the HUMAN LIFE REVIEW

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. . . "We don't want a country where abortion is simply outlawed," Congressman Paul Ryan—who usually makes news regarding economic matters—told right-to-lifers gathered for the annual Susan B. Anthony List Gala this spring. "We want a country where it is not even considered" ("Building a Coalition for Life," page 5). Our thanks to the Congressman's office for giving us permission to reprint his address here. We also welcome Marjorie Dannenfelser, who heads up the Susan B. Anthony List, a group that supports female pro-life candidates. In "We Can Be Heroes" (page 9), Ms. Dannenfelser urges members of the pro-life movement to recruit leaders with the stature of the late Governor Robert Casey of Pennsylvania, people who can harness the "intensity" in the rising ranks of young pro-lifers.

The *Wall Street Journal*'s James Taranto isn't pro-life, at least not entirely, at least not yet. And that perhaps is the reason his commentary on Kermit Gosnell is so powerful ("From *Roe* to Gosnell," page 13). Thanks to the *Journal* for allowing us to share it with *Review* readers. Thanks, too, to *The New Republic*, where Judith Shulevitz's riveting look at the social consequences of older parenthood ("The Grayest Generation," page 77), first appeared. And while we're at it, a nod to *National Review Online* (*Appendix B*, page 117), *Crisis* (*Appendix C*, page 122), and *First Things* (*Appendix D*, page 125). We have Lord David Alton himself to thank for permitting us to reprint his recent *ChinaAid* column in *Appendix A* (page 114).

The centerpiece of this issue, "The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation" (page 40), is an exhaustively researched article on the legal complexities surrounding in vitro fertilization. Shirley Darby Howell, a new contributor to these pages, teaches at Faulkner University's Thomas Goode Jones School of Law in Montgomery, Alabama. Sister Bosco Ebere Amakwe, who proposes pro-life solutions for infertile couples ("The Problem of *Infertility* in Africa," page 89), is also new to the *Review.* Welcome to both.

Brian Caulfield ("Leading Lady for Life," page 25) isn't a new contributor but he does have a new book out: *Man to Man, Dad to Dad: Catholic Faith and Fatherhood* (Pauline Books & Media). As does the subject of his profile, long-time pro-life activist Helen Alvaré: *Breaking Through: Catholic Women Speak for Themselves* (*Our Sunday Visitor*).

Our senior editor Mary Meehan is another long-time activist, and like Professor Howell, an impressively thorough researcher. Her article here, "Rape & Abortion: A Double Injustice" (page 31) profiles several children who were conceived in violence and welcomed in life. Donald DeMarco, another long-time contributor, graces this issue with one of his signature thoughtful excursions.

A very packed issue, and if you have any comments, we want to hear them. Yes, we are debuting a Letters-to-the-Editor section in our next edition and look forward to sharing readers impressions with . . . other readers'. We only ask that you take the time to make your missives shorter rather than longer.

Anne Conlon
Managing Editor

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INTRODUCTION

We lead this issue with Congressman Paul Ryan's call for the pro-life movement to step up its efforts and . . . *dis*-arm? Not in the sense of giving up: Ryan starts by roundly rejecting post-election critics who say the Republican Party should abandon its pro-life platform. To the contrary, he says, we need to *disarm* our opposition, as in *win them over*, by articulating a "vision that can attract a broad coalition." We need to reach out to those "who consider themselves pro-choice" with civility and patience; aiming to convince them with arguments not just based on faith, but on *reason*.

> The Declaration of Independence says "all men are created equal." It rejects the old notion that some are born to rule—and others to obey. In fact it calls this truth self-evident. . . . Consent is the source of power, not wealth or ancestry. Government is not the master of the people. It is their servant. So we must stay vigilant—because when government assaults any of your rights, all of them are endangered.

All citizens can understand that danger, Ryan insists, and we need to make sure they *see* it.

"Building a Coalition for Life" was Congressman Ryan's address to the Susan B. Anthony List at their Gala in April. We are pleased to welcome, next, Marjorie Dannenfelser, president of the SBA List, with her essay "We Can Be Heroes." We are at a strategic "tipping point," she writes. While 40 years of *Roe* has robbed us, each day, of "more than 4,000 boys and girls—each one necessary, sent for a purpose," the past 40 years have also seen "a blossoming, an understanding of, connection to, and friendship with the unborn child." We have a "rising tide of young American pro-lifers," but what we need are "ordinary folks-turned-heroes," who realize in their humility that the rightness of their cause will give them strength—and we need a leader, like the late Governor Robert Casey, a man who understood, with St. Paul, that "power is made perfect in weakness."

Indeed, Congressman Ryan also said we "have to show the pro-life cause isn't just the cause of the unborn. It's also the cause of the poor—and the powerless." Could there be a more stark example of how abortion hurts the poor and the powerless than the story of Kermit Gosnell, who was convicted of three counts of first degree murder on May 13th for killing helpless infants, and one count of manslaughter for leaving a poor woman to die? The ghastly reports even have self-identified "mushy middle" Americans, like our next author, the *Wall Street Journal*'s James Taranto, asking whether it is time for "a regime change on abortion." Taranto's article is a superb and unflinching look at abortion in America; not just the horrors of the Gosnells, but the obfuscation that separates abortion from homicide: "Maintaining it requires an assault on language and logic that has taken on a totalitarian character."

This verbal and logical assault began pre-*Roe* of course; and one of its lies is that abortion was good for women. In our next article, contributor Brian Caulfield profiles a pro-life veteran, Helen Alvaré ("Leading Lady for Life," page 25) , whose work as the Catholic Bishops' pro-life spokesperson in the 1990s (hired by the late

great Cardinal John J. O'Connor) "helped forge today's familiar woman-centered messages." Caulfield also gives us a glimpse of Alvaré's early life and the experiences which shaped her "formidable yet engaging pro-life presence."

Taranto quoted another journalist, PJMedia.com's Roger L. Simon, who said he couldn't be fully pro-life because of rape: "If women in my family, or a close friend, were (Heaven forbid) impregnated through rape, I would undoubtedly support her right to abortion." But one wonders if he might doubt this wisdom if he met any of the people senior editor Mary Meehan interviewed for her article on rape and abortion ("Rape & Abortion: A Double Injustice," page 31). It is undoubtedly unjust that a woman must carry to term a child conceived in rape, but "it is a greater injustice to kill the child." Meehan says we can "learn from the experience of women" who have had such children, either bringing them up or releasing them for adoption, as well as "the children of rape, who speak out in increasing numbers, saying they are glad they weren't made to pay for their fathers' crimes." As you read the stories Meehan includes, you will see how reality does not jive with the rhetoric of the pro-abortion activists. In one beautiful story, a mother found that her son, conceived in rape, actually saved her from her chronic depression, "restored my faith in life and gave me a reason to get up in the morning."

Though we as a culture may have become more friendly to the unborn child, we seem to have little regard for the tiniest human lives put at peril by modern fertility methods—there are over 500,000 frozen embryos "left over" and housed in the U.S. alone. Law professor Shirley Darby Howell contributes a fascinating and clearly detailed account of the "Scholarly Theories, Case Law and Proposed State Regulation" regarding frozen embryos (page 40). The legal debates, she writes, center around two questions: whether the embryo should be regarded as a person, property or something else," and "how to best resolve disputes between gamete donors concerning disposition of surplus frozen embryos." (She cites several contentious cases, and offers her own suggestions for policy.)

Contributor Donald DeMarco takes us next on a philosophical jaunt about the origins of human life: According to the science of the universe, the odds against the emergence of life are staggering, and he gives five major reasons why this is so. Yet life *is*, and many scientists explain it as the result of random chance, which DeMarco deftly points out is an "egregious oversight" because of "the simple fact that chance presupposes order." DeMarco makes the connection that proclaiming life to be the result of chance has helped us to trivialize and devalue especially the lives of unborn children.

Sometimes we see something in the liberal press that is so important we reprint it for our readers and our record. Such is the case with Judith Shulevitz's article from *The New Republic*, "The Grayest Generation." It is a devastatingly on-point analysis of the changes older parenting has wrought on society—not just on the parents themselves but on the children: She cites one study that says we are producing a generation "phenotypically and biochemically different" from previous

generations. And older-age parenting is implicated in the "world-wide fertility plunge," which is also the subject of a new book out by *The Weekly Standard*'s Jonathan Last (*What to Expect When No One's Expecting*), the subject of an interview with Kathryn Jean Lopez of National Review Online (*Appendix B*).

Shulevitz writes about the U.S., where older women struggle with infertility; our next article is an eye-opening report on infertility in Africa, where it poses a unique set of problems. Sister Bosco Ebere Amakwe, of the Holy Family Sisters of the Needy, reports that though medically men and women have the same rates of infertility, "in African tradition it is always the woman's fault." An infertile woman is stigmatized, with heartbreaking and sometimes life-threatening consequences. Sexually transmitted diseases (exacerbated by the awful practice of female circumcision) are the leading cause of infertility in Sub-Saharan Africa. But there is hope. As you will read, Sister is part of an order founded in 1983 in Nigeria to work against the stigma and superstition, to aid and house pregnant teenagers and help them, if they wish, give their children up for adoption to childless couples.

Dr. C. Everett Koop, who died on February 25th at age 96, was Surgeon General under President Ronald Reagan from 1982 to 1989. A pediatric surgeon, Dr. Koop was an early supporter and contributor to the *HLR*, and we reprint his 1977 "The Slide to Auschwitz" as our From the Archives article. Koop warns of a culture he already saw descending from abortion to infanticide; sadly, his predictions have become all too real, as babies born even with easily treatable conditions are routinely left to die in our hospitals.

Finally, we have two brief book reviews in Booknotes: Connie Marshner reviews *Courageous: Students Abolishing Abortion in this Lifetime*, edited by Kristen Hawkins; and I review Janet Morana's *Recall Abortion: Ending the Abortion Industry's Exploitation of Women*.

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In addition to the Jonathan Last interview mentioned above (*Appendix B*), and Nick Downes' marvelous cartoons, this issue includes three more appendices: (*A*) Lord David Alton writes about the massive scale and the terrible results of gendercide and forced abortion in China; (*C*) Austin Ruse writes that current legislative battles over abortion in Ireland were made possible by the pro-life "purists" who defeated the chance of a 2002 referendum; and (*D*) Philip C. Burcham, who, along with several members of his family, suffers from OI, osteogenesis imperfecta, or "brittle bone disease," reports that it is a condition for which doctors now urge abortion. Reading his words, I can't help but be sad anew that Koop's most dire predictions have come to pass—doctors are more and more comfortable exterminating their patients—and yet hopeful due to the power of Burcham's example and his words. This is the kind of writing, the kind of powerful message, for which our *Review* was founded, and the reason we will carry on.

Maria McFadden Maffucci
Editor

Building a Coalition for Life

Paul Ryan

There's a lot of talk these days about how to win the next election. Our critics say we should abandon our pro-life beliefs. But that would only demoralize our voters. It's an odd strategy, I think: the cynical ploy followed by the thumping defeat. Besides, you are proving the critics wrong. You are helping pro-life leaders win races across the country. You are showing that "what convinces is conviction."

And you are making headway: A majority of the country now believes abortion should be illegal in some or all cases. And young people are among our most passionate supporters. That said, we have had some setbacks. We have missed some opportunities and lost some key races. So what do we do? How do we "reclaim the human center" of this debate?

Here is my thinking: We need to articulate a vision—one that can attract a broad coalition. To advance the pro-life cause, we need to work with people who consider themselves pro-choice—because our task isn't to purge our ranks. It's to grow them. We need to expand our horizon—because our critics say our vision is one of self-denial—when in fact it is one of self-fulfillment. We don't want a country where abortion is simply outlawed. We want a country where it is not even considered. We want a country that values the dignity of every life at every stage.

That vision can unite us. It can win. But we have to make the case. We have to do it with patience—and with good cheer. We have to show the pro-life cause isn't just the cause of the unborn. It's also the cause of the poor—and of the powerless. So our position is not a narrow objection to so-called abortion rights. Instead, it is a deep affirmation of human rights.

To this audience, it may seem like an open-and-shut case. Many of us are pro-life because of our faith. We believe every person is made in the image of God. So every life is precious—and worthy of protection. But if we want to appeal to the broadest audience, we need to use every tool at our disposal. We can't just make arguments based on faith. We also need to make arguments based on reason. And if we deny the right to life, we deny the principle of equality—and with it, our belief in self-government.

The Declaration of Independence says "all men are created equal." It rejects the old notion that some are born to rule—and others to obey. In fact, it calls

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Paul Ryan is the United States Representative for Wisconsin's 1st congressional district. This is the text of an address he gave on April 11, 2013, at the Susan B. Anthony List Gala in Washington, D.C.

this truth self-evident. It is obvious to anyone with ears to hear and eyes to see. We each have the right to life, liberty, and the pursuit of happiness. And no one can deprive us of those rights without our consent.

Consent is the source of power, not wealth or ancestry. Government is not the master of the people. It is their servant. So we must stay vigilant—because when government assaults any of our rights, all of them are endangered. And once some people can deny the rights of others, we are no longer equal. The foundation of our government is weakened. The rights of the people are imperiled. Anyone can understand that danger.

The way I see it, we are the heirs of the Founding Fathers and Abraham Lincoln—of all those people who wanted our country to live up to its ideals. And we should follow their example. In other words, we should be prudent. Our forebears knew to strive for perfection, not to expect it—because mankind is flawed. Progress takes time. It takes work. And it takes common sense.

Take Lincoln. He hated slavery as much as anyone. But he defended a law that preserved it. He supported the Compromise of 1850, which prohibited slavery in California but allowed it in New Mexico. He even backed a law to return runaway slaves to their owners. Why? Because to end slavery, he had to preserve the Union. The country could not free the slaves if it did not exist.

Now, Lincoln didn't go along to get along. He used compromise to achieve his objective—which was to put slavery on the "course of ultimate extinction." He rejected compromises that worked against his purposes. But he accepted them if they brought him closer to his goal—even in just a small way. We all know what happened. After years of turmoil, he helped pass the Thirteenth Amendment, which ended slavery for good.

Like Lincoln, we should promote civility and compromise in pursuit of the common good. Perhaps the biggest mistake the Democratic Party ever made is it chased the pro-life movement from its ranks—with the notable exception of my friend Congressman Dan Lipinski, who is here with us tonight. In complete disregard of millions of pro-life Democrats, President Obama has catered to the extreme elements of his party. In the Clinton years, the stated goal was to make abortion "safe, legal, and rare." Now, the party stands for an absolute, unqualified right to abortion—at any time, under any circumstances, and even at taxpayer expense. By contrast, we understand the best way to advance a cause isn't to push our political adversaries away. It's to convince them.

And people can surprise you. Not long ago, there was a doctor who performed 75,000 abortions in his career—even on his own child. His commitment was so extreme that he helped found NARAL. Could we ever

work with a man like this? In fact, we did. Late in his life, Dr. Bernard Nathanson became a great spokesman for life. He renounced atheism. But religion didn't change his heart. Science did. The image of the ultrasound—of that tiny beating heart—made him realize that was life.

Not everyone will undergo such a change. But we should work with people of all beliefs to make progress. Building on the work of Professor Hadley Arkes, I think we should plant flags in the law—small changes that raise questions about abortion. People who consider themselves pro-choice do not agree with us on everything. But many agree we should stop taxpayer funding of abortion. That's "a flag." Many agree we should require parental notification. That's another "flag." Many agree we should restore the Mexico City policy. That's one more "flag." Even if we cannot agree on the final step, we can work with them on a few concrete steps. We can raise doubts—and save lives.

Such painstaking work can be tiring. The give-and-take of legislation usually is. But we cannot let up. And we have to recognize opportunities for what they are. Take my friend, former congressman Bob Dold. A pro-choice Republican from Illinois, he was an outspoken advocate for Planned Parenthood. Yet he voted to stop Obamacare from covering abortion. And he voted to allow doctors to refuse to perform abortions on conscience grounds. Last year, he lost to a Democrat who today is a down-the-line, pro-choice stalwart in the House. Dold was an ally of our cause. We need to work with others like him.

Labels can be misleading. A pro-choice Republican senator from Massachusetts nearly derailed Obamacare just by being elected. But a pro-life Democratic congressman from Michigan delivered the votes that passed it into law. The SBA List needs to help elect as many pro-life leaders as possible—and then work with people of all beliefs to pass pro-life legislation. We cannot abandon Washington to pro-choice extremists—because good legislation will help us change hearts and minds.

That is our goal. And we have got some work to do. We need to show the country our mission isn't just to protect life, but to improve it. We have to remind people that concern for the poor does not demand faith in big government. It demands something more—from all of us.

The poor and powerless need a helping hand. We are ready to offer it. But they need more than a check in the mail. They need a loving family and a supportive neighborhood. They need a vibrant community. Those experiences—of providing for their families, of being a part of something—they are what we all need. And we can speak to those needs—because just as we

see the worth of every human life, we see the potential in every human being.

Government cannot create that potential. It cannot confer dignity. But it can protect it. We want government to treat us equally—to protect our natural rights. We want government to make room for our communities to grow—so the families in them have room to thrive. That's the vision we need to articulate. We see a country where families are strong, where the economy is growing, and where women have real choices—between good schools and good jobs and great opportunities.

We want to turn this vision into reality. And you are. Pro-life groups sponsor around 2,500 crisis-pregnancy centers across the country. That's more than the number of abortion clinics. And many of these centers rely on donations—from people like you. My wife Janna and I also contribute. These centers serve about 2 million people a year. They offer adoption services, testing and treatment for STDs, ultrasounds, parenting classes, and counseling.

You are not just protecting the innocent. You are also helping the needy—in your churches and charity groups, like the Gabriel Network and Project Rachel. Take, for example, the Manhattan Bible Church. For 40 years, it's run a soup kitchen and an elementary school for poor children. It's fed over a million people and taught 90,000 students. Its members have adopted hundreds of children and counseled hundreds of drug addicts. This one church operates 40 ministries to "the least among us"—at no cost to the federal government.

Maybe the reason we don't often talk about these stories is that we are so used to them. They are what we think of when we hear of the pro-life movement. Well, our job is to spread the news. By working with people of all beliefs, we can show the world the good work you are doing. And we can win allies. That is how you bring people into the fold. First you respect their views. Then you politely encourage them to change them.

These stories are the best advertisement for the pro-life movement. They are the best way to "reclaim the human center" of this debate. But they can be undone in an instant—by a careless remark or an ugly sign. Yes, our side is held to a higher standard. But we have bound ourselves to a higher standard. The right to life is a higher standard. And it's one we should be proud of.

Thank you.

We Can Be Heroes

Marjorie Dannenfelser

Authentic civil and human rights movements grow and ferment and inspire until justice prevails. The longer the struggle and the deeper the harm to the human person, the longer it takes to heal the harm of injustice. A little over 40 years ago, the Supreme Court instigated decades of civil unrest with the companion decisions *Roe* v. *Wade* and *Doe* v. *Bolton*. Since 1973, abortion on demand has claimed roughly 50 million victims in our country—our brothers, sisters, neighbors, and friends. And the hidden ripple effects of those deaths are beyond the limits of human reason and social science to measure.

More than 4,000 boys and girls—each one necessary, sent for a purpose — continue to die every day. We can't accurately measure the effect of these losses, because we do not know what each life was sent to teach, what piece in the human puzzle each was meant to fill. As a nation, we stumble on absent 50 million people who could have contributed their share to solving society's many critical problems. As pre-born human beings, their weakness was mistaken for unimportance, the freshness of their creation dismissed as "a glob of tissue" or a bunch of cells.

Through those 40 years of loss, however, there has been a blossoming understanding of, connection to, and friendship with the unborn child. That developing understanding has in turn generated increasing agitation to change the post-*Roe* status quo. In fact, despite the political realities of an implacable opponent of the unborn in the White House and fresh pro-choice blood on the Supreme Court, we are in fighting distance to achieving equal protection for unborn children in the law sooner rather than later—if we fight well and unflinchingly to represent the majority of Americans who want change.

Embraced as the human and civil-rights movement of our day, the pro-life movement now has assembled all the ingredients for success. We lack only one thing: ordinary folks-turned-heroes who will, on the federal level, use the tools of our Constitution to lead us to peace on these terms.

The 19th century leaders of the women's movement understood how rights order themselves. They knew that it is not possible to build one group's rights on the broken rights of others—whether those rights were being denied to enslaved people, women, or the "innocent" in the womb. They did not

Marjorie Dannenfelser is president of the Susan B. Anthony List, a Washington, D.C.-based political action committee that helps pro-life women get elected to Congress.

need sonograms to know that it was unnatural and immoral to pit women against their children in the womb. Where such a mortal conflict occurs, it is evidence that the mother has been "greatly wronged," as Mattie Brinkerhoff put it.

Somewhere along the way, such wisdom was lost. My mother calls it "the Sixties business." In any case, a re-acquaintanceship with the child in the womb and his status as a fellow human being became necessary. In a horrible and hideous way, events like the Gosnell abortion clinic horrors and serial murder trial are part of that recollection process. It is a process the pro-choice women's movement has feared. Over and over, they have publicly bemoaned the state of their movement, its dearth of youth and intensity—due to the growing belief in the humanity of the fetus. At this point, with a rising tide of young American pro-lifers, it seems clear that they will not escape this reality. Kate Michelman and Frances Kissling have noted their movement's difficulty in "regaining the moral high ground." Now there's a place where we can all agree.

In a beautiful and liberating way, improvements in science and technology have been a gift to the pro-life movement. The window into the womb provided by 3D ultrasound has given us unforeseen clarity and insight into the humanity of the unborn child.

We are at a critical moment in this fight for human life that mirrors the successful civil rights battles of the past. Today the near-term forecast for our cause could go either way. If we are strong and resolute, we have the potential to end the horror for our culture soon. If we are passive, tired, beaten down, we and our grandchildren will likely suffer this horror for many more decades. It is a time for us regular folks to become heroes for women and children. Humility will lead us there, but central to this successful journey is recognizing that in our weakness, we are strong.

We are living in a time of curious compassion. As Flannery O'Connor put it, in order to aid our fellow man, we exercise "the tenderness of the gas chamber." Offering death as the answer to life's struggles, we add to misery. And we eliminate from our lives those weakest among us who were sent to ameliorate suffering. It is the sad narrative of every human-rights movement. Those with power forget that the appearance of weakness can be deceiving.

This is the fundamental mistake. As Saint Paul said, "For power is made perfect in weakness. I will rather boast most gladly in my weaknesses in order that the power of Christ may dwell with me." In putting aside our own perceived strengths, our vanities and desires, so that we may comply with the Father's Will, we become true heroes.

In the last 40 years, two models have developed along these lines. The

late Governor Robert Casey, a pro-life Democrat from Pennsylvania, embodied the first model. Just before being turned away at the 1992 Democratic Convention for his pro-life views, he helped craft this statement as a leadership model:

> The first 200 years of the American Republic tell an unfolding tale of aspiration and progress toward the idea of liberty and justice for all . . . . The boundaries of the community of the commonly protected were steadily expanded and the story of America became the story of an ever more inclusive society. The United States welcomed its immigrants, protected its workers, freed the slaves, enfranchised women, aided the needy, provided Social Security for the aged, insured the civil rights for all of its citizens, and made public space available to the handicapped all in service to its ideals of justice.
>
> Then in January 1973, the US Supreme Court . . . drastically reversed this pattern of expanding inclusion . . . Seven unelected justices performed the most momentous act of exclusion in our history.

Bob Casey understood what past civil-rights movements also knew: that the rights of one cannot be built upon the broken rights of another. The entrepreneur stood to lose when he exploited child labor. The slave-owner set up certain misery when he made human beings property. Abortionists cause crushing misery when they ignore the warnings of early feminists like Elizabeth Cady Stanton: "When we consider that women are treated as property, it is degrading to women when we treat our children as property to be disposed of as we see fit."

There is another model in how to view the weakest humans among us. It is an exclusive one, a model of entitlement. This is the way of the eugenics movement and Planned Parenthood's founder, Margaret Sanger. Sanger called some children "human weeds," to be cleared out like underbrush. She wrote in *The Birth Control Review* in 1921, "In this matter, the example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation."

It's pretty clear what camp the heroes stand in: The solid moral ground is in the championing of the weak. Women and children need those heroes now. The unmasking of the woman's movement is causing moments of epiphany similar to that of pro-choice Democratic African-American Pennsylvania state legislator Margo Davidson, whose cousin died in the Gosnell clinic in Philadelphia. She said pro-choice activists turned away from the horror because they "cared more about the institution [of abortion] than the individuals."

The pro-abortion movement and President Obama are indeed so committed to every abortion that they refuse to support even modest measures, like

clinic regulations, that are embraced by overwhelming majorities. Bans on sex-selection abortion and late, post-fetal-pain abortions are supported by an astounding 77 and 63 percent of Americans, respectively. An April 2013 NBC/*Wall Street Journal* poll found that a combined 52 percent believe that abortion should be illegal either with exceptions or without them.

By their fruits, we are coming to know them. Dedication to this curious institution of abortion on demand holds no appeal to America's youth, always on the lookout for authenticity and heroes. The majority reject the extreme abortion position shared both by President Obama and by Sanger's legacy, Planned Parenthood. They have seen their prematurely born brothers and sisters nursed to health and nurtured outside the womb through progress in perinatal care.

Intensity on the pro-life side is growing with its young recruits. They understand that the Casey legacy leads to heroism. The pro-life movement follows in a straight line of succession from all the successful rights movements in our nation's history by including the weak in the net of protection.

At similar tipping-point moments in the past, great leaders have stepped forward to make the difference. We are a movement at a moment hungry for just such leadership. Our Founders gave us all the tools we need to enact change and establish justice for the vulnerable children and mothers in our nation. But we will have to increase our political muscle and recruit and support a Lincoln, a Casey to lead us. The generous people of the pro-life movement, like their predecessors from other great movements, have created the moment.

It has been done before. It can be done now.

From *Roe* to Gosnell:

The Case for Regime Change on Abortion

James Taranto

Here is incontrovertible proof that Kirsten Powers and Conor Friedersdorf are correct in arguing that the murder trial of Philadelphia abortionist Kermit Gosnell has received insufficient media coverage: On Friday, Snopes.com was compelled to publish a page confirming that the story is real, not merely an urban legend.

Gosnell, as we noted in January 2011, is charged with eight counts of murder. One of his alleged victims, Karnamaya Mongar, was a 41-year-old woman. The other seven did not live long enough to acquire names. They were infants who were born when Gosnell induced labor in their mothers. According to the Philadelphia grand jury report, he or his employees then killed them by using scissors to sever the neck and spinal cord:

> He called that "snipping."
>
> Over the years, there were hundreds of "snippings." Sometimes, if Gosnell was unavailable, the "snipping" was done by one of his fake doctors, or even by one of the administrative staff. But all the employees of the Women's Medical Society knew. Everyone there acted as if it wasn't murder at all.
>
> Most of these acts cannot be prosecuted, because Gosnell destroyed the files.

The trial opened March 18, as the *New York Times* reported on page A17 of the next day's paper—its last word to date on the topic.

What accounts for the media's lack of interest in a trial that not only is sensational but implicates the most divisive social and political issue in America? PJMedia.com's Roger L. Simon has the answer: "The trial of Dr. Gosnell is a potential time bomb exploding in the conventional liberal narrative on abortion itself." He demonstrates via self-reflection:

> I can give you two guinea pigs to prove this point—my wife Sheryl and me. We were in the kitchen last night, preparing dinner, when we saw a short report of this story on the countertop TV.
>
> Both lifelong "pro-choice" people, after watching only seconds, we embarked in an immediate discussion of whether it was time to reconsider that view. (Didn't human life really begin at the moment of conception? What other time?) Neither of us was comfortable as a "pro-choice" advocate in the face of these horrifying revelations. How could we be?

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> Yes, Dr. Gosnell was exceptional (thank God for that!), but a dead fetus was a dead fetus, even if incinerated in some supposedly humane fashion rather than left crying out in *blind* agony on the operating room floor, as was reportedly the case with one of Gosnell's victims. I say blind because this second-trimester fetus did not yet have fully formed eyes. (Think about that one.)
>
> So I don't think I'm "pro-choice" anymore, but I'm not really "pro-life" either. I would feel like a hypocrite. I don't want to pretend to ideals I have serious doubts I would be able to uphold in a real-world situation. If a woman in my family, or a close friend, were (Heaven forbid) impregnated through rape, I would undoubtedly support her right to abortion. I might even advocate it. I also have no idea how I would react if confronted by having to make a choice between the life of a fetus and his/her mother. Just the thought makes my head spin.
>
> Anyone who he thinks he knows how he would respond in these situations—and hasn't—is doing nothing but posturing.

Welcome to the mushy middle, Roger. This columnist has been here for quite some time. But we too, when we were very young, were a "pro-choice" libertarian. We came to question, and ultimately rejected, that position, although fully accepting the "pro-life" side of the argument remains a bridge too far for us.

Our path was more cerebral and less visceral. It started with our education in constitutional law. Although we thought abortion on demand was a good policy, we knew how to read, and the Constitution had nothing to say about the matter. We came to view *Roe* v. *Wade,* the 1973 case that declared otherwise, as a gross abuse of power by the Supreme Court, notwithstanding that it was in the service of a cause we agreed with.

A funny thing happens when you dissent from *Roe* v. *Wade:* You come to see that there's not much else by way of intellectual content to the case for abortion on demand. *Roe* predates our own political consciousness, so we have to assume there were once stronger arguments. But these days the appeal to the authority of *Roe* is pretty much all there is apart from sloganeering, name-calling, appeals to self-interest and an emphasis on difficult and unusual cases such as pregnancy due to rape.

So totemic is *Roe* that on one recent day two top *New York Times* commentators, editorial-page editor Andrew Rosenthal and columnist Bill Keller, cited it as if it were still the law and ignored the 1992 case that supplanted it, *Planned Parenthood* v. *Casey.* The latter was pretty much a complete do-over, although the "core holding" was the same.

When you dissent from *Roe* v. *Wade,* you notice that people committed to the pro-abortion side almost never acknowledge that the question of abortion poses a conflict of rights or of legitimate interests. Try to pin them down as to where they'd draw the line—at what point in fetal development does abortion become unacceptable? It's pretty much impossible. The court in

Casey said abortion could be restricted after 23 to 24 weeks, earlier than *Roe*'s 28 weeks, but groups like Planned Parenthood oppose restrictions on late-term abortion, too. All they care about is "a woman's right to choose."

The line-drawing exercise is indeed a vexing one. We aren't "pro-life"—which is to say that we do not favor the outlawing of all abortion—and not only because of the difficult cases Simon notes. Our own moral intuition is that an early-term abortion, or the use of an abortifacient to prevent implantation, is different in kind from a late-term abortion or infanticide.

But we concede that intuition is irreconcilable with the scientific fact that the difference between a zygote and an infant—or, for that matter, an adult—is one of degree: All are the same human being at different stages of development. (To be sure, the natural occurrence of apogamy, or monozygotic twinning, makes that last statement a bit of an oversimplification, as do recent and prospective technologies like in vitro fertilization and cloning. That doesn't make the puzzle any easier to solve.)

Any line one could draw between acceptable abortion and homicide would be an arbitrary one. Both extremes in the abortion debate are united in rejecting the line-drawing exercise in principle for that reason. But either "principled" position leads to monstrous results.

A law protecting every human life from the moment of fertilization would be draconian or unenforceable, and probably both. Would a free society really tolerate its government's forcing a rape victim to carry her attacker's child to term? Surely not—but an exception for rape would also create a loophole, an incentive for women seeking abortions to claim rape falsely. Norma McCorvey, the anonymous *Roe* v. *Wade* plaintiff, did just that, albeit unsuccessfully, before filing her lawsuit.

The reductio ad absurdum of the pro-abortion side is Kermit Gosnell. That is why the Gosnell case has crystallized our view that the current regime of abortion on demand in America is a grave evil that ought to be abolished. It is murderous, if not categorically then at least in its extreme manifestations. Maintaining it requires an assault on language and logic that has taken on a totalitarian character. And it is politically poisonous.

Some pro-abortion commentators have denied that the horrors of the Women's Medical Society implicate their ideology. While they have little to say about the babies Gosnell allegedly killed, they certainly don't approve of the way he treated his pregnant patients, at least two of whom, according to the grand jury, ended up dead, with untold others mutilated or infected. No, these advocates assure us, they want abortion to be "safe and legal." (The Clintonian "rare" is not heard anymore. In a *Philadelphia Inquirer*

op-ed last month, Kate Michelman of NARAL Pro-Choice America came right out and said that she wants abortion to be "common.")

But the grand jury—which described its members as covering "a spectrum of personal beliefs about the morality of abortion"—directly blamed "pro-choice" politics for the regulatory failure that allowed the clinic to remain open for decades. The Pennsylvania Department of Health had conducted occasional inspections of the clinic starting in 1979, although it failed to act on the violations it found:

> After 1993, even that pro forma effort came to an end. Not because of administrative ennui, although there had been plenty. Instead, the Pennsylvania Department of Health abruptly decided, for political reasons, to stop inspecting abortion clinics at all. The politics in question were not anti-abortion, but pro. With the change of administration from Governor [Bob] Casey to Governor [Tom] Ridge, officials concluded that inspections would be "putting a barrier up to women" seeking abortions. Better to leave clinics to do as they pleased, even though, as Gosnell proved, that meant both women and babies would pay.

It's worth noting that the governors in question were both outliers in their parties: Casey (the respondent in the 1992 Supreme Court case) was an antiabortion Democrat; Ridge, a pro-abortion Republican. But Ridge's lassitudinous policy was bipartisan, continued by his successor, Democrat Ed Rendell. Inspections of Pennsylvania abortion clinics resumed only after a 2010 raid at the Women's Medical Society—initiated by the FBI, which was following up on a Drug Enforcement Administration investigation into suspected illegal narcotics prescriptions.

The grand jury also faulted the National Abortion Federation, "a professional association of 400 abortion providers nationwide that offers referrals and services to member providers." In 2009 Gosnell applied for membership in the NAF, a sort of Good Housekeeping seal of abortion:

> When asked if she had ever seen anything like the conditions and practices she observed at Gosnell's clinic in any of the roughly one hundred clinics she has visited in the United States, Canada, and Mexico, the evaluator answered: "No."
>
> Based on her observations, the evaluator determined that there were far too many deficiencies at the clinic and in how it operated to even consider admitting Gosnell to NAF membership.

The NAF rejected the clinic, but that's all it did. As the grand jury observed: "We have to question why an evaluator from NAF, whose stated mission is to ensure safe, legal, and acceptable abortion care, and to promote health and justice for women, did not report Gosnell to authorities."

Gosnell worked one day a week at another clinic, Delaware's Atlantic Women's Medical Services, which was NAF-certified. "At least six patients

were referred from Atlantic to Gosnell's clinic in Philadelphia for illegal late-term abortions," the grand jury reported. The federation suspended the Delaware clinic's membership only after the grand jury urged it to do so in its January 2011 report. (The clinic later closed.)

The grand jury report does not name any other clinic that referred women to Gosnell, but it implies that he had carved out a lucrative niche for himself in the abortion industry. He had a bad reputation in Philadelphia:

> As a result, Gosnell began to rely much more on referrals from other areas where abortions as late as 24 weeks are unavailable. More and more of his patients came from out of state and were late second-trimester patients. Many of them were well beyond 24 weeks. Gosnell was known as a doctor who would perform abortions at any stage, without regard for legal limits. His patients came from several states, including Delaware, Maryland, Virginia, and North Carolina, as well as from Pennsylvania cities outside the Philadelphia area, such as Allentown. He also had many late-term Philadelphia patients because most other local clinics would not perform procedures past 20 weeks.

Karnamaya Mongar, the woman Gosnell is accused of murdering by overdosing her with drugs, was likewise referred by an out-of-state clinic because her pregnancy was so far along. Again the report does not name the referring clinic, and it's unclear if it was in Virginia, where she lived, or the District of Columbia.

The abortion lobby opposes restrictions on late-term abortions. But surely at least they agree that infanticide—the killing of a child *after birth*—is murder. Or do they?

Two weeks ago John McCormack of *The Weekly Standard* reported on a shocking exchange between Alisa LaPolt Snow, a lobbyist for the Florida Alliance of Planned Parenthood Affiliates, and members of the Florida House who were holding a committee hearing:

> "So, um, it is just really hard for me to even ask you this question because I'm almost in disbelief," said Rep. Jim Boyd. "If a baby is born on a table as a result of a botched abortion, what would Planned Parenthood want to have happen to that child that is struggling for life?"
>
> "We believe that any decision that's made should be left up to the woman, her family, and the physician," said Planned Parenthood lobbyist Snow.
>
> Rep. Daniel Davis then asked Snow, "What happens in a situation where a baby is alive, breathing on a table, moving. What do your physicians do at that point?"
>
> "I do not have that information," Snow replied. "I am not a physician, I am not an abortion provider. So I do not have that information."
>
> Rep. Jose Oliva followed up, asking the Planned Parenthood official, "You stated that a baby born alive on a table as a result of a botched abortion that that decision should be left to the doctor and the family. Is that what you're saying?"
>
> Again, Snow replied, "That decision should be between the patient and the health care provider."

One full week later, ChristianPost.com reports, "Planned Parenthood clarified . . . that it is not in favor of killing babies who survive a botched abortion." Are you reassured?

YouTube has an audio recording of a 2001 exchange in the Illinois Senate between a sponsor of a bill to protect infants born alive in an "abortion" and a colleague who worries that the bill's requirement of a second physician would be too burdensome for the abortionist. It's chilling to listen in light of the Gosnell allegations. The second senator, who voted against the bill, is now president of the United States. In 2008, according to FactCheck.org, Barack Obama said he would have supported a similar federal law that was enacted in 2002 and accused his critics of "lying." Are you reassured?

Last year the *Journal of Medical Ethics* published a paper by two academics who argued that "what we call 'after-birth abortion' (killing a newborn) should be permissible in all the cases where abortion is [allowed], including cases where the newborn is not disabled."

There is a brutal logic to that position. As an abstract matter, birth is as arbitrary a point as any to draw the line between abortion and homicide. If a woman has a "right to choose" to hire a doctor to kill her baby in utero or partway down the birth canal, why should she lose that right simply because he's slow in getting the job done? Or, to put the shoe on the other foot, if infanticide is murder, how can an abortion of a child *at the same stage of development* be acceptable?

To avoid confronting the reality of what they were doing, Gosnell and his employees spoke in an elaborate euphemistic code. A baby wasn't born, "the fetus precipitated." Gosnell didn't slash it to death, he "snipped" it to "ensure fetal demise." The *Times*, in that A17 story, adopted the Gosnell code, referring repeatedly to the babies Gosnell is charged with murdering as "fetuses."

So did Roger Simon, we're guessing out of "pro-choice" habit. This Orwellian use of language was a commonality between the Gosnellites and the "safe and legal" abortion crowd. "Pro-choice" itself is one such euphemism. Lots of political movements are in favor of one or another form of "choice," but this is the only one we can think of that cries foul if you specify the choice that they're pro. The National Rifle Association surely would not object to being characterized as "pro-gun." (We should add that we're not wild about "pro-life" either. But it is merely tendentious. Its aim is to persuade but not to conceal.)

Most news organizations have adopted this pro-abortion doublespeak as a matter of style. The *New York Times*, for example, characterizes the two

sides as "abortion-rights" and "antiabortion." That at least has the virtue of acknowledging that the debate is about abortion, but it still tips the scale in favor of the pro-abortion side by acknowledging its claims of rights but not the antiabortion side's. And then there's the ever-popular "procedure whose opponents call it partial-birth abortion." What do its supporters call it? And who are they?

The most jaw-dropping example of pro-abortion Orwellianism is the one we cited last week: the fierce objection to the assertion that life begins at fertilization. As we noted, that is a simple statement of scientific fact—a tautology. MediaMutters responded, in essence, that human embryogenesis is just a theory. The proof was—you guessed it—an appeal to authority, namely the majority opinion in *Roe* v. *Wade:*

> The law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.

Justice Blackmun says it, I believe it, and that settles it!

We'd like to cite one more example because we find it especially neuralgic, though we must acknowledge this is one that professional abortion advocates typically have the sense to avoid. It is the characterization of an unborn child as a "parasite" because it depends for sustenance on its mother. Again, this is at best scientifically illiterate: In biology, a parasite by definition is a creature of a different species from the host. At worst, calling a baby a parasite is an act of rhetorical dehumanization, of a piece with likening hated minorities to insects or rodents or pigs.

Which brings us to the poisoning of American politics. In this respect neither side is innocent, though it is our impression that the pro-abortion side is far more aggressive. We hasten to acknowledge that our observation here may be biased by experience. We have lived almost all our life, and the entirety of our professional career, in big cities or upscale suburbs where the "pro-choice" view is dominant. Someone from Houston or Salt Lake City might have a different perspective. Then again, we are very widely read, and it seems to us that, say, *National Review* is a lot more respectful toward opposing viewpoints than the *New York Times* editorial page, and that antiabortion news sites are models of civility and reason compared with leftist and feminist ones.

Perhaps the most pernicious manifestation of this incivility is the effort to turn the sexes against each other—or perhaps more accurately the effort to cow men into submission. The imaginary "war on women" rages on: "Man, the feeding frenzy over Gosnell is a sobering reminder of how much hatred

there is out there towards women," tweeted *Slate*'s Amanda Marcotte Saturday. Over at *Salon*, Irin Carmon casually dismissed critics of the media's noncoverage as "almost uniformly male," a gendered argumentum ad hominem and quite a thigh-slapper given that she, like this column, opened by citing Kirsten Powers.

If you're a man and you're opposed to or uncertain about abortion, you've almost certainly had a woman tell you that because of your sex, you have no right to your opinion about the subject. (We've heard it from antiabortion women too, though much more rarely.) It's idiotic, offensive and indicative of a war on men.

The gist of Carmon's argument is that the horrors of the Women's Medical Center were caused by "politicized stigma, lack of public funding or good information, and a morass of restrictive laws allegedly meant to protect women." She favorably quotes a Philadelphia writer, Tara Murtha: "The bottom line is that politicizing abortion led to Gosnell. Their answer? Politicize it more."

In other words, if only abortion opponents were out of the picture, abortion would be safe and legal in no time. Problem solved. That conclusion, while arguable, strikes us as dubious. But the premise is delusional.

We live in a free society. People have an absolute right to form opinions about matters of public concern, and a nearly absolute right to express those opinions, individually or in concert with others of like mind. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court, by interpreting (or misinterpreting) the Constitution, has the capacity to impose vast and sweeping changes in the law, as it did when it decided *Roe* v. *Wade*. What it cannot do—what it lacks not only the authority but the slightest ability to do—is control people's thoughts.

One suspects that when the justices decided *Roe*, they expected a consensus would quickly jell in favor of legal abortion. That is certainly what they hoped for when they decided *Casey* 19 years later. "The Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," Justices Sandra Day O'Connor, Anthony Kennedy and David Souter wrote in their joint opinion.

That was a wish, not a command. There was no consensus on abortion in 1973, nor in 1992. Nor is there in 2013. If the Supreme Court, with all its authority and majesty, cannot conjure a consensus into being, it is silly and vain for Irin Carmon to imagine that she can.

All of which is to say that the bitter polarization around the question of abortion is inseverable from the *Roe* regime.

A variant of the if-only-the-other-side-would-disappear argument appeared in Michelman's *Philadelphia Inquirer* op-ed. One Gosnell patient, she wrote, "told the Associated Press that she had intended to go to a Planned Parenthood clinic but was scared away by antiabortion protesters."

Well, why were the protesters there? Again, the answer comes back to the *Roe* regime. Normally if you think a law is unjust, you take your case to lawmakers. But a march on Harrisburg would be futile. Even if Pennsylvania legislators agree with the protesters that abortion is murder, they can't do anything about it. The Supreme Court has tied their hands. So the protesters, driven by a sincere belief that innocent children are in jeopardy of being murdered, go to the scene of the "crime" to try to stop it before it happens, through the power of persuasion.

And what were the prospective patients afraid of? In her next paragraph, Michelman describes their "fear of violent protesters." But she provides no evidence to support her characterization of the protesters as violent, and a National Abortion Federation list of incidents of "extreme violence" against abortion providers and facilities, which goes back to 1997, includes not a single incident from Pennsylvania. Maybe Planned Parenthood frightened potential clients away by slandering the protesters as violent.

But maybe the prospective patients were averse to the message rather than the messenger. In a fascinating piece last week for LiveActionNews.com, Sarah Terzo (whose shirttail bio describes her as "a member of Secular Pro-Life and Pro-Life Alliance of Gays and Lesbians") reports that "pro-choice counselors at abortion clinics occasionally have to deal with a woman who asks, point blank: 'Is abortion killing my baby?'"

The clinic workers are trained to say no, naturally:

> Linda Couri, who worked at Planned Parenthood, described how she responded when a teenager considering abortion asked her the following question: "If I have an abortion, am I killing my baby?"
>
> Couri said: "'Kill' is a strong word, and so is 'baby.' You're terminating the product of conception."

You're terminating the product of conception. The fetus precipitates. Again the Orwellian doublespeak, in this case employed therapeutically. Euphemism is an analgesic for the psychological pain that "strong words" aggravate. And the protesters exercising their First Amendment rights outside Planned Parenthood refuse to stop administering "strong words." It's not hard to understand, or to sympathize with, the woman who decides to go elsewhere.

But strong words can be therapeutic too. They promote wakefulness as well as inflammation:

> Couri was haunted by the girl's question and troubled about her [own] response. She began questioning whether providing abortions was really moral. She recalls asking her supervisor if she had done the right thing. The supervisor did not deny that abortion was killing a baby but told her that in the teenager's case, abortion was a "necessary evil." Struck by the use of the word "evil," Couri continued to question her position at the clinic. Eventually, she left, and now she is a pro-life speaker.

Here, then, is another reason it is vain to expect opponents of abortion to disappear: The abortion industry itself is a breeding ground for them. Even Norma McCorvey became an antiabortion activist later in life.

One advantage the abortion lobby has is widespread complicity. If abortion is evil, almost everybody is at least a little bit guilty. There have been more than 50 million abortions in America since 1973, according to the Alan Guttmacher Institute. Maybe you've had, or facilitated, one. Very likely someone you know has had one, and do you want to call her a murderer? (If no one you know has had an abortion, what makes you think you know that?) Probably you've had sex for the pleasure of it, not wanting a baby to result. People were doing that before *Roe*, of course, but the nationwide deregulation of abortion made it a lot less risky, or at least made it seem so.

The Linda Couri story illustrates the antiabortion side's corresponding advantage: Sometimes the guilty repent. Many abortion opponents, being Christians, recognize that as a central insight. And the guiltiest, by virtue of having borne direct witness, can be the most zealous penitents.

One of the strongest practical arguments in favor of the *Roe* regime is that abortion has been around since time immemorial and outlawing it only drove it underground, leading women to endanger themselves by seeking out the services of back-alley quacks. The Philadelphia grand jurors recounted a powerful example from their own city's history.

It was called the Mother's Day Massacre. A young Philadelphia doctor "offered to perform abortions on 15 poor women who were bused to his clinic from Chicago on Mother's Day 1972, in their second trimester of pregnancy." The women didn't know that the doctor "planned to use an experimental device called a 'super coil' developed by a California man named Harvey Karman."

A colleague of Karman's Philadelphia collaborator described the contraption as "basically plastic razors that were formed into a ball. . . . They were coated into a gel, so that they would remain closed. These would be inserted into the woman's uterus. And after several hours of body temperature,

. . . the gel would melt and these . . . things would spring open, supposedly cutting up the fetus."

Nine of the 15 Chicago women suffered serious complications. One of them needed a hysterectomy. The following year, the Supreme Court decided *Roe* v. *Wade*. It would be 37 more years before the Philadelphia doctor who carried out the Mother's Day Massacre would go out of business. His name is Kermit Gosnell.

Back-alley abortions were indisputably a problem before 1973. That's no defense of the *Roe* regime, which failed to solve it.

What do we mean when we call for the abolition of the *Roe* regime? Simply this: a reversal of Supreme Court precedent, an acknowledgment by the Court that it erred when it decided *Roe* v. *Wade* and *Planned Parenthood* v. *Casey*. That would turn the question of abortion back to the states and the people, where the 10th Amendment makes clear it belongs.

The abortion debate needs more politics, not less. As we noted above, drawing the line between acceptable abortion and homicide is necessarily an arbitrary exercise. For judges to issue arbitrary rulings is a corruption of the judicial function. But the production of arbitrary results—imperfect but workable arrangements that can be revised if necessary to adapt to new circumstances or knowledge—is the essence of politics.

A reversal of *Roe* and *Casey* would no more yield a consensus than the decisions themselves did. Neither the worst pro-abortion fears nor the fondest antiabortion hopes would be realized. Abortion would remain legal in many states, and any hope for a "Human Life Amendment" to the Constitution would be a pipe dream, the same as it is today. But in the absence of consensus, politics in a democratic republic would produce that least bad outcome: compromise.

Some will say it's unrealistic to call for a reversal of *Roe* and *Casey*. But *Casey* was decided 5-4, and, as we noted last July, it reportedly came within a hair's breadth of going the other way. Although several new justices have yet to weigh in on the abortion question, it is generally believed that the balance of the Court is similar today to what it was in 1992.

Look at it this way: For Irin Carmon to succeed in realizing her dream of Safe and Legal Utopia, all those who disagree with her have to change their minds, and supporters of her view have to lock in their agreement permanently. For us to succeed, a change of one well-placed mind would suffice. The odds are probably against us, but they look awfully good by comparison.

"Try reasoning with him."

Leading Lady for Life

Brian Caulfield

In the 17 years from the *Roe* v. *Wade* decision through 1990, the number of abortions in America rose in an almost unbroken line, from 615,000 in 1973 to 1.5 million in 1980 to a peak of 1.6 million in 1990. A host of dedicated men and women battled in courthouses across the country, in federal and state legislatures, in local crisis-pregnancy centers, in the great yearly March for Life in Washington and its many offspring throughout the country, in the gritty world of sidewalk counseling, in medical schools and hospitals. But the numbers kept mounting, and pro-life forces in government, the culture, and religious circles always seemed to be on the defensive. Although pro-lifers strove to defend such circumscribed victories as the Hyde Amendment, which barred federal funds for abortion, they failed to find a foothold in turning back the rising tide of abortions.

In the Catholic Church, the bishops were routinely portrayed by the secular media as a bunch of old men in medieval robes trying to tell young women what they could do with their bodies. Yet a decision by the archbishop of what Pope John Paul II called "the capital of the world" would soon help change that. Cardinal John O'Connor of New York, the nation's most visible religious figure and an outspoken and eloquent abortion opponent, began looking for a young lay spokeswoman who could effectively communicate the facts about abortion and convincingly defend the teachings of the Church while embodying the opposite of the media stereotypes.

Enter Helen Alvaré, an attractive young Hispanic lawyer at the U.S. bishops' conference in Washington, D.C., handling the more routine legal issues that confronted the Church in the pre-sex-scandal days. During the bishops' nationwide search for a pro-life spokesperson, she was asked repeatedly to consider the job, but declined. Nonetheless, she got calls from the bishops' conference to "fill in" on TV debates, just until a full-time spokesperson could be found. So she dutifully took her seat in front of the cameras beside well-prepped Planned Parenthood and NOW reps, forming talking points and arguments on the spot and thinking—really—that she was not cut out for the media world, where image reigns above substance, and pro-lifers are viewed as early Christians in the Coliseum.

Eventually, she agreed to meet with Cardinal O'Connor, who forestalled

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her objections by telling her that taking the job was her duty to the Church and the people of God, not to mention the millions of unborn babies threatened by abortion, and she had to start that very day. Her objections were unfounded, her fears would pass, her path was clear—and so Alvaré said yes. Soon she and the Cardinal began mapping out media appearances and strategies that would change the public image of pro-lifers.

They didn't do it all, of course, and they didn't do it by themselves, but the alliance between Cardinal O'Connor and Helen Alvaré was key. They were a dynamic duo, rarely appearing together but always consulting and learning from one another. It took time, endless hard work, and sound strategy, but the fact that today a small majority of Americans describe themselves as "pro-life" as opposed to "pro-choice" can be credited in part to the groundbreaking efforts of Helen Alvaré and the guidance of His Eminence.

Though Alvaré insists that she was the student before the great teacher of life, it is also true that the Cardinal softened his pro-life rhetoric over the years, partly through her influence. In 1984, after being appointed to New York, yet before arriving in the city as archbishop, O'Connor had generated headlines by comparing abortion to the Holocaust. The Big Apple's Jewish community and the public protocol watchers were offended, and the Cardinal got a crash course in handling a media feeding frenzy. In the following years, he would touch a number of other New York third rails involving condom distribution to homosexual men, care for the dying in Mother Teresa's Greenwich Village AIDS home, "safe-sex" curricula in public schools and Church-run child-care facilities, and same-sex marriage and gay rights, including the infamous public school text *Heather Has Two Mommies.*

In hiring Alvaré, the Cardinal was acknowledging that good works and moral reasoning were not enough in a sound-byte world. The message had to get out in an appropriate manner and by acceptable means. Appearance, tone, and nuance mattered. In the case of abortion, that meant giving the message a feminine touch.

Over the next 10 years, Alvaré became the American Catholic hierarchy's formidable yet engaging pro-life presence. The rest of her story tracks pretty much with that of the pro-life movement over the past 20 years, as the greatest and longest-running grassroots civil-rights movement in America found one of its most effective feminine voices and faces. Throughout the 1990s, as Alvaré and an impressive array of other second-generation pro-life warriors, many of them women, appeared on the scene, abortion numbers began falling. While correlation does not prove causation, it is hard to avoid the conclusion that Alvaré and those who formed or led the host of other woman-friendly, positive-

spinning pro-life initiatives during this time period had an enormous effect.

A Tale for Our Times

Ardent pro-lifers who were well aware that women ran the movement, from the grassroots prayer vigils to the local pregnancy centers to the yearly March for Life, cheered Alvaré on as she went word for word with her opponents within a hostile media environment. The boost to morale was infectious throughout the 1990s.

"I remember seeing her on TV, maybe it was *60 Minutes*, and thinking, 'This is just what we need!' The bishops really knew what they were doing when they got her as a spokeswoman," recalled Deirdre McQuade, who now holds the position Alvaré did at the U.S. bishops' conference. "I was just out of college at the time and the larger pro-life world was still new to me. But I remember thinking that this was the kind of message we should be giving on a national stage. Helen just really inspired me and so many other women to devote ourselves more to this great cause for life."

Predictably, Alvaré was vilified, branded a traitor to her gender and a puppet of the Church's hierarchy, and endured personal attacks in print, on the airwaves, and in rallying speeches from "pro-choice" standard bearers. She persisted against such unthinking prejudice because she knew that two basic facts needed repeating every time she had the media's attention: Abortion ends the life of an innocent child and wounds the life of the mother. Abortion is bad for mother and child. By simply showing up and giving a feminine voice to this obvious message, she turned the focus of the abortion debate toward the woman, with the implied question: "Is abortion the best we can do for her?" Along with a contingent of other attractive, dedicated, and unapologetic pro-life women, Alvaré helped forge today's familiar woman-centered messages and supported a phalanx of second-generation pro-life initiatives, including Women Deserve Better Than Abortion, I Regret My Abortion, Project Rachel, Silent No More, and the Second Look Project.

Susan Wills, assistant director of the U.S. bishops' pro-life office, said that Alvaré's outstanding quality is her charity, which comes from a genuine respect of the human person, whether or not someone is on her side.

"She never attacked people, though she was attacked, she was always open to discussion because she had a curious mind that really wanted to know what the other person was thinking," Wills said. "She lifted us all up in the office and in the pro-life movement. Even when things were very dark, she never lost hope."

Having worked side by side with Alvaré for a number of years, Wills said,

"I have to say that Helen is perhaps the only person I always wanted to be like."

Getting to Know Her

This profile takes an unavoidably personal tone because I worked nine years for Cardinal O'Connor as a reporter for *Catholic New York*, and in that capacity covered Alvaré's career nearly from its beginning. I have no inside information on closed-door meetings or strategy sessions, but I have covered numerous press conferences, homilies, debates, public appearances and statements, and interviewed each separately dozens of times. When I first contacted Alvaré for this story, she immediately wrote back that she had no time: full-time professor, three children at home, book deadline, and a web campaign that has more than 38,000 signatures of pro-life women proclaiming "Women Speak for Themselves." In the persistent spirit of Cardinal O'Connor, however, I continued making plans for the story, waiting until after the November elections, and then informed her by e-mail that I was going to title the profile "First Lady for Life." That got a rise. She wanted me to know that the title was way off the mark:

> I am uncomfortable with being seen as "first" in any title. I see myself rather in terms of "kaizen," that marvelous Japanese concept about constantly seeking improvement. That is how I try to operate and it does mean that I "develop" or progress over the years with inspiration from the greats, John Paul II, Benedict XVI . . . .

The impetus for taking on this assignment was the desire to document a part of the pro-life movement's important history from an eyewitness perspective and also tell the story of a leading figure that many today may be unfamiliar with, since she has been out of the limelight for some 12 years. She is a link in the great chain of the pro-life movement, and her story tells much about the road we have traveled to get where we are today. I hope that her story may inspire others to continue their labors for life or to get more involved, because we are nearer the goal today than we were when Alvaré first joined the fight.

Her impressive career can be easily summarized. She graduated from Cornell Law School in 1984 and received a master's in theology from The Catholic University of America in 1989 (her doctorate is still on hold). She started her legal career at a Philadelphia firm, concentrating on commercial litigation and, tellingly, First Amendment free exercise of religion issues. In 1987, she began working for the bishops' conference in the Office of General Counsel, where she drafted amicus briefs for U.S. Supreme Court cases on abortion, euthanasia, and the First Amendment. Then came her 10-year stint as spokeswoman for the bishops' Secretariat for Pro-Life Activities. She lobbied for life on Capitol Hill, testified before Congress, addressed

sometimes unfriendly university audiences, and appeared on hundreds of television and radio programs. She also has worked with the Holy See on matters of women, marriage, and the family, and respect for human life as a consultor to the Pontifical Council for Life (and today also for the Pontifical Council for the Laity).

In 2000 she became an associate professor at the Columbus School of Law at Catholic University, and five years ago joined the faculty of George Mason University Law School, concentrating on family law and the legal issues surrounding new medical technologies. Though a secular institution, George Mason has given her the freedom to teach and publish according to Catholic and natural law principles, and her classes are very popular.

Yet to understand more about Alvaré, you have to know something about her strong Catholic upbringing in Philadelphia, the kind of solid and sensible faith that sought expression in both devotion and action.

The Alvaré home was thoroughly Catholic under her father and mother, who cared for her grandmother until her death and welcomed priests and religious sisters to the table. When she was a grade schooler, Alvaré recalls, she told some older nuns who were visiting that she wanted to "do something great for the Church." The youngest of five children, she also recalls feeling both the need and the drive always to do better, yet never quite measuring up. Coming of age during the 1970s women's movement, when anything seemed possible, "I had a feeling that I was always just falling short of being really good," she said, "and needed to work harder than others."

She met her future husband in college and "married my best friend" a few years after graduating from law school. Alvaré has kept her maiden name for professional purposes, and due to some exaggerated responses to her public stances, she doesn't reveal the names of her husband or their three children.

Speaking of children, probably the most surprising thing about Alvaré is that the one-time spokeswoman for maternal life grew up with a strong aversion to kids. "Even when I was a fairly young child myself, I wondered how people could stand having children," she writes as an opening salvo in the first sentence of the first chapter of the book she edited, *Breaking Through: Catholic Women Speak for Themselves* (Our Sunday Visitor). Her dislike for children was so pronounced that her nephew would sing-song as a toddler, "Mommy loves me, Daddy loves me, Aunt Helen doesn't love me." She once told her mother that with her college education she "could have been something" in life besides a wife and homemaker. Ouch!

She was caught in the feminist mindset, she explains, and also knew the stress of growing up with a mentally disabled child, an older sister who has

passed away. Rather than embrace the heroic path of her mother and father, she decided to blaze a new path for women in the world.

Of course, Alvaré changed. Getting married and having children of her own made her a better person, she writes. “I stand before you a woman convinced that children made me, in the sense of rendering me the halfway decent person I can claim to be.”

She also told me that “as a daughter of the Church,” she knew that children figured into marriage and, in fact were a “supreme gift,” according to *The Catechism of the Catholic Church*. Thus she was initially open to children as a matter of faith more than desire, and experienced a mixture of joy and hardship with each pregnancy and birth. She also suffered a few miscarriages: The woman who once abhorred the thought of pregnancy was left to mourn the loss of her own unborn children. Through life and loss, she learned to love more.

In her book, she describes her aversion to children as “giving in to the temptation to refuse the basic human vocation to love.” She feared “the trials associated with the Christian way of life: self-gift, for as long as parenting takes.” With this background she was later able to quietly counsel women on both sides of the issue about what it means to have the courage of your convictions, and how to face the sacrifice of childbearing bravely because it can bring a greater good than you ever imagined into your life.

In the years since Alvaré resigned from being the bishops’ spokeswoman, she has gone beyond her former role of spokeswoman and effective female voice of the pro-life movement. She has become a witness of the personal pro-life experience, still on the front lines and still leading, yet in a different way. We owe her our thanks, as we do the Cardinal who brought her to the pro-life ranks.

Rape & Abortion: A Double Injustice

Mary Meehan

After Todd Akin talked about "legitimate rape" and then lost his U.S. Senate campaign in Missouri last year, Marjorie Dannenfelser remarked that Akin "clearly could have used a little bit of debate prep before he made that statement." Dannenfelser heads the Susan B. Anthony List, a pro-life political action committee. She suggested how her group will deal with future candidates who want its support: ". . . I drill you on all the questions, all the tough things, and then you give it back to me. And then we see if that actually merits endorsement or not, because if you can't handle a rape question after everything that we just went through . . . then you're not paying attention and you don't care enough to figure it out."[1]

Feminists for Life of America has been dealing with rape and abortion for many years. "We will never trade one form of violence for another," says FFLA President Serrin Foster. She champions both the federal Violence Against Women Act and pro-life legislation. She calls abortion "a second act of violence against a woman who is raped," and she quotes a medical student who said her abortion "was worse than the rape." Foster declares: "Both victims—the woman and her child—deserve our unconditional support."[2]

It seems impossible to avoid some injustice when rape leads to pregnancy. It is unjust that a woman must carry to term a child conceived through rape. It is, though, a greater injustice to kill the child. Yet ethics, law, and reason are not enough to deal with this case. There is a need for wholehearted support and exceptionally good counseling for the mother and eventually for the child. Placing the child for adoption soon after birth is sometimes the best solution. Yet many women in this situation—32 percent of them, according to one study—decide to raise the child by themselves. This may be as many as 8,000 women each year.[3] Running through many case studies, though, is a heart-breaking strain of loneliness and lack of support from family or friends. Instead, these women should be recognized as the heroines they are, and their children should be welcomed as the innocents *they* are.

While there has been real progress in rape prevention in recent years, there is room for improvement there as well. I will make suggestions about

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that in the last section of this article. I write with the conviction that all children, born and unborn, have the right to life and to freedom from assault. And that all women have the same rights.

What Mr. Akin Should Have Said

Pro-lifers must appeal to the kindness, generosity, and courage of women who are pregnant by rape. *Whatever the legal status of abortion, these strengths are needed to deal with hard cases in a positive way.* Women who have done this provide outstanding examples that others can follow.

Mr. Akin would have done far better had he said something like this: "Let's stop *both* forms of violence. There is no reason to be defeatist about either one. In fact, there has been a decline in abortion since the 1980s—and a dramatic decline in rape in recent years. Let's learn from those successes and build upon them. Women have led strong anti-rape efforts over the past 40 years. They have prompted legal reforms in the handling of rape cases; educated police, judges, and doctors; and helped women learn self-defense skills. I salute them for that great work and pledge my support for their continued efforts to end rape.

"In the meantime, what should our response be when rape does occur and a child is conceived through it? Here, I believe we can learn from the experience of women who have carried such children to term and either brought them up themselves or released them for adoption. And we can learn from the children of rape, who speak out in increasing numbers, saying they are glad they weren't made to pay for their fathers' crimes. They believe that, like the rest of us, they have a right to be here. I urge all citizens—whatever their views on the legal status of abortion—to listen to these mothers and their children. Theirs is a hopeful story about overcoming evil with good. It's a story of courage and hope."

Women of Courage

Finding that rape has caused pregnancy often magnifies the trauma to a woman, at least initially. Fairly often, though, women find that they start bonding with their unborn children and decide to raise them by themselves (or, if married, with their husbands) or release them for adoption. Some say that the children become a great healing for them, a source of hope and joy. Shauna Prewitt, who is now an attorney, was raped during her senior year in college. In an open letter to Todd Akin last year, Prewitt said she was devastated by the rape. When she realized that it had caused pregnancy, she felt: "Scared, shocked, even betrayed by my body." Yet she also felt "a sort of kinship, a partnership" with her unborn child, "perhaps the kind that only

develops between those who have suffered together—but, nevertheless, I felt a bond." She added: "Neither getting pregnant from my rape nor finding unimaginable joy from raising my daughter during the past seven years makes me an 'illegitimate' rape victim."[4] Prewitt is now working to change state laws that allow a rapist to pursue visitation or custody rights. Weird though this sounds, it sometimes happens, and it happened to her. Sometimes a date rapist uses the *threat* of pursuing such rights to head off a criminal prosecution for rape.[5]

Sharon "Bailey" (a pseudonym), pregnant from rape by an acquaintance when she was only 15, said years later that "I didn't have deep mother instincts. Basically my feelings were, 'It's just you and me, kid.' I considered us both to be victims. Kind of like the bond between hostages." The young mother decided against adoption, but years later thought that would have been better for her daughter. "My first husband verbally abused her. I never have had, and still don't have, the maternal feelings for her that I have for my other kids. We're good friends and I so love her, but it's like we're sisters. I wish she could have had a more normal life."[6]

Some women decide on adoption because they fear the child will look like the father and be a reminder of the rape. One woman who was raising her child indicated this was sometimes a problem, although she described her daughter as "a fun-loving child, so sweet, with so many good qualities."[7] There are other accounts of women who found it a problem—and of women who did not. One, often asked if she didn't think of the rape every time she looked at her child, described the question as "downright bizarre." She said that, instead, she thought of "the joy of being a mother to someone so beloved to me who is just absolutely wonderful."[8] Some women fear that the child may inherit "evil genes" from the father. I have found no evidence of this. There are cases where the child has major problems, but ones likely due to other factors.[9] The worst horror stories, for both mothers and children, occur when they are caught in households that feature violence, alcohol abuse, street drugs, and/or incest. Getting them out of such situations is essential if they are to survive and have a chance for happy lives.

Some scared teenagers, as well as adult women, have shown such lonely courage in resisting pressures for abortion that gold medals should be struck for them. Others have received great support from family or friends when they needed it most. One woman, made pregnant by rape when she was "in a state of drunken helplessness at a party," said that the "people at my church stood by me, supported and helped me; and now I have this lovely little girl, Robin, that God has allowed to be my daughter." She added: "Through the fellowship of Alcoholics Anonymous, I can hang in there one day at a time

and not drink alcohol."[10] Lee Ezell, raped at age 18, found no help from her mother, who "asked me to leave and take care of this thing and come back as if nothing had happened. . . . So I headed south from the San Francisco area with a car and 50 bucks in my pocket, trying to decide what my next step would be." Abortion was then illegal, although available in nearby Mexico; but Ezell thought it might be "too permanent an answer for my temporary problem." She also doubted that the child should "be punished for the crime of its father." She found "a sweet old couple in Los Angeles" who invited her to stay with them. That made all the difference.[11] Pregnancy care centers also do much to help rape survivors who are pregnant, as a woman named Angela discovered. Her daughter was raped at age 14. Pregnancy followed, and many people encouraged the girl to have an abortion. But someone put her mother in touch with Birthright of Rolla (Mo.), where Trisha Davault was immensely helpful. Angela says that, the first time she took her daughter to Birthright, "we both knew everything was going to be okay . . . Trish cried with us and loved us and offered our family the support we needed." Her daughter's son, Angela adds, has not harmed his mother in any way, nor "added to her trauma. Actually, it has been the complete opposite . . ."[12]

Cathy D. Kirkland found that her son, conceived in rape, helped her deal with her longtime depression. "He restored my faith in life and gave me a reason to get up in the morning," she said. But because she was single, and her child biracial, she had to deal with prying questions. She commented: "I have a lot of fun with people who want to know what race Jonathan is: I say human . . . Or when they ask what does his dad do, I say he's an apprentice astronaut or a cowboy. At least they don't come back asking me silly questions again."[13]

Children of Rape

Some adoptees, when searching for their birth mothers, are shocked to find that they were conceived in rape. They had never suspected that possibility, and they need time to come to terms with it. Increasing numbers, though, are speaking out about their experience. They come from varied walks of life—students, pastors, writers, full-time homemakers, a musician, an artist, lawyers, a television talk-show hostess, a university professor. They are grateful that their mothers and/or the law protected their lives. Perhaps no one should be surprised that many are dedicated pro-life activists. One of the best-known is attorney Rebecca Kiessling, an adoptee who learned at age 18 that her father was a rapist. She was happy to be reunited with her birth mother, yet dismayed to find that her mother had tried twice to abort her. Terrible conditions in a back-alley clinic defeated the first abortion

effort, and a huge snowstorm prevented the second. While Kiessling developed a good relationship with her birth mother, she also kept her strong convictions about the right to life. She speaks widely on the issue and has started a group called Save the 1 to work against rape exceptions in pro-life legislation. She is featured in a Feminists for Life ad that asks, "Did I deserve the death penalty?"[14]

Faith Daniels was conceived when her birth mother, at age 17, was raped by a boyfriend. A factory worker and his wife, a hairstylist, adopted Daniels. "She's very lucky she grew up with wonderful parents who gave her a lot of love," Daniels's husband told *People* magazine. What does Daniels think of her origins? "It really doesn't matter how you were conceived," she said. "Only what you've become." Daniels became a reporter, wife, and mother. She delighted in her children, although she found it hard to be a working mom. She rose high in media ranks, becoming a national television news anchor for CBS and NBC and later hosting a daily talk show on NBC.[15]

Tony Kiessling (no relation to Rebecca Kiessling) grew up with his single mother, an aunt, and a grandmother. When he was 18, his mother told him that he had been conceived through rape. (His father had been a regular customer at a diner when she was working there.) Her "strong moral compass," her son said, led her to decide against abortion. Tony, who grew up to be a chemistry professor, was the only child she would ever have. His mother found it "very difficult" to talk about the rape, but made it clear that "she would not change a thing regarding giving birth to me and raising me. She could not imagine a world that did not include me and, in time, her three grandchildren."[16]

Juda Myers had a happy life with her adoptive parents. She was middle-aged in 2005 when she met her birth mother, Ann Phillips, and learned her story. After a gang-rape by eight young men in 1956, Phillips found that she was pregnant. She resisted pressures for abortion, but her parents made her place her child for adoption. Upon hearing her story many years later, Myers "wept for her," but Phillips "patted my shoulder and said, 'Honey, stop your crying. I've forgiven those men, and look what God has done. He's brought you back to me.' She had prayed for 48 years for my return." Myers now helps other mothers whose children were conceived in rape. She organized an Honor for Life Awards Gala, held in 2011, to honor such mothers. Comments from several honorees showed that the event brought great healing to them.[17]

Kristi Hofferber, adopted days after birth, says that she grew up in "a loving, Christian family." In her teen years, though, she was troubled by her adoption, yet didn't want to hurt her parents by asking them questions about it. Finally, at age 30, she did ask them and was shocked to find that her birth

father was also her grandfather. He had forced sex upon his daughter (Hofferber's birth mother) for many years. This had resulted in six pregnancies—one ended by a miscarriage forced by the father, and four "through abortion to cover his actions." Hofferber was the only one of the six children who was born alive. She found her birth mother, who "welcomed me into her life." Now working for a degree in social work, Hofferber plans to earn one in adoption counseling, too. She says that "my passion is to serve others who may be facing difficulties with any aspect of adoption."[18] Her approach calls to mind Ralph Waldo Emerson's remark about the person who, like a wounded oyster, "mends his shell with pearl."[19]

Ryan Scott Bomberger, conceived in biracial rape, was adopted by a couple who eventually had thirteen children—three birth children and ten adopted children of various backgrounds and races. "I was adopted and loved like *crazy*," Bomberger told the March for Life in January, 2013. He and his wife Bethany, who also have both birth and adopted children, started a pro-life group called the Radiance Foundation. They do educational work through public speaking and media campaigns. One of their projects placed billboards in African American communities, suggesting that abortion has made black children an "Endangered Species."[20]

How to Stop Rape (More Women of Courage)

According to a study based on the federal National Crime Victimization Survey, sexual violence against girls and women dropped by 58 percent between 1995 and 2010. Yet there were still about 270,000 "completed, attempted or threatened" rapes or sexual assaults against females in 2010. (Sexual assault other than rape includes grabbing, fondling, and verbal threats.)[21] The overall decline, though, has been truly dramatic. We should celebrate it—and keep those numbers going down. Serrin Foster, the Feminists for Life leader, attributes the decline to factors including the Violence Against Women Act, women's use of cell phones to call for help, "Take Back the Night" demonstrations, and the fact that college campuses "are doing huge amounts of education" about date rape. She stresses, though, that more effort is needed to tackle the immense backlog of untested DNA evidence from rape cases. This, she suggests, is a good way to get repeat offenders off the streets.[22]

The serial rapist who is also a stranger is the person most of us picture when we think of rape. Yet the crime-victim survey, covering both rape and the broader category of sexual assault, found that assailants were strangers in only 22 percent of cases. In another 38 percent, they were acquaintances, either casual or well-known. In an appalling 34 percent, they were intimate

partners, a category that includes spouses and boyfriends—either former or current. In a shameful six percent, they were relatives.[23]

Substance abuse is often involved in sexual assault. In the survey, "about 40 percent of victims believed the offender had been drinking or using drugs." The *victim* also has been drinking heavily in many date-rape cases. Sociologist Michael Kimmel says that "the most treacherous time for a college woman is when she is at a party, drinking, with people she thinks she knows."[24] Anything that reduces alcohol and drug abuse is likely to reduce rape and other crimes as well. In his book *Guyland*, Kimmel also urges major change in the culture of young males and their often-terrible attitudes toward women. He does not offer a simple recipe for change, but does stress the value of continued parental involvement in sons' lives during early adulthood. He notes the positive influence that one "charismatic adult"—perhaps a teacher, coach, or older sibling—can have by listening to a young man and encouraging him on the right path. He explains how individual guys can "break the culture of silence" that often protects bad behavior toward women. He also presents the story of a high school student who, at a keg party, prevented the rape of a drunken girl and found someone to drive her home.[25]

But what can women themselves do in their own defense? They often receive good advice about locking homes and cars, avoiding risky areas, and so forth. Sometimes, though, the list of things a woman should not do, and places she should not go, is so long that she might just as well be a prison inmate. Moreover, many women cannot afford to live in places that are totally safe. Yet nearly any woman can benefit from self-defense instruction. Many private agencies, and some public ones, offer courses ranging from several hours to weeks or months. They encourage strategic thinking about the best way to handle various attacks. They demonstrate basic techniques (such as breaking a stranglehold by bending back the attacker's little finger, or dealing with an attack from behind by elbowing the attacker in the stomach and stomping on his foot). They also give enrollees a chance to try out the techniques against well-padded instructors. All of this leads to real confidence and the ability to deal with an attack vigorously, instead of freezing in fear and confusion.

This is not to say that every woman can be successful in fending off an attacker. Sometimes the attack is so sudden, and done with such overwhelming force, that there is no chance of success. Experts generally advise against resistance when the assailant is armed with a gun or knife. The crime-victim survey found that attackers were armed "in 11 percent of all sexual violence"[26]—a much lower percentage than I would have guessed. When there is no weapon, there is often a good way to strike back and then escape. Denise Caignon

and Gail Groves collected stories of women who did this in a book called *Her Wits About Her*. While it mainly describes attempted rape by strangers, its defense techniques can be used to prevent acquaintance rape as well.

Louisa W. Peat O'Neil was painting her garage when she noticed "a sneakered foot just behind me." She screamed "like a banshee . . . Arms gripped me. I flailed and kicked, striking out with the paintbrush still in hand. I never quit screaming. He flung me down against the wall and took off in a flash. . . . Later the police said a rapist will run from a screamer, and I have a voice like a siren."[27] A woman identified only as Rashida knew she faced gang rape when two young men jumped from a car, grabbed her, and pulled her into the car where three other men waited. They drove her to a dark cemetery; four of them got out of the car while one remained and "put his arm around my neck to keep me in place. The others were outside of the car taking their pants down. When one of them climbed into the backseat and moved toward me, I snapped." She continued: "I bit the arm that held me, hit the guy behind me in the gut with my right elbow, and kicked the guy coming toward me, all at the same time. The one holding me let go, and the one facing me got out of the car, hurt. I got out of the car quickly and ran. The other men were so surprised, they didn't move fast enough to stop me."[28]

Sometimes an angry and determined verbal response, perhaps backed up by a fist, is enough to scare off a would-be rapist. After much training in martial arts, Tamar Hosansky was ready when she was alone in an elevator with a man who suddenly lunged toward her. "I hit him in the chest to back him off so he wouldn't grab me. . . . But he backed right off and said, 'I'm sorry, I'm sorry, don't hit me.' I took a fighter stance and yelled, 'Get off the elevator!'" He did.[29] Other women, in similar situations, use language they certainly didn't learn in Sunday School; but their assailants understand it.

Some women who have survived rape or other violence now teach other women how to defend themselves. But one of the teachers remarked: "My dream is to someday live in a world where there are no victims, to speak a language in which violence does not exist."[30]

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The Frozen Embryo:

Scholarly Theories, Case Law, and Proposed State Regulation

Shirley Darby Howell

INTRODUCTION

Fertility experts have been able to create human embryos outside the body since the 1970s. However, both moral and legal questions still persist regarding the use of In Vitro Fertilization (IVF). Using IVF to assist individuals and couples having trouble procreating would be seemingly positive, but the procedure has resulted in serious unintended consequences that continue to trouble theologians, physicians, and the courts. The ongoing legal debate focuses on two principal questions: (1) whether a frozen embryo should be regarded as a person, property, or something else and, (2) how to best resolve disputes between gamete donors concerning disposition of surplus frozen embryos.

State legislators have taken widely divergent and often constitutionally suspect positions on both of these questions. Some state legislatures have avoided potential political repercussions by refusing to address these troubling questions and, instead, have deferred to the courts.

Because of the largely unresolved issues surrounding frozen embryos, preeminent legal scholars have written extensively in an effort to provide guidance to decision makers. The theories range from simple contract to complex constitutional analyses. In this Article, I will present the strengths and weaknesses of each of these theories. After an analysis of these theories, I will propose model legislation that would provide gamete donors with human dignity and legal certainty.

Section I of this article discusses the in vitro fertilization process, including the unintended consequences and who is responsible for those consequences. Section II explores the controversy over the proper legal status of the frozen embryo. Section III presents scholarly approaches to dispute resolution that include the Robertson Contract Theory, the Coleman Contemporaneous Consent Approach, the Feminist Position, and the Supreme Court's

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jurisprudence on the Right to Procreate and the Right to Not Procreate. Section IV focuses upon Israel's controversial Nahmani case, in which Israel's divided Supreme Court embraced a solution to embryo disputes. In Section V, I propose legislation to enhance the dignity of gamete donors and to resolve the issue of the disposition of abandoned embryos.

SECTION I

A. The In Vitro Fertilization Process

With the birth in 1987 of the first baby conceived outside a woman's body,[1] science gave childless couples around the world a new hope for parenthood.[2] For the first time, fertility experts could combine an ovum and sperm in a petri dish and create an embryo or pre-embryo that *might* become a "test tube" baby.[3] Physicians labeled the revolutionary procedure in vitro fertilization ("IVF").[4]

To initiate an IVF procedure, a physician will administer hormonal treatments to the female gamete donor in order to stimulate her ovaries to produce an abnormally large number of eggs.[5] During the patient's next ovulation cycle, the physician will use one of two methods to harvest the eggs.[6] Through a minimally invasive procedure, the physician may remove the eggs by making a few small incisions in the patient's abdomen and extracting them, or may perform a vaginal aspiration using a suctioning needle.[7] Neither method is foolproof or without its risks to the health of the patient.[8] Because the patient faces both significant pain and a level of risk during each egg extraction, most elect to have more eggs extracted than they are likely to implant should issues arise with those eggs being implanted or they have a future desire for another baby via IVF.[9]

When the physician has harvested the eggs, she will attempt to fertilize them with the semen the patient has selected.[10] If fertilization is successful, the physician will implant two or three embryos in the first IVF cycle.[11] Any surplus embryos will be frozen for possible implantation in the future.[12]

B. Unintended Consequences

The IVF procedure has successfully enabled thousands of infertile heterosexual couples, gay couples, and single individuals to become parents. The IVF process, however, can have unexpected negative consequences. Today, there are over 500,000 frozen embryos stored in fertility clinics in the United States alone.[13] Some fertility clinics have so many embryos that they pay commercial storage firms to warehouse them indefinitely.[14]

C. Who Is Responsible?

Three distinct groups of gamete donors are responsible for the accumulation of this astounding number of frozen embryos. The first and perhaps most interesting group of gamete donors develop an intense familial affection for their frozen embryos, thinking of them as frozen children.[15] Fertility clinicians report that some of these donors occasionally stop by to "check on" their embryos.[16] One such donor, who can neither implant her surplus embryos nor bear to destroy them, states, "[m]aybe when I die, they'll just bury my embryos with me."[17] These donors continue to pay storage fees while they continue to search for moral answers to their dilemma.[18]

A second group of gamete donors who contributes to the proliferation of stored frozen embryos are those who divorce without having a clear plan for either distribution or destruction of their frozen embryos.[19] In many of these cases, one party wants to either implant the embryos or donate them to another infertile couple for implantation.[20] The other party, no longer wanting a child, wants to destroy the frozen embryos.[21] These donors must leave their embryos in storage until they either reach a meeting of the minds or a court decides the fate of the embryos.[22]

The third and most problematic group abandons its frozen embryos by leaving them in storage.[23] While there are no formal studies indicating how many embryos have been abandoned, anecdotal evidence suggests that thousands of embryos will never be claimed.[24] One physician has reported that he, alone, has "tons" of embryos that have been abandoned.[25]

SECTION II

THE LEGAL STATUS OF THE FROZEN EMBRYO: PERSON, PROPERTY, OR AN "ENTITY" DESERVING SPECIAL RESPECT

Bioethicists, legal commentators, religious philosophers, and judges all wrestle with how to deal with issues pertaining to frozen embryos.[26] Each group approaches the analysis from a different perspective. Not surprisingly, legal commentators begin the analysis by attempting to assign a legal status to frozen embryos.[27] Jurists and legal scholars thus far have concluded that frozen embryos must fall into one of three categories: (1) human life at its earliest early stage; (2) property; or (3) an entity occupying an interim status.[28]

A. The Frozen Embryo as Early Life

1. Proponents of the Position

Professors Robert P. George[29] and Christopher Tollefsen[30] argue in their

book, *Embryo: A Defense of Human Life*, that the frozen embryo is nothing less than human life, albeit at its earliest stage.[31] According to George and Tollefsen, "[a] human embryo is not something different in kind from a human being, like a rock, or a potato, or a rhinoceros. A human embryo is a whole living member of the species Homo sapiens in the earliest stage of his or her natural development."[32] George and Tollefsen seek to make their point with a story of the actions of first responders during Hurricane Katrina.[33] According to George and Tollefsen, first responders evacuating a flooded New Orleans hospital retrieved a tank of nitrous oxide that contained over 1,400 frozen embryos.[34] Subsequently, a child, aptly named Noah, was born as a result of the implantation of one of the rescued frozen embryos.[35] They contend that but for the humane actions of the police, "the toll of Katrina would have been fourteen hundred *human beings* higher than it already was."[36]

The views of George and Tollefsen largely mirror those of the Roman Catholic Church.[37] The Vatican's 1987 *Instruction on Respect for Human Life in Its Origins and on the Dignity of Procreation* articulates the Church's position that the embryo is fully human.[38] The IVF regulations of Italy reflect the Vatican's position. Italian law permits the harvesting of no more than three eggs per IVF cycle.[39] The three eggs must be implanted in the mother.[40]

Thus far, only two American states, both having large Catholic populations,[41] have adopted the moral position that a frozen embryo is fully human. Both Louisiana and New Mexico have severely restricted the use of IVF procedures.[42] Louisiana's pertinent IVF statutes provide that an in vitro fertilized human ovum is both a "juridical person"[43] and a "biological human being."[44] New Mexico implicitly grants a human embryo the status of human being by mandating that all in vitro fertilized ova be implanted in a human female recipient.[45]

2. Legal Impediments to the Enforceability of "Embryos as Early Life" Position

Louisiana's and New Mexico's statutes require that human embryos either be implanted or stored until they are adopted.[46] At first blush, the statutes seem to be a feasible means to treat frozen embryos as human life. Upon closer analysis, however, the statutes present insurmountable constitutional and practical problems.

Roe v. *Wade* and its progeny hold that a woman has a privacy interest in her own bodily integrity that includes the right to abort her non-viable fetus.[47] Consequently, if an IVF female gamete donor subsequently refuses implantation, the state cannot compel her to go forward with the procedure. If a woman reluctantly consented to implantation, she could still abort the

fetus; thereby frustrating the purpose of the Louisiana and New Mexico statutes.[48]

The Louisiana statute provides that gamete donors may renounce their parental rights "by notarial act" so that the embryos can be placed for adoption.[49] What the Louisiana legislature failed to contemplate is the possibility that (1) the gamete donors will abandon the embryo(s); or, (2) that no one will adopt the embryo(s). On a practical level, either situation may result in fertility clinics having to store countless embryos indefinitely. Predictably, fertility clinics will pass on these "legislative" costs to infertile patients, causing the already expensive procedure to become even more expensive.

Professor Diane K. Yang points out that several forms of popular contraceptives prevent pregnancy by preventing embryos that have formed *inside* a woman's body from attaching to the uterus.[50] These embryos flush naturally from the woman's system during her menstrual cycle.[51] "Such [natural] occurrences are not contemplated as a loss of life, but rather a loss of genetic cells."[52] If a woman can use a contraceptive to prevent embryos within her body from progressing into a pregnancy, it is illogical to say she must treat the same embryos as protected human life when they are frozen in nitrous oxide. The Louisiana and New Mexico statutes create this bizarre conundrum.

Somewhat remarkably, neither the Louisiana nor the New Mexico statutes have been challenged. Both are constitutionally weak and unenforceable as a practical matter. Respected scholars who favor treating frozen embryos as human beings are also openly and unapologetically opposed to abortion on religious and moral grounds.[53] Nonetheless, while *Roe* v. *Wade* is the settled law of the land, their attempts to classify frozen embryos as human life are unworkable.

B. Frozen Embryos as Property

To treat the frozen embryo as mere property is to view it as chattel, a movable piece of personal property. The owners of this embryonic property would enjoy the same rights in it as they would in a sofa, automobile, or beach chair. The owners could sell the embryos, throw them away, or trade them for something else. A third party could convert the embryos and become liable for the fair market value of the embryo.

The court in *York* v. *Jones* applied the property approach.[54] Through an IVF procedure, six eggs were harvested from Mrs. York for future implantation.[55] When the Yorks moved to California, they requested that the clinic transfer one pre-zygote to California.[56] The clinic refused, and the Yorks

sued.[57] The district court held that the clinic acted as bailee of the *property* and was under a legal duty to return it to the rightful owners.[58]

Katheleen R. Guzman, in *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, makes the argument that while one might appropriately consider the frozen embryo as mere property, doing so leads to unnecessarily awkward, formal results:[59]

> If the embryo is property, however, the legal owners lay their claim through a combination of labor and occupation theories—those who first expend capital or effort to produce the good have rights paramount to all others claiming an interest therein. Issues would focus not on the embryo but on others' status there-to—who has paramount rights relative to whom. The question involves possession and title issues such as bailments, equitable division of property, and concurrent ownership. The embryo's genetic contributors, the institution in which it was stored, or its intended recipients could assert control over the property and could own either or both legal and equitable title to the embryo depending on the theory of ownership proffered. The owner could then convey the property through donative transfer or sale regulated by basic gift, contract, and code principles. By contrast, if the embryo is a person, the attempted transfer would analogize to slavery or the chattelization of human life. In short, if a person, the embryo can own property. If property, the embryo can be owned.[60]

C. The Frozen Embryo as an Entity Deserving Respect

The majority of commentators and courts subscribe to or at least pay lip service to a conceptual middle ground between viewing the frozen embryo as human and viewing the frozen embryo as mere property.[61] Most contend that the frozen embryo is an entity "entitle[d] . . . to special respect" because it represents potential life.[62] It is difficult, however, to define respect in this context.

One might suppose that since a frozen embryo is an entity deserving of respect that every court would decide disputes over frozen embryos in favor of the party wanting to implant the embryo. On the contrary, courts have sided with the party who favored destroying the embryos in every case decided in the United States thus far.[63] Most courts have opined that the gamete donor who does not wish to implant should ordinarily prevail in a dispute with the other gamete donor.[64]

One can only wonder if the oft used term "entity deserving special respect" should be shortened simply to "entity." Professor Angela Upchurch pointedly questions the intellectual honesty of referring to frozen embryos as an entity deserving of "special respect."[65] She posits that a far more accurate assessment would be to call them an entity deserving of "special resistance," since courts routinely decide in favor of their destruction.[66]

Nonetheless, the term persists, if as nothing more than a comfort for Americans who are unwilling to designate frozen embryos as property.

SECTION III

SCHOLARLY THEORIES OF DISPUTE RESOLUTION

Preeminent legal scholars disagree sharply over the proper approach for deciding disputes between gamete donors regarding the fate of their unused frozen embryos. Professor John Robertson contends that gamete donors who voluntarily and advisedly enter into a contract prior to IVF regarding the disposition of unused embryos should be able to rely upon the enforcement of the agreement.[67] Professor Carl H. Coleman maintains that contracts concerning family relationships violate public policy and are unenforceable upon a change of mind by either party.[68]

Other legal scholars dismiss arguments based on contract principles and predicate their arguments on constitutional theories. Kimberly Berg cites Supreme Court cases relating to contraception and abortion that she maintains create a constitutional right not to procreate.[69] Professor Glenn Cohen argues that contraception and abortion cases do not necessarily apply to disputes over frozen embryos.[70] He also contends that if a right not to procreate exists, the right can be "unbundled" into three distinct subsections of parenthood: the right not to be a gestational parent; the right not to be a genetic parent; and the right not to be a legal parent.[71] Cohen asserts that to compel a person to become a genetic parent under some circumstances is constitutionally permissible.[72]

Professor Judith F. Daar argues that the constitutional right to procreate should be viewed as superior to any right not to procreate when one gamete donor wants to implant the frozen embryos and the other wants to destroy them.[73] Professor Daar further cites Supreme Court reproductive jurisdiction to support an award of embryos to the party who wants to donate the embryos to a childless couple so long as the unwilling partner is not burdened with legal responsibility toward the child.[74]

Feminist scholars, including Professor Daar, advocate that the female gamete donor should have exclusive control over her frozen embryos for the same period of time that a pregnant woman would have the right to choose an abortion.[75] These scholars view the female's interest in the embryos as superior to that of the male because of the greater physical investment that the IVF procedure requires of the female.[76]

In subsections A-E below, I set out the salient points of each theory.

A. The Robertson Contract Theory

In his article, *Precommitment Strategies for Disposition of Frozen Embryos*, Professor John Robertson takes a classic contract approach to resolving disputes between gamete donors.[77] Robertson maintains that parties who "knowingly, intelligently, and voluntarily" enter into a contract concerning the ultimate disposition of their surplus embryos must be bound by their agreements.[78]

One of Professor Robertson's most persuasive arguments for a contract model centers upon the concept of reliance.[79] To illustrate his point, suppose that Tom and Mary must resort to IVF to have genetic children.[80] They agree prior to undertaking IVF that any embryos they do not choose to implant would be donated to an infertile couple for implantation.[81] As a result of successful IVF treatment, Tom and Mary have one daughter.[82] Their marriage failed thereafter and the parties petitioned for divorce.[83] In her petition, Mary seeks to have the remaining frozen embryos awarded solely to her.[84] If the court awards the five surplus embryos to Mary, she will destroy them because she does not want her daughter to have siblings that she will never know.[85] Tom insists that the prior agreement to donate the embryos should control.[86]

Professor Robertson would argue that Tom's reliance upon his agreement must be vindicated for a number of valid reasons. Tom's willingness to undertake IVF may have been integrally intertwined with Mary's promise that surplus embryos would be donated to a childless couple.[87] Tom might not have been willing to proceed with IVF but for the agreement.[88] He may have had religious objections to the destruction of their embryos.[89] He may also have sought to protect against having more children with Mary if they divorced.[90] If Tom's contract is not enforced, all of his expectations will be nullified.[91] Professor Robertson further argues that if courts will not enforce agreements such as that between Tom and Mary, parties entering into the IVF process can have no certainty about their reproductive future.[92]

Professor Robertson also argues that the best way for infertile couples to have procreative autonomy is to permit them to enter binding contracts prior to beginning IVF treatments.[93] If such contracts are enforced, the parties, themselves, have directed their future as parents.[94] If such contracts are not enforced, decisions about the procreative future of gamete donors will be made by strangers, specifically the courts.[95]

Professor Robertson acknowledges the emotional sensitivity of the issues surrounding the fate of surplus embryos.[96] Professor Robertson discusses at some length the reasons why a person might have a change of mind.[97]

Ultimately, however, Professor Robertson concludes that contract enforcement is the only method that vindicates the reliance interests of both parties and eliminates, in so far as possible, the intervention of the court system into the highly personal issue of procreative liberty.[98] If a dispute arises between gamete donors who have executed a pre-IVF contract and a Robertson contract model is imposed, the only justiciable issue will be the interpretation of the contract.[99]

Professor Robertson's contract model has garnered the approval of the medical community and many courts. An overview of cases supporting Robertson's contract theory is set out below:

1. *Davis* v. *Davis*

Mary Sue Davis and Junior Davis undertook IVF during their marriage.[100] When they subsequently filed for divorce, they disagreed over the disposition of their remaining frozen embryos.[101] Mr. and Mrs. Davis had made no written agreement prior to the IVF procedure concerning disposition of their embryos should they file for divorce.[102]

The Tennessee Supreme Court's analysis contained an important reference to pre-IVF contractual agreements:

> We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be *presumed* valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.[103]

2. *Kass* v. *Kass*

In March 1990, the Kasses began the IVF process.[104] After two unsuccessful pregnancies, the Kasses executed an informed consent form that was provided by the hospital.[105] A short time later the Kasses separated and subsequently disagreed on the disposition of the remaining embryos.[106] In deciding custody of the embryos, the court stated the following regarding IVF agreements:

> Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation

> in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.[107]

3. *J.B.* v. *M.B.*

Before undertaking in vitro fertilization in March 1995, the Cooper Center gave J.B. and M.B. a consent form with an attached agreement for their signatures. The agreement stated in relevant part: "I, J.B. (patient), and M.B. (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF Program under the following circumstances: 1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues."[108]

After going through IVF, the couple gave birth to a daughter.[109] Soon after, the couple divorced and were unable to agree on the disposition of the embryos.[110] In deciding the fate of the embryos, the Supreme Court of New Jersey stated:

> We find no need for a remand to determine the parties' intentions at the time of the in vitro fertilization process. Assuming that it would be possible to enter into a valid agreement at that time irrevocably deciding the disposition of preembryos in circumstances such as we have here, a formal, unambiguous memorialization of the parties' intentions would be required to confirm their joint determination. The parties do not contest the lack of such a writing. We hold, therefore, that J.B. and M.B. never entered into a separate binding contract providing for the disposition of the cryopreserved preembryos now in the possession of the Cooper Center.[111]

Professor Robertson's model of pre-IVF contracts, however, is not what the courts have been encountering.[112] The contracts have consistently been no more than "Informed Consent" documents provided to the gamete donors by the fertility clinics.[113]

A number of courts have enforced the terms of the fertility clinic's "Informed Consent" documents as though they also created a binding agreement between the gamete donors.[114] A close analysis of the informed consent scenario, however, casts serious doubt upon the propriety of such an assumption. First, the clinic drafts all the documents and presents every couple the same forms for their signature.[115] These documents typically contain between twelve to twenty pages of *single-spaced* material relating both to the nature and risks involved in the IVF procedure and the disposition of unused pre-embryos.[116] The parties must either choose from the clinic's list

of dispositional elections or write in their own more specific choices.[117] Fertility clinics require the patient and her partner to indicate their preferences for disposal of unused embryos as a pre-condition of the clinic going forward with IVF.[118]

Since the clinic initiates the contract process, logic dictates that they do so to protect themselves in the event of a dispute with the potential gamete donors. The gamete donors enter the contract in order to obtain IVF services and to protect themselves from disputes with the clinic. It is beyond cavil that the clinic and the gamete donors create a classic bilateral contract. There is, however, no language in the informed consent documents in which the gamete donors make express promises to *each other* regarding future disposition of preembryos.[119] To the contrary, the typical informed consent document expressly provides that the clinic will obey a court order with respect to disposition of the preembryos.[120] By way of a somewhat crude analogy, I argue that the informed consent agreement, insofar as it concerns the storage of future preembryos, creates little more than a bailment for hire between the clinic and the gamete donors. For the gamete donors to create a binding express contract with each other, they must make express promises to each other.

The 1998 *Kass* case from New York illustrates some of the problems inherent in enforcing a fertility clinic's forms in disputes between husband and wife.[121] The Kasses executed several lengthy informed consent documents with the clinic that provided, inter alia:

> 1. We consent to the retrieval of as many eggs as medically determined by our IVF physician. If more eggs are retrieved than can be transferred during this IVF cycle, we direct the IVF Program to take the following action . . . .[122]
>
> [2.] We understand that our frozen pre-zygotes . . . will not be released from storage . . . without the written consent of *both* of us, consistent with the policies of the IVF Program and applicable law.[123]
>
> [3.] In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding . . . our stored . . . pre-zygotes, we now indicate our desire for . . . disposition of our pre-zygotes and direct the IVF Program [that] *[o]ur frozen pre-zygotes may be examined by the IVF Program . . . for approved research investigation as determined by the IVF Program*.[124]
>
> [4.] In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.[125]

The couple was unsuccessful in their initial IVF attempts at conception.[126] The Kass marriage subsequently failed and the parties instituted divorce proceedings.[127] The wife petitioned the court to award her the frozen

preembryos for future implantation, relying upon provision (4) above.[128] (Evidence suggested that implantation of the preembryos would represent the wife's last chance to become a genetic parent, though the wife did not expressly raise that and the court did not consider it.) The husband argued that the preembryos should be donated for research, relying upon provision (3) above.[129] The trial court disregarded both contract claims and awarded the embryos to the wife, reasoning that the wife should have exclusive decisional rights over a non-viable fetus under *Roe* v. *Wade* and its progeny.[130] The Appellate Division dismissed the trial court's reliance upon *Roe* v. *Wade* and reversed, finding the informed consent enforceable between the husband and wife.[131] The New York Court of Appeals (the highest court in New York) affirmed the Appellate Division, concluding that "[a]greements between . . . gamete donors . . . should generally be presumed valid and binding and enforced in any dispute between them."[132] The court ignored the fact that the informed consent document contained no provision creating a contract between the husband and wife, perhaps on the theory that the couple had waived the issue by failing to raise it.[133] In a tortured parsing of facts, the court found that the twenty-two page, single-spaced form unambiguously expressed the intent of the parties despite the conflict between provisions (3) and (4).[134] The Court awarded the preembryos to the husband, who would thereafter donate them to the clinic for scientific research.[135]

In the 2001 New Jersey case of *J.B.* v. *M.B.*, based upon provisions contained in a fertility clinic's informed consent documents that were substantially similar to those in *Kass*,[136] one might have predicted a result like the one in *Kass*. However, the New Jersey Supreme Court refused to enforce the terms contained in the informed consent documents and established a very different rule.[137]

The parties in *J.B.* v. *M.B.* had signed the clinic's consent forms, indicating that upon dissolution of their marriage any surplus frozen preembryos would become the property of the clinic unless a court made an alternate disposition.[138] The New Jersey court found that the form did not manifest "a clear intent by J.B. and M.B. regarding the disposition of the pre-embryos."[139] The Court then set out what it called "the better rule."[140] The Court held that unambiguous dispositional agreements would be enforced, "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos."[141] I discuss the public policy concerns underlying New Jersey's rule in Part B below. For now, it suffices to say that such a rule would appear to render dispositional agreements entered at the time of IVF completely illusory under ordinary contract principles. For purposes of illustration, suppose that John and Mary, both

contract attorneys, voluntarily and in good faith drafted and executed a contract separate from the informed consent documents providing that in the event of their divorce any surplus preembryos would be destroyed. Under the New Jersey rule, either party could subsequently change his or her mind and render their contract void at will.[142]

While a strict contract theory validates the right of competent adults to make advance decisions concerning their reproductive lives, it leaves something to be desired when one party to the contract loses his or her last chance to become a genetic parent if the preembryos are not implanted. This scenario is discussed in Section C below.

B. The Coleman Contemporaneous Consent Approach

Professor Carl Coleman rejects the idea of advance directives for the disposal of surplus embryos, calling the process "dehumaniz[ing]."[143] His philosophy is summed up as follows:

> The contractual approach to questions surrounding the disposition of frozen embryos embodies a conception of family relationships that society should be particularly reluctant to embrace. It is one thing for couples to assume the role of arms-length negotiators when deciding about the division of property in the event of a divorce. A couple beginning infertility treatments, however, is embarking on the creation of a family. Decisions about having children should be made in the spirit of trust and mutual cooperation, not as part of a negotiated deal backed by the force of law. Requiring partners to contract with each other about their future reproductive plans dehumanizes [it] like a business transaction rather than an expression of love. As Alexander Capron has argued, "[c]ontracts are a fine way to make binding agreements about disposition of property, but they are much less appropriate when deciding about personal relationships, especially ones like joint parenthood that would be purely hypothetical at the time a couple undergoing IVF would sign the contract."[144]

Professor Coleman's solution to the vexing problems that occur when couples ultimately disagree about the use or destruction of their embryos is what he terms a default position: the embryos would remain frozen until the parties reach a mutual decision.[145] He maintains that parties cannot predict with any certainty how they will feel once they have created embryos.[146] Much of his argument on this point is an appeal to human experience and intuition.[147] He suggests that a person who undergoes successful IVF and has a genetic child may experience a parental feeling toward the embryos despite an earlier decision to donate them or otherwise dispose of them.[148] Under Professor Coleman's theory, the regretful gamete donor could always change his mind.[149]

If Professor Coleman's model were accepted, the courts would not have

had to decide the *Kass* or *J.B.* cases, or any other case. Whether parties had a prior agreement would be irrelevant and the outcome certain: the embryos would remain frozen.[150] In Professor Coleman's reasoning, the constitutional right of one party to procreate could never outweigh the constitutional right of the other not to procreate and vice versa.[151] Such cases would always end in a constitutional stalemate; therefore, cases involving disputes over the disposition of embryos could only be solved by continuing to freeze them.[152]

Professor Coleman counters Professor Robertson's contention that parties can best control their reproductive lives by making advance directives with his argument that contemporaneous mutual agreement theory provides absolute certainty of the outcome and eliminates interference by the courts.[153] Professor Coleman dispenses with Professor Robertson's reliance argument with the simple statement that no one could reasonably rely on an advance directive under his theory.[154]

Professor Coleman anticipated the contention that his theory is paternalistic in so far as it denies consenting adults the right to contract in advance of IVF for the use or disposal of any frozen preembryos.[155] He responds by arguing that paternalism works to protect parties from the consequences of their actions and that society accepts limited paternalism in a variety of contexts, including mandatory seatbelt laws and laws that restrict use of nontested drugs.[156] His greater point, however, is that his theory is not paternalistic because it acts on behalf of a larger societal cause; "promoting family relationships based on trust, or in the interest of showing respect for the strength of genetic ties."[157] Professor Coleman bases his public policy argument upon the theory that some rights are so "central to identity" that they cannot be waived by advance directive.[158] Professor Coleman cites two particularly striking examples in support of his theory: contracts to marry and contracts to have an abortion, or to refrain from having one.[159] Coleman argues that these rights relate to "deeply personal decisions that are central to most people's identity and sense of self."[160] Courts will not enforce a contract to marry if one party changes his mind, and a court will not enforce a woman's promise to have an abortion or refrain from having one if the woman changes her mind because of the "pervasive, far-reaching, lifelong consequences."[161] Professor Coleman contends that a decision concerning disposition of surplus embryos has consequences as pervasive and far-reaching as marriage or decisions concerning abortion and, therefore, should enjoy the same constitutional protections against improvident decisions.[162]

While case law and anecdotal evidence support Professor Coleman's belief that some people cannot envision the changes in their beliefs upon undergoing IVF, others experience no such change.[163] They undergo successful or

unsuccessful IVF and feel no particular attachment to their remaining frozen embryos. The parties either agree to destroy the frozen embryos, or they abandon them.

C. The Feminist Position

Professor Judith Daar contends that the female gamete donor should hold the absolute right to implant or destroy any frozen embryos during the same time frame that a pregnant woman would have an absolute right over her fetus, citing *Roe* v. *Wade* and its progeny in support.[164] Professor Daar extrapolates from *Roe* v. *Wade* the proposition that a woman's right, procreative autonomy, should be equally protected whether she conceives by coitus or by IVF.[165] Professor Daar argues further that just as a man loses his right not to procreate when coital conception occurs, he loses that right as well when he voluntarily contributes sperm for in vitro fertilization.[166] Other feminist commentators such as Ruth Colker point out that the male gamete donor experiences no pain or risk of physical injury during the IVF process while the female is vulnerable to both.[167] Both Professor Daar and Colker conclude that because of the unequal investment of the male and female in the process, the courts should award frozen embryos to the female who seeks to use them to become a genetic parent.[168]

Professor Daar recognizes, however, that the male donor in IVF procedures faces a possible consequence that men who engage in sexual intercourse for procreation do not.[169] If a man fathers a child by sexual intercourse, his responsibility will attach within a relatively short period.[170] If a man participates in IVF, he faces the possibility that the female gamete donor will delay implanting the embryo for an unspecified period.[171] Thus, the male donor who is no longer interested in procreating with the female donor could remain in financial and emotional limbo indefinitely.[172] Professor Daar solves the inequity by proposing that the female be allowed a "medically reasonable" time in which to implant the embryos.[173] Professor Daar suggests a forty-week period for implantation that would roughly approximate the natural gestation period.[174] If the first round of implantation results in a pregnancy, she will exhaust the forty-week period and cannot subsequently use any remaining embryos.[175] If the first attempt is not successful and she is within the forty-week period, she can try again.[176] In any event, the male gamete donor will know within forty weeks if a pregnancy has begun.[177]

Opponents of the feminist "sweat equity" position argue that *Roe* v. *Wade* and its progeny logically cannot be extended beyond actual pregnancy because the cases cite the physical autonomy and privacy of the mother as

the constitutionally protected interests, not her right to have a genetic child by any means.[178] Since decisions involving frozen embryos do not implicate the female's physical autonomy or her privacy interests, opponents argue that the female is entitled to no greater consideration than the male.[179] While this argument is beyond dispute as far as it goes, feminist commentators argue that it misses the point. For feminists, the crucial distinction is not between discrimination based upon gender; rather, they argue that the law discriminates against women who must undergo IVF to have a genetic child, while granting protected status to women who conceive through intercourse.[180]

D. The Right to Procreate

In 1923, the Supreme Court in *Meyer* v. *Nebraska* recognized the "right of the individual to . . . marry, establish a home and bring up children."[181] In 1942, the Court addressed the right to procreate apart from the right to marry in *Skinner* v. *Oklahoma*.[182] *Skinner* addressed the constitutionality of an Oklahoma statute that allowed the sterilization of individuals convicted twice of crimes involving moral turpitude.[183] The Court struck down Oklahoma's statute, declaring procreation to be "one of the basic civil rights of man."[184]

However, the 1980 decision in *Harris* v. *McRae* concluded that the right to procreate is solely a negative one.[185] In the opinion set out in *Harris*, the Court upheld the right to procreate as decided in *Meyer* and *Skinner*, but held that a state has no affirmative duty to aid an individual in realizing his procreative liberty.[186] In *Harris*, the Court drew a sharp distinction between affirmative wrongful state action that interferes with procreative liberty and any duty of the state to smooth an individual's path to procreation.[187] For example, a state statute prohibiting an individual from having more than two children would constitute an unconstitutional interference with procreative liberty.[188] On the other hand, if an individual can only conceive a child through IVF but has insufficient funds to obtain the treatment, the state has no affirmative duty to provide the service.[189] Thus, in private disputes between gamete donors regarding the implantation or destruction of their surplus preembryos, the state has played no part in creating the obstacle to the procreative liberty.

Since constitutional case law provides no enhanced status to the party in a divorce who wants to implant the frozen preembryos, the state is free to engage its own discretion in creating statutory provisions to govern such disputes. A state might statutorily create a preference for a solution that allows for the preembryo to be implanted by one of the donors or donated for implantation by an infertile couple. The state might also create a

legal preference for the party who opposes implantation—most courts have adopted this option.[190]

E. The Right Not to Procreate

The right not to procreate has been derived from case law involving both contraception and abortion. The first of the contraception cases reached the Supreme Court in 1965 in *Griswold* v. *Connecticut*.[191] The Court reviewed Connecticut's statute that criminalized the act of disseminating information about contraceptives.[192] The Court concluded that the statute invaded a zone of privacy within marriage that was "older than the Bill of Rights" itself.[193] Since the purpose of obtaining and using contraceptives is to avoid procreation, *Griswold* provided the beginning of an argument that at least married couples possess both a right to procreate and a right not to procreate.

In 1972, the Supreme Court entertained arguments in *Eisenstadt* v. *Baird* that unmarried individuals should also possess the privacy right to use contraception and avoid procreation.[194] Having found a privacy right in "sacred precincts of marital bedrooms" seven years earlier,[195] the Court concluded in *Baird* that all consenting adults possessed the same right to avoid procreation.[196] To the consternation of many parents, the Court extended the right to obtain contraceptives to minors in the 1977 decision *Carey* v. *Population Services International*.[197]

It is clear from the progression of *Griswold*, *Eisenstadt*, and *Carey* that the Court has found an incontrovertible right for any individual to avoid procreation by the use of contraceptives.[198] Once conception has occurred, however, the right not to procreate is no longer universally guaranteed since the mother alone is thereafter vested with the right to decide whether the pregnancy will go to term or be terminated.[199]

The abortion cases began in 1973 with the still controversial Supreme Court decision in *Roe* v. *Wade*.[200] For the first time, the Court found an absolute right in the mother to terminate a pregnancy during the first trimester.[201] The Court found a right of privacy that was explained as follows:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be

> imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[202]

The Court's language indicates three primary interests of women in not procreating against their will.[203] The first and arguably the most significant is a woman's interest in protecting her own health and bodily integrity free of undue burdens by the state.[204] Second, the Court cites a woman's interest in the value of her reputation in her community, which in *Roe* v. *Wade* stood to be damaged by an unwed pregnancy.[205] Third, the Court recognized a woman's liberty interest in her own psychological wellbeing.[206] And fourth, the Court seemed to consider the detriment to other family members, including the child, when a woman is forced to bear a child against her will.[207] In *Roe* v. *Wade*'s progeny the Court reversed its decision somewhat but only in so far as to change its trimester timeline.

In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, the Supreme Court rejected the trimester scheme in *Roe* in favor of the mother's absolute right to obtain an abortion before viability.[208] *Casey* also addressed the constitutionality of Pennsylvania's statute requiring a woman to notify her husband of her intent to obtain an abortion.[209] While acknowledging the father's "deep and proper concern and interest . . . in his wife's pregnancy"[210] as set out in *Planned Parenthood of Central Missouri* v. *Danforth*,[211] the Court held that such a notification statute impermissibly invaded the mother's privacy.[212] When the husband and wife disagree about the propriety of the wife having an abortion, the balance weighs in favor of the wife since she is more directly affected by the decision.[213] The import of *Casey* is unmistakable. The father does not share the mother's constitutional right *not* to procreate after conception.[214] The father cannot override the mother's right to abort, nor can he prevent her from taking the pregnancy to term because he no longer wants to have a child with her.[215] Whatever psychological or financial hardship the wife's decision may cause the husband if she proceeds to carry the pregnancy to term is not sufficiently weighty to permit the husband to thwart the mother's decision.[216]

One may reasonably argue, however, that decision-making regarding the fate of a frozen embryo is distinguishable from those issues of maternal privacy set out in *Roe* v. *Wade*. The difference in these cases is the female gamete donor's bodily integrity is not implicated because she is not pregnant. So long as the embryos remain frozen, there is no *Roe* v. *Wade* mandate that would require deference to the preferences of the mother. The male gamete

donor's financial and emotional interests in not becoming a father "can in reason and all fairness be the object of state protection that overrides the rights of the woman."[217] The majority of courts have held that the right not to procreate will inevitably trump the other party's right to procreate.[218]

Professor Glenn Cohen argues that the right not to procreate is one that can be "unbundled."[219] He breaks parenthood into three categories: gestational parenthood, genetic parenthood and legal parenthood.[220] Gestational parenthood is unique to the female.[221] Genetic parenthood, characterized by the biological link between parent and child, is shared equally by the male and female progenitors.[222] Professor Cohen defines legal parenthood in terms of legal responsibilities such as the duty to support minor children.[223]

The right of the female gamete donor to refuse to implant an embryo is absolute. A female's liberty interest in bodily integrity cannot be abridged by forcing her to gestate her unwanted frozen embryos. Professor Cohen contends that the female's personal gestational right not to become pregnant is the *only* constitutionally protected right not to procreate.[224] In Professor Cohen's view, her right not to become pregnant does not equate with a right not to become a genetic parent against her will.[225] To illustrate Professor Cohen's point, suppose that John and Mary have undergone IVF and have three surplus frozen embryos. John remains eager for genetic parenthood and seeks legal control over the embryos so that a surrogate can gestate them. Mary seeks legal control over the embryos in order to destroy them. Professor Cohen's concept of parenthood would allow for John to enjoy genetic and legal parenthood so long as Mary is excused from the duties of legal parenthood.[226] Under this scheme, Mary's absolute right not to become a gestational parent against her will is vindicated, while John's right to procreate is also vindicated.[227] If the roles were reversed, Mary could enjoy the opportunity for gestational, genetic and legal parenthood.[228] While John would become a genetic parent against his will, he would not be a legal parent and would owe no duty to the offspring.[229]

Professor Cohen gives short shrift to the notion that one's sensitivities against having a genetic child that one is not willing to parent is a sufficiently important interest to invoke constitutional protection.[230] Professor Angela Upchurch also debunks the idea that unwanted genetic parenthood is "a sufficiently compelling basis" on which to decide embryo disputes.[231] She points out that if mere knowledge that one has a genetic child were sufficiently important to influence the trajectory of one's life, there would be no need for every state to have child support enforcement statutes.[232]

In his final analysis, Professor Cohen's theory centers on the question of whether the right to not be a genetic parent can be waived.[233] To support his argument that the right can be waived, Professor Cohen draws similarities to waivable constitutional rights, including a criminal defendant's right to a jury trial, and a civil party's right to settle rather than adjudicate a constitutional claim.[234] He notes that if waivers are reviewed by a court, the court should use the lower civil standard "where waiver is 'judged according to contract law principles.'"[235]

One may argue, as Professor Cohen suggests,[236] that mere participation in IVF is in fact a waiver of the right not to be a genetic parent. If a court adopted that concept, there would be no need for a waiver agreement signed by the parties. On the other hand, if a waiver agreement was required, then a document unlike the ones currently used by IVF clinicians would need to be created.[237]

SECTION IV

NAHMANI: ISRAEL'S SOLUTION[238]

After several years without children, Ruth and Daniel Nahmani decided to undergo IVF.[239] Because Ruth Nahmani was unable to carry a child, the couple contracted with a surrogate in California to bear their child.[240] After IVF, but before the surrogacy arrangement could be executed, Daniel Nahmani left his wife to live with another woman and fathered a child in the new relationship.[241] Although Ruth Nahmani refused to divorce her husband, she wanted to go forward with the implantation of the frozen embryos.[242] Daniel no longer wanted to have a child with Ruth and preferred that the embryos be destroyed.[243] When Ruth sought release of the embryos from the hospital and was refused, she filed suit.[244] At the time of the hearing, Ruth was no longer capable of producing ova, and implantation of the embryos by a surrogate was Ruth's last chance to become a genetic parent.[245]

The Nahmani case was the first of its kind to reach Israel's Supreme Court.[246] Israel had neither statutes nor case law to direct the Court in its decision.[247] In an eight-to-four split, the Court chose "a solution that is consistent with both the law and the fundamental principles" of Israel's legal system.[248] The majority reached a decision it saw as being in conformity with "the values and norms" of Israeli society.[249]

The Court began its analysis with the right to procreate, stating:

> It would appear that no one disputes the status and fundamental importance of parent-

> hood in the life of the individual and in society. These have been basic principles of human culture throughout history. Human society exists by virtue of procreation. Realizing the natural instinct to be fruitful and multiply is a religious commandment of the Torah.[250]

The Court further mentioned the constitutional right of procreation that exists in the United States.[251] The Court also took judicial notice of American case law that has been construed to create a right not to procreate.[252] When faced with whether to vindicate Ruth's right to procreate or Daniel's right not to become a genetic parent, the majority concluded that the contradictory concepts were not coextensive in Nahmani:

> [T]he choice of parenthood is not just a decision concerning a way of life; it has much greater significance for human existence. It expresses a basic existential need. Moreover, the decision to become a parent also has an element of self-realization, particularly in modern society, which emphasizes self-realization as a value. But the right to parenthood does not derive only from self-realization. The right to life is an independent basic right, and it is not a derivative of the autonomy of the will; the same is true of the right to parenthood. From this perspective, the symmetry created by the judgment between the right to parenthood and a decision (legitimate, in itself) not to be a parent (as an expression of personal freedom) is undermined.[253]

The Court then looked beyond its initial judgment of the asymmetry of the respective right to procreate and the right not to procreate to seek justice in the case at bar.[254] The Court pointed out that Nahmani was not a case of "forced parenthood" since before beginning IVF, Daniel had freely given his consent to parenthood.[255] In reliance upon Daniel's consent to parenthood, Ruth underwent "complex, invasive and painful procedures in order to extract the ova, in the knowledge that this was almost certainly her last opportunity to bring a child of her own into the world."[256] The Nahmani Court resolved the dispute under estoppel theory.[257] Daniel, having induced detrimental loss to Ruth in the forms of monetary investment, time, physical pain and risk, was held estopped from withdrawing his consent to implanting the embryos.[258] The Court also considered whether the rule would apply equally if it were the husband who wished to use a surrogate to implant the embryos.[259] The Court rejected arguments that the wife should have exclusive control over the embryos during the period in which she could lawfully obtain an abortion, concluding that the situations were inapposite.[260] The Court found that even though the wife made a greater physical investment in the IVF procedure because of the pain and risk she undertook, the husband's reliance interest in having a child is co-extensive with that of the wife's.[261]

SECTION V

ANALYSIS: CONTRACT VS. CONTEMPORANEOUS AGREEMENT MODELS

Professor Robertson's contract model is persuasive in that it validates the right of consenting adults to secure future benefits by the execution of prior agreements. The contract model also has the advantage of vindicating the reliance interests of both parties as they were stated prior to the IVF procedure. Still, because the subject matter of such agreements is especially sensitive and the male and female are arguably in a confidential relationship,[262] the contract should be subject to some of the same safeguards that control in premarital agreements. The Uniform Premarital Agreement Act ("UPAA") requires that premarital agreements be in writing and signed by both parties.[263] The same requirement should be imposed upon Pre-IVF agreements. Further, in order to assure that the parties understand that they will be bound by their agreement in the event of divorce or the death of a party, the Pre-IVF agreement should be a self-contained document clearly denominated "Pre-IVF Agreement" and executed solely between the male and female gamete donors. Enacting a Pre-IVF statute governing such agreements would set forth a clear public policy in favor of pre-dispositional agreements and would serve to place parties on notice of the effect of such agreements.

The UPAA does not specifically mandate that the parties consult with an attorney with respect to the terms of the agreement;[264] however, some states have ruled that absence of independent counsel or the opportunity to consult independent counsel can be construed as evidence of an agreement that was entered into involuntarily.[265] Imposing such a requirement in the IVF context would ensure that parties have had an opportunity to make careful, considered decisions before committing to a course of fertility treatments.

When a fertility clinic requires that patients sign an informed consent document, the document should be required to contain the following or similar *conspicuous* language:

> Your signature herein indicates only that you have been advised of all known risks of the IVF procedure and have consented to the procedure. Should you desire to decide in advance what shall be done with any unused embryos in the event of a divorce or upon the death of either of you, you should consult with an attorney and have your agreement reduced to writing. Your consent to the procedure does *not* constitute an agreement concerning your interests in any frozen embryos in the event of a divorce or the death of either party.

When parties execute a Pre-IVF agreement, the agreement should be presumed valid, and the burden of proof should fall upon the party seeking to

invalidate the agreement. Again, by analogy to the UPAA, Pre-IVF agreements should be subject to the following provisions:

> (a) A Pre-IVF agreement is not enforceable if the party against enforcement is sought proves that:
>
> (1) That party did not execute the agreement voluntarily; or
>
> (2) The agreement was unconscionable when it was executed.[266]

The term "unconscionable" should be defined narrowly to mean the agreement was obtained by duress or fraud. A party's emotional need to have a genetic child, standing alone, would not constitute duress.

Professor Coleman's contemporaneous agreement theory is generous in its attempts to allow for human frailty within the context of genetic relationships. Indeed, few adults can look back on all their decisions made within the family without regret. Still, agreements between family members should not be illegal simply because the potential for regret is great in such circumstances.

Professor Coleman contends that one's ability to divorce indicates a public policy in favor of not binding individuals to contracts that impinge upon one's sense of selfhood.[267] I disagree. States do not invalidate the marriage contract by granting a divorce. The states grant divorce, not because the parties' marriage was void for impinging upon selfhood, but because it was a valid contract. Divorce is the *remedy* for breach of the marriage contract. In the event of divorce, the state will enforce legally recognized duties of post-marital spousal support and child support, despite the changed feelings of the parties. If the parties had executed a premarital agreement in accordance with state law, the state will enforce its terms in spite of the regret that one party may experience.

I propose that any Pre-IVF contract should be presumed valid, subject to proof of fraud, duress, or unconscionable conduct. Thus, if the parties agreed that their surplus embryos would be destroyed, the agreement would be enforced as written. Employing the same reasoning, if the parties agreed that one party should have exclusive control over the embryos, the agreement should be enforced so long as the agreement conforms to the Pre-IVF statute I proposed above. If the parties agreed that surplus embryos should be donated for implantation by an infertile couple, the states should vindicate that intention as well.

The next concern is the situation that confronts the courts when there is no enforceable written agreement concerning the disposition of surplus

frozen embryos. Scholars have proposed four solutions to this issue that I have set out above: to privilege the right to procreate; to privilege the right not to procreate; to privilege the right of the female gamete donor to exclusive rights over the frozen embryos as set out in *Roe* v. *Wade* and its progeny; or to privilege the party who wants to procreate, if but only if, he or she proves that implantation is his or her last realistic chance to have a genetic offspring. (These bitter and heartbreaking choices are the very ones that the courts could avoid if parties were both permitted and encouraged to enter into considered agreement that would control in such situations. Ironically, Professor Coleman's laudable desire to "humanize" the process is best advanced by executing the very contracts he discourages.)

I am inclined, largely in view of the persuasive force of Professor Robertson's reliance theory and Professor Cohen's "unbundling" argument, to conclude that in the absence of an agreement, the best course is to presume that the party who wants to use the genetic material for procreation should be preferred. I agree with Israel's Supreme Court majority opinion that adopting a policy of privileging the party who wants to implant the embryos does not force procreation upon anyone. *Both* parties made an intentional, voluntary investment of time, genetic material, and financial resources in their effort to have a biological child. I do not find it credible that anyone would undertake such an intimate and heartfelt endeavor with the understanding that the other partner could unilaterally change his or her mind after the fact and have the embryos destroyed at will. Furthermore, both parties relied upon the good faith of the other in going forward with the conception process. I disagree with Professor Cohen, however, in so far as he seems to suggest that a genetic parent should be excused from financial responsibility for a child he or she does not want.

The last issue I must address is what should be done with frozen embryos that have been abandoned altogether. In this situation, I think only two solutions are workable. In Model I, the IVF statute would provide that the fertility clinic can dispose (destroy) of abandoned frozen embryos after a statutorily set period. In Model II, the fertility clinic would be required to notify a designated state agency that the embryos are available for adoption. Either model would serve to relieve fertility clinics of any ongoing responsibility for storing the abandoned genetic material.

Whether a state enacts Model I or Model II, the state should provide the gamete donors with procedural safeguards similar to those afforded to the parties in an adoption proceeding. In Model I states, the IVF statutes would require the fertility clinic to send notice by certified mail to the gamete donors' last known address(es) advising them of the entity's intent to dispose

of the embryos. The notice should advise the gamete donors of the time, place, and method of disposal. In the event that there is no response within thirty days, the statute would require notice by publication of the proposed disposal of the embryos. Should the donors again fail to respond, the statute would provide that the fertility clinic may then file a verified petition for leave to destroy the embryos.

In Model II states, the process of giving notice to gamete donors should parallel that required in adoption proceedings. If the donors do not respond to notice, the statute should require that the fertility clinic provide the designated state agency with the health histories of the gamete donors and notice that the embryos are available for adoption. In fairness to the fertility clinic, the IVF statute must provide that embryos not adopted within a set period may be disposed of under the same procedure employed in Model I.

Model I has little to recommend itself except expediency. The state treats the abandoned frozen embryo as mere property under the Model. Model II, however, treats the frozen embryo as an entity "deserving of special respect." The state provides a "life option" for the embryo and provides infertile persons with an opportunity to have children. Critics of Model II might argue that infertile individuals already have ample opportunities to adopt children, older children who may have physical or emotional disabilities. I do not disagree with this contention; however, too many infertile couples either feel inadequate to the task or they simply do not choose it. There is no compelling evidence to support the notion that denying other means of adoption would foster additional adoptions of older or impaired children.

CONCLUSION

As IVF becomes ever more popular, the need for clear embryo disposition procedures becomes even more necessary. By adopting clear methods of resolving disputes and handling abandoned embryos, both patients and IVF professionals will be able navigate the IVF process with one less burden.

NOTES

1. Clifton Perry & Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. Legal Med. 463, 463 n.1 (1992).
2. Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes Over the Fate of Frozen Embryos*, 7 B.U. Pub. Int. L.J. 315, 317 (1998) (explaining that Americans spend over a billion dollars a year on fertility treatments).
3. *See,* Olivia Lin, *Rehabilitating Bioethics: Recontexualizing In Vitro Fertilization Outside Contractual Autonomy*, 54 Duke L.J. 485, 489 (2004) (explaining that while the word "preembryo" may be awkward, the description is correct because the collection of cells has not

undergone sufficient differentiation to form what is considered an embryo); *cf*. Perry, *supra* note 1.
4. Perry, *supra* note 1, at 463.
5. *Id*. at 467.
6. *Id*.
7. *Id*.
8. See Joseph G. Schenker, *Prevention and Treatment of Ovarian Hyperstimulation*, 8 HUMAN REPROD 653 (1993).
9. Joshua S. Vinciguerra, *Showing "Special Respect" – Permitting the Gestation of Abandoned Preembryos*, 9 ALB. L.J. SCI. & TECH. 399, 403 (1999) (citing *Kass* v. *Kass*, 235 A.D.2d 150, 170 (N.Y. App. Div. 1997)).
10. Perry, *supra* note 1, at 467.
11. *Id*. at 468 n40.
12. *Id*.
13. Liza Mundy, *Souls on Ice: America's Embryo Glut and the Wasted Promise of Stem Cell Research*, MOTHER JONES (Jun. 30, 2006), at http://www.motherjones.com/politics/2006/07/souls-ice-americas-embryo-glut-and-wasted-promise-stem-cell-research.
14. *Id*.
15. *Id*.
16. Perry, *supra* note 1, at 494.
17. Mundy, *supra* note 13.
18. *Contra Id*.
19. *C.f*. *Davis* v. *Davis*, 842 S.W.2d. 588, 591-92 (Tenn. 1992).
20. *Id*. at 589.
21. *Id*.
22. *Id*. at 592.
23. Mundy, *supra* note 13.
24. *Id*.
25. *Id*.
26. Angela K. Upchurch, *Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2109 (2007).
27. *Id*. at 2117.
28. Diane K. Yang, *What's Mine is Mine, but What's Yours Should Also be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 592 (2002).
29. Robert P. George is a member of the President's Council on Bioethics and is a Professor of Jurisprudence and also Director of the James Madison Program in American Ideals and Institutions at Princeton University. He is the author of *Making Men Moral, In Defense of Natural Law, and The Clash of Orthodoxies*.
30. Christopher Tollefsen is an Associate Professor in the Department of Philosophy at the University of South Carolina, and is Director of U.S.C.'s Graduate Program in Philosophy.
31. Robert George & Christopher Tollefsen, *Embryo: A Defense of Human Life* 50 (2008).
32. *Id*.
33. *Id*. at 1-2.
34. *Id*.
35. *Id*.
36. *Id*. (emphasis added).
37. Compare Robert George & Christopher Tollefsen, *Embryo: A Defense of Human Life* (2008), with Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_ 19870222_respect-for-human-life_en.html
38. Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation, *supra* note 37.
39. George, *supra* note 31, at 216.
40. *Id*.
41. See *The Largest Catholic Communities*, ADHERENTS.COM: NATIONAL & WORLD RELIGION STATISTICS, at www.adherents.com/largecom/com_romcath.html. (last visited August 25, 2011) (listing New Mexico and Louisiana among the top ten states for Catholic Church membership. Mora County,

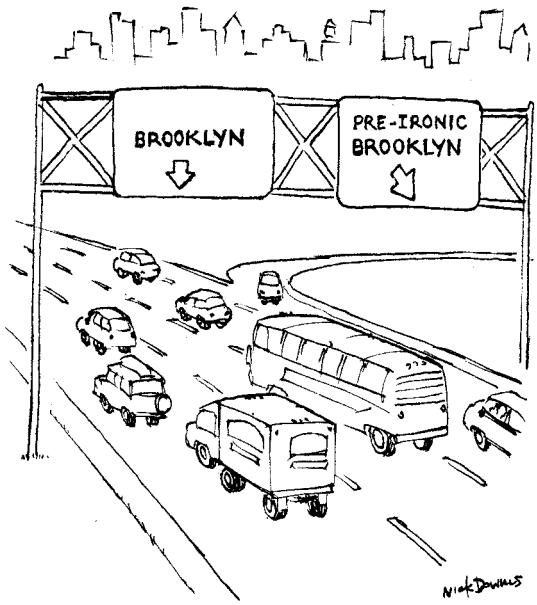
New Mexico has a 94.86% Catholic population, and St. James County, Louisiana is 84.18% Catholic).
42. See La. Rev. Stat. Ann. §§ 9:125, 9:126 (2011); See also N.M. Stat. Ann. § 24-9A-1(D) (2012).
43. La. Rev. Stat. Ann. § 9:125 (2011).
44. La. Rev. Stat. Ann. § 9:126 (2011).
45. N.M. Stat. Ann. § 24-9A-1(D) (2012).
46. N.M. Stat. Ann. § 24-9A-1(D) (2012); La. Rev. Stat. Ann. § 9:126 (2011).
47. *Roe* v. *Wade*, 410 U.S. 113, 727 (1973); *Planned Parenthood of Se. Penn.* v. *Casey*, 505 U.S. 833, 873 (1992).
48. See *Planned Parenthood of Se. Penn.* v. *Casey*, 505 U.S. 833, 873 (1992) (noting that a woman has a right to a pre-viability abortion).
49. La. Rev. Stat. Ann. § 9:130 (1986).
50. Yang, *supra* note 28, at 595-96.
51. *Id*.
52. *Id*.
53. Cf. Olga Batsedis, *Embryo Adoption A Science Fiction or an Alternative to Traditional Adoption?*, 41 Fam. Ct. Rev. 565, 571 (2003).
54. *York* v. *Jones*, 717 F.Supp. 421, 425 (E.D. Va. 1989).
55. *Id*. at 424.
56. *Id*.
57. *Id*.
58. *Id*. at 425.
59.See Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. Davis L. Rev. 193 (1997).
60. *Id*.
61. *Id*.; See also *Davis* v. *Davis*, 842 S.W.2d. 588, 597 (Tenn. 1992).
62. *Davis*, 842 S.W.2d. at 597; See also Upchurch, *supra* note 22, at 2122.
63. Upchurch, *supra* note 26, at 2128.
64. *Id*.
65. *Id*. at 2133.
66. *Id*.
67. Yang, *supra* note 28, at 597-98.
68. *Id*. at 598-99.
69. Kimberly Berg, *Special Respect: For Embryos and Progenitors*, 74 Geo. Wash. L. Rev. 506, 528 (2006).
70. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135, 1148 (2008).
71. *Id*. at 1139-40.
72. See *id*. at 1155.
73. Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 Am. J.L. & Med. 455, 466 (1999).
74. *Id*. at 460.
75. See *id*. at 466-69.
76. *Id*. at 460-62.
77. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 Emory L.J. 989 (2001).
78. *Id*. at 1024-25.
79. Robertson, *supra* note 77, at 1001.
80. See generally J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001) (giving an example of a case similar to the hypothetical case).
81. See generally *id*. at 710 (giving an example of a case similar to the hypothetical case).
82. See generally *id*. (giving an example of a case similar to the hypothetical case).
83. See generally *id*. (giving an example of a case similar to the hypothetical case).
84. See generally *id*. (giving an example of a case similar to the hypothetical case).
85. See generally *id*. at 710 (giving an example of a case similar to the hypothetical case).
86. See generally *id*. at 710-11 (giving an example of a case similar to the hypothetical case).
87. Robertson, *supra* note 77, at 1031.
88. *Id*.

89. *Id*. at 1024 n.159.
90. *Cf. id*. at 1031 (noting at the time of fertilization, a husband may wish the embryos be destroyed if the couple separates).
91. *Cf. id*. (explaining that a party may be less likely to participate in IVF if their pre-IVF contracts are subject to later review).
92. Robertson, *supra* note 77, at 1031.
93. *Id*. at 1039-40.
94. *Id*. at 1038-39.
95. *Id*. at 1039-40.
96. *Id*. at 1019-21.
97. *Id*. at 1016-25.
98. *Id*. at 1041-44.
99. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 75-76 (1999).
100. *Davis* v. *Davis*, 842 S.W.2d. 588, 591 (Tenn. 1992).
101. *Id*. at 592.
102. *Id*. at 590.
103. *Id*. at 597 (emphasis added).
104. *Kass* v. *Kass*, 696 N.E.2d 174, 175-76 (N.Y. 1998).
105. *Id*. at 175-76.
106. *Id*. at 177.
107. *Id*. at 180 (citations omitted).
108. *J.B.* v. *M.B*., 783 A.2d 707, 710 (N.J. 2001).
109. *Id*. at 710.
110. *Id*.
111. *Id*. at 714.
112.Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L. L. 75, 81 (2002).
113. *Id*.
114. *Kass* v. *Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); Davis v. Davis, 842 S.W.2d. 588, 597 (Tenn. 1992).
115. *Kass*, 696 N.E.2d at 176-77.
116. *Id*.
117. *Id*.
118. *Id*. Since the gamete donors are free to add their own terms regarding disposition of surplus preembryos, the contracts are not contracts of adhesion subject to attack as unconscionable.
119. *Cf. Kass*, 696 N.E.2d at 176-77 (giving an example of an agreement one couple had with the IVF clinic, with no language making an agreement between the couple).
120. *Id*.
121. *Id*.
122. *Id*. at 176.
123. *Id*.
124. *Id*. at 176-77 (emphasis added).
125. *Id*. at 176.
126. *Id*. 175-76.
127. *Id*. at 177.
128. *Kass* v. *Kass*, 663 N.Y.S.2d 581, 585 (APP. DIV. 1997).
129. *Id*.
130. *Id*.
131. *Id*. at 599.
132. *Kass*, 696 N.E.2d at 180.
133. See generally *Kass* v. *Kass*, 696 N.E.2d 174 (N.Y. 1998).
134. *Kass*, 663 N.Y.S.2d at 567-69.
135. *Id*. at 569.
136. *Cf. J.B.* v. *M.B.*, 783 A.2d 707, 709-10 (N.J. 2001), and *Kass*, 696 N.E.2d at 176-77.
137. *J.B.* v. *M.B*., 783 A.2d at 719.
138. *Id*. at 713.
139. *Id*.

140. *Id*. at 719.
141. *Id*.
142. *J.B.* v. *M.B*., 783 A.2d at 719.
143. Coleman, *supra* note 99, at 106.
144. *Id*. (quoting Alexander Morgan Capron, *Parenthood and Frozen Embryos: More than Property and Privacy*, HASTINGS CENTER REPORT, Sep.-Oct. 1992, at 33.
145. *Id*. at 126.
146. *Id*. at 102.
147. *Id*. at 100-102.
148. *Id*. at 100-101.
149. *Id*. at 126.
150. *Id*.
151. *Id*. at 84-85.
152. Compare Coleman, *supra* note 99, at 84-85 (explaining that even if the partner who wishes to reproduce cannot do so by other means, appropriating the genetic material of someone who objects is not a constitutional right), and Coleman, *supra* note 99, at 126 (noting that when no mutual decision can be made, all genetic material should be frozen indefinitely).
153. Coleman, *supra* note 99, at 124-25.
154. *Id*. at 125.
155. *Id*. at 121.
156. *Id*. at 121-22.
157. *Id*. at 121.
158. *Id*. at 96.
159. *Id*. at 92-93.
160. *Id*. at 95.
161. *Id*. at 92-93, 96 (quoting Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989)).
162. *Id*. at 96-97.
163. By negative inference, while cases surrounding IVF disputes involve persons who have changed their decisions that were stated in advanced directives, numerous couples do not change their decision recorded in the advanced directives, and therefore have no reason to litigate.
164. Daar, *supra* note 73, at 466-67.
165. *Id*. at 466.
166. *Id*. at 468.
167. Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1075 (1996).
168. Daar, *supra* note 73, at 466-77; Colker, *supra* note 167, at 1075, 1079.
169. Daar, *supra* note 73, at 467.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*. at 468.
174. *Id*.
175. *Id*.
176. *Id*.
177. *Id*.
178. Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONNL. L. REV. 1377, 1399-1402 (1995).
179. *Id*. at 1399-1401.
180. Daar, *supra* note 73, at 465.
181. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).
182. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-43 (1942).
183. *Id*. at 536.
184. *Id*. at 541.
185. *Harris* v. *McRae*, 488 U.S. 297, 316-17 (1980).
186. *Id*. at 317-18.
187. *Id*. at 315-16.
188. See *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (noting that decisions relating to procreation

are fundamental and thus subject to equal protection).
189. See John Robertson, *Children of Choice*, 86-89 (1994) (citing examples of affirmative rights as the state's duty to provide effective assistance of counsel to indigent defendants and to provide pre-termination hearings before terminating welfare benefits).
190. See *e.g.*, *Davis* v. *Davis*, 842 S.W.2d. 588, 591 (Tenn. 1992)
191. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
192. *Id*. at 480.
193. *Id*. at 485-86.
194. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).
195. *Griswold*, 381 U.S. at 485-86.
196. *Baird*, 405 U.S. at 453.
197. *Carey* v. *Population Services Int'l*, 431 U.S. 678, 694 (1977).
198. *Carey* v. *Population Services Int'l*, 431 U.S. 678, 694 (1977); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965).
199. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 69 (1976).
200. *Roe* v. *Wade*, 410 U.S. 113 (1973).
201. *Id*. at 163.
202. *Id*. at 153.
203. *Id*.
204. *Id*.
205. *Id*.
206. *Id*.
207. *Id*.
208. *Planned Parenthood of Se. Pa*. v. *Casey*, 505 U.S. 833, 870 (1992).
209. *Id*. at 887.
210. *Id*. at 895 (citing *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 69 (1976)).
211. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 69 (1976).
212. *Casey*, 505 U.S. at 897-98.
213. *Id.* at 896-98.
214. *Id*. at 898.
215. *Id*.
216. *Id*.
217. *Id*. at 870.
218.*A.Z.* v. *B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 720 (N.J. 2001).
219. Cohen, *supra* note 70, at 1139-41.
220. *Id*. at 1139.
221. *Id*.
222. See *id*. at 1139-40.
223. *Id*. at 1140 n.7.
224. *Id*. at 1154.
225. *Id*. at 1148.
226. *Id*. at 1167.
227. *Id*.
228. *Id*.
229. *Id*.
230. *Id*. at 1165-66.
231 .Upchurch, *supra* note 26, at 2145.
232. *Id*. at 2146.
233. Cohen, *supra* note 70, at 1185-86.
234. *Id*. at 1187.
235. *Id*. at 1193-94 (quoting Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 512 (1981).
236. *Id*. at 1194.
237. See *id*. at 1194-95.
238. CA 2401/95 *Nahmani* v. *Nahmani* 50(4) IsrLR 1 [1996] (Isr.).
239. *Id*. at 1.
240. *Id*.
241. *Id*.

242. *Id*.
243. *Id*.
244. *Id*.
245. *Id*. at 8.
246. See *id*. at 10.
247. *Id*.
248. *Id*. at 1, 2-3, 8.
249. *Id*. at 8.
250. *Id*. at 11 (citation omitted).
251. *Id*.
252. *Id*. at 6.
253. *Id*. at 40. (quoting Dr. D. Barak Erez, *On Symmetry and Neutrality: Reflections on the Nahmani Case*, 20 TEL-AVIV UNI. L. REV. 197 (1996)).
254. *Id*. at 41 (citing Professor Barak, JUDICIAL LEGISLATION, 13 Mishpatim, 25, 71 (1983)).
255. *Id*. at 40.
256. *Id*. at 42.
257. *Id*. at 44-45.
258. *Id*. at 45.
259. *Id*. at 49.
260. *Id*. at 46-48.
261. *Id*. at 48-50.
262. This would not be true if one party is using genetic material from an anonymous donor.
263. § 2. Formalities., Unif.Premarital Agreement Act § 2.
264. See *id*.
265. See *e.g*., In re Marriage of Hill and Dittmer, 136 Cal. Rptr. 3d 700, 705 (Cal. Ct. App. 2011); Mamot v. Mamot, 813 N.W.2d. 440, 447 (Neb. 2012).
266. See § 6. Enforcement., Unif. Premarital Agreement Act § 6.
267. Coleman, *supra* note 99, at 95-96.



Five Reasons Why There Cannot Be Life

Donald DeMarco

1. The Law of Entropy

The universe appears to be one vast conspiracy against the emergence of life. Astrophysicist Sir James Jeans has estimated that the number of stars in the universe is probably something like the number of grains of sand on all the beaches of the world. These stars are burning at extremely high temperatures and throwing off their heat in a random manner, so that the amount of disorder in the universe is always increasing in accordance with the Law of Entropy. As the distinguished astrophysicist Sir Arthur Eddington has stated, "The practical measure of the random element which can increase in the universe but can never decrease is called *entropy.* . . . The law that entropy always increases—the second law of thermodynamics—holds, I think, the supreme position among the laws of Nature."

A tsunami will leave a coastline more disorganized than it was before. A tornado will bring extreme disorder to a grocery store. A book thrown into the fireplace will reduce the text to smoke and ashes. The universe, it is said, is running downhill as it becomes increasingly disordered and disorganized. The main event in the universe is stars burning out while producing a situation in which matter is more and more randomly scattered. Away from these fires, there is the unimaginable cold of space, several hundred degrees below zero.

It would be hard to imagine a context more inhospitable to the formation and emergence of life. Extreme heat surrounded by extreme cold and a universe heading to what scientists have referred to as cosmic death surely does not seem to be a formula for producing life. And yet there is life, despite the overwhelming odds against its appearance. Life, which demands an exceptionally high degree of organization, exists despite everything around it seemingly breaking down.

2. The precise tilting of the Earth's axis

It is most unusual for a sun to throw off a planet that would orbit in a habitable zone. Astronomers estimate that about one star in 100,000 has a planet revolving around it in that small zone in which life is even a remote

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possibility. Many other features other than the right distance from the star are required, however, if there is to be life, including the precise tilting of the Earth on its axis.

The Earth is tilted from the perpendicular by 23.45 degrees. The precise tilting is exactly what is needed for there to be four seasons. "Axial tilt, or obliquity," writes Astrophysicist René Heller, "is a crucial parameter for climate and the possible habitability of a planet." If the Earth tilted 90 degrees, as does Uranus, the northern pole would be boiled during part of the year while the equator would get little sunlight. At the same time, the southern pole would freeze in total darkness. "It could turn out that the Earth's obliquity of 23.5 degrees," Heller argues, is a "Goldilocks' figure for seasonality—not too extreme in either direction—and therefore ideal for complex life." Despite the odds against it, planet Earth has just the right distance from the sun and just the right tilt on its axis for life to be possible. Yet, from a mathematical point of view, the emergence of life is highly improbable.

3. The recalcitrance of water

Most liquids have a quite simple form of behavior when they are cooled. They shrink, which is to say that their density increases. The reason is that, when their molecules move more slowly, they are less able to overcome the attractive intermolecular forces that draw them close to each other. As a result, most liquids become more compact as the temperature lowers to the freezing point. At the freezing point, liquids solidify.

Water, however, does not behave this way. It is one of the few liquids that actually expands when it nears the freezing point. At 3.98 degrees Celsius, its density decreases. At the freezing point it expands by approximately 9 percent. This explains why ice floats on water. If water became denser on freezing, it would submerge. Thus, if water behaved "normally," many bodies of water would freeze solid in the winter, thereby killing all the marine life contained in them.

If it is true that life began in the oceans, it may be that without this "recalcitrant" property of water life would never have emerged.

4. An immunological exception

The human body contains approximately 100 billion immunological receptors. They function to protect the body against the invasion of foreign substances. They have the extraordinary capacity to distinguish between the self and the non-self in order to protect the organism from harm.

From the standpoint of the immune system, however, the female body should reject male semen as a foreign substance, thereby protecting the female

organism from possible harm. Yet, if this were the case, a woman would never be able to conceive, and life would have ended with the passing of Adam and Eve. The male semen carries a mild immunosuppressant that allows the woman's immune system to make an exception and permit a "two-in-one-flesh" unity. The male, then, is regarded as a "friend" and so are any resulting babies. This male immunosuppressant, with respect to the billions of regulatory macro-molecules that make up the immune system, behaves in a truly exceptional way. Without this exception, the sexual transmission of life would not be possible.

5. Achieving immortality

Mortality is built into each human being. As people age, their bodies inevitably show signs of breaking down. Death is but a matter of time. But how is it possible that when people procreate, they do not bequeath to their progeny their age? New human life begins new and fresh. When Dolly the sheep was cloned in 1996, some thought that this would be a way of achieving a kind of cellular immortality. But Dolly was born old and exhibited premature aging before she was euthanized at age six.

Dolly was cloned using a somatic or body cell. Procreation takes place when two sex cells, a male gamete and a female gamete, fuse. Here is at least an image of immortality, since one generation after another can procreate human beings without endowing them with their own age. Offspring are truly younger than their parents. Sex cells can do something that somatic cells cannot do, namely start life over in its pristine originality and purity. Without this capacity to procreate truly new life, the human race would not have lasted more than one generation. It is a mystery as to why the sex cells can initiate new life again and again without there being any time limitation. The generations, at least from a biological point of view, can go on endlessly.

The odds against the emergence of life are staggering. Yet life exists. The forces that produce life need to escape one obstacle and improbability after another in order for life to emerge. Somehow, despite the Law of Entropy, that highly complex and beautifully unified reality of life must find a way to emerge. The Earth must be the right distance from the sun and have precisely the right tilt on its axis. Water needs to expand as it approaches the freezing point. Male semen must carry just the right immunosuppressant at the right time and to the right place. Sex cells must be able to initiate new life as truly new. Life is, from a scientific viewpoint, totally unexpected. And yet, no one can deny its reality. Life does exist because it is formed and guided by another Life that, in spite of the odds, shows Himself to be triumphant.

Scientists continue to ponder how life—the most improbable of all cosmic

occurrences—came about. Their pondering, however, carries them along widely divergent pathways, like the receding galaxies. Consensus among scientists is largely a myth. The supremely confident Richard Dawkins opens his international best-seller, *The Blind Watchmaker*, with the proclamation that "Our existence once presented the greatest of all mysteries, but . . . it is a mystery no longer because it is solved. Darwin and Wallace solved it, though we shall continue to add footnotes to their solution for a while yet." Dawkins may be alone on this point (or precipice, perhaps).

A far more modest approach comes from the Nobel-Prize winning physicist Erwin Schrödinger. In *What Is Life*? he confesses to a discouraging paradox that all modern scientists must face. On the one hand, there is the sense that scientists are only at the beginning stage of "welding together the sum total of all that is known into a whole." On the other hand, "it has become next to impossible for a single mind fully to command more than a small specialized portion of it." The more we know, the more it becomes difficult for any one person to grasp the big picture. Science *with humility* can be most admirable, though it may not be particularly commonplace.

Biologist Lynn Margolis of the University of Massachusetts at Amherst expresses a view that is altogether at variance with that of Dawkins. In her book *What Is Life?* she acknowledges how little we understand about life's origin and development. She pays tribute to "life: the eternal enigma." In a similar tone, Francis Crick, co-discoverer of the double-helix, states in *Life Itself* that "the origin of life appears to be almost a miracle, so many are the conditions which would have to be satisfied to get it going." "Miracle" may be a surprising word coming from a man with decided leanings toward atheism. Scientists, however, do not always stick to their science. Crick has hypothesized that billions of years ago aliens visited the earth and may have seeded it with microbes. Perhaps that most unorthodox of philosophers, Ludwig Wittgenstein, was displaying some rare wisdom when he wrote in *Tractatus Logico-Philosophicus,* "Not *how* the world is, is the mystical, but *that* it is." There are some things that, though they give us a sense of wonder, are too hidden or too complex for either our full observation or total comprehension. Life is perhaps better viewed as a mystery for everyone to respect and enjoy than a problem for scientists to conquer and solve.

An egregious oversight among the many scientists who believe that life is the product of chance is the simple fact that chance presupposes order. While trying to show how order evolved from chance, they ignore the fact that chance proceeds from order. As Aristotle pointed out, chance is the intersection of two lines of order or causality. For example, two friends go to a grocery store to buy provisions. They are both operating according to their

own specific intentions or lines of causality. They meet. But their meeting is by chance, not design. They would not meet, of course, had they not gone to the store. Chance does not explain order, it presupposes it. It is order that makes chance possible.

Peter Singer, who is not a scientist, makes the following gratuitous statement in his *Practical Ethics*: "Life began, as the best available theories tell us, in a chance combination of gasses; it then evolved through random mutation and natural selection. All this just happened; it did not happen to any overall purpose." To label the statement as "gratuitous" is kind. Psychiatrist Karl Stern regards it as "crazy" (*The Flight From Woman*, p. 290). Are we to believe that at a certain moment in time the temperature of the earth cooled and various atoms and molecules came together in random fashion, and over the course of billions of years produced increasingly complex organisms until a being emerged who could write epic poetry, compose symphonies, paint the ceiling of the Sistine Chapel, produce the *Summa Theologica*, choose love over hatred and justice over injustice? "Such a view of the history of the world," Stern goes on to say, "has much in common with certain aspects of schizophrenic thinking."

Life has been greatly trivialized in the attempt to see it as a purely chance occurrence. There can be no doubt that this process of trivialization has been extended to human life and to the human unborn. Our life, in a fundamental sense, is all we have. We need not know exactly how life originated and developed, although the quest can be exhilarating. Its appearance, from the standpoint of empirical science, is a mind-boggling improbability. At the same time, life is a simple matter from the viewpoint of an omnipotent God. The enigma of life only adds to its value. Thus, we should cherish life as we would offer hospitality to a stranger who traveled a great distance to arrive at our doorstep seeking our assistance. Life is what we have and what we share. It is our birthright, our vitality, and our contribution to posterity. Yet, do we fully appreciate our life? Perhaps G. K. Chesterton was on the mark when he said that "Life is a thing too glorious to be enjoyed."

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The Grayest Generation

Judith Shulevitz

Over the past half century, parenthood has undergone a change so simple yet so profound we are only beginning to grasp the enormity of its implications. It is that we have our children much later than we used to. This has come to seem perfectly unremarkable; indeed, we take note of it only when celebrities push it to extremes—when Tony Randall has his first child at 77; Larry King, his fifth child by his seventh wife at 66; Elizabeth Edwards, her last child at 50. This new gerontological voyeurism—I think of it as doddering-parent porn—was at its maximally gratifying in 2008, when, in almost simultaneous and near-Biblical acts of belated fertility, two 70-year-old women in India gave birth, thanks to donor eggs and disturbingly enthusiastic doctors. One woman's husband was 72; the other's was 77.

These, though, are the headlines. The real story is less titillating, but it tells us a great deal more about how we'll be living in the coming years: what our families and our workforce will look like, how healthy we'll be, and also—not to be too eugenicist about it—the future well-being of the human race.

That women become mothers later than they used to will surprise no one. All you have to do is study the faces of the women pushing baby strollers, especially on the streets of coastal cities or their suburban counterparts. American first-time mothers have aged about four years since 1970—as of 2010, they were 25.4 as opposed to 21.5. That average, of course, obscures a lot of regional, ethnic, and educational variation. The average new mother from Massachusetts, for instance, was 28; the Mississippian was 22.9. The Asian American first-time mother was 29.1; the African American 23.1. A college-educated woman had a better than one-in-three chance of having her first child at 30 or older; the odds that a woman with less education would wait that long were no better than one in ten.

It badly misstates the phenomenon to associate it only with women: Fathers have been getting older at the same rate as mothers. First-time fathers have been about three years older than first-time mothers for several decades, and they still are. The average American man is between 27 and 28 when he becomes a father. Meanwhile, as the U.S. birth rate slumps due to the recession, only men and women over 40 have kept having more babies than they did in the past.

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In short, the growth spurt in American parenthood is not among rich septuagenarians or famous political wives approaching or past menopause, but among roughly middle-aged couples with moderate age gaps between them, like my husband and me. OK, I'll admit it. We're on the outer edge of the demographic bulge. My husband was in his mid-forties and I was 37—two years past the age when doctors start scribbling AMA, Advanced Maternal Age, on the charts of mothers-to-be—before we called a fertility doctor. The doctor called back and told us to wait a few more months. We waited, then went in. The office occupied a brownstone basement just off the tonier stretches of New York's Madison Avenue, though its tan, sleek sofas held a large proportion of Orthodox Jewish women likely to have come from another borough. The doctor, oddly, had a collection of brightly colored porcelain dwarves on the shelf behind his desk. I thought he put them there to let you know that he had a sense of humor about the whole fertility racket.

The steps he told us we'd have to take, though, were distinctly unfunny. We'd start with a test to evaluate my fortysomething husband's sperm. If it passed muster, we'd move on to "injectables," such as follicle-stimulating and luteinizing hormones. The most popular fertility drug is clomiphene citrate, marketed as Clomid or Serophene, which would encourage my tired ovaries to push those eggs out into the world. (This was a few years back; nowadays, most people take these as pills, which are increasingly common and available, without prescription and possibly in dangerously adulterated form, over the Internet.) I was to shoot Clomid into my thigh five days a month. Had I ever injected anything, such as insulin, into myself? No, I had not. The very idea gave me the willies. I was being pushed into a world I had read about with intense dislike, in which older women endure ever more harrowing procedures in their desperation to cheat time.

If Clomid didn't work, we'd move into alphabet-soup mode: IVF (in vitro fertilization), ICSI (intracytoplasmic sperm injection), GIFT (gamete intrafallopian transfer), even ZIFT (zygote intrafallopian transfer). All these scary-sounding reproductive technologies involved taking stuff out of my body and putting it back in. Did these procedures, or the hormones that came with them, pose risks to me or to my fetus? The doctor shrugged. There are always risks, he said, especially when you're older, but no one is quite sure whether they come from advanced maternal age itself or from the procedures.

My husband passed his test. I started on my routines. With the help of a minor, non–IVF-related surgical intervention and Clomid, which had the mild side effects of making me feel jellyfish-like and blurring my already myopic vision, I got pregnant.

My baby boy seemed perfect. When he was three, though, the pediatrician

told me that he had a fine-motor delay; I was skeptical, but after a while began to notice him struggling to grasp pencils and tie his shoes. An investigator from the local board of education confirmed that my son needed occupational therapy. This, I discovered, was another little culture, with its own mystifying vocabulary. My son was diagnosed with a mild case of "sensory-integration disorder," a condition with symptoms that overlapped with less medical terms like "excitable" and "sensitive."

Sitting on child-sized chairs outside the little gyms in which he exercised an upper body deemed to have poor muscle tone, I realized that here was a subculture of a subculture: that of mothers who spend hours a week getting services for developmentally challenged children. It seemed to me that an unusually large proportion of these women were older, although I didn't know whether to make anything of that or dismiss it as the effect of living just outside a city—New York—where many women establish themselves in their professions before they have children.

I also spent those 50-minute sessions wondering: What if my son's individual experience, meaningless from a statistical point of view, hinted at a collective problem? As my children grew and, happily, thrived (I managed to have my daughter by natural means), I kept meeting children of friends and acquaintances, all roughly my age, who had Asperger's, autism, obsessive-compulsive disorder, attention-deficit disorder, sensory-integration disorder. Curious as to whether there were more developmental disabilities than there used to be, I looked it up and found that, according to the Centers for Disease Control, learning problems, attention-deficit disorders, autism and related disorders, and developmental delays increased about 17 percent between 1997 and 2008. One in six American children was reported as having a developmental disability between 2006 and 2008. That's about 1.8 million more children than a decade earlier.

Soon, I learned that medical researchers, sociologists, and demographers were more worried about the proliferation of older parents than my friends and I were. They talked to me at length about a vicious cycle of declining fertility, especially in the industrialized world, and also about the damage caused by assisted-reproductive technologies (ART) that are commonly used on people past their peak childbearing years. This past May, an article in the *New England Journal of Medicine* found that 8.3 percent of children born with the help of ART had defects, whereas, of those born without it, only 5.8 percent had defects.

A phrase I heard repeatedly during these conversations was "natural experiment." As in, we're conducting a vast empirical study upon an unthinkably large population: all the babies conceived by older parents, plus

those parents, plus their grandparents, who after all have to wait a lot longer than they used to for grandchildren. It was impressed upon me that parents like us, with our aging reproductive systems and avid consumption of fertility treatments, would change the nature of family life. We might even change the course of our evolutionary future. For we are bringing fewer children into the world and producing a generation that will be subtly different—"phenotypically and biochemically different," as one study I read put it—from previous generations.

What science tells us about the aging parental body should alarm us more than it does. Age diminishes a woman's fertility; every woman knows that, although several surveys have shown that women—and men—consistently underestimate how sharp the drop-off can be for women after age 35. The effects of maternal age on children aren't as well-understood. As that age creeps upward, so do the chances that children will carry a chromosomal abnormality, such as a trisomy. In a trisomy, a third chromosome inserts itself into one of the 23 pairs that most of us carry, so that a child's cells carry 47 instead of 46 chromosomes. The most notorious trisomy is Down syndrome. There are two other common ones: Patau syndrome, which gives children cleft palates, mental retardation, and an 80 percent likelihood of dying in their first year; and Edwards syndrome, which features oddly shaped heads, clenched hands, and slow growth. Half of all Edwards syndrome babies die in the first week of life.

The risk that a pregnancy will yield a trisomy rises from 2–3 percent when a woman is in her twenties to 30 percent when a woman is in her forties. A fetus faces other obstacles on the way to health and well-being when born to an older mother: spontaneous abortion, premature birth, being a twin or triplet, cerebral palsy, and low birth weight. (This last leads to chronic health problems later in children's lives.)

We have been conditioned to think of reproductive age as a female-only concern, but it isn't. For decades, neonatologists have known about birth defects linked to older fathers: dwarfism, Apert syndrome (a bone disorder that may result in an elongated head), Marfan syndrome (a disorder of the connective tissue that results in weirdly tall, skinny bodies), and cleft palates. But the associations between parental age and birth defects were largely speculative until this year, when researchers in Iceland, using radically more powerful ways of looking at genomes, established that men pass on more de novo—that is, non-inherited and spontaneously occurring—genetic mutations to their children as they get older. In the scientists' study, published in *Nature*, they concluded that the number of genetic mutations that can be acquired

from a father increases by two every year of his life, and doubles every 16, so that a 36-year-old man is twice as likely as a 20-year-old to bequeath de novo mutations to his children.

The *Nature* study ended by saying that the greater number of older dads could help to explain the 78 percent rise in autism cases over the past decade. Researchers have suspected links between autism and parental age for years. One much-cited study from 2006 argued that the risk of bearing an autistic child jumps from six in 10,000 before a man reaches 30 to 32 in 10,000 when he's 40—a more than fivefold increase. When he reaches 50, it goes up to 52 in 10,000. It should be noted that there are many skeptics when it comes to explaining the increase of autism; one school of thought holds that it's the result of more doctors making diagnoses, better equipment and information for the doctors to make them with, and a vocal parent lobby that encourages them. But it increasingly looks as if autism cases have risen more than overdiagnosis can account for and that parental age, particularly paternal age, has something to do with that fact.

Why do older men make such unreliable sperm? Well, for one thing, unlike women, who are born with all their eggs, men start making sperm at puberty and keep doing so all their lives. Each time a gonad cell divides to make spermatozoa, that's another chance for its DNA to make a copy error. The gonads of a man who is 40 will have divided 610 times; at 50, that number goes up to 840. For another thing, as a man ages, his DNA's self-repair mechanisms work less well.

To the danger of age-related genetic mutations, geneticists are starting to add the danger of age-related *epigenetic* mutations—that is, changes in the way genes in sperm express themselves. Epigenetics, a newish branch of genetics, studies how molecules latch onto genes or unhitch from them, directing many of the body's crucial activities. The single most important process orchestrated by epigenetic notations is the stupendously complex unfurling of the fetus. This extra-genetic music is written, in part, by life itself. Epigenetically influenced traits, such as mental functioning and body size, are affected by the food we eat, the cigarettes we smoke, the toxins we ingest—and, of course, our age. Sociologists have devoted many man-hours to demonstrating that older parents are richer, smarter, and more loving, on the whole, than younger ones. And yet the tragic irony of epigenetics is that the same wised-up, more mature parents have had longer to absorb air-borne pollution, endocrine disruptors, pesticides, and herbicides. They may have endured more stress, be it from poverty or overwork or lack of social status. All those assaults on the cells that make sperm DNA can add epimutations to regular mutations.

At the center of research on older fathers, genetics, and neurological dysfunctions is Avi Reichenberg, a tall, wiry psychiatrist from King's College in London. He jumps up a lot as he talks, and he has an ironic awareness of how nervous his work makes people, especially men. He can identify: He had his children relatively late—mid-thirties—and fretted throughout his wife's pregnancies. Besides, he tells me, the fungibility of sperm is just plain disturbing. Reichenberg likes to tell people about all the different ways that environmental influences alter epigenetic patterns on sperm DNA. That old wives' tale about hot baths or tight underwear leading to male infertility? It's true. "Usually when you give that talk, men sitting like that"—he crossed his legs—"go like this," he said, opening them back up.

Dolores Malaspina, a short, elegantly coiffed psychiatrist who speaks in long, urgent paragraphs, has also spent her life worrying people about aging men's effects on their children's mental state—in fact, she could be said to be the dean of older-father alarmism. In 2001, Malaspina co-authored a ground-breaking study that concluded that men over 50 were three times more likely than men under 25 to father a schizophrenic child. Malaspina and her team derived that figure from a satisfyingly large population sample: 87,907 children born in Jerusalem between 1964 and 1976. (Luckily, the Israeli Ministry of Health recorded the ages of their fathers.) Malaspina argued that the odds of bearing a schizophrenic child moved up in a straight line as a man got older. Other researchers dismissed her findings, arguing that men who waited so long to have children were much more likely to be somewhat schizophrenic themselves. But Malaspina's conclusions have held up. A 2003 Danish study of 7,704 schizophrenics came up with results similar to Malaspina's, although it concluded that a man's chances of having a schizophrenic child jumped sharply at 55, rather than trending steadily upward after 35.

"I often hear from teachers that the children of much older fathers seem more likely to have learning or social issues," she told me. Now, she said, she'd proved that they can be. Showing that aging men have as much to worry about as aging women, she told me, is a blow for equality between the sexes. "It's a paradigm shift," she said.

This paradigm shift may do more than just tip the balance of concern away from older mothers toward older fathers; it may also transform our definition of mental illness itself. "It's been my hypothesis, though it is only a hypothesis at this point, that most of the disorders that afflict neuropsychiatric patients—depression, schizophrenia, and autism, at least the more extreme cases—have their basis in the early processes of brain maturation," Dr. Jay Gingrich, a professor of psychobiology at the New York State Psychiatric Institute and a former colleague of Malaspina's, told me.

Recent mouse studies have uncovered actual architectural differences between the brains of offspring of older fathers and those of younger fathers. Gingrich and his team looked at the epigenetic markings on the genes in those older-fathered and younger-fathered brains and found disparities between them, too. "So then we said: 'Wow, that's amazing. Let's double down and see whether we can see differences in the sperm DNA of the older and younger fathers,'" Gingrich said. And they didn't just see it, he continued; they saw it "in spades—with an order of magnitude more prominent in sperm than in the brain." While more research needs to be done on how older sperm may translate into mental illness, Gingrich is confident that the link exists. "It's a fascinating smoking gun," he says.

Epigenetics is also forcing medical researchers to reopen questions about fertility treatments that had been written off as answered and done with. Fertility doctors do a lot of things to sperm and eggs that have not been rigorously tested, including keeping them in liquids ("culture media," they're called) teeming with chemicals that may or may not scramble an embryo's development—no one knows for sure. There just isn't a lot of data to work with: The fertility industry, which is notoriously under-regulated, does not give the government reports on what happens to the children it produces. As Wendy Chavkin, a professor of obstetrics and population studies at Columbia University's school of public health, says, "We keep pulling off these technological marvels without the sober tracking of data you'd want to see before these things become widespread all over the world."

Clomid, or clomiphene citrate, which has become almost as common as aspirin in women undergoing fertility treatments, came out particularly badly in the recent *New England Journal of Medicine* study that rang alarm bells about ART and birth defects. "I think it's an absolute time bomb," Michael Davies, the study's lead researcher and a professor of pediatrics at the University of Adelaide in Australia, told me. "We estimate that there may be in excess of 500 preventable major birth defects occurring annually across Australia as a direct result of this drug," he wrote in a fact sheet he sent me. Dr. Jennita Reefhuis, an epidemiologist at the Centers for Disease Control, worries that Clomid might build up in women's bodies when they take it repeatedly, rather than washing out of the body as it is supposed to. If so, the hormonal changes induced by the drug may misdirect early fetal development.

Another popular procedure coming under renewed scrutiny is ICSI (intracytoplasmic sperm injection). In ICSI, sperm or a part of a sperm is injected directly into an extracted egg. In the early '90s, when doctors first started using ICSI, they added it to in vitro fertilization only when men had low sperm counts, but today doctors perform ICSI almost routinely—

procedures more than doubled between 1999 and 2008. And yet, ICSI shows up in the studies as having higher rates of birth defects than any other popular fertility procedure. Among other possible reasons, ICSI allows sperm to bypass a crucial step in the fertilization of the egg—the binding of the head of the sperm with the coat of the egg. Forcing the sperm to penetrate the coat may be nature's way of maintaining quality control.

A remarkable feature of the new older parenting is how happy women seem to be about it. It's considered a feminist triumph, in part because it's the product of feminist breakthroughs: birth control, which gives women the power to pace their own fertility, and access to good jobs, which gives them reason to delay it. Women simply assume that having a serious career means having children later and that failing to follow that schedule condemns them to a lifetime of reduced opportunity—and they're not wrong about that. So each time an age limit is breached or a new ART procedure is announced, it's met with celebration. Once again, technology has given us the chance to lead our lives in the proper sequence: education, then work, then financial stability, then children.

As a result, the twenties have turned into a lull in the life cycle, when many young men and women educate themselves and embark on careers or journeys of self-discovery, or whatever it is one does when not surrounded by diapers and toys. This is by no means a bad thing, for children or for adults. Study after study has shown that the children of older parents grow up in wealthier households, lead more stable lives, and do better in school. After all, their parents are grown-ups.

But the experience of being an older parent also has its emotional disadvantages. For one thing, as soon as we procrastinators manage to have kids, we also become members of the "sandwich generation." That is, we're caught between our toddlers tugging on one hand and our parents talking on the phone in the other, giving us the latest updates on their ailments. Grandparents well into their senescence provide less of the support younger grandparents offer—the babysitting, the spoiling, the special bonds between children and their elders through which family traditions are passed.

Another downside of bearing children late is that parents may not have all the children they dreamed of having, which can cause considerable pain. Long-term studies have shown that, when people put off having children till their mid-thirties and later, they fail to reach "intended family size"—that is, they produce fewer children than they'd said they'd meant to when interviewed a decade or so earlier. A matter of lesser irritation (but still some annoyance) is the way strangers and even our children's friends confuse us

with our own parents. My husband has twice been mistaken for our daughter's grandfather; he laughs it off, but when the same thing happened to a woman I know, she was stung.

What haunts me about my children, though, is not the embarrassment they feel when their friends study my wrinkles or my husband's salt-and-pepper temples. It's the actuarial risk I run of dying before they're ready to face the world. At an American Society for Reproductive Medicine meeting last year, two psychologists and a gynecologist antagonized a room full of fertility experts by making the unpopular but fairly obvious point that older parents die earlier in their children's lives. ("We got a lot of blowback in terms of reproductive rights and all that," the gynecologist told me.) A mother who is 35 when her child is born is more likely than not to have died by the time that child is 46. The one who is 45 may have bowed out of her child's life when he's 37. The odds are slightly worse for fathers: The 35-year-old new father can hope to live to see his child turn 42. The 45-year-old one has until the child is 33.

These numbers may sound humdrum, but even under the best scenarios, the death of a parent who had children late, not to mention the long period of decline that precedes it, will befall those daughters and sons when they still need their parents' help—because, let's face it, even grown-up children rely on their parents more than they used to. They need them for guidance at the start of their careers, and they could probably also use some extra cash for the rent or the cable bill, if their parents can swing it. "If you don't have children till your forties, they won't be launched until you're in your sixties," Suzanne Bianchi, a sociologist who studies families, pointed out to me. In today's bad economy, young people need education, then, if they can afford it, more education, and even internships. They may not go off the parental payroll until their mid- to late-twenties. Children also need their parents not to need *them* just when they've had children of their own.

There's an entire body of sociological literature on how parents' deaths affect children, and it suggests that losing a parent distresses young adults more than older adults, low-income young adults more than high-income ones, and daughters more than sons. Curiously, the early death of a mother correlates to a decline in physical health in both sexes, and the early death of a father correlates to increased drinking among young men, perhaps because more men than women have drinking problems and their sons are more likely to copy them.

All these problems will be exacerbated if we aging parents are, in fact, producing a growing subpopulation of children with neurological or other disorders who will require a lifetime of care. Schizophrenia, for instance,

usually sets in during a child's late teens or early twenties. Avi Reichenberg sums up the problem bluntly. "Who is going to take care of that child?" he asked me. "Some seventy-five-year-old demented father?"

This question preys on the mind of every parent whose child suffers a disability, whether that parent is elderly or not. The best answer to it that I've ever heard came from a 43-year-old father I met named Patrick Spillman, whose first child, Grace, a four-and-a-half-year-old, has a mild case of cerebral palsy. (Her mother was 46 when Grace was born.) In his last job, Spillman, stocky and blunt, directed FreshDirect's coffee department. Now, he's a full-time father and advocate for his daughter. He spends his days taking Grace to doctors and therapists and orthotic-boot-makers, as well as making won't-take-no-for-an-answer phone calls to state and city agencies that might provide financial or therapeutic assistance. How does he face the prospect of disappearing from her life? A whole lot better than I would. (My lame-joke answer, when my children ask me that question, is that I plan to live forever.) "We're putting money aside now," he said. Into a trust, he adds, so that government agencies can't count it against her when she or a caregiver goes looking for Medicaid or other benefits.

Spillman also prepares Grace for the future by practicing tough love on her, refusing to do for her anything she could possibly do for herself. Her mother, he says, sometimes pleads with him to help Grace more as she stumbles over the tasks of daily life. But he won't. At her tender age, Grace already dresses and undresses herself; every morning, Spillman explained, they do a little "tag check dance" to make sure nothing's inside out. When, he says, someone makes fun of her way of walking and chewing and speaking, as he believes someone will inevitably do, "I want her to have years and years of confidence behind her." He adds, "She's going to go to college. She will be well-adjusted. She won't be able to live on a nineteenth-floor walk-up, but she will live a normal life."

When we look back at this era from some point in the future, I believe we'll identify the worldwide fertility plunge as the most important legacy of old-age parenting. A half-century ago, demographers were issuing neo-Malthusian manifestoes about the overpeopling of the Earth. Nowadays, they talk about the disappearance of the young. Fertility has fallen below replacement rates in the majority of the 224 countries—developing as well as developed—from which the United Nations collects such information, which means that more people die in those places than are born. Baby-making has slumped by an astonishing 45 percent around the world since 1975. By 2010, the average number of births per woman had dropped from 4.7 to 2.6.

No trend that large has a simple explanation, but the biggest factor, according to population experts, is the rising age of parents—mothers, really—at the birth of their first children. That number, above all others, predicts how large a family will ultimately be.

Fewer people, of course, means less demand for food, land, energy, and all the Earth's other limited resources. But the environmental benefits have to be balanced against the social costs. Countries that can't replenish their own numbers won't have younger workers to replace those who retire. Older workers will have to be retrained to cope with the new technologies that have transmogrified the workplace. Retraining the old is more expensive than allowing them to retire to make way for workers comfortable with computers, social media, and cutting-edge modes of production. And who will take care of the older generations if there aren't enough in the younger ones?

If you're a doctor, you see clearly what is to be done, and you're sure it will be. "People are going to change their reproductive habits," said Alan S. Brown, a professor of psychiatry and epidemiology at the Columbia University medical school and the editor of an important anthology on the origins of schizophrenia. They will simply have to "procreate earlier," he replied. As for men worried about the effects of age on children, they will "bank sperm and freeze it."

Would-be mothers have been freezing their eggs since the mid-'80s. Potential fathers don't seem likely to rush out to bank their sperm any time soon, though. Dr. Bruce Gilbert, a urologist and fertility specialist who runs a private sperm bank on Long Island, told me he has heard of few men doing so, if any. Doctors have a hard enough time convincing men to store their sperm when they're facing cancer treatments that may poison their gonads, Gilbert said. The only time he saw an influx of men coming in to store sperm was during the first Gulf war, when soldiers were being shipped out to battlefields awash in toxic agents. Moreover, sperm banking is too expensive to undertake lightly, up to $850 for processing, then $300 to $500 a year for storage. "There needs to be a lot more at stake than concern about aging and potential for genetic alterations," Gilbert said. "It has to be something more immediate."

What else can be done? Partly the same old things that are already being done, though perhaps not passionately enough. Doctors will have to get out the word about how much male and female fertility wanes after 35; make it clear that fertility treatments work less well with age; warn that tinkering with reproductive material at the very earliest stages of a fetus's growth may have molecular effects we're only beginning to understand.

But I'm not convinced that medical advice alone will lead people to "procreate earlier." You don't buck decades-old, worldwide trends that easily.

The problem seems particularly hard to solve in the United States, where it's difficult to imagine legislators adopting the kinds of policies it will take to stop the fertility collapse.

Demographers and sociologists agree about what those policies are. The main obstacle to be overcome is the unequal division of the opportunity cost of babies. When women enjoy the same access to education and professional advancement as men but face penalties for reproducing, then, unsurprisingly, they don't. Some experts hold that, to make up for mothers' lost incomes, we should simply hand over cash for children: direct and indirect subsidies, tax exemptions, mortgage-forgiveness programs. Cash-for-babies programs have been tried all over the world—Hungary and Russia, among other places—with mixed results; the subsidies seem to do little in the short term, but may stem the ebbing tide somewhat over the long term. One optimistic study done in 2003 of 18 European countries that had been giving families economic benefits long enough for them to kick in found a 25 percent increase in women's fertility for every 10 percent increase in child benefits.

More immediately effective are policies in place in many countries in Western Europe (France, Italy, Sweden) that help women and men juggle work and child rearing. These include subsidized child care, generous parental leaves, and laws that guarantee parents' jobs when they go back to work. Programs that let parents stay in the workforce instead of dropping out allow them to earn more over the course of their lifetimes.

Sweden and France, the two showcases for such egalitarian family policies, have among the highest rates of fertility in the Western half of Europe. Sweden, however, ties its generous paid parental leaves to how much a parent has been making and how long she has been working, which largely leaves out all the people in their twenties who aren't working yet because they're still in school or a training program. In other words, even a country with one of the most liberal family policies in the world gives steeply reduced benefits to its most ambitious and promising citizens at the very moment when they should be starting their families.

It won't be easy to make the world more baby-friendly, but if we were to try, we'd have to restructure the professions so that the most intensely competitive stage of a career doesn't occur right at the moment when couples should be lavishing attention on infants. We'd have to stop thinking of work-life balance as a women's problem, and reframe it as a basic human right. Changes like these are going to be a long time coming, but I can't help hoping they happen before my children confront the Hobson's choices that made me wait so long to have them.

The Problem of *Infertility* in Africa

Bosco Ebere Amakwe, HFSN

Infertility causes great worry and sorrow for many couples in Africa, especially for the women. Medical evidence shows that men and women usually have the same rates of infertility.[1] Yet African tradition views infertility as always the woman's fault. In Africa it is taboo to discuss male infertility; that is something "to be concealed at all costs." In Zimbabwe, for instance, "Covering up for men is usually done through a traditional practice called *chiramu* which involves the clandestine bringing-in of the husband's close relative (usually a brother) to impregnate the wife."[2] If that meeting is not successful, then it is concluded that the wife is to blame[3] and should be sent back to her parents.

The assumption that the wife is at fault may also lead to polygamy. As one African woman wrote: "To appease a childless husband, and desperate to save their daughter's marriage, the parents of the infertile woman sometimes purchase him a second wife. If they can't afford to do so, they offer a younger sister or niece as a second wife. Some of my relatives have done that. But I shuddered at the thought of sharing a husband with any of my younger sisters."[4]

The wife is obliged to protect the dignity of her husband. Yet nobody protects her, not even her own family. In my opinion, this is deceptive and destructive for all the parties involved.

Types and Causes of Infertility

Primary infertility is the state of couples who cannot have babies at all. This is usually measured by failure to achieve pregnancy after two years of trying. A 2008 study found a 2.7 percent primary infertility rate among women in an urban area of Tanzania. The authors said this "is in the range found throughout Sub-Saharan Africa."[5] Secondary infertility describes couples who have had one child but are unable to have more. This condition is very common in Africa, according to a 2011 report from the World Health Organization (WHO):

> Women in the developing world, particularly Africa, suffer from high rates of secondary infertility. Countries in northern Africa, Southern Asia, and Latin America all report a high prevalence of secondary infertility ranging from 15% to greater

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than 25%, but in the so-called "infertility belt" of Sub-Saharan Africa, the percentage of couples with secondary infertility exceeds 30% in some countries, and in Zimbabwe, it has been reported that almost 2 out of 3 women over the age of 25 are infertile.[6]

Sexually transmitted infections (STIs) are the main cause of infertility in Sub-Saharan Africa. In Gabon, it is reported that 32 percent of women are infertile, almost entirely as a result of blocked fallopian tubes caused by STIs such as gonorrhea and chlamydia.[7] Poverty and substandard medical care often aggravate this problem. As one report noted, "in Africa most of the sexually transmitted diseases which can cause infertility could be prevented or cured but are not because health services are not adequate, accessible, or affordable."[8] A study in Zimbabwe, for example, found that tubal blockages were the main cause of infertility in both men and women—"the result of delayed or inadequate treatment of reproductive tract infections (RTIs)."[9] Another aggravating factor is early-age sexual intercourse. In some regions of Africa, girls often marry early, sometimes even before puberty. Elsewhere, because of poverty, many girls accept gifts—often financial—from older men to "play sex." This places the girls at high risk for STIs and other reproductive problems.[10] Also, the African practice of female circumcision may lead to infertility by causing infections, pelvic inflammation, and inelastic scar tissue.[11]

Inadequate semen is another major cause of infertility.[12] Other causes include hormonal dysfunction, endometriosis, and polycystic ovarian disease.[13] Sexual dysfunction is another factor; it is often caused by psycho-social pressure from those around an infertile couple.[14] The aging process, of course, also affects fertility. As one expert noted, "Female fertility has a 'best-before date' of 35, and for men, it is probably before age 45-50."[15]

A 2011 study in Nigeria found that infertile women were significantly more likely than other women to have had abortions.[16] The abortion problem is acute in Africa, where abortions usually are done in poorly equipped health centers by unqualified personnel.[17] A 2012 study, reporting an infertility decline during one period, noted: "Post-abortion complications are also an important factor contributing to infertility. The risk is higher for unsafe practices than for safe abortion procedures" (thus implying there is some risk even in "safe" abortions). "Decline in unsafe abortion rates in Sub-Saharan Africa between 1995 and 2003," it said, "may have contributed to declines in infertility rates."[18]

Consequences of Infertility for Women

A married African woman who has no child is living on borrowed time. The first threat in most cases is outright divorce, non-negotiable. She is

someone because she is married, but she will be *nobody* outside marriage. A woman acquires an identity through marriage and, most importantly, when marriage is fertile. If not, she may be returned by the husband to her parents at any moment, in disgrace and shame. The husband considers himself wronged and deceived, as if the woman and her parents should have known beforehand that she could not bear children.[19] To me, this is sheer insanity. Often, nobody takes the time to examine the couple in order to find the source of infertility.

There is also psychological distress and trauma for the woman, due to insults from spouse, relatives, and neighbors. If the husband takes a second wife, the first wife may then have trauma from living in a polygamous and abusive marriage. She may leave the situation if she has the courage to do so. A study in Rwanda found negative consequences for men as well. The authors wrote that, "although women carry the largest burden of suffering, the negative repercussions of infertility for men, especially at the level of the community, are considerable."[20]

A *Harvard Mental Health Letter* report noted that family and friends "may inadvertently cause pain by offering well-meaning but misguided opinions and advice."[21] This problem is even worse in Africa, where the extended family system is practiced and valued. Though this system may be beneficial in other ways, it often aggravates the infertility problem. Childlessness, which should be a private matter, becomes an issue for open inquiry from relatives, friends, and neighbors. Such pressure can place intense stress on the woman.[22]

For women in mainstream Christian churches, infertility may lead to loss of their faith and resort to traditional healers or faith-based healers. Many turn to Pentecostal churches, which Africans often call "mushroom churches" because they spread so rapidly.[23] The theme of infertility is the number-one topic during sermons and rituals in these religious settings. They make couples believe that their infertility problem is spiritual, rather than medical. And in Zimbabwe, according to one study, "traditional beliefs linking infertility to witchcraft are rife."[24]

Media Influence

African media, especially the Nigerian film industry called Nollywood, emphasize the theme of infertility in films such as *Blind Choice, Desperate Soul, Immoral Act, Soul After Soul, The Pastor's Daughter,* and *The Power of Her Majesty.*[25] I recall seeing a Ghanaian movie on this theme that really moved me to tears. It was about a young girl who, married to a wealthy man, was unable to have a child. Her parents, in order to save their daughter from the shame of childlessness—and, above all, in order not to lose their wealthy

in-law—decided to give a younger daughter to the man. After that daughter had a baby, she and the man started working against the real wife—her big sister. The situation became so precarious that the older sister died out of frustration. She died practically in silence because she was unable to talk about her troubles with anybody, even her own parents. It was taken for granted that her younger sister was sent to save her marriage—so why should she complain? After her death, the younger sister took over the matrimonial home. Things went on well for a short time, but then the man started treating the younger woman the same way he had treated her sister. Eventually, she, too, died, leaving her small baby. The man remarried, and the new wife maltreated the child, who disappeared from his father's house and was never seen again. So the grandparents lost their two daughters and a grandson in the name of covering up a daughter's infertility. In their senseless act of covering up one problem, they created ones that were far worse.

As in the movies, so it is with African music, especially gospel music. Any music that does not say something about the solution to childlessness and ways to prosperity will hardly sell. The fertility dilemma is also a common theme in African novels and plays. According to Okonjo Ogunyemi, "childlessness is considered tragic, providing an irresistible attraction to writers." She listed some classic Nigerian writings that feature infertility as their central theme: *Song of a Goat, Behind the Cloud, The Dilemma of a Ghost, Anowa, Efuru, Idu, Many Things Begin for Change, The Joy of Motherhood, Chance or Destiny,* and *Garden House*.[26]

Actions To Be Taken

The first step is to end the "demonization"of infertile women in Africa and other parts of the world. This process should be for all. Let governments, churches, private groups, and others promote the dignity and rights of women. This can be done in workshops, seminars, and conferences. Some African women already have taken steps to improve the situation of women who face infertility. In Zimbabwe, for example, Betty Chishava and two other women started a support group for infertile women. Using words that mean "our own gift," they called it the Chipo Chedu Society. Also in Zimbabwe, the Women's Action Group (WAG), the country's largest women's organization, has run theater workshops and produced a booklet in the country's two main languages to try and demystify the traditional beliefs that are associated with infertility and to urge that those who are infertile be accepted into society."[27]

The education of girls and women is very important. It helps increase an individual's positive self-concept—the perception of one's character, body

image, abilities, emotions, qualities, and relationships with others.[28] In a culture where women are marginalized, their empowerment through education is crucial. And they should learn how to prevent infertility, or to cope with it, if they find themselves in that situation at any stage in their lives. Part of prevention is to revisit and rethink the tradition of female circumcision, which can lead to infertility and many other health problems. Another part is to discourage sexual activity at an early age—and promiscuous sexual activity at *any* age. Those practices encourage the spread of the STIs that often lead to infertility. Giving girls a sound moral upbringing helps prevent such practices. So does sending them to school and keeping them there until they complete their education.

When a couple is unable to conceive, it is important to find and treat the underlying cause(s), whether medical or psychosocial or both. Since popular media already pay much attention to infertility, perhaps they could be persuaded to include medical facts in their coverage. For example, they could make men more aware of male infertility and possible remedies for it. Good counseling can also help both men and women. Social and cultural expectations in Africa often limit the extent to which infertile couples talk about their sexual problems.[29] As two authorities noted, counseling "will help couples open up to each other and their doctor about their burden and obtain assistance, including information and education."[30]

There are now many remedies for infertility. In a case of low fertility, rather than none at all, timing intercourse for the fertile cycle may result in pregnancy. When a tubal blockage prevents conception, surgery may restore fertility. Some newer treatments for infertility, though, are extremely expensive and really beyond the reach of Africa's many poor people. Some also pose serious ethical problems for both Christian and Muslim couples. Use of bought or donated eggs or sperm, for example, is sometimes called "high-tech adultery."[31] The *in vitro* fertilization and implantation of embryos often results in multiple pregnancies and the offer of "reduction" when a couple does not want twins or triplets. "Reduction" means killing one or more of the unborn children, usually by lethal injection to the heart.[32]

The Adoption Alternative

Couples should seek medical solutions that are ethical. When those solutions fail, they should consider adoption. Many couples in Nigeria do seek adoption through my religious order, the Holy Family Sisters of the Needy. Our work was started as a response to great tragedy. After the Nigerian civil war (the Biafra War) of 1967-1970, there were many pregnant girls and women who had been raped and abandoned by soldiers on the streets. Their

war-torn families could not take care of them, and many of the women died in attempts to abort their babies with local herbs. In order to save the lives of both women and babies, Rev. Father Denis Ononuju, CSSP, a Nigerian priest, started giving them shelter in his parish. With the help of his parishioners, he was able to take care of them, and the women were able to give birth to their babies. Father Denis was also involved in an adoption program that helped keep Catholic childless families together.

As the pro-life work grew, many lives were saved, and many childless families were able to adopt children. Father Denis thought of beginning a religious order of women who would dedicate their lives to this noble work. In 1983 he started the Holy Family Sisters of the Needy (HFSN). Today the Sisters run centers and homes for teenaged pregnant girls both in Nigeria and abroad. We encourage and help girls to put their babies up for adoption after birth if they wish. We also help childless couples to adopt the babies.

This is, however, one of the hardest options for infertile couples in Africa. Although attitudes are gradually changing, adoption is not generally an accepted practice there. One study in a Nigerian hospital found that 78 percent of infertile women would not consider adoption as a solution.[33] This is a problem not only in Africa, but also in the developed countries. For instance, the already-cited report in the *Harvard Mental Health Letter* said infertile patients in the United States find "great difficulty" in making "the transition from wanting biological children to accepting that they will have to pursue adoption or come to terms with being childless."[34] This is why the work of the HFSN Sisters is very important in Nigeria and abroad.

When I was working in Nigeria, one couple came to me with a recommendation letter from their pastor (the first thing required for adoption) and their application. After going through the papers, I told them that I would open a file for them and contact them when we had a baby ready for adoption. They asked me how soon that might be, and I said that I couldn't tell because there were other applications before theirs. The lady started crying and telling me what she and her husband had gone through at the hands of his relatives and friends. They were urging him to divorce her and marry another woman who could give him children. She begged that we sisters help stop that by giving her a baby as soon as possible. Noticing her big tummy, I said to her, "But you look pregnant." She said no, although everybody thought that. She went on to tell me that she had a fibroid tumor and wanted to schedule surgery to remove it around the time that we would have a baby available for adoption. Receiving the baby and having the surgery the same day or thereabout, she reasoned, would make people think she had the baby naturally. Today, with a baby girl from our center, their relatives and friends are happy with them

and they are delighted with their child. So our baby girl has a happy home.

Once a wealthy couple came to us for help, explaining that they wanted to adopt a baby boy and to keep the adoption secret. The man said he was a prince, the ruler of his village. He and his wife had a daughter, about ten years old, but his wife was unable to have more children. Without a son, he would cease to be a prince. But if he had a son and people knew that the boy was not his biological child, then the so-called "illegitimate" son could not be a prince and would never inherit his father's kingdom. The husband said his only other option was to divorce his wife and marry another woman who could have a son who would inherit his palace and leadership role.

I explained that, for whatever reason, we seldom had boy babies and that others were ahead of them on the adoption list. The woman started crying and begging, and the man was fighting back tears. His wife, like the lady mentioned above, had a big tummy. When I asked her about that, she said that for months she had been wearing small pillows so that, when she received a baby through adoption, no one would know it was not her birth child. Speechless, I wondered how a woman could go through this for months. Later, though, they were able to adopt a baby boy from our center.

It is unfortunate that some couples feel they must hide an adoption because of social customs and pressures. I hope that attitudes toward adoption will change, so that people will be open about it. In this case, though, the couple is happy, and our poor baby boy is now a prince.

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From the Archives: (1977)

The Slide to Auschwitz

C. *Everett Koop, M.D.*

In July the City Council of Cambridge, Massachusetts, voted to petition Harvard University to temporarily halt the construction of a half-million-dollar laboratory for specialized genetics research. This intervention of the town in the affairs of the University was not just the hysterical reaction of ignorant people to the misunderstood pursuits of a scientific faculty. Rather, it had been initiated and pushed by distinguished scholars on the Harvard faculty. These individuals were deeply concerned with the newly acquired power in biology to alter the genes of living organisms and create new hybrids of animals and plants, and of viruses, some of them potentially dangerous.

It is the custom of men to be concerned about those things of which they know little at present but where the potential seems to be a threat to all of mankind. This was true of the first atomic bomb; of its successor, the hydrogen bomb; of all of the weaponry to deliver thermonuclear warfare; of biological warfare and of nerve gas. There are even environmentalists who are deeply concerned over the destruction of the ozone by aerosol cans. Yet, each of these potential dangers to mankind is theoretically, if not practically, controllable.

I would like to address you today on another potentially destructive force against mankind which, because of the nature of human beings, may not be controllable until it has inexorably pursued its path of destruction and has come to weigh upon the conscience of so many people that, like a Vietnam war, it must grind to a halt. I am speaking of the growing disregard for life itself. I am speaking of what was called in a more moral, or perhaps a more religious generation, the sanctity of human life. Given the conflicting concerns of our generation—the specter of famine raised by those primarily concerned about population control, the specter of financial chaos for the whole world raised by economic pundits, the intrusion of violence as an accepted thing into our culture, and the declining morality in all the affairs of men—it is quite possible that when the inevitable swing of the pendulum takes place and life once

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C. Everett Koop, who died on February 25th, was Chief of Surgical Services at Children's Hospital in Philadelphia when President Ronald Reagan named him Surgeon General of the United States, a position he held from 1982 until 1989. This article is (in slightly edited form) the text of his speech to the American Academy of Pediatrics on the occasion (October 18, 1976) of being awarded the William E. Ladd Medal (Dr. Ladd is known as "the father of pediatric surgery," and the Medal is the highest honor given pediatric surgeons in this country).

again becomes precious, it might be too late to stop the slide that will ultimately herald the decline and demise of our civilization.

I am nearing the end of my thirty-first year in the actual practice of pediatric surgery, longer I think than anyone in this room today. I have had the unusual advantage of growing up with my specialty. It has been for me an extremely satisfying career. One of the most satisfying aspects has been my participation in the rehabilitation of youngsters who were born with congenital anomalies incompatible with life but nevertheless amenable to surgical correction. The surgical correction might have been by a dramatic one-stroke procedure or it may have required years of time and effort, plus further operations, to get the best possible result. At times the best possible result was far from perfect. Yet, I have a sense of satisfaction in my career, best indicated perhaps by the fact that no family has ever come to me and said: "Why did you work so hard to save the life of my child?" And no grown child has ever come back to ask me why, either. On the other hand, in a recent study that I did on twenty-five families, all of whom had had a child with an imperforate anus operated upon by me in the period twenty-five to fifteen years ago, almost every family referred to the experience of raising the defective youngster as a positive one. A few were neutral; none were negative. Some siblings felt that they had not had some of the advantages that they might have had if their brother or sister had been born normal, yet on balance the conclusion from these twenty-five families whom we studied quite extensively was that many of them were better families than they would have been without the necessity of facing the adversity produced by the problems of the imperfect child.

I do not think that I am over the hill, but with mandatory retirement less than five years away it does behoove me to look at the end of my career. As I do it saddens me. But it frightens me too when I see the trends in our society and recognize the acquiescence, if not the *leadership,* of the medical profession down a path which in my judgement leads to destruction.

In January of 1973 the United States Supreme Court declared that a new right existed in the Constitution; namely, the right of a woman to have an abortion on demand. I am not here today to argue the pros or cons of the abortion question, but in a paper I presented in 1973, I predicted ten consequences of the Supreme Court's decision on abortion that would remarkably—deleteriously—affect the society in which we live.[1] All ten of these prophetic statements have found realization in historical fact.

Without going into all the details, I expressed the concern that abortion of somewhere between a million and two million unborn babies a year would lead to such cheapening of human life that infanticide would not be far behind. Well, you all know that infanticide is being practiced right *now* in

this country and I guess the thing that saddens me most about *that* is that it is being practiced by that very segment of our profession which has always stood in the role of advocate for the lives of children.

I am frequently told by people who have never had the experience of working with children who are being rehabilitated into our society after the correction of a congenital defect that infants with such defects should be allowed to die, or even "encouraged" to die, because their lives could obviously be nothing but unhappy and miserable. Yet it has been my constant experience that disability and unhappiness do not necessarily go together. Some of the most unhappy children whom I have known have all of their physical and mental faculties and on the other hand some of the happiest youngsters have borne burdens which I myself would find very difficult to bear. Our *obligation* in such circumstances is to find alternatives for the problems our patients face. I don't consider death an acceptable alternative. With our technology and creativity, we are merely at the beginning of what we can do educationally and in the field of leisure activities for such youngsters. And who knows what happiness is for another person? What about the rewards and satisfactions in life to those who work with and succeed in the rehabilitation of these "other-than-perfect" children? Stronger character, compassion, deeper understanding of another's burdens, creativity, and deeper family bonds—all can and do result from the so-called social "burden" of raising a child with a congenital defect—repaired but less than perfect.

I have frequently said, facetiously, that nothing makes a woman out of a girl quicker than a colostomy in her child. But it is true. When from the materialistic point of view a life seems to be without meaning, it can from the spiritual point of view be extremely useful. Such a life might, for example, provide a source of courage in the manner in which the stress caused by disease and its treatment is accepted. There is also no doubt that the value placed upon the patient by his associates as one who is respected and honored and loved is a source of inspiration to all who see it and a spiritual blessing to many.

"American opinion is rapidly moving toward the position where parents who have an abnormal child may be considered irresponsible." This is the observation of Dr. James Sorenson, Associate Professor of Socio-Medical Sciences at Boston University, who spoke at a symposium, "Prenatal Diagnosis and Its Impact on Society."[2]

Now, if I take a strong stand against a statement like Dr. Sorenson's, I am told that I am trying to legislate my morality for other people. I think, on the contrary, those who agree with Dr. Sorenson's statement are trying to legislate

the morality of our society. Parents who might give remarkable love and devotion to an abnormal child are put in the position of feeling they must conform to Dr. Sorenson's morality, or lack of it, for the good of *society* rather than for the good of their own child.

In the book, *Ideals of Life,* Millard Everett writes:

> No child [should] be admitted into the society of the living who would be certain to suffer any social handicap—for example, any physical or mental defect that would prevent marriage or would make others tolerate his company only from the sense of mercy.[3]

If dehumanization is one of the ideals of life, then when we reach the utopia planned by Mr. Everett, life will be ideal indeed. His reference to marriage I cannot help but consider because I am convinced that the backbone of our remarkable nursing profession and that of much of our pediatric care and pediatric social service is to be found in the many unmarried women who devote themselves selflessly to the care of patients. I cannot believe that all of these fine women *chose* not to be married merely to take care of patients. It would follow then that there might have been some "social handicap," to use the words of Millard Everett, that might have prevented marriage. If the social handicap existed then, the social handicap must exist today. How long will it be before the Millard Everetts of our society decide that those with this social handicap, whatever it might be, be eliminated also?

Lord Cohen of Burkenhead, speaking of the possibility of euthanasia for children in Great Britain who were mentally defective or epileptic, said:

> No doctor could subscribe to this view . . . who has seen the love and devotion which bring out all that is the best in men when lavished on such a chiId.[4]

J. Engelbert Dunphy, in the annual oration before the Massachusetts Medical Society in 1976, had this to say:

> We cannot destroy life. We cannot regard the hydrocephalic child as a non-person and accept the responsibility for disposing of it like a sick animal. If there are those in society who think this step would be good, let them work for a totalitarian form of government where beginning with the infirm and incompetent and ending with the intellectually dissident, nonpersons are disposed of day and night by those in power.

Dunphy goes on to say:

> History shows clearly the frighteningly short steps from "the living will" to "death control" to "thought control" and finally to the systematic elimination of all but those selected for slavery or to make up the master race. We physicians must take care that support of an innocent but quite unnecessary "living will" does not pave the way for us to be the executioners while the decisions for death are made by a panel of "objective experts" or by big brother himself. The year of 1984 is not far away![5]

Dr. Dunphy was speaking of adults dying of terminal cancer, yet his thinking can be extrapolated to the "imperfect" child with frightening consequences.

In the Forshall lecture given by Robert B. Zachary on July 9, 1976, in Sheffield, England, he said:

> I accept that the advice given by other doctors may well be different from that which I myself give, and although I would strongly support their right to have a different view, they should be expected to state the fundamental principles on which their criteria are based.

Zachary went on to state:

> I believe that our patients, no matter how young or small they are, should receive the same consideration and expert help that would be considered normal in an adult. Just because he is small, just because he cannot speak for himself, this is no excuse to regarding him as expendable, anymore than we would do so on account of race or creed or color or poverty. Nor do I think we ought to be swayed by an argument that the parents have less to lose because he is small and newborn, and has not yet established a close relationship with them or indeed because the infant himself does not know what he is losing, by missing out on life.

Mr. Zachary concluded his lecture:

> There are some ways in which modern society cares greatly about those who are less well off; the poor, the sick and the handicapped, but it seems to me that newborn babies are often given less than justice. Our primary concern must be the well-being of the patient—the neonate—as far as it is in our power to achieve it. In his battle at the beginning of life, it could well be that his main defense will be in the hands of pediatric and neonatal surgeons.

Has not Mr. Zachary enunciated the whole *raison d'être* of the specialty of pediatric surgery?

On the occasion of the 100th anniversary of the Children's Hospital in Sheffield in July of 1976, Mr. Peter Rickham of Zurich presented a paper entitled "The Swing of the Pendulum." Although he concerned himself largely with the problems of meningomyelocele (a birth defect where the spinal cord is exposed, leading to neurological *sequellae,* some correctable and some not), an ethical problem of greater proportion in the British Isles than here, he did talk to some degree on medical ethics in reference to the neonate. In discussing his own interviews with theologians of diverse religious convictions, he had this to say:

> They all doubt the validity of the basis of the present argument for selection of only the least handicapped patients for survival. The hope that selection will reduce to a minimum the overall suffering of these patients and their families is a well meant but somewhat naive wish. How many normal newborn infants will live happily ever after, especially in our present time? It may be argued that by not selecting, we

> artificially increase the number of people with an unhappy future, but can we be sure of this in any given case? After all we as doctors deal with single, individual patients and not with statistical possibilities. It has also been pointed out to me (said Rickham) that even a child with a grave physical and mental handicap can experience emotions such as happiness, fright, gratitude and love and that it may be therefore, in fact, a rewarding task to look after him. It has been further argued that, strictly speaking, selection implies a limitation of resources, because with an optimum of resources and care a great deal can be done for these children and their families. In underdeveloped countries these resources do not exist, but in developed countries, where such enormous sums are spent by governments on purposes which are of very doubtful benefit to humanity at large, the distribution of resources is a debatable subject. Finally it can be argued that if selection is practiced, it may not be necessarily the fittest on whom the greatest effort should be expended.

Duff and Campbell in their paper on moral and ethical dilemmas in the special care nursery make the statement that "survivors of these (neonatal intensive care) units may be healthy and their parents grateful but some infants continue to suffer from such conditions as chronic cardiopulmonary disease, short bowel syndrome, or various manifestations of brain damage; others are severely handicapped by a myriad of congenital malformations that in previous times would have resulted in early death."[6]

First of all, it is not necessarily true that the myriad of congenital malformations of previous times would now result in early death. Many patients who have lesions that appear to be lethal can have those lesions corrected and although they may not be pristine in their final form they are functional human beings, loved and loving and productive. If indeed we decide that a child with a chronic cardiopulmonary disease or a short bowel syndrome or various manifestations of brain damage should be permitted to die by lack of feeding, what is to prevent the next step which takes the adult with chronic cardiopulmonary disease who may be much more of a burden to his family than that child is, or the individual who may not have a short bowel syndrome but who has ulcerative colitis and in addition to his physical manifestations has many psychiatric problems as well or the individual who has brain damage—do we kill all people with neurological deficit after an automotive accident?

Very, very few parents of their own volition come to a physician and say, "My baby has a life not worthy to be lived." Any physician in the tremendously emotional circumstances surrounding the birth of a baby with any kind of a defect can, by innuendo, let alone advice, prepare that family to make the decision that that physician wants them to make. I do not consider this to be "informed consent."

Campbell and Duff say this:

> Often, too, the parents' and siblings' rights to relief from seemingly pointless, crushing burdens were important considerations.

Here again Duff and Campbell have enunciated a new right and that is that parents and siblings are not to have burdens. Even Duff and Campbell use the word "seemingly" in reference to "pointless" and I am sure that "crushing" as applied to the burden may not be nearly as crushing as when applied to the eventual guilt of the parents in days to come.

As partial justification for their point of view, Duff and Campbell say that although some (parents) have exhibited doubts that the choices were correct, all appear to be as effective in their lives as they were before this experience. Some claim that their profoundly moving experience has provided a deeper meaning in life and from this they believe they have become more effective people.

If these same parents were seeking deeper meaning in life and if Duff and Campbell were indeed interested in providing deeper meaning in life for the parents of their deformed patients, why not let the family find that deeper meaning of life by providing the love and the attention necessary to take care of an infant that has been given to them? I suspect that the deeper meaning would be deeper still and that their effectiveness would be still more effective and that they would be examples of courage and of determination to others less courageous.

Duff and Campbell talk about "meaningful humanhood," a phrase which they extract from Fletcher, and of "wrongful life," a phrase which they take from Engelhart. As soon as we let anyone, even physicians, make decisions about your humanhood and mine, about your rightfulness or wrongfulness of life and mine, then we have opened the door to decisions being made about our worth which may be entirely different in the eyes of a Duff and a Campbell or their followers than it would be in yours and mine.

In their discussion, Duff and Campbell say that parents are able to understand the implications of such things as chronic dyspnea, oxygen dependence, incontinence, paralysis, contractures, sexual handicaps, and mental retardation. Because a newborn child has the possibility of any of these problems in later life, does this give us the right to terminate his life now? If it does, then I suspect that there are people in this room who have chronic dyspnea, who may have oxygen dependency at night, who might be incontinent, who may have a contracture, who may have a sexual handicap and I trust that none of you are mentally retarded, but let's carry it to its logical conclusion. If we are going to kill the newborn with these potentials, why not you who already have them?

Finally Duff and Campbell say, "It seems appropriate that the profession

be held accountable for presenting fully all management options and their expected consequences." I wonder how commonly physicians who opt for starving a baby to death are willing to be held accountable for the eventual consequences in that family which may not be apparent for years or decades to come.

I think the essential message in the Duff and Campbell paper is missed by many. These authors first brought to attention the concept of death as one of the options in pediatric patient care. But it is not always understood that the death they presented as an option was not the death of infants who could not possibly survive but rather the death of infants who could live if treated, but whose lives would not be "normal." It is not the lesion, but the physician's *decision,* that is the lethal factor. In view of the fact that the socio-economic status of the family, and the stability of the marriage, are mitigating circumstances in deciding on treatment or non-treatment, it is clear that there has been introduced a discrimination just as deplorable as those of race, creed, or color, of which we are constantly reminded. I wonder how many of us would be here today if someone had the option of not feeding us as newborns?

Arthur Dyck, who has the intriguing title of Professor of Population Ethics at the Harvard School of Public Health, is also a member of the faculty at the Divinity School at Harvard. The connotation of being a Professor of Population Ethics these days, even with a seminary appointment, would lead one to expect that such a man would be ready and willing to eliminate all life that was not "meaningful"—a word I detest. Yet, Professor Dyck believes much more in the *equality* of life than he does in the *quality* of life; he believes that we should and must minister to the maimed, the incompetent, and the dying. To put it in his words:

> The moral question for us is not whether the suffering and the dying are persons but whether *we* are the kind of persons who will care for them without doubting their worth.[7]

We in the medical profession have traditionally responded in our treatment of patients as a reflection of our society's human concern for those who are ill or helpless. Indeed we have often acted as advocates for those who had no one else to stand up for them. Thus we have always responded, in days gone by, with love and compassion toward the helpless child. It may well be that our technical skills have increased too rapidly and indeed have produced dilemmas that we did not face a decade ago. But this does not give us any new expertise in deciding who shall live and who shall die, especially when so many non-medical factors must be taken into account in making the decision.

It is really not up to the medical profession to attempt to alleviate all of

the injustice of the world that we might see in our practice in the form of suffering and despair. We can always make the effort to alleviate the pain of the individual patient and to provide the maximum support for the individual family. If we cannot cure, we can care, and I don't mean ever to use the words "care" and "kill" as being synonymous.

Leo Alexander, a Boston psychiatrist, was at one time (1946-47) consultant to the Secretary of War on duty with the office of chief counsel for war crimes in Nuremberg. In a remarkable paper (which appeared in the *New England Journal of Medicine*, July 4, 1949), "Medical Science under Dictatorship," he outlined the problem.[8] Let me just mention the highlights of Dr. Alexander's presentation. The guiding philosophic principle of recent dictatorships, including that of the Nazis, was Hegelian in that what was considered "rational utility" and corresponding doctrine and planning had replaced moral, ethical and religious values. Medical science in Nazi Germany collaborated with this Hegelian trend particularly in the following enterprises: the mass extermination of the chronically sick in the interest of saving "useless" expenses to the community as a whole; the mass extermination of those considered socially disturbing or racially and ideologically unwanted; the individual, inconspicuous extermination of those considered disloyal to the ruling group, and the ruthless use of "human experimental material" in medical military research. Remember, physicians took part in this planning.

Adults were propagandized; one outstanding example being a motion picture called "I Accuse," which dealt with euthanasia. This film depicted the life history of a woman suffering from multiple sclerosis and eventually showed her husband, a doctor, killing her to the accompaniment of soft piano music played by a sympathetic colleague, in an adjacent room. The ideology was implanted even in high school children when their mathematics texts included problems stated in distorted terms of the cost of caring for and rehabilitating the chronically sick and crippled. For example, one problem asked how many new housing units could be built and how many marriage-allowance loans could be given newlyweds for the amount of money it cost the state to care for "the crippled, the criminal, and the insane." This was all before Hitler. And it was all in the hands of the medical profession.

The first direct order for euthanasia came from Hitler in 1939. All state institutions were required to report on patients who had been ill for five years or more or who were unable to work. The decision regarding which patients should be killed was made entirely on the basis of name, race, marital status, nationality, next of kin, regularly visited by whom, and a statement of financial responsibility. The experts who made the decisions were chiefly professors of psychiatry in the key universities in Germany. They never saw

the patients. There was a specific organization for the killing of children which was known by the euphemistic name of "Realms Committee for Scientific Approach to Severe Illness Due to Heredity and Constitution." Transportation of the patients to the killing centers was carried out by the "Charitable Transport Company for the Sick." "The Charitable Foundation for Institutional Care" was in charge of collecting the cost of the killings from the relatives without, however, informing them what the charges were for.

Semantics can be a preparation for accepting a horror. When abortion can be called "retrospective fertility control," think of all the euphemisms for infanticide!

Although Leo Alexander said this in 1949, it applies today:

> The case therefore that I should like to make is that American medicine must realize where it stands in its fundamental premises. There can be no doubt that in a subtle way the Hegelian premise of "what is useful is right" has infected society including the medical portion of society. Physicians must return to the older premises, which were the emotional foundation and driving force of an amazingly successful quest to increase powers of healing and which are bound to carry them still farther if they are not held down to earth by the pernicious attitudes of an overdone practical realism.

I think those of you who graduated from medical school within ten to fifteen years of my time probably came out of that experience with the idea that you had been trained to save lives and alleviate suffering. The suffering you were to alleviate was the suffering of your patient and the life you were to save was the life of your patient. This has now become distorted in the semantics of the euthanasia movement in the following way:

> You are to save lives; that is part of your profession. If the life you are trying to save, however, is producing suffering on the part of the family, then, they say, you are to alleviate that suffering by disposing of your patient. So in a strange way you can still say you are saving lives and alleviating suffering—but the practice of infanticide for the well-being of the family is a far cry from the traditional role of the pediatrician and more lately of the pediatric surgeon.

There are many times when I have operated upon a newborn youngster who subsequently dies, that I am inwardly relieved and express honestly to the family that the tragic turn of events in reference to life was indeed a blessing in disguise. However, being able to look on such an occasion in retrospect as a blessing does not, I believe, entitle me to distribute showers of blessings to families by eliminating the problems that they might have to face in raising a child who is less than perfect.

We are rapidly moving from the state of mind where destruction of life is advocated for children who are considered to be socially useless or have non-meaningful lives to a place where we are willing to destroy a child

because he is socially disturbing. What we need is alternatives, either in the form of education or palliative measures for the individual as well as for society. We here should be old enough to know that history does teach lessons. Destructiveness eventually is turned on the destroyer and self-destruction is the result. If you do not believe me, look at Nazi Germany. My concern is that the next time around the destruction will be greater before the ultimate self-destruction brings an end to the holocaust.

The power to destroy our civilization and indeed our race is not necessarily good or bad in itself. The difficulty is to be certain that we have the moral character to use this power appropriately. Man's reaction to this kind of power can be either pride, man's greatest problem, or humility, one of man's most commendable virtues. Power accepted in humility is a source of strength for man's moral prerogatives.

We are an enthusiastic and an aggressive people and one of our tendencies is to make decisions on the basis of expediency—to take shortcuts to solutions, if you will. We must be very careful not to throw the baby out with the bathwater and I can't think of any situation where the use of that aphorism is more apropos because we are concerned with babies and we are indeed throwing many babies out in what seems at first glance to be a commendable goal to make life easy for parents and to remove burdens from society.

I have not really chosen a title for these remarks although several have come to mind. The first is "The Camel's Nose Is in the Tent," from the Middle Eastern proverb that when the camel's nose is in the tent, it is not long before he is in bed with you, and refers to the thin edge of the wedge in reference to euthanasia. The second that occurred to me, because I see the progression from abortion to infanticide, to euthanasia, to the problems that developed in Nazi Germany, and being aware of the appeal of alliteration in titles, is "Dominoes to Dachau." But having just visited Auschwitz in the company of some of my Polish confreres and having read extensively from the Germans' own reports about what went on there, I view what we are experiencing now as a dynamic situation which can accelerate month by month until the progress of our downhill momentum cannot be stopped. Therefore, I guess I favor the title: "The Subtle, Slippery Slide to Auschwitz."

It is difficult to be a participant in history and understand what is going on with the same depth of perception that one would have if he were able to look back upon the present as an historian. The euthanasia movement—and I use that in the broadest possible sense—is with us today with greater strength and persuasion than ever has been the case before in the history of what we call modern civilization.

Do not dismiss contemptuously my concern in reference to the wedge

principle—that when the camel gets his nose in the tent he *will* soon be in bed with you. Historians and jurists are well aware of what I am saying.

The first step is followed by the second step. You can say that if the first step is moral then whatever follows must be moral. The important thing, however, is this: Whether you diagnose the first step as being one worth taking or as being one that is precarious rests entirely on what the second step is *likely* to be.

My concerns center around several aspects of this issue. First of all, I have to say that I am a proponent of the sanctity of life, of all life, born or unborn. I hate the term death with dignity because there is no dignity in death. I have many times withheld extraordinary measures from the care of my patients who were terminal regardless of their age and have felt that I was doing the moral and the ethical as well as the just thing. I have never, on the other hand, taken a deliberate action to kill a patient whether this deliberate action was the administration of a poison or the withholding of something as ordinary as feeding that would keep him alive.

I am concerned about legislation that would take the problems of life and death out of the hands of the medical profession, and out of the realm of trust between the doctor and his patient or the patient's family, and put them into the legal realm.

Perhaps more than the law, I fear the attitude of our profession in sanctioning infanticide and in moving inexorably down the road from abortion to infanticide, to the destruction of a child who is socially embarrassing, to you-name-it.

I am concerned that there is no outcry. I can well understand that there are people who are led to starve children to death because they think that they are doing something right for society or are following a principle of Hegel that is utilitarian for society. But I cannot understand why the other people, and I know that there are many, don't cry out. I am concerned about this because when the first 273,000 German aged, infirm, and retarded were killed in gas chambers there was no outcry from that medical profession either, and it was not far from there to Auschwitz.

I am concerned because at the moment we talk chiefly about morals and about ethics but what is going to happen when we add economics? It might be hard enough for me to survive if I am a social burden but if I am a social burden *and* an economic burden, no matter how precious life might be to me, I don't have a chance.

Let it never be said by an historian in the latter days of this century that after the Supreme Court decided on abortion in 1973, infanticide began to be practiced without an outcry from the medical profession.

Let it not be said by that historian that perhaps the entering wedge was the decision on the part of pediatricians that there were some burdens too great to be borne by families and that a far better solution to the burden was infanticide of a child who was either unwanted by those parents or who would produce social problems and emotional distress in the family and in society.

Let it not be said that the entering wedge was the infanticide of a portion of the neonatal population of our teaching hospitals' intensive care units.

Let it not be said that pediatric surgeons of this country, who have perhaps the greatest experience and the greatest understanding of what can be done with a deformed life, not just in the correction of mechanical problems but in the rehabilitation of a family, stood by while these things happened and said nothing.

Let it not be said by that historian that in the third quarter of the 20th century physicians were so concerned with perfect children that the moral fiber of our profession and of our country was irreparably damaged because we had forgotten how to face adversity.

Let it not be said that the extermination programs for various categories of our citizens could never have come about if the physicians of this country had stood for the moral integrity that recognizes the worth of every human life.

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BOOKNOTES

COURAGEOUS: Students Abolishing Abortion in this Lifetime
Edited by Kristan Hawkins
(CreateSpace Independent Publishing Platform, 176 pp., 2012, $10)

Reviewed by Connie Marshner (January 29, 2013)

Hundreds of thousands braved the weather for Friday's March for Life, commemorating the 40th anniversary of *Roe* v. *Wade*. Some observers will no doubt dismiss the enthusiastic young marchers as products of privileged, religious homes and educations, who don't know anything about the problems real women face, and whose parents have brainwashed them into going on the March. But the reality is quite different. Pro-life activists are not by any means all cut from the same cloth.

"I was in second or third grade and remember seeing . . . my mother's blood, hearing the desperate cries, and grabbing the phone to call 911." Melissa Pereira's violently abusive father would lock her in the closet for hours. He often told her she should have been aborted, but she didn't know what that meant until high school. She would go to sleep wondering if she'd ever wake up in the morning.

When she learned about abortion, she understood that "abortion is one of those instances where violence breeds violence." She began to realize that her father's violence often peaked when her mother was pregnant. Then she learned of the abortions her father had compelled her mother to have.

Melissa is "continually amazed to see how each abortion has a rippling effect," and became a pro-life activist to help to stop the violence.

Melissa's story is one of a dozen in *Courageous*, an anthology of the personal narratives of young pro-life leaders. In the words of editor Kristan Hawkins, President of Students for Life of America (SFLA), they are "ordinary individuals who have done extraordinary, courageous deeds."

The stories are not what the media would expect.

One student started a "Student Mothers Network" on her campus to help students who were also mothering meet and support each other. A girl who said she was pro-life had a secret abortion because there was not one person who would agree with her that abortion is wrong. She helplessly watched her life spiral downward until she was asked to work on a reality TV show called "Surrender the Secret" and it all came out, bringing (eventually) healing.

Another student, Amanda Lord, was an unchurched seventeen-year-old

who dropped out of high school to get away from her abusive father, got into the drug scene, and found herself pregnant. Her fiancé became so abusive that his own parents told her to seek a domestic violence shelter. She had the maturity to ask herself "What would my son's world look like if I kept him and was not able to give him the basic necessities of life?" and so she made an adoption plan for her baby.

Amanda is now studying ultrasound technology. She consoles herself in her loneliness with the thought that "with abortion, all you can think of is all you've done wrong, and, with adoption, all you think of is what you've done right, which is your baby."

It is particularly courageous to be a pro-life activist in an environment in which the powers-that-be are almost entirely arrayed against you.

"I had never considered myself pro-choice or pro-life, in fact, I'm not sure I really knew what either one meant," writes Julie Pritchett. And Julie would have continued in her blissful ignorance if her favorite high-school teacher had not taken time out of the lesson plan to talk about abortion. "After class," writes Julie, "I literally walked out of the classroom with a new awareness and passion."

Steve Macias had no kind of religious upbringing. His ambition won him presidency of student government at Sacramento City College. When approached to hold a Genocide Awareness Project display on campus, he thought the photo mural of fetal development contrasted with pictures of aborted fetuses and of the Holocaust and slavery would be a good conversation-starter for Constitution Day.

After following all proper procedures, his student government sponsored the two-day display. Then the conversation really started. Teachers and administrators were appalled. Some students tried to recall Steve summarily. Only after Steve got legal help did the college president reinstate him and declare that free speech—even regarding abortion—was welcome on campus.

"Six months prior to the recall," Macias writes, "I had no interest in pro-life work and wasn't even involved in pro-life activities. But afterwards, I went on to start 50 pro-life groups in California and Arizona."

Is there a pattern here? An over-zealous abortion advocate teaching in high school prompts a thoughtful student to become a pro-lifer. Suppression of free speech about abortion radicalizes a neutral student into a zealous pro-life activist.

SFLA President Kristan Hawkins believes that the tide is turning against abortion. She insists that seeing abortion end in our lifetime isn't just a dream. "Abolishing abortion will not happen solely through politics," she says; and she urges SFLA's 600+ campus clubs to make plans "for post-Roe America

now—to support and establish the structures, all across our nation, that we will need to make sure no woman and family gets left behind."

So as coverage of the March for Life continues to unfold, know that those faces are not necessarily sheltered innocents. Many of them are sadder and wiser than you might think—and many of their efforts to abolish abortion begin with helping women.

Connie Marshner is the president of Connie Marshner & Associates Consulting. This review originally appeared on altcatholicah.com (January 29, 2013) and is reprinted with permission.

Recall Abortion: Ending the Abortion Industry's Exploitation of Women
By Janet Morana
Foreword by Fr. Frank Pavone and Introduction by Teresa Tomeo
(Saint Benedict Press, Charlotte, North Carolina, 211 pp., 2013, $21.95)

Reviewed by Maria McFadden Maffucci

"Often the last thing supporters of legal abortion want to talk about is *abortion*" (emphasis mine), writes Janet Morana. Exactly: recently President Obama addressed Planned Parenthood's annual conference, and did not use the word "abortion" once, though that is Planned Parenthood's top-grossing product. And Morana adds, many Americans don't know what *Roe* v. *Wade* really did, or have any idea what goes on in the world of abortion on demand. Along with this is a blindness to the harm abortion does to women, men, families and society. *Recall Abortion* is Morana's excellent attempt to change this situation: It is a book focused not on religious or even moral arguments but on the facts, real-life stories and common sense observations, all adding up to a sensible solution: Abortion should be recalled.

Morana's approach is to look at abortion as a product, sold to women, and ask how it has lived up to its marketing. Is abortion "healthcare," for example? Certainly not for the babies, it *always* kills a human being. But it is not good care for women either. Morana starts with the abortion procedures themselves. Abortion is one of the most common ambulatory procedures carried out (over 3,400 surgical abortions every day in 2010), and yet it is appallingly unregulated. Nail salons and veterinary practices have more regulations and protections than free-standing abortion clinics (where most abortions are performed). There are usually no pre-op tests, you are lucky if you

get to talk to a counselor first, and there is often no meeting with the doctor beforehand; "The first time you see the doctor who is about to end your baby's life, you are already on the table with your feet in the stirrups. You will never see the doctor again (unless you come back for another abortion)." Morana, who is also co-founder of the Silent No More Network, has used many first person testimonies from women in the book, some of the more than a thousand gathered on their website (www.silentnomoreawareness.org). One woman tells of changing her mind on the table, at an abortion clinic in Mississippi, and being held down and given extra sedation until the abortion was complete.

What is very useful about *Recall Abortion* is that Morana took all the "hard cases" which are often the first retort in a debate on abortion—rape and incest, fetal anomalies, and life-of-the-mother—and devotes chapters to each, showing in real-life stories how the facts do not support the assumptions made by the "mushy middle." For example, victims' testimonies show that an abortion after rape "does nothing to erase the violence, fear and trauma of the experience" but can escalate the suffering of the woman.

Morano reveals the truth that Planned Parenthood, NARAL and other pro-abortion organizations fear: There is *no* good reason to support abortion. Abortion has not lived up to its promises: It has not made women happier or more free; it has not cut down on unwanted pregnancies; it has not decreased child abuse; it does not help ease the pain of rape; it does not help society by exterminating those who have disabilities; and it is not necessary, except in the rarest of cases, to save the life of the mother (as you will read in Chapter 9). Millions of human beings have been killed, maimed, and psychologically scarred by this product—which has succeeded only in making billions of dollars of blood money for the "providers." Any other product with such a track record would have been recalled.

APPENDIX A

[*David Alton is a member of the British House of Lords. He is also Professor of Citizenship at Liverpool John Moores University. The following article first appeared on ChinaAid News (www.chinaaid.org, March 17, 2013) and is reprinted with Lord Alton's permission.*]

China and One Child

David Alton

A shocking report in The Financial Times has finally revealed the true extent of China's one child policy—a policy which has resulted in a massive imbalance between young men and women and which has targeted girl babies in a relentless campaign of gendercide. Over decades, using taxpayers' money, this is a policy which has been indirectly aided and abetted by successive British Governments.

The report—which is based on official data from the Communist Party's own health ministry—suggests that Chinese doctors have undertaken over 330m abortions during the 40 years since China began to implement the one child policy.

First introduced in 1971 I began to challenge the policy in 1980, after my election to the House of Commons and over the years which have followed I have questioned the millions of pounds which Conservative and Labour Governments—enthusiastically supported by the Liberals and then Liberal Democrats—have poured into agencies which have, in turn, funded the Communist Party's Chinese Population Association.

At one memorable meeting with a Secretary of State for International Development the air was blue with undeleted expletives and four letter words as I was accused of undermining development policies which relied on population control. I told the politician concerned that we should be attacking poverty not people and that it was an egregious violation of the rights of women when they are forcibly aborted or sterilised. For the UK to have channelled money into agencies which have in turn funded those carrying out coercive population measures makes us collaborators in these violations.

Some years after that meeting, during a visit to China, and in conversation with Chinese officials, I was surprised when they privately gave me quiet encouragement in opposing the one-child policy.

In Beijing there was also more sympathy than I had anticipated when I took up the case of Chen Guangchen, the blind human rights activist who had single-handedly exposed the forced abortion of over 120,000 women in the Shandong province.

While Chen Guangchen was incarcerated during a four year prison sentence—and then kept under house arrest—I told senior Chinese officials that I thought that one day Chen would be seen as a national hero. It was striking that no one contradicted me or shouted me down. Of course, many officials have suffered under these policies too. Hardly anyone in China is unaffected.

Chen's bravery and the clarity with which he saw the economic and demographic consequences of a policy which evaded sighted people gradually opened the space

for more honest debate within the country.

The micro-bloggers in China—some of whom I recently met in London—took up Chen's case and began to question the policy. One of those bloggers has more than 5 million followers and is able to exert much greater influence than party cadres. In the absence of a free press the bloggers represent the best hope for changing opinion and attitudes.

Clearly this more open debate, and public exposure of horrifying stories like that of a women coercively aborted, and whose seven month unborn baby was then left by her side on her bed, as a warning not to become pregnant again, are having a radicalising effect on the population.

The scale of what has been done is phenomenal. Since 1971, Chinese doctors have aborted 336m women and undertaken 196m sterilisations. 403m intrauterine devices have been inserted into women, often without their consent.

The Chinese say that their population of 1.3 billion would be about 30% bigger if they had not pursued these draconian policies. Elsewhere, when poverty and infant mortality are reduced population has fallen naturally.

By comparison, since legal abortion was introduced in America in 1973, in a country about a quarter of China's size, around 50 million abortions have been undertaken. In the UK, with a population of around 60 million, the figure is 7 million abortions.

The attrition rate in China has not been getting better.

The official figures show that since the 1990s around 7 million babies are aborted every year, around 2 million men and women have been sterilised, and another 7 million women have been required to have intra uterine devices fitted.

For years economic analysts have been warning about the imbalances and distortions which this policy has created. The official data now confirms the inevitable. Not only are there 37 million more Chinese men than women, globally the sex-selection abortion of little girls means that between 100 million and 200 million females are missing in the world. But there are other implications of this social engineering.

The ratio of children and retirees shows that for the first time the one is less than the other—meaning that (as in child-poor Europe) there simply will not be the children to support those who have retired. One Chinese economist, Ken Peng, said: "This makes China's population look more like a developed country than a developing one, which is a key disadvantage in labour-intensive industries,"

The new Chinese leadership has hinted that it will introduce some welcome reforms—such as the dismantling of the network of re-education centres which indoctrinate citizens in Communist Party beliefs. Some observers also think they may also re-examine the one child policy.

One commentator, Mr. He Yafu, has suggested that one likely change to family planning rules would be to permit two children for parents who were both single children themselves. He said that the policy, in place on a trial basis in some cities, could be implemented nationwide. But he added that such a modest change would

not be enough to deal with the accelerating problem on an aging and unbalanced population; and even these modest changes have been attacked by die-hard officials in the Communist Party's family planning secretariat.

Yan Yuxue argued that "the idea of easing the ageing problem by increasing the fertility rate is like drinking poison to quench thirst."

So, despite the more open criticism of this appalling policy we should not assume that it will simply disappear without a fight.

Nor should we be seduced by the argument that the Chinese Government may allow some couples to have two children. The key question is not the number of children but the principle of State interference in the intimate life of a family and the coercion which the State uses to enforce limits. Even with a two-child policy, women will still be subject to forced abortion if they get pregnant without a birth permit.

And, of course, a "two-child policy" rather than a "one child policy" will not discourage gendercide, the sex-selective abortion of baby girls. There is already plenty of evidence of rampant gendercide in those districts where couples can have a second child if their first is female. Forced abortion up to the ninth month of pregnancy, and gendercide—the sex-selective abortion of baby girls—will undoubtedly persist until China abolishes all coercive birth limits.

What amazes me is that those who would normally be so outspoken against cruel abuses of human rights, and against discriminatory practices targeted at women, have been so quiet for so long. The moment abortion or population are mentioned the shutters come down and the world simply looks the other way as 330 million women are forcibly aborted.

APPENDIX B

[*Kathryn Jean Lopez is editor-at-large for National Review Online. Jonathan V. Last is a senior writer at* The Weekly Standard *and author of* What to Expect When No One's Expecting *(Encounter Books, 2013). The following interview was posted on NRO on February 21, 2013, and is reprinted with permission*.]

Disaster Coming?

Kathryn Jean Lopez & Jonathan V. Last

"It would be crazy to have children if they weren't so damned important," Jonathan V. Last writes in *What to Expect When No One's Expecting: America's Coming Demographic Disaster*. But he notes that "pets now outnumber American children by more than four to one."

"America's fertility decline was not caused by a grand conspiracy to eviscerate the family," he explains. "Rather, it's been the result of a thousand evolutions in modern life. Many of these changes (the decline in infant mortality; the liberation of women into the workplace) have been enormously beneficial to us as a society. Some of them (the epidemics of divorce and cohabitation) have not. But even the changes we think of as beneficial have, as ancillary effects, created roadblocks to family formation. They delayed marriage and childbearing, or increased the cost of children, or decreased the return on that investment." Last talks about his demographic warning in an interview with National Review Online's Kathryn Jean Lopez.

Kathryn Jean Lopez: Clever title, but what business is it of any of us who's expecting and who's not? It's a matter of choice, and who wants to bring a child into the world to pay our bills anyway?

Jonathan V. Last: That's totally true. And I celebrate choice. Really—I do. I've got three kids and one of the great blessings of parenthood is that it cures you of any sentimentality about children. So anyone out there who doesn't have kids, or doesn't want them, I say, Godspeed. Remember me fondly the next time you're taking a quick weekend getaway to London or going to the movies on a weeknight.

I say this pretty explicitly in *What to Expect*: Please don't construe any part of the book as me telling you to have kids.

All of that said, children are—as high-minded economist types will note—both public and private goods. And society can't function very well, or for very long, without a certain number of them being born. So whatever people decide to do at the individual level, there are macro effects to consider. I would just note that it's a little weird that certain types of people are happy to consider the macro effects of individual behavior when it comes to smoking, or drinking soda—but say that we're not allowed to notice these things when it comes to kids. I mean, it's only the entire future of Western civilization we're talking about.

Lopez: How is it that "fertility is shaping nearly everything in our national conversation"?

Last: My hero Phil Longman once wrote that demography is like the tectonic

plates shifting underneath the earth's crust, determining the scope of the possible. I don't think I can really improve on that metaphor. But just as a quick sample list, it's just true that you cannot fully understand Medicare, Social Security, immigration, defense spending, the foreign challenges of Iran and China, the housing bubble, or the polarization of American politics without taking account of demographics.

Lopez: What do you have against yoga studios and pet boutiques?

Last: I'm not against yoga studios or pet boutiques. In fact, without yoga studios, we would not have come up with one of the great inventions of the last century: yoga pants.

I just find the evolution of these kinds of lifestyle markers interesting. If you took a dog-lover from 1965 America and dropped him into the modern pet-fancy culture—with doggie car insurance and organic pet-food bakeries and kennels that built tiny houses with air conditioning and TVs for the pooches—he would probably think the world had gone insane.

By historical standards, our current fascination with pets is unusual. And hence interesting.

Last: Are we all going to become Florida Nation?

Last: Oh yes. If current projections hold, by 2050 the population of Americans over the age of 65 will be greater than the population under the age of 14. We will be Florida. And Florida might look like Japan, where last year people bought more adult diapers than they did diapers for babies.

Lopez: Why shouldn't we trust anyone over 65?

Last: Because [looks over both shoulders] they're Baby Boomers.

I kid. We're in a serious enough demographic bind that we're all going to have to work together to figure out a way to make this thing work. The thing is, when your fertility rate is sub-replacement, you enter a zero-sum game where either older folks aren't going to get the benefits they were promised or young workers are going to face much steeper tax rates. How the politics of this issue resolves over the next 20 years will be one of the most interesting stories around. Will older Americans relinquish some of their claims? Will younger workers volunteer to pay more? Will there be some grand bargain? The truth is, no one knows how it will end. We just know that something has to give.

Lopez: Why do you point to Poland?

Last: No real reason. Poland is just one of the interesting demographic case studies from Eastern Europe. You could just as easily look at the Czech Republic or Hungary. But I like Poland because I'm a good Catholic boy and it gave us John Paul the Great.

Lopez: What's the actual good news from Georgia?

Last: Georgia is the only known example of a country recovering from lowest-low fertility to near the replacement rate. And the way they did it will shock you. When you read the book.

Short version: The patriarch of the Georgian Orthodox church, Ilia II, stepped in and volunteered to baptize all third-born children. The Georgians are really into their church. So they started having more babies. It's pretty neat.

Lopez: Whose fertility do you worry about the most?

Last: The people who want babies. For all the fashionable talk about how family life has gone out of style and how people don't want kids anymore, the research is pretty clear: When demographers calculate America's "ideal fertility rate"—that is, the number of children people say they'd like in a perfect world—that figure has been a pretty constant 2.5 for almost two generations.

Put that 2.5 ideal rate next to our 1.9 actual rate, and what you see is that while many people may not want children—which is fine! we celebrate your choice!—that is not the median American experience.

So what we have here is a persistent, generations-long gap between ideal and achieved fertility. This suggests to me that the solution isn't arguing or trying to bribe people who don't want kids—leave those nice folks alone! No, the solution is finding ways to help the people who do want kids achieve the families they desire.

Lopez: Why does your outline of historic demographic transitions matter?

Last: Knowledge is its own reward. Plus, nothing makes you King of the Party like being able to dazzle your friends with a Brief Population History of the World.

Lopez: I thought you were a conservative, why does capitalism deserve only two cheers?

Last: Did I say two cheers? I meant one cheer. Take that, Mitt Romney. We are the 47 percent!

Look, capitalism is the least bad system of economic organization and it has been responsible—over the long haul—for an amazing array of good outcomes. It has lifted masses of people out of poverty and into freedom and made their lives better in ways that are, literally, innumerable.

But the fact that capitalism has, on balance, good outcomes in the very long term shouldn't blind us to capitalism's short-term failures—which are often quite spectacular.

Take parenting, for instance. We have a system right now in which children could reasonably be construed as a marker of social failure. On average, people with higher levels of education and higher incomes have fewer children. And the costs of children—it'll run you about $1.1 million to raise a middle-class kid through college—are such that to some degree, people become more economically successful by not having them.

If we were all Homo economicus, rational capitalism would never be able to suffice as an argument for having children. Yet, as we said up top, children remain both private and public goods. Here, then, I would suggest, capitalism fails us when it comes to providing right reason for pursuing the particular good of children. To cross that bridge, you need something else. Something I would suggest supersedes even capitalism as a guiding precept.

But then I already told you I was a good Catholic boy, and I don't want to belabor the point. I'll just say that there are greater things in heaven and earth than the free market.

Lopez: You note that religion helps demography. Further, you write: "Religion helps marriage and marriage helps fertility — the end result being that religiosity winds up being an even better predictor of fertility than either education or income. And as Americans have become more secular, they've cut back on having children. The good news is that while each of these three worlds — marriage, church, and fertility — is incredibly complicated, the interplay among them is somewhat straightforward. The bad news is that these realms are so foundational that it's difficult to see how society might consciously nudge them in a positive direction." You then go on to say that "something like the balance we had in the 1950s would be dandy." So you just want to turn back the clock?

Last: Yup. But let's be modest. How about we turn it back just to a time when the federal government wasn't forcing religious institutions to violate their consciences by providing contraception, sterilization, and abortifacients? I'd be happy to settle for there not being overt hostility on the part of government.

Lopez: Do you really need a "How to Make Babies"? We know how to do that, don't we? Maybe if we didn't consider medicating fertility the norm?

Last: Look, I was as surprised as anyone else. I had always thought that it happened only when you took a date to see The Dark Knight.

Lopez: How does the "Social Security regime" distort "the 'market value' of children" and force the fertility rate down?

Last: For a long time, one of the functions of children was to take care of parents in their dotage. Uncle Sam does that now. Moral hazard. Game. Set. Match.

The research on this suggests that Social Security and Medicare depress the American fertility rate by about 0.5 kids.

And as everyone knows, half-kids are the best kids.

Lopez: What's been the most interesting feedback thus far? The most challenging?

Last: A writer at the Huffington Post claimed that I'm part of "The Baby Matrix." Or something. I couldn't tell if I was Neo or Agent Smith. From her tone, probably Agent Smith. Still, that's not nothing.

There hasn't been much challenging feedback, but that's because at bottom, *What to Expect* isn't a particularly controversial book. It's heavily based on data and research, and these data and research come not from me, but from the demography establishment. Most of those guys and gals—whom I love, by the way—are pretty liberal in their politics. It's just that among the people who do this stuff for a living, there isn't a whole lot of daylight between "conservative" demographers and "liberal" demographers.

The only people who seem shocked by this stuff are what I think of as lay liberals, who don't follow the research closely.

Lopez: What do you find most dire?

Last: The abortion rate in Russia. It's the most depressing thing I've ever seen. So depressing, that I won't even write it down here.

Lopez: What do you find most encouraging?

Last: In Germany, they have a state-run program to take prostitutes and train them to become elder-care nurses—because their fertility rate is so low that they're running out of young people to take care of all the old folks.

So even in the midst of social tragedy, there is hope. At least for old, German men.

Lopez: You have a sense of humor in the book. Was that hard given the topic?

Last: One of the joys of being a grown-up is that no one assigns you book reports—so people don't have to read books that aren't fun. But it is important to read books that teach you things, kind of intellectual spinach. My writing mantra for *What to Expect* was "deep-fried spinach, wrapped in cotton candy."

"Be sure to grab a lollipop on your way out."

APPENDIX C

[*Austin Ruse is president of C-FAM (Catholic Family & Human Rights Institute), a New York and Washington DC-based research institute focusing on international legal and social policy. The following column originally appeared in* Crisis *(www.crisismagazine.com, March 1, 2013) and is reprinted with the magazine's permission.*]

Lord, Save Us from the Purists

Austin Ruse

Ireland is on the verge of making abortion legal in some circumstances and the fault can be laid directly on the doorstep of a tiny handful of misguided pro-lifers ten years ago.

Ireland is vitally important to the international pro-life movement. Ireland remains one of the few nations in the world where abortion is illegal. At the same time, Ireland has one of the lowest rates of maternal mortality in the world, according to the United Nations.

This combination of pro-life laws and low maternal mortality demonstrates the false notion of pro-abortion advocates that pregnant mothers need abortion in order to stay alive. This remains one of their final arguments after all the rest have fallen by the wayside these past decades.

What pregnant women need to survive pregnancy—indeed what we discovered many years ago in the United States—is basic medical and health care. Ireland has this and at the same time protects the unborn child from abortion.

Ireland has been in the crosshairs of big-abortion for years. Almost annually, pro-abortion meddlers ensconced at the UN and other bodies scold Ireland for her restrictive laws on abortion. UN treaty monitoring bodies regularly tell Ireland to liberalize her abortion laws. Even abortion-friendly Irish governments have to tell the UN that the Irish people have spoken regularly that they are against abortion. Indeed, there have been five national referenda on this topic in the past 30 years.

The last national referendum happened in 2002 that would have put unambiguous protection for unborn children in the Irish Constitution. The referendum would have closed an abortion loophole opened by the Irish Supreme Court that allows for abortion if the mother is suicidal. The Catholic Church and all the mainstream pro-life groups enthusiastically supported the referendum.

Enter Dana Scallon, who quite famously turned to politics after winning the Eurovision Song Contest and a lengthy recording career. Scallon was a darling of the pro-life movement and rightfully so. She was a fearless leader for the pro-life cause. She ran for the presidency of Ireland and lost and ended up in the European Parliament.

Scallon believed the 2002 referendum was really pro-abortion because it protected unborn children from implantation onward. To make it clear, the referendum would not have created a constitutional right to kill pre-implantation embryos which remained legislatively protected.

Scallon was joined in her campaign by John Smeaton who runs the London-based Society for the Protection of Unborn Children. Smeaton became head of SPUC after a bloody 1999 battle with SPUC founder Phyllis Bowman, which resulted in SPUC under Smeaton losing most of its support in the British Parliament. Smeaton earned a reputation as a bare-knuckler in his battles with the elderly and much loved Bowman.

The 2002 referendum went down to defeat by a mere 11,000 votes. Liberal urban voters voted in large majorities to defeat the pro-life measure. A post-election poll showed that 30,000 (5%) of the no votes were from self-identified pro-lifers who had been persuaded by Scallon and Smeaton.

Experts in Ireland make it angrily clear that the current debate in Ireland, one that may bring legislative abortion to Ireland, is the fault of Scallon and to a lesser extent Smeaton.

The current debate revolves around the plight of a pregnant woman who died last fall. Abortion proponents say she could have been saved by direct abortion and are calling for legislative action to liberalize abortion laws, particularly for "suicidal" pregnant women. Pro-lifers see the suicide provision as subject to abuse and the beginning of abortion on demand.

Because the 2002 referendum failed, Irish abortion laws can be changed by the Parliament. Responsible pro-lifers are calling for the government to issue medical guidelines on what doctors are allowed and not allowed to do to save a mother's life, excluding abortion. One of the interesting features of the Irish debate is the doctors have been almost universally pro-life and have said abortion is never medically necessary to save a mother's life.

The battle lines are drawn. Sadly pro-life lines are being smudged once more. In recent days, Smeaton sent around a divisive note charging that Irish pro-life leaders are planning on compromising with pro-abortion forces. This was met with an angry rebuke from Irish pro-lifers who basically said Smeaton does not know what he's talking about and after all he isn't even Irish.

The fight for the unborn child brings out the best and sometimes the worst in human nature. People commit their entire lives to fighting for the unborn child and this is a great good. On the other hand, the fight is so desperate it encourages in some an inclination to purity.

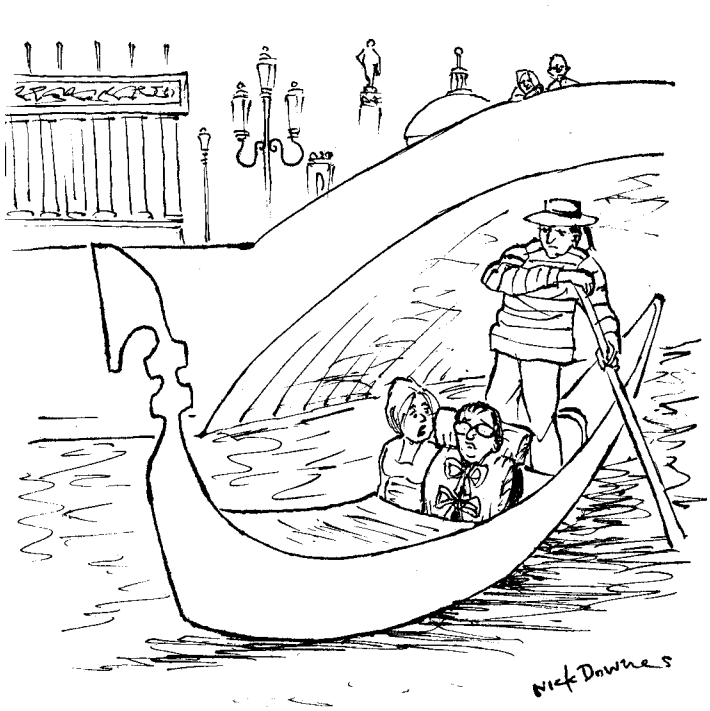
Purists will oppose any improvement in the law if the law does not go all the way. The 2002 referendum in Ireland was not perfect so it had to be opposed.

The same debate goes on in the United States. Even now there is a not-so-healthy debate among pro-life leaders over the question of rape and incest exceptions. Some say that they would oppose outlawing abortion if the law left behind those children conceived in rape or incest. Of 1.2 million abortions in America, it is estimated 20,000 are for rape and incest. The purists would oppose ending 1,180,000 abortions if those 20,000 could not also be stopped at the same time.

This is madness. Even the Catholic Church would allow for such a bargain provided everyone understands the remaining law is still unjust and still needs to be

changed. But, not the purists who say if you cannot save them all, then you should save none of them.

It is unclear how the current Irish debate ends. With the exception of a few outriders, the Irish movement is united. All eyes and prayers should be turned toward the good groups fighting for the unborn child in Ireland; Life & Family, Pro-Life Campaign, Iona Institute, and Youth Defense.



"You're not much of a romantic, are you, Harry?"

APPENDIX D

[*Philip C. Burcham is a professor of pharmacology in Perth, Western Australia. The following essay was published in the March 2013 issue of* First Things *and is reprinted with the magazine's permission. © Copyright First Things 2013*.]

My Brittle Bones

Philip C. Burcham

I belong to a very ordinary Australian family, albeit with two obvious differences. First, compared with the stereotypical sports-loving, tough Aussie, some of us are quite weak and physically frail, thanks to a mutant gene. Second, my family has resisted the secularism that is a dominant feature of modern Australian life.

I believe it is no accident that we preserved our Christian profession. One reason ill-mannered New Atheist attitudes gained little traction among us is that Christian theism provides a secure footing for our family in a darkening world, which, thanks to the recent proliferation of "genetics counseling" clinics in modern hospitals, is increasingly hostile toward the congenitally weak and imperfect.

Although my form of brittle bone disease (OI, osteogenesis imperfecta) is quite mild, I experienced some fifteen or so fractures in my youth. My high school classmates gave me such winsome nicknames as "Fragile Phil" and "Brittle Burcham." OI also affects one's hearing: Wearing bulky hearing aids from age thirteen did little for the machismo of a teenage boy coming of age in 1970s Australia.

After marrying my wife in the United States on completion of my postdoctoral studies, we returned to Australia, where our daughter was born a few years later. One day, our petite ten-month-old infant was trying to pull herself up using a chair leg for support. My wife heard a popping sound and a whimper as she flopped back onto the floor. X-rays indicated she had snapped a tibia.

Upon learning of the disorder affecting my family, the emergency-room staff in the local children's hospital told us about a gifted doctor who knew a lot about OI. I was keen to meet the doctor, given my positive memories of the orthopedic surgeons who cared for me in childhood. A pharmacologist by training, I also knew that the bisphosphonates—a class of drugs developed for osteoporosis sufferers—were then being tested on OI patients. I hoped the doctor would know if they might help our daughter.

We found the doctor had little interest in the clinical management of pediatric OI patients and knew little of bisphosphonate pharmacology. The doctor and attending nurse initially engaged us in chatty small talk, but their intentions soon became clear: They wanted to know whether we hoped to have another baby. After my wife said we did, exasperated grimaces passed between them.

"If that is the case," the doctor replied, turning toward me, "we will need to obtain blood samples from some members of your extended family to allow DNA testing." Fearing my family might be reluctant to participate in a research project, I naively asked why the genetic data was required. Waving a dismissive hand toward our daughter, who until this point had tried her darndest to win the doctor's

attention with coy smiles and giggles, this gifted physician who knew so much about the disease abruptly replied, "We want to ensure you don't have another one of those!"

My emotions now resembled those of Hansel and Gretel at the point of their rude awakening in the famous fairy tale. Like the sugary treats fastened to the witch's cottage, the saccharine assurances from the ER staff that this doctor was keen to help OI patients had obscured his intentions: They had brought us to a eugenicist who wished to push any of my future OI-affected offspring into the oven.

My wife had awoken to the same reality, and in one of the most galvanizing moments of our marriage, with firm voice she informed the doctor that she would never consider aborting a child within her womb. We were promptly shooed from the room.

Upon reflection, this episode exposed several questionable assumptions that underpin modern genetic counseling services. Unfortunately, those involved in these practices rarely, if ever, publicly clarify the beliefs that guide their daily work. What are these beliefs and their likely social consequences?

First, genetic counseling clinics essentially promise to "purify" the genetic stock of the populace, believing this will provide lasting benefits to any nation. I beg to differ. The negative impact that abortion would undeniably have exerted upon my own family line confirms that no physician on earth could possibly foresee the life achievements of future descendants of frail parents. After my grandmother Jessie arrived in Australia nearly a century ago, few doctors would have looked at her tiny, fragile frame or her abominable hearing—or at the small, unassuming gardener by her side—and rated the prospects of their offspring very highly.

Let us imagine Jessie fell under the spell of the coercive eugenicist my wife resisted and agreed to abort her three OI-affected offspring—Lloyd, Mabel, and Cyril—while retaining her firstborn Laura as her sole "genetically pure" child. How, precisely, might snuffing out her affected offspring have made my local society stronger?

Aborting these three babies would only have exacerbated the severe skills shortage afflicting our state economy. The multigenerational list of those who would have been flushed away is incomplete but includes a doctor, a medical student, several nurses, and an even greater number of teachers, plus a headmaster, two scientists, a systems engineer, a musician, an occupational therapist, a dental technician, a physiotherapist, a draftsman, some pastors, and several skilled tradesmen.

Each has been a caring, socially engaged, and responsible citizen without a single criminal conviction among them; none has depended on the state as a welfare recipient during his working years; and virtually all have been, or remain, selfless contributors to several mainstream branches of the Protestant tradition in Western Australia. The loss of human and social capital to our state had Jessie aborted her three OI-affected offspring would have been substantial.

Some genetic counselors allege that families like mine are an intolerable "social

burden," claiming that destroying us in utero saves the health care system significant "costs." How much would the West Australian hospital system have saved had my father and his OI-affected siblings experienced death before birth?

I would estimate that aborting them would have prevented an upper limit of some one hundred fractures. Treating a fracture is among the cheapest interventions in modern medicine: Perhaps we would have saved the cost of a few cartons of plaster-of-Paris bandages, several dozen calico arm slings, and several cases of radiography film. For the small number of fractures that required surgical correction, we could have saved the cost of a dozen or so brief hospital stays. For a wealthy state like ours, this seems a trivial sum.

Second, I fear that decisions concerning congenital mutations that condemn fetuses to destruction are made arbitrarily behind closed doors in a highly undemocratic manner. Every day, researchers around the world report new disease-associated mutations in medical journals. Such studies show that we are all walking genetic junkyards: Recent U.S. research suggests that every individual carries, on average, 313 disease-causing mutations.

Some of us become aware of our harmful mutations early in life, while others discover their presence late. Why should this simple biological reality consign my family members to in utero destruction? Why are some mutations more equal than others?

Who decides if a newly discovered mutation goes on the neo-eugenicists' list of unwanted disease genotypes? I was shocked to learn that my mild genetic disease was included on such lists. Who made that decision? What other conditions—mild, moderate, or otherwise—are included? Are the list-makers held to public account? Why aren't their lists posted on hospital websites? Choosing maternity hospitals would be easier for families like mine if we knew up front whether we were likely to be harassed.

Third, I fear that genetic counseling is doing great harm to the public standing of hospitals and the medical profession. I suppose it is hard for able-bodied people to grasp its significance to families like mine: I can recall gatherings from my youth where we discussed hospital staff in the same way other families chat about revered schoolteachers, parish priests, soccer coaches, or piano instructors. Dad often praised his favorite orthopedic surgeon, while his siblings would wax lyrical concerning the ENT surgeon who miraculously restored their hearing. I might pipe up to extol the wonderful nurse who had a happy knack of cracking jokes, immobilizing broken limbs, and administering painkillers in a way that sent a downcast lad safely on his way, thinking he could face the world again.

Because we knew they cared for our welfare, we grew to love these hospital staff. It never crossed our minds that they would intentionally harm or trick us. The slick, coercive genetic counseling workers we encountered were from a different planet.

Fourth, I fear that our societies have reached the sad point where the belief that some humans command a favored right to life simply because of their physical

strength is now unquestioned orthodoxy. What a strange warping of human potentiality this outlook implies. I can recall individuals from my youth who displayed great sporting prowess as teenagers but, on navigating the turbulent waters of adulthood, failed to cope as their personal lives ran aground on the reefs of drug and alcohol abuse or family disintegration.

As one born congenitally frail, I have come to respect this mysterious disorder called osteogenesis imperfecta and even thank heaven for how it prematurely confronted me with my own frailty during my youth. By forcing me to face my limitations and find the fortitude to transcend repeated bouts of medical adversity, in requiring me to choose a vocation in which success did not depend on brute strength, OI made me a stronger and more mature individual.

In the end, we are all frail creatures. Maybe this is why some people wish to abort persons like my father and me: Perhaps we confront them with the inconvenient truth of their own mortality and the ultimate futility of their existential rebelliousness. Rather than pursuing the futile idea that humanity can live in perpetual defiance of God, we Brittle Burchams have found great hope and refuge in the arms of the strong God who became as weak as a newborn baby to conquer the evil that stains our fallen world.

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