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ARTICLE

THE MEANING OF PERSON IN THE CONTEXT OF HUMAN EMBRYONIC CLONING—EVOLVING CHALLENGES FOR THE RULE OF LAW IN THE INTERNATIONAL ORDER

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> Any human society, if it is to be well-ordered and productive must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And as these rights and obligations are universal and inviolable so they cannot in any way be surrendered.[1]

I. INTRODUCTION

With these words, Pope John XXIII identified that every human being is a person with rights and duties. In the present day world, discussions of rights and duties of persons appear to be understood by all. But are they? In particular, how sound is the understanding of "who" is the person who is entitled to rights and expected to perform duties? This brief essay will provide a framework for tackling these issues. In doing so, it will provide some background about how the law, both domestic and international, has understood and explained "who" is a person before the law. For millennia, the law has acknowledged that a "person" simultaneously has rights and obligations that exist because of the law. But the understanding of "person" may need to be reconsidered in light of recent scientific developments that have had or will have an impact on the nature of human life and who is the human being that is closely connected with the legal concept of per-

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1. Pope John XXIII, *Pacem in Terris,* No. 9 (St. Paul Edition, April 11, 1963).

sonhood. Consequently, I will look at the impact that human cloning, particularly embryonic cloning is having on the continuum of human life and how this impact has a bearing on the nature and legal understanding of the human person.

These words of John XXIII also bring together the four elements of this symposium—God, the person, history, and the law. No person, who is created in God's divine image, can ultimately escape, as human history demonstrates, one's due or responsibility. As each person is owed his or her due from others, so too does each person owe his or her due to others. Yet, each of us knows that what is constitutive of the person—the human person—has and continues to be the subject of debate, particularly in discussions about the law and its meaning. Illustrative of these points was the debate surrounding Dred Scot: was he a person? Of course he was. The real problem was whether he was a person under the law of the land. In 1856, national history and the law of the land, whose meaning was vigorously debated, stated, or so a majority of the Supreme Court concluded, that he was not. But would the outcome have been the same under other systems of law, especially the natural law of right reason?[2] The question could be extended to the members of his family who were simultaneously swept up in the political, social, and legal drama surrounding this notorious case. The question about the legal status of Dred Scot and his family was raised and answered in this manner:

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and *had no rights or privileges but such as those who held the power and the Government might choose to grant them.*[3]

2. The significance of right or practical reason and the law was relied upon and developed by Thomas Aquinas in his Treatise on Law, where he stated, as the first principle of the law, that "good is to be done and pursued, and evil is to be avoided." Thomas Aquinas, *Summa Theologiae*, Part I-II, q. 94, a. 2, (available at http://www.ccel.org/a/aquinas/summa/FS/FS094.html) (accessed Nov. 6, 2003). Right reason is a search for truth that is not only conceptual but also practical. The search for truth is inextricably combined with the application or implementation of the truth. In this way, the rational and the moral merge through the exercise of right reason. For a more contemporary explanation of right reason, see Austin Fagothey, SJ, *Right and Reason: Ethics in Theory and Practice* 99-101 (6th ed., The C.V. Mosby Co. 1976).

3. *Dred Scot v. Sanford*, 60 U.S. 393, 404-05 (1856) (emphasis added).

The law in the United States and the law in the rest of the world has changed. No longer are persons who fall within any racial classification viewed as subordinate and inferior beings and denied personality under the law. No longer do we consider that the fundamental or universal rights of human beings are within the power of the State to grant, modify, or deny. They are inherent in and inextricably a part of human nature; therefore they cannot be created by the State. It appears that human law has finally acknowledged in many respects the general understanding that a person is an individual human being—man, woman, or child—and is to be distinguished from a thing or from the lower animals.[4] *Dred Scot* was effectively reversed and superseded by the Civil War Amendments to the Constitution. The Thirteenth Amendment proscribed slavery in 1865. In addition, subsequent legislation such as the Civil Rights Act of 1964 prohibited discrimination in employment situations on the basis of race, color, religion, sex, and national origin.[5] On the international level, the Universal Declaration of Human Rights acknowledged the evils of slavery and involuntary servitude[6] and the fact that everyone is to be recognized as a person before the law.[7] What had been denied by the law—Dred Scot's personhood—is now recognized and protected by the law.

Notwithstanding these important legal developments in the domestic and international legal arenas, the definition and understanding of the term "person" still retains ambiguities. Might these ambiguities be used to question or deny personhood to other human beings even in the present day? This issue has been raised in the context of abortion—is the fetus, is the unborn child a person before the law? From *Roe*[8] and its progeny to *Carhart*[9] the responses have not been promising. But on other fronts, the unborn child has been recognized as a person in the context of having legal rights and therefore status before the law. For example, under some state law in the United States the unborn child has received a variety of protections or legal recognitions, and therefore rights before the law for wrongful death and homicide.[10] Under particular international legal instruments, the fetus has acknowledged rights that strongly suggest something about his or

4. *The Oxford English Dictionary* vol. 11, 596, 597 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Clarendon Press 1989) (this is a primary definition of "person" which is applicable to this investigation).

5. 42 U.S.C.A. § 2000e-2 (Westlaw current through 2003 Reg. Sess.).

6. *Universal Declaration of Human Rights* art. 4, G.A. Res. 217A, U.N. Doc. A/810 (1948) (stating "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms").

7. *Id.* at art. 6 (stating "[e]veryone has the right to recognition everywhere as a person before the law").

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

10. *See e.g. 66 Federal Credit Union v. Tucker*, 853 So. 2d 104 (Miss. 2003) (holding that a nineteen week old fetus was a "person" for purposes of the state's wrongful death statute and that the mother was entitled to bring a wrongful death action for the death of the non-viable fetus).

her status under the law.[11] But I do not plan to address the issue of fetal rights, as it has been traditionally presented in the context of abortion, here.[12] Rather, I shall raise and attempt to answer a much newer issue, one of growing and vital significance to us as citizens of various communities and as members of the human family—the issue of human embryonic cloning.

This issue again raises the familiar question of who is a person before the law. However, this question now surfaces as a result of the recent, dramatic developments that have taken place in science. The subject of human embryonic cloning—a topic that could hardly have been considered in a practical context a few decades ago—has now acquired prominence in legal discourse because it seems to be approaching the state of reality in medical science.

This modest contribution to the conference honoring Judge Noonan—no stranger to legal and philosophical examination of and debate on issues concerning early human life[13]—and the dedication of this grand law school cannot comprehensively address this complex issue. It is a mammoth task to take account of the discussions, both academic and practical, which have fueled the debate about the moral and legal status of early human life that has been brought into existence by laboratory progress. But, I hasten to add that identifying the issue and beginning to raise consciousness about the grave moral and legal issues at stake may be an enterprise worthy of this symposium. Providing a context is a useful place to begin such a task.

There is a relevant parallel between my topic and our attendance at this symposium which simultaneously honors a great jurist and teacher and commemorates the dedication of this splendid new law school building. I wish to add my personal tribute to Judge Noonan and thank him for the contribution his scholarly work and judicial opinions have had on me as a priest, lawyer, citizen, teacher, sometimes diplomat, and human being. In

11. *See e.g. American Convention on Human Rights* art. 4(1) (entered into force July 18, 1978), 1144 U.N.T.S. 123 (stating "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

12. *See* Robert John Araujo, SJ, *The Legal Order and the Common Good: Abortion Rights as Contradiction of Constitutional Purposes*, http://www.uffl.org/vol11/araujo11.pdf (accessed Feb. 7, 2004).

13. John T. Noonan, Jr., *The Root and Branch of* Roe v. Wade, 63 Neb. L. Rev. 668 (1984). Judge Noonan has made well the case for my argument presented in this paper. As he stated,

> [t]he progeny of *Roe* have confirmed the Kelsenite reading of *Roe* that there is no reality that the sovereign must recognize unless the sovereign, acting through the agency of the Court, decides to recognize it. This view would be psychologically incomprehensible if we did not have the history of the creation of the institution of slavery by judges and lawyers. With that history we can see that intelligent and humane lawyers have been able to apply a similar approach to a whole class of beings they could not see—that they were able to create a mask of legal concepts preventing humanity from being visible. A mask is a little easier to impose when the humanity concealed, being in the womb, is not even visible to the naked eye.

Id. at 675.

focusing on this new academy for a moment, your dedication of this pristine *Edifice Lex* provides a basis from which we can consider the emerging and important legal issues that invariably accompany the development of new human life. In the early twenty-first century, we witness and participate in great scientific advances that contribute immensely to the individual and the common good. In particular, innovation in medical science has done much to alleviate human suffering and to promote healthier, longer, and more productive lives for many people. But, there is, if I may borrow from Sir Alec Guinness, a dark side to these advances that prompt some in the medical and lay communities to think that we may be God's substitute in the creation and manipulation of human life. Both the wonderful advances of scientific knowledge and the troubling aspects they bring to the surface in the ability to clone human beings raise significant legal questions that we must begin to address as lawyers, as citizens, and as moral human beings.

A robust debate about human cloning exists today at the national and international level.[14] While he may not have foreseen the development of human cloning technology, Blessed John XXIII neither ignored nor denied the important contributions that scientific development makes to human beings and their material improvement.[15] As he stated elsewhere in *Pacem in Terris*, "[r]ecent progress in science and technology has had a profound influence on man's way of life."[16] But science that is not in the service of humanity, science that is misdirected and harms rather than contributes to the individual and the common good of the human family is to be watched carefully, particularly when its influence can be of tragic disservice to some human beings. And this brings us to the matter of human cloning.

II. THE SCIENCE

Current developments in medical science have demonstrated that we humans are a pretty clever lot. Not only can we reproduce ourselves in the manner that we have for thousands of years, but we can also reproduce ourselves through *in vitro* techniques—or, as one anonymous commentator has suggested the method described as, "Look, Ma! No sex!"[17] We have

14. For example, this symposium occurs whilst the Sixth Committee of the United Nations General Assembly is debating the question of human cloning and the extent to which it should be regulated by an international convention. *See International Convention against the Reproductive Cloning of Human Beings* p. 3 (Oct. 3, 2003), A/C.6/58/L.9. For insight into the domestic debate within the United States, *see infra* n. 19.

15. He stated, "[b]ut what emerges first and foremost from the progress of scientific knowledge and the inventions of technology is the infinite greatness of God Himself, who created both man and the universe." Pope John XXIII, *Pacem in Terris*, No. 3 (April 11, 1963) (available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html).

16. *Id.* at No. 130.

17. I wish to be clear at this stage and note that my paper will not focus on the legal and grave moral issues that surround *in vitro* technology. However, *mutatis mutandis*, much of what I have to say likely has a bearing on that subject.

also developed the capability of reproducing human tissue and other components through morally non-offensive adult stem cell cloning (which will be elaborated upon in a moment),[18] and this technology is a source of much promise for therapies that could alleviate many ailments that plague humanity through the replication of human tissue of specific types, e.g., muscle, nerve, bone, etc. The fundamental distinction between this bio-technology, i.e., adult stem cell cloning, and the one that I shall address in this paper—embryonic cloning—is that a new human existence is not generated with adult stem cell cloning but is with embryonic cloning. In the case of cloning technologies that have the modifiers "reproductive," "therapeutic," "scientific," or "research," a new human life is produced through the creation of an embryo through somatic cell nuclear transfer (SCNT) or similar technologies. And what does the law say about this? What should the law say about this? And that is my task here at this symposium.

At this stage, knowing that many of us have varying degrees of legal expertise, most of us may need an elementary refresher on what is human cloning especially in the context of the issues that this essay addresses. First of all, cloning has been around for quite some time. It can occur naturally and takes place when identical twins occur. These identical twins essentially share the same genetic components which are manifested in many ways including an identical exterior appearance. Natural cloning, however, occurs without human intervention.

Then, there are the assisted or human-generated forms of cloning. Some lead to the propagation of existing human cellular material, and this form is known as adult stem cell cloning to which reference has been previously made. A second type is the form of human cloning in which a new human embryo—not unlike the embryo that you and I were earlier in our lives—is brought into this world.[19] The suggestion that these embryos which are at the early stage of the continuum of human life are not like the ones we were possessing our own unique genetic character would echo the words of Chief Justice Taney when he said in the *Dred Scot* case, "[t]he unhappy black race were separated from the white by indelible marks . . . and were never thought of or spoken of except as property."[20] In this context, it would be relevant to take stock of what Justice McLean said in his dissent about this different treatment when he said that it was "more a matter of taste than of law."[21]

18. For those interested in the scientific and medical details, the President's Council on Bioethics maintains a useful website which can be consulted to learn more about human cloning. *See generally* http://www.bioethics.gov.

19. As Heuster and Street declared in 1941, "[i]t is to be remembered that at all stages the embryo is a living organism, that is, it is a going concern with adequate mechanisms for its maintenance as of that time." Ronan O'Rahilly & Fabiola Müller, *Human Embryology and Teratology*, epigraph (2d ed., Wiley-Liss, Inc. 1996).

20. 60 U.S. at 410.

21. *Id.* at 533 (McLean, J., dissenting).

Making distinctions between the two types of human cloning techniques—adult stem cell and embryonic—turns out to be more than a matter of taste. Adult stem cell cloning technology does not generate a new human life. It also appears to hold great promise for addressing many concerns that threaten human health by making available a wide variety of replacement cells and tissues needed for treatment of injuries and diseases.[22] Moreover, it also generates few, if any, questions about the morality of what takes place in the laboratory. In contrast, embryonic cloning raises some dubious issues of bioethics and morality. Embryonic cloning begins with the SCNT process or similar technology by taking a human egg (ovum, oocyte) and replacing its nucleus with nuclear material from another human cell, either from the donor of the egg or another human being. Upon completion of the insertion of the donated replacement nucleic material, the egg is chemically or electrically stimulated so that the process of cell division that begins the existence of a new human embryo results. These cloned embryos can then be used for different goals. The two principal objectives for which they are used are "reproductive" cloning and "research" or "therapeutic" cloning.[23]

In "reproductive" cloning, the goal is focused on developing a child who will likely mature into adulthood. Hollywood did this in the film "The Boys from Brazil." The Raelians have also claimed to do this in reality; however, they have yet to offer proof that would satisfy the skeptical scientific community. The cloned human embryo is implanted in a womb and allowed to develop to birth. In "research" cloning, the ultimate goal is not to allow the embryo to develop toward birth and maturity but to extract stem cells from the evolving human being. While this embryo is cloned to enable the extraction of cellular material, its inevitable destiny is to be ultimately and premeditatively destroyed. The moral difference between "reproductive" cloning and "research" cloning (so-called "therapeutic" cloning) is non-existent. Any scientific or medical distinction exists only in the objective of the procedure but not the procedure itself.

The cloned human embryo is a human being. There is little doubt about its status in the scientific community. It is not animal (other than human), vegetable or mineral. It is from the very beginning of its existence a unique human entity that, given the opportunity for its natural progression, shares in the destiny that you and I now enjoy throughout the continuum of life. Its natural vocation is inexorably directed to fetus, to birth, to earthly habitation, and to natural death. It is like you and me, because you and I shared this same stage in our respective human lives. Incontrovertibly,

22. *See generally* David A. Prentice, *Adult Stem Cells* (July 2003), http://www.bioethics.gov/background/prentice_paper.html (accessed Oct. 31, 2003).

23. *See Human Cloning and Human Dignity: The Report of the President's Council on Bioethics* XLIII (Leon R. Kass, foreword, Public Affairs 2002).

science states that this embryo is a human being.[24] And, if you permit me, science also says that it is a person.[25] But what does the law say? What might it say? What should it say?

III. Personhood and Law

In the public mind, most of us probably share the same view on who is a person. To begin with, you are, and I am. We think about our family and our friends. They are persons too. For those of us who come from the Abrahamic tradition, we also acknowledge that the divine image is present in our personhood, our humanity.[26] As our reflection continues, we think of those who have gone before us, those who presently co-inhabit the planet with us, and those who will come after us as persons. But as lawyers or lawyers-to-be, we know that personhood or personality is also an important legal concept. We encounter the notion of personality very quickly in our legal studies.

Under the law, one quickly learns about the need to be clear about the distinction between the "natural person" (the live flesh and blood type who is a creation of human nature and, for some of us, God's plan) and the "juridical person" (the legal fiction entity such as a corporation which is a creation of the law rather than nature) even though each is a subject of the law. This paper will focus on the natural person, i.e., human beings. While the law can define and redefine the juridical person which is, in essence, a legal fiction, should it be able to do the same regarding natural persons?[27] This does not seem to be nor should it be the case, although this has been attempted in the past in such diverse places as the Germany of National Socialism and the United States of the antebellum era and the world of *Roe*.

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24. O'Rahilly & Müller, *Human Embryology*, *supra* n. 19, at 8 (suggesting that "[a]lthough life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. This remains true even though the embryonic genome is not actually activated until 4-8 cells are present, at about 2-3 days.").

25. *Cf.* Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* 2 (7th ed., Saunders 2003) (the authors state, "[i]nterest in human development before birth is widespread, largely because of curiosity about our beginnings and the desire to improve the quality of life. The intricate processes by which a baby develops from a single cell are miraculous, and few events are more exciting than a mother's viewing of her embryo during an ultrasound examination. The adaptation of a newborn infant to its new environment is also exhilarating to witness. Human development is a continuous process that begins when an oocyte (ovum) from a female is fertilized by a sperm (spermatozoon) from a male. Cell division, cell migration, programmed cell death, differentiation, growth, and cell rearrangement transform the fertilized oocyte, a highly specialized, totipotent cell—a zygote—into a multicellular human being.").

26. *Genesis* 1:27 (New Am.).

27. *See Byrn v. N.Y.C. Health & Hospital Corp.*, 286 N.E.2d 887, 893 (N.Y. App. Div. 1970) (Burke, J., dissenting) (noting the limitations on the state in determining the reality of who is a natural person and therefore who should be a person before the law). The implication of his dissent was that if the state could do this, the basis for fundamental human rights could be undermined by human whim or caprice.

These contexts demonstrate how human law, when detached from right reason, can betray recognition of who is and must be considered a natural person.

In constitutional law, for example, we know that the Constitution addresses "persons" in many ways, when, for example, it addresses who can hold office.[28] The Constitution acknowledges rights, duties, and statuses of persons. We know that they are to be secure and that their property is protected under the law.[29] No person can be in jeopardy of the law for the same thing more than once.[30] This basic law defines which persons are citizens and that none of them can be denied life, liberty, or property without due process of law.[31] Persons are to enjoy equal protection of the law.[32] But, as we have seen in the *Dred Scot* case, the legal understanding of "person" can be flawed.

These fundamental, legal principles about personality and personhood and being a person before the law also appear in international law which has a long history and association with right reason—a reason that is directed toward the good and found in the natural law schools.[33] The Universal Declaration of Human Rights of 1948 and its two implementing conventions of 1966, provide excellent grounds for exploring the meaning of person within the international legal context.[34] Sometimes the formulation used in these texts is "everyone" or "no one," but it is clear that the reference is to the "human" or "natural" person from the preambular language of the Declaration and the Covenants. This point raises the significance associated with understanding the natural person—one who is a subject before the law—and the person's fundamental rights and obliga-

28. U.S. Const. art. I, § 2, cl. 2; *id.* at art. I, § 3, cl. 3; *id.* at amend. XXII.

29. *Id.* at amend. IV, V.

30. *Id.* at amend. V.

31. *Id.* at amend. XIV.

32. *Id.*

33. *See* James V. Schall, SJ, *Natural Law and the Law of Nations: Some Theoretical Considerations*, 15 Fordham Int'l L.J. 997, 1017 (1991-92) (where the author states, "[T]he law of nations itself was a necessary derivative from natural law. It was based on the principle that human beings throughout time and space were the same in their essential structure, in that they each possessed reason, and that reason could be formulated, communicated, understood, and debated wherever men sought understanding. The theories and actions of anyone, even rulers, could and should be tested by reason. This testing would result in an agreed upon law if the reasonable solution could be found."). *See also* John Finnis, *Natural Law and Natural Rights* 23 (Oxford U. Press 1980); Ralph McInerny, *The Principles of Natural Law,* 25 Am. J. Juris. 1, 5 (1980).

34. The common preamble of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights begins by acknowledging "the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." *International Covenant on Civil and Political Rights*, preamble, G.A. Res. 2200A, U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Cultural Rights*, preamble, G.A. Res. 2200A, U.N. Doc. A/6316 (1966); *Universal Declaration of Human Rights*, *supra* n. 6, at preamble (the two covenants further recognize that the source of these rights is the human person's inherent dignity).

tions. When international law is manipulated to deny "personhood" to one who is naturally a part of the human race, violence is done to the law and to the natural person.

IV. Person under Public International Law

Like domestic law found in most countries including the United States, public international law acknowledges the distinction between natural and juridical persons. Simply put, the juridical person has the ability to be recognized as a subject before the law with rights and duties. In a simpler way, the juridical person has the ability to pursue legal remedies and to defend against the claims of others. Professor Ian Brownlie has catalogued juridical persons ranging from States to entities *sui generis*.[35] While taking account of Sir Ian's concern about the circularity of the International Court of Justice's advisory opinion in the Reparations Case,[36] it is nonetheless logical to consider entities as subjects before the law if they have the ability to redress legal questions and disputes before national and international tribunals.

Within the context of common sense, natural persons are much easier to define; however, they seem to escape formal definition. Interestingly, a live flesh and blood entity, a natural person, cannot be a party before proceedings of the International Court of Justice since only States may be parties to contentious proceedings.[37] However, with the emergence of international human rights jurisprudential norms since the Second World War, there are some legal points regarding natural persons that need to be taken into consideration.

While legal philosophers have been examining the issue for centuries,[38] one sensible starting point is the Charter of the United Nations and the Universal Declaration of Human Rights of 1948. Article 1, Paragraph 3, of the Charter notes that a purpose of the UN is to achieve international cooperation "in promoting and encouraging respect for human rights."[39] Perhaps if one can obtain a better understanding of "human rights" the investigator may be able to define the natural person, the holder of these rights. Professor Louis Henkin has offered a frequently quoted definition of human rights as that which incorporates "those liberties, immunities, and

35. Ian Brownlie, *Principles of Public International Law* 60-65 (4th ed., Clarendon Press 1990).

36. *Id.* at 58.

37. Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 33 U.N.T.S. 993. The concept of diplomatic protection avoids some of these problems, such as the fact that natural persons cannot be parties in ICJ proceedings. Their interests are nonetheless protected by this legal fiction when a State, usually the one conferring nationality, is a party to the ICJ proceedings.

38. *See e.g.* Robert John Araujo, SJ, *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 Ave Maria L. Rev. 159 (2003).

39. U.N. Charter, art. 1, ¶ 3. The Charter reiterates this under its discussion of international economic and social cooperation. *Id.* at art. 55.

benefits which, by accepted contemporary values, all human beings should be able to claim 'as of right' of the society in which they live."[40] However, there are some notable problems with using this definition to promote the quest of defining who is a natural person under international law.

First of all, the meaning of the term "human being" seems to be taken for granted. Now, I hasten to add that the application of right reason should lead anyone making an inquiry about the nature of person to the same conclusion when it comes to the holder of "human rights."[41] If this is an acceptable premise, problems still remain with Professor Henkin's definition. He notes several subjective elements that lead away from a conclusion that human rights, or at least some of them, are universal. First of all, he points out that what is constitutive of these human rights is contingent upon "accepted contemporary values." Second, he states that the claim "as of right" may be contingent upon a particular society in which the subject lives. But both of these criteria can be subjective and therefore flawed if the search is for a general or universal definition.

Both of these subjective elements limit not only the right but also the holder of the right. Thus, in one State, the right to something may exist because it is recognized and accepted under some "contemporary value" that is accepted by someone who holds political power. Consequently, it can be claimed "as of right" in that society. However, change the time and the society and its repository of political power and what used to be a right may no longer be. A graphic illustration is found in German law during the 1930s and early 1940s. A particularly effective example demonstrating some of the limitation of the Henkin definition is the Law for the Protection of German Blood and German Honor enacted by the National Socialist Party Congress at Nuremberg in September of 1935. The first provision of Section 1 makes the point: "[m]arriages between Jews and citizens of German or some related blood are forbidden."[42] Section 5 of the same legislation provided not only for detention but for penal servitude for violations of Section 1.[43]

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40. Louis Henkin, *Human Rights*, in *Encyclopedia of Public International Law* vol. 2, 886 (Peter Macalester-Smith ed., Elsevier Science B.V. 1999).

41. For a helpful discussion of Thomas Aquinas's development of the intellect's use of right reason and its connection with a set of universal and transcendent moral principles that is available to each human person, *see* John J. Coughlin, OFM, *Pope John Paul II and the Dignity of the Human Being*, 27 Harv. J. L. Pub. Policy 65 (forthcoming 2003). Pope John Paul II, in *Fides et Ratio*, No. 4, states "[o]nce reason successfully intuits and formulates the first universal principles of being and correctly draws from them conclusions which are coherent both logically and ethically, then it may be called right reason or, as the ancients called it, *orthós logos, recta ratio*." John Paul II, *Fides et Ratio*, No. 4 (Sept. 14, 1998) (available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html).

42. The Law for the Protection of German Blood and German Honor, § 1, v. 15, 9, 1935 (RGB 1.IS.1146-7) (available at http://web.jjay.cuny.edu/~jobrien/reference/ob14.html).

43. *Id.* at § 5.

As can be seen, these provisions apparently emerged from accepted contemporary values of a particular society—or at least its source of political power. The methods by which a particular society determines who has and who does not have human rights can be rather subjective and depart from objective reasoning. This circumstance is a major limitation or defect in purely positivist legal systems and the language they employ to define human or any other rights. As Lewis Carroll reminds us, "'[w]hen *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'"[44] Such is the problem with subjectivity in the law.

However, a method of resolving the problems posed by subjectivity is to turn to an objective approach to law making and interpretation that comes from relying on right reason.[45] If the investigator can objectively identify what is essential about human nature and the rights to be accorded to this nature, he or she can obtain a far better understanding of who the human person is as a subject of the law. As Professor Eibe Riedel has suggested, "[h]uman rights . . . are rights flowing from human nature. They are transcendental, supernatural or innate rights not necessarily laid down in texts."[46] Riedel's approach was reflected in *Barcelona Traction* wherein the International Court of Justice found that there are, without identifying them, certain rights basic to human nature that create obligations *erga omnes*.[47] While this ICJ decision still leaves some questions regarding what are the specific rights that are basic to human nature and who is entitled to enjoy them, it did point to an important and essential issue regarding rights and entitlement to them, namely that of universality.

At this point, attention must be given to a second important international text, the Universal Declaration of Human Rights, and its role in clari-

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44. Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 133, 214 (Modern Library 1936) (quoted in *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173, n. 18 (1978).

45. In his encyclical *Pacem in Terris*, Pope John XXIII offered an insight into this point when he stated, "[b]ut it must not be imagined that authority knows no bounds. Since its starting point is the permission to govern in accordance with right reason, there is no escaping the conclusion that it derives its binding force from the moral order, which in turn has God as its origin and end." *Pacem in Terris*, *supra* n. 15, at No. 47.

46. Eibe Riedel, *Commentary on Article 55(c)*, in *The Charter of the United Nations: A Commentary* vol. 2, 917, 921 (Bruno Simma ed., 2d ed., Oxford U. Press 2002).

47. *Concerning the Barcelona Traction, Light and Power Co., Ltd.* (Belg. v. Spain), 1970 I.C.J. 32 (Feb. 5) (the Court stated, "[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.").

fying who is a person entitled to these fundamental human rights.[48] Article 1 of the Declaration states that, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[49] This is the threshold by which one can understand the fundamental legal protection to be universally accorded to "human beings." This threshold article assumes greater definition in subsequent articles that state that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration,"[50] that "[e]veryone has the right to life,"[51] and, that "[e]veryone has the right to recognition everywhere as a person before the law."[52] These formulations provide the modalities that will enable "reason and conscience" to prevail over "power and interest" as Professor Mary Ann Glendon has argued in determining what is constitutive of these rights and who is entitled to them.[53] Moreover, these formulations provide an objective mechanism that enable anyone to overcome the limitations of the "accepted contemporary values" that are "contingent upon a particular society" and its centers of political power.

It is through the objective mechanism of right reason that law makers and enforcers as well as citizens come to a better understanding of who are persons before the law. But, law that is based on subjective principles and methodology can be notably flawed. The subjective Nationalist Socialist laws may have made Jews and other minorities nonpersons before the law, but that legislation did not take account of the reality of their situations and circumstances and the nature of human beings. It ignored them. It is objectivity—the search for what is true as determined by standards that extend beyond the reasoning of the isolated, autonomous self—and the sincere quest for it that makes the law an endurable and just institution. This is the exercise of right reason that is essential to the development of sound legal principles that are universal in both nature and application. Who is a recognized person before the law can be subject to the vagaries of human frailty and limitation when objectivity and right reason are absent. What makes the law firmer in its conviction and persuasion is the degree to which the understanding transcends these frailties. It is the role of right reason to help the law maker and the law decider overcome these frailties.

This now brings me to the subject of the status of the embryo who is cloned by scientists in a laboratory. If the concept of the "genuine link" is

48. An excellent overview and analysis of the Universal Declaration may be found in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001). Meriting particular attention are Chapter 12, *Universality Under Siege*, and the Epilogue, *The Declaration Today.*

49. *Universal Declaration of Human Rights*, *supra* n. 6, at art. 1.

50. *Id.* at art. 2.

51. *Id.* at art. 3.

52. *Id.* at art. 6.

53. Glendon, *supra* n. 48, at 241.

essential to determining citizenship or nationality,[54] it may also be useful in determining who is a human being, who is a natural person for purposes of the law. The suggested and recommended answer to this question is in the affirmative. The justification for this answer requires pursuing the goal of objectivity by the application of right reason. All of these points can be and should be a part of the current international deliberations in drafting an international convention banning human cloning.

V. DEBATES OF "PERSON" WITHIN THE CONTEXT OF THE DRAFTING OF THE HUMAN CLONING CONVENTION

In some legal discussions today, the reality and the science of human embryology sometimes get pushed aside or ignored. This can lead to developments in the law that deny the nature of the human embryo as an evolving human being who has begun the continuum of life. While formulaic norms in the law may be limited in both value and scope, there is something to be said about the intersection of reason and the law as previously noted. Good law that serves noble purposes is built on the strong foundation of reason, not on the sands of whim or caprice or even well-intentioned subjectivity. So much the better when the reason is right rather than wrong. In the context of assessing the status of the human embryo, including the ones that each of us were in our human development, many of the sound reasons for protecting them—us—come from science, in particular human embryology. Embryology is a part of the continuous development of the individual human being.[55] The development of each unique human being normally begins when egg and sperm have met.[56] Essentially the same process is present with *in vitro fertilization* (IVF) technologies—even though "mom" and "dad" are not present, their egg and sperm are. In the context of embryonic cloning, the process is artificial, but the product—i.e., a developing human being in embryonic form—is precisely the same.[57]

While conceding that there is a human entity created by either IVF or cloning, some commentators express the view that this human entity is not and will never be a person because it has not been implanted in a womb.[58] Some may convey the further view that it is human but a lesser-status human entitled to respect even though it may be destroyed in justifiable

54. Brownlie, *supra* n. 35, at 398.

55. *See supra* n. 19, and accompanying text.

56. Moore & Persaud, *supra* n. 25, at 2.

57. *Id.* at 11, 35 (describing *in vitro fertilization*, which is an artificial process where sperm and ovum are united, not in the same way as in the uniting of man and woman, but in a laboratory environment like a Petrie dish).

58. This is the view of Sen. Orin Hatch of Utah, as reported in The Salt Lake Tribune. Christopher Smith, *Hatch Alone in Utah's Delegation for Cloning Research*, http://www.sltrib.com/2003/Mar/03092003/utah/36567.asp (accessed Dec. 5, 2003).

scientific experimentation.[59] Interestingly, this perspective reaffirms some of the views expressed by Chief Justice Taney in *Dred Scot* or by the marriage laws of Germany under National Socialism that were examined earlier.

It is significant to realize that there are some legal institutions in which the status of protected human being has been extended to the embryo. For example, the American Convention on Human Rights (1969) states in relevant part that, "[e]very *person* has the right to have his life respected. This right shall be protected by law, and, in general, *from the moment of conception.*"[60] Although human cloning may not have been possible in 1969 when this convention was drafted, the nexus of human person, recognition under the law, and human embryonic development was directly acknowledged. The embryo that is conceived, the embryo that is produced by IVF, and the embryo that is cloned are precisely the same kind of human entity—a human being at the very beginning of his or her sojourn of life.

In 1997, the development of science and human embryology had progressed considerably. As a result of this scientific progress, members of the European Community convened at Oviedo, Spain to draft the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (hereinafter the "Convention"). This juridical instrument was the first legally binding international agreement prepared to protect human dignity, rights, and freedoms against the misappropriation of biological and medical innovation. One section addresses problems that can arise when research is done on *in vitro* embryos. The Convention states that where this is allowed under local law, the research "shall ensure adequate protection of the embryo."[61] In short, while scientists would not be precluded from conducting research on embryos, it is only allowed if no harm would be done to the embryo who is subjected to the research. This convention also acknowledged the fact that *in vitro* embryos existed, and it was for their benefit that this provision was written. However, the drafters also realized that medical and embryological science was making great strides. In recognition of this development, the Convention further explicitly recognized the dangers in and abuse of creating human embryos for research purposes; consequently, *their creation for*

59. *See e.g.* Michael J. Meyer & Lawrence J. Nelson, *Respecting What we Destroy*, http://www.scu.edu/ethics/publications/ethicalperspectives/respect.html (accessed Dec. 5, 2003) (where they state, "[i]nstead of banning therapeutic cloning or accepting just any use of embryos, we suggest, for starters, adopting the following practices. Scientists should handle embryos with great respect and, as with cadavers, this should never be an empty or insincere gesture. This display of moral consideration should include acquiring only the minimum number of embryos required for research and disposing of their remains in a genuinely respectful way.").

60. *American Convention on Human Rights*, *supra* n. 11, at art. 4(1) (emphasis added).

61. *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine* art. 18(1) (entered into force Dec. 1, 1999), E.T.S. No. 164.

research purposes was prohibited.[62] And the reason for this has already been explained but it is worth repeating here. Research on embryos typically means that cells, usually of the stem cell variety, will be extracted from the evolving embryo. When this occurs, the young human being is destroyed, i.e., killed. The nascent human who has commenced human existence has been prematurely and artificially terminated.

At this stage, the open minded individual might ask why should research be prohibited on a living entity that will never reach maturity? Perhaps that is just the point of this Convention. Had scientific knowledge and wherewithal developed earlier, each one of us gathered here today might have faced the fate of being subjected to scientific experiments that might ultimately claim our lives—and without the benefit of our informed consent. Of course, this is precisely what happens to embryos, be they cloned or created *in vitro*, whose stem cells are removed: they are destroyed; their development is terminated; they are killed. Although embryonic science was not at the stage that it is today, parallel concerns about this seemed to have been on the minds of the drafters of the 1966 International Covenant on Civil and Political Rights. In one of the nonderogable provisions,[63] the Covenant states, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[64] Moreover, "no one shall be subjected without his [or her] free consent to medical or scientific experimentation."[65]

VI. Conclusion

The drive to conduct such destructive experimentation on the nascent human life of cloned embryos is strong. But such research, if it were permitted to continue, defies the dignity to which each human being, each person is entitled. As John Coughlin has pointed out in his work on Pope John Paul II's explication of human nature, there are many factors "determinative of who the person is, and what the person may become."[66] What these factors are can be best known by applying the gift of right reason.

We live in interesting times; challenging times; dark times. May we use the wisdom of right reason and objectivity to illuminate and chart our course? Then the protection of some of the most vulnerable members of our human family will be ensured. Why should we worry about them? Because they are us for we were they. The right reason of the Silver and Golden Rules merge, make sense, and apply here: "[d]o to no one what you your-

62. *Id.* at art. 18(2) (emphasis added).

63. *International Covenant on Civil and Political Rights* art. 4(2), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966).

64. *Id.* at art. 7.

65. *Id.*

66. Coughlin, *supra* n. 41.

self dislike,"[67] and "[d]o to others whatever you would have them do to you."[68] Perhaps with these two rules as a foundation, the convergence of God, the person, history, and the law will enable those engaged in the cloning debate to understand with greater wisdom what is at stake.

67. *Tobit* 4:15 (New Am.).
68. *Matthew* 7:12 (New Am.); *see also Luke* 6:31 (New Am.).