

THE
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Roe v. Wade

THE ROAD FORWARD



ALSO IN THIS ISSUE

- Bioethics 2.0, by Paige Comstock Cunningham
- PPACA's Mandates, by Nathan A. Adams
- Chemical Warfare: The Abortion Industry's Strategy for the 21st Century, by Samuel B. Casey



David Nammo,
Executive Director and CEO

Life is sacred

The *Roe v. Wade* decision not only changed the laws concerning abortion in this country, it also redefined how our country views, defines, and treats life. If life, once considered sacred, is now subordinate to someone's competing interest of choice, then the repercussions will echo through a society, its laws, and its science – as it has in America.

Stem Cell Research. Conscience rights. Cloning. Assisted Suicide. Frozen Embryo Adoption. Bioethics. They are vocabulary words that had been mostly unknown to many Americans but since *Roe* have become household terms for those who care about the issue of abortion. These consequences, sprouting from a post-*Roe* society, are the topics we cover in this issue of *The Christian Lawyer*.

It is our desire that this issue educate us. May we learn a little more about the cutting-edge issues that affect the lives of so many, from the unborn to those at the end of life, and what our laws and courts are saying about them. It has been my goal, through this issue and the last issue of *The Christian Lawyer*, to educate us, as Christians in the law, about *Roe v. Wade* and the surrounding issues that have emerged since 1973.

Although it has been a generation since the *Roe* decision, the issue continues to be a front-page story. Just this week (as I write this): CLS filed an amicus brief in the Massachusetts case dealing with abortion clinic protestors; President Obama announced a market strategy for the Affordable Care Act, which continues to mandate abortion and contraceptive services against the consciences of religious

individuals and organizations; and dozens of lawyers met in Kansas City to discuss the issue of life and what can be done to protect both the lives of the unborn and the consciences of those who oppose abortion.

Although we have dealt mainly with the law and its treatment of abortion in these latest issues of *The Christian Lawyer*, it would be an oversight not to discuss those who have chosen abortion and need forgiveness, compassion, and a caring community. There are women and girls in our churches who have had abortions and are hurting. They have unfortunately been made to believe that they have nowhere to turn, least of all to the pro-life community.

My pastor once said that someone should be able to show up at our church doors, confessing that they are cheating on their spouse, embezzling money, contemplating suicide, neglectful of their children and addicted to drugs, and receive the response, "You have come to the right place." Do women and girls who have gone through the trauma of abortion feel the same way? It is unlikely – and we should always consider how we communicate on this issue with that in mind.

Our prayers should be not only that law would protect life from conception to natural death, but also that we would show compassion to the woman who has had an abortion and continues to carry the burden on her heart. I pray that we represent the loving arms of Christ to those in pain, whether they are considering an abortion or have had an abortion, with a message of healing, forgiveness, and love.

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Roe v. Wade

THE ROAD FORWARD



Bioethics 2.0

BY PAIGE COMSTOCK CUNNINGHAM, JD

I was introduced to the abortion issue as a first year law student. Up until then, I had never thought seriously about the issue. Neither, apparently, had the church or the (evangelical) academy. I enrolled in a Christian college just a few months after Roe was decided. Abortion was not discussed, not there, and not in my church.

During my first year in law school, I began to study the issue. I began to understand abortion as morally wrong. As a law student, I was struck by the injustice of it all. An entire class of human beings—the most dependent and therefore vulnerable—was excluded from constitutional protection by fiat of seven Supreme Court justices.

As a newly minted and rather naïve pro-lifer, I interned at Americans United for Life which led to a long-term relationship with AUL and immersion in pro-life law and public policy. I witnessed the awakening of the evangelical church to the reality, morality, and urgency of the abortion question. Meanwhile, infanticide, active euthanasia, and physician-assisted suicide pushed the boundaries of legal protection for human life.

Now, more than four decades later, we are still confronting serious moral questions about human life, and, once again, the church is inattentive or distracted. The law is struggling its way through some of the complex questions generated by technology's refashioning of human procreation, human bodies, and human nature.

The Biotech Century

Let's pause for a moment and consider how much has changed, as we enter the second decade of the biotech century. Medical and technological innovations reach seemingly miraculous activities of biblical proportions. The deaf can be made to hear, the blind can be made to see, and the lame can be made to walk, whether it's a cochlear implant, electronic retina, or injections of bone marrow stem cells for a spinal cord injury.

But science, medicine, and technology can do more than heal and repair. They also expand the options for living longer, healthier, more comfortable lives. We can reshape our bodies through cosmetic surgery, replace worn-out tissues and organs through regenerative medicine, and alter every kind of unsat-

isfactory behavior or mood with drugs. But where do we draw the boundaries between therapy and enhancement? How do we think about these questions?

Carl Sagan was right: "We live in a society exquisitely dependent on science and technology, in which hardly anyone knows anything about science and technology. This is a clear prescription for disaster."¹ We not only need to know about science and technology, we also need to know *how* it may affect us, and whether to use it.

An entire class of human beings—the most dependent and therefore vulnerable—was excluded from constitutional protection by fiat of seven Supreme Court justices.

These are the concerns of bioethics. An interdisciplinary study, bioethics draws on insights from theology, philosophy, law, medicine, life sciences, engineering, and public policy, to help us make ethical decisions about using these innovations. It is not just for the experts; these matters concern all of us. Each of us will make at least one bioethical decision in our lifetime. It could be a decision about kidney dialysis for an elderly parent, prenatal testing for a pregnant woman over thirty, Ritalin for a hyperactive child, or stem cell therapy for heart disease. These decisions are often made under stress. We must be ready to ask ourselves: Are we ready to address the challenges of genetic testing and privacy, gene modifications that could eliminate Down syndrome, synthetic biology (cells manufactured in the lab), or brain mapping and religious belief?

I suggest that it is the responsibility of the church and individual Christians to approach these matters from a biblical-theological perspective, grounded in a commitment to human dignity and human flourishing—dignity, because we are created in the image of God, and flourishing, because we are created in relationship. These challenges can overwhelm. One place to begin is to understand the two primary questions of bioethics.



cially the poor and marginalized. Our demand for the latest technology attracts human innovation, ideas, and ingenuity that might be better spent designing creative solutions for urgent issues of basic health.

Now, for three helpful attitudes. *One is gratitude.* Are we grateful for the human body? To give just one example: one reason the heart keeps on beating is because the muscle is packed with mitochondria, the powerhouses of the cell. Heart muscle cells have thirty times more mitochondria than leg muscles. We can be thankful that God perfectly tailored our bodies.

Another attitude is *contentment.* Contentment includes accepting the limitations of our bodies and our need for rest, exercise, and nutritious food. We are vulnerable to injury and disease,

and the irritations of aging. We may prefer a different body than the one we have, but we must ask ourselves if we are content with the design and the Designer?

Finally, we have *generosity.* A generous heart shifts our attention and affections from our own desires to the needs of others. It protects us against the thoughtless consumption of technology, medical and otherwise, leading us to regard others with genuine respect.

Bioethics Now

Bioethical issues can be organized around two primary questions. First, *what are the boundaries of human life at its beginning and at its end?* Second, *what does it mean to be human?* Most of us are familiar with the dilemmas posed by the first question: *Who counts as a human being? Who gets a seat at the table of the human family?* These are the Bioethics 1.0 issues of abortion, assisted suicide, embryonic stem cell research, and all technologies that take life.

But, over the past two decades new dilemmas have emerged: *How do we flourish as human beings in a technological age? Is it okay to want to be better than well?* These are the Bioethics 2.0 issues. They challenge us as we think about using technology for the purpose of enhancing our body's performance, or improving on its perceived defects.

Let me suggest three helpful questions, and three helpful attitudes, for thinking about how we flourish as human beings in the biotech century. First, is it necessary? Just because it's there doesn't mean we need it. New technologies do not always make our lives better. Doctors may order unnecessary medical tests because patients request them, and the physician feels they must do something, even when doing nothing might be just as effective.

Second, *who does it help? Who will benefit?* Does the technology help the sick and injured regain normal lives? Are they for the enhancement of a privileged few?

Finally, *who could it hurt?* We should be aware that our consumption of technologies may indirectly harm others, espe-

From Abortion to Reproductive Chaos

Bioethics 2.0 has not supplanted the traditional concerns of Bioethics 1.0. Although abortion and in vitro fertilization (IVF) have become commonplace, their ethical significance has not diminished. In the years since Roe, the national conversation has moved from "abortion rights" to the rigid codification of personal autonomy that excludes all other social considerations encompassing "reproductive choice." In a cultural whiplash, reproductive rights encompass both "sex without children" (contraception and abortion) and "children without sex" (assisted reproduction). Reflecting a transformation in our psyche, procreation was pushed aside by *reproduction.* Our children are now treated more like products and commodities (precious, to be sure) rather than gifts from our divine maker.²

The introduction of third party gamete donors and surrogates complicates marital relationships and parental bonding. Legal questions have multiplied. Is the embryo person or property, or an entity deserving special respect? How many parents (le-

gal, biological, genetic, social, or intended) can a child have? What about posthumous conception?

The moral status of the embryo continues to trouble culture and the church, weaving itself through decisions about artificial reproductive technology (ART), emergency contraception, prenatal testing, embryo stem cell research, and experimental cloning. Christians are participating in ART with little moral forethought. Is the church leading the way to moral clarity? Or, is it following the cultural currents wherever they lead? I have been asked about a church member who volunteered to be a surrogate for a young couple; a single Christian woman desiring artificial insemination; a couple intending to donate their IVF embryos for research; and young Christian women selling their eggs to pay for college tuition, oblivious to the physical risks and moral compromise. These are just a few of the alarms warning us to pay attention to science and technology, and consider their moral implications.

A Personal Conclusion

Bioethical questions can be maddeningly difficult. But, there are answers to bioethical questions, and they can be found. For Bioethics 1.0, the *boundaries of human life issues*, the analysis is fairly straightforward. If the organism is a member of the human species, then their life must be respected. For Bioethics 2.0 issues, ask: *Will they assist or inhibit my flourishing as a creature made in God's image?* If the medical technology is necessary, benefits a broad group rather than a select few, and does not hurt the excluded poor, it can be good. Check your motives about technologies that enhance or feed the appetite for perfection. And, in all things, be grateful, be content, and be generous.



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ENDNOTES

- 1 Carl Sagan, "Why We Need to Understand Science" Skeptical Inquirer Volume 14, No. 3 (Spring 1990). (accessed July 12, 2010 http://www.csicop.org/si/show/why_we_need_to_understand_science)
- 2 Cf. Oliver O'Donovan, *Begotten or Made: Human Procreation and Medical Technique* (New York: Oxford, 1984).



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An Update on Assisted Suicide and Euthanasia

BILL SAUNDERS, SR. VP OF LEGAL AFFAIRS AND SR. COUNSEL, AUL

The past year has seen many gains in the battle against legalizing assisted suicide. From Massachusetts to Georgia to Rhode Island, the past twelve months have witnessed more gains than losses in the effort to defend the terminally ill, the chronically sick, and the handicapped from the dangers of legalized euthanasia and assisted suicide.

The past year has seen some surprises, too.

Perhaps the biggest surprise has been the reluctance of the American judiciary to respond to the siren song for legalization. In fact, the last significant decision was issued several years ago—*Baxter v. State*, decided by the Montana Supreme Court in 2009.¹

Though the lower court in *Baxter* acknowledged that other state courts considering similar claims under similar constitutional “privacy” provisions had unanimously declined to recognize a right to assisted suicide,² the lower court nonetheless found a right to assisted suicide existed under the Montana state constitution. Why? Because of a combination, lacking in those other states, of a provision concerning privacy (“The right of individual privacy is essential”³) and *one* concerning dignity (“The dignity of the human being is inviolable.”⁴) The two “taken together” were decisive for the lower court.⁵

To the surprise of many, the Montana supreme court did not rule on the state constitutional question, citing the jurisprudential principle to “decline to rule on the constitutionality of a legislative act if we are able to decide the case without reaching constitutional questions.”⁶ Instead,

it rested its decision on another ground, holding that the “consent defense” to homicide “shields physicians from homicide liability if, with the patient’s consent, the physicians provide aid in dying...”⁷ The court opined that there was no indication that physician assisted suicide was against public policy in Montana and therefore no reason not to apply the consent defense.⁸

The effect of the decision was to leave open, perhaps for a subsequent case, whether the combination of the “dignity” and “privacy” provisions of the Montana constitution produces a constitutionally-based right to assisted suicide. In the meantime, anyone who wishes to stop assisted suicide in Montana must pass laws evidencing a public policy against assisting suicide (and, thus, the “consent” defense would not be available to a physician). Therefore, practically speaking, the effect

of the court’s decision was to bounce the matter to the legislature, which has yet to act.⁹

The reason I have spent some time reviewing this case, though it is from several years ago, is that it nicely illustrates both the threat posed by an activist judiciary (the lower court in *Baxter*) as well as the fact that the judiciary has not (yet) proved to be the reliable friend of the pro-assisted suicide forces.

Of course, the reason Montana—its courts and its legislature—may consider the question of legalizing assisted suicide/euthanasia is because, unlike with abortion, the United States Supreme Court resisted the temptation to “nationalize the issue” and to preempt state laws. In 1997, in *Washington v. Glucksberg*¹⁰ and *Vacco v. Quill*¹¹, the Supreme Court



held there was no right to assisted suicide under the national Constitution. Coming a scant five years after its decision upholding a national right to abortion in *Planned Parenthood v. Casey*,¹² in which the plurality relied upon a very broad definition of “liberty” for 14th Amendment purposes,¹³ the Court refused to use that definition to sanction assisted suicide as a constitutionally-protected liberty. “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected...”¹⁴

While such rights *did* include the right to refuse medical treatment,¹⁵ that was quite different from a right to assisted suicide. “[T]he decision to commit suicide may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.”¹⁶ The Court noted that, as a consequence, there was a “consistent and almost universal tradition that has long rejected the asserted right [to assisted suicide] and continues to explicitly reject it today...”¹⁷

The approach taken by the United States Supreme Court—that neither general principles of autonomy/dignity nor express guarantees of liberty/equality contain a right to assisted suicide—has been widely echoed in other jurisdictions. For instance, a recent case in the Irish High Court, *Fleming v. Ireland*,¹⁸ held that the constitution of Ireland—though it protects the “person” and recognizes “the dignity and freedom of the individual”—did not provide a right to assisted suicide. “Like Rehnquist C.J. in *Glucksberg*, the Court believes there is a real and defining difference between a competent adult patient making the decision not to continue medical treatment on the one hand—even if death is the natural, imminent, and foreseeable consequence of that decision—and the taking of *active steps by another* to bring about the end of that life of the other.”¹⁹ The former is protected (as it is in the U.S.), but not the latter.

The High Court, which also rejected the claim that a right to assisted suicide existed under the European Convention of Human Rights,²⁰ summed up the wide-spread judicial rejection of an implied right to assisted suicide as follows:

The reason Montana may consider the question of legalizing assisted suicide is because, unlike with abortion, the United States Supreme Court resisted the temptation to preempt state laws.

It will be seen, therefore, that the European Court of Human Rights has consistently taken the view that a ban on assisted suicide will always be justifiable...inasmuch as [nations of the Council of Europe] are entitled to think that such is necessary to prevent abuse and the exploitation of the vulnerable. But this survey of the contemporary case-law from other ju-

risdictions shows that the preponderance of judicial opinion in the U.S., Canada, the United Kingdom and the European Court of Human Rights has been to uphold a ban on assisted suicide for either precisely the same reason or substantially the same reasons as the ones which the Court has endeavoured to set out. Specifically, experience has shown that it would be all but impossible effectively to protect the lives of vulnerable persons and to guard against the risk of abuses were the law [against assisted suicide] to be [overturned by implying a right to assisted suicide under constitutional provisions].²¹

The effect of all these judicial decisions, including *Glucksberg* and *Vacco*, is to allow the people to decide, by referenda or through legislative action, whether assisted suicide or euthanasia should be legalized. In the U.S, of course, two states in the Northwest legalized assisted suicide, Oregon (1994) and Washington (2008). For several years, assisted suicide advocates called for “one more” state, predicting this would create a landslide in favor of such laws. Sadly, their wishes were partially granted when Vermont became the third state to legalize assisted suicide on May 20 of this year.²²

The remaining question is whether the rest of their wishes will be granted, i.e., will this start a landslide in favor of such laws? It will not if we are vigilant. For proof, we can look to the outcome of the referendum to legalize assisted suicide held in Massachusetts in November 2012. Six months before the vote, 68% *were in favor* (and only 19% were opposed). Nonetheless, forces opposed to legalizing assisted suicide worked very hard to get out information on the risks posed to vulnerable populations, the inevitable corruption of the medical profession, the irresistible slippery slope to involuntary euthanasia, and the fact that “death is not a treatment for depression.”²³ In the end, they defeated the bill 51 to 49%.

Of course, defeating a bad bill is no substitute for enacting a good one!²⁴ Bills legalizing assisted suicide respond to, or take advantage of, real issues and real fears. One of the most widespread fears is enduring untreatable agonizing pain. However, this fear is, thankfully, largely unfounded due to advances in palliative care. Along these lines, an encouraging development was the passage in July of a bill in Rhode Island to, among other things, “maximize the effectiveness of palliative care initiatives in the state by ensuring that comprehensive and accurate information and education about palliative care is available to the public, healthcare providers, and healthcare facilities.”²⁵ (AUL has a comprehensive model bill for palliative care education.²⁶)

Today, we can be grateful that courts everywhere have resisted the siren song of legalization of assisted suicide. But that leaves the job to us, as citizens in a democracy. The proponents of assisted suicide are relentless. We must continue to resist them and to respond to any unmet needs of the vulnerable. The consequences to society are too great if they should prevail.



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ENDNOTES

- 1 It should be noted that pro-assisted suicide advocates are relentless and are “creative” in advancing new legal theories. For example, in 2010, such advocates argued that a physician who provided “aid in dying” did not violate a state prohibition against “assisting suicide.” Though this sophistry was dismissed by the state superior court in *Blick v. Connecticut*, similar claims are likely to be made in future cases in other jurisdictions.
- 2 See (a) *Krischer v. Mciver*, 697 S. 2d 97 (Fla. 1997), (b) *Sampson v. State*, 31 P.3d 88 (Alaska 2001), (c) *Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 4 Cal. Rptr. 2d 59 (1992).
- 3 Montana Constitution article II, § 10.
- 4 Montana Constitution article II, § 4.
- 5 *Baxter v. State*, 2008 Mont Dist. LEXIS 482, at 16 (Mont. Dist. Ct. 2008).
- 6 *Baxter v. State*, 2009 MT 449, at page 10 (Mont. 2009).
- 7 *Id.* at page 12.
- 8 *Id.* at page 13.

- 9 The Georgia legislature is to be commended for responding, in 2012, to a similar ruling by the Georgia supreme court (finding absence of state public policy against assisted suicide) by passing a ban on assisted suicide. See, An Act that Prohibits Assisted Suicide, HB 1114 (2012).
- 10 521 U.S. 702 (1997).
- 11 521 U.S. 793 (1997).
- 12 505 U.S. 833 (1992).
- 13 “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at page 851.
- 14 *Washington v Glucksberg*, 521 U.S. at page 727.
- 15 *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).
- 16 *Washington v Glucksberg*, at page 725.
- 17 *Id.* at page 723.
- 18 Judgment [2013] IEHC 2 (10 January 2013).
- 19 See paragraph 53 (emphasis in original).
- 20 The Convention is a treaty binding the nations (currently, 47, including Ireland) constituting the Council of Europe.
- 21 The reader should be aware of a decision that dissents from this unanimity. The case is *Carter v. Canada*, [2012] BCSC 886, overturning a ban on assisted suicide under an implied right under the Canadian Charter of Rights & Freedoms. The decision, which is by a lower court, is on appeal to British Columbia Court of Appeal. It is subjected to respectful but comprehensive and devastating criticism by the Irish High Court, see, Fleming, paragraphs 88-105. The decision in *Carter* is troubling because the judge ignores the evidence of social harms that formed the backbone of judicial restraint—and deference to the legislature—in judgments from *Glucksberg* to *Fleming*.
- 22 Patient Choice and Control at End of Life Act, 18 V.S.A. ch. 113.
- 23 This is an important point since many studies show that those who request assisted suicide suffer from clinical depression that is undiagnosed and, thus, not treated. When it is treated, the requests decline to the vanishing point. See, e.g., Statement of Royal College of Psychiatrists on Physician Assisted Dying (2006).
- 24 AUL has a model bill that can be used in states which have weak or non-existent bans, the Assisted Suicide Ban Act, which is available at our web page: <http://www.aul.org/wp-content/uploads/2012/11/Assisted-Suicide-Ban-2013-LG.pdf>.
- 25 Rhode Island Palliative Care and Quality of Life Act, H 5204 (July 15, 2013). End of Life Act, 18 V.S.A. ch. I believe. tes are given for the legalization in other state.
- 26 Pain Medicine Education Act: <http://www.aul.org/wp-content/uploads/2012/11/Pain-Medicine-Education-Act-2013-LG.pdf>.



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Chemical Warfare: The Abortion Industry's Strategy for the 21st Century

SAMUEL B. CASEY, MANAGING DIRECTOR & GENERAL COUNSEL,
JUBILEE CAMPAIGN'S LAW OF LIFE PROJECT

From 1935 until 1982, America's oldest chemical company (founded in 1802 as a Delaware gunpowder mill), E.I. DuPont de Nemours & Company (known as "DuPont" today), sold America its growing list of chemical products using its Madison Avenue moniker: "Better Living through Chemistry." Sadly, as time has rolled on, we have also suffered "worse dying through chemistry."

Our chemical suffering has been most egregious when the pharmaceutical industry's drugs turn more deadly than therapeutic [e.g., thousands of deaths and complications leading to billion dollar settlements caused by the Glaxo's diabetes drug (Avandra) or Pfizer's painkiller (Bextra)], particularly when they are used "off-label" in ways not approved by the Federal Drug Administration (FDA). Even more appalling, we learned this past August that despite long-standing global treaties banning the use of such chemical weapons (to which Syria is not a signatory), deadly sarin gas (a key component of which may have been provided unwittingly by unknowing British companies) had been lethally used as an agent of chemical warfare in the Syrian civil war to kill nearly 1,500 civilians, including at least 426 children, outside of Damascus.

But the worst 'chemical warfare' against women and children in the world today is not being waged in Syria; it is being waged by the abortion industry. Led by Planned Parenthood, this warfare occurs with the complete complicity of the federal government which is now requiring with few exemptions that we all pay for this "worse dying through chemistry" with mandatory insurance premiums for abortifacient contraceptive and sterilization services, through Obamacare's so-called 'HHS Mandate.'

The HHS Mandate has provoked two national conversations. The first concerns religious freedom because the HHS Mandate provides no exceptions for most religious institutions, religious individuals, or private entities. Instead, it requires them to buy insurance for contraceptive, abortifacient or sterilization services which violate their conscience in contravention of their religious free exercise rights protected by our Constitution's First Amendment and the Religious Freedom Restoration Act. As more fully reported by CLS' Center Director, Kim Colby, in this edition of the *Christian Lawyer*, there are



robust legislative, judicial and grass roots responses underway, many involving CLS members dedicated to the protection of religious freedom.¹

The second debate concerns the centrality of "free" birth control and early abortifacients (e.g. RU-486, Elle, Plan B, and other morning and week(s) after pills) to the cause of women's freedom. In the words of American United for Life's Senior Counsel, Clark D. Forsythe, in his just published book, *ABUSE OF DISCRETION, THE INSIDE STORY OF ROE V. WADE*, this second debate holds the key to the future of *Roe v. Wade*, the landmark 1973 Supreme Court decision that, along with its companion case *Doe v. Bolton* decided that same day, effectively mandated abortion on demand throughout all nine months of pregnancy:

The key to the future of *Roe v. Wade* is not history or philosophy or personhood or fetal development or judicial nominations or presidential elections. The key to *Roe* is pragmatic results. The Justices in their 1992 decision in *Planned Parenthood v. Casey* called it the "reliance interests" of women. The Justices concluded that women have come to rely upon abortion as a backup for failed contraception for equal opportunity in American society. "Has *Roe* been good for women?" is the ultimate question for the future of *Roe*.

This second debate has been largely instigated by Planned Parenthood who convinced the current Executive Branch of government—likely for 2012 political/electioneering reasons—to announce that anyone opposing governmental programs and efforts towards the most widely available contraception and early abortion drugs was conducting a “War of Women.” In truth, according to a gathering storm of scientific and sociological studies, it is easy access to free birth control and the early abortion drugs offered by the abortion industry that make the lives of women, and indeed all society far worse, by severing human sexual relations from the fact of their originating new, vulnerable lives.

According to WOMEN SPEAK FOR THEMSELVES, a group marshaling the available evidence, the simplistic equation **more contraception + more abortion = women’s freedom**, so profitably marketed by the abortion industry every day as “reproductive health”, is simply not proved out by the available studies:

[M]assively available birth control and abortion have altered the sex, mating and marriage ‘markets’ so that the very problems everyone hopes they will solve –non-marital pregnancies and births, sexually transmitted infections, high abortion rates, and yes, poverty – have worsened, instead of improved. This happens as sexual intimacy becomes the normal price of relationship, while at the same time women are expected to ensure either that pregnancy does not occur or that if it does occur, they will resort to abortion.²

The most important legal battlegrounds for this second debate regarding women’s health are the state legislatures and, ultimately, the United States Supreme Court. In the state legislatures, like California, the abortion industry is arguing for further deregulation of abortion by removing the requirement that abortions, whether surgical or chemical, be performed or authorized by a doctor licensed to practice medicine. The abortion industry is doing so because fewer and fewer doctors are willing to do surgical abortions, and the costs of surgical abortion are rising as the public demands that the abortion industry’s sub-standard clinics either meet the same standards required for all other outpatient surgical facilities, or close

down. The abortion industry has chosen California because it is among the worst states in upholding any standards for abortion clinics. California is notorious for the four RU-486 deaths that occurred shortly after FDA approval of that chemical abortion regimen in 2000. This debacle occurred just after the California legislature changed the California abortion law to allow non-doctors to perform chemical abortions, thus giving proof to its lie (bought by the Justice Blackmun in his *Roe v. Wade* opinion) that abortion is best left to a private decision that can be only be safely made between a woman and her doctor. The truth is that the abortion industry invariably takes her

money and leaves the post-abortive woman alone in a decision for which she rarely has given her voluntary and truly informed consent.

On the other hand, in state legislatures, like Oklahoma, laws regulating the use of the chemical abortion pill regimen, RU-486, have been enacted to prevent the abortion industry’s dangerous off-label use of this two pill regimen that has proven so lethal and injurious to women, as occurred in California.³ When the Oklahoma Supreme Court summarily struck down Oklahoma’s law on the cursory ground without explanation that it violated the United States Supreme Court’s 1992 decision in *Planned Parenthood v. Casey*, the Court granted *certiorari* to review that decision,⁴ certifying the following question to be answered by the Oklahoma Supreme Court about Oklahoma’s law before it proceeds any further:

Whether H. B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies.

Whether H. B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies.

This past August, on behalf of a group of Oklahoma obstetrician-gynecologists who have treated Oklahoma women injured by the abortion industry’s off-label use of the RU-486 regimen, the Jubilee Campaign’s Law of Life Project (JCLLP) filed a ‘friend of the court’ brief advising the Oklahoma Supreme Court that the challenged law is a reasonable medical

In the state legislatures, like California, the abortion industry is arguing for further deregulation of abortion by removing the requirement that abortions, whether surgical or chemical, be performed or authorized by a doctor licensed to practice medicine.

regulation enacted to protect women's health by requiring that RU-486 be administered consistently with the protocol approved in 2000 by the FDA. The brief sets forth the substantial medical literature documenting why the abortion industry's off-label use of RU-486 poses significant well-documented health risks for women.⁵ Based upon the existing state of medical knowledge, the law is rationally related to the protection of a pregnant woman's health and neither bans the use of misoprostol nor restricts the use of methotrexate in the treatment of an ectopic pregnancy. Thus, the challenged statute does not on its face impose a substantial "undue burden" on a woman's access to abortion in violation of *Planned Parenthood v. Casey* since it neither bans the use of RU-486 as approved for use by the FDA, nor does it ban the use at any time of surgical abortion that is always safer than RU-486 to terminate a pregnancy. At least eight women have died from bacterial infections following an RU-486 medical abortion administered according to one of the off-label protocols, whereas no women have died from such infections following use of the FDA-approved protocol. Thus, the Oklahoma Legislature properly acted to address this serious health and safety problem by requiring that RU-486 and other abortion-inducing drugs be administered according to the FDA's prescribed protocol.

So it appears that the abortion industry, led by Planned Parenthood, is expecting that its strategy of chemical warfare against women and children will not only be endorsed by the federal government, and paid for directly or indirectly by the American taxpayers as "preventative health", but even protected by the United States Constitution.⁶ In response, we must endeavor to show that pregnancy is not a disease, and contraceptive and abortifacient chemistry is not health care. We must also marshal the facts and do whatever we can to expose the abortion industry for what it is – an agent of death and injury unworthy of constitutional protection, government funding or medical respect. Above all, we must show that a woman's freedom is best advanced by maintaining the bonds between herself and her children, not by severing those bonds and killing those children. When you think about it, our lives and culture ultimately depend on it.



Samuel B. Casey is the Managing Director & General Counsel for the Jubilee Campaign's Law of Life Project. For over 14 years before to that time, Mr. Casey served as the Christian Legal Society's Executive Director and Chief Executive Officer. Mr. Casey is well-known for his legal advocacy work

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defending the sanctity of human life before various state and federal courts and legislative bodies, including the United States Congress and United States Supreme Court.

ENDNOTES

- 1 For a listing of these legal activities see <http://www.becketfund.org/hhsinformationcentral/>.
- 2 See http://womenspeakforthemselves.com/docs/WSFTrisk_compensation_fact_sheet.pdf.
- 3 The chemical abortion regimen, often referred to as RU-486, was approved by the FDA in 2000. It has been used since then by close to two million American women, currently about 200,000 a year out of some 1.2 million abortions performed annually. The Oklahoma law doesn't ban the medical procedure. Rather, it requires doctors to follow the dosage and other instructions on the FDA label. The law is required because the abortion industry refuses to follow the FDA label insisting that it may change the dosage amounts, methods of ingestion, and extend the time after gestation the drug may be used beyond 49 days or less.
- 4 As JC-LOLP's United States Supreme Court BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI explains it:
"Mifeprex (also known as RU-486) was approved by the FDA for use under Subpart H, the accelerated approval regulations. See 21 C.F.R. §§ 314.500 to 314.560. Subpart H applies when the FDA concludes that a drug product shown to be effective

can be safely used only if distribution or use is restricted, such as to certain physicians with special skills or experience. ... Thus, the FDA explicitly recognized that the risks inherent in the Mifeprex Regimen for abortion are dependent on the conditions and circumstances under which the Regimen is used. The FDA concluded that the Mifeprex Regimen was safe enough to approve only on the condition that post-marketing restrictions applied, including adherence to the FDA protocol outlined in the Mifeprex label."

For a copy of this JC-LOLP brief filed in the United States Supreme Court on behalf of the thousands of doctors who are members of the American Association of Pro-Life Obstetricians and Gynecologists, the Christian Medical & Dental Association and the Catholic Medical Association, see <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/Cline-v.-Oklahoma-Coalition-etc.-Medical-Profession-USSC-Amici-Brief-Final-as-filed-4.8.13.pdf>.

- 5 For a copy of the friend of the court brief JC-LOLP filed on behalf of Oklahoma doctors in the Oklahoma Supreme Court, see: http://www.lawoflifeproject.org/sites/default/files/pdf/Cline_v_Oklahoma_Coalition_etc_Amicus_Curiae_Brief_of_Oklahoma_Doctors_per_Court_Order_As_filed_in_Okla_Supreme_Ct_82013.pdf.
- 6 As you can see by watching the following video on You Tube, produced by the Alliance Defending Freedom, Planned Parenthood's business plan for America is "pretty ugly" for everyone, except itself: <http://www.youtube.com/watch?v=LovY1eiallo>.

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There are successful, ethical alternatives to using human embryos as a source of stem cells for research and therapeutic purposes. One important source is umbilical cord blood—a very rich source of stem cells. Another is adult stem cells from various organs. Researchers have long known, for example, that bone marrow can form into blood cells. We now know that bone-marrow cells can form into fat, cartilage, and bone tissue. A third promising source is neural stem cells. These stem cells have been successfully isolated and cultured from living human neural tissue and even from adult cadavers. Moreover, research breakthroughs since 2007 are opening the door for the reprogramming of adult stem cells into the embryonic stem-cell state—without the use or destruction of human embryos.

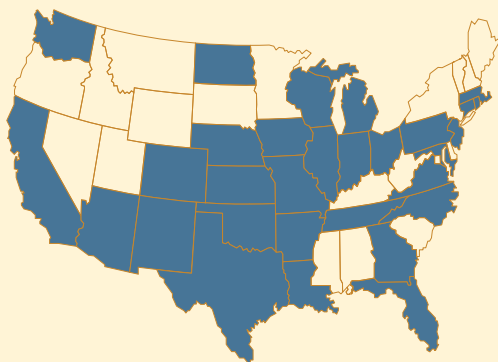
Scientific research utilizing adult stem cells has yielded peer-reviewed, published evidence for treatments or cures for over 70 conditions or diseases. Thus, the future of human cures is not in destroying some humans to treat others. It is in ethical treatments that treat all human life with dignity and respect. However, proponents of embryonic stem-cell research have purposely created a false impression that embryonic stem cells have a proven therapeutic use, when they have, in reality, never helped a single human patient.

In addition to the facts that 1) obtaining embryonic stem cells destroys the subject human embryo, and 2) embryonic stem-

cell research has never helped a human patient, such research is also immoral because the only way to obtain the human eggs necessary to create embryos is to exploit women. Women between the ages of 18 and 25 typically produce the healthiest and most scientifically useful efficient eggs and are highly sought after as egg “donors.” A woman normally only produces one or two eggs per reproductive cycle. To obtain enough eggs for research, a woman must take drugs that will cause her to super-ovulate, releasing 10-15 eggs at a time, and undergo an invasive surgical procedure in order to retrieve them. It is simply not possible to obtain enough eggs from willing women to adequately pursue this research or treat possible diseases that may come from any breakthroughs using embryonic stem cells. Moreover, egg harvesting carries risks; it requires preliminary hormone treatment that is accompanied by an increased risk of certain cancers and complications in future pregnancies.³ Putting women’s health and fertility—and perhaps even their lives—at stake for their eggs is nothing short of exploitation.

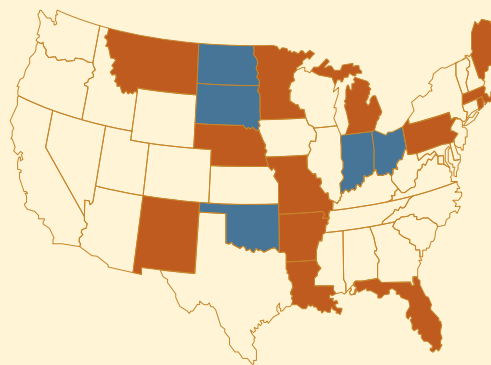
The U.S. Supreme Court has never ruled on the legal status of a human embryo outside of the mother’s womb. In August 2001, President George W. Bush announced that federal funding would be allowed only for research on then-existing embryonic stem-cell lines. Later, in March 2009, President Barack Obama signed an Executive Order reversing that policy. President Obama’s decision to fund such destructive research—which

Ethical alternatives to Human Cloning Research



At least TWENTY NINE states promote or encourage the use of umbilical cord cells and/or other forms of adult stem cells for research: AZ, AR, CA, CO, CT, FL, GA, IL, IN, KS, LA, MD, MA, MI, MO, NE, NJ, NM, NC, ND, OH, OK, PA, RI, TN, TX, VA, WA, and WI.

Other Restrictions on Cloning and Stem Cell Research



At least nineteen states prohibit fetal experimentation to varying degrees:

- At least FIVE STATES prohibit experimentation on aborted fetuses: IN, ND, OH, OK, and SD.
- At least FOURTEEN STATES prohibit experimentation only on live and/or aborted viable fetuses: AR, FL, KY, LA, ME, MA, MI, MN, MO, MT, NE, NM, PA, and RI.

runs counter to federal law under the Dickey-Weber amendment that prohibits research that will harm an embryo— was immediately challenged in federal court. Unfortunately, a district and appellate court have upheld the funding. The U.S. Supreme Court has been asked to review the case.

At this point, the best strategy is for states to institute protective measures. Currently, at least seven states either expressly or impliedly ban destructive embryo research on embryos created through in vitro fertilization (IVF) or by cloning, and at least 19 states ban fetal experimentation to varying degrees. In addition to these direct bans on research, at least six states restrict funding or the use of state facilities or tax credits for destructive embryo research, and at least 29 states have passed legislation encouraging the use of adult stem cells or umbilical cord blood and/or the donation of umbilical cord blood.

AUL has drafted several models to help states curb ineffective, unethical research, and to promote proven, ethical research. These models include the “Destructive Embryo Research Act,” banning destructive embryo research; a “Prohibition on Public Funding of Human Cloning and Destructive Embryo Research Act”; an “Egg Donor Protection Act,” focused on preventing the exploitation of women; and a “Real Hope for Patients Act,” focused on promoting and funding ethical research alternatives.

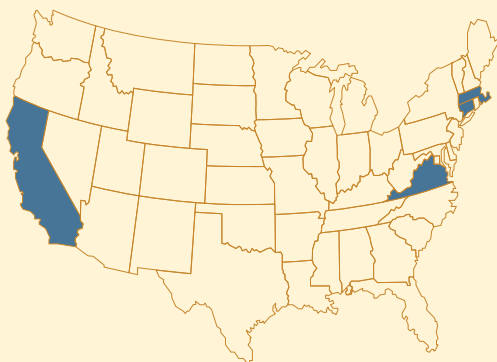
Human Cloning

One of the inherent problems in using embryonic stem cells in therapies is the problem of transplantation. If a transplanted cell’s DNA is even somewhat different from the DNA of the person being treated, the body usually sees those cells as invaders and kills them off—much like what happens when whole-organ transplants are rejected because of the recipient’s immune system response. Without the use of drugs to suppress the patient’s immune system, transplanted tissue generally survives only a few hours or days.

The differing justifications that one clone is destined to be destroyed for its stem cells and the other for implantation in a womb do not—and cannot—change the basic scientific fact that the cloned human embryos created for therapeutic or reproductive purposes are human beings.

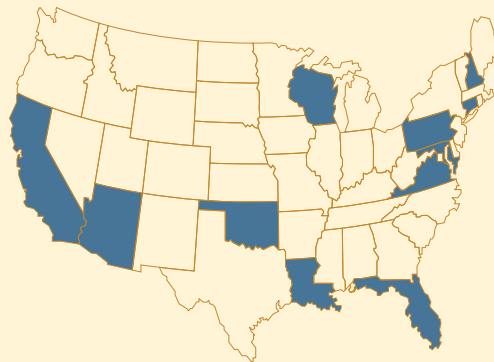
To overcome this inherent problem, scientists began pursuing human cloning as a method for obtaining genetically-compatible cells for transplantation. Human cloning is the process through which a human egg is taken from a woman, the nucleus is removed, and then it is replaced with a nucleus from a patient’s body cell. Using electrical shock or “chemical bath,” the egg is tricked into believing it has been fertilized, and it begins to divide, thereby becoming a human embryo.

Informed Consent for ART



■ At least **FOUR STATES** require some level of informed consent before a patient undergoes assisted reproductive technologies: CA, CT, MA, and VA.

ART Regulations



■ At least **ELEVEN STATES** regulate the provision of assisted reproductive technologies, to varying degrees: AZ, CA, CT, FL, LA, MD, NH, OK, PA, WI, and VA.

A general misconception exists that there are two types of human cloning : “therapeutic” cloning (or “cloning-for-biomedical-research”) and “reproductive” cloning (or “cloning-to-produce-children”). However, in both situations, the clones are created from the same procedure. These designations are simply descriptions of the two different rationales or purposes offered for the clones created from the same procedure, known medically as “somatic cell nuclear transfer,” or human cloning.

Both rationales are morally wrong because both scientifically begin with the creation of a cloned human being at the embryonic stage of life. The differing justifications that one clone is destined to be destroyed for its stem cells and the other for implantation in a womb do not—and cannot— change the basic scientific fact that the cloned human embryos created for therapeutic or reproductive purposes are human beings. For this reason and others, comprehensive bans on human cloning should be enacted in the 50 states and by the U.S. Congress.

Currently, no federal law bans human cloning for any purpose, and the U.S. Supreme Court has not yet spoken on the subject. However, eight states ban human cloning for any purpose, while ten states ban only cloning-to-produce-children.

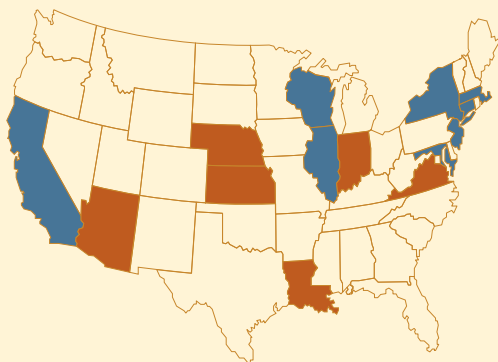
AUL has drafted a “Human Cloning Prohibition Act” to assist states seeking to ban human cloning for all In 2004, the Presi-

dent’s Council on Bioethics issued a report, *Reproduction & Responsibility*, outlining the lack of regulation of ART. As the Council’s report points out, “[t]here is only one federal statute that aims at the regulation of assisted reproduction: the

‘Fertility Clinic Success Rate and Certification Act of 1992’ (sometimes called the ‘Wyden Act’),” and it only serves two purposes: 1) providing consumers with information about the effectiveness of ART services, and 2) providing states with a model certification process for embryo laboratories.”⁴ Additionally, the “Clinic Laboratory Improvement Amendments of 1988” (CLIA) govern quality assurance and control in clinical laboratories including those involved in ART, and the U.S. Centers for Disease Control and Prevention (CDC) has announced a new national ART Surveillance System. These regulations pale in comparison to those in place in Great Britain, Germany, Sweden, Switzerland, and many other European nations, where, for example, the number of embryos created and/or transferred per reproductive cycle is limited by law.

The Council’s March 2004 report further confirmed that ART is little regulated by the states. In fact, as the report noted, “[t]he vast majority of state statutes directly concerned with assisted reproduction ... are concerned mostly with the question of access to such purposes. And as previously mentioned, we have also services.”

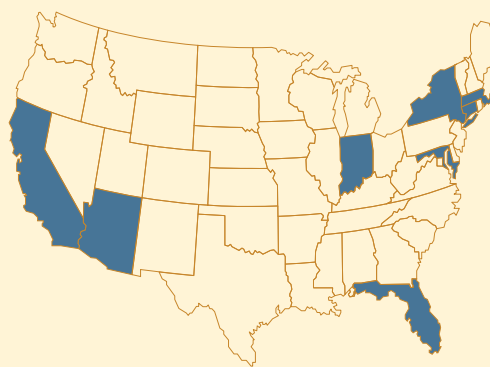
Funding of Cloning and Stem Cell Research



At least EIGHT STATES use or statutorily allow the use of state tax dollars to fund human cloning and/or destructive human embryo research: CA, CT, IL, MD, MA, NJ, NY, and WI.

At least SIX STATES restrict the funding or use of state facilities or tax credits for human cloning and/or destructive human embryo research: AZ, IN, KS, LA, NE, and VA.

Egg Harvesting



At least EIGHT STATES have laws or regulations related to the purchase, donation, transfer, solicitation, and/or harvesting of human eggs: AZ, CA, CT, FL, IN, MD, MA, and NY.

For example, numerous states only address drafted a model bill prohibiting the public funding of such unethical research and another preventing the exploitation of women providing human eggs.

Assisted Reproductive Technologies (ART)

In vitro fertilization (IVF) is the fertilization of a human egg by a human sperm outside a woman’s body, in a laboratory. The term “assisted reproductive technology” (ART) encompasses both IVF as well as newer forms of ART. Despite the increasingly widespread use of these reproductive technologies, there is a lack of commonsense regulation of these procedures at both the federal and state levels. This lack of regulation has resulted in the storage of more than an estimated 600,000 cryopreserved (frozen) human embryos in laboratories across the United States.

Responsible state and federal regulation is necessary for several reasons:

- Assisted reproductive technologies, primarily IVF, are the “gateway” to all future genetic engineering. The current lack of regulation promotes the creation and destruction of excess embryos and, without an adequate response, promotes conditions conducive for human cloning and other immoral experimentation on human life in its earliest forms.

- The health of women undergoing IVF, who are often injected with hormones that may cause cancer and other diseases, may be compromised, and subsequently-born children may suffer birth defects or other complications from the procedures.⁶

There are increasing numbers of multiple births (with associated health and safety concerns), as well as the use of so-called selective reductions (i.e., abortions) of unborn children.⁷

AUL has drafted model legislation, entitled the “Assisted Reproductive Technology Disclosure and Risk Reduction Act,” aimed at ensuring truly informed consent by couples undergoing ART processes as well as regulating the number of embryos that can be created and transferred in a single reproductive cycle.

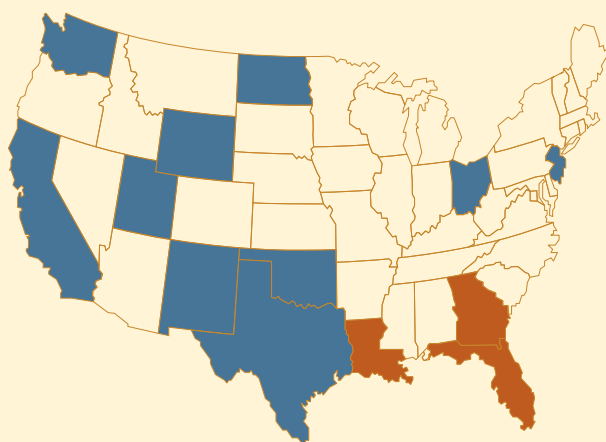
Embryo Adoption

The lack of ART regulation has left hundreds of thousands of embryos frozen in time. But through embryo adoption, couples can adopt so-called “leftover” embryos from other couples who have already undergone IVF. This process represents an emerging alternative to the traditional options left to IVF parents: indefinite cryopreservation, donation to anonymous persons, or donation for research (and ultimately, destruction).

Not only does embryo adoption allow parents to choose an alternative other than destruction for research, but it also offers a more attractive option than donation. When the embryos are donated to other couples, as opposed to adopted by them, the process is anonymous and the placement is usually determined by the fertility clinic’s physician. Receiving couples usually undergo only basic medical screening and psychological counseling.

When embryos are adopted, on the other hand, the process is typically much more open. The adopting family will likely have access to the child’s history, a potential match for future organ donation, and the possibility of a relation-

Laws Related to Embryo donation and adoption



■ At least TEN STATES provide varying levels of guidance for embryo donation: CA, NJ, NM, ND, OH, OK, TX, UT, WA, and WY.

■ At least THREE STATES provide varying levels of guidance for embryo donation and allow for embryo adoption: FL, GA, and LA.

ship with the placing family. Programs such as the Snowflake Embryo Adoption Program require adopting couples to undergo extensive screening, such as fingerprinting, background checks, home studies, infant CPR, and parenting classes. Placing-families and adoptive-families prepare informational portfolios about themselves—dossiers including everything from photographs to information regarding religious backgrounds. Like birth mothers, genetic parents use this information to choose adoptive parents to bear and raise their embryos.

Currently, however, embryos are usually stranded in a sort of legal nowhere-land. Many courts are reluctant to classify embryos as property, but they also do not characterize them as human beings. Laws regarding embryo donation and adoption are, at best, unsettled. There are no federal laws which specifically address these issues, but at least 13 states provide varying levels of guidance for embryo donation and/or embryo adoption.

AUL has crafted a model bill, entitled the “Embryo Adoption Act,” for states interested in explicitly allowing for a court order of adoption for frozen embryos.

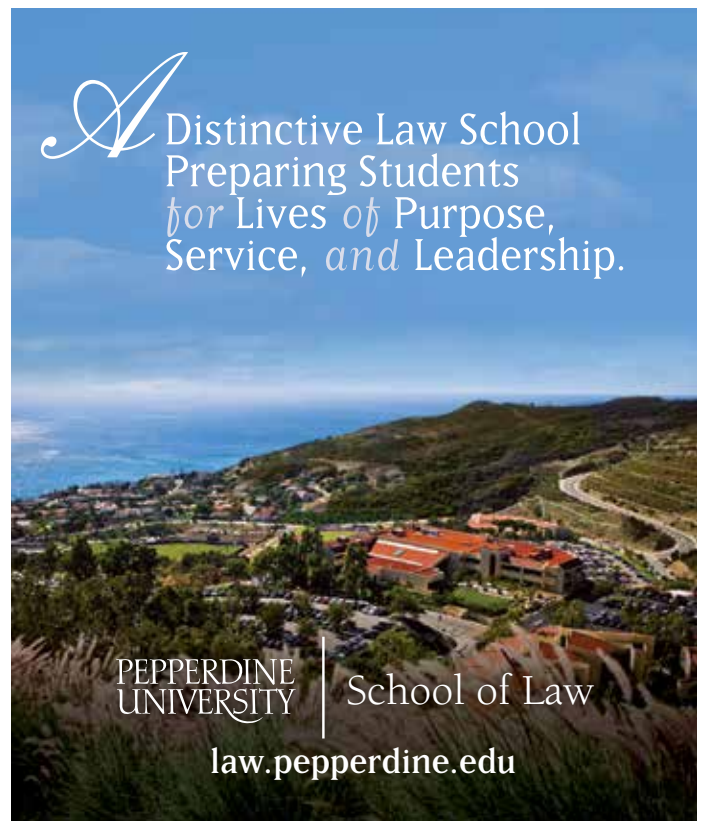
Genetic Testing and Discrimination

Genetic testing is currently available for 1,200 diseases, and tests for hundreds of others are being developed.⁸

But, as with other areas of biotechnological success, ethical questions have arisen with the advancement of genetic testing. For example, can health insurance companies use the results of genetic testing in granting or denying coverage? Or can employers screen the genetic information of potential employees before making hiring or promotion decisions?

Denying health insurance coverage on the basis of genetic disease is not new. In the 1970s, some insurance companies denied coverage or charged higher premiums to African Americans who carried the sickle cell anemia gene. More recently, young children were denied health insurance because they carried a recessive genetic disease. In another example, the health insurance coverage of a young boy with Fragile X Syndrome (an inherited form of mental retardation) was dropped; the company claimed the syndrome was a pre-existing condition. On the employment front, workers for Burlington Northern Santa Fe Railroad were tested for genetic predisposition to carpal tunnel syndrome.

In 2008, Congress took an initial step toward protecting patients against such discrimination by passing the “Genetic Information Nondiscrimination Act” (GINA).⁹ GINA prohibits



employers and health insurers from discriminating against persons on the basis of their genetic information.

This is only an initial step. GINA only protects against discrimination by employers and health insurers—it does not prohibit discrimination by life, disability, or long-term care insurers. The issue of coverage remains alive even under the Affordable Care Act (“ACA” or “Obamacare”), as GINA is limited to only certain insurers and it remains to be seen how Obamacare is implemented in the states. Further, no current federal law or U.S. Supreme Court precedent addresses the issue of prenatal testing and the proper use of the results of genetic testing performed on the unborn. Therefore, it is up to the states to ensure that their citizens are not discriminated against by health, life, disability, and long-term care insurers.

Some states already address prenatal testing in one way or another—either by affirming life or by encouraging abortion (whether intentionally or not). While most states and the District of Columbia encourage life by prohibiting discrimination by insurance companies, some states effectively encourage the abortion of children with birth defects through the use of prenatal testing. For example, the California Department of Health maintains a “Prenatal Screening Branch” that is “focused on detecting birth defects during pregnancy” and identifying “individuals who are at increased risk of carrying a fetus” with a birth defect.¹⁰

Myths and Facts

MYTH: Embryonic stem-cell researchers are close to finding cures for a host of terrible diseases, like cancer, diabetes, and neurological disorders such as Parkinson's.

FACT: Embryonic stem cells are unable to cure anyone of anything. In fact, the first company to receive government approval for human clinical trials using human embryonic stem cells—Geron Corp.—announced in 2011 that it was discontinuing “further development of its stem programs.”¹⁵ Instead, use of the cells in humans can do great harm (for example, use of embryonic stem cells has led to tumor formation in some animal experiments). Adult stem-cell research is helping cure or treat more than 70 diseases, with more work being prepared for or currently in clinical trials.

MYTH: Embryonic stem-cell research, including the destruction of embryos for their parts, is morally and ethically acceptable.

FACT: Even if breakthroughs using embryonic stem cells do occur, it is still unethical to destroy human embryos for their “parts.” Regardless of the perceived or real benefit of

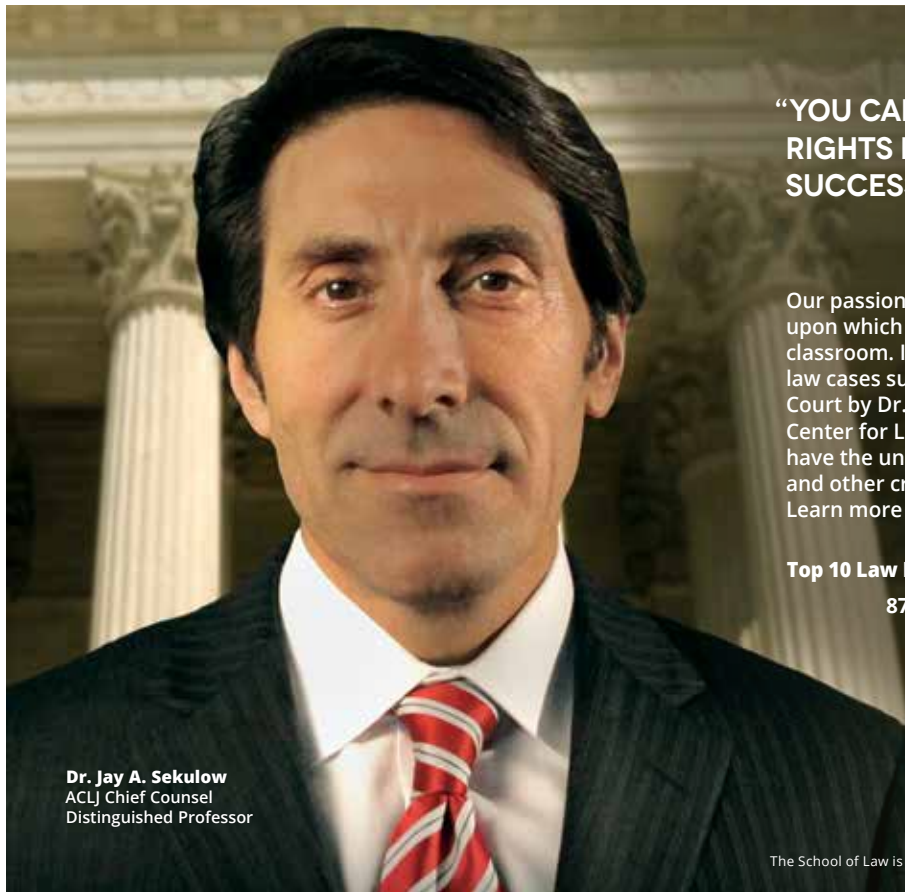
destroying human embryos, there is no ethical justification for destroying nascent human life regardless of its origins. It is never right to intentionally develop and kill innocent human life to save another's life, especially in such a systematic manner.

MYTH: Cloned human embryos are not really human.

FACT: This would mean that Dolly, the first mammal clone ever, was not a sheep, despite the fact she was created using a sheep egg and sheep DNA and after birth looked and acted like a sheep. If cloned human embryos are not human, then what are they? The only logical answer is that a cloned human embryo is fully human.

MYTH: We do not owe a “right to life” to cloned embryos. They are an unnatural aberration.

FACT: Regardless of the ethical issues surrounding the creation of human clones or why a clone was created, if created, it should not be forbidden to live. Laws against creating cloned embryos should not require the clone's destruction.




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MYTH: A ban on destructive human embryo research or human cloning will stifle scientific research or economic development.

FACT: Few companies even do this research, in part because there are no foreseeable cures that will recoup the money needed for investment. And if embryonic stem-cell research does not produce cures, companies may not survive long enough to produce any benefit.

MYTH: Embryos left over from in vitro fertilization (IVF) procedures are just going to die anyway. We should get some benefit from them.

FACT: That is unpersuasive—every human being (embryo or adult) eventually dies; that does not mean we can kill it. Further, it is not necessarily the case that embryos “left over” from IVF procedures will be destroyed. Some parents change their mind and decide to implant the embryos to give them a chance at survival. Increasingly, infertile couples are adopting embryos that would otherwise be destroyed or languish in cryopreservation.

MYTH: You cannot compare a clump of cells smaller than the tip of pencil to an existing human being who is suffering and may die without this research.

FACT: It is not your size or location that gives you value and dignity; rather it is your status as a member of the human race. Every human being, whether as small as the tip of a pencil or as large as a sumo wrestler, deserves the protections accorded to all other human beings. If we decide that some members of the human race should not receive those protections, then we are all at risk if the rich, powerful, or a simple majority decides some of us are no longer worthy of life.

MYTH: Adult stem cells are not as capable as embryonic stem cells.

FACT: While it is generally agreed that embryonic stem cells are more flexible in becoming different tissue types than adult stem cells, the idea that adult cells are not as capable as embryonic cells for use in treatments is pure speculation. Currently, adult cells are much more capable of treating human beings than embryonic cells, which have yet to cure a single disease.

MYTH: Promoting embryo adoption will limit the availability of embryos for research and will, therefore, prevent us from discovering important cures for debilitating diseases.

FACT: The vast majority of embryos in storage are reserved for the genetic parents’ possible future use (i.e., if they decide to give birth to another child). Encouraging embryo adoption will simply lessen the number of embryos that remain indefinitely suspended in frozen storage, and further allow loving families with fertility problems to bear and raise children.

MYTH: Now that the federal government has passed GINA, patients are fully protected.

FACT: GINA does not cover everyone. For example, GINA does not cover members of the military. In addition, GINA only applies to employers and health insurers. It does not prohibit discrimination by life, disability, or long-term care insurers. Furthermore, GINA is only a minimum standard of protection that must be met in all states. States are free to pass laws providing more restrictions on the use of genetic information by insurers and others.

MYTH: Americans who possess certain genetic traits are already protected under the “Americans with Disabilities Act” (ADA).

FACT: While it is true that the ADA prohibits employers from discriminating against disabled persons who are capable of performing their duties with reasonable accommodation, and the Equal Employment Opportunities Commission (EEOC) has stated that healthy persons with genetic predispositions to a disease fall within the scope of the ADA, this carries no weight with insurance companies, who are not held accountable to the EEOC in their decisions of who and who not to insure. Thus, GINA and state laws are necessary to protect individuals from such discrimination on the part of insurance companies.

MYTH: My state adequately protects me against genetic discrimination.

FACT: While the majority of states and the District of Columbia prohibit discrimination in health insurance policies based upon genetic testing, the extent of the protection differs. For example, some states specifically prohibit health insurers from requiring testing, while others allow health insurers to consider the results of tests only if the patients voluntarily submit favorable results. On the other hand, some states actually encourage genetic testing or allow discrimination in certain types of health insurance policies. Thus, states are encouraged to enact further restrictions limiting the use of genetic information by all insurance companies.



Mailee R. Smith is Staff Counsel for Americans United for Life. Among her many responsibilities at AUL, Smith provides legislative consultation on the constitutionality of bills related to abortion, including informed consent, ultrasound requirements, abortion bans, fetal pain information, and Mifeprex (RU-486) regulation. Mailee's legal expertise also extends to bioethics, such as bans or regulation of destructive embryo research, human cloning, and human egg harvesting.

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ENDNOTES

- 1 M.J. Schlambott et. al., *Derivation of pluripotent stem cells from cultured human primordial germ cells*, Proc. Nat'l Acad. Sci. USA 95:23, 13726-731 (1998).
- 2 See M.J. Evans & M.H. Kaufman, *Establishment in culture of pluripotent cells from mouse embryos*, Nature 292, 154-56 (1981).
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- 6 See, e.g., The President's Council on Bioethics, *Reproduction & Responsibility: The Regulation of New Biotechnologies* 37-43 (2004).
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- 12 Id.
- 13 National Human Genome Research Institute, *Frequently Asked Questions About Genetic Testing* (updated Feb. 18, 2012), available at <http://www.genome.gov/19516567> (last visited Aug. 8, 2012).
- 14 National Human Genome Research Institute, *Genetic Information Nondiscrimination Act of 2008*, *supra*.
- 15 See Geron Corp., *Geron to Focus on its Novel Cancer Programs* (Nov. 14, 2011), available at <http://ir.geron.com/phoenix.zhtml?c=67323&p=irol-newsArticle&ID=1635764&highlight=> (last visited Dec. 3, 2012).

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The Equal Humanity of the Human Embryo

BY MARTIN PALMER

Dr. Jerome Lejeune of Paris, France, has been called the “father of modern genetics.” He would often say that geneticists and scientists did not need to speak so complicated really; that they could say it much more simply. He demonstrated his ability to do so when he said: **“In the beginning, there is a message, and this message is life and this message is in life. And if this message is a human message, this life is a human life.”** He added: “And that is all of genetics. And it is also the beginning of a very old book, the gospel according to St. John: ‘In the beginning was the Word...,’ and it is very comforting to we scientists that it took us only 2,000 years to discover what was there all along, ‘In the beginning was the Logos.’”

Dr. Lejeune explained “There is no such thing as living matter, but rather Spirit animates matter.”

Speaking of the human embryo, he said: “It is a being, and being human, it is a human being. It is person and not property because it is the only property which has the property of building itself.”

Called to testify in the now world-known “Tennessee frozen human embryo case,” he explained that there is more information, perfectly organized, in the newly conceived human embryo immediately following fertilization than would fit in one million NASA computers. Everything necessary to build the new human being we will later call Mary or Peter or Paul is present in the very beginning. Nothing is added. If we could but see it, the human embryo figuratively glows with a white-hot incandescence, having just been released from the fingertip of God.

All presidential administrations from President Carter on had resolutely stood against beginning human embryo experimentation until the Clinton administration when it was proposed by that administration to begin it. The International Foundation for Genetic Research wanted to file suit to stand against this denatured biology but were not able to afford the legal costs of going into court. They approached me, and I took the case pro bono, and we succeeded in holding human embryo experimentation at bay until President Bush took office and stood against the killing of any new human embryos for experimentation. No person on the planet has benefited from human embryo stem cell experimentation. The hope lies with adult stem cell experimentation, which does not require killing the donor to extract the stem cells.



Dr. Jerome Lejeune

The Obama administration has now picked up where the Clinton administration left off and is of a mindset to go forward with the denatured biology of human embryo stem cell experimentation on a mass scale, which involves the vivisection and killing of innumerable living human embryos. There is a need to again move in the courts to enjoin it.

When Dr. Lejeune was called to testify in the Circuit Court for Blount County, Tennessee, in August of 1989, he purchased his own airline ticket to fly from Paris, France, to Tennessee, telling the judge: “Your Honor, this is the judgment of Solomon. It is a three-thousand-year-old judgment. I did not think it could reoccur in human history, but it is reoccurring, and if it reoccurs in your lifetime, it is worth the trip.”

The case was on the front page of USA Today and the nation’s papers at the time. A couple by the name of Mary and Junior Davis were getting divorced in Tennessee. A beautiful young woman, Mary was a model for the boat show in Knoxville, Tennessee. Junior Davis, her husband, was a handsome young man. They had

been married for 10 years and had not been able to conceive a child. They had undergone in vitro fertilization, which produced nine human embryos, two of which were implanted in Mary and seven of which were stored in the deep freeze of cryopreservation. The first two failed to produce a pregnancy for Mary. Before she could return to implant two additional embryos, Junior Davis completely surprised her by filing for divorce and at the same time seeking and obtaining a temporary injunction preventing her from implanting anymore of their embryos. He said he did not want to be made to be a father against his will. Mary said: "He already is a father." Junior responded: "Nonsense! They are only potential life." Mary responded: "They are lives with potential."

Reading about the case for the first time on the front page of the Sunday Philadelphia Inquirer while on vacation with my wife and children along the Atlantic seaboard, I telephoned attorney Jay Christenberry, whose name I learned from the newspaper account, introduced myself and told him that the best possible expert witness available to him in the world would be Dr. Jerome Lejeune (he received from President Kennedy's own hand our nation's highest award for isolating the X-21 chromosome responsible for Down's Syndrome). Mary's attorney asked if I thought Dr. Lejeune would come from Paris to Tennessee to testify in Mary's case because if so he thought the judge would delay the case a day for him to get there. I telephoned Dr. Lejeune in Paris. He agreed. I met Dr. Lejeune's flight at Dulles International Airport in Washington, and the two of us continued on a local United Airlines flight to Knoxville. Dr. Lejeune's question to me as we took our seats on the plane was: "What is it that the Tennessee judge must decide?" I said: "Well, essentially he must decide if these seven human embryos are person or property. If property, he would divide them like the silverware or the furniture in a divorce. If person, he would enter up a custody order." Dr. Lejeune thought pensively for just a moment, and then I shall never forget his reply as he turned to me and said: "I would say the human embryo is a being, and being human, it is a human being; it is person and not property because it is the only property which has the property of building itself."

At his own expense, Professor Brabner-Smith had copies of the testimony printed and distributed at no cost to each and every member of the Christian Legal Society that year. Many said that Dr. Lejeune painted "a symphony of life."

The late Professor John W. Brabner-Smith, founder of the International School of Law in Washington, DC (now the George Mason University Law School), called Dr. Lejeune's testimony in the Tennessee frozen human embryo case: "The greatest testimony ever given in any court, any time, anywhere;" quite a statement coming from Professor Brabner-Smith, who was not given to hyperbole. At his own expense, Professor Brabner-Smith had copies of the testimony printed and distributed at no cost to each and every member of the Christian Legal Society that year. Many said that Dr.

Lejeune painted "a symphony of life." Those wishing to peruse it and view it in its entirety may find it by going to our website for the National Association for the Advancement of Preborn Children at www.naapc.org; click on the Request Materials tab, and near the bottom of that page, the book *Symphony of the Preborn Child* is available for download and/or printing.

Following Dr. Lejeune's testimony in that Tennessee courtroom in August of 1989 before Judge Young, he was asked to be a keynote speaker at the International Congress on the Family held in Brighton, England, the following year. There had been great interest in his testimony in the Tennessee case throughout Europe, and he had been asked to speak in many cities throughout Europe. Addressing an assembled gathering of 16,000 at that meeting, I shall never forget a statement he made. He said: "I was asked to testify for Mary of Maryville, Tennessee, for the seven hopes of Mary. And the lawyer who represented Mary, his name was 'Christenberry.' And the judge who was for the first time in history to pronounce the judgment for the very young, his name was 'Judge Young,' and my name in French, 'Lejeune,' it means the same, 'the young.' Sometimes truth ventures coincidences that science fiction would not dare!!!"



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The Danger Of “Maybe”

BY ZACHARY R. CORMIER

Are The Unborn “Human Life”?

“Maybe” is a profoundly dangerous proposition. This is because “maybe” is not the unknown, at least not in the strict sense. Rather, “maybe” is better described as the knowledge of some relevant likelihood that exists within the unknown, which inevitably fills, colors, and defines that unknown. “Maybe” is risk – a risk that sets the stakes and demands appropriate action.

It may be surprising to some that are unfamiliar with the intricacies of *Roe v. Wade*¹ and *Planned Parenthood v. Casey*² that the Supreme Court’s entire abortion jurisprudence has been built upon perhaps the weightiest “maybe” in legal history.

Justice Blackmun’s chronological presentation of the issues in *Roe v. Wade* is somewhat misleading to the reader. Substantively, the privacy right of the expecting mother within the abortion context was not the most fundamental determination before the Court.³ Rather, the *Roe* Court first had to determine whether the characteristics of the unborn either required or justified protection by the state regardless of privacy.⁴

The *Roe* Court definitively ruled that the unborn was not a “person” in the legal sense of the term as contemplated by the Fourteenth Amendment’s Due Process Clause since the Constitution used that term in other instances to refer to those that had already been born.⁵ The Constitution therefore did not require protection of the unborn.⁶ But, this was not the end of the *Roe* Court’s fundamental inquiry, as the Court still had to determine if the state’s protection of the unborn was justified because the unborn was a “person” in the whole sense of that term.⁷ Was the state’s protection of the unborn from conception justified under its police powers because that is the point at which human life begins?⁸

At first, the *Roe* Court seemed to sidestep the question altogether by responding that it “need not determine the difficult question of when life begins.”⁹ The *Roe* Court explained that it was inappropriate for the Court to resolve this question given the widespread disagreement over the issue and the law’s historic hesitation to provide legal rights to the unborn.¹⁰

Despite this seemingly express declination, the Court did not in fact leave the question unresolved. The *Roe* Court decided to give some measured protection to the unborn by defining



the developing unborn as “potential human life” under the framework of the chronologically shifting interests between the expecting mother and the state.¹¹ What is “potential human life?” It is the Court’s resolution to the human life question – a maybe. The *Roe* Court did not determine that the unborn was human life; however it also did not conclude that the unborn was not human life. The unborn might be human life.

As such, the *Roe* Court did not in fact leave the human life question unresolved. Indeed, “maybe” is a very tangible answer. In this context, maybe was the recognition that there was a relevant likelihood that the unborn was human life. This likelihood fills, colors, and defines the Court’s unknown regarding the beginning of human life. Most importantly, this maybe established a profound risk regarding what the Court might allow to happen to such potential life.

The Court Mishandles The Risk Of Its “Maybe”-Based Resolution

Again, by the *Roe* Court’s own definition, the unborn is “potential human life” from conception through birth.¹² What does this mean? It means that an abortion at any point during this time period might be the killing of a human life. It further means that protecting an abortion decision anywhere along this scale would then be allowing the termination of what might be millions of human lives. The *Roe* Court’s own definition of the unborn defined and established this risk.

What does a court do with such a monumental risk? Given the inherent magnitude of the risk, the conservative approach would have been to either deny the right of abortion altogether and/or to at the very least send the question back to legislative bodies that can better analyze and manage such risk.

The *Roe* Court however ignored the established risk of its “maybe” answer. The substance of the *Roe* Court’s holding was that an expecting mother has the right to choose to have an abortion at any point before the unborn reaches the stage of “viability.”¹³ The *Roe* Court concluded that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” given the “detriment” (sacrifices) that the “State would impose upon the pregnant woman by denying this choice....”¹⁴ Essentially, the known “detriments” for the expecting mother outweighed the unborn’s “potential human life.”

To many this was actually the conservative approach given that the expecting mother’s interests were known, whereas the unborn’s hung on a maybe. Indeed, the expecting mother’s sacrifices in child rearing are profound and very real; but, should they have outweighed or erased this lingering maybe regarding the unborn’s very life? Did this Court-established maybe, this risk, set the stakes altogether too high and demand a different course of action?

Natural Law And Reason Required A Truly Conservative Approach That Deferred To The Risk Inherent In The Court’s “Maybe”-Based Resolution

The Lord has taught us an important lesson about how to approach the risk of “maybe,” especially when the stakes are high, when life is at issue. In Genesis 18, the Lord informed Abraham that an “outcry” had come before Him regarding the sin of Sodom and Gomorrah.¹⁵ Abraham apparently understood that such an “outcry” meant that God might destroy these cities.¹⁶ Accordingly, Abraham proposed a very interesting maybe-based hypothetical to God, “Suppose there are fifty righteous within the city. Will you then sweep away the place and not spare it for the fifty righteous who are in it?”¹⁷ Abraham rather boldly expressed the injustice of such a result, “Far be it from you to do such a thing, to put the righteous to death with the wicked, so that the righteous fare as the wicked! Far be that from you! Shall not the Judge of all the earth do what is just?”¹⁸

Remember, at this point in the conversation the question was still only a hypothetical posed by Abraham. God responded with an acknowledgment of Abraham’s perspective of justice in this case, “If I find at Sodom fifty righteous in the city, I will spare the whole place for their sake.”¹⁹ Abraham went on to whittle his hypothetical from forty-five, to thirty, to twenty, to finally ten righteous people in Sodom.²⁰ God in turn acknowledged that He would withhold His hand of judgment on the entirety of these cities for each of these potential groups of righteous individuals.²¹

True to His word, God did not destroy Sodom or Gomorrah before resolving the unknown/maybe regarding the innocent that lived in those cities.²² It would appear that this exercise was for our benefit in showing justice within such a maybe-based situation. Being omniscient and omnipresent, God knew the number of righteous in Sodom and Gomorrah even as the hypothetical was falling from Abraham’s mouth. However, He chose to explain that justice demanded a resolution of this “maybe” before action was taken since there was potential (innocent) life at stake. God’s commitment to explaining this principle to us went so far as to actually send messengers to investigate the facts (so we could see such an investigation) and create a record for us that He had resolved Abraham’s maybe-based hypothetical.²³

God's principle here is not one that is limited to the Christian or Jewish faiths, but one that is naturally established and readily observable by reason. Maybe is dangerous, especially when potential life is at stake. Justice demands in such a circumstance that the maybe be resolved before any action can be taken that would risk potential life. If the maybe is unresolved, the risk demands a just decision to withhold action that would put potential life at hazard.

This was the failure of the *Roe* and *Casey* Courts – to not give appropriate deference to the inherent danger of their “maybe” answer regarding the unborn’s life. The truly conservative approach was not to give deference to the known over the maybe, but rather to give appropriate respect to the risk inherent in the Court’s definition of the unborn as “potential human life.”

This would have been an extremely difficult decision to make given the profound and deep sacrifices at stake for the expecting mother; however, it was a conclusion demanded by the “maybe” given by the Court itself. Indeed, “maybe” does not make a decision easier, rather it makes a decision more difficult. When “potential human life” was at issue, the difficult decision was also the correct decision.

The *Roe* Court’s maybe-resolution, having been confirmed by *Planned Parenthood v. Casey*,²⁴ maintains its relevance today because the “maybe” has not gone away. If anything, the “potentiality of human life” from conception has become altogether more definitive in the interim. If the Supreme Court were to take up the privacy/abortion issue once again for consideration, it must take a hard look at its maybe-based conclusion regarding the unborn and whether it by definition justifies a reservation of this issue to legislatures that can better analyze and manage the inherent risks at stake.



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ENDNOTES

- 1 *Roe v. Wade*, 410 U.S. 113 (1973), overruled in part by *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (rejecting or overruling the trimester framework used in *Roe*).
- 2 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
- 3 See *Roe*, 410 U.S. at 156-62.
- 4 See *id.*
- 5 See *id.* at 156-58 (also explaining that many post-Fourteenth amendment laws had allowed abortion to some degree).
- 6 See *id.*
- 7 See *id.* at 159-62.
- 8 See *id.*
- 9 *Id.* at 159.
- 10 See *id.* at 159-62.
- 11 See *id.* at 163-65.
- 12 See *id.*
- 13 See *id.*; see also *Casey*, 505 U.S. at 871 (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”).
- 14 *Roe*, 410 U.S. at 153.
- 15 Genesis 18:20-21 (ESV).
- 16 Genesis 18:22-23 (ESV).
- 17 Genesis 18:20-21 (ESV) (emphasis added).
- 18 Genesis 18:24 (ESV).
- 19 Genesis 18:25 (ESV) (emphasis added).
- 20 Genesis 18:27-33 (ESV).
- 21 See *id.*
- 22 See Genesis 19 (ESV).
- 23 See Genesis 18-19 (ESV).
- 24 See *Casey*, 505 U.S. at 871.

SILENT TO ACTIVE

IN THE WAKE OF *ROE V. WADE*



Richard Thornton / Shutterstock.com

BY AMY PEDAGNO, STAFF ATTORNEY AT JUBILEE CAMPAIGN – LAW OF LIFE PROJECT

Over the past forty years, *Roe v. Wade* has been both defended and maligned, upheld yet revamped, critiqued as an example of judicial activism and celebrated as case which champions women’s rights. What began as a misguided attempt to give women a more active voice in the social realm has instead led to the dampening of entire conversations within the public square.

What has come to pass in the wake of the Supreme Court’s 1973 *Roe* decision? Post-abortive women speak to the emotional consequences of the abortion decision, as doctors continue to study the medical effects. Law professors chart out for 1Ls the big-name cases that came down in the post-*Roe* era, even as constitutional scholars admit that *Roe* lacks a solid constitutional underpinning. The facts speak for themselves, of course. Over 55 million innocent lives have been violently ended in the name of “privacy” and “choice.” An entire generation—my generation—has come to adulthood with the knowledge that a full third of our contemporaries are missing. *Roe* has done more than silence the voices of the aborted children; it has silenced society from having honest discussions about abortion.

Roe has taught us that individual liberty now means “privacy.” What we do in our bedrooms, how (and when) we die, whom we marry, etc.—all of those are personal decisions which stem

from a right to privacy. With catchy chants like “keep your rosaries off my ovaries” and “my body, my choice,” the pro-abortion movement post-*Roe* and the larger American society which has acquiesced have taken the abortion discussion hostage: we can no longer talk about abortion without first passing the hurdle of “reproductive rights.” Essentially, by allowing the abortion discussion to occur within the privacy context, we’ve tuned out the value of community—both what an individual can contribute to community and what community provides for the individual.

I don’t think the framers of the *Roe* decision (and by this I mean both the justices on the Court and the pro-abortion individuals who desired this case) envisioned that people like me would one day exist—educated individuals who not only view abortion as a moral evil, but who allow the “single-issue” of abortion to define how we vote. Rather than causing abortion to become a non-issue in the lives of young people, much the way vaccinations and bi-annual teeth cleanings are, *Roe* caused abortion to become one of the most politicized and controversial issues in our country.

This politicization of abortion means that society does not talk about any issues which are related to abortion but which should otherwise be largely non-controversial in American culture.

For example, because of son-preference and restrictive government birth policies in certain countries, social scientists now estimate that there are over 100 million missing girls across the globe. Yet, despite the fact that a hundred million girls have been aborted, killed or neglected solely because of the fact of their gender, the international community has done little more than pay lip service to condemning such actions.

In China, as a result of the One-Child Policy, women pregnant with a second child may be kidnapped from their homes and subjected to forced abortions even if they are near ready to give birth. They are often forcibly sterilized if they do not have the required pregnancy or birth permits or have already otherwise exceeded the One-Child Policy limitations. Families are granted harsh ultimatums: pay exorbitant fines or abort. Those who don't comply are beaten and imprisoned. Those who dare to speak out are ostracized in their communities.

When asked about the practice of forced or sex-selective abortion, politicians and pro-abortion groups will state that they are against it but will take no official action to condemn China's One-Child policy which allows these practices to occur. Even in the United States, where it is more politically expedient to speak out against the sex-selective abortions, few people will. For years, certain members of Congress have introduced legislation, called the Prenatal Nondiscrimination Act (PRENDA). What's concerning is not that the Bill has never passed—obviously, there are constitutional and political issues that go into passing an effective pro-life law—but that, except for a select group of legislators, no one even wants to address the issue or the need for legislation in the first place.

The politicization of the abortion issue means that even when things like “Dr. Gosnell's House of Horrors” are made public, pro-lifers have to fight tooth and nail to get the media to notice. Journalists and politicians refuse to discuss it, citing the fact that it's a “local issue” or that they “can't comment on an ongoing trial.” No one is willing to talk about Gosnell's heinous actions because that might lead to observations that abortion is a brutal, violent act or conclusions that abortion facilities really ought to be regulated. If a topic has the potential to undermine the validity of legal abortion, then we can't talk about it. A federal judge has recently ordered the FDA to make Plan B emergency contraception universally available over the counter, regardless of the girl's age, and it has been celebrated as a triumph for women's rights. We can't talk about the underlying issue of

whether young girls having sex is safe or smart or at all a good idea, because that might lead to the conclusion that waiting for sex has inherent value. And, of course, telling teenagers not to have sex goes against the very successful Planned Parenthood business model, and we wouldn't want to undermine that.

Even outside of the abortion context, *Roe* has wrought terrible effects. The take-away from *Roe* is that a woman has a right to determine when she becomes a mother. Obviously, *Roe* dealt with the termination of pregnancy, but the flip side of that coin is the right to become a mother on-demand. One need only look to “Octomom” to see a modern-day example of the over-exercise of this “right.” Yet, even outside of that extreme example, this “right” is seen in the over 400,000 “excess” human embryos in storage across the United States, leftovers from their parents' IVF efforts. The fact that over 90% of babies with Down Syndrome are aborted tells us that we have a right not only to have children, but to have “perfect” children. Adoption is no longer about the rights of children to homes and parents, but about the rights of adults to have children.

All hope is not lost, however. In the wake of *Roe* a fiercely pro-life generation has arisen, one which is willing to stand up and speak out for human life. The ubiquity of ultrasound photos is dispelling the idea that a fetus is not a baby. State legislatures are looking at new and creative ways to regulate abortion, even with the *Roe* and *Casey* limitations in place. Pro-lifers are effectively using social media to demand that the media and the American public pay attention to abortion. Every January, hundreds of thousands of individuals gather in the bitter cold on the National Mall to literally join their voices in protest of *Roe v. Wade*.

Though *Roe* initially wrought silence, in the forty years hence, pro-lifers have come to understand that abortion will not end until the hearts of a majority of Americans are converted and there are laws in place to protect the most vulnerable among us. Overturning *Roe* will be an important and symbolic step in our fight against the culture of death, but we must also work to create a culture of life.



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PPACA's Mandates

BY NATHAN A. ADAMS, IV, PH.D., ESQ.

The contraceptive coverage mandate in the Patient Protection and Affordable Care Act (PPACA)¹ has by now become common knowledge among lawyers in the faith community. But that mandate is to PPACA what the spec in Finding Nemo is to the ocean. Without doubt, the contraceptive coverage mandate poses a serious affront to religious liberty, but the rest of PPACA matters as much or more to a broad spectrum of liberties from the freedom to contract to the right to life. As Christian lawyers, the Administration has drafted you, whether you know it or not, to guide clients and influence the culture about what PPACA means.

To my knowledge, no single legal scholar, or for that matter lower court, predicted the Supreme Court's ruling about the constitutionality of PPACA.² The decision opens breathtaking new avenues for federal taxation exploited in spades in PPACA. Taxation is at the heart of PPACA's core mandates: the individual mandate and several employer mandates to include the play or pay mandate, unaffordable coverage mandate, and minimum value mandate. The key question these mandates pose for individuals and employers is whether to comply or simply pay the penalty.

Over 80% of the cost of PPACA is related to the individual mandate. Without it, PPACA cannot work because it requires the uninsured and healthy to foot the bill of the unhealthy. Effective January 1, 2014, the individual mandate requires all non-exempt U.S. residents to maintain "minimum essential coverage"; otherwise, the Internal Revenue Service (IRS) will impose an annual escalating penalty beginning in 2014 of \$95 per person or \$285 per family or 1% of family income, whichever is greater.³

Minimum essential coverage is available to individuals through a combination of any of the following sources: (1) eligible employer sponsored plans, including grandfathered plans, (2) individual market plans, and (3) government-sponsored plans like Medicare, Medicaid, or Children's Health Insurance Program (CHIP).⁴ For individuals without access to other insurance, the state health exchanges will be the main portals through which they acquire insurance plans designated bronze to platinum according to the percent of costs covered by the plan (from 60% to 90%).⁵

Many employers including many churches are choosing to cut their full-time work force and to roll back the definition of part-time employment to less than 30 hours rather than comply with the employer mandates.⁶ Beginning now in 2015, employers with 50 or more full time equivalent employees (FTEE) during the preceding calendar year for 120 days or more,⁷ must pay \$2,000 per year per full-time employee (FTE), excluding the first 30 up to a cap, if the employer fails to offer its FTEs the opportunity to enroll in “minimum essential coverage” and at least one FTE is certified as having enrolled in coverage through a state health exchange.⁸

If the employer offers coverage, but not “affordable health coverage,” the employer must pay the lesser of \$2,000 per year per FTE or \$3,000 per employee who receives a tax credit on the state health exchange.⁹ “Affordable health coverage” requires the coverage to be less than 9.5% of the employee’s household income.¹⁰ Because employers do not generally know their employees’ household income, the IRS created a safe harbor in the event the employee portion of the self-only premium for the employer’s lowest cost coverage that provides minimum value does not exceed 9.5% of the employee’s W-2 wages.¹¹

Likewise, if the employer offers coverage, but the coverage is less than “minimum value,” employers must pay an annual penalty of \$3,000 per FTE (up to a cap).¹² Minimum value requires the employer to pay for at least 60% of the actuarial value of the benefits the plan provides.

Under PPACA, the IRS, Department of Health and Human Services (DHHS) and Independent Payment Advisory Board (IPAB) now exercise great influence over healthcare and insurance. DHHS requires all new insurance plans to offer “essential health benefits” defined by category and, eventually, procedure.¹³ Grandfathered plans are exempt from offering essential health benefits, but not a series of other limitations.¹⁴ As a result, they are endangered species. Some insurance companies are abandoning grandfathered plans and companies themselves are making changes that require their relinquishment.¹⁵

IPAB is a 15-member agency charged with recommendations to slow the growth in national health expenditures while preserving the quality of care. IPAB or, if it fails, DHHS has authority to make changes to Medicare, reserving to Congress exclusively the power to overrule the agency’s decision by supermajority vote.¹⁶ Beginning in 2013, if the projected per

capita growth rate for Medicare for a multi-year period exceeds a target growth rate, IPAB must propose Medicare spending reductions. This is likely to lead to rationing of healthcare.

Many employers including many churches are choosing to cut their full-time work force and to roll back the definition of part-time employment to less than 30 hours rather than comply with the employer mandates.

The expansion of Medicaid coverage from the current median eligibility of 63% of federal poverty level (FPL) for working parents to 1383% FPL (including a 5% income disregard) is another key element of PPACA.¹⁷ The Supreme Court ruled that states can refuse to participate in the expansion without losing all of their Medicaid funds or accept the expansion and obey all expansion rules.¹⁸ So far, 13 states have indicated they definitely will not expand Medicaid; and roughly 26 states have said they will most likely will expand Medicaid.¹⁹ The siren song of at least short-term federal funding for Medicaid expansion is difficult to resist.

As a result of PPACA, many clients are looking for your thoughts on whether they should comply by obtaining or offering insurance, cut their full-time workforce and definition of part-time employment, or simply pay a penalty. They will inquire about living wills and want to know whether to spin off services or ministries. You may also get the chance to discuss your theological and legal insights on PPACA at local forums, in newspapers, and with legislators. Take advantage of these God-given opportunities to be your client’s and freedom’s preservative. If we can help, please do not hesitate to contact me.²⁰



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ENDNOTES

- 1 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010).
- 2 *National Fed'n of Indep. Bus. v. Sebelius*, 2012 WL 2427810, 567 U.S. ___ (June 28, 2012).
- 3 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 5000A(c)(3)(B)-(C), 124 Stat. 119 (2010). Few are exempt from the individual mandate without a waiver. The individual religious exemption applies exclusively to members of religious sects in existence since 1950, conscientiously opposed to insurance of all types, which makes provision for its own members, or members of a health care sharing ministry in existence since 1999, in which members share medical expenses in accordance with their religious beliefs and retain membership after developing a medical condition. Not surprising, the numbers enrolling have multiplied.
- 4 Id. § 5000A(f).
- 5 Id. § 1302.
- 6 Id. § 1302.
- 7 FTEEs are determined by adding (1) FTEs, which are those working 30 or more hours per week for more than 120 days or 130 hours per month during the prior three months to one calendar year, see the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4980H(d)(2), (4), 124 Stat. 119 (2010), to (2) the number equal to the total hours worked by part-time employees (i.e., working less than 30 hours per week, but not more than 120 hours per month) divided by 120, see id. § 1421(a) (modifying § 45R(d)(2)), (3) FTEs working for other companies that are part of the same controlled group or affiliated service group, see id. § 4980H(d)(2)(C)(i), and (4) independent contractors and «leased employees» that meet the common law employee test or, for purposes of the small business tax credit, certain workers who are leased employees, once the employee has worked for the employer on a substantially full-time bases for 12 months. Id. § 1421(a) (modifying § 45R(e)(1)(B)). FTEEs exclude seasonal workers to the extent they work less than 120 days in a year. Id. § 4980H(d)(2)(B). Exclusively for 2014, companies part of a controlled group can measure whether they have 50 FTEEs using any six-month consecutive period in 2013.
- 8 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4980H(a), (d)(4), 124 Stat. 119 (2010).
- 9 Id. § 1411(e)(4)(B)(iii).
- 10 See IRB 2011-40 (Oct. 3, 2011) (referencing § 36B(c)(2)(C)(i) (there is an exception for 10 individuals).
- 11 Id. Essential health benefits are defined by DHHS to include specified healthcare services categorized as (i) ambulatory patient services, (ii) emergency services, (iii) hospitalization, (iv) maternity and newborn care, (v) mental health and substance use disorder services, (vi) prescription drugs, (vii) rehabilitative and habilitative services and devices, (viii) laboratory services, (ix) preventive and wellness services and chronic disease management and (x) pediatric services including oral and vision care. . Id. § 1302(b)(4)(C)(D). Essential health benefits do not include “abortion services” except in cases involving rape, incest, or danger to the mother’s life. Id. § 1303(a)(1)(A)(i).
- 12 Id. § 1401.
- 13 For example, most grandfathered plans (individual plans but not group plans) may not materially reduce the scope of benefits, maintain preexisting condition exclusions, increase the fixed amount and the percentage cost-sharing requirements, decrease the employer contribution rate, impose non-preexisting overall annual or lifetime limits on benefits, or decrease the annual limit on benefits. Patient Protection and Affordable Care Act; Requirements for Group Health Plans and Health Insurance Issuers Under the Patient Protection and Affordable Care Act Relating to Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions and Patient Protections; Final Rule and Proposed Rule, 75 Fed. Reg. 37,188, 37,192 (June 28, 2010) (to be codified at 26 C.F.R. Pts. 54 and 602, 29 C.F.R. Pt. 2590, and 45 C.F.R. Pts. 144, 146, and 147).
- 14 The government’s “mid-range” prediction is for a similar effect on grandfathered plans by 2013. Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act; Interim Final Rule and Proposed Rule, 75 Fed. Reg. 34,538, 34,552 (June 17, 2010) (to be codified at 26 C.F.R. Pts. 54 and 602, 29 C.F.R. Pt. 2590, and 45 C.F.R. Pt. 147).
- 15 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 10320(a)(5)(o), 124 Stat. 119 (2010).
- 16 Id. § 2001(a).
- 17 *National Fed'n of Indep. Bus. v. Sebelius*, 2012 WL 2427810, 567 U.S. ___ (June 28, 2012).
- 18 The Advisory Board Company, *Where Each State Stands on ACA's Medicaid Expansion* (Feb. 27, 2013) (available at <http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap>) (last visited on Mar. 4, 2013) (we use the phrase “most likely” instead of definitely “participating” because for some states listed as participating on this website such as Florida, the Governor has announced it but the legislature has not yet passed it into law).
- 19 Christian Lawyer credits *The Nacha Ledger* where a fuller treatment of the subject was published in Vol .32, No. 1 (Spring 2013).



TOWARD A fully formed, three-dimensional LAW STUDENT

BY DAN KIM

“Do not be conformed to this world, but be transformed by the renewal of your mind, that by testing you may discern what is the will of God, what is good and acceptable and perfect” (Romans 12:2, ESV).

This past June, my wife Sandra and I celebrated our first year of marriage. As we reflected on how we got to where we were, we could not help but laugh. Sandra and I first met, via email, through a mutual Christian Legal Society (!) friend who did not think the fact that we resided on opposite ends of the country would be a hindrance to a relationship. Evidently, she was correct! We in fact never laid eyes on one another until after two months of twice weekly phone calls.

During those two months, we developed feelings for one another. Those feelings led me to admit to her that I liked her. Sandra was led to tell me that she had given me a nickname. She took to calling me “Two-Dimensional Dan.” I did not find this amusing. She explained that it was her funny way of ex-



pressing to her friends and reminding herself that, until she got to meet me, I was not real. In other words, until a face-to-face interaction could confirm what she suspected—that I was indeed a good guy—she was not ready to assume the feelings she had meant that she liked me. She was right.

This type of self-reflective assessment is also necessary for students seeking to pursue a thriving Christian law student chapter. In fact, it is the first thing they should discuss and keep in mind as they grow. Without having this discussion, fellowships cannot expect to begin to understand what it is they should be doing (which ironically is the first thing our office gets asked). Unfortunately many do not do this. So, it is not surprising that when asked why they, as the Christian law students on campus, sought one another out, they either do not have an answer or they give a response that reveals their mislaid priorities.

The Two-Dimensional Fellowship Group

Exploring this question is of utmost importance because of the call we have as believers. The Bible calls us to “. . . not be conformed to this world...” Instead we are to “. . . be transformed by the renewal of [our] mind[s].” As we have written in this space many times, law school presents challenges to the Christian student. Over three years law school constantly pulls students into a certain way of thinking that may not be biblical. If these challenges are not met fully, students will inevitably forgo their call to seek transformation through the renewal of their minds. They will allow their minds to decay and begin to conform to the values that law school slowly molds onto them. The resulting fellowships are those that will earnestly confess Christ, believe in Christ, while lacking the mind of Christ. They cannot be anything more than “two-dimensional.” Two-dimensional objects do not exist in our three-dimensional world. Similarly two-dimensional chapters will not produce real Christian lawyers and law students. So how should fellowships explore the question of why they get together? How do they become a fully formed three-dimensional chapter?

Exploring the Question of Why

First it seems appropriate to state that even if the Christian Legal Society did not exist, Christian fellowships at law schools would. I say this not to express how independent they are from us but that their existence occurs naturally. Christians confronted with the values and environment of law school seek other believers out. This coming together should not be mistaken for the extension of habit (church, undergraduate fellowship involvement, etc.). But students often do. Therefore the Christian law student chapter must purposefully ask the question of why they come together. And they are the only ones who know the answer to this. Law schools and law students, while they share similar traits and passions, can vary to a great degree based on where they are (geography) and what school they attend (why they chose to go there). Accordingly, every fellowship may answer the question of why they came together differently.

As they come to an understanding of why they have come together, they then have to seek to apply the specific call of Romans 12:2 to grow in their relationship with Christ while in law school. The call is not only to let go of the past but is an ongoing pursuit. As co-heirs with Christ having been adopted as sons and daughters of God, it is necessary to examine our minds. Law school can certainly challenge and change our views, but

it can also reinforce flawed assumptions we may have entered with. The community’s purpose is specifically to correct, inform and challenge all those views, but fellowships often make the mistake of not engaging in this questioning.

Instead they proceed in one of two erroneous ways. Some settle for creating a refuge whose primary purpose is to comfort one another in their shared and individual “suffering.” This set of groups actively seeks “fun” things to do while avoiding hard questions that may turn some of their fellow believers as well as those outside of their faith, “off.” Other groups pursue their own agendas, believing their purpose is to bring about political or social change in a certain narrow way, their way, of course, being “What Jesus would do?” The former group desires not to offend anyone. The latter, believes any offense taken is a sign they are doing the right thing. Both groups fail to engage the hard questions that may cause individual and group internal conflict (not to mention conflict or disdain from the law school community).

Fellowships in Three Dimensions

The challenge of growing a thriving chapter can at times be difficult. If we overlook asking the most important and basic questions, it will be impossible. I was not wrong to feel the way I did about my wife over those two months. I was wrong however for making more out of those feelings than was appropriate. I took for granted the most basic thing. I had not met her. In community relationships we must not take for granted how we arrive at the conclusions that we do. A full formed, three-dimensional fellowship will not be so much about what they do or the feeling of closeness they manifest but about how they facilitate the renewal of law student minds. They must ask why they came together and what they think about what they are learning. This three-dimensional group will bear much fruit: Christian law students and lawyers who have the mind of Christ.



Dan Kim graduated from Brandeis University in 2000. He entered law school in 2002, and was the Brooklyn Law School's fellowship President from 2003 - 2004. He is a 2005 graduate of Brooklyn School of Law. He has been with Christian Legal Society since January 2006 as the Deputy Director of Law Student Ministries.



RELIGIOUS LIBERTY IN THE MARKETPLACE: A TALE OF TWO FAMILIES AND TWO COURTS

BY KIM COLBY

Consider the Hahns and the Greens. For decades, these two families have toiled to build companies that, first, honor God and, second, provide valued products in the marketplace and good jobs for their employees. The Hahns began their company, Conestoga Wood Specialties, in a Lancaster, Pennsylvania garage in 1964. The manufacturer of kitchen cabinetry employs 950 persons.¹ As Mennonites, the Hahns seek to operate their company in accordance with their faith.

Similarly, the Green family's company began in a garage in Oklahoma in 1970. The well-known chain of arts-and-crafts stores, Hobby Lobby, has grown to 559 stores and 13,000 employees. The Green family also owns the Mardel chain of Christian bookstores, which operates 35 stores with 400 employees and sells exclusively Christian books and materials. The Green family operates its companies to "honor[] the Lord in all [they] do by operating the company in a manner consistent with biblical principles."² They seek to "serv[e] [their] employees and

their families by establishing a work environment and company policies that build character, strengthen individuals and nurture families." Hobby Lobby is known for its overt Christian values, including Sunday closing and taking out newspaper ads that proclaim the Gospel.

For several decades, the Hahn and Green families have pursued two essentials of the "American Dream": the religious liberty to honor God in all that they do and the economic freedom to build a successful company. Whether the Hahns and the Greens will be allowed to pursue both religious liberty and economic prosperity may be decided by the Supreme Court in its 2013 Term that begins October 7th.

Like many other religious business owners, as well as many religious non-profits, the Hahn and Green families have run afoul of a new government regulation that penalizes religious persons and organizations for their religious belief that it is wrong to de-

stroy nascent human life. Initially proposed in August 2011, the “HHS Mandate” requires certain employers to provide insurance coverage of all “FDA-approved contraceptives,” including Ella and Plan B, the so-called “emergency contraceptives.” Scientists have not identified the precise mechanisms by which these drugs work, but the FDA itself has stated that the drugs may prevent implantation of a fertilized egg in the uterine lining. For the Hahns and the Greens, these drugs violate their religious convictions that human life begins at conception.

The families filed federal lawsuits to defend their religious liberty to run their companies in accordance with their religious beliefs.³ Hobby Lobby and Mardel won in the Tenth Circuit.⁴ Conestoga Wood lost in the Third Circuit.⁵ The Hahns have announced that they will ask the United States Supreme Court to review their case. Because it lost the Hobby Lobby case, the government must decide whether it will ask the Supreme Court to review the Tenth Circuit decision. The results and rationales of the two circuits are so contradictory that it is likely that the Court will hear one or both cases and rule by late June 2014.

The Tenth Circuit Decision

The Greens challenged the Mandate as violating the two fundamental federal protections of religious liberty: the constitutional protection found in the Free Exercise of Religion Clause and the statutory protection found in the Religious Freedom Restoration Act of 1993 (“RFRA”).⁶ Because it found that RFRA likely protects Hobby Lobby and Mardel from having to include the objectionable drugs in their insurance plans, the Tenth Circuit did not reach the constitutional free exercise claim.

The Greens’ challenge had a bumpy start in the district court, which initially denied injunctive relief in October 2012,⁷ and was affirmed by the Tenth Circuit.⁸ The Greens took the unusual step of asking the Supreme Court to intervene at that early stage, but Justice Sotomayor, sitting as Circuit Justice for the Tenth Circuit, denied relief in December 2012.⁹

Back in the Tenth Circuit, prospects improved when it agreed to hear the case on an expedited basis and en banc (meaning that eight, rather than the customary three, judges would hear the case). By a 5-3 ruling, in June 2013, the Tenth Circuit essentially held that RFRA protected Hobby Lobby and Mardel from the Mandate’s compulsion to provide coverage for abortion-inducing drugs.¹⁰

The five-judge majority first determined that a corporation may qualify as a “person” with religious exercise rights protected by RFRA. Although RFRA does not explicitly define the term “person,” the Dictionary Act¹¹ defines the term to include corporations. The court further noted that the Supreme Court has applied RFRA to protect corporate claimants.

The court rejected the government’s argument that a for-profit entity does not qualify for RFRA’s protections. The government insisted that Title VII’s exemption for religious organizations should be read to limit RFRA’s protection to include only non-profits. But the court rejected that argument by noting that Title VII (which the court carefully observed might not be limited to non-profits) demonstrated that Congress could have crafted a narrow exemption but chose not to do so in RFRA. An individual “may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values.”¹² The court questioned why an individual who operated for profit and retained free exercise rights should lose those rights simply because of incorporation. Because the court found that the companies were protected by RFRA, it did not decide whether the Greens’ individual free exercise rights were violated by the Mandate.

Having found that RFRA may protect corporations’ religious exercise, the court then found that the companies “incurred a substantial burden on their ability to exercise their religion because the [Mandate] requires [them] to compromise their religious beliefs, pay close to \$475 million more in taxes every year, or pay roughly \$26 million more in annual taxes and drop health-insurance benefits for all employees.”¹³

Finally, the court concluded that the government’s justification for applying the Mandate to Hobby Lobby and Mardel did not meet RFRA’s stringent “compelling interest” requirement. While the court “recognize[d] the importance of” the government’s “interests in [1] public health and [2] gender equality,” the government failed to demonstrate a compelling interest in applying the Mandate to Hobby Lobby and Mardel because it exempted many other employers.¹⁴

The Third Circuit Decision

In a 2-1 ruling in July, a Third Circuit panel came to a diametrically opposite result. The court found that neither the Hahns nor Conestoga Wood Specialties had free exercise rights under RFRA or the Free Exercise Clause that protected them from the Mandate’s requirement to provide coverage for the drugs they believe destroy human life. First, the court concluded that there was no history of the Free Exercise Clause applying to for-profit, secular corporations. The Third Circuit then refused to impute the owners’ free exercise rights to their company, concluding that “by incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities from the Hahns, as the owners of the corporation.”¹⁵ The majority then turned this legal distinction against the Hahns to find that “[s]ince Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything. All responsibility for complying with the Mandate falls on Conestoga.”¹⁶

Turning to RFRA, the Third Circuit simply asserted that its conclusion that a for-profit, secular corporation had no constitutional claim “necessitate[d]” the conclusion that it could not exercise religion for purposes of RFRA.¹⁷ The court concluded that to hold “that a for-profit corporation can engage in religious exercise would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners,” but it failed to explain why that “fundamental principle” overrides the fundamental constitutional right to freely exercise religion.¹⁸

In eloquent dissent, Judge Jordan showed that the majority’s legal reasoning “rest[ed] on a cramped and confused understanding of the religious rights preserved by Congressional action and the Constitution.” But more importantly, Judge Jordan brought the focus back to the human cost of forcing religious owners to choose between their faith and bankruptcy: “[O]ne need not have looked past the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government’s determination to either make the Hahns bury their religious scruples or watch while their business gets buried.”¹⁹

The Mandate sharply departs from the Nation’s bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience rights in the context of participation in, or funding of, abortion. We will soon learn, possibly this Term, whether the Supreme Court will uphold genuine religious liberty and require the government to respect the religious beliefs of those who will not participate in providing drugs that may end human lives.



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ENDNOTES

- ¹ <http://www.conestogawood.com>.
- ² http://www.hobbylobby.com/our_company/our_company.cfm.
- ³ For more information about the HHS Mandate litigation, visit the CLS website at www.clsnet.org.
- ⁴ The Tenth Circuit covers Oklahoma, Wyoming, Colorado, Utah, New Mexico, and Kansas.
- ⁵ The Third Circuit covers Pennsylvania, New Jersey, and Delaware.
- ⁶ 42 U.S.C. §§ 2000bb, et al (2013).
- ⁷ *Hobby Lobby Stores, Inc., et al. v. Sebelius*, et al., 870 F. Supp.2d 1278 (W.D. Okla. 2012).
- ⁸ *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. Dec. 20, 2012).
- ⁹ *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers).
- ¹⁰ Technically, the Tenth Circuit ruled that the companies had shown a likelihood of prevailing on the merits and irreparable harm but remanded for the district court to balance the equities and the public interest of issuing injunctive relief. The district court subsequently ruled in favor of the companies and issued a preliminary injunction prohibiting application of the Mandate to the companies’ coverage of the objectionable drugs. *Hobby Lobby v. Sebelius*, 2013 WL 3869832 (W.D. Okla. July 19, 2013).
- ¹¹ 1 U.S.C. § 1 (2013).
- ¹² *Hobby Lobby Stores, Inc., et al., v. Sebelius*, et al., 2013 WL 3216103, at *15 (10th Cir. 2013),.
- ¹³ *Id.* at *20 (formatting altered).
- ¹⁴ *Id.* at *23.
- ¹⁵ *Conestoga Wood Specialties Corp., et al., v. Secretary of HHS, et al.*, 2013 WL 3845365, at *7 (3d Cir. 2013).
- ¹⁶ *Id.* at *8 (original emphasis).
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.* at *9 (Jordan, J., dissenting).



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Pressed Out of Our Comfort Zones

It is human nature to do what makes us comfortable: to live in environments that are familiar, to form cliques and interact only with those who are like us, to worship in familiar settings and styles, to do ministry in customary ways, and to focus our legal practice on what we know best. We find comfort in developing expertise and familiarity in some area of life and then staying there. We experience discomfort when we move into that which is new and unfamiliar.

While there is definitely good that comes from developing expertise and familiarity, limiting our lives to focus on the areas where we are most comfortable has a serious downside: we are not challenged to grow. It is when we are moved into uncertain circumstances that we see our weaknesses and work to shore them up, develop our strengths, seek the help of others, and most importantly, rely on God. In short, we grow.

“Consider it pure joy, my brothers, whenever you face trials of many kinds, because you know that the testing of your faith develops perseverance. Perseverance must finish its work so that you may be mature and complete, not lacking anything” (James 1:2-4).

I have come to believe that one of the benefits I have in knowing Jesus is He brings circumstances into my life that take me out of what makes me comfortable to help me grow. There was a time I believed that life’s difficulties were completely random and that James was telling us in James 1:2-4 to accept stoically those random “trials” because God would use those difficulties to make us stronger.

Through my years of experience with Jesus, I am beginning to see a different pattern emerge. Jesus specifically calls me to do things outside my comfort zone so I will grow. He is not content with the progress I have made or with the goals I have just accomplished. Instead, He moves me into a role, circumstance, or activity that is difficult. I learn lessons from my experience and grow more mature. I find rest and joy in Him, but then another trial comes that gives me the opportunity to grow even more. Jesus loves us too much to allow us to stagnate. He knows we are not perfect and he wants us to grow to be more and more like Him. The best and perhaps the only way for that to happen is through the trials we face, often brought on by His calling.

I’ve seen this in my professional life. There are aspects of my legal practice that are not as strong as they should be. I believe Jesus is aware of even those things and He works in my practice to force me to face those weaknesses, to shore them up, to make them into strengths, and to rely on God throughout the entire process. When I’m tempted to rely on myself, I struggle—God wants me to learn to trust in Him, not in myself.

In faith, the Apostle Peter walked onto wind-swept waves to be with Jesus. For a moment, Peter’s focus on Jesus wavered, causing him to sink. Jesus nonetheless reached out to Peter and saved him from sinking into rough waters (Matthew 14:27-33). I want to learn to follow Peter’s example. In the midst of the storm, Peter stepped out to be with Jesus instead of retreating to the safety and comfort of his boat. May God grant us all the courage to do the same so God can work in our lives to make us “mature and complete, not lacking anything.”



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