

Human Rights and Stem Cell Research:
An Emerging Set of Limits for Rights Vocabularies?

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Human rights are the most recent and inclusive species of rights, and are widely thought to come with all of the moral and political powers of rights languages. Yet perhaps because we live in a time when rights are the most favored vocabularies in negotiating issues and constructing institutions, at least in the West, it is easy to miss limits on the powers of rights to do any of the things expected in their use. In the simplest sense rights can conflict with each other, as a right to move across geographical territory clashes with a right to property that authorizes closing off areas from free travel, a right to disseminate information is sometimes countered and shaped by rights to privacy in some circumstances and security needs in others, a right to free speech is constrained by rights to be protected against libel and defamation and hate, rights to freedom can oppose rights to equality, and, in general, we allow these and other such conflicts to be adjudicated by understandings of the greater public good. Rights may also be limited by domains of validity. Like all terms, rights flourish in a set of conditions within which they are intelligible (have a coherent sense and reference), outside of which they are not. These are limits of scope, not those resulting from conflicts among rights all of which are valid.

Both types of limits qualify and restrict even the most powerful of rights. But limits fixed by scope can be especially difficult both to see and to fix. One of the more demanding issues in all inquiry is determining when a dominant vocabulary is no longer able to describe and resolve the issues occasioning its own formation. The modern dominance of rights originates with the contract theorists of the 17th and 18th centuries when the languages of consent and the vocabularies of individual rights simultaneously underwrite the separation of individuals from their collective settings and establish a form of legitimate authority for the new sovereign states which have replaced the medieval system of rule. From the primacy assigned to the group as the foundational unit in human experience we witness a shift to the individual (from Aristotle and Aquinas to Hobbes). These transformations in political and moral languages track in remarkable detail the sea changes at that time in forms of social organization. When,

for example, Hobbes rethinks the concept of authority, lodging it in individuals instead of law, he is responding to the new and growing worlds of individual-based, state-circumscribed, democracies.

The rights-driven individualistic model has served Western democracies well in spite of its narrow initial franchise, and its extension to more and more dimensions of life – women, children, members of ethnic and racial groups previously excluded from civil societies, non-human animals – has enlarged the political and moral community. But there are growing indications that the model is reaching its limits in addressing many salient moral issues in today's world. The original designation of rights was to fully mature sentient and rational (competent) individuals, in practice, white males who owned property, to be cruel (but accurate). Recent extensions of rights, however, have included inchoate forms of life in human gestations, e.g., the assignment of rights to life to blastulas and fetuses in the abortion debates and fertilized embryos in the resistance to stem cell research. None of these new protected life forms are found in the original and standard conditions or rights assignments.

The issue in this extension is whether a language of rights formed on one set of conditions has the conceptual power to address vastly different forms of life in other conditions. Are rights vocabularies efficacious among non-sentient, non-competent, and non-mature forms of life? Are these historic principles for organizing society increasingly irrelevant to current conditions? The possibility of this kind of disjuncture is consistent with the shift in political terms at the end of the feudal period. The unavoidable fact is that concepts and theories crafted in one set of historical conditions may not be suitable for radically different conditions. A familiar contemporary question occurs. How can the vocabularies of Western political cultures, in particular the inventory of different species of rights -- which generally cover the desiderata of Western liberal and democratic political theory -- be brought to bear on experience if these terms of endearment no longer have strong referential power in the current set of moral and political issues?

Any scan of recent events in bioethics yields case studies of remarkable innovation in fitting the rights-driven model to new classes of phenomena. In hospices, and in intensive and chronic care medical facilities, adult individuals who are not competent to give consent are served by a variety of pragmatic devices to accommodate these limitations: substituted judgment reconstructed on what the individual

would choose if s/he were competent (based on evidence drawn from the life, and family/ friends, of the individual); surrogate judgments that introduce others who act in the best interests of the incapacitated individual; various forms of advanced directives that combine substituted judgments with surrogacy, in which a designated individual stands for the patient by combining expressed or revealed preferences with the discretionary decisions required when events unanticipated by the advanced directive are encountered; stricter best-interests judgments that rely on standard and generalizable treatment decisions to select options for an incompetent individual. In neonatology or pediatrics patients are more likely to fall under the models of surrogacy and best interests since children have not yet attained the age of consent nor typically have lived a life sufficiently long to provide evidence on treatment preferences. In most of these events efforts are made to retain the consent model with modifications occasioned by failures of competence. These pragmatic interventions, moreover, have emerged from the needs of practitioners to address real-world cases that in many ways are unprecedented. The interventions are not the creations of the philosophical turn of mind.

Even the terms relied on for centuries in guiding medical decisions are sometimes problematic in contemporary medicine. The Hippocratic maxim to do no harm is an easily understood moral guide until it becomes clear that life itself can be maintained today in high tech medical centers in such extreme conditions that it is a greater harm than death. Then “do no harm” may require opposing the standard medical maxim to maintain the life of the patient. Since doctoring to kill is contrary to the defining purpose of medicine, the recognition of life – in some conditions – as a form of harm introduces antinomies to the central practices of medical care. Even basic political and moral principles can be mutually contradictory in the individualistic rights-driven model. In the occasional conflict between religious beliefs and allopathic medicine these contradictions can be dramatic, agonizing and suggestive of flaws in the liberal approach to governance. Christian Science, for example, can present ancient challenges to modernity with its rejection of all forms of medical intervention. Then, when children are involved in critical-care cases, the state is faced with a dilemma: override parental rights to the free exercise of religion (which is a heresy trial – the religious beliefs are judged to be wrong) or fail to protect

children from the acknowledged harm of not treating medical conditions that would respond successfully to medical remedies.¹

But the most fascinating and troubling extension of rights to different conditions, and one area that may not yield to pragmatic adjustments, is the assignment of rights to life to inchoate or infinitesimal forms of life. My special target in this paper will be the assignment of rights vocabularies to human embryos in the current disputes over research into the therapeutic uses of human stem cells, a special type of a higher-level nanotechnology that promises extensive benefits from the manipulation of a single micro organism on morally contested interventions. I will maintain -- with minimalist arguments -- that this assignment of rights is a category mistake. My opening assertion is that inchoate and infinitesimal forms of life do not provide intelligibility conditions for rights languages. In this sense what follows is a contrarian stance, one suggesting that the use of inchoate life presents conditions that are hostile to the standard uses of moral terms, and that a different language might be required to cope with and legislate the promises and hazards of nanotechnology in general. But my main argument will be that the assignment of rights to one form of infinitesimal life creates a false conflict between the rights of embryonic life and the human rights of sentient life to secure the benefits of stem cell research. The question following these assertions is critical: If rights do not work successfully at the inchoate levels to which they are assigned today, then what can work in the contemporary forms of liberal democracy to provide moral and ethical guidance in these areas? What can instruct us on the extraction and use of human stem cells for therapeutic purposes in the absence of the rights-driven individualistic model?

2

There are, arguably and very generally, three generations of rights languages. The notion of a “generation” is contestable, does not indicate a rank ordering of importance, and while by definition is a chronological presentation it still does not yield a sharp distinction in categories historically arranged (there are considerable overlaps). Nor will the following conceptual troika correspond to the arrangements found in the bulk of the international relations/ comparative politics literatures. But as a

bookkeeping device it more than holds its own in setting out some distinctions in the logic or grammar of three different species of rights languages that *roughly* follow one another historically.

The first generation is the language of natural rights, which has a theoretical pedigree stretching back to classical philosophy. In this perspective on rights the controlling argument arrives from a view of nature as the definitive source of right living, that the world as given, in the absence of human perspectives, yields laws and rights whose legitimacy is grounded in a natural order distinct from human conventions. The critical viewing experience that permits the discovery of rights entails a bracketing of conventional viewing and, if possible, a direct or unmediated contact with a nature that is always to some degree fugitive to normal human experience. In many ancient cultures, and in the cultures of native peoples, the correct human action is often marked as that which is in accord with a natural order continuous with human societies. Hobbes presents natural law and right in this primordial sense, arguing that the impulse to preserve the self is a first-order natural law and right, not contrived or conventional, and so trumps rival moral principles. Natural rights are derived from this understanding of nature, and bind individuals according to a natural world independent of human conventions. The most striking contrast is with legal rights, which are products of convention. On the stipulation that human law can be genuine without reference to the good, or justice, or natural norms of any kind, one of the more important uses of natural law and right is as a standard to judge the morality of positive law.

The second generation of rights is civil rights, the legal and political rights that adorn modern Western practices and are reasonably seen as extensions of natural rights to political societies. If we accept the general view that natural rights attach to individuals by virtue of how we define the location of individuals in nature, that we are born or endowed (by God or nature) with certain rights drawn from a natural order, then the predictable tendency will be to translate these rights into positive laws. The rights enumerated in the Bill of Rights in the U.S. Constitution and The Declaration of the Rights of Man and of the Citizen in France, for example, indemnify, in a legal document, the natural rights to life, liberty, property (or honor, or the pursuit of happiness), and equality enshrined in the political philosophies of the contract theorists through the celebrations of liberty by John Stuart Mill on to John Rawls.

Civil rights seem always to expand on the implications of natural rights as implementation proceeds, in many cases by specification exercises and the use of logical axioms like sameness. For example, civil rights in democratic practices typically include rights to vote, a fair trial, privacy, freedoms of movement and assembly, equal protection of the laws, religious freedoms. The Civil Rights movement in the United States was primarily an effort to secure equal protection and due process under existing laws (though these efforts often required additional laws against discrimination). This extension of rights to groups that had been excluded from coverage invoked sameness and denied differences. The binary arrangement of rights into negative and positive can be regarded as a byproduct that recognizes the needs of individuals for protective devices that shield them from unwarranted regulation (negative rights) and for those resources in the absence of which they cannot secure the prudential goods identified in the natural world (positive rights). Included in the category of civil rights is the extension of natural rights to the broad and important category of social and economic rights. These rights were advanced shortly after the Second World War in blocs of countries and by groups driven by socialist economic theories and/or marked by subsistence living conditions. Martin Luther King, Jr., began turning the U.S. civil rights movement to economic rights, a redirection folded into opposition to the Vietnam War, shortly before he was assassinated.²

The third generation of rights is defined by human rights. Human rights are the predictable descendants of natural rights in their standing as universal norms, meaning independent of and legislative for all particular social conventions. Unlike natural rights they emphasize the dignity of all human beings and the conditions needed to preserve this dignity against political, legal and social assaults. It is not nature that is the source of human rights, as it is for natural rights, but the nature of the human self defined as a person, replete with intentional qualities not always continuous with nature as such. Humans, as animals with higher levels of consciousness, are often regarded as *sui generis* in human rights theory. Because of predicates assigned and discovered about humans *qua* humans, largely centered in a concept of the person, meaning a creature of sentience and reason and purpose, certain norms follow almost inexorably. These are delineated in the lexicon of human rights.

The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 lists the items required to honor and secure the basic values of freedom, equality, security against abuse – generally the ingredients of natural law and right calibrated to the realization of dignity among all humans regardless of surface differences marked by such as race, sex, religion, nationality, and so on. The use of the phrase “the human family” in the document speaks to the underlying view that to be human comes with entitlements that ensure the value of personhood ascribed to all human life everywhere. The 30 articles in the UN Declaration that outline human rights have been the target of recent critiques pointing out their bias toward Western cultures, and the universality condition itself has been challenged as a normative proposal.³ The most important inclusion in the domains of human rights has been the orientation to solidarity rights in the late 20th century. This orientation brought the natural environment, what came to be known as ecological matters, under the rubric of rights with a reversal of fortune: protecting and preserving that which is the source of the rules and principles that instruct us on how to live rightly as well as the resource that allows us to live at all. Solidarity is the logical extension of human rights to the larger vistas represented by ecology, and in this way folds human rights back into a more robust sense of natural rights.

3

Can rights, in particular the more inclusive program of human rights, bear on the issues occasioned by research into and the resulting therapeutic uses of human stem cells?

The opportunities and challenges presented in stem cell therapy are straightforward, and deceptively simple, at least on the surface, even as the indispensable conditions on which the political and scientific debates are crafted remain notoriously unstable. If we paraphrase Senator Howard Baker’s famous aphorism crafted during the Watergate hearings, we might ask what do we know about stem cell research, and when do we know it. We know currently that human stem cells may be the closest items we have to pure magic, or near miracles. They have remarkable powers of adaptation. They can be transplanted in tissues and they grow as normal cells of that tissue without provoking the immune system, or introducing infectious or neoplastic disease risk from a donor. Brain cells crippled by Alzheimer’s and

Parkinson's diseases, injured spinal nerves, defective corneas, heart valves, diseased liver and pancreatic cells, skin, cartilage, muscles and bones – all parts of the human body may eventually be candidates for regeneration with stem cell therapy. But the promise of miracles, like all bioethical promises, is based on mutable research findings that seem to change almost weekly, and disputes over the moral costs of the miracles are dominating the promissory notes.

There are three sources of stem cells: adult or child tissue, cloned adult cells, and embryos. The least promising source at the early stages of research is cellular matter (bone marrow, blood, skin) from an adult or child. Stem cells from living humans have limited therapeutic powers. They are difficult to isolate and grow, and do not regenerate all types of tissue. Stem cells grown from cloned adult cells may have broader therapeutic potential, and are better in overcoming rejection if grown from the cells of the person to be treated, but they are also limited when compared to embryonic stem cells.

The most effective healing is secured by human embryonic stem cells. Scientists believe that these cells can reproduce themselves in the laboratory, perhaps indefinitely, and mutate into and regenerate any of the body's 200+ cell types, suggesting a new and miraculous era of regenerative medicine. These embryonic stem cells also provide the earliest windows into the beginnings of human life, a study opportunity that may lead to remedies for initial fault lines in the human condition (such as genetic defects). The problem is that this powerful magic is cloaked in the disturbing shadows cast by rights discourses. The most efficient extraction of human embryonic stem cells requires the cultivation and destruction of human embryos. To many these embryos are inchoate human beings with all of the rights to life of fully developed sentient beings. On this view any use of human embryonic stem cells for regenerative therapy follows and depends on the wrongful destruction of human life.

This places us at the center of a familiar and profound moral dispute that is yet dependent on rapidly changing research results and a very bad fit between rights and inchoate life. The use of embryonic stem cells in therapy promises extraordinary benefits for the human race while raising an issue that is probably more disturbing than any other at this point in history: the use of some human beings as means to benefit others. Many secular (for example, Kantian) and religious ethical systems prohibit this. There are anomalies in the prohibition movement (as always in every movement). Embryos used to

extract stem cells are dormant in a strong sense, meaning that they require an intervention to become active forms of life. The contrast with abortion is accordingly marked. The fetus is life in a developmental process toward birth and sentience. Abortion is an intervention to stop this process. In stem cell research frozen embryos require an intervention to start gestation, after which the embryos so activated are destroyed. This intervention requirement leads to parallels that present anomalies for those who resist the use of embryonic stem cells. For example, a cell from a born human can be cloned (at least in principle), meaning that all human cells might be regarded as potential human life conditioned on an intervention.

This two-step version of teleology suggests that, on a right-to-life program, resistance to the use of human stem cells may require resistance to any use of human cells for any purpose (which is an absurdity from any point of view), and that abortion may be the more problematic action in destroying an already gestating form of human life. The more general difficulty is that assigning rights to life to human embryos has implications that are remarkably (and disturbingly) robust. If one regards the human embryo as a creature with rights to life, then even the limited program that President Bush endorsed on August 9, 2001, is wrong, or at least morally odd. The President's stipulations that funded research can only use embryos that have already been destroyed misses the point of the pro-life thesis. One cannot, for example, heedlessly conduct experiments on the bodies of murdered individuals just because they are already dead and one is not the murderer, especially if the experiments encourage additional homicides. The fruit of the poisonous tree really is poisonous, a view represented in existing laws that partition bioethical issues from each other, for example in protecting embryonic life outside the womb even in a system (tainted or not) that has legalized elective abortions.

The additional problem is that the poison is a form of blight, contaminating even accepted programs. Consider the uses of embryos in fertility clinics. Michael Sandel has pointed out that *in vitro* fertilization procedures routinely create excess or spare embryos in efforts to solve infertility problems. These excess embryos are later destroyed when not used. The same arguments against the use of human embryos in research into diseases like Parkinson's and Alzheimer's surely bear on using and discarding embryos for the good ends of helping infertile couples to conceive. Or, as framed by Sandel in a different

direction, “if the creating and sacrifice of spare embryos in infertility treatment is morally acceptable, why isn’t the creation and sacrifice of embryos for stem cell research also acceptable?”⁴ Like so many right-to-life arguments the concluding strictures go too far even for proponents when the implications are tracked to collegial practices.

Here is the problem stated as a set of blunt rankings. If the benefits of morally problematic actions are marginal it is easy to be moral in traditional terms. But in this case the benefits of embryonic stem cell research may truly be revolutionary in helping the human species. The temptation to disregard the moral strictures of rights would also be an easy rejection if purely egoistic returns were at issue. Self-centered or narrowly drawn group benefits are deniable without too much trouble when contrasted with the trumping powers of rights. But, again, the benefits in this case are in principle generalizable to everyone. On the reasonable assumption that moral discourse is putatively beneficial rather than punitive for human experience we are invited, no summoned, to be thoughtful. Can we find a way to circumvent the restrictions that rights vocabularies have introduced to these matters while maintaining allegiance to the moral life? Are there moral languages that permit research into embryonic stem cells? Or should we abandon stem cell research for good moral reasons?

The obvious exit route from the moral problem is, I suppose, a flat denial that human embryos have human standing in moral and positive law. Many responsible people take this perspective on embryonic life. A human embryo is, yes, biologically human. No one can deny this. The full complement of genes is present in embryonic life, meaning (among other things) that such embryos gestate into humans, not dogs, cats, or elephants. But, in the familiar argument, the human embryo does not meet any of the tests of personhood, which typically occur on the condition of sentience. Embryos do not think, talk, love, or interact with others in any way. It is the absence of personhood coupled with the full gestation of embryonic life within the body of another that leads to the arguments for pro-choice in abortion laws.

The problem is that no rational or generalizable settlement will follow this kind of discussion. It is the same word play that has frozen the abortion dispute in moral terms for over three decades in the United States. Do inchoate forms of life have moral standing as individual humans? Does teleology

extend back in time and gestation to protect those who are in a law-like developmental continuum toward human standing? We know from the abortion debates that the discussants may select among many reasonable moral perspectives on these issues, and the perspectives are opposed to one another, divisive in their effects and entirely predictable. We might hope and ask: Is there another, non-fossilized path away from this way of arguing bioethical issues, given that rights languages are virtually incoherent in these conditions?

I submit that there are three such paths (and on only one of these do I have anything original to say). One path is cut from ongoing research into stem cell therapy. This research is new, unprecedented in its methods and findings, and currently producing results that seem to be revising almost daily the logic and scope of moral disputes over the use of embryonic stem cells in therapy. Since the research techniques have occasioned the moral issues it follows that changes in the focus and outcomes of the research may modify and perhaps extinguish these issues. The reflexivity of systems theory is especially vital in presenting these research findings to the primary moral rules of the stem cell debates. A second path is a stronger employment of what I have called in my work collateral reasoning. This reasoning asset provides movement on sidebar issues while leaving untouched – for a time – core moral and legal holdings. It also illuminates the ways in which shifts in moral references can revise even basic ways of thinking. The third path is opened with revisions in public reason coupled with --- and this is going to be a very strange argument – a religious sense of community to mediate the influence on rights vocabularies with an emphasis on holism – of a particular sort. There is a certain irony in this third path since religious frames for right-to-life arguments often seem to introduce a high energy level to the pro-life side. But this too narrowly depicts religious sensibilities. A religious sense of community offers a more promising frame for stem cell debates than the rights vocabularies that seem to dominate the current scene. The revisions in public reason will involve a shift from what I call ontological individualism to forms of holism, and then systems theory, the latter presented briefly as a provisory note. There will NOT be a list of specific resolutions to any bioethical disputes in this paper, including those occasioned by types of stem cell research, but rather a proposal for a shift in our references for addressing these matters, with the unmistakable implication that the status of such as fertilized embryos as research units or protected life

forms will turn not on rights to life but on a larger understanding of human interests drawn from more synoptic considerations. It is precisely these more synoptic considerations that invite the possibility of systems theory as a higher order and more formal sense of community.

4

I have nothing important to say on the first path. So many moral and legal issues depend on conditions, a dependency illustrated in the pointed reminder by Justice Blackmun in Roe v Wade that, since the initial prohibitions against abortion were driven in large part by the need to protect women from the high mortality rates of such procedures, and since studies now show that with the advent of antiseptic surgery it is marginally safer to have a first trimester abortion than to carry to term, the fact of clean surgical techniques provides a shift in conditions and a reason to consider a reversal of the earlier ban on abortion.

It is the especially rapid change in research into stem cells that suggests revisions in our moral takes on the issues. Stem cell issues are obviously not just moral issues. The complex questions of proper research methods, the use of sound rules of inference and evidence, sharing data, selecting critical tests to falsify hypotheses – scientific inquiry is usually replete with a variety of items that raise issues of standards and personal integrity.⁵ These items are ethical concerns, but need not be immersed in moral matters. But when moral matters are raised, the enduring question in all fields is how the *conditions* on which moral issues occur are related to the moral issues. The question can be raised because all moral issues seem to depend on conditions. Imagine, for example, how radically the abortion disputes would be modified if *in vitro* gestation were as effective as *in vitro* fertilization. The moral issues of stem cell research clearly depend on conditions, especially the biological techniques and findings that are the source of the moral issues in the first place. The findings, moreover, seem to change the moral playing fields almost daily. One very real possibility is that the moral dilemmas of stem cell research may be otiose from research developments long before they are resolved or avoided by moral exploration of the issues.

Current research developments resemble the rapid transit of an underground system without a schedule. A survey of recent work also gives the impression that the trains are going back and forth on the same tracks. Two studies published in Nature (online, March 13, 2002), for example, indicated severe limits on the transforming properties of adult stem cells, suggesting that stem cell therapy may have to rely on embryonic stem cells due to the failure of adult cells to cure human diseases. This study suggested that the alternative proposed by President Bush to rely on adult stem cells is a null proposition even as debate on his proposal is in inchoate stages. But the May 2, 2002, edition of Nature indicated a more active role for adult astrocytes in the regulation of synapse formation and synaptic transmission. Then, more recently, scientists have isolated cells from bone marrow that seem capable of transforming into most and perhaps all of the specialized cells in the human body. The upshot of this finding, reported online in Nature (June 20, 2002), renders the early distinctions between adult and embryonic stem cells moot by suggesting that all of the healing powers of embryonic stem cells may also be in the possession of adult cells. Recent summaries, however, qualify these hopeful findings.⁶ The prospects have become tantalizing again by two even more recent research findings. In 2005 scientists at Kingston University in England claimed to have discovered a new kind of stem cell found in the umbilical cord that is remarkably like an embryonic stem cell, and in January 2007 scientists at Harvard and Wake Forest Universities announced the discovery of stem cells in amniotic fluid.⁷ Both of these newly discovered types of stem cells may be as effective as embryonic stem cells and avoid the moral controversy entirely. One has the impression that the moral resistance to and support of embryonic stem cell therapy is playing a losing game of catch-up with even restricted ongoing research.

On the second path I may have said too much already in published work.⁸ The fact is that we have mediation methods that can find paths around and away from all manner of moral dispute. In the main, the heavy lifting in the abortion dispute is at the collateral level, sidebar arguments that are not resolvable with major premises consisting of generalizable rules and governing principles. In abortion law collateral reasoning has permitted a reasoned exploration of the conditions on which abortion can be regulated by states. Ian Shapiro has documented the U.S Supreme Court's reliance on an "undue burden" test in ruling on the constitutionality of abortion regulation.⁹ In Planned Parenthood v. Casey (1992), for

example, the Court allowed a mandatory waiting period for abortions and the requirement that a minor get permission from one parent or a judge, and rejected a consent provision for the father-to-be, all rulings guided by whether the statutes placed an *undue burden* on women contemplating abortion (while leaving the core holding in Roe intact).

The point of another reference to the abortion dispute is not to numb the readers and audience into a false sense of familiarity but to locate the areas of collateral reasoning between moral disputants in the right conceptual area. Political and legal reasoning at the level of minor premises seems to represent what we might call systemic reflexivity, meaning a type of reflection that permits a system to manage disputes over primary rules with additional layers of arrangements that reflect on the primary rules, meaning recursive functions in which – ideally – everything is in play. This arrangement is represented at systemic levels by H.L.A. Hart's depiction of complex systems of law as consisting of primary statements which impose duties or obligations and secondary statements that address the primary statements.¹⁰ In a true recursive system of law revisions in the primary rules will affect the secondary rules, and vice versa, in a continuing reciprocal activity. George Mitchell's work as a mediator in Northern Ireland is a practical representation of recursive powers in his excursions into and decompositions of languages in discussions with the adversaries.¹¹ The mediators in today's world are designated peace makers, historically the third parties slightly outside the action, not umpires or judges as such, not adjudicators, but professionals engaged instead in *mediation*.

5

It's the third path that I want to elaborate as an exercise in public reasoning. The first two paths are oblique approaches to stem cell issues. In the first technology can and may redefine the playing field and present the moral concerns as illusory. In the second, the moral issues are avoided with oblique and definitely pragmatic methods that seek mediated outcomes agreeable to the adversaries while, mainly, bracketing the core moral issues. In this, the third path, we start with a direct assault on the moral frame in which the disputes are joined and argue that human rights are inappropriate assignments to inchoate life forms. Think about it this way. Human rights are formed on a respect for human life, for the sense of

personhood that exhibits the sentient and rational capabilities that define a full human life: autonomy, liberty, dignity, equality. The controlling assumption is that, while there may be gradations in human powers, there is a sharp distinction between the human species and all other forms of animal life. (There are no extant hybrids between, say, apes and humans.) The singular nature of the human condition may signal the need for respect toward those individuals who lack the full inventory of human powers, those, for example, who are dying, or badly injured, or lacking certain mental and physical capabilities. Even the hopeless and most fragile among us, the dead and dying, are said to warrant dignity, and typically receive it in civilized societies.

But the assignment of these rights to human embryos misses the point that rights presuppose or underwrite human powers that are not present in inchoate forms of life. Even the fact that these life forms develop into mature humans does not make the assignment intelligible. In all patterns of development certain values, rights and responsibilities are locked into place as relevant powers are achieved. In biological development the deployment of the full inventory of differentiated organs signals the presence of the life forms that these organs signify. Before the completion of the metamorphosis the life is in premature or incomplete stages, typically incapable of assuming the roles marking off its biological placement. What is remarkable is that the assignment of predicates to sequential stages of maturity is routine in both biology and social practices (a certain age must be attained to vote, drive a vehicle, drink alcoholic beverages). Periodic assignments -- according to stages -- also are in accord with that odd phenomenon, the inversions of values that track increases and decreases in scale. The indifference to metamorphic changes and their implications represented in the blithe assignments of rights to life to inchoate forms of life is counter to the entire corpus of developmental patterns and the points of receptivity to value assignments germane to some stages in development and not others.

Conceded: these arguments are no more likely to convince pro-life supporters than they have in the abortion dispute. But they do introduce leverage for a rights restriction on a more level playing field. On the acknowledgement that a human rights assignment to inchoate life is at least problematic, not as clear and effective as the use of such rights among mature sentient creatures, then the *possibility* of such limitations on the scope of human rights brings the issue of this paper to an explicit level: are there forms

of reasoning and considerations that will provide effective moral guidance in negotiating the contestable areas of stem cell research and the employment of these research products in therapy that avoid the anomalies of rights languages in the area of inchoate life forms?

Here I want to start by identifying an argument in the long history of assertions for models of reasoning that has always required close attention. The thought that moral judgments vary across the dimension of size is a critical assumption and conclusion of reason-of-state theories. The inversion patterns suggested by Machiavelli and demonstrated in game and collective choice theories with, among other devices, the threshold points presented in non-monotonic functions, are both impressive and disturbing as they indicate that moral and rational predicates successful at individual levels are failures at collective levels. The difficulty of finding a rational and moral path to connect individual and holistic levels is impressive because there does seem to be a mapping breakdown between the micro and the macro that is both incorrigible and general.¹²

Contemporary science is a continuous demonstration of the influence of magnitudes on even basic variables. Quantum mechanics tells us that fundamental laws can be inverted at microscopic levels, and physicists have more recently revealed that at high energy levels, and only at these levels, the discrete electromagnetic and weak nuclear forces seamlessly combine, and at even higher energies the strong nuclear force also melds into the same consolidation.¹³ Change the size (magnitudes) or the force fields (the measure of energy or power) and laws and relationships change. In social theory a parallel pattern occurs. Individuals and collectives invite value assignments that vary along a scale that distinguishes the actions of the private citizen from those of the government. Individual morality, such as placing family before professional associates, may not track to state levels, and what is authorized for the state, e.g., declaring war or administering the death penalty, may not be licit or even possible as individual actions. These kind of moral variations along scale have been acknowledged from the classical period through contemporary life, and (as Machiavelli suggested) the patterns are augmented whenever state power (a kind of force field) inverts conventional moral values to secure vital collective goods.

This kind of non-monotonic function, where values are inverted as magnitudes reach certain threshold points, drives reason-of-state theories. The core proposition in all such theories is that the state

relies on different rational considerations and purposes than found in reasoning at individual levels, and these differences at least occasionally require that the moral constraints binding individuals be abandoned in state reasoning. The sources of the privilege differ. The divine right of kings granted dispensation to the monarch because his legitimacy originated with God, and the source of this legitimacy was regarded as a warrant drawn from a higher moral source. The state override of conventional morality came clothed in special moral commands. Later reasons of state were drawn from the logical standing of political authority and the perception sharpened by Richelieu of the temporal world as morally and rationally compromised. All modern versions of reason of state are developed on an understanding of political reality that requires a political leader to secure certain primary public goods for the political community even at the expense of ordinary morality. Any contradiction between the exercise of political authority and the demands of ordinary morality depends on the presence of state reasons that are different from those guiding the self-referential decisions of the ordinary citizen. The arguments we draw from Machiavelli depend on these differences. So too does the moral: when the contradiction occurs it is ordinary morality that must give way since securing primary goods for the political community must trump individually grounded morality. In the famous phrase, virtue and morality are provisional, to be dismissed as needed “according to necessity.”¹⁴

But this pattern of variance is also disturbing because any demonstrations of structural dualism in social theory suggest versions of holism containing both benign and malicious versions of collective reasoning. The modern hostility to a political morality based on the logic of holism is understandable. The terrible events in 20th century Western cultures carried out in the name of a putative collective or state reason would incline even disinterested observers toward methodological individualism and a denial that wholes even exist (as in Karl Popper’s strident political defense of methodological individualism).¹⁵ This denial, typically expressed as an argument that wholes are either derivable from or reducible to individuals, compromises at least a strong version of holism. Holistic terms, however, are found throughout ordinary language, and seem to have far more plausible standing than strong methodological individualism allows. We might ask whether a benign version of holism, a sympathetic rejection of methodological individualism, might serve our moral needs.

A number of commonplace stories illustrate the differences between collective and individual considerations, and also provides a cleaner, minimalist cut into public reason that escapes altogether the rich assignments of values to the reasoning exercise. The commonplace stories that illustrate the differences between collective and individual considerations make this point. Imagine going for a swim in the ocean on a warm summer day. In the distance is a sand bar. You calculate the risks in swimming to the sand bar. They are high given your poor physical condition, but you are on the whole a risk-inclined person. Besides, the challenge itself is exhilarating. You dive in and start swimming. Now imagine that you are the leader of a group of college students, in the sense that you are responsible for organizing events in a trip to the beach. The sand bar looms in the distance. The group is inclined to swim to it but they leave the decision in your hands. You hesitate. The swimming skills in the group are mixed. Some are excellent swimmers, others are adequate. The risk and exhilaration are still present, but now you are assigning these predicates to others, not yourself.

It seems likely that you will be more cautious in deciding on the swim, for two reasons. One, the information on which you base such a decision is more complex. It is distributed across a spectrum, so that it is difficult to say (as one can more reliably say for an individual) that the group is or is not capable of the swim. Also, even if one has a judgment of certainty on the capability of each and every individual in the group, this would not translate into certainty of judgment for the group if (as is likely) the capabilities among the individuals are different. (Fallacies of composition start with simple arithmetic.) More succinctly, the complexity affecting the reliability or certainty of information will be a function of the heterogeneity and numerical magnitude of the group, variables more muted when assigned to an individual. Two, the moral principles or rules appropriate to deciding for or on behalf of a group will be a function of magnitudes (harm being more grievous – *ceteris paribus* clauses in place -- when moving on a numerical scale to greater magnitudes) and the fact of power or authority over a group yields a dimension of responsibility expanded beyond the obligations to the self. In part for these (and other) reasons a fiduciary relationship to the group is part of any list of leadership duties in Western democracies. Risk-averse strategies seem morally rational in many of these relationships.

One can argue endlessly about whether the group of students should be taken on a swim to the sand bar on this or any other day, or whether a culture of violence might invert the calculations in favor of risk-inclined strategies, or even what models of representation (surrogacy, substituted judgment, best interests) might depict any set of decisions.¹⁶ But this much seems unassailable. The considerations in making rational decisions for the group are different in the story from those appropriate in making decisions for the self. The distinction indicated in the story between collective and individual considerations is the opening condition for a freestanding public reason. Of course the story is not a microcosm of real political worlds. Among the central differences between the story and at least a freestanding language of state is this. State leaders, as opposed to education instructors, are often depicted in reason-of-state traditions as engaged in practices that aggressively pursue a collective good, like security, even at the expense of conventional morality, not just in terms of a forbearance that limits risk for individuals.

But the important observation is that the values exhibited in the story are minimal. To regard a collection of individuals as presenting the need for a kind of fiduciary relationship of course is grounded in the assignment of certain values to individuals, an assignment that can vary with a number of distinctions, such as whether the individuals and the leader form a cohesive or disjointed group, an in-group or an out-group, etc. The main rational concern, however, is with the augmentation that the story presents. A reliance on risk-averse or risk-inclined strategies, for example, follows the conditions of uncertainty that groups present with the complexity typically introduced by numbers, diversity among individuals, and the relationships of individuals to each other. The main shifts in considerations track the size and diversity of the group. They do not require a full set of liberal, or any, values for the critical turns in reasoning. Collectives present – to a certain degree -- their own endogenous values.

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The missing item in this narrative is the type of collective at issue. To regard a collection of individuals as presenting the need for a kind of fiduciary relationship of course is grounded in the assignment of certain values to individuals, an assignment that can vary with a number of distinctions,

such as whether the individuals and the leader form a cohesive or disjointed group, an in-group or an out-group, etc. At this stage, assuming that we can move from a rights-driven to a communitarian orientation, I want to raise a leading issue *not* asked in the stem cell dispute -- whether rights are the proper languages to negotiate it. The questions addressing this issue are both vital and predictable. Is there a sense of community that can legitimately shape a path away from the rights-driven individualistic model? Are there communal variations that blend moral values with an altruism that authorizes the use of inchoate life for the greater good? Can particular communitarian forms offer a different moral frame within holism for stem cell debates, in particular as a form of life used in a communal sense to heal and give life to those in need? Are there communal variations that blend moral values with an altruism that authorizes the use of inchoate life for the greater good?

Answers to these questions begin to appear on the recognition that some communities regard the deeper features of individuals as not privately owned or even chosen but part of a larger human community, collective rather than rights-driven, harmonious rather than adversarial, giving rather than self-protecting. The very identity of the individual is sometimes supplied by the dense cultural context of group identities and alignments.

Oddly enough -- and this is very strange in the current political climate -- religious groups at their best are communal, not rights-driven. Religious perspectives routinely assume that human experience is a limited area within more comprehensive domains of the real, and that these more robust domains are the sources for our deepest understandings of human experience. In William Christian's formulation, "Someone is religious if in his universe there is something to which (in principle) all other things are subordinated. Being religious means having an interest of this kind."¹⁷ A deep and comprehensive community, including the thought that the human community consists of the living and the dead, is (almost literally) the heart and soul of religious beliefs and ethics. Islam, for example, relies on a strong sense of community and individual submission to God. The Muslim praying in the direction of Mecca aligns with all others facing Mecca, and in this communal prayer finds the path to salvation. It is precisely this comprehensive sense of communal identity that authorizes the offering of life for life which is celebrated in many religions in one way or another.

Sacrificial practices are found in many religions. Animal sacrifice is a ritual deeply embedded in religious practices. The Book of Leviticus provides detailed instructions for the Israelites on the slaughter of animals, including the statement that “The priests shall dash the blood against the altars of the Lord at the entrance of the tent of meeting, and turn the fat into smoke as a pleasing unto the Lord” (17-6). Not all writers of the Bible endorsed sacrifices but “burnt offerings” were very much a part of Hebrew traditions. Pre-Western cultures in the Americas, including especially the Aztec and Mayan, practiced sacrifices that included both animal and human victims. In all of these rituals blood is regarded as sacred, and the spilling of blood from a live animal an offering that placates the gods. More precisely, sacrifice is a conciliatory gesture that intends reciprocity between human and deity. The ritual offers the sacrificed animal as propitiation to spare the life of the human disciple. Christianity did not conduct actual sacrifices but the influence of Dionysian rites is evident in the Christian communion ritual, which is described as the eating of Christ’s body and the drinking of his blood. In Christianity Jesus assumes all sacrifices by offering himself as the ultimate sacrifice, the “lamb of God” in the Catholic Eucharistic Liturgy. Modern religions have largely substituted virtual sacrifice for actual sacrifice, relying on tokens and symbols instead of the real thing.¹⁸ The symbolic giving of life is a central ritual in human experience, and contrary to the adversarial right-to-life attitude of the contemporary scene. Even a cursory look at both secular and religious communities today, for example, reveals celebrations of actual though non-ritualistic human sacrifices. The communal aspects of Western nations continue to respect sacrifice, and typically devote a day to honor those who have given their lives for their country. Higher causes are almost routinely invoked to justify the sacrifices that some bear for the good of all.

To the reader: relax. This is *not* the beginning of an argument for human sacrifice, or even animal sacrifice. It is a recognition and a corrective. The logic of religious understandings of community provides different moral resources than those driving the secular uses of rights vocabularies, *and* rights traditionally impose a protection and entitlement grounded in a wider set of interests than those centered just on the individual bearer of rights, and in this way depend on community values. Rights traditionally do impose a protection and entitlement grounded in a wider set of interests than those centered just on the individual bearer of rights, and in this way depend on community values. A negative right establishes a

protective shield around the bearer of the right, but the right imposes obligations on others to refrain from restricting the protected action. To have a (negative) right to vote, for example, constrains registrars and the like from impeding your freedom to vote but does not obligate you to vote. Any right can also be superseded by communal concerns. Stated accurately, a right to life means that one cannot be killed unjustifiably. It does not mean that one cannot be killed under any circumstances, or that one has the right to all means necessary to sustain that life. Put in the language of the current age, rights in general invoke a due process that simultaneously issues a protective shield for individuals while permitting override mechanisms that can invoke more comprehensive concerns. Individuals who have a right to life are not due all resources needed to sustain that life (your kidneys, for example), may still be conscripted into military service that places their lives in jeopardy, may be executed for capital offenses after a just trial, and so on.

The interesting thought is that a religious sensibility might offer an override mechanism to rights based on the dominance of community. In this way the shift in background conditions represented by a religious communal setting can redefine the constraints and scope of the stem cell dispute according to variables of scale. For example, the practice of using life to save life might be active only at points on a developmental scale where atomistic and inchoate life levels are clustered and rights are inappropriate assignments. Utilizing embryonic life in fertility clinics is one illustration of atomist life sacrificed (in discarded embryos) to produce life (a practice not condemned by pro-life supporters).

The deficit in negotiating the advisability of stem cell therapy is profound and the normative solution obvious. A genuine religious community should seek moral guidance on stem cell issues not from rights languages, which are inconveniently placed within inchoate life forms, but from the acknowledgment of sacrifice to meet those higher needs identifiable in the synoptic human community. The religious right should be the first to embrace the use of such microscopic life forms to serve the greater good. Now, is anyone sufficiently risk-inclined to take bets that this will occur?

Finally, I've talked about the effects of magnitudes on values in crafting a new set of resources for stem cell issues, and argued for a special type of community in completing the picture of reasoning on non-monotonic functions. But these proposals on scale may also be elaborated in a second way by

relying on work in cognitive sciences and systems theory, broadly conceived.¹⁹ Much of this work abandons dualisms that are at the heart of liberal theory, making distinctions between collectives and individuals a transitional stage in political modeling. For example, the dualities (mind-body, self-other) on which so much of modern democratic theory is based are welcome casualties of both systems theory and recent theories of consciousness. Also, one of the more important recent contributions of systems theory is a heightened awareness of what works and does not work in human practices. We know now that recursive systems are superior to the static conditions of non-reflexive practices. Practices that contain rules allowing a reflexive scrutiny of themselves have competitive advantages. But what is truly intriguing is that systems theory introduces a frame that is consistent with biological accounts of life, and in this sense promises a more insightful look at the moral perspectives appropriate for mediating disputes over the use of inchoate forms of life in human practices. In a systems framework all bioethical issues would be negotiated by recursive functions and collective interests, not by immutable rights. There are no halting points, none of the braking shields introduced by negative rights, no sacred or privileged values, nothing to halt the recursive powers of a complex system. Everything is in play, even the most sacrosanct of moral positions. It is fair to conclude that the terms of engagement over the use of fertilized embryos in therapeutic research (and all other bioethical issues) would be redefined radically. Systems theory also presents itself as a less contentious and more congenial resource than the heuristics of religious communities.

If we assemble a propositional summary of this paper, the following outline meets that conditional.

1) The stem cell dispute over research into and use of human embryos can be reduced to the issue of assigning particular sets of rights, a right to life to the inchoate life represented by embryos, human rights to the more mature creature represented by sentient human beings. The cleaner arguments are found in the assignment of human rights to mature forms of life, the contestable arguments are located in the assignment of a right to life to inchoate forms of life.

2) If both sets of rights are assigned then there is a conflict between rights to life and human rights. But this conflict (as is usually the case) is resolvable only with the invocation of a greater good.

The particular first instrument is a community selected from an inventory of communities and joined to arguments of value inversions on increases and decreases in magnitudes (scale). A religious community has the dubious distinction of providing an override mechanism to use inchoate life in this case for the greater good, thus allowing human rights to trump rights to life in this instance.

3) But the imbalance in fit, a demonstration of the limits attending to the extension of rights languages to inchoate forms of life, renders the conflict between these two species of rights illusory. Human rights assigned to mature individuals dominate because the right-to-life assignment is contestable and uncertain, and certainly not argumentatively equivalent to the human rights assignment.

4) The epistemic dominance of human rights opens the possibility of a second instrument of resolution. Arguments on scale conjoined with human rights open a path to systems theory, which invites us to consider the whole human community in a recursive examination of competing claims, and in this way recognize a *formal* greater good within a greater system of evaluation.

The answer to the question posed near the start of this paper -- What can instruct us on the extraction and use of human stem cells for therapeutic purposes in the absence of the rights-driven individualistic model? – has a definite answer. The epistemic dominance of human rights shifts the playing field. The source of moral guidance is the set of needs in the human community, arguable the oldest moral map in history. This map is adequately delineated in the language of human rights. Stem cell research should proceed in order to provide the spectacular benefits to humanity that the scientific community anticipates.

Endnotes

¹ See, for example, the case of David and Ginger Twitchell, whose four-year-old son died of a bowel obstruction after they “treated” him with prayer and medication instead of using standard medical care. I discuss this case, and the dilemma it presents to liberal version of governance, in my book, Healing Powers (Chicago: University of Chicago Press, 1992).

² For a different take: Lloyd L. Weinreb, “What Are Civil Rights?” in E.F. Paul, F.D. Miller, Jr., and J.Paul (eds.) Reassessing Civil Rights. (1991).

³ For overviews, rebuttals, and extensions of these rudimentary ideas: David Duquette, “Universalism and Relativism in Human Rights,” in Reidy and Sellers, eds., Universal Human Rights (2005); Makau Mutua, “Human Rights as an Ideology” and “Human Rights as Metaphor,” in Human Rights: A Political and Cultural Critique; Louis Henkin, Introduction “The Human Rights Idea” and “Epilogue: Human Rights and Competing Ideas,” in The Age of Rights. The non-Western dissent from human rights seems to consist of two propositions: that the purveyors of such rights are corrupt, in effect extensions of the colonial rulers who legislated Western norms on indigenous cultures as a form of hegemony, and/or that even with the right moral purpose the human rights program is flawed in the parochialism of the rights inventory, which, the critics maintain, are norms from Western cultures with little generalizing powers across non-Western communities.

⁴ NY Times, Op Ed Section, May 28, 2002.

⁵ Note the scandal that erupted in 2005 over the fabrication of data by the South Korean scientist Hwang Woo-suk and his research team to support the fraudulent claim that they had produced patient-specific stem cells.

⁶ See the biological and political discussions in The New England Journal of Medicine (July 17, 2003), especially Nadia Rosenthal, “Prometheus’s Vulture and the Stem-Cell Promise,” Konrad Hochedlinger and Rudolph Jaenisch, “Nuclear Transplantation, Embryonic Stem Cells, and the Potential for Cell Therapy,” and George Q. Daley, “Cloning and Stem Cells – Handicapping the Political and Scientific Debates.”

⁷ On the Kingston University research: Andy Coghlan, “Cord blood yields 'ethical' embryonic stem cells,” New Scientist (August 18m 2006); on the Harvard/ Wake Forest University research: “Isolation of

amniotic stem cell lines with potential for therapy,” Nature Biotechnology - 25, pp. 100 - 106 (2007) -- published online: 7 January 2007, and Paul Elias, “Amniotic fluid yields stem cells,” Associated Press, Harvard researchers report (January 7, 2007).

⁸ See, for example, my Public Reason (Ithaca, NY: Cornell University Press, 1999).

⁹ Ian Shapiro, ed., Abortion: The Supreme Court Decisions (Indianapolis: Hackett Publishing Company, 1995)

¹⁰ The Concept of Law (Oxford: Clarendon Press, 1961, 1994)

¹¹ Mitchell, Making Peace (Berkeley, CA: University of California Press, 2002)

¹² Brian Barry and Russell Hardin, eds., Rational Man and Irrational Society? (London: Sage Publications, 1982) remains the best sourcebook for readings in these literatures.

¹³ The Nobel Prize-winning works of Sheldon Glashow, Abdus Salam and Steven Weinberg produced this consolidation In the 1960's, work that (in the words of Brian Greene) “has yet to be confirmed experimentally, but which has convinced many physicists that there is no fundamental obstacle to unifying three of nature's four forces.” See Greene, “The Universe on a String,” New York Times (October 20, 2006).

¹⁴ The Prince, trans and introduction H.C. Mansfield, Jr., Chicago and London: Chicago University Press, p. 62.

¹⁵ See, for example, Popper’s strident political defense of methodological individualism in The Open Society and its Enemies (London: Routledge, 1945).

¹⁶ These rough models are drawn from bioethics and the pragmatic efforts of practitioners to craft decision-making models when informed consent from patients is not a possibility. But see the rich tradition of works on political representation, beginning with Edmund Burke’s *trustee* (Reflections on the Revolution in France (London: Penguin Books, 1968) and James Madison’s *delegate* concepts (Hamilton and John Jay, The Federalist Papers, ed., Isaac Kramnick (Harmondsworth: Penguin, 1987), and the more recent work in, for example (and almost randomly), Hannah Pitkin’s The Concept of Representation (Berkeley: University of California, 1967), Linda Alcoff, 199 “The Problem of Speaking for Others,”

Cultural Critique (Winter, 1991) pp. 5-32, and Jane Mansbridge, "Rethinking Representation," American Political Science Review, 97 (2003) 4: 515-28. I am maintaining that a set of rational considerations is generalizable across these modes of representation, that what one looks at, must calculate from -- the salient considerations in public reasoning -- are presented by the fact of a collection of individuals, not the species of representation depicting the action.

¹⁷ Christian, Meaning and Truth in Religion (Princeton: Princeton University Press, 1964). The quote is on page 61. See also Ninian Smart's overview of concepts in religion in Worldviews (Saddle River, NJ: Prentice-Hall, 2000). Also Paul Tillich, The Shaking of the Foundations (New York: Charles Scribner's Sons, 1948), page 57 for the suggestion that religion is oriented toward ultimate matters. Then there is Roy Rappaport, who argues for ritual as the main component in religion. See his magisterial Ritual and Religion in the Making of Humanity (Cambridge: Cambridge University Press, 1999). Also, yes, there is a close relationship between rights and community values in many religious communities. Remember that Locke believed that God bestowed rights on humans. (I thank Cyril Ghosh for this observation.)

¹⁸ I am using arguments here from my paper, "The Free Exercise of Religion: Lukumí and Animal Sacrifice," Institute for Cuban and Cuban-American Studies Occasional Paper Series, University of Miami (November 2001).

¹⁹ For example, Niklas Luhmann, Social Systems, translated W. Whobrey (Stanford, CA: Stanford University Press, 1995) and 1995; Andy Clark, Being There (Cambridge, MA: M.I.T. Press, 1998). I discuss recursive functions in my recent book, Bounded Divinities: Sacred Discourses in Pluralist Democracies (Palgrave Macmillan, September 2006).