

2009

# Public Bioethics and the Bush Presidency

O. Carter Snead

*Notre Dame Law School*, [snead.1@nd.edu](mailto:snead.1@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Health Law and Policy Commons](#), and the [President/Executive Department Commons](#)

---

## Recommended Citation

O. C. Snead, *Public Bioethics and the Bush Presidency*, 32 Harv. J. L. & Pub. Pol'y 867 (2009).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/488](https://scholarship.law.nd.edu/law_faculty_scholarship/488)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# PUBLIC BIOETHICS AND THE BUSH PRESIDENCY

O. CARTER SNEAD\*

INTRODUCTION .....	868
I. THE BUSH ADMINISTRATION'S APPROACH TO PUBLIC BIOETHICS: GROUNDING GOODS .....	870
A. The Fundamental Equality of All Human Beings .....	870
B. Pursuit and Application of Biomedical Knowledge for the Common Good .....	874
II. IMPLEMENTATION OF THE GROUNDING GOODS ...	874
A. Embryonic Stem Cell Research and Related Issues .....	875
1. Executive Actions.....	879
2. Legislative Actions.....	886
3. Bully Pulpit and the Pedagogical Authority of the Presidency .....	889
B. Abortion.....	890
1. Executive Directives, Administrative Agency Actions, and Foreign Policy ....	892
2. Promoting, Shaping, and Blocking Legislation .....	895
3. Shaping the Judiciary .....	897
4. Invoking the Pedagogical Authority of the Presidency.....	898
C. Conscience Protections for Health Care Providers .....	899
1. Executive Actions.....	899
2. Legislative Actions.....	900
D. End-of-Life Matters .....	901
1. Executive Actions.....	902
2. Legislative Actions.....	904

---

\* Associate Professor, Notre Dame Law School. Many thanks to Bill Kelley, Rick Garnett, Yuval Levin, John Meiser, and Leigh Fitzpatrick Snead.

III. ASSESSING THE BUSH ADMINISTRATION .....	906
A. Harnessing the Tools of the Executive Branch .....	906
B. The Problem of Metrics .....	907
C. The Metric of the Procedural Values of Liberalism .....	907
D. The Metric of Substantive Disagreement.....	909
E. Judgment According to Bush's Own Principles .....	910
CONCLUSION.....	913

## INTRODUCTION

"Bioethics" emerged in America as a field of scholarly reflection in the 1960s.<sup>1</sup> The field concerns itself with fundamental questions, including what it means to be human, the nature and value of human life (and death), the ends of medicine, and the purpose of science. It began with a series of conferences convened to discuss the tensions between the humanistic and scientific dimensions of medical practice wrought by extraordinary advances in biomedical science and biotechnology.<sup>2</sup>

---

1. GILBERT C. MEILAENDER, *BODY, SOUL, AND BIOETHICS* 1 (1995) ("Albert Jonsen dates the 'birth of bioethics' from the year 1962, when Shana Alexander's article describing the Seattle dialysis selection committee appeared in *Life* magazine. Elsewhere, Jonsen describes 1965-75 as the 'formative decade' for bioethics in this country. David Rothman, in what is the first history of the bioethics movement, dates its beginning with the 1966 publication of Henry Beecher's articles exposing abuses in human experimentation."). The origin of the term "bioethics" is contested, though its first usage appeared in 1970. It has been attributed both to Sargent Shriver (original funder of the Georgetown Kennedy Institute of Ethics) and Van Rensselaer Potter (research oncologist from University of Wisconsin). Whereas Shriver used the term to denote the ethical analysis of the development and application of biomedical science, Potter seemingly meant something more capacious, encompassing the relationship between man, his environment, and the civilized world. Shriver's definition more closely approximates the meaning of the term as it is used in America. For a discussion of the history of the term, see ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* 26-27 (1998).

2. Such conferences included *Great Issues of Conscience in Modern Medicine*, held at Dartmouth College in 1960, *Man and His Future*, held by the Ciba Foundation in London in 1962, the Nobel Laureate Series at Gustavus Adolphus College, which included *Genetics and the Future of Man* (held in 1965, featuring a presentation by William Shockley on eugenics, and a rebuttal by Paul Ramsey), and *The Human Mind* (in 1967, featuring a presentation by James Gustafson). For a detailed discussion of these events, see JONSEN, *supra* note 1, at 13-15. Dr. S. Marsh Tenney

Shortly thereafter, several centers were founded to explore bioethical questions in a sustained and rigorous way.<sup>3</sup> As with many of the most compelling and contentious matters of moral concern, bioethics also captured the attention of those charged with making and enforcing the law at both the federal and state levels. In the same years that scholars were turning to these questions at conferences and in academic centers, Congressmen and Senators were holding hearings of their own.<sup>4</sup> This constellation of governmental activity marked the birth of a new branch of bioethics—*public bioethics*—concerned with the *governance* of medicine, science, and biotechnology in the name of ethical goods. Since its emergence in American law, public bioethics has been a permanent fixture in the halls of government and the public square. Issues such as abortion, embryo research, assisted reproduction, end of life matters, genetic screening and engineering, organ transplantation, human cloning, and

---

(then Dean of Dartmouth Medical School) noted at one of the very first such events, "Although [medicine's] foundations have become more rational, its practice—the welding of science and humanism—is said to have become more remote and indifferent to human values, and once again medicine has been forced to remind itself that it is often the human factors that are determinant." *Id.* at 13.

3. Such institutions included The Hastings Center (opened in 1969 to study ethical issues relating to death and dying, behavioral control, genetic engineering and counseling, and population control), *id.* at 20–21, the Society for Health and Human Values (opened in 1968 in response to concerns about an undue emphasis on mechanistic explanations in medical education), *id.* at 24–25, and the Kennedy Institute of Ethics at Georgetown University (opened in 1971 to study issues in reproduction and ethics), *id.* at 22–23.

4. *Id.* at 92–100. Senator Walter Mondale convened hearings in 1968 in connection with his proposal to create a "President's Commission on Health Science and Society," which would recommend policies on organ transplantation, genetic engineering, behavior control, human subjects protections, and the financing of research. *See id.* at 90. In 1973, Senator Edward Kennedy convened hearings to discuss proposed research on living fetuses slated for abortion and race discrimination in human subjects abuses (such as those that had occurred in Tuskegee, Alabama). *See id.* at 95. These hearings resulted in the passage of the National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974), which created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, charged "to identify the basic ethical principles that should underlie the conduct of biomedical and behavioral research involving human subjects and develop guidelines that should be followed in such research," and to conduct a "comprehensive study of the ethical, legal and social implications of advances in biomedical research." JONSEN, *supra* note 1, at 99–100. The Secretary of Health, Education, and Welfare (now known as the Secretary of Health and Human Services) was directed by law to implement the advice received by the National Commission within a stated period of time, or to show cause why such action was not taken.

the relationship between mind, brain, and behavior, have proliferated as political questions and quite often, by extension, legal matters. These issues are now routinely the subject of both political campaigns and concrete actions by the political branches of government.

Public bioethics figured prominently during the tenure of President George W. Bush. This Article explores the Bush legacy in this domain. It begins by articulating and examining the grounding norms of President Bush's approach to public bioethics. Next, it analyzes how these norms were applied to concrete areas of concern. Building on this analysis, the next section reflects on what the President's actions illustrate about the capacity of the Executive Branch to shape public bioethics. The Article concludes with a brief discussion of the possible metrics by which the Bush Administration's efforts might be judged, and then offers several assessments according to the various standards identified.

## I. THE BUSH ADMINISTRATION'S APPROACH TO PUBLIC BIOETHICS: GROUNDING GOODS

### A. *The Fundamental Equality of All Human Beings*

In justifying the bioethics policy of the Administration, President Bush repeatedly and unambiguously cited one particular grounding good: respect for the intrinsic and fundamental equality of all human beings.<sup>5</sup> Indeed, this was arguably the most commonly invoked normative principle during his tenure in office (though many have and will continue to object vigorously to how he defined the substance and scope of human

---

5. See, e.g., Remarks on Signing the Fetus Farming Prohibition Act and Returning Without Approval to the House of Representatives the "Stem Cell Research Enactment Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1362, 1364 (July 19, 2006) ("America was founded on the principle that we are all created equal and endowed by our Creator with the right to life."). Some might argue that "human dignity" was the grounding norm, and it is true that President Bush sometimes used that term to describe his approach. That said, the concept of dignity is famously contested and difficult to define. See PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN DIGNITY AND BIOETHICS (2008). Moreover, the President's recurrent theme was the equal value and "matchless worth" of all human lives. In defending this good, the President regularly invoked the Declaration of Independence and similar sources. Accordingly, this Article will treat "equality" as the appropriate term to describe his grounding norm for public bioethics.

equality, as well as the means he employed to pursue it).<sup>6</sup> In his first inaugural address, President Bush appealed to a robust notion of equality to defend his domestic agenda (particularly regarding the problem of poverty): "The grandest of [our Nation's] ideals is an unfolding American promise that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born."<sup>7</sup> The intrinsic equality and worth of every human being was also the stated norm underlying the President's Malaria Initiative (PMI), begun in 2005 to ameliorate and ultimately eradicate the disease in Africa. On Malaria Awareness Day in 2007, President Bush described the program as rooted in the notion that "[e]very life matters to the American people. Every life is precious."<sup>8</sup> Similarly, President Bush has defended the President's Emergency Plan for AIDS Relief (PEPFAR), meant to fight the global AIDS pandemic in Africa and the Caribbean. Upon signing the Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, President Bush noted that "[w]ith this legislation, America is showing its tremendous regard for the dignity and worth of every human being."<sup>9</sup> Indeed, President Bush invoked the intrinsic equality of every human being as the primary justification for his highly controversial approach to promoting freedom and fighting tyranny around the globe (including in Afghanistan and Iraq):

From the day of our founding, we have proclaimed that every man and woman on this Earth has rights and dignity and matchless value, because they bear the image of the Maker of heaven and Earth. Across the generations, we have proclaimed the imperative of self-government, because no one is fit to be a master and no one deserves to be a slave. . . .

So it is the policy of the United States to seek and support the growth of democratic movements and institutions in

---

6. For a very brief discussion of how such supporters and critics might appraise the Bush Administration's legacy for public bioethics, see *infra* Part III.D–E.

7. Inaugural Address, 1 PUB. PAPERS 1, 1 (Jan. 20, 2001).

8. Remarks on the Observance of Malaria Awareness Day, 43 WEEKLY COMP. PRES. DOC. 525 (Apr. 25, 2007).

9. Remarks on Signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, 44 WEEKLY COMP. PRES. DOC. 1045 (July 30, 2008).

every nation and culture, with the ultimate goal of ending tyranny in our world.<sup>10</sup>

The most distinctive feature of President Bush's conception of human equality was its unconditional and uncontingent nature. According to this view, all human beings are equal in value simply by virtue of their membership in the species; because of *who* they are as members of the human family. It is intrinsic to every human being irrespective of his age, size, location, race, sex, usefulness (or burdensomeness) to others, possession or lack of certain favored physical or mental capacities, or the worth assigned to him by others.<sup>11</sup> President Bush conceived of equality as a pre-political attribute of the human being; the state can neither confer nor negate it.<sup>12</sup>

President Bush implicitly rejected the notion that an individual's moral status (and the attendant protections that it entails) waxes and wanes according to the judgment of others, in light of physical, mental, or circumstantial criteria that such others might establish.<sup>13</sup> He regarded this competing approach as standing the

---

10. Inaugural Address, 41 WEEKLY COMP. PRES. DOC. 74 (Jan. 20, 2005). Obviously, some would take strong issue with this justification and would argue to the contrary that the President's doctrine of preemption reflects an unequal valuation of American lives (risked by the threat of terrorism) compared to the lives of innocent civilians living in terrorist-supporting regimes targeted by the U.S. military.

11. See, e.g., Telephone Remarks to the March for Life, 42 WEEKLY COMP. PRES. DOC. 101 (Jan. 23, 2006) ("You believe, as I do, that every human life has value, that the strong have a duty to protect the weak, and that the self-evident truths of the Declaration of Independence apply to everyone, not just to those considered healthy or wanted or convenient. These principles call us to defend the sick and the dying, persons with disabilities and birth defects, all who are weak and vulnerable, especially unborn children."). See also the discussion of the Bush Administration's policy for federal funding of embryonic stem cell research, *infra* Part II.A, and the case of Terri Schiavo, *infra* Part II.D.2.

12. See, e.g., Remarks to March for Life Participants, 44 WEEKLY COMP. PRES. DOC. 93 (Jan. 22, 2008) ("This America is the destiny of a people whose founding document speaks of the right to life that is a gift of our Creator, not a grant of the state.").

13. President Bush's conception of human equality stands in stark contrast to those frameworks that define "persons" (that is, rights-bearing individuals who merit moral concern and forbearance) in a more exclusive fashion—according to more exacting criteria such as the presence or absence of certain active capacities (such as sentience, the ability to feel pain, and so on). This competing approach is reflected in H. Tristram Englehardt's argument that "persons" are those who have the ability to be "concerned about moral arguments and . . . convinced by them. They must be self-conscious, rational, free to choose, and must possess moral concern." MEILAENDER, *supra* note 1, at 109–10 (quoting H. TRISTRAM ENGLEHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 105 (1986)). In a similar vein, bioethicist Ronald Green has argued that the criteria for personhood need to be determined

equality principle on its head—privileging the claims of the strong over those of the weak. He believed that this principle of contingent personhood would produce monstrous practical results—including, for example, a sliding scale of moral and legal standing for people based on their cognitive ability, usefulness, strength, and so on. In this way, President Bush's approach appears to have taken its bearings from Hans Jonas's injunction that "utter helplessness demands utter protection."<sup>14</sup> And he said many times that the fundamental purpose of government is to protect the weak from the strong.<sup>15</sup>

As will be discussed in detail below, the key concrete ethical entailment of this conception of basic human equality for biomedical research is that no human subject (regardless of his age, size, or circumstance) shall be intentionally instrumentalized or destroyed for the benefit of others.<sup>16</sup> For the practice of medicine, this principle of equality entitles patients to care and concern regardless of their condition of dependency or disability, and precludes the withholding or withdrawal of care (or, for that matter, active killing) based on others' judgments that such a life is not worth living. Also, this particular vision of equality grants all health care providers, without discrimination, the right to pursue their vocations without being compelled to act against their consciences.

---

by those who are indisputably persons (that is, members of the able-minded community of reasoners), according to their judgments about how granting or withholding moral personhood might affect the liberty interests of the decisionmakers. See Ronald Green, *Toward a Copernican Revolution in Our Thinking About Life's Beginning and Life's End*, 66 *SOUNDINGS* 152, 152–57 (1983). Under these and related approaches, "personhood" or moral worth is something that is earned or accrued, and thus is possessed by a subset of human beings. It is not a universal, intrinsic quality, co-extensive with merely being a living human being.

14. Hans Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, 98 *DAEDALUS* 219, 240 (1969).

15. See, e.g., Statement on Signing Legislation for the Relief of the Parents of Theresa Maria Schiavo, 41 *WEEKLY COMP. PRES. DOC.* 484 (Mar. 21, 2005).

16. See, e.g., Remarks on Returning Without Approval to the Senate the "Stem Cell Research Enhancement Act of 2007," 43 *WEEKLY COMP. PRES. DOC.* 832 (June 20, 2007) ("Destroying human life in the hopes of saving human life is not ethical . . ."); Telephone Remarks to the March for Life, 38 *WEEKLY COMP. PRES. DOC.* 101 (Jan. 22, 2002) ("[A]nd a compassionate society will defend a simple, moral proposition: Life should never be used as a tool or a means to an end."); George W. Bush, Op-Ed., *Stem Cell Science and the Preservation of Life*, *N.Y. TIMES*, Aug. 12, 2001, at WK13 ("There is at least one bright line: We do not end some lives for the medical benefit of others.").



B. *Pursuit and Application of Biomedical Knowledge  
for the Common Good*

The Bush Administration asserted that its second animating good for bioethics policy (to be pursued within the ethical boundaries defined by the conception of equality laid out above) was a robust commitment to supporting biomedical research, aimed ultimately at the alleviation of human suffering as well as the humane and competent medical practice that it augmented.<sup>17</sup>

II. IMPLEMENTATION OF THE GROUNDING GOODS

The narrative of the Bush Administration's approach to public bioethics can largely be described as an effort to find the proper relationship between its two grounding principles—profound respect for the fundamental equality of every human being and vigorous support for biomedical research and the healing arts. The search for a fitting balance between these competing goods unfolded in a variety of public bioethical contexts, most notably in the debates over embryonic stem cell research (and related questions, such as human cloning), end of life matters, abortion, and conscience protections for healthcare providers.

The governance of biomedical research and medical practice in the name of ethical goods can take many forms. The public bioethics spectrum includes a vast array of governmental activity, including (from most permissive to least permissive types of interventions): formal endorsement and support (typically in the form of federal funding), silent permission (the default rule in the face of governmental inaction), permission with surveillance (such as reporting requirements), permission with conditions (such as licensure and certification), and outright criminal bans. The executive branch of the federal government has manifold tools at its disposal to implement a public bioethics agenda, including the issuance of executive directives (such as executive memoranda or orders), the operation of administrative agencies, the legislative process (where the President can shape, promote, or block relevant bills), appointments to the

---

17. See Message to the House of Representatives Returning Without Approval the "Stem Cell Research Enhancement Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1365 (July 19, 2006) ("Like all Americans, I believe our Nation must vigorously pursue the tremendous possibilities that science offers to cure disease and improve the lives of millions.").

judiciary, and the use of the unparalleled bully pulpit of the presidency. The Bush Administration deployed all of these mechanisms in pursuing its bioethics agenda.

#### A. *Embryonic Stem Cell Research and Related Issues*

The moral, legal, and public policy dispute over embryonic stem cell research (and related matters, such as human cloning) is the most prominent issue in public bioethics of the past decade. Since the derivation of human embryonic stem cells in 1998 at the University of Wisconsin,<sup>18</sup> the issue has been debated and discussed by scholars, politicians, members of the popular media, and the public at large. It has been a recurring issue in political campaigns and the activities of the political branches of government at the state and federal level. Without question, it is the defining issue for President Bush's contribution to public bioethics.

The primary question raised by the practice of embryonic stem cell research is whether it is morally defensible to disaggregate (and thus destroy) living human embryos in order to derive pluripotent cells for purposes of basic research that may someday yield regenerative therapies.<sup>19</sup> The embryos used in this kind of research are typically donated by individuals or couples who conceived them by in vitro fertilization (IVF) in the context of receiving assisted reproduction treatment, but who no longer need or want them for such a purpose. There are reports of some researchers creating embryos by IVF solely for use (and destruction) in research.<sup>20</sup> Theoretically, embryos for use in stem cell research could also be created by somatic cell nuclear transfer (that is, human cloning for biomedical re-

---

18. James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 *SCIENCE* 1145 (1998).

19. Pluripotent cells are unique and valuable because they are undifferentiated (meaning that they have the capacity to become any kind of tissue in the body) and, in principle, self-renewing (that is, they can reproduce themselves indefinitely without losing their pluripotency). They can be derived from the inner-cell mass of the early embryo (embryonic stem cells), the gonadal ridge of the early fetus (embryonic germ cells), and perhaps from a variety of other sources, including amniotic fluid, bone marrow, adipose cells, and so on. Recent developments suggest that adult cells can be reprogrammed to pluripotency through the introduction of certain genetic factors. See, e.g., Kazutoshi Takahashi et al., *Induction of Pluripotent Stem Cells from Adult Human Fibroblasts by Defined Factors*, 131 *CELL* 861 (2007).

20. See Sheryl Gay Stolberg, *Scientists Create Scores of Embryos to Harvest Cells*, *N.Y. TIMES*, July 11, 2001, at A1.

search, or so-called "therapeutic cloning"), though efforts to derive pluripotent cells from cloned human embryos have not yet succeeded.<sup>21</sup> The scientific aspirations for embryonic stem cell research are manifold, including the goals of understanding the mechanisms of early human development, testing and developing pharmaceuticals, and ultimately devising new regenerative therapies. According to prominent researchers in this field, realizing these aspirations will require the creation of a bank of embryonic stem cell lines large enough to be sufficiently diverse both for the creation of models to study all relevant diseases or injuries that might admit of regenerative cell-based therapy, and for purposes of immunocompatibility (should such therapies be developed). This program will thus require the use and destruction of millions of human embryos. Given the scarcity of donated IVF embryos for this purpose,<sup>22</sup> creating embryos by IVF or cloning solely for the sake of research is a necessity.<sup>23</sup>

The moral permissibility of embryonic stem cell research depends ultimately on the status of the human embryo that is necessarily destroyed in this process. In resolving this question, President Bush appealed both to his radical conception of human equality and the findings of modern embryology. The relevant science confirmed that the five- to six-day-old human embryo used and destroyed in stem cell research is a complete, living, self-directing, integrated, whole individual<sup>24</sup> member of

---

21. For extended discussion of the science, ethics, and public policy of embryonic stem cell research and human cloning, see PRESIDENT'S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH (2004) [hereinafter MONITORING STEM CELL RESEARCH], and PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY (2002) [hereinafter HUMAN CLONING AND HUMAN DIGNITY]. See also O. Carter Snead, Keynote Address: *Preparing the Groundwork for a Responsible Debate on Stem Cell Research and Human Cloning*, 39 NEW ENG. L. REV. 479 (2005).

22. The most comprehensive study to date, conducted by RAND in 2003, estimated that there are 400,000 or so embryos in cryopreservation, only 2.8% of which have been formally designated for donation. See David I. Hoffman et al., *Crytopreserved embryos in the United States and their availability for research*, 79 FERTILITY & STERILITY 1063, 1068 (2003).

23. See Robert Lanza & Nadia Rosenthal, *The Stem Cell Challenge*, SCI. AM., June 2004, at 92.

24. In making his stem cell funding decision, President Bush implicitly rejected the argument that because the embryos used in stem cell research are capable of "twinning," they are not yet stable individuals, and thus not entitled to substantial moral respect. "Twinning" is the process by which cells that become disarticu-

the human species, who, given the proper environment, will (if all goes well) move itself along the trajectory of human biological development from embryo, to fetus, to neonate, to child, to adolescent, to adult.<sup>25</sup> The biological status of embryos as human organisms did not, however, settle the question of their moral status. For this judgment, President Bush reflected on the notion of human equality as a principle of classical liberalism underlying the nation's founding. He concluded that the only coherent (non-self-destroying) understanding of human equality is one that encompasses all human beings without discrimination on the basis of accidental characteristics such as age, size, condition of dependency or vulnerability, circumstances, or the esteem of others. Accordingly, President Bush concluded that the intentional use and destruction of embryos in stem cell research is gravely immoral and unjust. Furthermore, he took the position that the intentional creation of embryos (by IVF or cloning) for use and destruction in research is, *a fortiori*, morally unacceptable.<sup>26</sup>

---

lated from the embryo sometimes, through a process of restitution and regulation, resolve themselves into a new, whole organism. It is believed that twinning occurs in very few cases; monozygotic twins are rare, accounting for only 1 in 240 births. President Bush may have been moved by the argument that, as a biological matter, "indivisibility" is not regarded as a necessary criterion for individuation in an organism. Other species are clearly classified as individual organisms, despite their capacity for the biological equivalent of twinning (for example, flatworms). Rather, organisms are defined according to the level of integration and organization of their constituent parts. Human embryos show highly integrated organization, specialization, and differentiation well before the blastocyst phase of development (that is, when they are used in stem cell research). Accordingly, there is strong support for the proposition that a blastocyst is clearly an individuated organism—that is, a whole, individual member of the human species. See, e.g., Louis Guenin, *The Nonindividuation Argument Against Zygotic Personhood*, 81 *PHILOSOPHY* 463 (2006) (arguing in favor of embryo research on other grounds). Moreover, opponents of the twinning argument cite recent research (showing a dramatic increase in incidence of monozygotic twinning after preimplantation genetic diagnosis) to support the notion that monozygotic twinning is caused by an extrinsic disruption (for example, blastomere biopsy, as performed in PGD), and is not an intrinsic quality of the early embryo.

25. See Bush, *supra* note 16.

26. President Bush has also expressed several other ethical concerns about human cloning for biomedical research, including that its practice makes reproductive cloning inevitable (as the only remaining step for that procedure is a transfer of the cloned embryo to a woman's uterus), that it represents an unprecedented step toward more refined techniques of engineering human organisms with a pre-selected genetic constitution, and that the massive number of ova required to conduct cloning research creates dangerous incentives to exploit women, particularly poor women, as sources.

In making this judgment, President Bush implicitly rejected the arguments of those who assert that the human embryo is not entitled to a high degree of moral respect because it lacks certain preferred capacities or characteristics.<sup>27</sup> This, in President Bush's mind, was tantamount to the most unjust and invidious kind of discrimination. He likewise rejected the more limited argument in favor of using and destroying donated embryos from fertility clinics because they are destined to be discarded and destroyed in any event. President Bush's understanding of equality dictated that living human beings should not be treated as raw materials to be exploited and destroyed for biomedical research purposes simply because someone else has made the decision that their lives were no longer useful and thus should be terminated.<sup>28</sup> And his devotion to the principle of radical equality and, in his words, respect for the "matchless worth" of every individual, led him to reject a straightforward utilitarian argument that assumed the personhood of the embryo, but nevertheless justified its use in research simply by virtue of the hoped-for lifesaving promise of the therapies that might emerge from it.<sup>29</sup>

Having explored the way in which President Bush applied his principle of radical equality to the ethical question of embryonic stem cell research as a general matter, let us examine the concrete actions he took as head of the executive branch in this regard.

---

27. A prominent proposed characteristic for this purpose is the "primitive streak"—a biological structure that marks the location of the vertebral column and indicates the anterior-posterior axis of the organism (though recent evidence suggests that polarity may be established much earlier, perhaps by the locus of penetration of the egg by the sperm). The primitive streak also marks the moment after which "twinning" is no longer possible. Other suggested capacities marking personhood include the nervous system, the brain, and more mature human somatic form. For a review of these arguments and rejoinders to them, see MONITORING STEM CELL RESEARCH, *supra* note 21.

28. For an extended exploration of this argument, see Gilbert Meilaender, *Spare Embryos*, WKLY. STANDARD, Aug. 26–Sept. 2, 2002, at 25.

29. See, e.g., Julian Savulescu, *The Embryonic Stem Cell Lottery and the Cannibalization of Human Beings*, 16 *BIOETHICS* 508, 529 (2002) ("ES cell technology stands to benefit everyone . . . . It is this property that may make it reasonable to kill some embryos to conduct ES cell research even if the embryo is a person."). One might take issue with the claim on its own terms in light of the speculative nature of the promise of embryonic stem cell research compared to the certainty of the destruction of the embryonic human life on which it depends. Also, the possibility that other non-embryonic sources of pluripotent cells—for example, adult stem cells, or reprogrammed adult cells—might yield similar therapies further complicates the utilitarian calculus in this context.

## 1. Executive Actions

### a. Presidential Directives and Agency Actions

One of the first major actions of the President's tenure was to set the federal policy for funding embryonic stem cell research. In fact, prior to September 11, 2001, this issue was the most hotly debated of his presidency. When President Bush took office, there was a nearly thirty year history of gridlock among the political branches on the question of federal funding for research entailing the destruction of embryos. At various periods, Congress would favor such funding, but the White House would not, and vice versa.<sup>30</sup> The practical result of the stalemate was that the federal government had never provided funding for research that depended on the destruction of human embryos. After much deliberation, President Bush announced his policy in the first televised address of his presidency on August 9, 2001. He spent the bulk of the address discussing the competing ethical goods, namely, respect for the equality of every human life, and the moral obligation to advance scientific knowledge aimed at the amelioration of human suffering wrought by debilitating injuries and dread diseases. He concluded that, although he strongly supported biomedical research aimed at these ends, he firmly held the view that such research must operate within the boundaries dictated by the ethical norm of respect for human equality. Accordingly, he authorized federal funding for all types of stem cell research that met these criteria and would not create incentives for the further destruction of human lives at the embryonic stage of development. Obviously, all forms of non-embryonic stem cell research would be eligible for funding under this plan, including so-called adult stem cell research (meaning pluripotent or multipotent cells derived from differentiated tissue, including bone marrow, umbilical cord blood, and the like). President Bush also authorized funding for embryonic stem cell research using cell lines that had been derived from embryos that had been destroyed prior to the announcement of the policy. He

---

30. For a discussion of this debate and the various actions taken by Congress and the White House, see O. Carter Snead, *The Pedagogical Significance of the Bush Stem Cell Policy: A Window into Bioethical Regulation in the United States*, 5 YALE J. HEALTH POL'Y L. & ETHICS 491 (2005).

said that funding work using these lines would move the science forward without incentivizing future embryo destruction (given that no federal funding would be available for work on lines derived after August 9, 2001).

When he announced the policy, he said that there were more than sixty genetically diverse lines that met the funding criteria.<sup>31</sup> In the days that followed, other qualifying lines were identified, bringing the number to seventy-eight. Though seventy-eight lines were eligible for funding, far fewer were available for research, for reasons relating both to scientific and intellectual property related issues.<sup>32</sup> At the moment, there are twenty-one lines available for use, and nearly one thousand shipments of cell preparations from these lines have been shipped to researchers.<sup>33</sup> As of July 2007, the Administration had made more than \$3 billion available for all eligible forms of research, including more than \$130 million for embryonic stem cell research.<sup>34</sup>

In 2007, in the wake of a series of revolutionary developments in non-embryonic stem cell research,<sup>35</sup> including, most prominently, the development of a technique for reprogramming adult stem cells to a state of pluripotency merely by introducing a small number of genetic factors ("induced pluripo-

---

31. Bush, *supra* note 16.

32. The President's Council on Bioethics explained the process by which an eligible cell line becomes available for use:

The process of establishing a human embryonic stem cell line, turning the originally extracted cells into stable cultured populations suitable for distribution to researchers, involves an often lengthy process of growth, characterization, quality control and assurance, development, and distribution. In addition, the process of making lines available to federally funded researchers involves negotiating a contractual agreement (a "materials transfer agreement") with the companies or institutions owning the cell lines, establishing guidelines for payment, intellectual property rights over resulting techniques or treatments, and other essential legal assurances between the provider and the recipient.

MONITORING STEM CELL RESEARCH, *supra* note 21, at 43.

33. The recently announced Phase I clinical trials for embryonic-stem-cell-based therapies sponsored by Geron use Bush-approved cell lines. Peter Benesh, *Stem Cell Companies See Signs of Hope, Obama's Position a Plus with Fewer Restrictions*, INVESTOR'S BUS. DAILY, Feb. 9, 2009, at A8.

34. See Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007); President's Message to the Senate Returning Without Approval the "Stem Cell Research Enhancement Act of 2007," 43 WEEKLY COMP. PRES. DOC. 833 (June 20, 2007).

35. See, e.g., Paolo De Coppi et al., *Isolation of amniotic stem cell lines with potential for therapy*, 25 NATURE BIOTECH. 100 (2007).

tent state cells" or "iPS cells"),<sup>36</sup> President Bush expanded the National Institutes of Health Stem Cell Registry to list all forms of pluripotent cell research eligible for funding.<sup>37</sup> The registry was renamed the "NIH Human Pluripotent Stem Cell Registry" to emphasize the function of the cells rather than their origins. He also directed the Secretary of Health and Human Services (HHS) to "prioritize[] research with the greatest potential for clinical benefit," and to "take[] into account [alternative, non-embryo-destructive] techniques outlined by the President's Council on Bioethics."<sup>38</sup> The Executive Order clearly stated that the activities of the federal government in this context must be consistent with "the principle that no life should be used as a mere means for achieving the medical benefit of another."<sup>39</sup> Consistent with this principle, the government should "move forward vigorously with medical research."<sup>40</sup> In this way, the 2007 Executive Order captures the balance at the heart of President Bush's approach to public bioethics.

The Food and Drug Administration (FDA) also played a significant role in facilitating the President's stem cell funding policy. It issued guidance documents and sent letters to interested parties (including Congressmen) making clear that there would be no problem in administering the approval process for therapeutic products using the approved lines, should any be devel-

---

36. See Takahashi et al., *supra* note 19; Junying Yu et al., *Induced Pluripotent Stem Cell Lines Derived from Human Somatic Cells*, 318 *SCIENCE* 1917 (2007). The world's leading stem cell researchers hailed the development of these iPS cells as ground-breaking because these new cells were easier to produce than embryonic stem cells, they appeared to have all the characteristics of their embryonic counterparts, they were immunocompatible with the donor of the reprogrammed skin cell, and they were ethically uncontroversial in that their derivation required neither an embryo nor human ova. Some have raised safety concerns about the kinds of genes used (some were oncogenes associated with formation of tumors) and the viral vectors used to introduce the genes. Defenders of the research respond that embryonic stem cells have been associated with the formation of tumors. In any event, several papers have been published achieving the same results without using either the controversial oncogenes or viral vectors (retroviruses). Very recently, a paper was published describing a technique for reprogramming adult cells without the need for any viral vector at all (thus removing a key safety concern). See Knut Woltjen et al., *piggyBac transposition reprograms fibroblasts to induced pluripotent stem cells*, *NATURE*, Mar. 1, 2009, at 1.

37. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007).

38. *Id.*

39. *Id.*

40. *Id.*



oped. In particular, the FDA offered assurances that there were no novel xenotransplantation issues presented relating to the co-culture of some of the cell lines on murine (mouse) feeder layers.<sup>41</sup>

Separately, the FDA took action consistent with the President's view that human beings at the embryonic stage of development are entitled to deep moral respect. The agency issued an interim final rule in 2005 and a final rule in 2007 regarding its regulatory regime for "Human Cells, Tissues, and Cellular and Tissue-Based Products," which clarified that the related provisions for donor screening and testing would not preclude "adoption" of embryos from fertility clinic patients that might otherwise be destroyed.<sup>42</sup>

Also within HHS, the Secretary's Advisory Council on Human Research Protections (SACHRP), tasked with providing "advice relating to the responsible conduct of research involving human subjects,"<sup>43</sup> took a symbolic step affirming President Bush's commitment to human equality in the context of embryo research. It formally amended its charter to include explicitly embryos as human subjects for purposes of the committee's work. This action did not have any concrete legal effects given that the federal statutory scheme for human subjects protections does not include embryos *in vitro* within its ambit.<sup>44</sup>

### b. *Interventions in Intergovernmental Fora*

The Bush Administration pursued and defended its conception of radical human equality through various international instruments concerning public bioethics. The most notable example of this effort is the four-year negotiation of the United

---

41. See, e.g., Letter from Bernard A. Schwetz, Acting Principal Deputy Comm'r, Food & Drug Admin., to Senator Edward M. Kennedy (Sept. 5, 2001), available at <http://www.fda.gov/oc/stemcells/kennedyltr.html> ("Thus, as intended and practiced, the FDA regulation of xenotransplantation products, while aimed first and foremost at safeguarding the public health, should not impose a substantial impediment to xenotransplantation product development, including HEPSC that are produced by culture in vitro with mouse cells.").

42. Human Cells, Tissues, and Cellular and Tissue-Based Products, 70 Fed. Reg. 29,949 (May 25, 2005) (interim final rule); 72 Fed. Reg. 33,667 (June 19, 2007) (final rule).

43. Sec'y of Health & Human Servs., Charter, Secretary's Advisory Committee on Human Research Protections (Sept. 25, 2008), available at <http://www.hhs.gov/ohrp/sachrp/charter.htm>.

44. See PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 131 (2004) [hereinafter REPRODUCTION AND RESPONSIBILITY].

Nations Declaration on Human Cloning.<sup>45</sup> The United States vigorously supported the efforts of Costa Rica and other nations to adopt a declaration calling upon member states to ban all forms of human cloning. Conversely, the United States adamantly opposed any instrument that would seek to ban cloning to produce children (that is, the transfer of a cloned embryo to a woman's uterus in order to initiate a pregnancy meant to result in a live-born child; this is sometimes called "reproductive cloning") while approving or remaining silent on the issue of cloning for biomedical research (in which the cloned embryo is disaggregated for purposes of deriving embryonic stem cells, sometimes called "therapeutic cloning"). The United States took the position that a ban on cloning to produce children alone would be ineffective. But more importantly, the mechanism of such a ban would be the prohibition of transfer of cloned embryos to a woman's uterus—effectively requiring the destruction of any embryo produced by cloning. A law that required the killing of an entire category of living human organisms (that is, cloned embryos) ran squarely afoul of President Bush's principle that all human lives are equal, regardless of developmental stage or circumstance. Through the efforts of the United States working along with a diverse array of nations, a declaration calling for a ban on all forms of cloning passed, 84-34 (with 37 nations abstaining).<sup>46</sup>

Similarly, at the United Nations Education, Science, and Culture Organization (UNESCO), the United States pressed the Administration's commitment to radical human equality in the negotiation of the Universal Declaration on Bioethics and Human Rights, adopted in 2005.<sup>47</sup> During this process, the United

---

45. United Nations Declaration on Human Cloning, G.A. Res. 59/280, U.N. Doc. A/RES/59/280 (Mar. 23, 2005). See generally Rev. Robert John Araujo, *The UN Declaration on Human Cloning: A Survey and Assessment of the Debate*, 7 NAT'L CATH. BIOETHICS Q. 129 (2007); Nigel M. de S. Cameron & Anna V. Henderson, *Brave New World at the General Assembly: The United Nations Declaration on Human Cloning*, 9 MINN. J.L. SCI. & TECH. 145 (2008).

46. Press Release, Gen. Assembly, General Assembly Adopts United Nations Declaration on Human Cloning by Vote of 84-34-37, U.N. Doc. GA/10333 (Aug. 3, 2005). Some of the abstaining nations later came forward in support of the declaration.

47. Universal Declaration on Bioethics and Human Rights, UNESCO Gen. Conference Res. 33/36 (Oct. 19, 2005). From 2004–2005, the Author led the U.S. delegation for the negotiation of the Universal Declaration on Bioethics and Human Rights. Currently, the Author is serving a four-year term as a member of UNESCO's Inter-

States successfully lobbied against the inclusion of language that would endorse embryonic stem cell research or human cloning. Moreover, the United States succeeded in including several clauses that advanced the principle of radical human equality, including language that one of the principal aims of the Declaration was to “promote . . . respect for the life of human beings.”<sup>48</sup>

*c. President’s Council on Bioethics*

As his predecessors had done, President Bush created a commission to advise him on public bioethics. In particular, the commission (the President’s Council on Bioethics<sup>49</sup>) was charged:

- (1) to undertake fundamental inquiry into the human and moral significance of developments in biomedical and behavioral science and technology;
- (2) to explore specific ethical and policy questions related to these developments;
- (3) to provide a forum for a national discussion of bioethical issues;
- (4) to facilitate a greater understanding of bioethical issues; and
- (5) to explore possibilities for useful international collaboration on bioethical issues.<sup>50</sup>

The Council, chaired by Dr. Leon R. Kass (from 2001–2005), and later Dr. Edmund Pellegrino (from 2005–2009), held regular public meetings to discuss a variety of ethical issues arising from advances in biomedical science and biotechnology. Much of its work centered on the issues of embryonic stem cell research and related topics, including human cloning and the synthesis of assisted reproduction and genomic knowledge. The Council was composed of seventeen members, selected for

---

national Bioethics Committee, which, among other things, is charged with monitoring the implementation of all UNESCO instruments relating to bioethics.

48. *Id.* For a full discussion of the negotiation process and the ways in which the final declaration signals respect for human life, broadly understood, see O. Carter Snead, *Assessing the Universal Declaration of Bioethics and Human Rights: Implications for Human Dignity and the Respect for Human Life*, 7 NAT’L CATH. BIOETHICS Q. 53 (2007).

49. From October 2002 until July 2005, the Author served as General Counsel to the President’s Council on Bioethics.

50. Exec. Order No. 13,237, 66 Fed. Reg. 59,851 (Nov. 28, 2001).

their expertise in science, medicine, ethics, political theory, law, and social science. The members had widely differing views on most issues that came before the Council, and were quite divided as to the moral status of the embryo and the appropriate policies for stem cell research. A substantial number of members openly and vigorously disagreed with President Bush's funding policy for stem cell research.

The Council has produced several reports advising the White House on the issue of stem cell research and the related issues of cloning and the synthesis of assisted reproductive technologies and genomic knowledge. The first report, *Human Cloning and Human Dignity: An Ethical Inquiry*, elaborated the arguments for and against human cloning, both for purposes of biomedical research and producing children.<sup>51</sup> In the descriptive sections of the report it also discussed the state of the science, and reflected on the importance of terminology that fully and fairly captured the ethical matters in dispute. The report concluded with majority and minority recommendations. Ten members of the Council voted to ban cloning to produce children and to impose a five-year moratorium on cloning for biomedical research.<sup>52</sup> Seven members voted to ban cloning to produce children, but voiced support for cloning for biomedical research, subject to the creation of a sound regulatory regime.<sup>53</sup>

The Council's report entitled *Monitoring Stem Cell Research* surveyed the developments in scientific research and ethical discourse since the announcement of the Bush funding policy.<sup>54</sup> It offered an ethical account of the President's policy and discussed all of the arguments for and against it that had emerged since its announcement. No formal recommendations were offered in this report. The Council's report, *Reproduction and Responsibility*, examined the current governance of the activities at the intersection of assisted reproduction, genetics, and embryo research,<sup>55</sup> and concluded by offering unanimous recommendations for legislation and self-regulation by professional societies to remedy weaknesses in the prevailing regime.<sup>56</sup> Finally, the

---

51. HUMAN CLONING AND HUMAN DIGNITY, *supra* note 21.

52. *Id.* at 202.

53. *Id.*

54. MONITORING STEM CELL RESEARCH, *supra* note 21.

55. REPRODUCTION AND RESPONSIBILITY, *supra* note 44.

56. *Id.* at 207–09, 215.

Council's white paper, *Alternative Sources of Pluripotent Cells*, provided a scientific and ethical analysis of four proposed techniques for obtaining stem cells without destroying or seriously harming human embryos.<sup>57</sup>

The work of the Council supported President Bush's public bioethics agenda for stem cell research and related matters by reflecting on, giving further content to, and elaborating the ethical principles underlying his approach. The Council reports offered a rigorous and comprehensive account of (including arguments for and against) his principle of radical human equality as applied to the context of embryonic stem cell research and cloning. Because of its unusual degree of ideological diversity and its rules of procedure (which explicitly rejected consensus as a standard for agreement), the Council was able to offer advice that included vigorous challenges to the President's premises and conclusions. In addition to its advisory function, the Council tried to inform and promote public discussion on these issues more broadly.

## 2. *Legislative Actions*

President Bush actively intervened in the legislative process on several occasions to promote and defend his views regarding stem cell research and cloning. The first two vetoes of his Administration came in response to bills intended to liberalize his stem cell funding policy. The proposed Stem Cell Research Enhancement Act of 2005 and the Stem Cell Research Enhancement Act of 2007 provided federal funding for research on embryos that were originally conceived for use in assisted reproduction therapy but no longer wanted or needed for this purpose. Because President Bush regarded these measures as creating an incentive for the instrumentalization and destruction of embryonic human beings (subsidized by American taxpayers, a substantial portion of whom were deeply morally opposed to the practice), he vetoed both bills.<sup>58</sup>

He promoted bills that he believed reflected the proper balance between respect for human equality and the obligation to pursue biomedical research for the common good. One success

---

57. PRESIDENT'S COUNCIL ON BIOETHICS, *ALTERNATIVE SOURCES OF HUMAN PLURIPOTENT STEM CELLS*, at x (2005).

58. *Supra* notes 17, 34.

in this regard was the Stem Cell Therapeutic and Research Act of 2005, which established and funded a new federal program to acquire and store umbilical cord blood, and expanded the pre-existing bone marrow program to include cord blood. The Bush Administration supported, but failed to secure passage of, another bill—the Hope Offered through Principled and Ethical Stem Cell Research Act (the HOPE Act)—which would have directed the Secretary of Health and Human Services to pursue and promote research involving alternative sources of pluripotent cells.<sup>59</sup>

President Bush also promoted bills meant to prevent research practices that he believed directly contravened his fundamental principle of human equality. His chief success in this regard was the Fetus Farming Prohibition Act of 2006, which made it a federal crime for anyone:

involved or engaged in interstate commerce to . . . solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue; or . . . knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal.<sup>60</sup>

The Act was a response to a unanimous recommendation of the President's Council on Bioethics that such practices be banned.<sup>61</sup> President Bush also supported the successful inclusion of an appropriations amendment (the "Weldon Amendment") that prohibited the patenting of human embryos.<sup>62</sup>

---

59. Following the defeat of the bill in the House (it had passed the Senate with 70 votes), President Bush issued the Executive Order discussed above, *supra* notes 37–40 and accompanying text, which included essentially the same directives for HHS.

60. Pub. L. No. 109-242, 120 Stat. 570 (codified at 42 U.S.C. 289g-2).

61. REPRODUCTION AND RESPONSIBILITY, *supra* note 44, at 218–24 (recommending that "Congress should consider some limited targeted measures . . . proposed as moratoria").

62. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3, 101 ("None of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism."); *see also* REPRODUCTION AND RESPONSIBILITY, *supra* note 44, at 162–63 ("Recently, Congress enacted a measure effectively prohibiting the issuance of patents on human organisms. The Consolidated Appropriations Act of 2004 provides, 'None of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism.' As further indication of the intended scope of this provision, the man-

President Bush was unsuccessful in supporting a ban on all forms of human cloning (though the measure passed twice in the House of Representatives). He lobbied members of Congress and regularly expressed support for the bill in his State of the Union addresses. Additionally, his Assistant Attorney General for the Office of Legislative Affairs argued in his testimony to Congress that anything short of a total ban on human cloning would be practically unenforceable. Specifically, he argued that the competing proposal—a bill that would ban only the transfer of a cloned embryo to a woman's uterus to initiate a pregnancy (that is, cloning to produce children), while offering support for cloning to produce embryos for use in stem cell research (that is, cloning for biomedical research, or "therapeutic" cloning)—would be impossible to implement for a variety of reasons.<sup>63</sup> Nevertheless, no comprehensive ban ever made it to the President's desk for signature.

Viewed from another perspective, however, President Bush was instrumental in defeating the competing bill mentioned above that banned cloning to produce children while endorsing cloning for biomedical research. He opposed it because it operated by effectively mandating, under pain of criminal law, the destruction of all cloned human embryos—a measure deeply at odds with his commitment to the fundamental equality of all

---

ager's statement for this amendment points to a June 22, 2003, colloquy wherein Rep. David Weldon (the amendment's sponsor) assured Rep. David Obey (the ranking minority member of the House Committee on Appropriations) that the amendment 'would not interfere' with any existing patents on human genes or human stem cells. Weldon further noted that the purpose of the amendment was to affirm that 'human life in any form should not be patentable.' The Weldon Amendment thus proscribes the patenting of human organisms at any stage of development. It will remain effective for the duration of the relevant appropriations period, namely, for the fiscal year ending September 30, 2004. To continue in affect, it would have to be included in subsequent appropriations bills or be enacted as a freestanding, permanent law." (internal citations omitted)). The Weldon Amendment has been reauthorized every year since its enactment.

63. Written statement from Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to the H. Subcomm. on Criminal Justice, Drug Policy & Human Resources of the Comm. on Government Reform, 107th Cong. (May 15, 2002), available at [http://www.nrlc.org/killing\\_embryos/Justice\\_Dept\\_on\\_cloning.pdf](http://www.nrlc.org/killing_embryos/Justice_Dept_on_cloning.pdf) (noting, among other things, that the prohibited action, "transfer of an embryo to a uterus," was routinely done with IVF embryos, which were impossible to distinguish from cloned embryos in vitro, and observing that "once a pregnancy were established, any government-directed attempt to terminate a cloned embryo in utero would create problems enormous and complex" (internal quotations omitted)).

human beings. Additionally, the bill explicitly endorsed and protected the intentional creation and destruction of human embryos (through cloning) solely for purposes of research—clearly something that the President's conception of human equality could not abide. Moreover, if passed, the new law would have marked a radical shift away from the federal government's longstanding position of neutrality with respect to the practice of embryo destructive research (that is, permitting it in the private sector but withholding federal support). The ban on "reproductive cloning" only was defeated in the House, and no vote on either cloning ban ever reached the Senate floor.

President Bush also used the threat of veto to shape legislation that he believed ran afoul of his equality principle in the embryonic stem cell research context. Specifically, following the Democrats' 2006 victories that gave them control of both Houses of Congress, President Bush sent a letter to the new Senate Majority Leader, Harry Reid, and the new Speaker of the House, Nancy Pelosi, stating unambiguously that he would "veto any legislation that . . . encourages the destruction of human life at any stage."<sup>64</sup>

### 3. *Bully Pulpit and the Pedagogical Authority of the Presidency*

As the head of the executive branch of the federal government, the only federal official elected by the entire country, and the leader of the most powerful nation on Earth, the President of the United States enjoys an unparalleled platform from which to disseminate his views and influence the consciences of the American people and the world in accordance with his normative commitments. President Bush made some use of this pedagogical mechanism to promote and defend his conception of human equality in the context of embryonic stem cell research.

As noted above, his first televised address to the nation announcing the policy included an extended reflection on the proper relationship between his principle of radical human equality and vigorous support of biomedical science. In five of his eight State of the Union addresses, President Bush reaf-

---

64. Letter from George W. Bush, U.S. President, to Harry Reid, Majority Leader of U.S. Senate (May 3, 2007), available at <http://www.nrlc.org/Records/PresidentBushtoReidVetoWarning.pdf>; Letter from George W. Bush, U.S. President, to Nancy Pelosi, Speaker of U.S. House of Representatives (May 3, 2007), available at <http://www.nrlc.org/Records/PresidentBushToPelosiProLifeVetoes.pdf>.



firmed his equality principle in the biomedical research context and called on Congress to pass laws that reflected this principle (including bans on cloning, selling or patenting embryos, creation of human-animal hybrids for research, initiating pregnancies for research, and the like).<sup>65</sup> At his veto ceremonies for the 2005 and 2007 Stem Cell Research Enhancement Acts, he delivered speeches reaffirming his core principles in this area and promoted embryo adoption (featuring at one event a number of “snowflake” children who had been adopted as embryos), as well as research using alternative sources for pluripotent cells (featuring at another event patients who had benefited from such therapies). He also reprised these themes in his annual phone call to the March for Life participants.

### B. *Abortion*

Abortion is arguably the most contentious and inflamed public question in America. The lines of disagreement are familiar. The principal arguments in favor of abortion rights (sometimes made individually, sometimes in conjunction) are first, that the fetus is not a person (and thus not entitled the moral concern and protections owed to a post-natal human being), and second, that the pregnant woman’s interest in bodily autonomy gives her the sole right to choose to either carry the fetus to birth or terminate the pregnancy (and thus its life).<sup>66</sup> Those opposed to abortion rights respond that because the fetus is an innocent living member of the human species, it is gravely unjust to intentionally kill the child, absent the most compelling

---

65. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126 (Feb. 2, 2005); Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145 (Jan. 31, 2006); Address Before a Joint Session of the Congress on the State of the Union, 44 WEEKLY COMP. PRES. DOC. 117 (Jan. 28, 2008).

66. There are, obviously, many different permutations of this argument. One variation is a “developmental” approach to moral status, which accords increasing moral worth to the fetus (and its interests as against the claims of the mother) as it progresses through the gestational stages. Other arguments focus on the dependency of the fetus on the mother for bodily support, and weigh its claim to life more heavily in comparison with the mother’s autonomy rights as it becomes more biologically independent (that is, “viable”). As Gilbert Meilaender has observed, these arguments about “personhood” and “bodily support,” though analytically distinct, are deeply intertwined. See MEILAENDER, *supra* note 1, at 114.

justification (for example, to save the life of the mother, or perhaps when the pregnancy resulted from rape or incest).<sup>67</sup>

President Bush's approach to abortion was also driven by his particular conception of the radical equality of all human beings. He rejected the notion that the moral status or "personhood" of the unborn was something earned, accrued, or conferred based on the needs or wants of others. He held to the view that human equality is truly an intrinsic, pre-political attribute—one that does not depend on accidental characteristics such as gestational stage, condition of dependency, or the value judgments of others. For him, the notion that the moral status of the fetus should increase as it grows stronger, less vulnerable and less biologically dependent on its mother, effectively inverted the fundamental ethical obligation of the strong to care for the weak. The idea that one human being is entitled to kill another because she considers that life to be unwanted, burdensome to others, not worth living, or an obstacle to her own full participation in social and economic life<sup>68</sup> was, for President Bush, contrary to the principle of equality on which the nation was founded.

The particular actions of the Bush Administration with respect to the issue of abortion were calculated to vindicate these principles to the extent permitted by the prevailing legal regime.<sup>69</sup> Such actions will be discussed below according to the legal mechanisms deployed for their implementation.

---

67. President Bush took the position that a woman has the right to choose to terminate a pregnancy resulting from rape or incest. See Interview With the Danish Broadcasting Corporation, 41 WEEKLY COMP. PRES. DOC. 1099, 1101 (June 29, 2005).

68. Both Justice Ginsburg and Reva Siegel have sought to justify the right to abortion on sex equality grounds. See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (arguing that the right to abortion protects "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature"); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

69. It bears noting that since *Roe v. Wade*, the Supreme Court has effectively reserved to itself the principal responsibility to define the contours of the law of abortion. The abortion precedents of the Supreme Court facing the Bush Administration upon its arrival in 2001 strongly privileged the pregnant woman's interests over those of the fetus, allowing, for example, a woman to terminate her pregnancy at any gestational stage whenever she and her abortion provider concluded that it was in the interests of her health—defined capaciously to encompass virtually all aspects of well being, such as "physical, emotional, psychological, [and] familial" concerns. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). The breadth of the health exception has been confirmed by several federal courts having invalidated limits on abortion

1. *Executive Directives, Administrative Agency Actions, and Foreign Policy*

President Bush used his authority to issue presidential directives in an effort to reduce the number of abortions worldwide and to avoid compelling American taxpayers to subsidize organizations that promote or provide abortions. Two days after his inauguration, President Bush issued an Executive Memorandum to the Administrator of the United States Agency for International Development ordering the restoration of the "Mexico City Policy," which

required nongovernmental organizations to agree as a condition of their receipt of Federal funds that such organizations would neither perform nor actively promote abortion as a method of family planning in other nations.<sup>70</sup>

The policy was originally established in 1984 by President Ronald Reagan to fill a perceived loophole in the Foreign Assistance Act of 1961, which prohibits federally funded nongovernmental organizations (NGOs) from using such funds "to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."<sup>71</sup> President Reagan concluded that any federal support for such organizations would indirectly promote abortion, given the fungibility of such funds. The Mexico City Policy remained in effect until shortly after the inauguration of President Clinton, who rescinded it.<sup>72</sup>

---

because they lacked exceptions for "serious non-temporary threat[s] to a pregnant woman's mental health." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997). Thus, for much of the Bush presidency, the political branches of government were only able to regulate the manner in which abortions were procured (for example, through the enactment of waiting periods, informed consent requirements, parental involvement laws, and the like). In April 2007, the Court upheld the first restriction on a particular abortion procedure in its history. The federal Partial Birth Abortion Ban Act lacked a health exception, but the law was upheld in part because the law did not ban alternative safe and effective abortion procedures. See *Carhart*, 550 U.S. at 157-64; see also O. Carter Snead, *Unenumerated Rights and the Limits of Analogy: A Critique of the Right to Medical Self-Defense*, 121 HARV. L. REV. F. 1 (2007), <http://www.harvardlawreview.org/forum/issues/120/may07/snead.pdf>.

70. Memorandum on Restoration of the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 2001).

71. 22 U.S.C. § 2151b(f)(1) (2006).

72. See Memorandum on the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 1993). President Obama likewise rescinded the policy on his third full day in office. Mexico

In a separate Executive Memorandum, President Bush transferred funding previously allocated to the United Nations Population Fund (UNPFA) to the Child Survival and Health Program Fund (administered by USAID “in support of reproductive health and maternal health and related programs”).<sup>73</sup> The stated grounds for defunding UNFPA was that its alleged “support of, and involvement in, China’s population-planning activities allow[ed] the Chinese government to implement more effectively its program of coercive abortion.”<sup>74</sup> UNFPA received no further funding during President Bush’s tenure in office.

As the head of the executive branch, President Bush directed administrative agencies to promote his efforts to reduce the incidence of abortion and advance his conception of human equality in this context. He also consistently selected key political appointees who, like himself, regarded abortion as the unjust taking of innocent life.<sup>75</sup>

The Department of Health and Human Services (HHS) was the most important administrative agency for promoting President Bush’s vision regarding the equal moral status of the child *in utero*. As part of its administration of the President’s Faith and Community Based Initiative (designed to facilitate the provision of social services to the poor), HHS directed over sixty million dollars in grants to pro-life crisis pregnancy centers.<sup>76</sup> Additionally, in October 2002, HHS issued a final rule

---

City Policy and Assistance for Voluntary Population Planning, 45 WEEKLY COMP. PRES. DOC. 1 (Jan. 23, 2009).

73. Memorandum on the Transfer of Funds From International Organizations and Programs Funds to the Child Survival and Health Programs Fund, 38 WEEKLY COMP. PRES. DOC. 1660, 1661 (Sept. 30, 2002).

74. Todd S. Purdum, *U.S. Blocks Money for Family Clinics Promoted by U.N.*, N.Y. TIMES, July 23, 2002, at A1. The report of the China UNFPA Independent Assessment team recommended that “unless and until all forms of coercion in the PRC law and in practice are eliminated, no U.S. Government funds be allocated for population programs in the PRC.” U.S. DEP’T OF STATE, REPORT OF THE CHINA UNFPA INDEPENDENT ASSESSMENT TEAM (2002), available at <http://www.state.gov/g/prm/rls/rpt/2002/12122.htm>. Supporters of UNFPA vigorously dispute the assertion that it supports China’s program of coerced abortion in any fashion, and thus oppose the Bush Administration’s actions in this regard.

75. For example, he selected U.S. Senator John Ashcroft to lead the Department of Justice, and Wisconsin Governor Tommy Thompson as head of the Department of Health and Human Services, two agencies that play potentially significant roles in the abortion policy context.

76. Thomas B. Edsall, *Grants Flow To Bush Allies On Social Issues*, WASH. POST, Mar. 22, 2006, at A1.

clarifying that the term "child" in the State Children's Health Insurance Program (a program designed to distribute matching funds to states to provide insurance coverage for children whose family income did not qualify them for Medicaid) included "the period from conception to birth."<sup>77</sup> Secretary Leavitt also took steps to enforce the provisions of the Born Alive Infants Protection Act (discussed below). He issued "clear guidance that withholding medical care from an infant born alive may constitute a violation of the federal Emergency Medical Treatment and Labor Act and the Medicare Conditions of Participation."<sup>78</sup>

President Bush used his authority to shape U.S. foreign policy as another mechanism to promote his views on abortion. In addition to the funding decisions discussed above, the Bush Administration worked to advance its agenda in intergovernmental fora. Most of the efforts in these contexts were defensive—U.S. delegations were tasked with resisting perceived efforts to elevate the right to abortion to the status of an international human right. To this end, U.S. delegations to intergovernmental fora would frequently intervene to prevent inclusion of language in international instruments that appeared to promote abortion. The 2005 negotiations surrounding the "Review and Appraisal of the Beijing Declaration and Platform for Action" at the United Nations Conference on the Status of Women provides a representative illustration. At that negotiation, the U.S. delegation offered an amendment to the draft resolution under discussion (to reaffirm and build upon the Beijing Declaration) that would clarify that the proposed instrument did not create an international right to abortion. After receiving assurances on the record from other delegations that the instrument was not meant to create such a right, the U.S. withdrew its amendment. At the conclusion of the proceedings, the United States made an official statement reaffirming its understanding of the scope of the document.<sup>79</sup>

---

77. 42 C.F.R. § 457.10 (2008). In 2007, efforts to codify this language in the bill reauthorizing SCHIP failed.

78. National Right to Life, Statement on Announcement by D.H.H.S. on Born-Alive Infants Protection Law, (Apr. 22, 2005), available at [http://www.nrlc.org/federal/Born\\_Alive\\_Infants/StatementonDHHS042205.html](http://www.nrlc.org/federal/Born_Alive_Infants/StatementonDHHS042205.html).

79. For a description of the U.S. government's efforts at this negotiation, compare Feminist Majority Found., Women's Rights Coalition Demands Withdrawal of Bush's Nomination of Sauerbrey (Oct. 18, 2005), <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9335> (criticizing the U.S. delegation), and Janice Shaw

## 2. *Promoting, Shaping, and Blocking Legislation*

Many of President Bush's most significant efforts to promote his conception of equality in the abortion context were directed at the legislative process. He used his influence as President to shape legislation, offering support or opposition (often backed by a veto threat).

During his time in office, President Bush actively supported and ultimately signed several bills into law that reflected his normative outlook on abortion. Most prominent, perhaps, was the Partial Birth Abortion Ban Act,<sup>80</sup> which criminalized a particularly grisly and controversial form of abortion, namely "in-tact dilation and extraction," which entailed:

[the] deliberate[] and intentional[] vaginal[] deliver[y of] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.<sup>81</sup>

President Bush used the threat of veto to deter congressional efforts to weaken federal laws limiting abortion. Following the 2006 elections in which Democrats won control of both houses of Congress, President Bush sent letters to Senate Majority Leader Harry Reid and House Speaker Nancy Pelosi in which he flatly stated, "I will veto any legislation that weakens current Federal policies and laws on abortion, or that encourages the destruction of human life at any stage."<sup>82</sup> The letters specifi-

---

Crouse, Concerned Women of Am., *The United States Hangs Tough: Sauerbrey shows savvy and strength* (Mar. 7, 2005), available at <http://www.cwfa.org/articledisplay.asp?id=7622> (praising the U.S. delegation).

80. 18 U.S.C. § 1531 (2006).

81. *Gonzales v. Carhart*, 550 U.S. 124, 142 (2007) (upholding the ban against a challenge of facial unconstitutionality). For a discussion of the case, see Snead, *supra* note 69, at 5–6 (2007), <http://www.harvardlawreview.org/forum/issues/120/may07/snead.pdf> ("*Carhart* is particularly noteworthy in that the government interest cited for the abortion restriction was *not* the direct preservation of fetal human life. Rather, the law aimed to promote respect for human life, to prevent the coarsening and numbing of society's moral sense, and to safeguard the integrity of the medical profession by banning what Congress judged to be a particularly shocking and brutal procedure bearing a striking resemblance to infanticide. In other words, the purpose of the law was to prevent the moral degradation of society.").

82. Letter from George W. Bush to Harry Reid, *supra* note 64; Letter from George W. Bush to Nancy Pelosi, *supra* note 64.

cally mentioned federal laws and policies that preclude federal funding of abortion domestically and internationally, and related measures such as the "Mexico City Policy" and the funding limits on UNFPA.<sup>83</sup>

In addition to laws regulating abortion, President Bush also signed laws that reflected his conception of radical human equality in other *in utero* contexts. Such laws offered protection and legal recognition to unborn and newly born children without imposing any limits on the practice of abortion itself. One such law was the Born-Alive Infants Protection Act of 2002,<sup>84</sup> which provided that for purposes of federal law, "the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species *homo sapiens* who is born alive at any stage of development."<sup>85</sup> Furthermore, the law made clear that in this context, "born alive"

means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.<sup>86</sup>

The purpose of the law was to remove any doubt about the personhood of newborns who survive abortions, for purposes of federal law. The President and congressional supporters of the law were motivated by the concern that such newborns might be denied emergency medical treatment. Indeed, at a congressional hearing, witnesses recounted instances in which they personally observed infants surviving abortions being left to die.<sup>87</sup>

President Bush also signed into law the Unborn Victims of Violence Act of 2004 ("Laci and Conner's Law"), which recognizes "a child in utero" (defined as "a member of the species *homo sapiens*, at any stage of development, who is carried in the womb") as a legal victim when he or she is injured or killed dur-

---

83. See Letter from George W. Bush to Harry Reid, *supra* note 64; Letter from George W. Bush to Nancy Pelosi, *supra* note 64.

84. Pub. L. No. 107-207, 116 Stat. 926 (codified at 1 U.S.C. § 8 (2006)).

85. 1 U.S.C. § 8(a).

86. 1 U.S.C. § 8(b).

87. H.R. REP. NO. 107-186, at 9-11 (2001).

ing the commission of a federal crime of violence.<sup>88</sup> Though it does not apply to abortion, the law clearly reflects the principle of equality that animated President Bush's approach to that issue.

During his time in office, President Bush offered his support for bills limiting abortion that never made it to his desk. One such bill, the Child Custody Protection Act, was killed procedurally in the Senate after its passage in the House (where it was known as the Child Interstate Abortion Notification Act.). The bill was meant to prohibit the transport of minors across state lines for purposes of avoiding the relevant home-state parental notification abortion laws.<sup>89</sup>

President Bush also intervened in the legislative process to assist women facing crisis pregnancies (as he had done via HHS's efforts to support crisis pregnancy centers with federal funding from his Faith and Community Based Initiative). For example, the budget he submitted to Congress in 2005 included ten million dollars to support maternity group homes.<sup>90</sup>

### 3. *Shaping the Judiciary*

President Bush never explicitly linked his power to shape the judiciary to the question of abortion. Indeed, he regularly denied that he imposed any ideological "litmus test" for his nominees to the bench. He frequently stated, however, that he aspired to appoint judges and Justices who would "faithfully interpret the law," and not "legislate from the bench."<sup>91</sup> This struck many commentators as a shorthand description of a jurisprudence unfriendly to the proposition that the Constitution provides a right to abortion. Though they would not speak to this question during their confirmation hearings, many commentators believe that Chief Justice Roberts's and Justice Alito's approach to constitutional interpretation would lead them to overturn *Roe v. Wade* (and its progeny), thus returning the question of abortion to the political branches for resolution

---

88. Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (2006)).

89. Child Interstate Abortion Notification Act, H.R. 1063, 110th Cong. (2007).

90. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 456 (2004).

91. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 129 (Feb. 2, 2005).



through the legislative process.<sup>92</sup> If this speculation is accurate, there are currently four votes for this position.

In any event, one can say with certainty that by replacing Justice O'Connor with Justice Alito, President Bush affected abortion jurisprudence in a dramatic and concrete way, providing the fifth vote to sustain the federal Partial Birth Abortion Ban Act against a facial challenge to its constitutionality on the grounds that it was fatally vague, and lacked an exception for a woman's health. Seven years earlier, Justice O'Connor had joined the majority in a 5-4 decision striking down nearly identical state laws in *Stenberg v. Carhart*.<sup>93</sup> One might infer from the outcome of this case that there are now five votes to sustain limits on abortion that Justice O'Connor would not have abided. If this proves to be true, it will constitute another significant impact of the Bush Administration on public bioethics.

#### 4. *Invoking the Pedagogical Authority of the Presidency*

The most prominent forum in which President Bush used his office to speak to the nation (and the world) about how the principle of equality should shape the law and public policy of abortion was the State of the Union Address. In 2003, President Bush urged the creation of "a culture that values every life," and to that end asked Congress to "to protect infants at the very hour of their birth and end the practice of partial-birth abortion."<sup>94</sup> In 2004, he noted that our moral tradition "teaches that each individual has dignity and value in God's sight."<sup>95</sup> In 2005, President Bush argued that "[b]ecause a society is measured by how it treats the weak and vulnerable, we must strive to build a culture of life."<sup>96</sup> In 2006, he affirmed that "[h]uman life is a gift from our Creator, and that gift should never be dis-

---

92. Interestingly, the majority opinion joined by Chief Justice Roberts and Justice Alito in *Gonzales v. Carhart* merely "assume[d]" the validity of the framework established by *Planned Parenthood v. Casey* for purposes of its reasoning. Conspicuously, it did not reaffirm *Casey*. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

93. 530 U.S. 914 (2000).

94. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 82, 84-85 (Jan. 28, 2003).

95. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004).

96. Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 129 (Feb. 2, 2005).

carded, devalued, or put up for sale.”<sup>97</sup> In 2008, he asserted that we must “ensure that all life is treated with the dignity it deserves.”<sup>98</sup> President Bush also expanded and deepened these themes in his annual speech (usually by telephone) to the attendees of the annual March for Life in Washington, D.C.<sup>99</sup> He also used the occasion of bill signing ceremonies (for the laws discussed above) to reaffirm his belief in the equal moral worth of all human beings, born and unborn.

### C. *Conscience Protections for Health Care Providers*

Another context in which President Bush pursued his public bioethics agenda concerned the question of conscience protections for health care providers. His actions in this domain reflected the same fundamental principle of respect for human equality that animated his bioethics agenda in other contexts. Here, President Bush sought to preserve the equal right of all health care providers to pursue their vocations without fear of discrimination based on their refusal to provide, pay for, participate in, or refer for abortions. In taking this position, he implicitly rejected the counterargument that health care providers have a professional obligation to ensure patient access to all legal treatments that meet the relevant standard of professional care.

#### 1. *Executive Actions*

The highest profile action of the Bush Administration in this context was the issuance by HHS of a final rule that clarified and strengthened the protection of existing federal laws on healthcare provider conscience.<sup>100</sup> Specifically, the new rule was promulgated to:

---

97. Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145, 151 (Jan. 31, 2006).

98. Address Before a Joint Session of the Congress on the State of the Union, 44 WEEKLY COMP. PRES. DOC. 117, 120 (Jan. 28, 2008).

99. *See, e.g.*, Remarks to March for Life Participants, 44 WEEKLY COMP. PRES. DOC. 93 (Jan. 22, 2008).

100. 45 C.F.R. § 88.1 (2009) (“The purpose of this Part is to provide for the implementation and enforcement of the Church Amendments of the Public Health Service Act, and the Weldon Amendment (collectively referred to as the federal healthcare conscience protection statutes). These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons.” (citations omitted)).

Clarify that non-discrimination protections apply to institutional health care providers as well as to individual employees working for recipients of certain funds from HHS; Require recipients of certain HHS funds to certify their compliance with laws protecting provider conscience rights; Designate the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the proposed regulation; and Charge HHS officials to work with any state or local government or entity that may be in violation of existing statutes and the proposed regulation to encourage voluntary steps to bring that government or entity into compliance with the law. If, despite the Department's efforts, compliance is not achieved, HHS officials will consider all legal options, including termination of funding and the return of funds paid out in violation of the nondiscrimination provisions.<sup>101</sup>

The final rule took effect one day before the inauguration of President Obama.

## 2. *Legislative Actions*

On the legislative side, President Bush vigorously supported and signed into law the Weldon Amendment, an appropriations rider providing that no federal, state, or local government agency or program receiving federal funds may discriminate against any health care provider (including individual professionals as well as hospitals, HMOs, insurers, or "any other kind of health care facility, organization or plan") for refusing to "provide, pay for, provide coverage of, or refer for abortions."<sup>102</sup> Also, in his letters to Majority Leader Reid and Speaker Pelosi (following the 2006 election victories that gave their party control of Congress), President Bush warned that he would veto any legislative efforts to remove such federal protections.<sup>103</sup>

---

101. U.S. Dep't of Health & Human Servs., Regulation Proposed to Help Protect Health Care Providers from Discrimination (Aug. 21, 2008), <http://www.hhs.gov/news/press/2008pres/08/20080821a.html>.

102. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004) [hereinafter Weldon Amendment]. President Bush signed the Weldon Amendment into law on December 8, 2004. The previous month, President Bush had sent a letter to the House Appropriations Committee Chair, Representative Bill Young, urging the retention of the provision in the omnibus appropriations bill.

103. See *supra* note 64.

#### D. End-of-Life Matters

While President Bush's efforts to promote and defend his public bioethics agenda generally centered on the ethical issues at the beginning of life, there were two very notable exceptions that shed light on how his principle of equality maps on to the end-of-life context. The first related to Oregon's regime of legalized physician-assisted suicide, and the second concerned the case of Theresa Marie Schiavo. The details of the Bush Administration's involvement in these matters will be explored below, but it bears noting at the outset that his interventions seemed to reflect his concern about the potential for abusive discrimination against persons based on others' appraisals of their quality of life. Concretely, in the context of governing end-of-life decision making for profoundly cognitively disabled persons, President Bush defended his actions as necessary safeguards against the risk that surrogate decision makers would terminate life sustaining measures based on their paternalistic judgment that a particular life was not worth living, without any serious effort to discern the patient's wishes.

President Bush did not elaborate on his concerns about physician-assisted suicide, but judging from his comments about end-of-life decision making more generally,<sup>104</sup> one might reasonably infer that he harbored similar concerns about the possibility of discrimination and abuse in practice. That is, he may have worried that a regime of legalized assisted suicide opened the door to coercion of patients by their physicians, family members, or even society at large to choose to end their lives to discontinue the burdens that they imposed on others. President Bush may have also been concerned that legalized physician-assisted suicide was merely a transitional measure on the way to legalized euthanasia, which presented in his mind far greater temptations and opportunities for abuse (for example, unconsented mercy killing) based on discriminatory quality of life judgments.

Thus, in the end-of-life context, President Bush's concrete interventions appear to have been grounded in the same norm of radical human equality that drove his approach to those questions arising at the beginning of life. His worries about discrimination

---

104. E.g., Statement on the Terri Schiavo Case, 41 WEEKLY COMP. PRES. DOC. 458 (Mar. 17, 2005); see *infra* Part II.D.2.

against the profoundly disabled obviously outweighed the competing concern about possible limitations on patient autonomy that might result from a legal system that erects a very high bar of certainty about patient intent to justify discontinuing treatment, and certainly a regime that bans assisted suicide.

### 1. *Executive Actions*

#### a. *Administrative Agency Actions*

The Controlled Substances Act (CSA), which criminalizes “the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act’s five schedules,”<sup>105</sup> provides that certain drugs be available only by written prescription (that is, “Schedule II” drugs).<sup>106</sup> In 1971, the Attorney General promulgated a regulation requiring that prescriptions be used “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>107</sup> The CSA further requires physicians who prescribe controlled substances to register with the Attorney General, according to the rules and regulations that he establishes.<sup>108</sup> The Attorney General may suspend, revoke, or deny any registration determined to be “inconsistent with the public interest,”<sup>109</sup> in light of five statutory factors.<sup>110</sup> In 2001, Attorney General John Ashcroft, relying on legal analysis provided by the Office of Legal Counsel, issued an interpretive rule declaring that dispensing or prescribing controlled substances for assisted suicide was not part of “legitimate medical practice,” and was thus illegal under the CSA.<sup>111</sup> His purpose in doing so was to nullify the effect of the Oregon Death with Dignity Act (enacted in 1994), which, at the time was the only law in the nation permitting physician-assisted suicide.<sup>112</sup> The action was challenged as unconstitutional, and ultimately, in a 6-3 decision, the United States Supreme Court agreed, holding that the At-

---

105. *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

106. 21 U.S.C. § 829(a) (2006).

107. 21 C.F.R. § 1306.04(a) (2008).

108. 21 U.S.C. § 822(a)(2) (2006).

109. 21 U.S.C. § 823(f) (2006).

110. *See* 21 U.S.C. §§ 822(a)(2), 823(f), 824(a)(4) (2006) (specifying the factors).

111. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

112. *See id.* at 248–49.

torney General's judgment was not entitled to deference (under the prevailing administrative law standards), and that his actions went beyond the authority delegated to him by the Controlled Substances Act.<sup>113</sup>

*b. The President's Council on Bioethics*

In its report, *Taking Care: Ethical Caregiving in Our Aging Society*, the President's Council on Bioethics provided a normative reflection on the obligations to care for the elderly who are unable to care for themselves, and the crisis that will soon emerge as this population increases. The report offered the following suggestion regarding life-sustaining treatment:

We emphasize both the singular importance of seeking to serve the life the patient still has and the moral necessity of never seeking a person's death as a means of relieving his suffering. At the same time, we emphasize also that serving the life the patient still has does not oblige us always to elect life-sustaining treatments, when those interventions impose undue additional burdens on that life or interfere with the comfortable death of a person irretrievably dying. Even when the doctor's black bag of remedies is empty, comfort and care remain inviolable duties.<sup>114</sup>

The report concluded with concrete recommendations to caregivers, including: (a) a categorical moral injunction against euthanasia and assisted suicide; (b) ethical caregiving should aim at benefiting the life the patient has; it is not simply to extend life at any cost; and (c) life-sustaining treatments may be discontinued if the intervention itself is either unduly burdensome to the patient or not efficacious.<sup>115</sup> The report provided similar advice to law- and policymakers. Among other things, these recommendations urged caution against undue reliance on living wills or advance directives, and urged more reliance on proxy decision-making aimed at benefiting the life the patient now has.<sup>116</sup> Finally, the Council urged the creation of a Presidential Commission on Aging, Dementia, and Long-Term Care.<sup>117</sup>

---

113. *Id.* at 248–49, 275 (2005).

114. PRESIDENT'S COUNCIL ON BIOETHICS, *TAKING CARE: ETHICAL CAREGIVING IN OUR AGING SOCIETY*, at x (2005).

115. *Id.* at 210–13.

116. *Id.*

117. *Id.* at 214–22.

## 2. Legislative Actions

The case of Theresa Marie Schiavo also provides a window into the Administration's approach to public bioethics in the end-of-life context.<sup>118</sup> Mrs. Schiavo was a profoundly cognitively disabled woman with no written instrument declaring her preferences for medical treatment. She was not dying, but did require delivery of nutrition and hydration by means of a percutaneous endoscopic gastrostomy tube. Her husband (Michael Schiavo) and parents (the Schindlers) violently disagreed as to what course of treatment to pursue. Mr. Schiavo argued that it was her wish under such circumstances to discontinue artificial nutrition and hydration so that she could be "allowed to die." The Schindlers asserted that she had expressed no such wish and had indeed expressed the contrary view on several occasions. The case made it to the Florida state courts, which purported to apply guardianship laws that aimed to discern and implement her actual wishes if possible, and failing that, to act in her best interests. The law directed the courts to resolve any evidentiary ambiguities in favor of continuing life-sustaining treatment. The burden was thus on Mr. Schiavo to prove by "clear and convincing evidence" (the highest standard of proof in the civil context) that she would have wanted to withdraw artificial nutrition and hydration under these precise circumstances.

On the basis of four oral statements made by Mrs. Schiavo (in various informal settings many years prior to her collapse) recounted by Mr. Schiavo, his brother, and his sister-in-law, the Florida trial court held that the standard had been met.<sup>119</sup> The Schindlers appealed repeatedly over a period of several years pursuant to a number of different theories, but ultimately did

---

118. For a comprehensive discussion of the facts surrounding the Schiavo case, see O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 55–71 (2005) [hereinafter Snead, *Dynamic Complementarity*], and O. Carter Snead, *The (Surprising) Truth About Schiavo: A Defeat for the Cause of Autonomy*, 22 CONST. COMMENT. 383, 384–86 (2005) [hereinafter Snead, *(Surprising) Truth*].

119. See *In re the Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at \*6–7 (Fla. Cir. Ct. Feb. 11, 2000) (granting authorization to Michael Schiavo to discontinue artificial life support for Theresa Marie Schiavo); see also Schindler v. Schiavo, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) (upholding trial court's order). For an extended criticism of the trial court's disposition of this question, see Snead, *(Surprising) Truth*, *supra* note 118, at 393–403 (arguing that the court gravely misapplied the "clear and convincing evidence" standard).

not prevail.<sup>120</sup> Because of persistent doubts about the soundness of the Florida courts' rulings, the Florida Legislature passed a law allowing the governor to issue a temporary stay of the order to terminate Mrs. Schiavo's nutrition and hydration and allowing the relevant Florida state judicial authority to appoint a guardian ad litem to make recommendations about the case to the governor and the court.<sup>121</sup> The Florida Supreme Court struck down the law as an unconstitutional violation of the principle of separation of powers.<sup>122</sup>

At the urging of the Schindlers, as well as of prominent members of the disability rights community, civil rights leaders (including the Rev. Jesse Jackson), consumer advocates (including Ralph Nader), religious advocates for the sanctity of life (including prominent Catholic public figures), and politicians of both parties (including social conservatives such as Sam Brownback and social liberals such as Tom Harkin, Joe Lieberman, and a substantial percentage of the Congressional Black Caucus), Congress authorized a federal intervention, granting authority to the federal district court in Florida to review *de novo* any claims of civil rights violations arising from the proceedings. Not a single U.S. senator objected to this intervention. President Bush signed the bill into law.<sup>123</sup> Ultimately, the federal courts declined the Schindler family's petitions for relief under the new law,<sup>124</sup> and Mrs. Schiavo died shortly thereafter.

Of all the available evidence during his tenure in office, President Bush's signing statement yields the most insight about his approach to end-of-life matters:

The case of Terri Schiavo raises complex issues. Yet in instances like this one, where there are serious questions and substantial doubts, our society, our laws, and our courts should have a presumption in favor of life. Those who live at the mercy of others deserve our special care and concern. It should be our goal as a nation to build a culture of life, where all Americans

---

120. See *Bush v. Schiavo*, 885 So. 2d 321, 324–28 (Fla. 2004).

121. See *id.* at 328–29 (citing 2003 Fla. Laws 418).

122. *Id.* at 337. For an extended criticism of the Florida Supreme Court's decision, see Snead, *Dynamic Complementarity*, *supra* note 118, at 88–89 (2005).

123. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

124. *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1289 (11th Cir. 2005), *reh'g denied*, 404 F.3d 1282 (11th Cir. 2005), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir. 2005).



are valued, welcomed, and protected—and that culture of life must extend to individuals with disabilities.<sup>125</sup>

It seems from the foregoing statement that President Bush's equality principle, discussed above, likewise animates his approach to end-of-life matters. His justification for signing into law the Congressional intervention was to explore "serious questions and substantial doubts" about the fair adjudication of the Schiavo matter. He was concerned that in cases involving end-of-life decision-making for patients who are living in a severely diminished state, surrogate decision makers would be strongly tempted to choose termination of artificial nutrition and hydration because of their subjective appraisal of the patient's quality of life rather than in the name of the patient's actual wishes. This is a species of discrimination that is deeply inconsistent with President Bush's principle that every life should be accorded equal moral worth.

### III. ASSESSING THE BUSH ADMINISTRATION

#### A. *Harnessing the Tools of the Executive Branch*

The foregoing examination of the Bush Administration's implementation of its public bioethics agenda revealed a multifaceted effort to utilize a host of mechanisms uniquely available to the President of the United States, including: acting unilaterally through executive orders and memoranda (pursuant, of course, to legal authority conferred by the Constitution or delegated by statute); operating by extension through the work of administrative agencies and other advisory bodies; setting foreign policy (particularly in the negotiation of international instruments); intervening in the legislative process to promote, shape, or block relevant bills; shaping the character of the federal judiciary (including especially the Supreme Court) through the appointments power; and using the unparalleled moral and pedagogical authority of the American presidency to educate and persuade the nation and the world of the soundness of the moral principles underlying the proposed policies, as well as the manner in which they are applied. President Bush's ef-

---

125. Statement on the Terri Schiavo Case, 41 WEEKLY COMP. PRES. DOC. 458 (Mar. 17, 2005).

forts revealed that the President of the United States has an enormous array of resources at his disposal to shape public bioethics at home and abroad.

### *B. The Problem of Metrics*

President Bush governed the conduct of biomedical research and the practice of medicine in the name of one principal overarching good: respect for the fundamental equality of all human beings, regardless of their developmental stage, condition of dependency, quality of life, circumstance, or the extent to which they are esteemed or valued by others. Consistent with this principle, President Bush purported to vigorously support biomedical research and the competent and humane practice of medicine.

How can one begin to assess the success or failure of his efforts? As with most issues in public bioethics, judging a particular governmental action as a success or failure is impossible to disentangle from one's substantive appraisal of underlying moral norms, and the manner in which they were applied. Whether President Bush's rendering of the concept of human equality was sound as a theoretical matter is a deeply complicated question well beyond the scope of this Article. For present purposes, it will suffice to make a few brief concluding observations about how the Administration's public bioethics agenda accords with certain procedural values of liberalism (specifically, respect for pluralism and public reason) and how the Administration's actions might be regarded by both those who reject the central animating good of radical equality (as President Bush understood and applied it) and by those who accept it.

### *C. The Metric of the Procedural Values of Liberalism*

What can be said to evaluate the Bush Administration's efforts in public bioethics from the perspective of the core procedural values of liberalism, namely respect for pluralism and public reason? On the one hand, the norm that animated all of President Bush's efforts may have been too strong and contested to justify government actions in a pluralistic society. His conception of human equality was indeed extremely robust (even radical), sweeping within its ambit human beings in all developmental stages, in all conditions (including those whose capacity for physical and mental functioning was severely diminished), and in all circumstances. It is a conception of equality that is vigorously debated, supported by some and opposed by others. Ac-

cordingly, it may have been too strong a principle to impose on a society with widely divergent normative opinions.

On the other hand, the above criticism is ironic and arguably internally inconsistent. That is, the degree of respect for pluralism should, in principle, track the strength of one's commitment to equality. Indeed, respect for pluralism makes little sense absent a robust first-order judgment that all people are fundamentally equal.

In addition, the centerpiece of President Bush's public bioethics agenda—the federal funding policy for stem cell research—was deeply solicitous of pluralism in that it sought to promote biomedical science while also preventing American taxpayers from being compelled to subsidize a highly controversial species of research. Indeed, some commentators criticize the policy precisely on the grounds that it did nothing to abate embryo-destructive research in the private sector. As for the other state actions that restricted private conduct (for example, bans on all forms of cloning, prohibiting physician-assisted suicide, and abortion restrictions), such restrictions are the usual consequence of governmental intervention. Whenever the state acts (regardless of the goods in whose name it does so), it will affect private interests.

Moreover, President Bush was entitled by virtue of his election to govern according to his conception of the moral goods at issue in public bioethics. Public bioethics was a prominent feature of his 2000 and 2004 campaigns, during which he was explicit about where he stood on the most hotly contested questions. Thus his governing actions were surely legitimate, as they were grounded in the outcome of two elections in which the relevant issues were discussed and debated in an unusually full manner.

Once elected, President Bush articulated and defended his policies in a manner fully consistent with the liberal requirements of public reason. That is, contrary to the claims of some critics,<sup>126</sup> he framed and justified the reasons for his policies in terms that could be accepted or rejected irrespective of one's adherence to a particular faith tradition. For example, in his August 9, 2001 address on stem cells, President Bush made it

---

126. See, e.g., Geoffrey R. Stone, *Religious rights and wrongs*, CHI. TRIB., July 26, 2006, at 27 ("What Bush describes neutrally as 'ethics' is simply his own sectarian religious belief.").

clear that his federal funding policy was driven by two premises: first, that embryos are living members of the human species, and second, that all such members of the human family are entitled to equal moral respect sufficient to preclude their unconsented use and destruction in biomedical research.<sup>127</sup> The first premise is confirmed by modern embryology, and the second is grounded in the classical liberal principle of equality reflected in our nation's foundational legal instruments. Although one might disagree with how President Bush formulated his policy (and indeed, many thoughtful people do), one cannot fairly claim that it was based on assertions intelligible only through the lens of revealed dogma (religious or otherwise).

#### D. *The Metric of Substantive Disagreement*

Turning from process to substance, it is not difficult to see how President Bush's public bioethics agenda would be assessed by those who disagree with the scope, substance, or application of his chief normative principle. For those who believe that President Bush's conception of radical human equality was overbroad (and did not otherwise have separate reasons to agree with the outcomes of his actions<sup>128</sup>), the bioethics policies built on that premise (which is to say all of them) must be seen as disastrously misguided. President Bush's commitment to equality as he understood it defined the outer boundaries for ethical biomedical research and medical practice. If, for example, he was wrong to extend maximal moral regard to human embryos, fetuses, and severely cognitively impaired patients, the consequences of this error were serious.

---

127. Address to the Nation on Stem Cell Research, 2 PUB. PAPERS 953 (Aug. 9, 2001).

128. There are commentators, for example, who either reject or are not certain that human embryos are the moral equivalent of born persons, but nevertheless favor the Bush restrictions on federal funding for embryonic stem cell research, and who support a ban on all forms of cloning. Such individuals occupy all points on the political spectrum, from conservatives such as Leon Kass to liberals like Dan Callahan. See, e.g., Leon Kass, *Human Frailty and Human Dignity*, NEW ATLANTIS, Fall 2004–Winter 2005, at 110, 118 (“And since I don’t know whether the early embryo is or is not one of us, . . . I am inclined not to treat human embryos less well than they might deserve.”); Dan Callahan, *Promises, Promises: Is embryonic stem-cell research sound public policy?*, COMMONWEAL, Jan. 14, 2005, at 12, 14 (“If the moral claims for the full humanity of the embryo are weak, the moral claims for an obligation to carry out embryonic stem-cell research are even weaker. Respect for embryos in any meaningful sense is, at the least, incompatible with destroying them solely for our medical benefit.”).

Concretely, this meant no federal funding for embryonic stem cell research using new cell lines, arguably slowing the pace of scientific progress in this context, allowing other nations to move ahead in pursuing and reaping the benefits of innovation,<sup>129</sup> and ultimately pushing possible therapies further into the future. It meant criminalizing the efforts of scientists to derive stem cells from cloned human embryos. It meant trying to impose restrictions on a woman's right to abortion, thus limiting her ability to terminate a pregnancy that might inhibit her full participation in economic and social life as she sees fit. It meant being hyper-scrupulous about determining the treatment preferences of disabled people whose life quality and prospects were severely diminished. It meant allowing health-care providers to subordinate the interests of patients seeking access to abortions to their own moral principles. Not surprisingly, those who disagreed with the Bush Administration (including many members of his own Council on Bioethics) were, and continue to be, vigorous and spirited in their opposition to his approach to public bioethics. This is, of course, as it should be, given that the stakes were enormously high, and the costs of error quite serious in human terms.<sup>130</sup>

#### E. Judgment According to Bush's Own Principles

What might be the appraisal of the Bush Administration's approach to public bioethics among those who hold, along with President Bush, that the only coherent (indeed non-self-destroying) conception of equality is one that understands it to

---

129. For a debate as to whether the limits imposed by President Bush on the federal funding of embryonic stem cell research adversely affected U.S. competitiveness in the field, see the exchange between Eric Cohen and Jonathan Moreno in *Stem-Cell Back and Forth*, NAT'L REV. ONLINE, June 13, 2006, <http://article.nationalreview.com/?q=MmQ2MmNINTIzY2E2YjZjNTgyY2IyMWM4YjY3NDJkODI=>.

130. For strong criticisms of "conservative" bioethics, see R. Alta Charo, *Passing on the Right: Conservative Bioethics is Closer Than it Appears*, 32 J.L. MED. & ETHICS 307 (2004), Ruth Macklin, *The New Conservatives in Bioethics: Who Are They and What Do They Seek?*, HASTINGS CTR. REP., Jan.-Feb. 2006, at 34, Susan M. Wolf, *Law & Bioethics: From Values to Violence*, 32 J.L. MED. & ETHICS 293 (2004), and Steven Pinker, *The Stupidity of Dignity: Conservative bioethics' latest, most dangerous ploy*, NEW REPUBLIC, May 28, 2008, at 28. For a defense of "conservative" bioethics, see Eric Cohen, *Conservative Bioethics and the Search for Wisdom*, HASTINGS CTR. REP., Jan.-Feb. 2006, at 44, Yuval Levin, *The Paradox of Conservative Bioethics*, NEW ATLANTIS, Spring 2003, at 53, and Gilbert Meilaender, *In Search of Wisdom: Bioethics and the Character of Human Life* (Jan. 2002), available at <http://www.bioethics.gov/background/meilaenderpaper.html>.

be a pre-political attribute intrinsic to all human beings? It is likely that such individuals would find his efforts largely successful. In every instance in which the current legal framework permitted him to make a decision that advanced this conception of human equality, he consistently did so. His federal funding policy for stem cell research was designed to avoid offering material incentives for the future destruction of human embryos and provided incentives for researchers to find alternative means of pluripotent cells (including the revolutionary iPS cells). He vetoed efforts to undo the stem cell funding policy. He supported a ban on all forms of human cloning at home and abroad. He signed a ban on the use of tissue harvested from fetuses conceived and gestated for research. His Department of Health and Human Services promoted research on alternative sources of pluripotent cells. He worked to reduce the number of abortions in this country and abroad by restricting its practice (through, for example, signing the ban on partial birth abortion and restricting funding of NGOs who promote or provide abortions overseas), and supporting women in crisis (by seeking funding for maternity group homes and crisis pregnancy centers). He promoted and signed the Unborn Victims of Violence Act to symbolically and actually offer protection to victims of crime *in utero*. He promoted and signed the Born Alive Infants Protection Act to ensure that children surviving abortions would receive emergency medical assistance. His delegations to intergovernmental fora opposed what was perceived to be an effort to establish the freedom to choose abortion as an international human right. And he made use of the bully pulpit to shape the consciences of the American people and the people of the world in accordance with this capacious understanding of human equality.

Thus, for those who shared his view that all human beings have “matchless worth” and are entitled to the moral concern of their neighbors and the protection of the law, there was much to like about President Bush’s public bioethics agenda.

That said, one can also imagine possible angles of criticism according to the very metric of President Bush’s aspirational norm of human equality. First, one might take issue with the strength of the normative principle and the relative modesty of the policies that it animated. For example, one might argue that merely restricting federal funding for the intentional exploitation and destruction of human life in biomedical research is a

woefully inadequate and indeed unserious response to a fundamental injustice. One who shares President Bush's commitment to radical human equality might further argue that providing funding for research on human embryonic stem cell lines derived before the announcement of the policy constitutes indefensible complicity in the original act of embryo destruction, and indeed rewarded the scientists who engaged in such unjust actions, even in the absence of market incentives. Worse still, the Administration's funding of approved embryonic stem cell lines moved the science forward as a general matter, and thus actually created incentives for those researchers funded by states or private interests to push forward with the disaggregation of more embryos to derive lines for use in research.

Those who share President Bush's commitment to radical human equality might argue that he did not fully utilize the bully pulpit to promote his views. Though he did indeed dedicate his first televised address to defending his stem cell funding policy, the balance of the communications efforts were intermittent, limited to a few lines in the State of the Union Address, the annual March for Life telephone call, and a few veto ceremonies. Such critics might argue that the strength of the principle and the scope of the injustice of its persistent violation compelled a more comprehensive and sustained communications strategy.

There are, of course, rejoinders to these criticisms. First, a defender of the Administration might say, for example, that the modesty of President Bush's approach to embryonic stem cell research reflected a pragmatic judgment that a more sweeping effort to ban all embryo destruction would have been met with a vigorous and devastating backlash. Perhaps his judgment was that a prudential incrementalism was better suited to preparing the hearts and minds of the American people to accept his principle of equality for the long term. As to the claim that his funding policy made taxpayers complicit in the original destructive act, a defender of the Administration might reply that the taint of injustice from the original embryo-destructive act was ameliorated by the President's public declaration of its wrongness and his subsequent steps to remove incentives to its recurrence.<sup>131</sup> Furthermore, a defender of the Administration

---

131. See MONITORING STEM CELL RESEARCH, *supra* note 21.

might argue that, far from incentivizing future derivations of embryonic stem cell lines (and the destruction of human life that this entails), his policy provided enormous incentives for scientists to find alternative sources of pluripotent cells. Thus, the policy spurred innovation that culminated in the development of iPS cells, which may very well displace embryonic stem cell research among the world's elite scientists (leaders in the field appear to be already shifting their resources in pursuit of this approach<sup>132</sup>). And finally, as to the claim of insufficient or ineffective use of the bully pulpit, a defender of the Administration might cite the extraordinary set of challenges facing the President during his tenure, including two wars, the threat of terrorism, and an economy in deep distress, as regrettably having limited the amount of time he could spend publicly defending any one set of issues, regardless of their importance.

#### CONCLUSION

The foregoing Article offered a reflection on the Bush Administration's contribution to public bioethics. It revealed that the American presidency offers an extraordinary array of mechanisms by which the holder of that office can put his stamp on this domain, effectively embedding a particular set of ethical goods in the fabric of the law, with far reaching practical consequences for science, medicine, and indeed how human beings understand what (and who) they are, as well as their obligations to one another.

---

132. For example, Ian Wilmut—the embryologist who cloned Dolly the sheep in 1997—and Jamie Thomson—the first researcher to successfully isolate human embryonic stem cell lines—have both shifted their research to iPS cells. See Sally Lehrman, *No More Cloning Around*, *SCI. AM.*, Aug. 2008, at 100, available at <http://www.sciam.com/article.cfm?id=no-more-cloning-around>.



