

May 2001

A Law School Forum on Human Cell-Lines and Frozen Embryos

Michael P. Orsi

Follow this and additional works at: <http://epublications.marquette.edu/lnq>

Recommended Citation

Orsi, Michael P. (2001) "A Law School Forum on Human Cell-Lines and Frozen Embryos," *The Linacre Quarterly*: Vol. 68: No. 2, Article 7.

Available at: <http://epublications.marquette.edu/lnq/vol68/iss2/7>

**A Law School Forum
on
Human Cell-Lines and
Frozen Embryos**

by

The Rev. Michael P. Orsi, Ed.D.

The author is Research Fellow in Law and Religion at Ave Maria School of Law. He was previously Assistant Chancellor of the Diocese of Camden, New Jersey

I was told that law school would be an academic nightmare; that my eyes would be fixed on a casebook for all hours of the day, and that I would not see sunlight for three years. The Ave Maria School of Law is proving to be anything but that. I can assure you, my eyes seem to be perpetually fixed upon that casebook. In spite of that, the academic community has yet been able to provide our minds and souls with something greater.

Our moral and theological discussions of historical cases, such as *Moore and Davis*, may not pertain directly to the classroom, but they do prepare our spirits for the legal profession in a way that most conventional law schools could not. We are learning to look beyond the mere rationale of courtroom decisions. We also learn exactly how close to (or how far from) man's sense of justice can come to God's, and what effect our decisions will have on the world as a whole.

(Adam Frey, Class of 2003)

The above quote is that of a first year law student. His enthusiasm stemmed from a student sponsored forum that addressed the Catholic, ethical and legal issues involved with ownership of human cell lines and a possible solution to the moral development posed by the ownership of

frozen human embryos. This unique type of discussion was possible because Mr. Frey is a law student with a specific objective – to examine the law process from a Catholic perspective by demonstrating the harmony between faith and reason and affirming Catholic legal education's traditional emphasis on the only secure foundation of human freedom – the natural law written on the heart of every human being.

The impetus for the forum arose from two cases discussed in Property Class; *More v. Regents of the University of California* and *Davis v. Davis*. Both cases provided timely discussion; *Moore* in light of the recent decoding of the genome and *Davis* with the production of a made to order baby by pre-implantation genetic analysis of embryos. The students enlisted as a panel Professor Howard Bromberg, to comment on Property Theory, Professor Mollie Murphy for Tort Law, and the author, a moral theologian and lead presenter, to discuss these issues in light of Catholic moral thinking.

When the project was first proposed the three principals recognized that this approach would be consistent with the law school's mission to promote rigorous intellectual stimulation on the issues of the day through the use of reason in light of faith. The professors had at their disposal the reasoning and decisions of the courts. These cases and legal opinions provided them an opportunity to examine the philosophical concepts which underline the conclusions reached by the courts. It also gave the author an opportunity to apply some fundamental Church teachings to these issues; and in a broader sense to propose some guidelines for the ever-growing concerns presented by biotechnology.

References to Catholic thought will, we believe, be very influential in shaping the legal education of the students who will bring natural law principles and methods to the public forum as attorneys, judges, legislators, and scholars. This will assure a wider acceptance of the analysis of future cases and legislation since the natural law is non-sectarian and broadly applicable. Pervasive relativism and utilitarian ethics which breed legal positivism, law without morality, has been found wanting as court cases and judicial precedent built on these brittle foundations are proving of little worth and even dangerous in building a legal or ethical base for new developments in this rapidly changing field. (Rommen, H.A., 1998).

As is often the case with new technologies and the moral issues that accrue, response on the part of the official Magisterium is often slow and with good reason. It gives philosophers, ethicists and theologians a chance to mull over the facts and evaluate them each according to their discipline. In some cases a decision may be quicker in coming than others. However, this does not mean that we are left completely in the dark or without bearings as new technologies emerge.

For example, in a recent address Pope John Paul condoned and even applauded under certain parameters organ donation to be a "genuine act of love" while condemning the cloning of human embryos with an eye to obtaining organs for transplants insofar as they involve manipulation and destruction of human embryos, since church teaching believes that human life begins at conception. This procedure, the Pope states, "even though its intention may be good, fails to respect the intrinsic value of human life at this very early stage" (International Congress on Transplants, August 29, 2000).

If such clear statements were always available our moral decision-making would be much easier. This however is not often the case. Nevertheless the above statement does provide insight as to how one might proceed in moral reasoning. The author will rely heavily on the aforesaid Papal address in the proposed solutions for *Moore*, *Davis* and their future progeny. We must also be ready to face the fact that in certain matters we may never have a definitive judgment and will be left with speculation that may be radically different in outcome but nonetheless fall within the pale of Catholic orthodoxy. The concept that there isn't a black and white answer for everything is difficult for most Catholics to understand. However, for a highly motivated group of "lawyers to be" this lack of a definitive Catholic response poses a welcome "crisis." This is meant in the best sense of term as an opportunity to debate using their newly acquired but often not yet refined skills to come to a reasoned judgment. The hope is that it will come not too hastily, and when it comes, that it will be based on solid reasons and Catholic social and moral teaching.

The discussions of the cases that follow come from the forum held at Ave Maria School of Law on October 2, 2000. The theological opinions offered are solely the author's. It is my hope that others will respond to correct and refine that I proposed. As "I" told the assembled students "I" am merely offering a "Restatement" a civil law term used to describe a treatise in a given area meant to aid in guiding the laws' development but in no way binding.

The Restatement's object should not only be to help make certain much that is uncertain and to simplify unnecessary complexities, but also promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can best be described by saying that it should be at once analytical, critical and constructive.

(American Law Institute, 1 ALI Proc. 14, 1923).

In the scholastic tradition in which the dicta of authorities in matters of theology, law, and philosophy were submitted, the discussion proceeded

with brief 1 *Moore v. Regents of University of California*, Professor Murphy's comments and my theological input. We followed in a like manner with Professor Bromberg's comments on *Davis v. Davis*. Both cases are particularly germane since the recent mapping of the genome has already caused heated debate between The National Institute for Health (NIH) and the privately owned Celera Corporation concerning ownership and patenting rights for future genetic information (Berenson, A. & Wade, N. 2000) The *Moore* case certainly was the precursor. Recently a biotech company entered into a contract for diseased tissue removed in operations with two hospitals in exchange for free access to the tissue library of the firm, research grants and small equity interest in the company. Although the CEO of the company denies money to be the motive he admits that some people could become very rich selling tissue data to genetic researchers. Some immediate problems that arise are:

1. Since 1984 it has been illegal to sell your own organs. Some say the law should be changed since people can sell blood and sperm.
2. How can privacy be protected when a company buys tissue from an individual?
3. What if researchers pass off information to an employer?
4. Will patients be able to give a valid informed consent?
5. Will patients have the ability to understand all the implications regarding the company's profits with their cell line?
(Reeves, H., 2000)
6. Can the patenting of genes hinder the study of chronic illness as families of children with Canavan disease contend in a federal suit which alleges that researchers are trying to profit from their children's illness?

(*Ann Arbor News*, Nov. 19, 2000, p. A12)

So, too, the recent case of embryo selection used by parents to produce a child in order to obtain stem cells of an ailing sibling (Vergano, D., 2000). The *Davis* case provides a prototype for discussion that promises to grow even more complicated and heated among philosophers, theologians and legal experts. Questions such as:

1. Are embryos people or property?
2. Souls or just cells?
3. Who are the legal parents of embryos transferred to patients who can't produce their own?
4. May fertility doctors destroy any of the 20,000 abandoned embryos?
5. In divorce and custody disputes should judges decide whether laws written for property and contracts apply to this early form of human life?

(Zintner, A., 2000)

Case 1

MOORE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA Supreme Court of California, 1991

Facts: Plaintiff (P): Moore; Defendants (D): Regents.

P treated at University Medical Center. D told P that his condition was life-threatening and that his spleen should be removed immediately. P was not told that his cells were unique and had great scientific and economic value. P agreed to the operation, his spleen was removed and used for research purposes. At follow-up visits to the hospital, samples were taken from P. Researchers used P's cells to develop a cell line, which they patented and from which they made hundreds of thousands of dollars.

P sued for conversion (wrongful exercise of ownership rights over the property of another) and other causes of action. Trial court sustained D's demurrers to conversion (and other causes of action by extension).

Court of Appeals overturned: P retained property rights because he did not give consent nor did he abandon his tissue.

Supreme Court: holds that P does not state a cause of action for conversion (cause of action does lie for breach of fiduciary duty and lack of informed consent).

Issue: Whether a medical patient has a property right in his excised cells.

Holding: No, such a right would hinder socially useful medical (research and development).

Professor Murphy began the discussion stating:

In the Moore case, plaintiff sought to use tort law to enforce both his property rights and his right to bodily integrity. Both cases of action, conversion and negligence, presented interesting legal issues. With regard to conversion, the court had to determine whether Moore retained a property interest in his excised cells. In the case of the informed consent issue the court had to decide whether the physician's failure to disclose his research interest in the patient's treatment was malpractice under the informed consent doctrine.

This latter issue is interesting because the information the doctor failed to disclose was the economic and research interests he had in the plaintiff's treatment. The informed consent doctrine requires that the physician inform the patient of material risks involved in the proposed treatment or procedure. Typically, however, the failure to disclose encompasses medical risks, i.e., the patient may die during heart surgery. Because materiality is described as information the patient would want to have in making his decision regarding the proposed procedure, it is certainly plausible that a patient would want to know that his doctor had research or other economic interests in any proposed treatment. The court properly concluded that under the informed consent doctrine a doctor would have a duty to disclose such information and his failure to do so would constitute malpractice.

Outlining some of these issues, Professor Murphy suggested that the court's resolution was unsatisfactory for a number of reasons. First, although the court recognized the viability of a cause of action based on informed consent in this situation, the malpractice action reaches only the doctor, who has a professional duty to the patient. Others who participated in the misconduct are not subject to suit under the doctrine. Second, the court's resolution of the conversion action is disquieting because it appears that, as a result, everyone except the patient profits from the exploitation of the patient's cells. On the other hand, if one recognizes a conversion action in these circumstances, one brings property vocabulary and values into the analysis, leading potentially to desensitization to the fact that one is dealing with the human body

and that that fact imposes limitations on the way in which the legal system does or should treat these transfers.

Although the court did not settle the case on the basis of property rights we can see in the cause for action an emergent market mentality that reduces life or the "stuff of life," as it is now termed by some, to a commodity. This line of reasoning sees the human person in light of scientific positivism which identifies the individual as an end in himself with personal ownership of the self allowing for manipulation and even disposal according to one's own lights. This attitude is well ascribed to by the Supreme Court in the 1992 decision *Casey v. Planned Parenthood of Southeastern Pennsylvania*, when it states:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

This concept also dominates much of the arguments and legislation of the physician assisted suicide movement.

Catholic thinking is radically different. Stemming from the Judeo-Christian tradition one need look no further than the Book of Genesis where man is made by and for God and is given dominion and stewardship over creation but not ownership. This concept has framed Catholic theology which places man's origin and final end in and with God who is revealed by Christ to be a Trinity of Persons. *The Catechism of the Catholic Church* makes this abundantly clear in its prohibition of suicide:

It is God who remains the sovereign master of life. We are obliged to accept life gratefully and preserve it for His honor and for the salvation of souls. We are stewards, not owners, of the life God had entrusted to us. It is not ours to dispose of. (#2280)

This stewardship then is also revealed as relational to God and to others since Jesus put these on a par for the disciple. Catholic social teaching has therefore always had a communitarian aspect to it which reminds us that all we have including our person should be mimetic of the Trinity and be for the benefit or good of all. This notion of the common good is deeply embedded in natural law philosophy since human reason attests to its soundness for overall human life and living.

With the above in mind we are therefore able to extrapolate from the above and from recent papal statements on organ transplants certain principles and practical considerations for *Moore*, the human-genome and future cases that will inevitably follow:

1. Human beings do not own their life, their body parts, or their cell lines.

2. That our life and bodily parts are always to be used at the service of others in the human community and as Pope John Paul recently stated "without reward" (John Paul II, 2000)

3. That any procedure involving the invasion of the human person be predicated upon the fact that the donor gives a fully informed consent or decline in a free and conscientious manner. (John Paul II, 2000)

4. Although the *Moore* case was found for the plaintiff on grounds of pertaining to lack of consent (and rightly so since he had been involved in various procedures to obtain his DNA for over 8 years) the question remains as to what kind of remuneration is he entitled. It would seem fair to extend to him financial reimbursement not only for the Tort (lack of consent) but also for the time and inconvenience the procedure cost him. This benefit should also be extended to others, duly informed, who choose to donate DNA for medical research.

5. Regarding the obligation of researchers who will benefit financially from these cell lines, it is only fitting that they offer free medical treatment to the donors, return some of their profits to the local and worldwide community for the betterment of humankind, and plow some back in for research on other diseases. Many for-profit companies already do this as a matter of policy.

6. The individual profit motive in itself is not inherently wrong since in the free market it motivates research and development. However, as stated above it must reflect a social consciousness. This would be in keeping with all of the social encyclicals since *Rerum Novarum* (Leo XIII, 1891) up to and including *Centisimus Annos* (John Paul II, 1991).

7. There is also no reason to deny such a donor the title of philanthropist, since his gift, if given in the spirit of love, will be of benefit to humankind.

8. Geneticists should seek the guidance of an ethics committee to draft guidelines that would protect against accusations of exploitation by the scientific community. This would benefit everyone involved and promote research.

Case 2
DAVIS V. DAVIS
Supreme Court of Tennessee, 1992

Facts and Procedural History: This case began as a divorce action, the question is, who has control over the couple's pre-embryos? The couple tried numerous times to achieve pregnancy spending \$35,000, and also tried adoption. Junior filed for divorce after last attempt which produced these seven pre-embryos failed. There is an impasse regarding disposal of the pre-embryos. Mary Sue originally wanted them for her own implantation, now wants to donate them to another woman for implantation. Junior Lewis wants them destroyed and does not want to be a parent outside of marriage. Trial Ct. determined that the pre-embryos were human beings and awarded them to mother in best interest of the children. Ct of Appeals reversed because (1) Junior has a right not to become a parent when pregnancy has not occurred. (2) there is no state interest in implantation and (3) parents have equal right to control over what happens to pre-embryos, remanded with joint control. Mary Sue appeals. Note: there is no legal agreement about what to do with pre-embryos and there is no statute governing disposition of pre-embryos. Judgment for Junior (P), although should not be interpreted as an automatic veto for parent who does not want to reproduce.

Issue: What sort of property are pre-embryos? Which party here has rights to them and on what grounds?

Holding: Resolve such issues by (1) look to preference of progenitors. (2) if these don't match or can't be ascertained, prior agreements should be carried out. (3) if there is not prior agreement, than relative interests of the parties must be weighed. Party wishing to avoid procreation should prevail if the other party has other means of achieving pregnancy.

Reasoning: *Scientific Testimony.* Classified as pre-embryos. Still a loose group of identical cells until the 8 cell stage. TN law shows pre-embryos

are not persons (abortions ok). Federal law also denies person status. But may not be just property.

Court holds: pre-embryos are not either persons or property but “an interim category that entitles them to special respect because of their potential for human life.” There is a need for agreements between progenitors.

No contract in fact or implied in this case. Right to privacy includes right to procreational autonomy which includes right to and not to procreate. Both parents are equal gamete providers. State does not have right to gametes. Interests of parties are compared. Junior is vehemently opposed to having kids outside of a marriage due to his childhood.

Professor Bromberg began the discussion stating:

It is shocking that this entire area of in vitro fertilization has been left to the ad hoc decisions of the courts. This is certainly an area where we would expect a responsible legislature to make laws. Even in the Moore case, the court was forced to make analogies from health and safety measures that hardly relate.

Both the majority and dissent in Moore are hobbled by their commitment to utilitarianism, especially their focus on scientific and biotechnical research. It has less obviously pernicious ramifications in Moore which is truly a difficult case. But we see the workings out of a utilitarian view of the human body in the treatment of the frozen embryos in Davis, where the court focused on the husband's desire to avoid procreation.

A lot of work remains to be done to propose a full-fledged legal theory in this field. I suspect the solution remains with a natural rights theory that emphasizes the union of body and personhood. Body parts essential to life would be accorded dignity and protection – which would forbid their sale, commercialization or commodification – fitting their close connection to personhood. And needless to say, actual persons would be accorded the rights of human beings and not subjected to a utilitarian treatment more suitable to things.

The *Davis Case* gives us pause to consider three moral issues involved with embryos; their production, use, and storage. First, their production. Church teaching has always maintained that life giving and love making are an inseparable act. To procreate outside of the loving embrace of the marriage act is contrary to the natural law (*Humanae Vitae*, 1968). Therefore, in vitro fertilization (IVF) is morally unacceptable since

it separates the action and even introduces a third party in the process (Congregation for the Doctrine of the Faith, 1987). Secondly, the production of embryos for implantation has further commodified human life so much so that the courts have resorted to euphemisms referring to embryos as pre-embryos putting them in a quasi human state. There is no scientific data to justify this designation. Current techniques using genetic screening have already led to the discarding of those embryos not deemed useful or desirable. For example, in the *Nash Case* that produced a genetically matched sibling to obtain from stem cells to aid an ailing sister at least 14 embryos were destroyed in the process according to newspaper reports (Vergano, D., 2000).

The Clinton Administration has also found a convoluted way to advance experimentation on embryos by allowing NIH to purchase cell lines from private laboratories who have already experimented and killed the embryos. Unfortunately, this quasi human concept is gaining acceptance in Western society since it assuages the conscience and advertises hope for the cure of genetically related diseases. Thirdly, the storage of frozen embryos in itself has proven a problem as to what is to be done with them in cases like *Davis*. The courts have in two other instances in New Jersey and New York favored the right of the parent who does not want to reproduce. What should be done then with the embryos?

Having examined some of the issues, and cognizant of the initial evil of procreating outside of the natural law, the recourse this author would suggest would be directed at stopping the chain that only compounds the first infraction of the natural law. A basic principle of moral theology is that an evil means cannot be permitted, even for a good result. (see *Veritatis Splendor*, John Paul II, 1993)

The author makes the following proposal as a solution to the dilemma posed by frozen embryos based on the Catholic teaching pertaining to health care decisions commonly known as "extraordinary means" as defined by Pope Pius XII in his 1954 "Address to Italian Midwives." The teaching states that medicines, treatments and operations that cannot be obtained without excessive expense, pain or other burden, or may be experimental or esoteric need not be initiated and may even be discontinued. In light of this teaching I believe it would be permissible and perhaps even desirable to disconnect the frozen embryo from their cryogenic storage and "allow" them to die of natural causes, (Note: I did not say kill) for the following reasons:

1. Any use, even implantation in the biological mother, compounds the initial evil of separating life giving and love making.

2. During implantation many if not most of the embryos will die.
3. Those embryos deemed not suitable after genetic screening will be discarded or perhaps used for experimentation. A Frankenstein like scenario has already been proposed whereby an Australian firm has requested a patent for human-pig embryos (www.zenit.org; Oct. 9, 2000).
4. Soon to come genetic screening will be able to select embryos for certain desirable traits, further commodifying human life.
5. The cost of preserving the embryos, the cost of the procedure for implantation and the low success rate of approx. 15% certainly fit the criteria for costly, burdensome and esoteric.
6. The social consequences of a child perhaps born out of time, years maybe even centuries after the natural parents have died, leaves the person born without family and without time reference, doubly compounding the problems of adoptive children.
7. Embryo adoption by surrogate mothers should be discouraged since it permits the continuation of the initial evil and lends further to the erosion of the natural family as the nucleus of society.
8. There should be, on the part of most people, a natural sense of revulsion in the creation, manipulation, selection, preservation and possible experimentation that these embryos may be subject to.
9. When lawyers counsel clients regarding their personal Last Will and Testament they should ask about embryos the clients may have stored. The attorney should encourage the client to make a provision to see that the embryos are treated with a dignity deserving of human life and allowed to die naturally. Lawyers already advise clients on Living Wills and Organ Donation.

In the discussion with the students that followed some were shocked at this proposal. But for the most part the students were able to see the principles involved and the nuances of reasoning. Such discussions will lead to further thought and refinement of positions, including this author's.

The forum outlined above enabled vigorous debate on contemporary legal, ethical and moral issues. It also allowed for some tentative opinion in the realm of Catholic moral thinking and the Natural Law. Though we

recognize that law has a certain autonomy as John Paul II says in *Fides et Ratio* (1998) Catholic thought provides a structure to critically evaluate it. This is, I believe, the main reason for Ave Maria's existence. This first exercise in a multidisciplinary forum portends great things to come for the school and its graduates.

References

Berenson, A. and Wade, N., (2000, March 15), "A call for sharing research causes gene stocks to plunge," *The New York Times* p. A1.

Casey Governor of Pennsylvania v. Planned Parenthood of Southern Pennsylvania., Supreme Court of the United States, 505 U.S. 83. 1992.

Davis v. Davis. Supreme Court of Tennessee, 842 S.W. 2nd 1992.

Congregation for the Doctrine of the Faith, (1987) *Donum Vitae*.

John Paul II, (1993). *Veritatis Splendor*.

John Paul II, (1998). *Fides et Ratio*.

John Paul II, (2000). "Address of the Holy Father to the International Congress in Transplants." *Crux of the News*, September 4, 2000. p.5.

Moore v. Regents of the University of California. , Supreme Court of California. 793 2d479. 1990.

Reeves, H., (2000, October 22), "The Way of Some Flesh: That excised tumor is valuable to someone," *The New York Times Magazine*, sec. 6, p.40.

Rommen, H.A. (1998) *The Natural Law: A Study in Legal and Social History and Philosophy*. Indianapolis, IN: Liberty Fund Inc.

Vergano, D., (2000, October 19) "Cells from baby brother take hold in girls body." *USA Today*, p. 3A.

www.zenit.org. October 9, 2000. "Patent for Human Pig Embryos Withdrawn."

Zintner, A., (2000, October 19), "Frozen embryos' legal status remains in limbo," *The Detroit News*, p. 11 A.