approval, even in science's name, that would by euphemism or other verbal device, subject any unconsenting human being, born or unborn, to harmful research, even that intended to be good for society. Scientific purposes might be served by nontherapeutic research on retarded children, or brain dissection of the old who have ceased to lead "meaningful" lives, but such research is not proposed—at least not yet. As George Bernard Shaw put it in *The Doctor's Dilemma*: 'No man is allowed to put his mother in the stove

III. COMMENT

A. *Critique of John Paul's Thought*

1. *The validity and application of John Paul's argument in the secular and pluralistic context*

Given John Paul's explicitly religious approach to this issue, how can his thought contribute to the debate on embryo research? John Paul appeals to "natural law" and to reason throughout his encyclical, arguing that any person of good will can come to recognize the sacred value of the human being even from the moment of conception.[220] He is adamant in insisting that the "gospel of life" is not for believers alone, and in this he is not mistaken; surely respect for human life is an obligation for all people. This is manifest in our laws on homicide, assault and battery, dueling, Russian roulette, suicide and so forth.

Yet how can we all agree on the "sacredness" of the human person when our beliefs about our origins (and destinies) are so vastly divergent? One of the most profound observations John Paul made in *Evangelium Vitae* is that when humans lose the sense of the Creator, they naturally begin to lose sight of who they, as creatures, are.[221] However, if this is the case, it would seem logical that one who does not believe in God is hopelessly stuck in this position and therefore cannot see the force of logic in John Paul's argument.

John Paul is well aware that many people criticize the position he takes by arguing that in a secular democracy, we cannot capitulate to the religious and moral opinions of others. Some argue that we ought to employ the lowest common denominator in agreeing on what norms all will have to follow.

John Paul's answer is to point out the terrible problems that arise when

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because he desires to know how long an adult woman will survive the temperature of 500 degrees Fahrenheit, no matter how important or interesting that particular addition to the store of human knowledge may be.' Is it the mere youth of the fetus that is thought to foreclose the full protection of established human experimentation norms? Such reasoning would imply that a child is less deserving of protection than an adult. But reason, our tradition, and the U.N. Declaration of Human Rights all speak to the contrary, emphasizing the need of special protection for the young.

Louisell, *supra* note 217, at 318.

220. *Evangelium Vitae*, *supra* note 2, ¶¶ 2, 101.

221. *See id.* ¶¶ 21-22.

these arguments are pushed to their logical limits. Democracy cannot be idolized. It is a system; a means, not an end; and it stands or falls on the values that it embodies.[222] If a democracy chooses by congressional vote, or judicial fiat, to expel a certain group of human beings from the community of "persons" who are protected by law, we are all placed at risk. John Paul pointed out that everyone rightly rejects many well-known crimes against humanity experienced in the twentieth century. Certainly there are very few people who would say that Hitler's "solution" to the "Jewish question" (and other groups) was morally permissible. Would such crimes cease to be crimes if he had run it through Congress and obtained a fifty-one percent vote?[223] Yet this is the logical conclusion of extreme positions on autonomy and legal positivism. Such a philosophy ends with a vision of democracy which deifies whatever the majority chooses, and "gives" rights to minority groups as it pleases instead of *recognizing* rights which we all have because they are inherent in our human nature.

Despite John Paul's response to his critics, the problem remains. Even if we can all agree that human beings have dignity, there is no consensus on the meaning or the extent of such dignity, nor on the proper basis for a common ground for both believers and nonbelievers alike. Indeed, even among religious believers there is widespread disagreement on these matters.[224]

2. *Natural Law and Human Rights Theories*

John Paul's appeal to natural law theory is a step in the right direction, but it is not enough to salvage his argument from those who would dismiss all arguments premised on a belief in God. Natural law theory, while not specifically religious in character, does presuppose a natural theology; that is, the existence of a rational Creator who "wills that the order of nature be fulfilled in all its purposes, as these are inherent in the natures found in the order."[225] This is really a philosophical belief rather than a theological one. It does not assume that one must worship God or "believe in" him in the ordinary sense, but only that logic dictates that if there is a "creation" with a discernible order or rationality to it, there

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222. *See id.* ¶ 70.

223. *See id.*

224. *See* THE NBAC REPORT, *supra* note 9, app. E at 99-104 (reporting the widely divergent positions of Catholic, Jewish, Eastern Orthodox, Muslim and Protestant thinkers on the moral status of human embryos and the ethics of embryonic stem cell research).

225. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 328 (1960).

must be a rational creator behind it all. Nonetheless, this underpinning of natural law theory would alone be enough to cause some people to reject it as a religious approach to law and public policy.

John Paul also referred to modern day theories of human rights, which might provide a bridge from specifically religious arguments to a more secular approach. Following the Second World War, many ideas of human rights that had been percolating in the Western world for the previous 200 years began to converge into a universal language of rights.[226] In the wake of the experience in Nazi Germany, people were seeking a solid basis for securing fundamental human rights and liberties for all human beings without distinction.[227] "The idea of prepolitical 'human' rights thus came to have wide appeal, although there was no consensus on any secular foundation for such rights, or on their precise content."[228]

The United Nations' Universal Declaration of Human Rights might provide a good beginning for translating John Paul's argument into a secular approach. It is based on the premise that the "inherent dignity" and the "equal and inalienable rights of all members of the human family" are the "foundation of freedom, justice and peace in the world."[229] This Declaration does not address the status of unborn human life. However, if rights truly "inhere" in humans by their very nature, and are therefore "inalienable," such rights must be coterminous with the span of a human being's biological existence.[230] The idea of a human nature, after all, does not depend on one's actual capacities at any given time. All who are members of the human species participate equally in such a nature,

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226. *See* GLENDON, *supra* note 144, at 38.

227. *See id.*

228. *Id.*

229. *Universal Declaration of Human Rights*, *in* THE INTERNATIONAL BILL OF HUMAN RIGHTS 4, 4 (United Nations, 1978).

230. Paradoxically, religious beliefs could be more apt to challenge this than nonreligious beliefs. Belief in God can lead to theories that God "ensouls" human beings at a certain point after conception (at the fortieth day of life, for example). If this were true, perhaps it could justify denying any legal protection to such early human life.

On the other hand, one who does not believe in God, or that there is any spiritual component to human nature, has nothing *but* biology to look to for the span of human life or existence. In such case, either one must recognize an imperative to respect life at all those stages, or one must concede the position of Mary Anne Warren, *supra* note 164, who holds there is no *inherent* value to biological life. Warren maintains that only when humans are *capable* of exercising rationality, self-awareness, communicative capacities, etc., are they "persons" needing or deserving protection of life by the legal system. *See id.*

regardless of their given mental or physical abilities.

Furthermore, this is not engaging in "genetic reductionism," or reducing the human person solely to his or her biological reality. John Paul has argued strenuously against any such understanding of the human person. Instead, our genetic code, which is at work from the moment of conception, is the *sine qua non* of our existence. While there are some rights that come with age or the capacity to exercise them (for example, the right to marry, the right to vote), the most basic of human rights (the right to life, the right not to be subjected to nontherapeutic life-threatening experimentation) must be ascribed to each human being from the beginning. The refusal to recognize and respect such rights would therefore be a form of unjustified age discrimination, or perhaps discrimination on the basis of "disability." It is a refusal to extend to one class of human beings the most basic rights enjoyed by all others.

CONCLUSION

Scientific research and experiments cannot and should not be conducted according to the crass utilitarian ethos promoted by the NBAC, the NIH and certain members of Congress. If human dignity means anything, it means we cannot create or destroy other human beings, even those who are tiny, undeveloped and vulnerable, to pursue scientific ends, no matter how laudable those ends may be. The fact that stem cells might be obtained from "leftover" IVF embryos who will "die anyway" does not lessen their human dignity, nor our duty to respect that dignity.

The Supreme Court's abortion jurisprudence is not dispositive of the debate on embryo research. Many of our nation's laws protect early human life and recognize a wide variety of rights for the unborn. Congress chose to protect unborn human life by maintaining a moratorium on embryo research, and this decision can and must be supported by arguments which appeal to the inherent dignity of human beings.

John Paul's contribution to this debate is invaluable insofar as it is a much-needed critique of the more dangerous trends in law and politics that we face in our modern democracies. The fact that John Paul based his argument in *Evangelium Vitae* on explicitly religious premises does limit the effectiveness of the argument in a secular and pluralistic society. However, the language and theory of human rights may provide a basis for translating John Paul's position into a language with a wider appeal in the public forum.