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EXCLUDING RELIGION EXCLUDES MORE THAN RELIGION

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Abstract: This Article contends that excluding apparently religious perspectives from public debate may inadvertently exclude non-religious perspectives as well, consequently impoverishing public discussion. This contention is demonstrated through an examination of the current debate over embryonic stem cell research, in which the pro-life position is often declared unacceptably religious. The truth is that those who envision the unborn as *under construction* in the womb do not find a human being present when gestation has just begun, while those who understand the unborn to be *developing* see an identity of being from conception. But neither view is based on religion. To disqualify the pro-life view as religious would exclude from public debate an important secular perspective.

INTRODUCTION

I would like to join in thanking the organizers of this very important symposium and the preceding two speakers. I don't know whether it is serendipitous or providential, but I think our three presentations fit very nicely together. What I would like to do is to offer a bit more support for the profound arguments by John Hass and Carter Snead that a viewpoint should not be excluded from public debate simply because it is connected to religion. The additional reason I propose here is that there may be non-religious viewpoints that at first sight appear to be religious—namely, those viewpoints that conceptualize the world in a radically different ways. Since it is easier to dismiss a different vision of the world as religious than to rethink one's own fundamental structures of thought, the *a priori* disqualification of religious argument may end up disqualifying new non-religious arguments as well, thus impoverishing even non-religious public debate. The exclusion of religion makes it too easy for some to close their minds, and ours as well, to what are really perfectly sensible secular arguments.

In the short time available today, I will use only one public debate to make my case, examining a contention that appears to be obviously religious from a certain point of view, while clearly non-religious from

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another point of view. I will explain both why the pro-life position regarding embryonic stem cell research tends to appear religious to many people of good will and also why that religious appearance is an illusion, founded on a simple conceptual mistake. That is, the pro-life position in question will be shown to have a wholly non-religious foundation.

I. HUMAN BEINGS UNDER CONSTRUCTION

In December of 2005, an op-ed piece by New York University sociologist Dalton Conley appeared in the *New York Times* in which he commented, “most Americans . . . see a fetus as an individual under construction.”¹ This widespread vision of the fetus is the key to understanding much of the abortion debate as well as the embryonic stem cell debate.

Just think of something being constructed (fabricated, assembled, sculpted, composed, made)—think of a house, or a scholarly article—or let’s say a car under construction in an assembly line. When is a car first there, at what point in the assembly line would we first say “There’s a car”? Some of us would no doubt go with appearance, saying there’s a car as soon as the body is fairly complete (analogy to the fetus at 10 weeks or so). I suppose most of us would look for something functional: We would say there is a car only after a motor is in place (analogy to quickening). Others might wait for the wheels (analogy to viability) or the wipers (viability even during rain). And, a few might say “It’s not a car until it rolls out onto the street” (analogy to birth). There would be many differing opinions.

But there are a couple of things upon which almost all of us would agree. One is that there is no one right answer. Each of us obviously has our own idea of the form or essence of a car and measures the object under construction by that idea. And so we’re not going to get really uptight about it, insisting on any one definition. Even toward the end of the process, when practically everybody agrees that it’s a car, we will see our agreement as just a matter of consensus, not of truth.

The other thing upon which we’ll probably all agree is this: Nobody is going to say that the car is there at the very beginning of the assembly line, when the first screw or rivet is put in or two pieces of metal are first welded together (you can see how little I know about car manufacturing). Two pieces of metal fastened together doesn’t match up to *anybody’s* idea of a car.

¹ Dalton Conley, Op-Ed., *A Man’s Right to Choose*, N.Y. TIMES, Dec. 1, 2005, at A33.

I think this is exactly the way that many people see the embryo, like the car-to-be at the very beginning of the construction process. In the first stages of construction you don't have a house, you don't have a car, you don't have a human individual yet. You don't ever have what you're making when you've just started making it.

How does religion come in? Let's listen to a couple of commentators on President Bush's opposition to funding embryonic stem cell research, research in which human embryos are destroyed in order to obtain stem cells. Writing in the *Washington Post*, Michael Kinsley expressed his utter bewilderment: "I cannot share, or even fathom, [the pro-life] conviction that a microscopic dot—as oblivious as a rock, more primitive than a worm—has the same rights as anyone reading this article."² When pro-lifers come in and say, "we consider that embryo to be a fellow human being," they sound to Kinsley, and to many other Americans, just bizarre, crazy!

Geoffrey Stone, responding to the Bush funding veto shortly thereafter, took the next step, the accusation of an improperly religious motivation:

In vetoing the bill that would have funded stem-cell research, President Bush invoked what he termed a "conflict between science and ethics." But what, exactly, is the "ethical" side of this conflict? Clearly, it derives from the belief that an embryo smaller than a period on this page is a "human life"—indeed, a human life that is as valuable as those of living, breathing, suffering children. And what, exactly, is the basis of this belief? Is it Science? Reason? Logic? Tradition? Morals? None-of-the-Above?

What the President describes neutrally as "ethics" is simply his own, sectarian religious belief.³

I doubt very much that Professor Stone actually investigated the President's Methodist faith and discovered that its creed included the protection of embryos. His allegation of a religious definition of life appears to come, fairly enough, at the end of a process of elimination. If science, reason, and the like can't begin to explain the President's action, aren't we justified in thinking he must be basing his decision on some sort of supernatural belief, e.g. that God has inserted a soul into

² Michael Kinsley, Editorial, *False Dilemma on Stem Cells*, WASH. POST, July 7, 2006, at A17.

³ Geoffrey R. Stone, Editorial, *Religious Rights and Wrongs*, CHI. TRIB., July 26, 2006, at 27, available at http://www.huffingtonpost.com/geoffrey-r-stone/religious-rights-and-wron_b_25594.html.

that little embryonic dot? And if (as Stone seems to think, though I disagree) religious faith cannot rightly be the basis of public action, doesn't the President deserve to be criticized?

There is a deep truth at the base of Kinsley's puzzlement and Stone's leap to faith. Nothing can be a certain kind of thing until it possesses the form of that kind of thing, and the form of a thing under construction just isn't there at the beginning of the construction process. It isn't there because that form is being gradually imposed from the outside and the persons or forces doing the construction haven't yet been able to shape the raw material into what it will eventually be.

Professor Conley, importantly for us, did not argue that the fetus had no value because it was still under construction. He claimed, rather, that the fetus has some value, precisely as an individual under construction.⁴ We might say that it has value as a significant work-in-progress. Abortion may not be murder, for Conley, because a human individual hasn't yet been constructed, but it's not good to destroy anything well on the way to being something we really care about. If the entity on the assembly line were, say, a Corvette-To-Be, and we really loved Corvettes, then we would feel bad about destroying it even part way through the construction process. Suppose (before the days of computers) a colleague is composing an article and I destroy it a third of the way through. It might be true that no one would have called it an "article" yet, but I still did something bad because it was a meaningful work-in-progress. I think that explains much of the feelings of those who say that there is something wrong with abortion but it still isn't murder.

Even many believing Christians and Jews may base their aversion to abortion on a kind of reverence for God's work-in-progress, rather than on the idea that abortion is actually murder. After all, the Bible talks many times about God forming us in the womb, which is a construction idea. Job exclaims, for example, "Did you not pour me out like milk and curdle me like cheese? You clothed me with skin and flesh, and knit me together with bones and sinews."⁵ It might be very wrong ever to interrupt God's awe-inspiring construction project, but it can't count as murdering a human being who hasn't yet been knitted together.

⁴ Conley, *supra* note 1, at A33. Conley writes that "most Americans . . . do not think a fetus is the same as a person, but neither do they think of it as part and parcel of a woman's body like her appendix, a kidney or a tumor. They see a fetus as an individual under construction."

⁵ *Job* 10:10–11 (Revised Standard Version); see also *Psalms* 138:13–14.

The relevance of the construction idea to the embryonic stem cell debate is this: The peculiar dignity of a work-in-progress, of a Corvette-To-Be, comes from the fact that it is being formed from the outside, that it is on the way to becoming something we care about. Especially in its early stages, it has little or no intrinsic value. It gets its definition and meaning not from its own form but from the form in the mind of its maker. Thus if our colleague somehow decides not to write that article, of what value are the papers upon which he's written? They just become scrap; we can turn them over and use the back of the sheets for grocery lists, or fold them into paper airplanes. If the factory making the Corvette-To-Be shuts down, anything left on the assembly line becomes scrap metal. You can use it for whatever you want for the simple reason that it's not a Corvette-To-Be any more. By the same token, if an embryo is conceived outside the womb—with no plan to implant it so that it could be born—it never gains any work-in-progress dignity to begin with, which is all it can ever have for Conley and those who agree with his construction model of gestation.

I think this could be the reason legislators like Senators Orrin Hatch and John McCain, who are strongly anti-abortion, can feel free to vote for embryonic stem cell research funding. They may think an embryo or fetus has great religious or non-religious⁶ value, and thus shouldn't be aborted, even when just recently conceived. But they could think it has this value only when and where it is under construction. For these senators and many other Americans, the thousands of frozen, test-tube generated embryos scientists want to use for experiments must not count as finished works or even as works-in-progress, because they have been abandoned prior to being significantly constructed. As scrap left over from IVF treatments, they can be recycled without a qualm.

II. DEVELOPING HUMAN BEINGS

Despite the great explanatory power of Conley's construction metaphor, for an understanding of contemporary life-issue debates, it is radically mistaken about the nature of gestation. It is in fact not true that living beings are constructed, by God or by anyone else. There is

⁶ See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993) (developing the theory that a fetus has a non-religious value because of what is being invested in it). But see Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289 (1997) (providing a lengthy argument against Dworkin's theory).

no outside builder or maker. Life is not something intrinsically static, changing only when pushed from the outside. Life contains its own principle of change. Life *develops*.

In construction, the form defining the entity that is being built arrives only slowly, as it is added from the outside. In development, the form defining the entity that is growing lies within it from the beginning. If Corvette production is cancelled, the initial two pieces of metal stuck together can become the starting point for something else, another kind of car or maybe a washing machine. But even if you take a human embryo out of the womb, you can never get it to develop into a puppy or a guppy.

Remember how we found ourselves in benign disagreement about when a car first appears on the assembly line? When it comes to living beings, our varying subjective definitions count for much less. Life is not formed or defined from the outside. Life defines and forms itself. Its form or nature is there, in its activated genes, and begins to manifest itself from the very first moment of its existence. All embryos need is food, oxygen and protection from external hazards, not form. They don't need to be molded into a type of being. They already are a definite kind of being.

This idea of development—as the continual presence but gradual appearance of a being—lies deep within us. Look at the word “development” itself. To “de-velop” is to unwrap, to unveil, the opposite of “en-velop”. If you look at other Western languages, this is true, too. In German to develop is “ent-wickeln”, in contrast to “ein-wickeln”, to wrap up. In Spanish develop is “des-arrollar,” while “arrollar” is to roll up. In development, we unwrap or unroll, make manifest, that which was previously rolled or wrapped up and thus hidden from sight. That is the fundamental idea of development in our consciousness. Note that despite continuity of development, there may be great changes in appearance—radically new manifestations of that ongoing identity.

Let's say, for example, that you have a valuable tree, a quince tree, bearing its proper fruit. I might well say to you, “I remember seeing that tree five years ago when it had just sprouted from the ground,” expressing the plant's continuity of being despite tremendous change in appearance. But I would no longer see that continuity if you responded, “No, that was an apple tree you saw sprouting. When the apple tree grew up, I cut off its apple-bearing branches and grafted quince tree branches onto it.” The grafted quince tree would not be the same plant, the same organism, as that first sprout. Grafting is making, constructing, and something that has been made is not the same being it was in the beginning.

Here by contrast is a (non-biological, like the car) example of development: Suppose we are back in the pre-digital photo days and you have a Polaroid camera and you have taken a picture which you think is unique and valuable—let's say a picture of a jaguar darting out from a Mexican jungle. The jaguar has now disappeared and so you are never going to get that picture again in your life and you really care about it (I am trying to make this parallel to a human being, for we say that every human being is uniquely valuable). You pull the tab out and as you are waiting for it to develop, I grab it away from you and rip it open, thus destroying it. When you get really angry at me, I just say blithely, "You're crazy. That was just a brown smudge. Why anyone would care about brown smudges is unfathomable to me." Wouldn't you think I was the insane one? Your photo was *already there*. One just couldn't see it yet.

That's just what pro-lifers think when people say "How can a microscopic dot matter to President Bush?" That microscopic embryo is a human being in the first stage of its development. We each started off looking like that. But we have each been the same organism and the same kind of being at every stage of our development. To prove something is a quince tree, we can just wait and see whether it bears quinces; if it does, we know it was always a quince tree, regardless of whether it looked like one or bore fruit back when it first began to develop.

The nature of development is the reason the German Constitutional Court has twice held that there is a right to life throughout pregnancy.⁷ The Court emphasizes over and over again in its opinions that the unborn child is "self-developing" and therefore cannot be said to come into being at some stage, as might happen with a thing being constructed. The Court also points out that almost all of us adopt the developmental understanding of life once a child has been born, for the peculiarly valuable characteristics we identify with humanity (e.g. reason and free choice) do not appear until some time after birth. Thus if the newborn infant were somehow thought of as being constructed, we would have to say that it's not yet human until those espe-

⁷ See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.) (translated in John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605, 606 (1975–1976)) and Bundesverfassungsgericht [BVerfG] [federal constitutional court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.). Note that in neither decision was the Court asked to rule on the legal status of the pre-implantation embryo. However, also note that the arguments employed by the Court apply with equal strength to the earliest stages of development and that German law does protect human embryos from lethal experimentation.

cially human traits are in place. But we give the child “credit” for those traits long before they show up, because we know they are already part of its nature, are already developing within it. Needless to say, the German legal arguments in no way rely on religion.

III. CLASH OF THE TWO MODELS OVER THE EMBRYO

Now how does this tie in—in particular to the embryonic stem cell debate? We saw before that the biologically incorrect construction model of gestation leads many Americans (some of whom, like Senators Hatch and McCain, oppose abortion, and others of whom, like Dalton Conley, defend abortion) nevertheless to a certain valuing of the fetus in the abortion context, as a kind of child a-borning, whose destruction is to be mourned. I think we see that kind of valuing not just in the abstract but in many people’s relationship to the fetus they abort. Abortion is a human tragedy. Many have abortions because they think that they have a duty as parents to take care of their nascent child if they let the child be born, and, therefore, they have the abortion because they don’t feel that they are up to doing their duty. Despite its violence, abortion has a human and even a family aspect to it, insofar as it acknowledges a parental relationship and a parental duty. The aborted fetus dies at least with the dignity of having been on the way to being someone’s cared-for child. The clash of the construction model with the development model is therefore much greater with regard to embryo research than it ever was with regard to abortion. Both models, as we have seen, find something to regret about abortion. But they split radically with regard to the killing of extra-uterine embryos.

In contrast to their concern for aborted fetuses, pure constructionists can care little or nothing about embryos killed just after having been conceived or cloned in a test tube. Never having been even works-in-progress, they lack any relationship to a future human form, or to their parents, and can just be used as scrap.

Yet from the very beginning, the identity of a *developing* human being remains constant. The value of that jaguar photo changes hardly at all from the time it’s snapped to the moment it’s fully developed. Thus, from a developmental viewpoint, embryonic stem cell research is not less but more dehumanizing than abortion. Embryos subject to research are first commodified and then destroyed for body parts. No one mourns their deaths, though they are just as much our younger brothers and sisters as are human beings at other stages of development—fetuses, infants, toddlers, teenagers. In this sense, their equal

human dignity is more radically negated by lethal embryo research than it is by abortion.

IV. EXCLUDING RELIGION WOULD WRONGLY EXCLUDE THE NON-RELIGIOUS IDEA OF DEVELOPMENT

Kinsley and Stone argue that it is utterly irrational to think of a newly conceived embryo as a fellow human being, and so to oppose its destruction, so irrational that Stone has no qualms about invalidating such a position as religious. And indeed, from within a constructionist mindset, there may be no possible non-religious basis for opposition to the killing of human embryos. Of course, from within this mindset, there also seems less of a religious basis for vehemently opposing embryo-killing, in that Biblical reverence for God's construction project would be at its minimum when that construction has just begun. So one needs to look beyond constructionism to explain strong opposition to embryo research.

By contrast, the developmental understanding of gestation can oppose embryo killing while having nothing to do with religion, as shown above. Stone's aspersions reflect only his own failure to undertake the difficult task of imagining an alternative to his erroneously static assumptions about the nature of very early life. A rule excluding religion from public decision-making would give people like Professor Stone a way to shut out their opponents' views simply because they do not understand them. The community of reason would suffer as a result.