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### **THE EMBRYO RESCUE CASE**

ABSTRACT. In the debate regarding the moral status of human embryos, the Embryo Rescue Case has been used to suggest that embryos are not rightholders. This case is premised on the idea that in a situation where one has a choice between saving some number of embryos or a child, it seems wrong to save the embryos and not the child. If so, it seems that embryos cannot be rightholders. In this paper, I argue that the Embryo Rescue Case does not independently show that embryos are not rightholders.

KEY WORDS: moral status, embryo, rights, time-relative interest, persons, potentiality

### **THE EMBRYO RESCUE CASE**

In the debate regarding the moral status of human embryos, an example has been used to show that embryos cannot be rightholders like you and me.<sup>1</sup> The example is as follows:

Imagine that an IVF clinic is burning. There are  $n$  number of embryos (where  $n$  is equal to or greater than 1) and there is a five-year-old child. You can save either the embryos or the child, but not both. If embryos are rightholders like you and me, it seems that one should either be permitted to save the embryo if  $n=1$ , or be required to save the embryos if  $n > 1$ . However, intuitively, it seems that one should save the child regardless of the number of embryos present. If so, it seems that embryos cannot be rightholders like you and me.

Call this the Embryo Rescue Case. In this paper, I shall argue that this case does not independently show that embryos are not rightholders. I do not claim that if this case were coupled with some theory of the moral status of embryos, it could not show that embryos are not rightholders. But what would be doing the work in showing that embryos are not rightholders, I think, would be that theory rather than this case. Also, I do not claim here that embryos are in fact rightholders.<sup>2</sup> My purpose here is entirely a negative one.

## **THE EMBRYO RESCUE CASE 2**

One reason for doubting the validity of the Embryo Rescue Case is as follows: If the case were valid, that is, if embryos are indeed not rightholders, then it should be the case that

at least in most cases, when one is faced with a scenario of either saving an embryo or saving a five-year-old, one should always save the five-year-old. But consider a close variant of the Embryo Rescue Case, Embryo Rescue Case 2 or ERC2 for short:

Imagine that another IVF clinic is burning. There is an embryo and there is a five-year-old child. The five-year-old child is unconscious as a result of the smoke and will die soon (in a few days time) and the embryo happens to belong to you. Suppose that the embryo was fertilized using your or your spouse's last egg. You have been desperately trying to have a child for years and the doctors tell you that this time there is a very good chance you will succeed. In any case, this is your last chance to have your own biological child.

Is our intuition the same as in the Embryo Rescue Case, namely, that you are not permitted to save your embryo? You may of course bite the bullet and say that you are not permitted to save your embryo. But my intuition is certainly not as clear in the ERC2 as in the Embryo Rescue Case. Indeed, I think that you may be permitted to save your embryo.

You might think though that I am able to obtain this result because I have unfairly loaded the example with additional factors. For example, you might think that the reason why it is permissible to save the embryo in ERC2 is that the older child is about to die soon, and not because the embryo is a rightholder. This line of thinking assumes that one is permitted to save non-rightholders (assuming for argument's sake that the embryo is

not a rightholder) if the rightholder is about to die soon. But consider the Picasso Rescue Case.

Imagine another IVF clinic burning. All the embryos have been burnt. There is though a five-year-old child, who is unconscious as a result of the smoke and is about to die soon (in a few days time). And there is your personal Picasso painting, which Picasso had made for you, and which you love dearly. Indeed, you would suffer serious distress for many years if it were destroyed. You can save one or the other, but not both.

Surely, it would not be permissible for you to save your Picasso, a non-rightholder, even though the child is about to die soon. If this is correct, then the principle that one is permitted to save non-rightholders if the rightholder is about to die soon cannot be correct. This means that the fact that the child is about to die soon cannot be the only reason why it is permissible to save the embryo.

You might think instead (or additionally) that the reason why you are permitted to save the embryo is because it is *your* embryo. In particular, you have an enormous stake in making sure that the embryo stays alive, since it is your last chance to have your own biological child. The reason why you are permitted to save the embryo then, so the argument goes, is because of your interest in the matter and not because the embryo is a rightholder like you and me.

However, this argument also will not work. The reason is that in the Picasso Rescue Case, the painting is *your* painting as well. Indeed, you love the painting dearly and would be seriously distressed if the painting were destroyed. Even so, it seems that

you would not be permitted to save your Picasso instead of the dying child, even though it is *your* Picasso. Yet, it still seems permissible for you to save your last embryo instead of the dying child. So the reason why you are permitted to save the embryo cannot just be because it is *your* embryo. If this is right, then ERC2 cannot be explained just by the additional facts I have introduced.

At this point, you might argue that our intuitions regarding ERC2 and the Picasso Rescue Case are simply not reliable and therefore do not carry any weight.<sup>3</sup> However, if our intuitions regarding these cases are not reliable, why presume that our intuition is reliable in the Embryo Rescue Case? If one does not presume this, then one can hardly draw the conclusion that the Embryo Rescue Case definitively shows that embryos are not rightholders.

Assuming then – as it is necessary if the Embryo Rescue Case is to have some plausibility – that our intuitions are (sometimes) reliable, the existence of cases such as ERC2 is a serious problem for the Embryo Rescue Case’s claim that embryos are not rightholders. Indeed, if embryos are not rightholders, there should not be cases so similar to the Embryo Rescue Case in which it is permissible to save an embryo and let a five-year-old child die.

### **TIME-RELATIVE INTERESTS AND EMBRYOS**

There is a second reason to doubt the validity of the Embryo Rescue Case. That is, there is an alternative, more plausible, explanation as to why one would save the child instead of the embryos in the Embryo Rescue Case that does not preclude an embryo’s being a

rightholder. In particular, it could be argued that the embryos have little or no *time-relative interests* while the grown child may have very strong time-relative interests. Time-relative interest is a concept introduced by Jeff McMahan.<sup>4</sup> To have time-relative interests is to be able to stand in some psychological relations to one's future and past selves. The strength of one's present time-relative interests depends on how strongly one is psychologically connected to those future and past selves. For example, an infant will typically have weaker time-relative interests in, for example, continuing to live than a grown adult, since an infant has little or no awareness of his or her future self. Or, someone in the middle stage of an Alzheimer's disease will have weaker time-relative interests than a normal adult.

All things being equal, in a case involving two rightholders where one has much more time-relative interests than the other, it seems that one should save the one with the stronger time-relative interests. For example, consider the Alzheimer's Case.

A hospital is burning, and there is a person in the middle stage of an Alzheimer's disease and there is a normal adult. You can only save one of them.

All things being equal, it seems that you should save the adult instead of the person with the Alzheimer's. The time-relative interest account provides an explanation as to why this should be so, namely, the adult has stronger time-relative interests than the person with the Alzheimer's. At the same time, the time-relative interest account need not deny that the person with the Alzheimer's is still a rightholder. Indeed, time-relative interests are being used here as additional factors to determine who should be saved. As such,

how strongly a being has time-relative interests does not affect the moral status of the being at issue.

To illustrate this last point further, consider a variant of the Alzheimer's Case, call it, Alzheimer's Case 2:

A hospital is burning, and there is your spouse who is in the middle stage of an Alzheimer's disease and there is a normal adult stranger. You can only save one of them.

In this case, you may be permitted to save your spouse even though your spouse has weaker time-relative interests than the stranger. This is because while there is an agent-neutral reason to prefer the stranger over your spouse, since the former has stronger time-relative interests than the latter, you have arguably a stronger agent-relative reason to save your spouse. Your agent-relative reason to save your spouse can override the agent-neutral reason to prefer the stranger, because both your spouse and the stranger are rightholders. The Picasso Rescue Case shows that agent-relative reasons may not override agent-neutral reasons if the entity to be saved (e.g. your Picasso) by the agent-relative reason is not a rightholder while the other entity to be saved by the agent-neutral reason is a rightholder.

If this is right, the time-relative interest account can also explain why in the Embryo Rescue Case one would choose the grown child over the embryos. On the time-relative interest account, the embryos will have no time-relative interests, since the embryos will not have the required capacities to be able to stand in some psychological relations to the embryo's future and past selves. The grown child, on the other hand, may

have very strong time-relative interests, since the child could by then have fully developed psychological capacities. Hence, on the time-relative interest account, one should choose the grown child because the child has stronger time-relative interests than the embryos. At the same time, the time-relative interest account is compatible with the embryos' being rightholders because, as with the Alzheimer's Case, time-relative interests are being used here as additional factors to determine who should be saved.

Indeed, since the time-relative interest account does not preclude the embryos' being rightholders, this allows one to explain why in ERC2, it may be permissible for you to save your embryo instead of the unconscious child, who despite being unconscious, will arguably still have stronger time-relative interests than the embryo. The reason is that, like the Alzheimer's Case 2, your agent-relative reason to save your embryo may override the agent-neutral reason to prefer the unconscious child, given that both are rightholders.

Incidentally, it has been pointed out that from the perspective of an entire life, the younger one is, the more of a valuable future one loses from death, all things being equal.<sup>5</sup> So if an embryo were a rightholder, this seems to lead to the view that the embryo will be harmed more by death than a five-year-old child. If this is the case, this might imply that one should always save the embryo instead of the five-year-old, which seems contrary to our intuition. Again the time-relative interest account can help us resolve this problem. The valuable future that an embryo has needs to be discounted by its lack of time-relative interests. Once discounted, we can explain why from an agent-neutral perspective, we may save a five-year-old instead of an embryo, all things being equal. Again though, this does not mean that a grown child should always be preferred to the

embryo, when one has to make a choice. First, some grown children may not have much stronger time-relative interests than some embryos, e.g. severely mentally handicapped children or anencephalic infants. Secondly, even if a grown child does have stronger time-relative interests than an embryo, one may have agent-relative reasons to save the embryo, as for example, in the ERC2.

At this point, you might argue that the time-relative interest account marks out precisely who can and who cannot be rightholders. If this is correct, this would mean that embryos are not rightholders, since they have no time-relative interests. I have two replies to this line of thought. First, when one is faced with a choice between saving a rightholder (e.g. a normal adult human being) or non-rightholder (e.g. your Picasso), all things considered, one is obligated to save the rightholder. Indeed, if you were to save the non-rightholder (e.g. your Picasso) instead of the rightholder, under ordinary circumstances, you would be committing a wrong. Yet, this is not true when one is faced with a choice between saving a being with time-relative interests and a being without time-relative interests. Indeed, in ERC2, you are permitted to save your embryo, which has no time-relative interest, even though the dying five-year-old has stronger time-relative interests. Moreover, as the Picasso Rescue Case shows, this is not just because you have a very strong agent-relative reason to do so. For, in the Picasso Rescue Case, you also have a strong agent-relative reason to save your Picasso; yet this does not permit you to save your Picasso, precisely because your Picasso is not a rightholder while the dying child is. This suggests that the time-relative interest account in fact does not mark out who can be rightholders. Secondly, if one needs to invoke something like the time-relative interest account to show that embryos are not rightholders, then the Embryo

Rescue Case is not making its case independently. What is doing the work is the time-relative interest account. In such a case, the Embryo Rescue Case does not by itself show that embryos are not rightholders.

## **CONCLUSION**

The Embryo Rescue Case purports to show that embryos are not rightholders. I have argued this conclusion does not follow from this case. One reason is that a close variant of the Embryo Rescue Case implies that it is permissible to save an embryo instead of a child. If embryos are not rightholders, such a case should not exist. Another reason is that there is an alternative explanation, the time-relative interest account, as to why one would save the child instead of the embryos in the Embryo Rescue Case that does not preclude an embryo's being a rightholder. Together, they suggest that the Embryo Rescue Case is not conclusive.

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## **NOTES**

<sup>1</sup> Jeff McMahan, for example, used this example at the American Society of Bioethics and Humanities conference in Philadelphia, November, 2004. See also Michael Sandel "The Ethical Implications of

Human Cloning." *Perspectives in Biology and Medicine* 48, no. 2 (2005): 241-47, p. 245; George Annas "A French Homunculus in a Tennessee Court." *Hastings Center Report* 19, no. 6 (1989): 20-2.

<sup>2</sup> I defend the claim that embryos are rightholders elsewhere. See S. Matthew Liao. "Virtually all Human Beings as Rightholders: A Non-Speciesist Approach." Manuscript.

<sup>3</sup> I thank an anonymous reviewer for prompting me to discuss this point.

<sup>4</sup> Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford, Oxford University Press, 2002), pp. 80, 170-174, 183-188.

<sup>5</sup> See, e.g. Don Marquis "Why Abortion is Immoral." *Journal of Philosophy* 86 (1989): 183-203, p. 189. McMahan calls this the Life Comparative Account of the badness of death (McMahan, cited in n. 2, above, pp. 105-107).

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