Research on Embryos and Human Dignity

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The legal framework in effect in Germany since 1991, bars all research on human embryos and permits, since 2002, the import of embryonic stem cells only under the fulfillment of relatively demanding conditions. Legislation linked this position to the goal of ensuring freedom of biomedical research (only) to the extent that it could be justified in view of the state's obligation to protect human dignity and the right to life. Underlying this was the assumption, understood by the draft of the law that embryonic stem cells, given the destruction of embryos, which necessarily precedes their utilization, "cannot be viewed just like any other biological material from an ethical perspective." In the meantime, however, the legal-political, would-be "enlightened"; Zeitgeist has become oriented toward a hidden or openly displayed "liberalization" of human embryonic stem cell research, which raises the question of what could have fundamentally changed about the previously named "ethical problem." Great uncertainties obviously exist regarding the central significance of the "human dignity" guaranteed to be "inviolable" as well as about the relevance of this "iron ration" of libertarian-humanist legal thought in the context of destructive embryo research. The present essay gives an overview of the potential interpretive possibilities and subjects them to critical examination against the background of current legal-political developments, which are perceived in Germany not only as a "revolution" not only in the sphere of biological policy, but also ultimately in that of the central determining factors in general in the relationship between state and individual. In this light, how can the kernel of the ideal of human dignity be preserved even against the demands of the (post-) modern (age)?

Introduction: Between Freedom of Biomedical Research and Guaranty of Human Dignity

"Human dignity is inviolable. Its respect and protection is the obligation of every power of the state." Thus is the wording of the first article of the German constitution and also the highest principle of the European Union Charter of Fundamental Rights,[1] which although has not yet legally come into effect as part of the planned European constitution, is nevertheless generally understood to be an accurate description of the essence of the "European community of values."[2] What is more, with its reference to

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[1] Charter of Fundamental Rights of the European Union, art. 1, 2004 O.J. (C310) 42.

[2] *Id.* Preamble ("The peoples of Europe ... are resolved ... based on common values.").

https://doi.org/10.1017/S0021223700000613 Published online by Cambridge University Press

the fundamental axioms of human "freedom," "equality," and "solidarity," the charter presents itself at the same time as a condensed expression of the "moral heritage" *of all humanity*, based ultimately on "indivisible, universal values." Here again "human dignity" holds the supreme place,[3] as it also does in the United Nations Universal Declaration of Human Rights; in the latter it is characterized as an "inalienable" and "inherent" possession of the human being, recognition of which is owed by all "members of the human family."[4]

Nevertheless, whether embryos may or must be accounted members of this "human family," i.e., whether those dividing, growing, and differentiating cell complexes formed by "fusion" of two gametes may or must be considered early forms of human life,[5] is well known to be a debated question, now as ever. If appearances do not lie, the view seems to be gaining the upper hand worldwide[6] that embryos should *not* be granted the elite status of a legal *subject,* but rather may be utilized for research purposes, with the goal of improved therapeutical options in the future—whether these embryos are available as "excess," in the case of their "inutility" for bringing about a pregnancy or even as a result of being produced with the express purpose of their use by biomedical science. In contrast to states in which research on embryonic stem cells has taken place for some time, however, the legal situation in Germany has until now been extraordinarily restrictive: The German Embryo Protection Act (EPA)[7] permits the artificial fertilization and utilization of embryos only *in order to bring about a pregnancy*; the Stem Cell Law (SCL)[8], which came into effect in 2002 after

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[3] *Id.* ("values of human dignity, freedom ... " The preamble of the Charter of Fundamental Rights emphasizes in addition: "It [the European Union] places the individual at the heart of its activities ....").

[4] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg. U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR] (Many translations use a variant formulation, speaking of "recognition of the inherent dignity and of the equal and inalienable rights *of all members of the human community.*") *id.* Preamble.

[5] In the terminology of Embryonenschutzgesetz [Embryo Protection Act], Dec. 13, 1990 BGBL. I at 2746, § 8 no. 1, an English translation *available at* http://www.bmj.bund.de/files/-/1147/ESchG%20englisch.pdf [hereinafter EPA], which is not thereby made "false" because it deals with a process which takes place over time ("fertilization cascade"); *see* Eberhard Schockenhoff, *Pro Speziesargument: Zum moralischen und ontologischen Status des Embryos, in* DER MORALISCHE STATUS MENSCHLICHER EMBRYONEN 11, 25 ff (Gregor Damschen & Dieter Schönecker eds., 2003); *cf. id.* at 192 ff.

[6] For more on this subject see INTERNATIONALE PERSPEKTIVEN ZU STATUS UND SCHUTZ DES EXTRAKORPORALEN EMBRYOS (Albin Eser, Hans-Georg Koch & Carola Seith eds., 2007).

[7] EPA, *supra* note 5.

[8] Stammzellgesetz [Stem Cell Law], June 28, 2002, BGBL. I at 2277 [hereinafter SCL] (*available in English (unofficial translation) at* http://www.bmj.bund.de/files/-/1146/Stammzellgesetz%20englisch.pdf (last visited Sept. 8, 2009).

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an extremely heated debate, permits the import of embryonic stem cells only with prior permission and, above all, only when the stem cells were derived in their country of origin prior to January 1, 2002—that is, before the passage of the resolution by the German Parliament. This cut-off date was created to avoid the possibility that research in Germany might be the cause of the killing of embryos, wherever around the world this might take place.[9]

All the same, this compromise, reached approximately six years ago, is today "under fire"; political pressure from interested parties to expand the possibilities for embryonic stem cell research in Germany as well is increasing. The cut-off date, in particular, has come to be seen as "a first-order obstacle to research"[10]; the conclusion of a "biopolitical peace treaty" is conditioned on either the complete abolition of this set date,[11] its replacement by a "sliding" ("rolling" or "progressive") cut-off date (i.e., a case-dependent waiting period, e.g., six months before the submission of an import application),[12] or the postponement of the cut-off date, i.e., the establishment of a new date.[13] With that, however, the question of complete "liberalization" would immediately become acute, since it would easily appear morally hypocritical to

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[9] *Cf.* BTDrucks [printed paper of the German Bundestag] (Parliament)) 14/8394 at 8: "The ... regulations adopted, especially the cut-off date, assure that the destruction of human embryos will not be occasioned by any actions coming from Germany and that the import permission will not give rise to any increase in the demand for new stem cells resulting in the destruction of additional embryos"); *see also* Regine Kollek, *Stellungnahme zur öffentlichen Anhörung "Änderung des Stammzellgesetzes" am 3. März 2008, Leitfragen und Antworten zur Anhörung des Ausschusses*, at the public expert-witness hearing held by the Parliamentary Committee on Education, Research, and the Assessment of the Consequences of Technology, German Federal Parliament, Mar. 3, 2008, A-Drs. [printed papers of the committee of the German Bundestag] 16(18)336f. (2008) at 2: "the idea of not adding a new injustice to the one that was no longer to be prevented."

[10] Most recently along these lines the *Deutsche Forschungsgemeinschaft*, Pressemitteilung Nr. 11, Apr. 7, 2008; *see also* the opinion of the Aachen specialist in reproductive medicine Henning Beier, *Stellungnahme zur öffentlichen Anhörung "Änderung des Stammzellgesetzes" am 3. März 2008, Leitfragen und Antworten zur Anhörung des Ausschusses*, A-Drs. 16(18)336j (2008), at 8: "anti-science."

[11] As in the draft law by parliamentary deputy *Flach*, BTDrucks 16/7982; *see also* the draft law by the Free Democratic Party caucus, BTDrucks 15/5584; likewise the opinion of the Deutschen Forschungsgemeinschaft, *Stammzellenforschung in Deutschland – Möglichkeiten und Perspektiven, Stellungnahme der Deutschen Forschungsgemeinschaft*, Oct. 2006, at 60 ff, *available at* http://www.dfg.de/aktuelles_presse/reden_stellungnahmen/2006/download/stammzellforschung_deutschland_lang_0610.pdf.

[12] *Cf.* Jochen Taupitz, *Erfahrungen mit dem Stammzellgesetz*, 3 JURISTENZEITUNG (JZ) 113, 117 (2007); STAMMZELLFORSCHUNG UND ZELLTHERAPIE, SUPPLEMENT ZUM GENTECHNOLOGIEBERICHT DER BERLIN-BRANDENBURGISCHEN AKADEMIE DER WISSENSCHAFTEN 241 (Anna Wobus et al. eds., 2006).

[13] As in the draft law by parliamentary deputy *Röspel*, BTDrucks 16/7981 (for example, at 6: "one-time adjustment of the cut-off date.").

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single out embryonic stem cell research as a pursuit (potentially) worthy of special encouragement,[14] on the one hand, and on the other, to leave the production of these cells to the scientists of other countries, on account of the deadly consequences involved.[15] In order that the "bad" means of the "use"[16] of embryos no longer stand in the way of the hoped-for "good" end product, the legal-ethical debate surrounding the moral-philosophical status of embryos, intensively fought until recently, has come to be declared simply irrelevant,[17] in the framework of the struggle which broke out in the meantime against an (alleged) "hypertrophy of embryo protection."[18] Yet it is obvious that in the last analysis our fundamental self-understanding, i.e., our "image of humanity,"[19] is at stake in the question of which forms of conduct we allow with regard to which creatures, a self-understanding which no legal order can do without insofar as it is an approximation of the "legal ideal" of justice.

But what is "a human being"? Who is allowed to consider himself or herself as such, as someone whose "dignity" is guaranteed by every power of the state[20] irrespective of his or her personal circumstances? To many, this guarantee seems to be an "empty formula"[21] of more or less arbitrary content and dangerously expansive

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[14] SCL, *supra* note 8, at § 5 ("Research involving embryonic stem cells shall not be conducted unless it has been shown by giving scientific reasons that (1) the projects are directed toward high-level research goals for the advancement of scientific knowledge ....").

[15] *See, e.g.*, Kurt Fassbender, *Der Schutz des Embryos und die Humangenetik: Zur Verfassungsmäßigkeit des neuen Stammzellengesetzes und des Embryonenschutzgesetzes im Lichte des einschlägigen Arzthaftungsrechts*, 5 MEDIZINRECHT 279, 279 (2003); Hans-Ludwig Schreiber, *Das Menschenwürdeprinzip in der Diskussion über Embryonenforschung, Klonen und Präimplantation sdiagnostik, in* BOCHUMER BEITRÄGE ZU AKTUELLEN STRAFRECHTSTHEMEN, GEILEN-SYMPOSIUM 157, 167 (Klaus Bernsmann & Klaus Ulsenheimer eds., 2003), ("Germany has the morality, the others do the work"); *see also* the justification of the draft law by parliamentary deputy Hubert Hüppe et al., BTDrucks 16/7983 at 2: "The position of respect for human dignity which considers the derivation of embryonic stem cells irreconcilable with the prescriptions of the Basic Law is inconsistent with the legal situation which permits the use of stem cells so derived").

[16] This terminology is not "neutral," but rather already implies an understanding of embryos not as subjects, but as objects.

[17] Eric Hilgendorf, *Strafbarkeitsrisiken bei der Stammzellforschung mit Auslandskontakten*, 1 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 22, 25 (2006).

[18] So *Hilgendorf*, speech on the occasion of the specialized conference held by the Friedrich-Ebert-Stiftung, Mar. 19, 2007, on the topic: "Stammzellforschung in Deutschland."

[19] Fundamental on the subject is KARL HEINZ AUER, DAS MENSCHENBILD ALS RECHTSETHISCHE DIMENSION DER JURISPRUDENZ (2005); ERNST-WOLFGANG BÖCKENFÖRDE, VOM WANDEL DES MENSCHENBILDES IM RECHT (2001).

[20] *Cf.* Grundgesetz [German Basic Law], art. 1, sec. 3.

[21] *See* ARTHUR SCHOPENHAUER, PREISSCHRIFT ÜBER DIE GRUNDLAGE DER MORAL (1840), *reprinted in* ARTHUR SCHOPENHAUERS SÄMTLICHE WERKE 629, 695 (Wolfgang Frhr. v. Löhneysen ed., Frankfurt am Main, vol. III, 5th ed. 1998); *see also* Dieter Birnbacher, *Menschenwürde—abwägbar oder unabwägbar?, in* BIOMEDIZIN UND MENSCHENWÜRDE 249 ff (Matthias Kettner ed., 2004).

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tendencies—a "hill of shifting sand," important and pleasant-sounding as "opium for the people,"[22] but really no more than a *terra incognita*, lacking any fixed meaning. Yet even a glance at the significance of the ideal of human dignity, ascribed in normative language in central documents as noted above, and in addition, of course, absolutely fundamental in the history of ideas, makes clear that this fatalistic attitude cannot be left at that; rather, it is of the greatest importance to reconstruct the rational kernel of significance of this "guarantee" pledged to every "human being," starting with its character, also to be found in an international context,[23] as a universal and thereby *strictly egalitarian* entitlement, one which is also independent of any countervailing considerations[24] and so is qualitatively unique, namely *superlative,* when compared to other assurances of basic rights.[25] Here, to all appearances, is the key not only to explaining its systematic connection to the right to life,[26] but also to laying a foundation for distinguishing plausible and less plausible arguments regarding the legal-ethical status of embryos. The consequences for destructive embryo and stem cell research are sketched in propositional form at the end; that these conclusions should meet with universal agreement is not expected. What is hoped, however, is to offer some provocative thoughts toward an understanding of "human dignity" capable of enabling this central normative point of reference for every social order to remain relevant to twenty-first-century questions and conflicts.

I. CONCEPTION OF HUMAN DIGNITY

The starting point for the elucidation of my question is the generally-recognized specific character of the guarantee of human dignity as an especially valuable shelter for the preservation of the value of all human beings, a value which is both indivisible

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[22] Franz Josef Wetz, *Menschenwürde als Opium fürs Volk. Der Wertstatus von Embryonen*, *in* BIOMEDIZIN UND MENSCHENWÜRDE. *supra* note 21, at 221 ff, (at 227: "drug which clouds the mind.").

[23] *See especially* Reiner J. Schweizer & Franziska Sprecher, *Menschenwürde im Völkerrecht*, *in* MENSCHENWÜRDE ALS RECHTSBEGRIFF, TAGUNG DER INTERNATIONALEN VEREINIGUNG FÜR RECHTS- UND SOZIALPHILOSOPHIE (IVR), Schweizer Sektion Basel, 25. bis June 28, 2003, Archiv für Rechts- und Sozialphilosophie (ARSP) [Archives for Philosophy of Law and Social Philosophy] supplement, Nr. 101, at 127 ff (Kurt Seelmann ed., 2004).

[24] *Cf.* Grundgesetz, *supra* note 20, art. 1, sec. 1: "inviolable."

[25] *Cf.* Sigrid Graumann, *Präimplantationsdiagnostik, Embryonale Stammzellforschung und das Regulativ der Menschenwürde*, *in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 122, 128 ff; making further analytical distinctions: Annemarie Pieper, *Menschwürde. Ein abendländisches oder ein universelles Problem?, in* MENSCHENBILD UND MENSCHENWÜRDE 19 ff (Eilert Herms ed., 2001) ("inborn," "indivisible," "inalienable," "non-negotiable," "underived," and "inviolable.")

[26] Grundgesetz, *supra* note 20, art. 2, sec. 2, sentence 1.

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and inalienable, on the one hand, and nonnegotiable and incapable of being lost, on the other. Since theological explanations, with their shared postulate of the *imago dei*, cannot suffice for a legal order aspiring to *general* validity and observance (and hence neutral with regard to worldview), on account of their insufficient acceptability for non-religious members of society,[27] current interpretations range among (substance-)ontological, anthropological, and "relational" (i.e., ascribing "human dignity" according to empirical data in the realm of lived experience)[28] perspectives. This last approach, motivated by a fundamental skepticism regarding metaphysical concepts of ethics, makes the accordingly postmetaphysical[29] ascription of human dignity dependent on the start of an interpersonal relationship with its inherent reciprocal recognition,[30] something which is naturally lacking in the case of embryos given the practical impossibility of communication. Such a model, however, must necessarily fail, since it has no way out of the "arbitrariness trap"[31] into which it unavoidably falls: It lacks any criterion for rejecting as irrelevant the arbitrary denial of social recognition, so that in reality nothing is left of the generally-accepted presumption of absolute[32] human dignity. When Habermas, for example, sees the moment of birth as decisive, because "only in the moment of separation from symbiosis with the mother ... does the child enter a world of persons who meet him, address him, and speak with him," and hence introduce him into "the public web of interactions of an intersubjectively-shared world of lived experience,"[33] one need only call to mind the way children born out of wedlock used to be treated in order to acknowledge the

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[27] Along the same lines, see Tatjana Hörnle, *Die Menschenwürde: Gefährdet durch eine "Dialektik der Säkularisierung" oder "Religion der Moderne"?, in* POSTSÄKULARE GESELLSCHAFT 170, 172 (Walter Schweidler ed., 2007).

[28] Also referred to as "social construction theory," *cf.* Matthias Kettner, *Über die Grenzen der Menschenwürde, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 292, 300.

[29] JÜRGEN HABERMAS, NACHMETAPHYSISCHES DENKEN (1992), (*see especially* the section titled: Motive nachmetaphysischen Denkens, at 35 ff).

[30] JÜRGEN HABERMAS, DIE ZUKUNFT DER MENSCHLICHEN NATUR. AUF DEM WEG ZU EINER LIBERALEN EUGENIK? 62 (2001); *see also* Reiner Anselm, *Menschenwürde als regulatives Prinzip in der Bioethik, in* MENSCHENWÜRDE UND MEDIZINETHISCHE KONFLIKTFÄLLE 221 ff (Nikolaus Knoepffler & Anja Haniel eds., 2000); Ulfried Neumann, *Die Menschenwürde als Menschenbürde – oder wie man ein Recht gegen den Berechtigten wendet, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 42, 60 (n. 19: "start of social interaction."

[31] *See esepcially* Matthias Kettner, *Über die Grenzen der Menschenwürde, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 292, 300.

[32] On "the absolute in law" in greater detail, see Gunnar Duttge & Michael Löwe, *Das Absolute im Recht. Epilegomena zur deontologischen Legitimation abwägungsfreier Rechtsgehalte*, 14 JAHRBUCH FÜR RECHT UND ETHIK [ANNUAL REVIEW OF LAW AND ETHICS] 351 ff (2006).

[33] HABERMAS, *supra* note 29, at 64 ff.

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untenability of this position for a welfare state governed by the rule of law—leaving aside its internal contradictions, arising from the fact that a newborn naturally does not yet belong in any way to the human speech community. And when moreover the Düsseldorf moral philosopher Birnbacher confesses, with laudable frankness, that he has "the greatest of difficulties in thinking of the fertilized ovum ... as a subject of moral rights,"[34] this is not the solution of our problem, by way perhaps of an appeal to the concept of an "ethical intuitionism,"[35] but rather quite the opposite, a demonstration of the ways in which every perspective relying on acts of *real* recognition jumps to conclusions and is literally shortsighted. One might also formulate this fundamental objection in the terms used by the Swiss scholar of constitutional law Mastronardi, as follows: A contract model anchored in lived experience is not capable of itself producing reciprocal recognition of the parties as subjects, but rather assumes this as a precondition and points thereby to a previous foundational act; "recognition" is therefore not, as it were, the foundation, but far more the consequence of human subjectivity.[36]

The anthropocentric position finds supporters today in its consciousness-theoretical variant (when it is based on a capacity for self-awareness or on the possession of a consciousness of self)[37] as well as in its utilitarian form (when it is linked to the capacity for pain, or more generally for feeling or for desire).[38] A position

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[34] Dieter Birnbacher, *Menschenwürde – abwägbar oder unabwägbar?, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 249, 259; *Cf.* Christine Hauskeller, *Stammzellforschung und Menschenwürde. Plädoyer für einen Blickwechsel, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 145, 154 ("only visible under the microscope and ... no concrete opposite number.")

[35] For an overview of the problems involved in such a perspective, see REINHARD MERKEL, FORSCHUNGSPROJEKT EMBRYO. VERFASSUNGSRECHTLICHE UND ETHISCHE GRUNDLAGEN DER FORSCHUNG AN MENSCHLICHEN EMBRYONALEN STAMMZELLEN 15 f. (2002).

[36] *Cf.* Philippe Mastronardi, *Verrechtlichung der Menschenwürde—Transformation zwischen Religion, Ethik und Recht, in* MENSCHENWÜRDE ALS RECHTSBEGRIFF, *supra* note 23, at 93, 101 ff; *see also* Wilfried Kluth, *Verfassungsrechtliche Rahmenbedingungen der Präimplantationsdiagnostik, in* RECHTSFRAGEN DER PRÄIMPLANTATIONSDIAGNOSTIK 83, 103 (Christian Dierks, Albrecht Wienke, & Wolfgang Eisenmenger eds., 2006).

[37] Along these lines see Werner Heun, *Humangenetik und Menschenwürde. Beginn und Absolutheit des Menschenwürdeschutzes, in* MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG 197, 209 ff (Petra Bahr & Hans M. Heinig eds., 2006), ("at least in principle ego-consciousness, the capacity for self-determination and reason"; NORBERT HOERSTER, ETHIK DES EMBRYONENSCHUTZES 74 (2002), ("ego-consciousness"); Julian Nida-Rümelin, *Wo die Menschenwürde beginnt,* DER TAGESSPIEGEL, Jan. 3, 2001, at 25: capacity for "self-awareness" in still another form Matthias Kettner, *Über die Grenzen der Menschenwürde, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 292, 314 (based on "the self-awareness of *normally* morally-developed beings," i.e., on a "human *characteristic quality.*").

[38] *Cf.* Dieter Birnbacher, BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 266; based on "capacity for feeling," ANTON LEIST, EINE FRAGE DES LEBEN 69 (1990); Bettina Schöne-Seifert, *Contra*

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based on a human being's real qualities will hardly suffice, however, to enable the equal acknowledgment of an absolute dignity for *all* "members of the human family"[39] without exception, i.e., a dignity divorced from and independent of all concrete actualities of the world of lived experience, for the egalitarian claim to validity is necessarily lost when it is tied to real qualities which can necessarily only be encountered in gradual, relativizing forms.[40] It cannot be surprising, therefore, that the efforts to close the loopholes thus opened, especially with regard to the comatose or the demented, but also with regard to the weak or even specifically with regard to infants, always appear notably lacking in energy.[41] But where, then, is the specialness, the uniqueness of human "dignity" to be found?

As is well-known, the conviction has run through the entire history of philosophy that a specific "endowment" is proper to every member of the human species. Whether one would like to describe this state of affairs, a touch profanely, by means of Pascal's image of a "thinking reed,"[42] or would prefer Kant's conception of an "intelligible world" in which the human being in his or her manifestation as *homo noumenon*, as it were, always has one foot already planted:[43] It is always the "*endowment* of reason," which it could only occur to anyone to contest who does not know him- or herself, and the "power of making plans"[44] inherent in it, which we claim for ourselves and which we simultaneously look upon as the foundation for the claim we make on the respect of others, and therefore must admit to apply to our own behavior, if only for reasons of equality and freedom from contradiction. In contrast to a theocentric perspective, "dignity" hereby does not descend upon the human being as reflected splendor from

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Potentialitätsargument: Probleme einer traditionellen Begründung für embryonalen Lebensschutz, in DER MORALISCHE STATUS MENSCHLICHER EMBRYONEN, *supra* note 5, at 169, 183.

[39] *Supra* note 4.

[40] *See* Tatjana Hörnle, *Menschenwürde und Lebensschutz*, 89 ARSP 318, 321 (2003); Ralf Müller-Terpitz, *Der Embryo ist Rechtsperson, nicht Sache*, 2 ZEITSCHRIFT FÜR LEBENSRECHT (ZFL) 34 ff (2006).

[41] *See, e.g.* HABERMAS, *supra* note 30, at 68 ("in accordance with the weighing of higher- or lower-ranked goods," which is nevertheless described at the same time as "something ungraspable"!); Ulfried Neumann, BIOMEDIZIN UND MENSCHENWÜRDE 61, *supra* note 21 ("paternalistic protection.").

[42] BLAISE PASCAL, PENSÉES 142 (1952):

> Man is only a reed, the weakest thing in nature, but he is a thinking reed. There is no need for the entire universe to arm itself in order to crush him; a vapor, a drop of water is sufficient to kill him. But when the universe crushes him, he will still be nobler than that which kills him, since he knows that he dies and the advantage that the universe has over him. The universe knows nothing of the matter. All our dignity consists therefore in thought.

[43] An instructive overview in Friedo Ricken, *Homo noumenon und homo phaenomenom*, *in* GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN. EIN KOOPERATIVER KOMMENTAR 234 ff (Otfried Höffe ed., 3rd ed. 2000), *see especially* 240 ff.

[44] Giovanni Pico della Mirandola, ÜBER DIE WÜRDE DES MENSCHEN 5 (August Buck ed., 1990).

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a transcendental world, but rather forms the essence of that which distinguishes the human being as such in earthly life: not only, as it were, "a piece of nature concerned about itself in the midst of a world unconcerned about it," but rather the endowment of a "creative sculptor" of his or her own self, oriented toward the "ideal of reason," which gains at least potential reality as the reference point of human activity.[45] The "ideal of freedom" which this presupposes, the ability to orient one's own actions and decisions toward generally-binding grounds for justification—in Kantian terms, that is, human "autonomy"[46] —does indeed form the "basis for the dignity of human nature and of every rational nature,"[47] as the *Groundwork of the Metaphysics of Morals* explicitly announces; however, it would be a fundamental misunderstanding of Kant's moral philosophy to conclude from this that it is only the development in each individual of a "capacity for reason," based on freedom, which determines the recognition of human dignity.[48] Rather, precisely the other way around, the human being as a being endowed with reason is already "*through his own nature ... destined [to]* ..." exist "as an end itself and precisely in this regard as legislative in the realm of ends,"[49] or in other words: only on the basis of his humanity and thereby as necessarily sharing in the "principle of humanity,"[50] without need of any other empirical data, the relevance or irrelevance of which could never be judged in a non-arbitrary manner.

Only the "ban on definition"[51] resulting from this, beyond generic membership in the human family, offers safety from the denial of rights, the prevention of which is precisely the sense of an ideal of "human dignity" guaranteed on a level antecedent to the state, as a thereby "inclusive egalitarian concept."[52] Not inclusion, but exclusion

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[45] In greater detail, Kurt Bayertz, *Die Idee der Menschenwürde: Probleme und Paradoxien*, 81 ARSP 465, 473 (1995); on "reason as idealized ego," see VOLKER GERHARD, SELBSTBESTIMMUNG 356 (1999) 356.

[46] For greater depth on the Kantian concept of "autonomy," see GERHARD, *supra* note 45, at 406 ff.

[47] IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785), *reprinted in* WERKE 69 (Wilhelm Weischedel ed., vol. 6 1983).

[48] *See* Immanuel Kant's express indication (*id.* 63): "This principle of humanity and of every rational nature in general, as an end in itself ... is not derived from experience ... because in it humanity is not envisaged (subjectively) as the end of the human being ..."

[49] *Id.* at 69.

[50] I.e., not understood in the sense of a collective, but rather as a specific characteristic of every human being "as human being," on which in greater detail, Dietmar von der Pfordten, *Zur Würde des Menschen bei Kant,* 14 JAHRBUCH FÜR RECHT UND ETHIK 501, 505 (2006).

[51] Wolfram Höfling, *Definiert die Rechtsordnung den Menschen?, in* MENSCHENLEBEN—MENSCHENWÜRDE 165, 167 (Walter Schweidler, Herbert A. Neumann, & Eugen Brysch eds., 2003); Robert Spaemann, *Wer jemand ist, ist es immer, in* DER SCHUTZ DES MENSCHEN VOR SICH SELBST: EINE ETHIK ZUM LEBEN 19, 25 (Michael Fleischhacker ed., 2002).

[52] Graumann, *supra* note 25.

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thus requires justification, if only on account of the fundamental consequences which flow from it, for that which cannot claim respect by virtue of its intrinsic value has no dignity, but only a price, "in place of which ... something else [could] therefore be substituted as an equivalent."[53] If the idea of equality contained in the promise of human dignity is tied to membership in humanity, on the other hand, then it is only the generic *potential* for rationality and moral capacity which is taken into consideration thereby, not their actual presence, as is easily made plain by a simple supplementary consideration, on the other hand: Were the commandment of respect to be valid only under the precondition that the party in question was demonstrably endowed with reason or morality, then every duty apparently prescribed for the individual would in reality melt entirely away—along with every justification for the expectation that the individual himself will be treated by his counterpart as an "end" and not "just a means." The challenge, then, is to respect the ideal without reference to its concrete shape, and consequently to treat every member of the human family *as if* he or she had shared "reason" and "morality."

II. RELATION BETWEEN HUMAN DIGNITY AND RIGHT OF LIFE

The "potentiality" argument[54] so often problematized in the debate over the moral or legal-ethical status of embryos is hence precisely inherent in the ideal of an *equal* human dignity, since the recognition of the fundamental position bound up with this ideal is *eo ipso* independent of real qualities or capacities. The charge sometimes made of an erroneous inference from "is" to "ought"[55] thus appears as a grotesque misinterpretation, since the point of the concept of human dignity, is precisely, to bear witness to a basic status of unquestionable subjectivity without appeal to ontological data and without consideration of any relativizing factors related thereto, with the

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[53] KANT, *supra* note 47, at 68 ("that which on the contrary is exalted beyond any price and consequently allows no equivalent, that has dignity.")

[54] For a favorable examination of the potentiality argument, see Wolfgang Wieland, *Pro Potentialitätsargument: Moralfähigkeit als Grundlage von Würde und Lebensschutz, in* DER MORALISCHE STATUS MENSCHLICHER EMBRYONEN, *supra* note 5, at 149; for a critical perspective, see Schöne-Seifert, *supra* note 38, at 169 ff.

[55] MERKEL, *supra* note 35, at 131; *see also* Eric Hilgendorf, *Stufungen des vorgeburtlichen Lebens- und Würdesschutzes in* RECHT UND ETHIK IN DER PRÄIMPLANTATIONSDIAGNOSTIK 115 (Anette Gethmann-Siefert & Stefan Huster eds., 2005); Eric Hilgendorf, *Irrwege des Biologismus. Ein Kapitel aus der Geschichte des Verhältnisses von Biologie und Recht in* ZIVIL- UND WIRTSCHAFTSRECHT IM EUROPÄISCHEN UND GLOBALEN KONTEXT. FESTSCHRIFT FÜR NORBERT HORN ZUM 70. GEBURTSTAG 1131, 1145 (Klaus Peter Berger et al. ed., 2006).

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goal of excluding every possible form of discrimination. This creates the *basis of validity* for allegiance "to inviolable and inalienable human rights as the foundation of every human community"[56]; in other words, particular fundamental rights turn out to be, as it were, concrete manifestations of the guarantee of human dignity, which for its part—not unlike Kelsen's "basic norm"[57] —holds a unique place in the hierarchy of norms[58] and in this sense establishes a primary (originary) right "to have rights at all."[59] Only this explains its unique rank, resulting from the "inviolability" ascribed to it[60], as well as its "taboo status" even with regard to legislative acts of constitutional amendment.[61] In the words of Alan Gewirth: "It is because humans have dignity that they have human rights."[62]

On the basis of such a "foundational relationship,"[63] between the guarantee of human dignity and particular basic freedoms, an argument that seeks to draw conclusions about the quality of an embryo's basic status from the practical impossibility of its exercise of particular freedoms (e.g., freedom of expression, assembly, etc.) can be seen to have the absurdity of a "looking-glass world." After all, it would never occur to anyone, for example, to deny the right to life or other fundamental freedoms to young people not yet ready for adult employment or not yet old to enough to vote. Rather, the existence of something human in its early form, which needs to preexist as an entity and can therefore not be attributed to both like gametes in their separated state prior to their conjunction (argument of identity),[64] already provides

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[56] Grundgesetz, *supra* note 20, art. 1, sec. 2.

[57] *Cf.* Kurt Seelmann, *Vorwort, in* MENSCHENWÜRDE ALS RECHTSBEGRIFF, *supra* note 23, at 7, 8; Wolfgang Wodarg, *Diesseits des Rubikon? Politische Standortbestimmung im Streit um die rechtliche und moralische Auslegung der Menschenwürde, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 15, 26 ("basic norm.").

[58] *Cf.* Matthias Kettner, *Über die Grenzen der Menschenwürde*, *in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 305 ("highest moral status.").

[59] Kurt Seelmann, *Haben Embryonen Menschenwürde, Überlegungen aus juristischer Sicht, in* BIOMEDIZIN UND MENSCHENWÜRDE, *supra* note 21, at 63, 66; *similarly* Christoph Enders, *Die Menschenwürde als Recht auf Rechte – die mißverstamdene Botschaft des Bonner Grundgesetzes, in* MENSCHENWÜRDE ALS RECHTSBEGRIFF *supra* note 23, at 49, 59 ("the human being's right to rights.").

[60] Grundgesetz, *supra* note 20, art. 1, sec. 1.

[61] *Cf. id.* art. 79, sec. 3.

[62] Alan Gewirth, *Human Dignity as the Basis of Rights, in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 10 (Michael J. Meyer & W. A. Parent eds., 1992).

[63] Horst Dreier, *Bedeutung und systematische Stellung der Menschenwürde im deutschen Grundgesetz*, *in* MENSCHENWÜRDE ALS RECHTSBEGRIFF, *supra* note 23, at 33, 36; *Cf.* Seelmann, *supra* note 57 ("relationship of precondition.").

[64] *Cf.* Gunnar Duttge, *Die Rechtsphilosophie vor den Herausforderungen der Biotechnologie*, 1 ZEITSCHRIFT FÜR RECHTSPHILOSOPHIE (ZRPH) 67 ff (2004).

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the structure—one which deserves protection—for the differentiation of an "I" as a preliminary to later self-determination in its particular versions. This protection-deserving expectancy, now, can logically only exist or not exist; that is, only one of the two qualities under consideration can be ascribed to any entity—subjecthood on the one hand or objecthood on the other, or in Kantian terms, either having a "dignity" or alternatively having a "price."[65] Hence, the idea, proposed in a spirit of pragmatic compromise,[66] of a "graduated" value which increases step-by-step in the course of the process of further development[67] is no solution to the "inclusion problem" (i.e., the question about the "start" of the possession of rights). Even if such a concept of "gradualization" might be applicable to the rights derived therefrom in any particular case (e.g., the right to vote, freedom of contract, choice of religious confession, etc.), for the basic status of an existence with an unconditional claim to respect, there can be only one thing or the other—*tertium non datur*![68]

Here a further thought can be shown to be a necessary consequence of the previously-developed line of argument: If human dignity forms the basis for the validity of all conceivable rights possessed by a human being, then an encroachment on those rights does not per se carry the stamp of what is *simply* beyond discussion; the acknowledgment of subject status is thus in no way identical in significance to the exclusion of its irremediable infringement. Rights of course, can only be infringed upon where a subject is present; not every influence on the possessor of

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[65] *See supra* note 48.

[66] Which nevertheless is impossible at the categorical level of the acknowledgment or denial of subject status!

[67] *See* Horst Dreier, *Grenzen des Tötungsverbotes – Teil 1*, 6 JURISTEN ZEITUNG (JZ) 260 ff (2007); *see also* Eric Hilgendorf, *Biostrafrecht als neue Disziplin. Reflexionen zur Humanbiotechnik und ihrer strafrechtlichen Begrenzung am Beispiel der Ektogenese*, *in* DER WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART. FESTSCHRIFT FÜR WINFRIED BROHM ZUM 70 GEBURTSTAG 387, 398 ff (Carl-Eugen Eberle et al. ed., 2002); Hans-Ludwig Schreiber, *Das Menschenwürdeprinzip in der Diskussion über Embryonenforschung, Klonen und Präimplantationsdiagnostik, in* GEILEN-SYMPOSIUM, *supra* note 15, at 157, 164 ff; Christiane Wendehorst, *Rechtliche Anforderungen an ein künftiges Fortpflanzungsmedizingesetz, in* DER ZUGRIFF AUF DEN EMBRYO, ETHISCHE, RECHTLICHE UND KULTURVERGLEICHENDE ASPEKTE DER REPRODUKTIONSMEDIZIN 35, 41 ff (Fuat S. Oduncu, Katrin Platzer & Wolfram Henn eds., 2005); *See also* Christiane Woopen, *Substanzontologie versus Funktionsontologie—Wie bestimmen wir den Beginn und dei Ansprüche schutzwürdigen menschlichen Lebens?, in* RECHTSFRAGEN DER PRÄIMPLANTATIONSDIAGNOSTIK, *supra* note 36, at 21 ("a kind of phase of constitution of the new living being" in the first days after fertilization).

[68] Typically unclear, on the other hand, see, e.g. Hartmut Kreß, *Der ontologische und moralische Status des Embryos aus der Sicht protestantischer Ethik, in* DER ZUGRIFF AUF DEN EMBRYO, *supra* note 67, at 75, 87 ("To however great an extent dignity is to be ascribed to the early embryo, it should be kept in mind at the same time that … it is a human being in the process of becoming.").

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rights is necessarily forbidden however thereby—admittedly excepting such influence as infringements on the "inviolable" guarantee of human dignity. By contrast, according to German constitutional law[69] the right to life is thoroughly susceptible to encroachment; moreover, according to the European Charter of Fundamental Rights[70] and to the European Human Rights Convention[71] even if given its special value this is always only in the most exceptional cases and with especially scrupulous application of the principle of proportionality. One may hence surmise that recognition of a subject status for embryos will ultimately shrink the sphere of activity of destructive embryo research to a more or less narrow field. Absolute protection, on the other hand, contrary to the mistaken opinions sometimes encountered, is not thereby pledged, so that the aim of preventing a comprehensive ban on embryonic stem cell research[72] does not require opposition to the possession of rights as such.[73] What, however, are now the concrete consequences of this for research on or with embryos—from the perspective of their right to life as well as from that of the ideal of an inviolable human dignity?

Taking into consideration the special protection granted to human life[74] a situation's quality of being "*contrary* to human dignity" cannot arise, at least not primarily, from the degree of loss suffered by the individual affected, but rather in the first instance from the manner of the infringement: Only in instances subject status is *flatly* denied, that is, where the owner of rights is treated from the start as only a negotiable quantity without any intrinsic value—in Kantian terms merely as a means and not at least partially also as an "end in himself"[75]—does one enter the realm of what is simply

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[69] *Cf.* Grundgesetz, *supra* note 20, art. 2, sec. 2.

[70] Charter of Fundamental Rights of European Union, *supra* note 1, art. 52.

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

[71] *Cf.* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, sec. 2, Nov. 4, 1950, 213 U.N.T.S. 222.

[72] *See* BTDrucks 16/7983 ("weighty ethical concerns" on account of insufficient clinical prospects as a result of "uncontrollable risks of tumors" as well as in view of "unproblematic" alternatives in the form of pluripotent stem cells (derived from umbilical cord blood, from amniotic fluid, or through the genetic reprogramming of human skin cells)).

[73] Such a discussion strategy might naturally be the most effective for obtaining the desired "liberalization," but it makes the constantly-emphasized balance—between which opposed rights or legally-protected interests—of the proposed solution necessarily implausible.

[74] *Cf.* Grundgesetz, *supra* note 20, art. 2, sec. 2.

[75] KANT, *supra* note 47, at 61.

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forbidden.[76] Insofar as embryos, therefore, are conceived only for purposes profitable to others (e.g., for research purposes), and consequently from the start without any prospect of individual development, the presumption of a violation of human dignity ought not seriously be questioned.[77] Far less clear, on the other hand, is the substantially more difficult and probably on a practical level, far more significant question of the degree to which embryos originally conceived for implantation and only subsequently no longer utilizable for this end, i.e., embryos which have become excess, may be handed over to research. The act of production does not carry the stigma of an instrumentalization of the subject and so points to a location outside the realm of the "simply forbidden." Yet the destruction of human life self-evidently has an intrinsic gravity which uncontroversially takes precedence over freedom of research in the case of human beings who have been born.[78]

If one calls to mind the cases of legitimate homicide recognized up to now in German law, we have to affirm that destructive embryo research goes far beyond this narrow scope: To the extent that the right of self-determination of the individual affected does not justify divergence from the principle of preservation of life, as for example in the case of patient-chosen limitations on medical intervention,[79] authorization for homicide has been limited up to now to cases of the prevention of an acute danger, a prevention aimed, as above all in the case of self-defense[80] or of the final rescue shot by the police, at the source of the danger. This last requirement was dispensed with by the authorization to shoot down civilian airplanes contained

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[76] *See also* Tatjana Hörnle, *Menschenwürde und Lebensschutz*, 89 ARSP 318, 321 & 324 ff (2003).

[77] *See also* MANUELA BREWE, EMBRYONENSCHUTZ UND STAMMZELLGESETZ 93 ff (2006); WOLFRAM HÖFLING, REPROGENETIK UND VERFASSUNGSRECHT 42 ff (2001): "functionally reduced conception of human life"; Hans-Ludwig Schreiber, *Das Menschenwürdeprinzip in der Diskussion über Embryonenforschung, Klonen und Präimplantationsdiagnostik, in* GEILEN-SYMPOSIUM, *supra* note 15, at 167 (distinguished from the utilization of excess embryos); Christian Starck, *Maßstäbe der Gestaltung dse rechtlichen Rahmens für Lebenswissenschaft und Lebenstechnik, in* LEBEN KONGRESSBAND DES XI. EUROPÄISCHEN KONGRESSES FÜR THEOLOGIE V. 15.-19.9.2002 IN ZÜRICH 120, 125 (Eilert Herms ed., 2005).

[78] *Cf.* Grundgesetz, *supra* note 20, art. 5, sec. 3.

[79] *See* GUNNAR DUTTGE ET AL., PREIS DER FREIHEIT. REICHWEITE UND GRENZEN INDIVIDUELLER SELBSTBESTIMMUNG ZWISCHEN LEBEN UND TOD 10 ff (2d ed. 2006); *see also* Gunnar Duttge, *Rechtliche Typenbildung: Aktive und passive, direkte und indirekte Sterbehilfe, in* SELBSTBESTIMMUNG AM LEBENSENDE 36, 56 ff (Dietrich Kettler, Alfred Simon, Reiner Anselm, Volker Lipp & Gunnar Duttge eds., 2006).

[80] *Cf.* Übersetzung des Strafgesetzbuches [German Criminal Code] (CC) § 32, an English translation *available at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

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in the Aviation Security Law[81] set in motion following the disturbing act of terror of September 11, 2001,[82] given that no responsibility for the origin of the danger can be ascribed to the passengers. The Federal Constitutional Court, however, saw in this permission a purely utilitarian quantification of human lives, and hence one which infringed on human dignity, since the individuals affected by the downing of a plane were treated de facto as already non-living, i.e., as non-subjects: In the court's view, this was unjustifiable even when it would supposedly[83] prevent something even worse.[84]

In the case of destructive embryo research even this kind of scenario, the prevention of danger, is lacking, since someone who is presently ill with Parkinson's disease, Alzheimer's, leukemia or multiple sclerosis, could not be helped by research now under way. Although estimates of stem cell research's likelihood of success diverge widely, much speaks in favor of the assumption that at least a few more years, possibly several decades,[85] will pass before the stem cell control mechanisms as well as, above all, the pathological processes of deterioration which are the occasion for stem cell therapy[86] are sufficiently understood. In other words, the widely-favored argument

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[81] ASL, old version, § 14, no. 3.

[82] Law for the Reform of Aviation Security Affairs (Gesetz zur Neuregelung von Luftsicherheits aufgaben), Jan. 11, 2005, BGBl. I, 78.

[83] Question: Is it at all even possible to weigh or compare what is "worse" among the various consequences of the proposed catastrophic scenarios?

[84] Bundesverfassungsgericht [Federal Constitutional Court] (BVerfG), *Nichtigkeit der Abschussermächtigung im Luftsicherheitsgesetz,* 11 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, 751 (headnote) (2006), as well as 758:

> Such treatment fails to respect the individuals affected as subjects with dignity and inalienable rights. They are objectified and deprived of rights by the fact that their killing is used as the means to the rescue of others; in that the state claims a one-sided power of disposition over their lives, the occupants of the plane, who are as victims themselves in need of protection, are denied that value which pertains to a human being on his or her own account.

[85] *See, e.g.*, the Heidelberg hemato-oncologist Anthony Ho, *Stellungnahme zur Anhörung am 9. Mai 2007 im Deutschen Bundestag zum Thema "Stammzellforschung,"* Statement to the hearing of 5th may 2007 in the German federal parliament concerning "stem cell research" by the commission of education, research and technology. A-Drs. 16(18)192m (2007), at 1; See *also* Gerd Kempermann, *Anhörung des Ausschusses für Bildung, Forschung und Technikfolgeabschätzung des Deutschen Bundestages am 09. Mai 2007*,Statement, A-Drs. 16(18)193a (2007) at 2: "Much basic work remains to be done"; Lukas Kenner, *Anhörung des Ausschusses für Bildung, Forschung und Technikfolg enabschätzung. ThemaStammzellforschung am 9.5.2007.* Statement, A-Drs. 16(18)193s (2007): Therapeutic uses are "with high certainty not to be expected in the next few years."

[86] *See* Axel Bauer, *Ethische Fragen neuer Therapien am Beispiel menschlicher embryonaler Stammzellen,* 2 ZFL 40, 42 (2007) ("A sickness the causes and pathogenesis of which are insufficiently

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which appeals to the "life lost in any case" of excess embryos is even farther than the Aviation Security Law, ruled unconstitutional, from the—at least with regard to the German legal system hitherto—existing basic constitutional consensus in dealing with human life, which permits no "killing of an equal member of the community of rights"[87] for the good of science. The recognition of a full right to life for embryos therefore condemns all attempts at the legitimation of destructive embryo and stem cell research to failure. This explains the desperate search for a way out in the idea of graduated levels of protection of the right to life,[88] which takes away from the embryo in a second step, in an admittedly contradictory valuation, that same right to existence which, supposedly, was momentarily granted to it in the first step. If only on account of the consequences to be feared for the effective protection of human life as a whole, such a "second-class right to life," which in the case of conflict is really worthless,[89] is better realized without. With regard to stem cell research, what is urgently needed in the first place is a scientifically-serious plan of action that concentrates first of all on biological basic research in animal models and strives for procedures that make possible the derivation of stem cells *without the killing of embryos.* Only when this has been achieved, and the necessary therapeutic interventions have also been mastered in animal models,[90] can the next step lead to a transfer to human beings—then, however, in a manner of sparing embryos. Opposingly, as long as stem cell research seeks to pursue its goals through reductionist messages, especially the claim that new and effective therapies

understand can perhaps be treated symptomatically through quantitative cell replacement from outside, but not healed at its root and in the long run"); see the admission in Oliver Brüstle, *Anhörung des Ausschusses für Bildung, Forschung und Technikfolgenabschätzung. Thema "Stammzellforschung" am* May 9, 2007, Statement, A-Drs. 16(18)193k (2007), at 6: "For example, the causal pathological mechanisms of illnesses such as multiple sclerosis, Parkinson's, or Alzheimer's are not understood as of today."

[87] LUDWIG SIEP, KONKRETE ETHIK 335 (2004).

[88] *See supra* note 66.

[89] Wilfried Kluth, *Verfassungsrechtliche Rahmenbedingungen der Präimplantationsdiagnostik, in* RECHTSFRAGEN DER PRÄIMPLANTATIONSDIAGNOSTIK, *supra* note 36, at 104 ("There is ...no discernible difference between the complete denial of the protection of fundamental rights and the theory of the graduated protection of life.").

[90] Remarkably, "ethical concerns" are brought into play in this regard by stem cell researchers. *Cf.* Hans Schöler, *Stellungnahme für die Anhörung des Ausschusses für Bildung, Forschung und Technikfolgenabschätzung des Deutschen Bundestages zum Thema "Stammzellforschung" am 9. Mai 2007*, Statement, A-Drs. 16(18)193e (2007), at 3 (item 9).

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are to be expected *right away,*[91] it corrupts itself to the harm of all, but not least to the harm of law and ethics.[92]

CONCLUSION: LOGICAL CONSEQUENCES OF STEM CELL RESEARCH

What balance can be drawn up following this discussion? Concretely, with regard to stem cell research, postponing or abolishing the existing cut-off date[93] would unmistakably reveal that the legislative power is no longer inclined to take its own precedents seriously. This is also true with regard to the law protecting embryos. Consequently all limitations which previously, at least de jure, stood in the way of the supply of "excess embryos" would have to be laid aside in order to promote stem cell research.[94] The result would ultimately be the complete surrender of embryos for research purposes. As the Mannheim historian of medicine Bauer has rightly warned, however, it is simply unacceptable "[to] constantly redefine what human life deserves protection according to the current demands of the biological sciences,"[95] for this may be stated as generally valid: To wish under no circumstances to sacrifice human life even to the highest-ranking of common interests, was and is, that historical lesson which in the *topos* of "inviolable human dignity" has become the ineffaceable spiritual foundation of our social order.[96] The Treaty of Lisbon [97] pledges allegiance

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[91] *See, e.g.*, Otmar D. Wiestler, *Stellungnahme zur öffentlichen Anhörung "Änderung des Stammzellgesetzes" am 3. März 2008, Leitfragen und Antworten zur Anhörung des Ausschusses*, A-Drs. 16(18)336h (2008), at 1: "regenerative medicine, where entirely new possibilities are being opened up for the transplantation of donor cells in common sicknesses such as Parkinson's disease or diabetes"; on the contemporary state of the field, Hubert Hüppe, *Antworten auf häufig gestellte Fragen zur Forschung mit menschlichen embryonalen Stammzellen*, 1 ZFL 10, 12 (2008): "embryonic stem cells have cost thousands of research animals their lives on account of tumors, but have so far healed not one ... patient worldwide."

[92] *See* Axel Bauer, *Ethische Fragen neuer Therapien am Beispiel menschlicher embryonaler Stammzellen,* 2 ZFL 40, 44 (2007).

[93] BTDrucks 14/8394, *supra* note 9.

[94] On this subject in greater detail Axel Bauer, *Ethische Fragen neuer Therapien am Beispiel menschlicher embryonaler Stammzellen,* 2 ZFL 40, 43 (2007); *see also Riedel, Stellungnahme für die Anhörung des Ausschusses für Bildung, Forschung und Technikfolgenabschätzung des Deutschen Bundestages zum Thema "Stammzellforschung" am 9. Mai 2007*, Statement, A-Drs. 16(18)193f (2007), at 3: the law for the protection of embryos will be hollowed out; *cf.* Kollek, *supra* note 9, at 2.

[95] Bauer, *supra* note 94; *contra* Brüstle, *supra* note 86, at 10 ("It is to be presumed that without changes in the law the field of human embryonic stem cell research will come to a standstill in Germany within a few years.").

[96] On this subject from the more recent literature at length ADRIENNE WEIGL, DER PREISGEGEBENE MENSCH. ÜBERLEGUNGEN ZUM UMGANG MIT MENSCHLICHEN EMBRYONEN (2007).

[97] *See* art. 1 (a), Dec. 17, 2007, 2007 O.J. (C306/10) ammending the preamble to Treaty of the European Union, Feb. 7, 1992, 1992 O.J. (C191) 1.

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to the "cultural, religious and humanist inheritance, from which have developed ... the inviolable and inalienable rights of the human person." This image of humanity emphatically distinguishes itself from a positivistic restriction to the here and now and understands itself by contrast as characterized by a specific fundamental tension between two reciprocally-linked worlds: the order of *law* in this one and the order of *justice* in the one beyond, which alone opens up the possibility of protecting the human being from the totalitarian demands of modernity,[98] for it is only in that "respect" owed to him or her despite his or her foreignness[99] that there is to be found "the recognition of a dignity ... i.e., of a value which is beyond price."[100] The task of extending this value-forming tradition into the future and of preserving continuity in changing times is laid upon us all.

[98] *See* Tine Stein, *Irdisches Recht ohne himmlische Werte? Was das Recht mit dem Absoluten zu tun hat*, 1 ZRPH 58, 66 (2004).

[99] On the "perception of the foreign as the orienting originary impression of the question of human dignity," see Philipp Stoellger, *Fremdwahrnehmung. Die Menschenwürde des Fremden und die Fremdheit der Menschenwürde*, *in* MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG, *supra* note 37, at 367, 388.

[100] IMMANUEL KANT, METAPHYSIK DER SITTEN (1797), *reprinted in* WERKE 600 (Wilhelm Weischedel ed., vol. 7) (with the addition: "The judgment of a thing as being such as has no value is contempt.")

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