

## The “special status” of the human embryo in the United Kingdom: an exploration of the use of language in public policy

### Abstract

*There is an apparent gap between public policy on embryo research in the United Kingdom and its ostensible justification. The rationale is respect for the “special status” of the embryo, but the policy actively promotes research in which embryos are destroyed. Richard Harries argues that this is consistent because, the “special status” of the human embryo is less than the absolute status of persons. However this intermediate moral status does no evident work in decisions relating to the human embryo. Rather, public policy seems to be based on a different account of “special status”: that developed by Mary Warnock. According to this, the embryo has no inherent status and the language of “special status” serves rather to accommodate the feelings of those who object to embryo research. This “emotivist” account is highly problematic, not so much for its attitude to the embryo as for its subversion of public moral reasoning.*

### Introduction

The aim of this paper is to understand how the phrase “the special status of the human embryo” functions in law and public policy in the United Kingdom. It is not primarily concerned with the moral status of embryo in itself, that is, with the level of respect or protection that it merits. It therefore does not seek to express a view as to whether the embryo is shown too much respect, too little respect, or an appropriate degree of respect. The author naturally has a view on this, and in the interests of transparency, can let it be known that he would wish policy to show greater respect to the human embryo, and indeed this preference may well be apparent at some points in the article. Nevertheless, the primary focus of this argument is not the level of respect given but is rather the rationale that is typically given for public policy on human embryo research and how to understand the observed practice in relation to this rationale.

### I. The apparent gap between rationale and policy in the United Kingdom

It should be noted that the status of the human embryo is not the only ethical issue at stake in the embryo research debate. Indeed, in the 1970s this was less prominent in the assisted reproduction debate than the issue of safety.<sup>i</sup> The issue of eugenics was also important, particularly in the German debate, but not only there.<sup>ii</sup> Tom Banchoff asserts that even the Vatican at first saw the issue of embryo research primarily in relation to the ethics of procreation and only later in the mid-1980s began to associate embryo experimentation more with abortion as a “pro-life” issue.<sup>iii</sup> In the cloning scandal in South Korea in 2005 involving the disgraced scientist Hwang Woo-suk ethical concerns were first raised about how he obtained sufficient quantities of human oocytes. It was alleged that he had paid and even coerced women into “donating” their eggs.<sup>iv</sup> The issue of the embryo played little role in that controversy.<sup>v</sup> So also the impact of assisted reproduction and of human embryo research programmes on women has sometimes played an important role in framing

national legislation in this area, as for example in Canada.<sup>vi</sup> The status of the embryo is thus far from the only ethical issue relevant to the regulation of the use of human embryos in research.<sup>vii</sup>

It is significant, therefore, that the embryo research debate in the United Kingdom, and the public policy that emerged from that debate, has been framed primarily in terms of the moral status of the human embryo. This has repeatedly been given as the rationale for the law in the United Kingdom. Thus the Warnock Report<sup>viii</sup> of 1984 concluded that “the embryo of the human species ought to have a *special status*”.<sup>ix</sup> This status was declared to be “a matter of *fundamental principle* which should be enshrined in legislation”.<sup>x</sup> The Warnock Report provided the basis for the Human Fertilisation and Embryology Act 1990.

Furthermore, in subsequent Reports by the House of Lords in 2002, the House of Commons in 2005, and by both Houses in 2007, the principles of the Warnock Report, and in particular the “special status” of the human embryo, have been asserted to provide the fundamental rationale for legislation in this area:

“The starting point for consideration of the ethics of research on human embryos is the status of the early embryo”<sup>xi</sup>

“We have concluded that the embryo should be accorded special status in common with the Warnock Committee”<sup>xii</sup>

“We acknowledge that the special status of the embryo means regulation of both research and treatment continues to be appropriate and desirable”<sup>xiii</sup>

The “special status” of the human embryo has thus been reiterated many times as the very basis of legislation in the United Kingdom. This is the rationale given by Parliamentary Committees and by government ministers, by those involved in shaping the law.

As policy on embryo research is ostensibly based on the moral status of the embryo, one might expect it to be relatively restrictive, if not absolutely so. However, in practice the United Kingdom is at the least restrictive end of the political spectrum. For example, it has not signed the 1997 *Convention on Human Rights and Biomedicine* in part because this convention prohibits the creation of embryos for research.<sup>xiv</sup>

The same pattern can be seen in a non-binding vote of the United Nations in 2005: the Declaration on Human Cloning, which opposed all forms of human cloning, was passed by 84 votes to 34 with 37 abstentions.<sup>xv</sup> The UK was in the pro-cloning minority, the smallest group.

In 2006, Isasi and Knoppers<sup>xvi</sup> analysed the embryo research policies of 50 countries and categorised them as restrictive, intermediary, or liberal. The largest group, of 27 countries, adopted an intermediary approach not too strict, not too lax, the second largest group was restrictive in orientation, and included 16 countries. The smallest category with only 7 countries was the liberal group, among which was the United Kingdom. It was among a

“negligible number of countries”<sup>xvii</sup> which specifically permitted cloning embryos for research.

Two years later, in 2008 a new law was passed in the United Kingdom, the Human Fertilisation and Embryology Act 2008. This act considered embryos that could be created by mixing human and non-human material, including genetic modification of human embryos and crossing human gametes with those of other animals. It specifically permitted every conceivable category of embryo to be created for research, subject to a licence, to the 14 day limit, to not being transferred into a woman or animal.<sup>xviii</sup> Yet again this legislation put the United Kingdom at the furthest extent of what any country had explicitly permitted.

When we move from legislation to regulation, to what is done in practice, we see the same unwillingness to restrict embryo research.

The regulator, the Human Fertilisation and Embryology Authority (HFEA) shows little evidence of willingness to restrict embryo research in practice. By 2008, 1.2 million embryos had been destroyed or discarded in clinical practice or research in the UK.<sup>xix</sup> In the same period the HFEA had only once refused a research license, and this was later granted on appeal.<sup>xx</sup> This apparent profligacy in the use of human embryos and the extraordinary record of never ultimately refusing a research license makes it difficult to substantiate the claim that research is “subject to stringent controls and monitoring”<sup>xxi</sup>. The Secretary of State explained the then 100% success of research licence applications on the basis that “the HFEA works closely with research teams on the development of the project”<sup>xxii</sup>. However, this very proximity raises the danger of a lack of independence from the interests the HFEA is supposed regulate.

In 2005 the chair of the HFEA told parliament that she thought that “you must subscribe to the acceptability of embryo research”<sup>xxiii</sup> in order to be a member of the HFEA. This seems to exclude from membership those who would show too high a regard for the status of the embryo. However, there was no suggestion that having too little respect for the embryo was an obstacle to membership.<sup>xxiv</sup> Thus while the Warnock Report recommended that the HFEA should not be “unduly influenced by sectional interests” and that “its membership must be wide-ranging”,<sup>xxv</sup> it seems that in practice the membership represents the more pro-research end of the spectrum.

Furthermore, the same House of Commons also expressed concern that the HFEA, rather than act as a watchdog had acted as lobby organisation on behalf of the fertility industry. “We are concerned that the HFEA has crossed the boundary from regulation to advocacy... **it has acted outside its statutory remit and crossed a boundary that risks compromising public trust**”.<sup>xxvi</sup> This same attitude also seems to be exhibited in at least some of the public consultations of the HFEA. The feminist scholar Françoise Baylis, after a detailed analysis of one such consultation, concludes that the HFEA “had a clear policy preference in support of research... [and] it sought to communicate this preference to those who were consulted. Indeed, in many respects, the HFEA consultation process can be seen as an exercise in strategic public relations”.<sup>xxvii</sup>

In summary: There is an apparent gap between the ostensible rationale of law and policy in the United Kingdom (which is to respect the special status of the human embryo) and the content of that policy in practice (which serves to promote research using embryos). The aim here is not to argue which of these attitudes represents a more reasonable or ethical public policy for embryo research, only to exhibit the prima facie disjunction between ethically conservative language and ethically permissive practice.

## II. The conventional explanation: warranted but not absolute respect

One way to explain this apparent paradox is by distinguishing different possible accounts of the moral status of the embryo. Within the context of the debate in the United Kingdom it has become conventional to distinguish three broad categories of approach. These could be summarised as follows:

1. that the embryo is a human life and therefore is entitled to conferral of full human rights;
2. that the development of personhood is a gradual process but that the embryo is entitled to some protection; and
3. that the embryo is no more than a collection of cells, albeit with the potential to develop into a human being.<sup>xxviii</sup>

The first approach would, of course, guarantee full human rights and protection, and it is this possibility that is most immediately suggested by words such as “respect”, as for example in the World Medical Association Declaration of Geneva of 1948, “I will maintain the utmost respect for human life, from the time of its conception, even under threat”.<sup>xxix</sup> This approach typically lays great stress of the humanity of the embryo: “a human embryo is a whole living member of the species *Homo sapiens* in the earliest stage of his or her natural development”.<sup>xxx</sup> Nevertheless, without prejudice to the arguments in favour or against this position, it is clear that this form of respect or moral status is not that which embodied by legislation in the United Kingdom. The Human Fertilisation and Embryology Act 1990 permits the destructive use of embryos in research, which it could not do if the embryo were treated as possessing full human rights.

The third approach is less an account of moral status than the bald denial of moral status, as is asserted by Professor Julian Savulescu with admirable frankness, “The embryo does not have a moral status, above that which is derived from the interests of a couple or individual to have a child”.<sup>xxxi</sup> This instrumental approach would clearly allow use of human embryos for research but is not compatible with the repeated assertions of “special status” which characterise policy statements in the United Kingdom. No status is not a special status.

According to the second approach, which one might term inherent but intermediate status, the human embryo possesses a “special” moral status that deserves respect but the respect due to the embryo is less than the “absolute respect” due to adult persons. This is the approach taken by Richard Harries,<sup>xxxii</sup> the Anglican bishop who both chaired the House of Lords Select Committee on Stem Cell Research (in 2001) and was a member of the HFEA (from 2003 to 2009) and for a brief period was its interim chair (in 2006). According to

Bishop Harries, the “special status” of the embryo is intermediate, a middle way between full status and no status. Full moral status would not permit the use of human embryos; no status would allow use but would contradict the stated rationale for the law. The “special status” of the embryo is purportedly an intermediate status that implies some respect and shows this respect through the stringent requirements of the law.

“All this, it seems to me, gives substance to the claim that the early embryo does indeed have ‘a special status’ in law and that behind this special status is the idea that although it does not have the absolute respect due to persons it does have the moral respect which it warrants.”<sup>xxxiii</sup>

However, if respect for the embryo is supposed to be more than that due to a clump of cells but less than that due to a person, with an intermediate status that increases gradually through development, this immediately raises a number of puzzling questions:

- Does the idea of gradation contradict the idea of respect?<sup>xxxiv</sup>
- If respect can reasonably be graduated, how much respect should be shown to the embryo at the various stages of its development?
- Why, for example, allow research only up to 14 days if abortion is legal in the United Kingdom up to 24 weeks and up to birth for reason of disability?
- Why is there no gradation of penalties for transgression of the law in accordance with the age of an embryo used in research?
- How is one to establish moral criteria for these decisions?
- Does this intermediate status require a specific philosophy of the person to give it content?
- Or is there more than one philosophical approach that could justify “special status”, in which case, is there more than one set of criteria?
- How can “special status” do the real work needed to make concrete decisions?

The idea of a “special status” which is more than nothing and less than everything is in fact radically ambiguous, as philosophically and theologically there are innumerable more or less restrictive forms of intermediate status. A modern theory of personhood as defended by philosophers such as John Harris or Peter Singer represents one form of intermediate status, a gradual increase in status from fertilisation to self-awareness, but it would not give any significant status to the embryo or foetus until it was sentient. It would be almost nothing. On the other hand the Christian tradition, while it has sometimes included a kind of intermediate status (for example, graded penalties for abortion) has never sanctioned the deliberate destruction of human life at any stage of development.<sup>xxxv</sup> It is almost everything.

To establish criteria as to where to place the middle way, how to treat the embryo at what stage of development, it is therefore necessary to construct a philosophical account of the embryo that neither collapses into the personhood view preferred by many modern bioethicists nor tends to the full moral status view supported by the Geneva Declaration (and, arguably, by the mainstream of the Christian tradition until the twentieth century). Furthermore this middle position would have to be specified with the level of detail and rigour that could act as a guide to action in relation to how much protection at what stage.

However, there is no widely accepted account of “special status” that provides such detail. It remains forever hazy, set out only in general terms.

Furthermore, as has been pointed out, neither in law nor in public policy does the United Kingdom represent an intermediate position. On any international comparison, United Kingdom policy is consistently at one end of the spectrum, among the most pragmatic or instrumental in its attitude to the human embryo. While the HFEA pays lip service to the “special status” of the human embryo, it shows great reluctance ever to restrict research for the sake of respecting the embryo. “HFEA has long supported a permissive legislative framework for human embryo research—all such research should proceed on condition that the purpose of the research is legally permitted and the research is limited to 14 days.”<sup>xxxvi</sup>

### III. An alternative explanation: Warnock’s emotivist account of “special status”

There is, however, an alternative explanation for this apparent gap between rationale and policy on embryo research. While the Warnock Report coined the term “special status”, Warnock’s own account of respect for the “special status” of the embryo is subtly different from the conventional account of inherent intermediate status defended by Harries and others. This alternative approach can be seen at work even in the Warnock Report itself. Rather than engage with “questions of when life or personhood begin” Warnock sought instead go “straight to the question of *how it is right to treat the human embryo*”.<sup>xxxvii</sup> She thus sought to “bypass the concept of the person altogether”.<sup>xxxviii</sup> What then was the basis for attributing moral status to the embryo? Consider the following passage from the Warnock Report:

“Nevertheless, because of the special status that we accord to the human embryo, such research must be subject to stringent controls and monitoring... We see these controls as essential to safeguard the public interest and to allay widespread anxiety.”<sup>xxxix</sup>

It begins with reference to the status of the embryo, but at the end of the paragraph an alternative reason is given for these restrictions: to allay public anxiety. The legal scholar Professor Emily Jackson, herself now deputy chair of the HFEA, gives an illuminating interpretation of this:

“A majority of the Warnock Committee admitted that the instrumental use of the early human embryo will profoundly offend those who believe that a person comes into being immediately after fertilization, but decided that that offence has to be put into the balance with the benefits which may flow from embryo research.”<sup>xl</sup>

Note that what is being compared with possible benefits from research is not harm *to the embryo* but moral offence *to the public*. The embryo itself has dropped out of consideration. Lest anyone question whether Jackson, writing much later, is reading this view back into the report we have the words of Warnock herself, writing in 1987 only three years after the publication of the Report.

“So no harm could come to *it* by its being destroyed, only to someone else. But the harm to someone else could take no other form than *an offence to moral feelings*.”<sup>xli</sup>

“And so we come to the compromise . . . the attempt to balance utilitarian consideration of beneficial outcome against moral feelings that human cells, though not identical with human beings, yet need to be treated differently.”<sup>xlii</sup>

Note that Warnock is adamant that the destruction of a human embryo does it no harm: so all that is left to compare is the more or less realistic prospect of beneficial outcomes over and against the more or less strong feelings of offence. The embryo itself does not figure, it cannot be harmed; Warnock thus explicitly denies the embryo any inherent moral status.

It should be clear that this is not an account of the moral status of the *embryo*, which is treated only as the object of moral feelings. It is, rather, an emotivist account of moral *discourse* about the embryo. By emotivism, I mean the view that moral statements should be understood as no more or less than expressions of feeling, in this case, the feelings of those who object to destroying human embryos. In describing her philosophical account she states that she has moved beyond pure utilitarianism and is seeking to mix this with some accommodation of moral feelings.

“And, at this point, I am inclined to think that utilitarianism breaks down. For as soon as the criterion of right and wrong moves from a plain calculation of benefits and harms, and begins to take into account people’s *moral sentiments*, then I believe it becomes a different theory.”<sup>xliii</sup>

Warnock’s approach is highly problematic. It is disingenuous to call this an account of “the status of the embryo” when the embryo has dropped out of consideration and it is only the moral feelings of objectors that are considered. Furthermore, it is an arbitrary admixture of theories, for the case in favour of using embryos is described in utilitarian terms as though it had no subjective element, while the case against is described only in relation to the feelings of the proponents, as though the embryo has no objective moral status. However, if it could be demonstrated that the embryo had no inherent or objective moral status then it is not clear why the offense taken by its defenders would be worthy of such respect. This point is well made by Professor John Harris.

“[T]he crucial problem entirely ignored by Warnock is that not all feelings are moral feelings and not all outrage is moral outrage. So that while we ought to respect the moral beliefs and feelings of others even when we don’t share them, we have no reason to respect their prejudices.”<sup>xliiv</sup>

Ironically, while Warnock is seeking to show respect to those who object to embryo research, it is Harris who shows greater respect. For, in distinguishing moral outrage from prejudice, Harris redirects us to the content and rationale of those feelings. Those who object to the destruction of human embryos are not primarily objecting that people do not respect their feelings. They are objecting because they regard the embryo as having some inherent moral worth or status (even if it only an intermediate moral status). Harris denies

that embryos possess any such inherent worth, but at least he is addressing the question of the status of the embryo itself. He is not seeking to by-pass this question or to re-describe moral status in terms of the expression of emotion.

#### IV. Warnock's account as a description of the use of "special status" language

Warnock's approach thus utterly fails as a convincing account of what it is to respect the moral status of the embryo. Indeed such an account fails not only to respect the embryo but even to respect the moral feelings of those who respect the embryo. However, while Warnock's approach is deeply flawed as an account of the *meaning* of moral status of the embryo, it may be helpful as an account of the *use* of this language in the British political context.

Here some illumination may be provided by Alasdair MacIntyre who has argued that, understood historically, emotivism is better regarded not as a general analytic account of the meaning of moral terms, but as an empirical account of how moral terms are used in a specific context. The theory of emotivism was first propounded in Cambridge in the early twentieth century. The immediate context of this theory was the influence of GE Moore for whom moral judgement was supposed to be a matter of intuiting "the presence or absence of the non-natural property of good".<sup>xlv</sup> However, as such a non-natural property does not exist, except as a philosopher's fancy, this was a hopeless task. There was therefore a "gap between the meaning and purport of what was being said and the use to which the utterance was being put".<sup>xlvi</sup>

In analogous way, it seems that there is a gap between meaning and use in relation to the "special status" of the human embryo. The actual use of this term is accurately discerned by Warnock not to reflect an inherent but intermediate respect for the embryo, rather it reflects a purely instrumental status, subject only to the need to maintain public confidence. "Special status" thus stands as a cipher for public feelings. This explains why consultations of the HFEA have the strategic function of managing public reactions, for on this account the function of the whole regulatory structure is not to grant actual protection to the embryo, but rather to maintain public support for policies decided primarily on utilitarian grounds.

Warnock's account of the moral status of the embryo also explains why the HFEA have been so concerned with public opinion. According to Harries "The work of the HFEA is affected by a number of factors. The first is public opinion."<sup>xlvii</sup> If the ethical foundation of regulation is the moral status of the embryo, why is it so important to continue to assess public attitudes? Neither ethics committees that concern research on human subjects nor those concerned with animal welfare take *such* a keen interest in public opinion. Their primary focus is on the welfare of the human or nonhuman subjects of the research. This is surely because, in these cases it is the research subject itself that is the focus of ethical concern, whereas the interests of the embryo do not seem to figure prominently in the deliberations of the HFEA. The embryo itself has no status.

The Warnock account of "special status" also shows why this term is so frequently defended by those who wish to *deregulate* embryo research. A good example is the Science and



Technology Committee Report of 2005. This committee was deeply divided with five of the ten members dissenting and issuing a statement that the report adopted “an extreme libertarian approach from the start”, and was “unbalanced, light on ethics, goes too far in the direction of deregulation and is too dismissive of public opinion and much of the evidence”.<sup>xlviii</sup> It is striking that this highly permissive committee, writing in a context which is already highly permissive by international standards, nevertheless appealed to “the Warnock Committee’s approach to the status of the embryo.”<sup>xlix</sup> Indeed so entrenched was this approach that the committee found that “the third view, that the embryo is no more than a ball of cells, has not been expressed to us in this inquiry”<sup>1</sup>. This is readily explicable if the third view, the explicitly instrumentalist approach, had become redundant. “Special status” is invoked by those promoting deregulation because, as the term is used in the UK debate, special status simply is a disguised form of instrumental status.

The situation in the United Kingdom thus embodies the irony of using the language of status as a means to strip the embryo of status.<sup>li</sup> This has been described as “deregulation by regulation”<sup>lii</sup>. Far from being a compromise position establishing a real but intermediate status it represents an instrumental use not only of the embryo itself but of the public language of moral status.

Warnock’s account of the actual use of the term “special status” also shows why policy makers can appeal to the concept despite there being no philosophical consensus around an intermediate status that could support decision-making criteria; these criteria are not in fact needed, for the content of “special status” does no work, its function is not to guide policy but to act as a façade to shield policy constructed on a different basis: by assessing how far it is possible to promote embryo research while maintaining public confidence. The aim of the legislation, as Jackson has astutely observed, is not actually to protect the embryo but is to minimise offence.

“the restrictions placed upon embryo research are not principally concerned to protect the individual embryo... and instead [are] concerned principally with ensuring that scientists’ behaviour minimises, as far as possible, moral offence”.<sup>liii</sup>

With passage of time Warnock’s approach has become entrenched in the United Kingdom with the result that the question of the status of the embryo has been assumed to be settled. Yet “special status” as this phrase is used in the UK debate has no inherent content but functions as a mechanism to manage public concerns, so that the issue of the inherent status of the embryo has not been resolved so much as “by-passed”.

That the rationale for public policy relies on a deception, a denial of status disguised as the attribution of status, is something Warnock herself now seems to admit.

“I regret that in the original report that led up to the 1990 legislation we used words such as ‘respect for the embryo’ ... you cannot respectfully pour something down the sink – which is the fate of the embryo after it has been used for research, or if is not going to be used for research or for anything else”.<sup>liv</sup>

Inasmuch as Warnock's original account of "special status" accurately reflects its use in public policy discussions in the United Kingdom, this is deeply problematic, even from a utilitarian perspective. For even if this usage is regarded as a political device that has utility in defusing public anxiety while allowing human embryos to be used, it is a deceptive device that relies on disguising its true rationale. Such a strategy, even if defensible in utilitarian terms, relies on Sidgwick's principle that "a Utilitarian may reasonably desire, on Utilitarian principles, that some of his conclusions should be rejected by mankind generally"<sup>iv</sup>. However, this is to abandon the transparency of public moral reasoning, a move that is controversial even among utilitarians. It represents an elitist, anti-democratic and even a colonial attitude, what Bernard Williams has termed "government house utilitarianism"<sup>vi</sup>.

## **V. The review of the HFEA and the implications of this analysis**

The present political context for this discussion in the United Kingdom is the question of whether the responsibilities of the HFEA might be re-assigned as part of a larger review of arms-length bodies. In this context, the chair of the HFEA, Professor Lisa Jardine, has warned that this would threaten the status of the embryo.

"My worry is that... the safeguarding of the 'special status of the embryo' will be lost – that fundamental principle laid down in the Warnock report, which provides special protection in law for the human embryo and embryonic material outside the body."<sup>vii</sup>

A similar point was made by Professor Jackson,

"On the other hand, if the HFEA disappears and embryo research becomes just one part of a much larger body's remit, the original justification for setting up the HFEA in the first place – the special status of the human embryo – may become lost. Public support for embryo research in the UK is high, but surveys consistently show that it is contingent on the existence of strict regulation."<sup>viii</sup>

This appeal has drawn calls of support, with more or less reluctance, from those who regard the human embryo as possessing some real inherent moral status. Hence, for example Ian Galloway, Convener of the Church and Society Council of the Church of Scotland stated that,

"We are concerned that if the regulation of research on human embryos is handed to a more general body, the special status of the embryo recognised in law will be further eroded. This special status is a fundamental principle laid down the Warnock report, and prevents human embryos from being used in routine research."<sup>lix</sup>

So also Lord Alton of Liverpool, an indefatigable defender of the full moral status of the human embryo, has expressed his caution by quoting a verse of Hilaire Belloc, "always keep a-hold of Nurse, For fear of finding something worse".<sup>lx</sup>

The analysis presented here suggests that Galloway and Alton had been mistaken in thinking that if the HFEA is abolished "the special status of the embryo recognised in law will be further eroded". For, the concept of "special status" in the context of public policy is not an

inherent but intermediate status recognised by law but is a cipher that acts to strip the embryo of status. This may be discerned even in the way that Jackson juxtaposes “special status” with the need for “public support”. This juxtaposition coheres perfectly with the key claim of this paper, that the concept of “special status” has no inherent content but functions as a mechanism to maintain public support. Later in the same article Jackson quotes Hon Andrew Lansley MP as saying, “It was always clear that the legislation is not intended simply to facilitate research”<sup>lxi</sup>. However, an alternative explanation is that the law and system of regulation were indeed established “simply to facilitate research” and this facilitation was to be achieved through the managing of public sentiment. Such management is instrumental or in Francois Baylis’s terms “strategic” and it is for this reason that the HFEA in its consultations aims “to change the ideas, attitudes and behaviors of publics but not those of the organization”<sup>lxii</sup>.

The HFEA was established on the basis of the Warnock Committee approach and such an approach is not based on an attribution of inherent but intermediate moral status to the human embryo. The special status of the embryo has always been a cipher for other concerns, principally the maintenance of public confidence. Nor is there a danger that matters would become “worse”, for those for whom “worse” means more use of human embryos in research. Both the philosophical analysis of “special status” provided here (that such “status” is understood in emotivist terms), and the actual behaviour the HFEA, as evident in the conduct of its consultations and the character of its subsequent decisions, demonstrates that it always acts so as to promote the use of human embryos as far as it can within the limits of its powers and the limits of public opinion.

This paper has identified a problem with UK public policy on embryo research, not in relation to how much or little respect is shown to the embryo, for this substantive question is outside the scope of the present discussion. The key problem here identified is that UK public policy embodies an emotivist approach to discussion of the moral status of the human embryo. Ruth Deech, a former chair of the HFEA has warned against any radical change arguing that “in all such amalgamations history tells us that very often you go back to ground zero”<sup>lxiii</sup>. In practice this seems unlikely, as it underestimates the extent to which the Warnock Report and its principles are almost certain to remain the point of reference for public policy discussion in the United Kingdom.<sup>lxiv</sup> However, were it achievable, ground zero is precisely where we should wish to get back to in relation to the status of the human embryo. For, moral theories are perpetuated by the institutions in which they are embedded and the HFEA embodies an approach to the “special status” of the human embryo that is deceptive, corrupting to public moral discourse, and that effectively suppresses honest debate and reflection on a fundamental moral question.

In summary, a public policy has been established in the United Kingdom that is not only instrumentalist about the embryo but is instrumentalist in its use of moral language and instrumentalist in its attitude to the public. The exposing of this conceit is a prerequisite for an open debate about the degree of respect that is actually due to the human embryo itself whether this be the utmost respect, or an intermediate degree of respect, or, in all honesty, no respect at all.

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- <sup>i</sup> Thomas Banchoff, *Embryo Politics: Ethics and Policy in Atlantic Democracies* (Ithaca and London: Cornell University Press, 2011), 32-34.
- <sup>ii</sup> Banchoff, *Embryo Politics* 3, 27-30.
- <sup>iii</sup> Banchoff, *Embryo Politics* 30-32.
- <sup>iv</sup> Donna Dickenson, *Body Shopping* (Oxford: Oneworld, 2008) 166–7.
- <sup>v</sup> Emily Jackson, “Fraudulent Stem Cell Research and Respect for the Embryo,” *BioSocieties* 1 (2006): 349-356.
- <sup>vi</sup> Diana Backhouse and Maneesha Deckha, “Shifting Rationales: The Waning Influence of Feminism on Canada’s Embryo Research Restrictions” *Canadian Journal of Women and the Law*, 21.2 (2009): 229-266; see also Françoise Baylis and Matthew Herder, “Policy design for human embryo research in Canada: A history. Part 1 of 2” *Journal of Bioethical Inquiry* 6.1, (2009): 109-122; Françoise Baylis and Matthew Herder, “Policy design for human embryo research in Canada: An analysis. Part 2 of 2” *Journal of Bioethical Inquiry* 6.3, (2009): 351-365; Carolyn McLeod and Françoise Baylis. “Feminists on the Inalienability of Human Embryos” *Hypatia* 21.1 (2006): 1-14.
- <sup>vii</sup> David A. Jones, “Is the creation of admixed embryos ‘an offense against human dignity?’” *Human Reproduction and Genetic Ethics* 16.1 (2010): 87-114.
- <sup>viii</sup> Mary Warnock (chair) *Report of the Committee of Enquiry into Human Fertilisation and Embryology* (London: Her Majesty’s Stationery Office, 1984). For the political background to the Warnock Report and the debates that led to the 1990 Act, see Michael J. Mulkey *The Embryo Research Debate: Science and the Politics of Reproduction* (Cambridge: Cambridge University Press, 1997).
- <sup>ix</sup> Warnock, *Report* 11.17 emphasis added.
- <sup>x</sup> Warnock, *Report* 11.17 emphasis added.
- <sup>xi</sup> House of Lords. *Report from the Select Committee of the House of Lords, Stem Cell Research* (London: Her Majesty’s Stationery Office, 2002) 4.4.
- <sup>xii</sup> House of Commons Science and Technology Committee *Fifth Report of Session 2004-05. Human Reproductive Technologies and the Law* (London: Her Majesty’s Stationery Office, 2005) Vol.I, paragraph 49.
- <sup>xiii</sup> Joint Committee on the Human Tissue and Embryos (Draft) *Bill Report Volume I, HL Paper 169-I and HC Paper 630-I* (London: Her Majesty’s Stationery Office, 2007) paragraph 105.
- <sup>xiv</sup> Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, (ETS No.: 164), 18 (2) “The creation of human embryos for research purposes is prohibited” (Oviedo: Council of Europe 1997) <http://conventions.coe.int/Treaty/en/treaties/html/164.htm> [accessed 28 October 2011]
- <sup>xv</sup> United Nations “General Assembly adopts United Nations Declaration On Human Cloning by vote of 84-34-37” Press Release GA/10333 <http://www.un.org/News/Press/docs/2005/ga10333.doc.htm> [accessed 28 October 2011]

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<sup>xvi</sup> Rosario M. Isasi and Bartha M. Knoppers, "Mind the Gap: Policy Approaches to Embryonic Stem Cell and Cloning Research in 50 Countries" *European Journal of Health Law* 13 (2006): 9-26.

<sup>xvii</sup> This included only seven out of fifty countries surveyed: Belgium, Japan, Singapore, South Korea, Sweden and United Kingdom (by law) and Israel (by national guidelines), Isasi and Knoppers, "Mind the Gap", p. 19.

<sup>xviii</sup> The Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008), section 4A, see especially 4A 6(a)-(e).

<sup>xix</sup> Hansard, *House of Commons, Written Answers to Questions*. Volume 471 Part 40 (29 January 2008). Column 342W.

<sup>xx</sup> The exact figure from embryos created was 2,137,924. These were created for IVF but 1.2 million were not used for this purpose. MacKenna Roberts, "UK parliament alarmed by 1.2 million leftover IVF embryos" *BioNews* 439 (07 January 2008) [http://www.bionews.org.uk/page\\_13266.asp](http://www.bionews.org.uk/page_13266.asp) [accessed 28 October 2011]

<sup>xxi</sup> Warnock, *Report* 11.18.

<sup>xxii</sup> Hansard, *House of Commons, Written Answers* 342W.

<sup>xxiii</sup> House of Commons, *Human Reproductive Technologies*, Vol I paragraph 202.

<sup>xxiv</sup> These remarks are not isolated. When giving evidence to US President's Council on Bioethics, the chair of the HFEA stated that "don't think we need them continually on the committee saying that I am opposed to all of this..." (House of Commons, *Human Reproductive Technologies*, Vol II, Ev 265, paragraph 10), again nothing was said about whether there might be an analogous problem with those who were continually "in favour of all this".

<sup>xxv</sup> Warnock, *Report* 13.4.

<sup>xxvi</sup> House of Commons, *Human Reproductive Technologies*, Vol I paragraph 216, bold in the original. The issue on which the HFEA was taken to task was the promotion of gamete donation. It is difficult not to see the 2011 decision of the HFEA to increase payment to donors (up to £750 per cycle in the case of egg donors) as repeating history and again crossing the line from regulation to advocacy.

<sup>xxvii</sup> Françoise Baylis, "The HFEA Public Consultation Process on Hybrids and Chimeras: Informed, Effective, and Meaningful?" *Kennedy Institute of Ethics Journal* 19.1 (March 2009), p. 47.

<sup>xxviii</sup> House of Commons, *Human Reproductive Technologies*, Vol I paragraph 24.

<sup>xxix</sup> David A. Jones, "The Hippocratic Oath II: Modern adaptations of the classical doctors' oath," *Catholic Medical Quarterly* 56.1 (February 2006): 6-16.

<sup>xxx</sup> Robert P. George and Christopher Tollefsen *Embryo: A Defense of Human Life* (New York: Doubleday, 2008), p. 3. Other scholars arguing the same point would include Laura Palazzani "The Nature of the Human Embryo: Philosophical Perspectives" *Ethics and Medicine* 12 (1), 14-18, Helen Watt, "Embryos and pseudoembryos: parthenotes, reprogrammed oocytes and headless clones" *J Med Ethics* 33 (2007):554-556, David A. Jones, *The Soul of the Embryo: An enquiry into the status of the human embryo in the Christian tradition*, London: Continuum, 2004, pp. 214-235, among many others.

<sup>xxxi</sup> Julian Savulescu "The HFEA has restricted liberty without good cause," *Guardian* 7 Feb 2011. Other scholars arguing the same point would include John Harris, "The Concept of the Person and the Value of Life," *Kennedy*



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*Institute of Ethics Journal* 9.4 (1999) 293-308 , Peter Singer, *Unsanctifying Human Life*, ed. Helga Kuhse Malden: Blackwell Publishers Ltd., 2002, among many others.

xxxii Richard Harries, "Delivering Public Policy: The Status of the Embryo and Tissue Typing" *Studies in Christian Ethics* 18 (2005): 57-74. Other scholars arguing the same point would include Gordon Dunstan. "The moral status of the human embryo: a tradition recalled," *J Med Ethics* 1 (1984): 38-44; Donald Bruce "Stem cells, embryos and cloning - Unravelling the ethics of a knotty debate," *Journal of Molecular Biology* 319 (2002): 917-925 among many others.

xxxiii Harries, "Delivering Public Policy", p. 58.

xxxiv The idea of an embryo or foetus as meriting some *proportion* of the respect due to a person seems to imply that respect for persons could be present in proportion. This is reminiscent of the discredited compromise of the Philadelphia Convention of 1787 where a slave counted for "three fifths" of a free citizen. To be counted as three fifths of a person is surely a denial of respect.

xxxv Jones, *The Soul of the Embryo*; David A. Jones, "A Theologians Brief On the place of the human embryo within the Christian tradition and the theological principles for evaluating its moral status" *Ethics and Medicine* 17.3 (Fall 2001): 143-153.

xxxvi Baylis, "The HFEA Public Consultation", p. 58.

xxxvii Warnock, *Report* 11.9 emphasis in the original.

xxxviii Mary Warnock, "Do human cells have rights?" *Bioethics* 1.1 (1987): 1-14, p.3.

xxxix Warnock, *Report* 11.18.

xl Jackson, "Fraudulent Stem Cell Research", p. 353.

xli Warnock, "Do human cells have rights?", p. 7 emphasis in the original.

xlii Warnock, "Do human cells have rights?", p. 13.

xliii Warnock, "Do human cells have rights?", p. 8 emphasis in the original.

xliv John Harris, "Embryos and Hedgehogs: on the moral status of the embryo" in John Harris and Anthony Dyson *Experiments on Embryos* (London: Routledge, 1990), p. 74.

xliv Alasdair MacIntyre, *After Virtue* (London: Duckworth, 1985) p. 17.

xlvi MacIntyre, *After Virtue* p. 17.

xlvi Harries, "Delivering Public Policy", p. 72.

xlvi BioNews "UK committee split over reproductive technology report" BioNews 301 (24 March 2005) [http://www.bionews.org.uk/page\\_12299.asp](http://www.bionews.org.uk/page_12299.asp)

lxix House of Commons, *Human Reproductive Technologies*, Vol I paragraph 28.

<sup>l</sup> House of Commons, *Human Reproductive Technologies*, Vol I paragraph 28.

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<sup>li</sup> This is an exact parallel to the proposal the 1979 Ethics Advisory Board in the United States that the embryo be treated with “profound respect” but that destructive use of embryos should be permitted before 14 days development. Daniel Callahan in his analysis of that judgement stated that the term “profound respect” served as cover for “stripping preimplantation embryos of any value at all” Daniel Callahan “The Puzzle of Profound Respect” *Hastings Center Report* 25.1 (1995): 39-40.

<sup>lii</sup> Svea Luise Herrmann, “Deregulation via Regulation: On the Moralisation and Naturalisation of Embryonic Stem Cell Research in the British Parliamentary Debates of 2000/2001,” *Österreichische Zeitschrift für Politikwissenschaft*, H.2 (2003): 149-161.

<sup>liii</sup> Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* Oxford: Hart Publishing, 2001, p. 232.

<sup>liv</sup> Hansard *House of Lords, Debates. Volume 641 Part 14* (5 December 2002), Column 1327.

<sup>lv</sup> “[I]t seems expedient that the doctrine that esoteric morality is expedient should itself be kept esoteric. Or, if this concealment be difficult to maintain, it may be desirable that Common Sense should repudiate the doctrines which it is expedient to confine to an enlightened few. And thus a Utilitarian may reasonably desire, on Utilitarian principles, that some of his conclusions should be rejected by mankind generally.” Henry Sidgwick (1874) *The Methods of Ethics* as quoted in the (1874), p. 490 as cited in Driver, Julia, “The History of Utilitarianism”, *The Stanford Encyclopedia of Philosophy* (Summer 2009 Edition), Edward N. Zalta (ed.), Available at <<http://plato.stanford.edu/archives/sum2009/entries/utilitarianism-history/>>.

<sup>lvi</sup> Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana, 1985), p. 109; Bernard Williams, *Utilitarianism for and against* (Cambridge: Cambridge University Press, 1973), p. 139.

<sup>lvii</sup> Sarah Boseley, “Human embryos ‘at risk of losing legal protection’ in research: Lisa Jardine, chair of watchdog HFEA, warns that coalition plans will scrap the special status restricting use of embryos” *Guardian* 5 January 2011.

<sup>lviii</sup> Emily Jackson, “Abolishing the HFEA: The coalition government’s plans for the regulation of fertility treatment and embryo research in the UK” *BIOS News* 16 (Michaelmas 2010), p. 3.

<sup>lix</sup> Church of Scotland: News “Church calls for the continued protection from research for human embryos” (Friday 7, January 2011)  
[http://www.churchofscotland.org.uk/news\\_and\\_events/news/archive/archive/church\\_calls\\_for\\_the\\_continued\\_protection\\_from\\_research\\_for\\_human\\_embryos](http://www.churchofscotland.org.uk/news_and_events/news/archive/archive/church_calls_for_the_continued_protection_from_research_for_human_embryos)

<sup>lx</sup> Hansard House of Lords Grand Committee Column GC333 (Tuesday, 1 February 2011).  
<http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110201-gc0001.htm#11020174000138>

<sup>lxi</sup> Jackson, “Abolishing the HFEA”, p.3 quoting Hansard 12 May 2008 c1073.

<sup>lxii</sup> Baylis, “The HFEA Public Consultation”, p. 47 quoting James E. Grunig, “Theory and Practice of Interactive Media Relations,” *Public Relations Quarterly* 35 (3): 18–23, p. 21.

<sup>lxiii</sup> Ruth Deech, “How not to save money: Unscrambling the HFEA” *BioNews* 570 (09 August 2010)  
[http://www.bionews.org.uk/page\\_68208.asp](http://www.bionews.org.uk/page_68208.asp) [accessed 28 October 2011]

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<sup>lxiv</sup> Banchoff has called attention to “the force of historical and institutional legacies” (Banchoff, *Embryo Politics* p. 4) in determining embryo research policy, not only in the United Kingdom but equally in United States, France and Germany.