**“They deserve better”: Reflecting on “Reflecting the ‘human nature’ of IVF embryos”**

**A common framework**

Jenni Millbank emphasises the broad similarity of approaches taken by Australia and the United Kingdom in relation to the regulation of IVF. Both countries “provide fairly liberal access to a wide range of state-subsidized treatment practices”.[[1]](#footnote-2) Neither country has granted “specific legal protections to the human embryo”.[[2]](#footnote-3) And yet both countries have ethical guidance or regulations that make reference “to the ‘special status’ of the human embryo”.[[3]](#footnote-4) In this, Australia and the UK are distinct from more restrictive regimes (such as Germany or Italy) and also (though Millbank does not make this explicit) distinct from the free-market approach of the United States.

The Warnock Report of 1984 invoked the “special status” of the human embryo as “the original justification”[[4]](#footnote-5) for IVF regulation in the United Kingdom. While the Human Fertilisation and Embryology Act 1990 has been revisited several times, it remains the case that the status of the embryo is regarded as the “starting point for consideration of the ethics of research on human embryos”.[[5]](#footnote-6) As a joint committee of both houses of parliament stated in 2007, “We acknowledge that the special status of the embryo means regulation of both research and treatment continues to be appropriate and desirable”.[[6]](#footnote-7)

Millbank’s critique of the framing of Australian regulation thus applies equally to regulation in the United Kingdom. The Warnock Report and subsequent parliamentary debates have been “responsible for creating this space for the embryo as a contested but constantly centered ethical subject, not-quite-life but not-mere-cells.”[[7]](#footnote-8) A direct consequence of the focus on the seemingly interminable debate over the moral status of the human embryo is that other important ethical aspects of IVF have been marginalised.

The most significant contribution of Millbank’s paper is to redirect attention to “the perspective of the woman undertaking treatment”.[[8]](#footnote-9) This perspective is explored through listening to the voices of women themselves: emerging from this exploration is a critique of “abstract notions of regard for embryos”[[9]](#footnote-10) and the development of “a relational sense of the embryo that centers the woman and values the… meaning of the embryo *to her*”.[[10]](#footnote-11)

This commentary aims not to defend IVF regulation in the UK or Australia against Millbank’s often justified critique, but rather to argue that some of her arguments need to be pursued further and with more consistency.

**How the rhetoric of “special status” functions in practice**

Millbank argues that a focus on the “special status” of the embryo has led to “the disappearance of women in this framework”.[[11]](#footnote-12) However, she fails to question whether the rhetoric of “special status” really functions to give “primacy”[[12]](#footnote-13) or “centrality”[[13]](#footnote-14) to the embryo or to recognise the embryo “as a rights-bearing entity that requires protection”.[[14]](#footnote-15) In the context of the United Kingdom, at least, this language arguably has the opposite function.

UK public policy on IVF is driven by the desire of the government to enable the work of clinicians and scientists while at the same time maintaining public confidence. “Public support for embryo research in the UK is high, but surveys consistently show that it is contingent on the existence of strict regulation”.[[15]](#footnote-16) Regulation, ostensibly based on the attribution of “special status” to the embryo, is thus utilised by government not because it inhibits or restricts experimentation on human embryos but precisely because it helps facilitate such experimentation. This paradox has been called “deregulation via regulation”.[[16]](#footnote-17) I have argued elsewhere that discussion of the status of the human embryo in the United Kingdom therefore functions as “a cipher for other concerns, principally the maintenance of public confidence”.[[17]](#footnote-18) This analysis seems at least prima facie applicable to discussion of IVF in Australia, in that appeals to “the ‘special status’ of the human embryo”[[18]](#footnote-19) also seem to function in Australia to promote, rather than inhibit, “liberal access to a wide range of state-subsidized treatment practices”.[[19]](#footnote-20)

From this perspective, it is not an accident or a “perverse effect”[[20]](#footnote-21) of the law that rhetorical commitment to the embryo’s welfare “may require its destruction”.[[21]](#footnote-22) The true object of concern is not the welfare or protection of the embryo but the management of public opinion. The public is reassured by the establishment of regulations and by the stipulation of rules which scientists deem reasonable. It is not only the woman who is undergoing IVF who has disappeared from this frame; so also has the embryo she conceives.

**Relationality implies a relation with the other**

It is therefore not the case that in the United Kingdom and Australia “law and policy prioritize a universalized and disembodied respect for the embryo over and above the feelings and wishes of those who created them”.[[22]](#footnote-23) Law and policy on IVF in these jurisdictions show scant regard either for human embryos or for the feelings, rights, duties and relationships of those from whom and for whom they were conceived. Hence, if the human nature of the embryo is not currently respected, then it cannot be such alleged (but in fact absent) respect that is impeding greater respect for the woman. While, in specific circumstances, there can of course be some conflict in the prioritising of the interests of the embryo and those of his or her mother, in many more circumstances, these interests “march together” in a way not recognised by regulators, who either see these interests as in conflict or, more often, ignore both sets of interests.

Millbank argues at length, drawing support from the language of the women she quotes, that the embryo can and should be understood in relation to the woman, and perhaps also in relation to the couple, and perhaps also in relation to siblings rather than being understood in the abstract or in relation to wider society. However, this very emphasis on relationality does not sit easily with the determination to focus “exclusively on the perspective of the woman undertaking treatment”.[[23]](#footnote-24) How can selfhood be acknowledged as relational if it is understood “exclusively” from the perspective of one person and thus in isolation from those to whom the person relates?

It may be true, for example, that women generally “experience a greater sense of connectedness to, and investment in, stored IVF embryos,”[[24]](#footnote-25) than do their partners. However, women also relate to their partners and may understand their embryos also in relation to their partners. Indeed, a partner’s relative lack of connectedness may be an important part of the woman’s own narrative.

A greater appreciation of relationality might also have saved the paper from setting up so many false dichotomies. Recognising that the embryo has a “specific significance to the woman undertaking treatment”[[25]](#footnote-26) does not imply that the embryo has no “significance to society at large”.[[26]](#footnote-27) Recognising that “it is her body in which the hope of implantation rests”[[27]](#footnote-28) does not imply that the embryo is not “an object of concern with a future potentiality that should be protected”.[[28]](#footnote-29) Starting with the question, “what is the respect due to the woman undertaking treatment?”[[29]](#footnote-30) does not imply that one cannot also ask the question “what is the respect due to the human embryo?”[[30]](#footnote-31)

Persons exist in relation and if human beings are rational beings, they are also *dependent* rational beings.[[31]](#footnote-32) Nevertheless, this relationality and dependence does not imply that the moral status of human beings is something granted by or constructed by others. We come to recognize the moral status of others, and come to be recognized by others, through our relations with them, but we have an inherent moral status before this status is acknowledged.

Helen Watt has argued at length that an adequate ethical understanding of pregnancy requires both a recognition of the inherent moral status of the embryo or foetus and a recognition that “the embryo’s potential or orientation [is] precisely in relation to the body of a woman who is, or who could be, pregnant.”[[32]](#footnote-33) Indeed, according to Watt, it is not possible to explain the *rights conferred* by pregnancy on the woman if pregnancy is understood only as a matter of location or beneficence. “The child either is, or risks being, or is perhaps appropriately, more to the woman socially and emotionally than that”.[[33]](#footnote-34)

The human nature of the human embryo is thus to be understood relationally. This is not because the embryo lacks a human nature but is because the human nature of all human beings is to be understood relationally. The recognition that the human embryo is an embryonic human being and thus “a rights-bearing entity that requires protection”[[34]](#footnote-35) will nevertheless have different ethical implications for the dislocated embryo in vitro and the embryo in utero. For example, if an embryo cannot be transferred to the woman from whose egg the embryo was conceived, then there is no other woman who has the right or responsibility to receive the embryo. Watt, who argues that human embryos are rights-bearers, argues against embryo “adoption” or “donation” because of the moral significance of pregnancy.[[35]](#footnote-36) Nevertheless, on Watt’s view, if an embryo is transferred to another woman then that woman becomes the gestational mother and acquires maternal rights. Pregnancy makes someone a mother and motherhood brings with it not only responsibilities but also rights.[[36]](#footnote-37)

**Unacknowledged women**

Even before the embryo is transferred to a woman there are rights that accrue to the woman from whom and for whom the embryo was conceived. However, it is a feature of IVF that not only is the embryo dislocated, being conceived outside the body of the genetic mother, but motherhood is also fractured, at least potentially, with genetic, gestational and social maternity potentially lying with different women.

The question “what is the respect due to *the* woman undertaking treatment?”[[37]](#footnote-38) seems to imply that there is but one woman who is “undertaking” IVF. In cases of “egg donation” the effect of Millbank’s question is thus to further marginalise the status of the woman from whose egg the child is conceived. This is the woman that Donna Dickenson had in mind in her essay The Lady Vanishes.[[38]](#footnote-39) The invisibility of this “other woman”[[39]](#footnote-40) is rendered complete in the case of “mitochondrial replacement”[[40]](#footnote-41) techniques when the role of the woman who provides the egg may be denied all maternal or generative significance.

In some cases, both an egg or embryo donor and a “surrogate mother” will be used and the commissioning couple may have no biological link to the child. Such arrangements raise serious questions of exploitation, especially where the surrogate mother is from a lower socioeconomic background and perhaps lives in a poorer country. The relational approach suggested by Millbank has the potential to provide a richer ethical account that could inform lawmaking in this area, both in regard to which activities should be legally prohibited and in regard to managing the consequences when children are born to such arrangements. However, to provide such resources, the focus needs to be widened to include not only the woman undertaking treatment but also the woman from whose egg the embryo is conceived, the genetic father, the embryo in vitro and in utero, the child born in these circumstances, the person or persons who were seeking to bring up the child, and the impact on wider society.

**“They deserve better”**

The greatest strength of Millbank’s paper is in giving access to the self-understanding of eight women who have undergone IVF and who have embryos in storage: Ruby, Clarice, Danielle, Rose, Apple, Phoebe, Scarlet, and Chloe. Their words, which comprise some 12.5% of the paper, are a rich source of insight. These eight women should not be taken as representative and do not speak with one voice; nor are they always clear or consistent in expressing their thoughts. Nevertheless, they each speak from experience and there is a freshness in their words which come without the constraints of a strong theoretic frame. Such material can help challenge the adequacy of common notions of women’s relationships to their embryos.

Millbank helpfully arranges the material, considering issues thematically but also providing extended quotations, especially from Phoebe, Scarlet, and Chloe. This helps bring out some strong common themes. Two themes are particularly noteworthy: first, the added significance of the embryo due to the birth of a sibling from the same “batch”. A number of examples are given but perhaps the most striking is from Ruby: “I look at my Claudia and I go, ‘My god they’re all potential Claudia’s’”.[[41]](#footnote-42)

A second theme, of which Millbank provides several examples, is the women’s aversion to treating the embryo as waste, to be “chucked” in the bin or “flushed down the sink”.[[42]](#footnote-43) It is striking that Mary Warnock uses this same example to show how current regulation and practice does not in fact respect the human embryo: “You cannot respectfully pour something down the sink”.[[43]](#footnote-44) Warnock seems to have thought that, apart from transfer to a woman, no use of, or disposal of, IVF embryos could express respect. In contrast, for Rose or Phoebe this is both a possibility and a practical question: how should they respectfully dispose of their embryos or of the remains of their embryos?

Millbank generally allows the women to speak for themselves but on occasion she brings her own frame to their words. She describes herself as engaged in the “difficult but important task [of crafting] a space in public discourse that can acknowledge women’s experience of relationality in reproduction without having fetal/embryonic personhood claims imposed upon it”.[[44]](#footnote-45) However, in the effort to avoid any claims of personhood or inherent moral status, Millbank effectively imposes her own reductive view of the embryo onto her sources.

Millbank attributes to Chloe the view that the embryo is “The part of me that kind of still makes me a mother”.[[45]](#footnote-46) However, in the quotations provided, Chloe never describes her embryo as a “part of [her]”. Her embryo is “all I have left”; it is “an embryo”; it is “this living little thing there”; it is “mine”; it is “the only living thing that I’ve created”. The embryo that “kind of still makes me a mother”[[46]](#footnote-47) is clearly not simply a part of her but is a distinct living thing to which (or to whom) she relates.

Millbank asserts that “none of the women quoted here, understood their own embryos to be ‘life’ or attributed personhood or almost babyhood to them”.[[47]](#footnote-48) While it is true that those quoted do not use philosophical terms like “personhood”, they do indeed regard their embryos as living beings worthy of some respect. Chloe expressly states that her embryo is “this living little thing there” and though she does not think it is yet a child she does think it is almost a child, it is “the physical thing” that is “the closest to being a child”.[[48]](#footnote-49) Ruby, in the very first quotation in the paper, goes further, stating that “The embryos are our children”.[[49]](#footnote-50) This can, of course, by parsed by reference to her potential for having future children, but that is not how Ruby actually expresses; nor is there any hint that she sees herself as projecting meaning onto the embryos, in the absence of any meaning they have in themselves.

Rose expresses concern about the respectful disposal of her embryos in the words “they deserve better”.[[50]](#footnote-51) Yet “they” can only “deserve” better if they are subjects of desert and beings properly referred to in that way. It is of course possible to reject Rose’s claim in favour of the reductive view expressed succinctly by Ruby’s husband, “No”, they do not deserve better, “they’re just embryos”.[[51]](#footnote-52) However, rather than transparently criticise her material Millbank re-interprets any implicit or explicit claims that the embryo has inherent status worthy of respect. These occasions of re-interpretation take away from the strongest aspect of the paper, which is to redirect attention to the perspective of women undertaking IVF treatment, as expressed in their own words.

1. Jenni Millbank, *Reflecting the ‘human nature’ of IVF embryos: disappearing women in ethics, law, and fertility practice*, J Law Biosci, doi:10.1093/jlb/lsw058 2016, 2 (2016) (hereinafter “Millbank”) [↑](#footnote-ref-2)
2. Millbank, 2. [↑](#footnote-ref-3)
3. Millbank, 2. [↑](#footnote-ref-4)
4. Emily Jackson, *Abolishing the HFEA: The Coalition Government’s Plans for the Regulation of Fertility Treatment and Embryo Research in the UK*, 16 BIOS News 2, 3 (2010), at 3.

Joint Committee [↑](#footnote-ref-5)
5. House of Lords. Report from the Select Committee of the House of Lords, Stem Cell Research (2002), para. 4.4. [↑](#footnote-ref-6)
6. Joint Committee on the Human Tissue and Embryos [Draft] Bill (2007), para. 105. [↑](#footnote-ref-7)
7. Millbank, 14. [↑](#footnote-ref-8)
8. Millbank, 5. [↑](#footnote-ref-9)
9. Millbank, 24. [↑](#footnote-ref-10)
10. Millbank, 16. [↑](#footnote-ref-11)
11. Millbank, 9. [↑](#footnote-ref-12)
12. Millbank, 16. [↑](#footnote-ref-13)
13. Millbank, 4. [↑](#footnote-ref-14)
14. Millbank, 24 quoting Isabel Karpin, *The Legal and Relational Identity of the Non-Yet Generation*, 4 L. Innovation &Technol. 122, 143 (2012). [↑](#footnote-ref-15)
15. Jackson (2010), *supra* note 4, 3. [↑](#footnote-ref-16)
16. Svea Luise Herrmann, *Deregulation via Regulation: On the Moralisation and Naturalisation of Embryonic Stem Cell Research in the British Parliamentary Debates of 2000/2001*. H.2 Österreichische Zeitschrift für Politikwissenschaft, 149 (2003). [↑](#footnote-ref-17)
17. David Albert Jones, *The ‘Special Status’ of the Human Embryo in the United Kingdom: An Exploration of the Use of Language in Public Policy*. 17 Human Reproduction and Genetic Ethics 66, 80 (2011). [↑](#footnote-ref-18)
18. Millbank, 2. [↑](#footnote-ref-19)
19. Millbank, 2. [↑](#footnote-ref-20)
20. Millbank, 3. [↑](#footnote-ref-21)
21. Millbank, 3. [↑](#footnote-ref-22)
22. Millbank, 23. [↑](#footnote-ref-23)
23. Millbank, 5. [↑](#footnote-ref-24)
24. Millbank, 5. [↑](#footnote-ref-25)
25. Millbank, 3. [↑](#footnote-ref-26)
26. Millbank, 3. [↑](#footnote-ref-27)
27. Millbank, 12. [↑](#footnote-ref-28)
28. Millbank, 12. [↑](#footnote-ref-29)
29. Millbank, 9. [↑](#footnote-ref-30)
30. Millbank, 7. [↑](#footnote-ref-31)
31. Alasdair MacIntyre, Dependent Rational Animals: Why Human Beings Need the Virtues (1999). [↑](#footnote-ref-32)
32. Helen Watt, The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Childbearing, 19 (2016). [↑](#footnote-ref-33)
33. Watt (2016), *supra* note 32, 57 [↑](#footnote-ref-34)
34. Millbank, 24. [↑](#footnote-ref-35)
35. Watt (2016), *supra* note 32, 112-114, 129-130. [↑](#footnote-ref-36)
36. Watt (2016), *supra* note 32, 57. [↑](#footnote-ref-37)
37. Millbank, 9, emphasis added. [↑](#footnote-ref-38)
38. Donna Dickenson, *The lady vanishes: What’s missing in the stem cell debate*. 3 J Bioeth Inq 43 (2006). [↑](#footnote-ref-39)
39. David Albert Jones, *The other woman: Evaluating the language of ‘three parent’ embryos.* 10. Clinical Ethics 97 (2015). [↑](#footnote-ref-40)
40. On “mitochondrial replacement” see also Françoise Baylis, *Human Nuclear Genome Transfer (So‐Called Mitochondrial Replacement): Clearing the Underbrush*. 31 BIOETHICS 7 (2017). [↑](#footnote-ref-41)
41. Millbank, 18. [↑](#footnote-ref-42)
42. Millbank, 18. [↑](#footnote-ref-43)
43. Millbank, 3 quoting HL Deb, Dec. 5, 2002, Col. 1327. [↑](#footnote-ref-44)
44. Millbank, 17. [↑](#footnote-ref-45)
45. Millbank, 22. [↑](#footnote-ref-46)
46. Millbank, 22. [↑](#footnote-ref-47)
47. Millbank, 17. [↑](#footnote-ref-48)
48. Millbank, 22. [↑](#footnote-ref-49)
49. Millbank, 2. [↑](#footnote-ref-50)
50. Millbank, 17. [↑](#footnote-ref-51)
51. Millbank, 2. [↑](#footnote-ref-52)