

# EMBRYONIC DISCOURSE: ABORTION, STEM CELLS, AND CLONING

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## I. INTRODUCTION

Two debates, one about abortion and the other about embryonic stem cell research<sup>1</sup> and therapeutic cloning,<sup>2</sup> are being conflated in

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1. The National Institutes of Health define a stem cell as “a cell from the embryo, fetus, or adult that has, under certain conditions, the ability to reproduce itself for long periods or, in the case of adult stem cells, throughout the life of the organism.” NAT’L INSTS. OF HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., STEM CELLS: SCIENTIFIC PROGRESS AND FUTURE RESEARCH DIRECTIONS ES-2 (2001). Human stem cells were first isolated in the late 1990s. A group of scientists at the University of Wisconsin isolated human embryonic stem cells in 1998. James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 SCI. 1145 (1998). In the same year, a group of scientists at Johns

social and legal discourse. The two debates resemble each other. Within each, society has fashioned a context for discourse that allows people to entertain and dispute the scope of personhood and the parameters of community. Moreover, public disagreement within each debate has focused around the meaning of the term *embryo*.<sup>3</sup>

Those similarities notwithstanding, this Article argues that a fundamental discontinuity distinguishes the two debates. The debate about abortion, framed in response to the needs and demands of the nineteenth and twentieth centuries, concerns the preservation of a world view that valued hierarchy, fixed roles, and communal solidar-

Hopkins University isolated human germ cells from fetuses. See Michael J. Shamblo et al., *Derivation of Pluripotent Stem Cells from Cultured Human Primordial Germ Cells*, 95 PROC. NAT'L ACAD. SCI. 13726 (1998). The promise of stem cell research is enormous; including *tailor-made replacement tissue* for patients with failing organs and for others suffering from a variety of neurological conditions such as Parkinson's disease. Fred Guterl & Karen Lowry Miller, *Attack of the Clones*, NEWSWEEK, Jan. 13, 2003, at 40.

2. The term *therapeutic cloning* refers to cloning embryos for use in medical research and therapy. Synonyms include research cloning, cloning-for-biomedical-research, somatic-cell nuclear transfer (or transplantation), and simply cloning (though, without further clarification, this last term may imply *reproductive cloning*). Some have rejected the term *therapeutic cloning*, largely for strategic reasons: the journal *Nature* "wanted to distance [human embryonic stem] cells from the term 'cloning' to insulate the research from the emotional valence of the cloning debate." Paul Root Wolpe & Glenn McGee, "*Expert Bioethics*" as *Professional Discourse: The Case of Stem Cells*, in THE HUMAN EMBRYONIC STEM CELL DEBATE: SCIENCE, ETHICS, AND PUBLIC POLICY 185, 188 (Suzanne Holland et al. eds., 2001). This distancing is hard to justify in that human embryonic stem cell research often depends on somatic cell nuclear transfer: in effect, on *cloning*. *Id.* Moreover, moral questions about *therapeutic cloning* are often indistinguishable from questions about embryonic stem cell research. *Id.* In the main, this Article uses the terms *research cloning* or *therapeutic cloning* to refer to somatic cell nuclear transfer (or transplantation) for the production of embryos for use in research. A more accurate term might be simply *non-reproductive cloning*. However, the term is not often used in popular or legal literature. In order to reflect common usage, this Article generally relies on other, more frequently used, terms. Sometimes alternative terms are used. No distinction in meaning is intended unless otherwise indicated.

3. This Article delineates the ideological implications of arguments about embryonic or fetal life for two broad social debates in American society. Thus, in the context of this Article, differences between embryos and fetuses are of less importance than they may be for scientists, theologians, or pregnant women.

For scientists, embryos become fetuses at about eight weeks of gestation. In fact, however, there is significant confusion even among scientists about the precise meaning of the term *embryo*. Simon B. Auerbach, Comment, *Taking Another Look at the Definition of an Embryo: President Bush's Criteria and the Problematic Application of Federal Regulations to Human Embryonic Stem Cells*, 51 EMORY L.J. 1557, 1567 (2002) (citing Professor Glen McGee, Address at Emory University Stem Cell Panel (Oct. 5, 2000)). Auerbach reports that one bioethics professor found great disagreement among twenty embryologists when he asked them what the term *embryo* means. *Id.* at 1568 (citing Glen McGee, Address at Emory University Stem Cell Workshop (Feb. 21, 2002)). In particular, Auerbach noted, it is not clear whether a five-day old fertilized egg should be categorized as an embryo. *Id.* at 1567-68. Only in the last half of the twentieth century did it become comparatively easy to obtain early embryos for research. Before the advent of *in vitro* fertilization, most embryos available for scientific research were the products of miscarriages and were thus not living. Lynn M. Morgan, *Materializing the Fetal Body*, in FETAL SUBJECTS, FEMINIST POSITIONS 43, 50 (Lynn M. Morgan & Meredith W. Michaels eds., 1999).

ity more than equality and choice—a world view that had been relegated mostly to the domestic arena by the middle years of the nineteenth century.<sup>4</sup> The debate about embryonic stem cell research and therapeutic cloning raises novel questions about personhood. This debate is being framed in response to very different needs and demands than those that defined the central ideological debates of the two previous centuries. In part, the needs and demands of the present century are being constructed in response to society's expanding capacity to disseminate information and to alter biological structures and thus to redefine the essence of being human. In particular, the debate about embryonic research (in comparison with that about abortion) largely assumes autonomous individuality and then focuses on and assesses the *nature* of the autonomous individual.<sup>5</sup>

In order to disentangle the debate about abortion from that about research cloning and embryonic stem cell research, this Article analyzes the embryo-as-symbol and suggests that the panoply of meanings attributed to *embryo* serves to elide, or even disguise, the central concerns underlying the complicated, often volatile, and generally confusing debate about abortion and the emerging debate about embryonic research and cloning for the production of research embryos.

Both cloning and embryonic stem cell research have focused public attention on the meaning and status of human embryos in contexts essentially unrelated to abortion. As a result, society and the law have begun to construct new understandings of the term *embryo*. Those understandings merge with and reshape old understandings. Thus, the politics of abortion are being transformed as society responds to developments in molecular biology, especially the advent of mammalian cloning in 1997<sup>6</sup> and the isolation of human embryonic stem cells a year later.<sup>7</sup>

Neither discourse about abortion nor discourse about cloning and embryonic stem cell research can adequately be interpreted apart from an underlying ideological shift in American society that became evident in the last decades of the twentieth century.<sup>8</sup> That broader underlying shift implicates the contours of personhood, family life, and community. And in consequence, both debates (largely through interpretations of their shared central symbol, the *embryo*) serve as a pretext for entertaining broader disputes about underlying social goals and values.

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4. See *infra* Part III and accompanying notes.

5. See *infra* Part IV and accompanying notes.

6. I. Wilmut et al., *Viable Offspring Derived from Fetal and Adult Mammalian Cells*, 385 NATURE 810 (1997).

7. See Thomson et al., *supra* note 1.

8. See *infra* Parts III - IV.

The politics of abortion have reflected disagreements about the status of fetuses and embryos, and even more fundamentally, disagreements about a set of underlying issues that include the legitimacy of feminism, the importance of gender in understandings of personhood, the value of so-called traditional forms of relationship within the domestic sphere, and the implications of displacing those forms of relationship with others that assume autonomous individuality in place of communal solidarity. For pro-life adherents in particular, the politics of abortion further (*and* sometimes mask) a broad agenda concerned with preserving a model of family life and understandings of personhood that developed in the early years of the Industrial Revolution. Similarly, the much more recent debate about embryonic stem cells and therapeutic cloning implicates understandings of personal identity and social relationships. It represents the swan song of an understanding of personhood that reflects the values of the Enlightenment and that has served the needs of the Industrial Revolution. And it represents, as well, a new debate about personhood that assumes autonomous individuality even in familial settings.

This Article interprets the debate about abortion and the debate about embryonic research and therapeutic cloning as aspects of a larger history of ideas. The Article suggests that embryos increasingly stand for different truths in discourse about abortion on the one-hand and about embryonic stem cell research and therapeutic cloning on the other. More specifically, the Article suggests that the contemporary debate about the meaning of the *embryo* in the context both of abortion and of embryonic research bespeaks a widespread transformation in Western, and especially American, society during the last three or four decades. At base, that transformation involves displacement of an understanding of personhood, particularly in domestic settings that depended on the submersion of individualism with an understanding of personhood that values autonomous individuality and that envisions community as the consequence of individuals' distinct choices rather than as a pre-existing, hierarchically structured whole.<sup>9</sup>

Part II of this Article briefly presents the scope of the contemporary social and legal debate about embryonic research, including especially embryonic stem cell research and therapeutic cloning. Part III outlines the ideological history of the debate about abortion and then describes the socio-cultural and legal frameworks within which understandings of the term *embryo* have developed. It explores the

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9. See LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* 1-20 (Mark Sainsbury et al. trans., 1980) (1911) (considering cultural implications of Western individualism as compared with traditional Indian caste system).

central contentions that have defined the debate about abortion since the second half of the twentieth century. This Part also suggests that pro-life groups may sometimes elide their own essential ideological interests in the effort to forge political and legal strategies for opposing abortion. Part IV returns to the issues raised by research cloning and embryonic stem cell research. This Part summarizes responses of lawmakers to embryonic research. Part V analyzes the parameters of the ideological divide that separates the twentieth century debate about embryos in the context of abortion from that now unfolding in the context of therapeutic cloning and stem cell research. This Part suggests that shifting understandings of *embryo* symbolize broad changes in social understandings of personhood.

## II. THE EMBRYO IN SCIENCE: RESEARCH CLONING AND EMBRYONIC STEM CELL RESEARCH

Developments in science and technology beginning in the last years of the twentieth century have generated a new notion of embryo that has, in turn, facilitated novel conceptions of reproduction, sexuality, health, and relationship.<sup>10</sup> This new embryo, unlike the embryo of the nineteenth and twentieth centuries, is formed outside the human body; it can be created either through joining sperm and egg *in vitro*<sup>11</sup> or through the transfer of somatic cells into denucleated ova;<sup>12</sup> it provides for reproduction apart from sexuality;<sup>13</sup> it promises *salvation* for people now suffering or likely to suffer from serious illness or disability;<sup>14</sup> and it is a source of potential wealth for the fledgling biotechnology industry and the related, though more established, pharmaceutical industry.<sup>15</sup> This new embryo represents unprecedented forms of human reproduction and relationship and sug-

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10. See Auerbach, *supra* note 3, at 1559-60, 1567-68.

11. N.Y.S. TASK FORCE ON LIFE AND THE LAW, N.Y. STATE DEP'T OF HEALTH, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 51-59 (1998) [hereinafter N.Y.S. TASK FORCE ON LIFE AND THE LAW].

12. Wilmut et al., *supra* note 6.

13. See N.Y.S. TASK FORCE ON LIFE AND THE LAW, *supra* note 11, at 51-59.

14. See Robert A. Weinberg, *Of Clones and Clowns*, 289 ATLANTIC MONTHLY 52, 57 (2002) (noting "potential" of therapeutic cloning "to revolutionize the treatment of a number of currently untreatable degenerative diseases").

15. See David Firm & Victoria Griffith, *Stem Cell Science on a Shoestring: Biotechnology: Moral Objections Have Hampered Cloning Research. But Lack of Funds may Kill it Off*, Michael West Tells Victoria, FIN. TIMES (London), July 18, 2002, at 11 (reporting decision of publicly traded biotechnology company, Geron, in California, to shift work with embryonic cells for transplantation to "become a traditional pharmaceuticals company"); Weinberg, *supra* note 14, at 57 (noting the speed with which biotechnology industry is moving ahead to develop uses of therapeutic cloning for potential treatment of disease).

gests novel approaches to health care that stimulate dreams of greatly expanded lifespans and even of immortality.<sup>16</sup>

This Part describes the events that brought this new embryo into public consciousness. That happened dramatically in 1978 with the first successful use of *in vitro* fertilization to create a human baby.<sup>17</sup> This Part outlines relevant aspects of the development of reproductive technology after that time, the advent of somatic cell nuclear transfer in mammals in 1997, and the isolation of embryonic stem cells in 1998.<sup>18</sup> These developments have engendered the social construction of the *new* embryo. This notion of the embryo, in turn, has raised a host of moral conundrums and has spawned a widespread social and legal debate about the ontological status of embryonic life that reflects aspects of the preexisting debate about abortion.<sup>19</sup>

That preexisting debate depended centrally on assertions about the status of the embryo and fetus. Many of those assertions, especially from pro-life adherents, are being sorely challenged by society's increasing readiness to support and use contemporary developments in molecular biology and medicine.<sup>20</sup>

#### A. Reproductive Technology and In Vitro Fertilization

In 1978, Louise Brown, the first baby conceived outside a woman's body,<sup>21</sup> was born in Oldham, England.<sup>22</sup> Since that time, reproductive technology has provided, among other things, for cryopreserving gametes and embryos for years, possibly even for decades;<sup>23</sup> testing embryos for genetic flaws prior to implantation;<sup>24</sup> and transferring ova, produced in the body of one woman and fertilized *in vitro*, to the body of a second woman for gestation and birth.<sup>25</sup> Moreover, treat-

16. See, e.g., BEN BOVA, IMMORTALITY 3 (1998) (asserting that "[t]here are men and women alive today who may well be able to live for centuries, perhaps even extending their life spans indefinitely").

17. ALBERT R. JONSEN, THE BIRTH OF BIOETHICS 305-06 (1998).

18. Part III, *infra*, considers more fully the socio-political responses to the developments delineated in this Part.

19. See *infra* Part IV.

20. See Weinberg, *supra* note 14, at 57 (noting potential of therapeutic cloning to revolutionize the treatment of a number of currently not treatable degenerative diseases).

21. See Howard W. Jones, Jr. & James P. Toner, *Current Concepts: The Infertile Couple*, 329 NEW ENG. J. MED. 1710, 1712 (1993) (describing *in vitro* fertilization).

22. See, e.g., Sandra Redcliff, *Louise Brown Talks About Life Under the Microscope From Day 1*, SCOTTISH DAILY REC., Jan. 17, 1994, at 2/21; Paul Wells, *World's First Test-Tube Baby, Teenager Visits In-Vitro Clinic*, THE GAZETTE (Montreal), Oct. 10, 1993, at A3.

23. See Owen K. Davis & Zev Rosenwaks, *Assisted Reproductive Technology*, in TEXTBOOK OF REPRODUCTIVE MEDICINE 571, 583 (Bruce R. Carr & Richard E. Blackwell eds., 1993).

24. See Peter Gorner, *Pre-Conception Test for Down's Syndrome*, CHI. TRIB., June 21, 1995, at A4.

25. See John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 991 (2001).

ment for infertility has produced so-called *spare embryos*: that is, embryos produced *in vitro* and cryopreserved for future reproductive use but not in fact needed for that purpose.<sup>26</sup>

As a result of such developments, biological maternity has been separated into two different aspects (gestational and genetic), reproduction has been divorced from sexuality, and the presumed biological anchors through which families were once understood are being replaced with a variety of alternative *truths* about human reproduction. Each of these developments raises questions about the scope of family and the essence of personhood. And each raises new questions or re-frames old questions about the status of embryos. The phenomenon of *spare embryos*, in particular, suggests a new vision of the embryo and engenders a new debate about the use and status of embryonic matter.

Disputes occasioned by embryo cryopreservation have forced courts to delineate the appropriate disposition and to discuss the ontological status of four to eight cell frozen embryos.<sup>27</sup> Several legal cases have involved disputes between divorcing couples about the disposition of embryos frozen during treatment for infertility.<sup>28</sup> One case, *Davis v. Davis*,<sup>29</sup> decided in Tennessee in 1992, starkly suggests the law's confusion about embryos. The case developed out of a dispute between a divorcing couple about the disposition of seven frozen embryos produced from the husband's sperm and the wife's ova. Each of the three state courts that rendered decisions in the case characterized the ontological status of the disputed embryos differently from the other two. The trial court portrayed the embryos as children and vested *temporary custody* of the frozen embryos with the divorcing wife.<sup>30</sup> The intermediate appellate court understood the status of the embryos as resting somewhere between property and body or-

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26. Barbara Gregoratos, Note, *Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977, 977 (1986).

27. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (in absence of contract, court relied on balancing of interests of divorcing spouses to determine appropriate disposition of frozen embryos produced from husband's sperm and wife's ova); *Kass v. Kass*, No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (unpublished decision), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998) (relying on contracts to resolve dispute between divorcing spouses about disposition of frozen embryos produced from husband's sperm and wife's ova); *Litowitz v. Litowitz*, 48 P.3d 261, 270-71 (Wash. 2002), *amended by sub nom. In re Marriage of Litowitz*, 53 P.3d 516 (Wash. 2002), *cert. denied sub nom. Litowitz v. Litowitz*, 123 S. Ct. 1271 (2003) (mem.) (In a dispute between divorcing husband progenitor and non-progenitor wife about frozen embryos, the court relied on contract entered into between fertility center and divorcing husband and wife.).

28. See cases cited *supra* note 27.

29. No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *reh'g in part* No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992) (mem.).

30. *Davis*, 1989 WL 140495, at \*1.

gans.<sup>31</sup> And the state's highest court concluded that the embryos, while neither persons nor property, enjoyed a special status because of their potential for human life.<sup>32</sup>

For the most part, courts, entertaining disputes about frozen embryos, have relied on contractual agreements to resolve such disputes,<sup>33</sup> or in the absence of such agreements, on the comparative interests of the parties.<sup>34</sup> However, a few state trial courts, including the trial court in *Davis*, have ascribed human status to frozen embryos.<sup>35</sup> Stored embryos have presented new questions to a legal system that assumed, at least since *Roe v. Wade*,<sup>36</sup> that embryos develop inside women's bodies.<sup>37</sup>

The Catholic Church has consistently opposed the use of reproductive technology on the ground that a child enjoys the *right* to be conceived by a married couple through sexual intercourse.<sup>38</sup> Yet, in the main, embryos produced in the context of infertility treatment have not engendered the sort of intense controversy about the status and rights of the embryo that has surrounded discussion of therapeutic cloning and embryonic stem cell research.<sup>39</sup> In part, the explanation is simply that ethical discourse surrounding reproductive technology has focused around a larger set of issues including, for instance, the implications of third-party participation in the reproductive process,<sup>40</sup> the commodification of reproduction,<sup>41</sup> the potential for

31. *Davis*, 1990 WL 130807, at \*2 (vesting "joint control" of the embryos in the divorcing husband and wife).

32. *Davis*, 842 S.W.2d at 594-96; see also *infra* notes 332-38 and accompanying text (further considering court's decision in *Davis*).

33. *Davis*, 842 S.W.2d at 594-96.

34. See, e.g., *id.* at 604 (noting preference for contractual analysis in resolving disputes about frozen embryos, but relying on balancing interests of parties in absence of such an agreement).

35. See, e.g., *Kass v. Kass*, No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. 1995); *Davis*, 1989 WL 140495, at \*1. See *infra* notes 332-38 and accompanying text (considering implications of judicial responses to dispute about embryos in *Davis*).

36. 410 U.S. 113 (1973).

37. See *id.* at 152-54 (granting women a limited right to abortion premised on the right of a pregnant woman to privacy with regard to her body).

38. THE GIFT OF LIFE, (DONUM VITAE): THE PROCEEDINGS OF A NATIONAL CONFERENCE ON THE VATICAN INSTRUCTION ON REPRODUCTIVE ETHICS AND TECHNOLOGY, Opp. at 216 (Marilyn Wallace & Thomas W. Hilgers eds., 1990).

39. Steven Kotler, *The Final Frontier: Depending on Whom You Ask, Stem-Cell Research Is Either a Medical Godsend or Further Proof That God Is Dead*, L.A. WKLY., Jan. 31, 2003, at 24.

40. See, e.g., Kelly Oliver, *The Matter of Baby M: Surrogacy and the Courts*, in ISSUES IN REPRODUCTIVE TECHNOLOGY I: AN ANTHOLOGY 321, 322-27 (Helen Bequaert Holmes ed., 1992).

41. See, e.g., CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 199-200 (1987) (referring to the commodification of women, children, and of embryos).

racism and classism in the employment of surrogates,<sup>42</sup> and the consequences of assisted reproduction for conceptions of the family.<sup>43</sup> In addition, many who oppose the use of embryos in research are ready to ignore the destruction of embryos produced *in vitro* for reproductive purposes.<sup>44</sup> One commentator suggests that neither the Bush administration nor the religious right “wish[es] to confront sterile parents or hamper a multimillion-dollar industry.”<sup>45</sup>

### B. Cloning and Embryonic Stem Cell Research

About two decades after the birth of the first child conceived *in vitro*, scientists announced the development of another, significantly different method for creating human embryos outside the human body: somatic cell nuclear transfer or cloning.<sup>46</sup> In 1997, scientists in Ireland successfully cloned a lamb, whom they named Dolly.<sup>47</sup> The technique used to create Dolly, developed by Ian Wilmut at the Roslin Institute in Scotland, involves removing the nucleus from an ovum and then merging the denucleated ovum with the nucleus of a somatic cell from the animal to be cloned.<sup>48</sup> Wilmut’s laboratory used an adult sheep’s mammary cell, though in theory any somatic cell could have been used<sup>49</sup> because each somatic cell contains the full complement of the nuclear DNA of the animal.<sup>50</sup> After the fertilized

42. See Laura M. Purdy, *Another Look at Contract*, in ISSUES IN REPRODUCTIVE TECHNOLOGY I: AN ANTHOLOGY, *supra* note 40, at 303, 315-17.

43. See CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 21-36 (1989).

44. Kotler, *supra* note 39 (noting that “the [Bush] administration and the religious right are opposed to using those ill-fated embryos for stem-cell research, [but] they are more than happy to turn a blind eye to their destruction in the name of pregnancy”).

45. *Id.* That the administration and the religious right are reluctant to “confront sterile parents” seems likely. That they are unwilling to “hamper a multimillion-dollar industry” is possible; however, the embryonic stem cell research industry could well grow soon to be a multibillion-dollar industry if the law does not prohibit such research. See, e.g., Linda B. Blackford, *Cloning Bill Would OK Stem Cell Research Two Others Filed Ban All Types, Therapeutic or Not*, LEXINGTON HERALD-LEADER, Feb. 2, 2003, at B1 (noting that Lee Todd and Jim Ramsey, presidents respectively of the University of Kentucky and the University of Louisville, supported a state law that provides for therapeutic cloning and embryonic stem cell research in Kentucky; both men recognized stem cell research as important to economic development).

46. Wilmut et al., *supra* note 6, at 810.

47. *Id.* In February 2003, the Roslin Institute, where Dolly was cloned, announced the sheep’s death; Dolly suffered from progressive lung disease. Jim Gilchrist, *A Sheep of Faith*, THE SCOTSMAN, Feb. 19, 2003, at 2, available at <http://www.news.scotsman.com/index.cfm?id=208722003> (last visited Sept. 1, 2003).

48. Gilchrist, *supra* note 47.

49. Wilmut et al., *supra* note 6, at 813.

50. Human somatic cells normally contain 46 chromosomes: 22 pairs plus an additional pair composed of two X chromosomes (in the case of a female) or an X chromosome and a Y chromosome (in the case of a male). THE PRESIDENT’S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY 35 (July 2002), available at <http://www.bioethics.gov/reports/cloningreport/fullreport.html> (last visited Aug. 23, 2003) [hereinafter PRESIDENT’S COUNCIL CLONING INQUIRY]. Usually, fertilization in humans occurs when the egg cell fuses with a sperm cell, resulting in a zygote containing a nucleus

egg cell began to divide<sup>51</sup> it was implanted into the uterus of a sheep. That sheep gestated and gave birth to the lamb, Dolly.<sup>52</sup> Dolly carried the DNA of the sheep from which the mammary cell had come, not the DNA of the sheep that gestated and gave birth to Dolly.<sup>53</sup>

Responses to cloning were immediate and widespread. Within a day of Wilmut's announcement, President Clinton asked the National Bioethics Advisory Commission to study the ethical implications of cloning and make recommendations for appropriate federal responses.<sup>54</sup> That group issued a report that recommended congressional action prohibiting somatic cloning of a human for at least three to five years.<sup>55</sup>

Congress has not yet passed legislation regulating cloning.<sup>56</sup> For the most part, however, early responses to the advent of mammalian cloning focused on the implications of reproducing humans through use of the technique and did not focus on the implications of non-reproductive cloning for the creation of embryos to be used in research (described popularly as *research* or *therapeutic* cloning,<sup>57</sup> in contrast with *reproductive* cloning).<sup>58</sup>

with 46 chromosomes (half from the female progenitor and half from the male progenitor). *Id.* at 35-36.

51. Wilmut facilitated division of the fused cell by activating it with an electric current. Other laboratories have effected cell division in the activated egg through the use of chemicals. *Id.* at 36.

52. Since the birth of Dolly, researchers elsewhere have successfully cloned a variety of other animals including cats, cattle, and mice. Taeyoung Shin et al., *A Cat Cloned by Nuclear Transplantation*, 415 NATURE 859 (2002); Robert P. Lanza et al., *Cloned Cattle Can be Healthy and Normal*, 294 SCI. 1893 (2001); Teruhiko Wakayama et al., *Ageing: Cloning of Mice to Six Generations*, 407 NATURE 318 (2000).

53. In addition to the DNA of the somatic cell, the cloned baby also carries mitochondrial DNA from the cytoplasm of the egg. Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 647 (1998). Mitochondria are organelles that contain a small amount of DNA; they provide information for producing a few mitochondrial proteins. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 36. Mitochondria exist in every cell. However, after fertilization mitochondria in sperm degrade. This leaves only mitochondria from the egg in the developing zygote. *Id.* Thus, if the egg and the somatic cell come from different females, the resulting baby will carry DNA from both of them. *Id.*

54. Andrea L. Bonnicksen, *Creating a Clone in Ninety Days: In Search of a Cloning Policy*, 38 JURIMETRICS J. 23, 24 (1997).

55. *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission: Executive Summary*, 38 JURIMETRICS J. 3, 6 (1997) [hereinafter NBAC 1997].

56. See *infra* notes 82-84 and accompanying text (describing proposed bills about cloning and responses to them).

57. See *supra* note 2. The July 2002 report of the President's Council on Bioethics criticizes use of the term *therapeutic cloning* on the ground that the only distinction between research and reproductive cloning "is based entirely on the differing goals of the cloners." PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 27. The term *therapeutic cloning* was originally used by advocates of cloning for biomedical research. *Id.* at 28. Some advocates would now prefer to substitute for the term therapeutic cloning, the phrase *somatic cell nuclear transfer* or *nuclear transplantation*. While acknowledging that the suggested change is "not wholly cosmetic and rhetorical," the President's Council re-

The public began energetically to consider the implications of therapeutic cloning in 1998 when two groups of scientists in the United States isolated stem cells. One group, at the University of Wisconsin, isolated human embryonic stem cells.<sup>59</sup> Embryonic stem cells are derived from the inner mass of the embryo at the blastocyst stage (six to seven days after fertilization).<sup>60</sup> Simultaneously, scientists at Johns Hopkins University isolated human fetal germ stem cells (taken from fetuses).<sup>61</sup> The promise of embryonic stem cells<sup>62</sup> depends on their capacity to differentiate into each cell of the body and to proliferate indefinitely *in vitro*.<sup>63</sup> Thomas Okarma, President of Geron Corporation, described this promise at its grandest:

The potential for these cells is to allow permanent repair of failing organs by injecting healthy functional cells developed from them, an approach called regenerative medicine. The significance would be to broaden the definition of medical therapy from simply halting the progression of acute or chronic disease to include restoration of lost organ function. . . . Regenerative medicine would be a totally new value paradigm for clinical therapeutics.<sup>64</sup>

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port opposes the switch because the scientific terminology (*somatic cell nuclear transfer* or *nuclear transplantation*) “fails to convey the nature of the deed itself, and hides its human significance.” *Id.* at 28.

58. In the year or two following announcement of Wilmut’s success in cloning a lamb, a significant body of literature about the socio-legal implications of cloning appeared. Few of the early responses considered the implications of cloning using human somatic cells to create embryos for research rather than for reproduction. *See, e.g., Cloning Symposium*, 38 JURIMETRICS J. (1997) (including 12 articles about cloning); *Symposium on Human Cloning: Legal, Social, and Moral Perspectives for the Twenty-First Century*, 27 HOFSTRA L. REV. 473 (1999). A Lexis search located fifty-five law review articles containing the words therapeutic and cloning in connection with each other. Almost all were published in the year 2000 or later. Only four published before 2000 (all published in 1998 or 1999) refer to the potential use of cloning as a source of embryonic matter for research. (The search request to Lexis (Law Review Library, All Review file) was therapeutic w/3 cloning).

59. Thomson et al., *supra* note 1, at 1145.

60. *See id.* Human embryonic stem cells can also be isolated from fetal germinal tissue. Shablott et al., *supra* note 1. Multi-potent progenitor cells have been isolated as well from adult tissue, including bone marrow. Morayma Reyes et al., *Origin of Endothelial Progenitors in Human Postnatal Bone Marrow*, 109 J. CLINICAL INVESTIGATION 337 (2002).

61. Shablott et al., *supra* note 1, at 13726.

62. Embryonic germ cells, the precursors of sperm and eggs, resemble embryonic stem cells in their apparent capacity to differentiate into all cell types. NAT’L BIOETHICS ADVISORY COMM’N., ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH: VOLUME I: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION 8 (1999), *available at* <http://www.georgetown.edu/research/nrcbl/nbac/stemcell.pdf> (last visited Aug. 23, 2003) [hereinafter NBAC 1999]. Stem cells can additionally be derived from some adult organs, including bone marrow. *Id.*

63. *Id.* at 9-10.

64. Thomas B. Okarma, *Human Embryonic Stem Cells: A Primer on the Technology and Its Medical Applications*, in THE HUMAN EMBRYONIC STEM CELL DEBATE: SCIENCE, ETHICS, AND PUBLIC POLICY, *supra* note 2, at 3, 3.

Research on embryonic stem cells depends on the availability of embryos.<sup>65</sup> Somatic cell nuclear transfer offers one source. *In vitro* fertilization is a second source.<sup>66</sup> For some who oppose embryonic stem cell research, all sources of human embryos for research are controversial. Recently, however, the use of cloning to obtain embryonic stem cells has been framed by legislative bodies, including Congress,<sup>67</sup> and by the public media reporting on legislative developments, as especially problematic.<sup>68</sup> Some who oppose research on embryonic stem cells have sketched disquieting visions of reproductive cloning and have suggested that research cloning will create a slippery slope leading to reproductive cloning and to a variety of related aberrations.<sup>69</sup> Others opposing cloning for research argue that any sort of cloning using human DNA is inherently anathema.<sup>70</sup> Such fears were fueled in early 2003, with the unsupported claim by Clonaid, a company founded by a religious sect called the Raelians, that it had successfully produced a human clone.<sup>71</sup>

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65. Stem cells have been isolated from embryos, fetuses, and from adult cells, especially bone marrow, fat tissue, the central nervous system, and the liver. *Id.* It is not yet clear whether adult stem cells have the same capacity to differentiate into other cells as do embryonic stem cells. John A. Balint, *Ethical Issues in Stem Cell Research*, 65 ALB. L. REV. 729, 731-32 (2002) (indicating embryos for research could be obtained from spare embryos after reproductive *in vitro* fertilization (IVF)).

66. Some embryos are created through IVF, specifically for research. Others fall within the category of spare embryos, created for reproduction but not needed for that purpose. NBAC 1999, *supra* note 62, at 9-10. A further source of embryos that can be used in stem cell research may result from the process of parthenogenesis. This process involves stimulating unfertilized eggs to divide so that they contain the full complement of chromosomes usually found in the relevant species. Parthenogenesis has led to live offspring in the case of amphibians, but not in the case of mammals. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 44. It is not yet certain that cloned stem cells from parthenogenesis can be reprogrammed correctly. *Id.* In late 2002, Ian Wilmut, who cloned Dolly, applied to the British government for the right to experiment with parthenogenesis. Steve Connor, *Dolly 'Dad' Eyes Human Eggs*, DAILY TELEGRAPH, Nov. 26, 2002, at 19.

67. See *infra* notes 82-83 and accompanying text.

68. See, e.g., Howard Markel, *Weighing Medical Ethics for Many Years to Come*, N.Y. TIMES, July 2, 2002, at F6; Dave Weldon (R.-Fla.), Editorial, *Cloning and Congress*, WASH. POST, June 19, 2002, at A20; Marcia Coyle, *As the Senate Prepares to Ban Some or All Cloning*, NAT'L L.J., May 15, 2002; Kristen Philipkoski, *Death Knell to Cloning Movement?*, WIRED NEWS, Jan. 26, 2002, at <http://www.wired.com/news/medtech/0,1286,50042,00.html>.

69. See, e.g., PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50 (noting that cloning for biomedical research will "open[] the door to other moral hazards, such as cloning-to-produce-children or research on later-stage human embryos and fetuses"). In late 2001, Advanced Cell Technology again intensified the debate about cloning when it announced it had cloned a human embryo. Paul Lesko & Kevin Buckley, *Attack of the Clones and the Issues of Clones*, 3 COLUM. SCI. & TECH. L. REV. 3, ¶ 1 (May 10, 2002) at <http://www.stlr.org/html/volume3/lesko.pdf> (last visited Sept. 1, 2003).

70. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50 (describing cloning for biomedical research as "disquieting" because it uses "seeds of the next generation as mere raw material for satisfying the needs of our own").

71. Gina Kolata, *The Promise of Therapeutic Cloning*, N.Y. TIMES, Jan. 5, 2003, § 4, at 4. Scientists expressed concern that legislators and the public would fail to recognize the difference between reproductive and therapeutic cloning. *Id.*

Controversy about the production of embryos for research through cloning in particular, has galvanized strong social and legal responses<sup>72</sup> and has resulted in widespread confusion about the differences between non-reproductive cloning<sup>73</sup> and research on pluripotent stem cells.<sup>74</sup> Public media, lawmakers, social theorists, and the public at large have contributed to the confusion between non-reproductive cloning and stem cell research.<sup>75</sup>

The debate about cloning intensified in 1998 when Advanced Cell Technology, a Massachusetts biotechnology company, announced that it had fused a human somatic cell with a cow ovum.<sup>76</sup> This rendered the possibility of human cloning real and reinforced fears that cloning would eventually be used to produce unsettling chimeras such as a cow-person.<sup>77</sup> Yet, the stunning promise<sup>78</sup> (or hype, depending on perspective) of embryonic stem cell research<sup>79</sup> has galvanized a wide set of responses favoring cloning for research.<sup>80</sup> In the few years since the isolation of embryonic stem cells in 1998,<sup>81</sup> Congress<sup>82</sup> and state legislatures<sup>83</sup> have entertained a variety of bills aimed at banning or regulating human cloning, several bioethics bodies have released reports on cloning and/or on stem cell research,<sup>84</sup> and a wide

72. See *infra* Part IV and accompanying notes.

73. Nuclear transfer involves replacing the nucleus of an embryonic cell with a nucleus taken from any other cell (somatic or embryonic). DEREK MORGAN, ISSUES IN MEDICAL LAW AND ETHICS 187 (2001).

74. Okarma, *supra* note 64, at 5 (indicating embryonic stem cells are termed pluripotent because of their capacity to differentiate into all of the cells of the human body). Totipotent cells are differentiated from pluripotent cells by the capacity of the latter to be directly implanted into a woman's uterus and grow into a fetus. Wolpe & McGee, *supra* note 2, at 188-89.

75. See Wolpe & McGee, *supra* note 2, at 187-88. Human reproductive cloning that is cloning to create a baby, has been widely condemned and feared. See *id.* at 188. The authors refer to politicians who opposed embryonic stem cell research as a slippery slope toward human cloning. *Id.* For instance, Congressman Jay Dickey (R.-Ark.) asserted:

[t]here are no instances in which I feel the ban on federally funded research on human embryos should be lifted. The language of the ban prevents taxpayer funding for bizarre experiments, such as cloning. Eventually, I could see the embryonic stem cell technology going in this direction.

*Id.* (citing D. Butler, *Breakthrough Stirs US Embryo Debate*, 396 NATURE 104 (1998)).

76. Research using embryonic stem cells may lead to treatments for conditions resulting from cell malfunction, including diseases such as Parkinson's disease, diabetes, and Alzheimer's. NBAC 1999, *supra* note 62, at 19.

77. Nicholas Wade, *Researchers Claim Embryonic Cell Mix of Human and Cow*, N.Y. TIMES, Nov. 12, 1998, at A1.

78. See *id.*

79. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 20-21.

80. See *infra* notes 85, 87-88 and accompanying text.

81. See Thomson et al., *supra* note 1, at 1145.

82. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 21-22 (summarizing bills in Congress).

83. Sheryl Gay Stolberg, *Washington Not Alone in Cell Debate*, N.Y. TIMES, July 23, 2001, at A12.

84. See, e.g., NBAC 1999, *supra* note 62.

variety of public interest groups have become active in the debate, variously favoring or condemning cloning and embryonic research.<sup>85</sup>

The promise of embryonic stem cell research may not be fulfilled for many years, or at all.<sup>86</sup> But the possibilities of treatments and cures for fatal illnesses and debilitating disabilities, as well as the enormous sums of money likely to flow to the biotechnology and pharmaceutical industries if the promise of the research is actualized, have stimulated public and governmental support for therapeutic cloning and embryonic stem cell research.<sup>87</sup> A fairly effective pro-research campaign was constructed in the face of strong opposition from an alliance of pro-life adherents and others, largely drawn from the camp of neo-conservatives, who oppose cloning because it “dehumanizes human life.”<sup>88</sup> In the resulting controversy, old social and political alliances are being readjusted, underlying agendas are being unmasked and realigned, and the embryo-as-symbol is being reconstructed.

### III. AT STAKE IN THE DEBATE ABOUT ABORTION: EMBRYOS AND BEYOND

The politics of abortion have molded the concerns and temper of the debate about embryonic research. Thus, in order to understand public responses to embryonic research and cloning for the production of research embryos, it is necessary first to understand the history of ideas that shaped the politics of abortion<sup>89</sup> during the nine-

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85. Those lobbying in support of therapeutic cloning for the production of embryonic stem cells include representatives of the biotechnology industry, patient groups, and scientific societies. Aaron Zitner, *The Nation: Cloning Receives a Makeover Politics: Nuances of Language Helped Reframe the Debate and Derail an All-Out Ban in Congress*, L.A. TIMES, June 17, 2002, at A1. Those opposing cloning have, for the most part come from groups opposing abortion. See *id.* (quoting Douglas Johnson of National Right to Life Committee). In addition, a group of conservative intellectuals, not connected to pro-life groups, have actively opposed therapeutic cloning. See Chris Mooney, *The Future Is Later*, AM. PROSPECT, July 15, 2002, at 10 (considering position of Francis Fukuyama, Leon Kass and other neo-conservatives on cloning and embryonic research).

86. Heather Johnson Kukla, Note, *Embryonic Stem Cell Research: An Ethical Justification*, 90 GEO. L.J. 503, 507 (2002) (citing various sources). In fact, it now appears to some scientists that both therapeutic cloning and the use of stem cells to cure illness and disability are unlikely to be actualized for some time. In early 2003, Gina Kolata reported that “almost all researchers, when questioned, confess that such accomplishments [as the use of therapeutic cloning to cure diseases] are more dream than reality.” Kolata, *supra* note 71, § 4, at 7.

87. Zitner, *supra* note 85, at A1.

88. Ramesh Ponnuru, “Checks and Balances,” NAT’L REV. ONLINE, (July 12, 2002) at <http://www.nationalreview.com/ponnuru/ponnuru071202.asp> (last visited Aug. 23, 2003).

89. This Article aims to delineate the ideological implications of arguments about embryonic or fetal life for two broad social debates in American society. Thus, in the context of this Article, differences between embryos and fetuses are of less importance than they may be for scientists, theologians, or pregnant women. For scientists, embryos become fetuses at about eight weeks of gestation. Only in the last half of the twentieth century did it be-

teenth and twentieth centuries. Exploration of that ideological history suggests a significant irony at the heart of the debate about abortion.

That debate developed during the middle years of the nineteenth century. From the start, it more or less openly paralleled a larger debate about the meaning of family and the scope of family relationships. Although the right to abortion was not a central principal of the feminist movement until the second half of the twentieth century,<sup>90</sup> those who opposed abortion in the nineteenth century (and later) also strongly tended to favor the preservation of distinct gender roles and to view woman as the preserver of hearth and home—as suited by *nature* to serve her husband and to care for their children.<sup>91</sup> In the late twentieth century, especially in the years surrounding *Roe v. Wade*,<sup>92</sup> that correlation became explicit. By the last decades of the twentieth century, however, as the American family almost visibly jettisoned the incidents of traditional domestic life, those who opposed abortion relied increasingly on arguments that stressed the sanctity of fetal and embryonic life. Concomitantly, they relied less often, at least in public debate, on arguments about the sanctity of traditional family life.<sup>93</sup>

The attribution of personhood to embryos occurred only in the middle of the nineteenth century.<sup>94</sup> But most of those who actively participated in the right-to-life movement in the aftermath of *Roe* simply assumed that embryos were children and that abortion was murder.<sup>95</sup> This assumption did not become the central tenet of the right-to-life movement, eclipsing rhetoric about family life (including rhetoric about the importance of preserving gender differences), until the last decades of the twentieth century. By then, a majority of Americans were, in fact, living in families that no longer reflected traditional understandings of the domestic arena.<sup>96</sup> And so, by this time, pro-life adherents were compelled, as a practical matter, to seek alternative modes of furthering their cause. Developing a platform that emphasized the morality of safeguarding embryonic life (rather than the morality of safeguarding traditional family life) served the movement well.

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come comparatively easy to obtain early embryos for research. Before the advent of *in vitro* fertilization, most embryos available for scientific research were the products of miscarriages and were thus not living. Morgan, *supra* note 3, at 50.

90. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 112-13 (1984).

91. *Id.*

92. 410 U.S. 113 (1973).

93. See *infra* notes 132-37 and accompanying text.

94. See *infra* notes 100-15 and accompanying text.

95. LUKER, *supra* note 90, at 128 (describing emergence of right-to-life movement).

96. See *infra* notes 132-36 and accompanying text.

This Part delineates the ideological contours of the debate about abortion, and situates that debate within its wider ideological history—one concerned with the scope of the family arena, the comparative significance of autonomous individuality and of community, the role and status of women, and the meaning of personhood. This Part suggests that the debate about abortion during the nineteenth and twentieth centuries reflected shifting understandings of personhood and family life that developed during the same period.

#### A. “Abortion Politics” in the Nineteenth and Early Twentieth Centuries

In the United States, abortion was not widely criminalized until the second half of the nineteenth century.<sup>97</sup> Before the Civil War, abortion was supported by custom and public policy.<sup>98</sup> Under common law, abortion was not a crime until quickening, the stage of pregnancy at which a woman first felt fetal movements (generally the first half of the second trimester).<sup>99</sup> The politics of abortion developed as part of a broad set of social movements that aimed variously to oppose gender equality, sexual freedom, and the displacement of faith by modern rationalism.

##### 1. *The Concept of Fetal Life*

The sanctification of fetal life was part of that opposition from the middle of the nineteenth century, although it did not become the essential tenet of pro-life groups for over a century. After the Civil War, a variety of voices—all supportive of the nascent movement to criminalize abortion—proclaimed the sanctity of fetal life. In 1869, Pope Pius IX rejected the Augustinian view that ensoulment occurs at forty days after conception,<sup>100</sup> and proclaimed that a fetus gains a

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97. JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253-59 (1994). Some states passed laws restricting abortion in the middle decades of the nineteenth century, but when these laws were challenged in court, the majority of state courts upheld the common law tradition of allowing abortion. *Id.* at 254 (citing Carroll Smith-Rosenberg, *The Abortion Movement and the AMA, 1850-1880*, in DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA (1985)). Beginning in the 1860s, however, states successfully passed restrictive abortion statutes. *Id.* at 254-55 (citing JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978) and Smith-Rosenberg, *supra*). Moreover, states criminalized mailing products or information regarding abortion or contraception. *Id.* at 255. And in 1873, Congress passed a law (known as the *Comstock Law*) prohibiting mailing or importing “any article whatever for the prevention of conception, or for causing unlawful abortion.” *Id.* at 255-56 (citation omitted).

98. See BRODIE, *supra* note 97, at 253.

99. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281-82 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 132-36 (1973) and MOHR, *supra* note 97, at 3).

100. See Balint, *supra* note 65, at 735 (citing JOHN T. NOONAN, JR. ET AL., THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 38-39 (John T. Noonan, Jr.

soul (and thus becomes a full person) at conception.<sup>101</sup> After this proclamation, the Church classified all abortions as murder.<sup>102</sup> In the same year, a council of bishops, meeting in Baltimore, condemned abortion.<sup>103</sup> Abortion, in the council's view, was no different than "the killing of a child after birth."<sup>104</sup>

The Church's strong public position about abortion served as a condemnation of *modern* rationalism, inducing the rejection of faith.<sup>105</sup> For the Church, opposing abortion was part of a more general opposition to modernization. At stake was the future of a venerable universe of power and belief. That universe was grounded in faith; it prized hierarchy and status and it frowned upon autonomous choice for almost everyone. For the Church, the controversy over abortion became, in effect, a last stand in a larger battle to safeguard a vanishing world of social privilege, political power, and religious faith.

During the same years that the Catholic Church publicized its new position about the status of fetal life, American physicians developed a similar position from the perspective of science rather than religion. They laid the groundwork for a popular vision of fetus-as-child, premised not on faith, but on fact.<sup>106</sup> The nineteenth-century medical community was motivated by interests beyond those of science. The community hoped to upgrade the status of the profession, and toward that end, to eliminate competition from alternative healthcare practitioners.<sup>107</sup> By defining fetuses as people, the profession laid claim to an exclusive ability to treat pregnant women, which helped define physicians as better trained and more capable

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ed., 1970)). The Augustinian view was shared by Thomas Aquinas and by Popes Innocent III (in 1211) and Gregory XIII (in 1550). *Id.* (citing NOONAN ET AL., *supra*, at 20-23, 27). *See also infra* note 101 (noting the Church's identification of conception with ensoulment in 1869).

101. John T. Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* *supra* note 100, at 39. In Apostolic Sedes, Pius IX redrafted the Church's assertion about excommunication for abortion by omitting language that appeared in an earlier pronouncement about abortion of an *ensouled fetus*. This omission by Pius IX was taken as an assertion that ensoulment began at conception insofar as any other interpretation "would be making an old law more onerous, which is contrary to the intent of the constitution." *Id.* at 39 n.133 (quoting Anonymous, *De Animatione Foetus*, 11 NOUVELLE REVUE THEOLOGIQUE 186 (1879)).

102. *Id.* at 39 (citing THEOLOGIE MORALE A L'USAGE DES CURES ET DES CONFESSEURS (1874)).

103. MOHR, *supra* note 97, at 186.

104. *Id.* (citation omitted).

105. JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* 389-91 (1965) (speaking, in particular, of the spread of contraception in France in the nineteenth century).

106. Balint, *supra* note 65, at 735. *See supra* notes 100-01 and accompanying text (noting the Church's identification of conception with ensoulment in 1869).

107. LUKER, *supra* note 90, at 28.

than alternative practitioners of the day.<sup>108</sup> Thus, nineteenth-century physicians provided scientific backing for claims about the moral status of the fetus.<sup>109</sup> A century later, these claims were incorporated at the center of the ideological platform of the pro-life movement.<sup>110</sup>

Dr. Hugh Hodge, a medical school professor at the University of Pennsylvania, played an important role in the nineteenth-century effort. He excoriated abortion on the ground that the fetus was a thinking, moral being.<sup>111</sup> Hodge described the fetus as an “independent being” with “independent powers.”<sup>112</sup> A couple of decades later, Dr. Stephen Tracy substantiated the claim that the fetus is a “human being” by recording the knowledge of “well-informed medical men”:<sup>113</sup>

At forty-five days, the form of the child is very distinct, and it is not termed a fetus. The head is very large; the eyes, mouth, and nose are to be distinguished; the hands and arms are in the middle of its length, fingers distinct . . . at two months, all the parts of the child are present . . . the fingers and toes are distinct. At three months, the heart pulsates strongly, and the principal vessels carry red blood.<sup>114</sup>

In the same year (1869) that Pius IX proclaimed the personhood of fetuses, Hodge published *Foeticide, or Criminal Abortion*.<sup>115</sup> There, he summarized his medical assessment of the fetus’ ontological status as a full person.

The convergence of religious and scientific authority with regard to fetal status significantly strengthened the movement to outlaw abortion in the nineteenth century. However, at that time, the ontological status of the fetus was one among a wide set of concerns and assertions publicized by abortion opponents.

## 2. *Abortion, Gender, and Families*

Nineteenth-century abortion opponents constructed the notion of the embryo-as-person, but their agenda was grounded in a vision of traditional family life and gender roles.<sup>116</sup> “The true wife,” explained Dr. Horatio R. Storer, a leader of the physician’s campaign against

108. *Id.* at 18-20.

109. See BRODIE, *supra* note 97, at 87, 266-67.

110. *Id.* at 88; see also Siegel, *supra* note 99, at 325-26.

111. See BRODIE, *supra* note 97, at 266.

112. MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 113 (1992) (citing HUGH HODGE, FOETICIDE, OR CRIMINAL ABORTION 9-10 (1869)).

113. *Id.* at 114 (quoting STEPHEN TRACY, THE MOTHER AND HER OFFSPRING 109 (1853)).

114. *Id.*

115. HODGE, *supra* note 112.

116. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 11 (1997).

abortion, rejected “undue power in public life . . . [and] undue control in domestic affairs . . . [as] privileges not her own.”<sup>117</sup>

Anti-abortion rhetoric included express warnings about the dissolution of family life. Abortion became synonymous with the failure of women to effect their natural duties as wives and mothers.<sup>118</sup> The very notion of abortion provided a powerful, negative symbol of independent women—of both the prostitute who stood outside family life and the wife who stood inside but rejected the sacred demands of moral decency. Abortion symbolized the threat of sexual excesses, and in this vein, it stood for the desecration of sacred truth and the destruction of public morality.<sup>119</sup> It symbolized efforts to undermine a domestic sphere populated by loving mothers, presumed to care selflessly for their treasured children,<sup>120</sup> and wives, expected to provide sanctuary to their presumptively beleaguered husbands, viewed as returning each evening from the hardships of the marketplace to the comfort of home.<sup>121</sup> Such images suggested that women who failed to fulfill their proper role within the domestic arena threatened the backbone of social and economic life. Opposition to abortion reaffirmed that view.<sup>122</sup>

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117. *Id.* at 11 (quoting HORATIO ROBINSON STORER, *IS IT I? A BOOK FOR EVERY MAN* 1886 (reprinted as *A PROPER BOSTONIAN ON SEX AND BIRTH CONTROL* 1934)). Members of the medical profession were heavily represented among the important nineteenth-century anti-abortionists. Among other things, they sought to exclude women from the profession. *Id.* at 11.

118. “[F]or the married shirk, who disregards her divinely-ordained duty,” wrote Augustus Gardner in 1876 (distinguishing *this sort of woman* from the “poor,” “seduced” “girl”), “we have nothing but contempt, even if she be the lordly woman of fashion, clothed in purple and fine fashion.” MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 171 (1985) (quoting AUGUSTUS K. GARDNER, *CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH AND THEIR EFFECTS UPON THE FATHER, MOTHER, AND THE CHILD* 117 (1876)). Clearly, the most contemptuous of women was she who could easily have been a devoted wife and mother but instead chose other paths (symbolized by the *married shirk* who chose abortion).

119. *See id.* at 176 (noting Anthony Comstock’s role as protector of *public morals*).

120. *See* VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 3 (1985) (explaining that during the nineteenth century, children became “economically worthless” but “emotionally priceless”).

121. *See* STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 50-52 (1988) (By mid-nineteenth century, “[t]he middle-class husband was expected to be the breadwinner for the family. Instead of participating in domestic industries, the middle-class wife was expected to devote herself full-time to keeping house and raising children.”). The nineteenth-century wife was viewed ideally as a nurturer and protector of sacred, familial values. A popular nineteenth-century magazine for women, *Ladies’ Magazine*, characterized woman as “forming the future patriot, statesman, or enemy of his country, [but] more than this, she is sowing the seeds of virtue or vice which will fit him for Heaven or for eternal misery.” MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 52-53 (1994) (quoting MAXINE MARGOLIS, *MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND WHY THEY CHANGED* 38 (1984)).

122. *See* LUKER, *supra* note 90 and accompanying text.

But nineteenth-century responses to abortion were not uniform. Opinions about abortion reflected tensions at the center of the ideology of traditional family life. Not everyone viewed abortion with disgust. For some, abortion and contraception represented a new, positive vision of independence within the home because these options provided for reproductive choice within the context of affective marriage.<sup>123</sup> This vision indicates that the modernization of family life began, not in the 1960s (when it became manifest), but over a century earlier.<sup>124</sup>

Whatever nineteenth-century Americans believed about abortion and contraception, family size declined sharply during the century. Birth rates fell dramatically, from about seven children to a family at the start of the century to less than four at the century's end.<sup>125</sup> The decrease was not due to external disasters such as famine or war.<sup>126</sup> Rather, it was a product of parental choice and was effected through use of contraception and abortion.<sup>127</sup> By the middle of the nineteenth century, abortion, once practiced largely by *desperate* women (motivated by poverty or guilt about the consequences of extra-marital sexuality), became important as a practical matter to a new community of women.<sup>128</sup> White, middle-class women, not driven by the pressures of poverty or by fears of being revealed as sinful, sought abortion in order to preserve (or more accurately, perhaps, to create) families that reflected the nineteenth-century ideal of two parents, living together with their cherished (and chosen) children.<sup>129</sup>

Thus in the nineteenth century, with the so-called traditional family still in its ascendancy, but with the harbingers of its transformation already present in society's readiness to embrace notions of independence and autonomy in defining the spousal relationship, opposing conceptions of abortion reflected opposing conceptions of family. Abortion was deplored by many as an assault on family life,

123. GROSSBERG, *supra* note 118, at 170-71.

124. The process of modernization within the domestic arena during the nineteenth century is well illustrated by the promulgation of the Married Women's Property Acts. See LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 13 (2d ed. 2000); see also e.g., Illinois Married Women's Act, 1861 Ill. Laws 1433 (providing that "all property, both real and personal, belonging to any married woman, as her sole and separate property . . . shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property").

125. N.E.H. HULL & PETER C. HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* 25 (2001).

126. *Id.* at 25-26.

127. *Id.* at 26.

128. *Id.* at 25-26.

129. *Id.* (The "growing fondness for children" in nineteenth-century America "did not lead to larger families. In fact, the reverse was true."). Hull & Hoffer explained that "[a]s the investment in love and family funds in each child increased, and the mortality of children declined, parents opted for fewer children." *Id.* at 25.

but abortion also provided an important *private* option in the construction of companionate family life.<sup>130</sup>

B. "Abortion Politics" in the Second Half of the Twentieth Century:  
*Text and Pretext*<sup>131</sup>

In the late twentieth century, as in the previous century and a half, the debate about abortion reflected a more general debate about the scope of family life and the parameters of personhood. But by this time, those concerned with safeguarding traditional family life faced a society that had largely abandoned that form of family in favor of families constructed through negotiation and choice.<sup>132</sup>

Although the traditional family (forged in the early years of the Industrial Revolution) appeared to find its elixir in the middle decades of the twentieth century, signs (though often subtle and rarely decisive) appeared soon after World War II that indicated that the traditional family was under siege. By the 1960s, the once clear boundaries between public life (in the marketplace) and private life (in the home) had begun to blur.<sup>133</sup> As part of this shift, discussions of sexuality and reproductive matters, understood in earlier decades as almost shamefully private, entered public discourse.<sup>134</sup> And by the last decades of the twentieth century, the domestic arena had altered significantly both in fact and in social conception.<sup>135</sup> At least with regard to adults within families, society and the law widely prized autonomous individuality and negotiated choice.<sup>136</sup> As a result, it became less and less effective, as a strategic matter, to premise opposition to abortion on the importance of preserving traditional family life. The audience for that sort of argument had grown thin.

This Section suggests that, as a result, abortion opponents focused less often, at least in public discourse, on the connection between

130. GROSSBERG, *supra* note 118, at 170-71.

131. This Article differentiates text from pretext in order to explore the shifting foci of the social debate about abortion. The differentiation is not intended to suggest that beliefs and agendas delineated in this Article as *pretext* are not real or that they do not seem momentous to those voicing them. Only pretexts that are also convincing in their own terms are effective. In the context of social and political debate, effective pretexts must also be convincing in some regard or at least present stumbling blocks to sociopolitical antagonists. Moreover, pretexts may, over time, become texts. Arguably, for instance, shifting understandings and uses of the embryo in disputes about abortion and stem cell research illustrate that process. Or at any rate, in the debate about abortion, the text (safeguarding traditional family life) has been subsumed, at least in public debate, by the pretext (the ontological status of the embryo).

132. See *infra* notes 134-67 and accompanying text.

133. See BRUCE J. SCHULMAN, *THE SEVENTIES* 1-20 (2001).

134. LUKER, *supra* note 90, at 107-18.

135. See MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 34-35 (1993) (defining the modern family in terms of increased autonomy among family members).

136. See *id.*

abortion and the weakening of traditional family life. Instead, the pro-life movement grew silent about the agenda around which the debate about abortion had developed and focused more and more often on the status of fetuses and embryos. Thus, for pro-life adherents, arguments about the sanctity of fetal and embryonic life encompassed (while displacing) arguments about the value of traditional family life.

This Section first describes the transformation of the American family during the last half of the twentieth century and the widespread acceptance of that change within society and, in particular, within the law. It then describes the consequent shift in strategy among abortion opponents as they shifted focus, at least in public discourse. Pro-life discourse about the value of traditional family life was eclipsed by pro-life discourse about the value of fetal and embryonic life.

### 1. *Accepting the "Modern" Family*

By the second half of the twentieth century, Americans widely prized familial relationships, at least between adults, that mirrored the values of the nineteenth century marketplace rather than those associated with the nineteenth-century home.<sup>137</sup> Among other things, this new family provided for negotiation and choice in place of predetermined roles, it preferred autonomous individuality to communal dependency, and it valued equality rather than fixed, hierarchical statuses for family members.

#### (a) *Shifts in Family Law*

This new understanding of family was reflected in a wide variety of legal changes that occurred during the same period. For instance, beginning in the early 1970s, courts recognized and agreed to enforce prenuptial agreements in contemplation of divorce;<sup>138</sup> previously these agreements were deemed violative of public policy.<sup>139</sup> In the same period, lawmakers increasingly recognized cohabitation agreements between individuals who chose not to marry.<sup>140</sup> And perhaps

137. *See id.* at 34-36.

138. *See, e.g.,* *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982).

139. A number of the early decisions recognizing prenuptial agreements in contemplation of divorce justified that step by referring to sociological changes in the character of families. In *Posner*, the court took judicial notice of the disturbing rate of divorce given the rate of marriage. *See* 233 So. 2d at 394.

140. *See, e.g.,* *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (enforcing nonmeretricious contracts between unmarried cohabitants); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (recognizing express agreements between unmarried cohabitants); *Cohabitation: property and financial agreements*, MINN. STAT. § 513.075 (1988).

most importantly, beginning in California in 1969,<sup>141</sup> every state amended its divorce law by the mid-1980s to provide for some form of divorce not dependent on accusations of fault.<sup>142</sup> Many states added new no-fault options to the traditional fault grounds for divorce (including adultery, cruelty, and desertion);<sup>143</sup> others abandoned traditional divorce rules and provided for divorce on grounds of marital breakdown.<sup>144</sup>

Moreover, the transformation of the American family in the last decades of the twentieth century is reflected in a set of Supreme Court decisions<sup>145</sup> that implicitly acknowledge a vision of families premised on autonomous individuality—a vision of family members free to negotiate the terms of familial relationships and to define their sexual and reproductive lives without reference to the constraints of traditional family life.

(b) *Individualism, Autonomy, and Family Jurisprudence*

*Griswold v. Connecticut*,<sup>146</sup> decided in 1965, was among the first cases that suggested the Court's interest in, and its mode of responding to, disputes about domestic (and especially reproductive) matters. In *Griswold*, the Court invalidated a state law that prohibited the distribution of contraception.<sup>147</sup> Six years later, in *Eisenstadt v. Baird*,<sup>148</sup> another case involving state limitations on contraception,

141. See Act of Sept. 4, 1969, ch. 1608, 1969 Cal. Stat. 3312 (first state statute to provide for no-fault divorce). See generally Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401 (1974) (listing grounds for divorce by state).

142. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 78 (1987) (observing that by 1985 all states had some sort of no-fault provision for divorce).

143. *Id.* at 78-79.

144. See *id.* at 78.

145. Changes in constitutional jurisprudence during the second half of the twentieth century facilitated the Court's entertaining of family issues. That jurisprudence provided for applying the equal protection and due process protections of the Fourteenth Amendment to family matters. See EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* 13 (1986) (pointing to importance of *Brown v. Board of Education*, 347 U.S. 483 (1954) in beginning this process).

Traditionally, federal courts did not often hear cases involving family matters, in large part this followed from the unavailability of diversity jurisdiction in domestic cases. See *Ankenbrandt v. Richards*, 504 U.S. 689, 698-99 (1992). The absence of diversity jurisdiction has broadly limited the path to federal courts for family disputants. They can only be heard in federal court if a federal statute is at stake or a constitutional question is present. Originally, the absence of diversity jurisdiction in family cases was attributed to dicta in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board."). In 1992, the Court decided that the exception was predicated on the Judiciary Act of 1789. *Ankenbrandt*, 504 U.S. at 698-99.

146. 381 U.S. 479 (1965).

147. *Id.* at 485-86.

148. 405 U.S. 438 (1972).

the Court went much farther than it had in *Griswold* in delineating and justifying a new vision of family. In *Eisenstadt*, the Court invalidated a Massachusetts statute that limited the distribution of contraceptives to unmarried people.<sup>149</sup> If *Griswold* is remarkable for its jurisprudential extension of spouses' constitutional right to privacy, *Eisenstadt* is remarkable for its openly modern assumption about the parameters of family life. In *Griswold*, the Court predicated its decision on the sanctity of the marital unit. Marriage, explained Justice Douglas, "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."<sup>150</sup> In stunning contrast, and without any meta-commentary about changes in the parameters of marriage since *Griswold*, the Court in *Eisenstadt* described marriage as a partnership rather than a communal union and as a fungible choice open to continuous revisitation rather than as a relationship imbued with *sacred* truth. In *Eisenstadt*, Justice Brennan, writing for the Court, explained:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>151</sup>

Thus, Justice Brennan, perhaps unconsciously, acknowledged an essentially new form of family. No longer was the law to view marriage as the sacred center of family life, with fixed parameters and familiar roles. After *Eisenstadt*, families were centered, in the eyes of the law as in the eyes of much of society, in the choices of individual family members.<sup>152</sup> *Griswold* and *Eisenstadt* together laid the jurisprudential grounding for the Court's decision in *Roe*.<sup>153</sup>

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149. *Id.* at 454-55.

150. *Griswold*, 381 U.S. at 486.

151. 405 U.S. at 453.

152. The still unresolved ideological struggle about family in the United States today focuses not on the relationship between adults within families but on the dimensions and meaning of the parent-child relationship. In the last three and a half decades, the Court has variously viewed children as autonomous individuals, for example, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511-14 (1969), which extended First Amendment rights to school students under certain circumstances; *In re Gault*, 387 U.S. 1, 30-31 (1967), which granted constitutional rights to children in delinquency proceedings, or as unequal dependents, for example, *Parham v. J.R.*, 442 U.S. 584, 616-17 (1979), which upheld state law permitting parents to commit children *voluntarily* to state mental hospitals. In a number of cases, the Court has been openly hesitant to classifying children clearly in either category, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899-900 (1992), which allowed the state to require a minor girl seeking abortion to obtain *informed consent* from a parent or from a court; *Belotti v. Baird*, 443 U.S. 622, 651 (1979), which invalidated a Massachusetts statute requir-

(c) *Roe v. Wade*<sup>154</sup>

*Roe v. Wade*, decided in 1973, reflects the notion of privacy as a constitutional right (articulated in *Griswold*), and it reflects the vision of family underlying *Eisenstadt*. *Roe* is, however, more complicated than these earlier decisions about reproductive freedom, largely because the interests of the pregnant woman are balanced against those of the developing fetus. For instance, *Roe* reflects *Eisenstadt's* endorsement of individual choice, but it also depends on an understanding of pregnant women (elaborated on the basis of the Court's trimester scheme) as less free to make their own reproductive choices than is the case for those deciding about whether and when to use contraception. Moreover, *Roe*, in its dependence on a trimester scheme, reflects an understanding of pregnancy that harmonizes more fully with a traditional common law understanding of pregnancy than with the understanding that emerged in the mid-nineteenth century.<sup>155</sup>

The limited right to abortion, first delineated in *Roe*, was predicated in part on an understanding of pregnant women as autonomous individuals, free to make basic decisions about their bodies without state interference, and in this sense, represents an extension of the vision of family members articulated in *Eisenstadt*.<sup>156</sup> Yet, in *Roe*, the Court was less ready than in *Eisenstadt* to protect unfettered individualism. The *Roe* Court refrained from defining embryos explicitly, but the Court openly balanced the interests of the pregnant woman against the interests of the developing fetus.<sup>157</sup>

Similarly, in the abortion cases that followed *Roe*, the Court has been less ready than in other cases involving adults' familial choices to jettison the claims of tradition and to provide firmly for autonomy and choice. In consequence, the right of autonomous adults within family settings, so clearly prized and protected in *Eisenstadt*, is ex-

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ing a minor girl seeking abortion to obtain parental consent and did not provide for a judicial bypass option.

153. 410 U.S. 113 (1973).

154. *Id.*

155. LUKER, *supra* note 90, at 14.

156. See 405 U.S. at 453. *Roe* also developed from the jurisprudence developed in *Griswold*. The link between contraception, protected in *Griswold*, and abortion, protected in *Roe*, is clear. David Garrow observes that before *Griswold*, abortion reformers focused on liberalizing state abortion statutes. David Garrow, *Abortion Before and After Roe v. Wade: A Historical Perspective*, 62 Alb. L. Rev. 833 (1999).

157. 410 U.S. at 159. The Court noted that

[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and later, a fetus . . . As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

pressly balanced in the cases about abortion with concern for the status of the fetus.<sup>158</sup> In the abortion cases, in contrast with most cases about familial and reproductive matters, the Court has constructed a framework that encompasses both arguments that value tradition and arguments that value modernity.<sup>159</sup> The Court's abortion jurisprudence, far more than its responses to related familial matters (including contraception and divorce) that involve adults within families, has constructed a jurisprudential stage on which a clear voice favoring tradition in familial contexts (the voice of fetal interests) can be heard alongside a voice favoring modernity (the voice of a woman's right to autonomy and choice).<sup>160</sup> This jurisprudence suggests the dimensions of social debate about abortion, and it explains the increasing focus of pro-life adherents on the ontological status of embryos and fetuses in public debate. Ironically, that focus increasingly displaces claims about the value of traditional family relationships (originally, the central concern of the pro-life movement).<sup>161</sup>

(d) *The Social Debate About Family*

The Court's abortion cases reflect, while standing somewhat apart from, other decisions about adults in families. Those decisions,<sup>162</sup> reflecting the larger society, have assumed a view of adults within

158. See, e.g., *id.*; Teresa Godwin Phelps, *The Sound of Silence Breaking: Catholic Women, Abortion and the Law*, 59 TENN. L. REV. 547, 565 (1992) (noting that debate about abortion "is generally framed using rights language: the fetus or the woman has the superior right to life or to autonomy").

159. Even outside the context of disputes about abortion, the Court has not always sided with modernity in cases questioning the limits of choice in familial relationships. For instance, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472, 2475 (2003), the Court upheld Georgia's sodomy law, which criminalized sodomy between consenting adults. In *Hardwick*, however, the Court did not openly balance the interests of tradition against those of modernity and conclude that the balance favored the first. Rather, the Court concluded that the Constitution simply failed to "confer[] a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190-91.

160. In cases involving children (in contrast with cases involving adults in family settings), the Court has usually balanced the interests of tradition against those of modernity. These cases have often been confusing precisely because the Court has been unable to safeguard adults' autonomous choices *while simultaneously* protecting children. For instance, in *Troxel v. Granville*, 530 U.S. 57, 75 (2000), the Court invalidated a state non-parental visitation statute as applied. The decision presumes childhood to be a fixed status that parents are free to regulate according to the contours of their familial lives, but reflects a confused understanding of family and of the parent-child relationship in particular. See Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 369-92 (2002) (considering the assumptions underlying the Court's decisions in *Troxel*).

161. See *supra* notes 134-35 and accompanying text.

162. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (invalidating state statute prohibiting distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (invalidating state statute prohibiting distribution of contraceptives to married people).

families as autonomous individuals, free to design the terms of their own relationships. By the end of the twentieth century, the so-called debate about family that had engaged society during the previous two centuries was weighted, if not firmly settled,<sup>163</sup> in favor of the so-called *family of choice*.<sup>164</sup>

For traditionalists (including many religious fundamentalists and political conservatives), arguments that depended on society's assuming the inherent value of old-fashioned families were becoming increasingly ineffective.<sup>165</sup> Divorce, smaller families, single-parent families, and families with two working parents had all become commonplace.<sup>166</sup> Each of these changes reflected the increasingly large set of choices available to adults within families.<sup>167</sup> As a result, it became more difficult to safeguard traditional family life (including status-based understandings of women) with direct appeals to its value, including fixed gender rolls that largely precluded choice.<sup>168</sup>

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163. American society did not reconstruct its notion of childhood or of the parent-child relationship in comparable terms. Thus, society continues to struggle with competing understandings of childhood and of the best forms of parental authority and responsibility. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (allowing courts to displace parental authority in sanctioning minor's abortion decision); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 271, 287-88 (1990) (considering various understandings of children as different from adults).

164. See, e.g., KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 73-75 (1991) (noting the importance of *choice* rather than biology in construction of family bonds for gays and lesbians and thus providing a paradigm for importance of *choice* in construction of family bonds more generally).

165. By the end of the twentieth century, even traditionalists began to rely on the importance of *choice* in the effort to safeguard traditional family life. For instance, several states passed laws in the late 1990s that granted couples contemplating marriage the opportunity to *choose* covenant marriage and thus, at least in theory, preclude the possibility of obtaining a no-fault divorce if the marriage failed. See, e.g., ARIZ. REV. STAT. §§ 902-05 (1998); 1997 La. Sess. Law Serv. 1380 (West). These laws depend on the very modern notion that adults should be free to *choose* the rules according to which their families are formed and structured. See *infra* note 188 (considering covenant marriage in greater detail).

166. NATIONAL COMMISSION ON CHILDREN, *FINAL REPORT: BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 15 (1991) (describing American families as having undergone "[d]ramatic social, demographic, and economic changes during the past 30 years").

167. Relevant choices included, among others, the choice to use contraception, to divorce or separate, to have children before or outside of marriage, to work outside the home, and to abandon one's children. See *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000) (plurality opinion) (noting that "[i]n 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States") (citation omitted); Dolgin, *supra* note 160, at 348 n.40.

168. See *Troxel*, 530 U.S. at 63 (noting that "demographic changes of the past century make it difficult to speak of an average American family"); see also Siobnan Morrissey, *The New Neighbors: Domestic Relations Law Struggles to Catch up with Changes in Family Life*, A.B.A. J., Mar. 2002, at 37, 39 (charting change in makeup of U.S. households between 1970 and 2000). In 1970, about forty percent of U.S. households were composed of married couples with children. *Id.* In 2000, only about twenty-four percent were so composed. *Id.* Moreover, Morrissey observes that at present, "America is largely a crazy quilt

The shifting temper of public debate about abortion reflects this change. Instead of focusing openly on the sanctity of woman as wife and mother, as their nineteenth-century counterparts did, abortion opponents after *Roe* increasingly shifted the focus of debate away from open condemnation of modern familial choices, especially those that implicated gender.

Focus on the embryo-as-person provided a rhetorical and strategic option. For many firmly committed to a pro-life position, this new focus masked an ideology committed to the preservation of traditional family life.<sup>169</sup> For others, including those committed to the right to abortion, claims grounded in assessments of fetal and embryonic status became harder to dispute than claims that focused on familial choices, especially those of women.<sup>170</sup> In short, the elaboration of arguments about embryonic status, including the critique of abortion as murder, has proved powerful in public discourse. Rhetoric defining the embryo-as-person has, oddly perhaps, been assisted by the development of imaging techniques such as ultrasonography that allow visualization of embryos and fetuses inside the womb.<sup>171</sup> Thus, by the last decades of the twentieth century, the abortion debate had become a debate about the status of embryos and fetuses. This theme has largely displaced the themes of the older abortion debate, which focused openly on the status of women and the scope of family life.

## 2. *The Shift in Abortion Rhetoric: The Debate About the Personhood of Embryos and Fetuses*

Americans widely committed themselves *in practice to modernity* in family relationships, as they began to cohabit without marrying, to divorce without accusations of fault, and to define their relationships through contracts that they asked courts to interpret and enforce. In consequence, the pro-traditional-family agenda of the right-to-life movement became less effective simply because many people were choosing to define and construct their family relationships in terms

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of one-parent households, blended families, singles, unmarried partnerships and same-sex unions that would have astonished" Americans of a generation ago. *Id.* at 38.

169. See LUKER, *supra* note 90, at 7-9 (noting that those engaged in the debate about abortion are, at bottom, debating "a notion of what they see as sacred and important"; "a decision about the moral status of the embryo is an implicit statement about the role of children and women in modern American society").

170. See Marsha Saxton, *Disability Rights and Selective Abortion*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, at 374, 390 (Rickie Solinger ed., 1998) (noting *taboo* among feminists in exploration of fetal status).

171. Douglas Johnson, legislative director of the National Right to Life Committee, has explained that "[t]he new technologies create a window to the womb, which makes people much more cognizant of the humanity of the unborn child." Robin Toner, *The Abortion Debate, Stuck in Time*, N.Y. TIMES, Jan. 21, 2001, § 4, at 1. David Garrow, historian at Emory University, has noted, similarly, that "[w]e are a much more fetally aware society than we were when [*Roe*] came down." *Id.*

that contradicted those prized by traditionalists.<sup>172</sup> Anti-abortion publicists increasingly began to rely on assertions about fetal and embryonic status. Moreover, they publicized fetal images, often more powerful in public debate than words about fetuses. This shift from words to images was facilitated by new technologies that made it possible to visualize embryos and fetuses *in utero*.<sup>173</sup> Thus, images of the fetus elided *both* the discomfort of those unwilling to actively oppose contraception, no-fault divorce, and nonmarital cohabitation *and* contradictions *within* the antiabortion movement itself.<sup>174</sup> These images carried a powerful message to which pro-choice adherents rarely responded effectively.<sup>175</sup>

Even pro-choice feminists have tended to avoid discourse that inquires into the parameters of fetal and embryonic status.<sup>176</sup> The gradualist interpretation of fetal development toward personhood held by many pro-choice advocates<sup>177</sup> has made it difficult to explain the morality of aborting an 8-week fetus while hesitating to abort a 38-week fetus. In consequence, feminists seek to avoid questions about embryonic and fetal status.<sup>178</sup> Marsha Saxton refers to a “*taboo* in the feminist movement against discussing the fetus.”<sup>179</sup> In short, antiabortionists have been more successful in forging their own coalition and in responding to pro-choice adherents by stressing the sanctity of fetal life than by presenting arguments about the immorality of divorce and contraception.

Yet, even as the rhetoric and public focus of the pro-life movement have changed, many who define themselves as pro-life continue to value gender differences, to attribute those differences to human nature, and to assume that a woman’s proper role is the traditional one of stay-at-home mother, endowed (they assume) as no man could be, with a natural propensity to socialize and nurture children and to care for home and hearth.<sup>180</sup> Further, many pro-life adherents view the family as a private arena that should ideally be free from state regulation. This position presumes that families are organic wholes, and thus state efforts to protect individual rights within family contexts are misguided. Many not only oppose constitutional protection

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172. See *supra* notes 132-36 and accompanying text; see *infra* notes 190-91 and accompanying text.

173. Carol A. Stabile, *The Traffic in Fetuses*, in FETAL SUBJECTS, FEMINIST POSITIONS, *supra* note 3, at 133.

174. *Id.* at 151.

175. See Saxton, *supra* note 170, at 380-81.

176. See *id.* (noting moral qualms among pro-choice adherents about multiple abortions).

177. LUKER, *supra* note 90, at 180-81.

178. See Saxton, *supra* note 170, at 380-81.

179. *Id.* at 390.

180. See LUKER, *supra* note 90, at 159-63.

for the right of the individual to use contraception or to terminate a pregnancy, but also oppose legal provisions such as no-fault divorce rules, which allow family members to negotiate and define their own relationships.<sup>181</sup>

Kristin Luker, who studied abortion activists on both sides of the issue,<sup>182</sup> explained that for most pro-life women,<sup>183</sup> “their position on abortion is the ‘tip of the iceberg,’ a shorthand way of supporting and proclaiming not only a complex set of values but a given set of social resources as well.”<sup>184</sup> Central to those values and social resources is an understanding of woman as home-maker, wife, and mother. But as public debate about abortion has focused, often it would seem almost exclusively, on arguments about the status of embryos and fetuses, the legitimacy and future of an entire way of life appear to hinge on conclusions about embryonic and fetal life.

In fact, the debate about abortion, though often framed as a debate about the status of embryonic and fetal life, is much more than that. At base, it is tantamount to a last stand for the preservation of traditional family life and the values and beliefs that sustained that form of family.<sup>185</sup> Kristin Luker offers a similar reading of many pro-life activists’ underlying concerns:

[O]n an intimate level, the pro-life movement is women’s version of what was true of peasants in the Vendée, the part of France that remained Royalist during the French Revolution. Charles Tilly has argued that in the Vendée, traditional relationships between nobles and peasants were still mutually satisfying so that the “brave new world” of the French Revolution represented more loss than gain, and the peasants therefore resisted the changes the Revolution heralded. By the same logic, traditional relationships between men and women are still satisfying, rewarding, and meaningful for

181. *Id.* at 209.

182. Luker studied committed activists in one state. However, she asserts her study “is probably a reasonably accurate picture of how abortion activists think and feel throughout the United States.” *Id.* at 256.

183. Luker interviewed at least one person from every important pro-life and pro-choice group in California as well as abortion activists from six other states. *Id.* at 9.

184. *Id.* at 200.

185. More specifically, the abortion battle can also be understood as a last stand for the valuation of a world in which community was more important than individuality, status was more important than rights, and in which hierarchy was essential to the preservation of the social whole. The implications of this claim are somewhat different for different groups of antiabortion activists. For the Catholic Church, for instance, the debate about abortion has constituted a *last stand* for a battle aimed at saving an entire way of life that buttressed the power of the Church within sacred and secular realms. That way of life, largely constructed during feudal times, presumed, valued, and depended upon the preservation of hierarchy and communal solidarity. For Protestant evangelicals and fundamentalists, in contrast, abortion has a more immediate referent. It has symbolized (and helped to effect) the transformation of family life in the twentieth century from a model that presumed set roles, identified through age and gender, to a model that values choice and freedom. 2 MARCH BLOCH, FEUDAL SOCIETY 283-84, 346 (L.A. Manyon trans., 1974).

pro-life women, and they therefore resist the lure of “liberation.” For pro-choice women, however, with their access to male resources, a division of labor into the public world of work and the private world of home and hearth seems to promise only restriction to “second-class” citizenship.<sup>186</sup>

Thus, Luker explained that for at least some women, commitment to the pro-life cause is a means of preserving a commitment to a universe encompassed by rapidly transforming socio-political forces. As the Royalist peasants in the Vendée committed themselves to tradition in the face of monumental social change, the pro-life women, whom Luker interviewed, commit themselves to a form of family and a view of women that have widely succumbed to alternative forms of family and views of gender.

For such pro-life women, and others affiliated with their cause, safeguarding a vision of embryonic and fetal humanity harmonizes with an underlying and more general set of moral goals. It is also of strategic value because for others now committed, though sometimes with lingering ambivalence, to a world that values families-of-choice, pro-life visions of the embryo and fetus can be discomfiting.<sup>187</sup>

In consequence, as traditionalists have increasingly, though often implicitly rather than explicitly, conceded the debate about family to modernity, they have largely refrained from making concessions about abortion.<sup>188</sup> In opposing abortion, traditionalists have been able to avoid express claims about the moral implications of disassociating family life from traditional forms. They have instead relied on arguments about the biological and theological status of embryos and fetuses.<sup>189</sup> In opposing abortion (as is no longer the case, for instance, in opposing divorce or gender equality), traditionalists need not appear openly to gainsay the importance of equality and freedom. In the context of abortion, almost uniquely, traditionalists have con-

186. LUKER, *supra* note 90, at 201-02.

187. Saxton, *supra* note 170, at 384.

188. Traditionalists rely on modernity's tools to affect their own agendas but have generally not recognized the implications of that reliance. So, for instance, so-called covenant marriage statutes, which allow couples planning to marry to select between modern marriage (with the option of no-fault divorce) and traditional (*covenant*) marriage (without that option) presume to limit choice *through the mechanism of choice*. See, e.g., ARIZ. REV. STAT. §§ 901-05 (1998); LA. REV. STAT. ANN. § 9:272(A) (West 2002). See generally Jason Andrew Macke, Note, *Of Covenants and Conflicts—When “I Do” Means More Than It Used To, But Less Than You Thought*, 59 OHIO ST. L.J. 1377 (1998). Such laws suggest that potential spouses can successfully *select between* tradition and modernity and that tradition could thereby be revived were enough people to *choose* tradition over modernity. However, covenant marriage statutes suggest the basic infirmity of the effort to safeguard tradition through the elaboration of choice. Once choice defines the enterprise (here the construction of family relationships) then, eventually, any particular choice can be displaced by a host of other choices.

189. LUKER, *supra* note 90, at 228 (noting that pro-life activists premise their arguments on the deeply held belief that every embryo is a baby).

structed a mode of argument that apparently safeguards tradition without expressly debunking choice in familial settings. As a result, they need not openly dispute the consequences of gender equality for family life.<sup>190</sup>

For abortion opponents, perhaps in part due to the greater public appeal of arguments about embryonic and fetal personhood as compared with arguments about women's inexorable status,<sup>191</sup> the struggle to have abortion declared illegal and immoral has become a more and more intense focus and concern in the last few decades. The shifting character of pro-life activist tactics is illustrative.<sup>192</sup> In addition to widespread political<sup>193</sup> and legal<sup>194</sup> efforts to outlaw abortion,

190. *Id.* (noting that even some pro-life activists have favored the notion of an Equal Rights Amendment).

191. Even those firmly committed to safeguarding the right to abortion are often reluctant to debate questions about the status of fetuses and embryos. Saxton, *supra* note 170, at 390.

192. In the 1980s and 1990s, those who opted to abort pregnancies, as those performing the abortions and those caring for the patients before and after the procedure, faced threats of bombing, arson, and murder from the so-called *Army of God*. See HULL & HOFFER, *supra* note 125, at 269. In 1998 a sniper named James Charles Kopp murdered Dr. Barnett Slepian because Slepian performed abortions. *Id.* This sort of violence and threats of its continuance discouraged doctors from performing abortions in the 1990s and discouraged medical schools and physician training programs from teaching medical students and doctors how to do so. *Id.* at 269-70. Other tactics have aimed to embarrass and shame women seeking abortions or to shock the public into opposing abortion. For instance, in the summer of 2002, the Center for Bioethical Reform, a pro-life group based in California, arranged for banners depicting aborted fetuses to be flown over public beaches on Long Island. Thai Jones, *Anti-Abortion Group Unfurls Air Campaign/Using Plan Banners to Provoke*, NEWSDAY, July 11, 2002, at A22. According to Gregg Cunningham, director of the Center, the group hoped to devote two million dollars to finance additional demonstrations of a similar sort over various summer festivals and sporting activities. *Id.*

193. Beginning in the 1970s, Christian evangelicals and fundamentalists opposing abortion joined with political conservatives. Jerry Falwell's Moral Majority sought to elect political conservatives and to oppose abortion. ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 82 (1993). In addition to its commitment to opposing abortion and working for political conservatives, the Moral Majority pledged itself to fight homosexuality and pornography and to work toward reviving prayer in public schools. *Id.*

By 1980, the *new Christian right*, a coalition of religious fundamentalists and political conservatives played a significant role in the election of President Ronald Reagan. *Id.*

194. In the years following *Roe*, abortion opponents succeeded in convincing state legislatures to restrict the right to abortion. For instance, a Missouri statute at issue in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), was amended to proclaim as legislative "findings" that "[t]he life of each human being begins at conception." *Id.* at 500-01 (quoting MO. REV. STAT. § 1.205.1(1), (2) (1986)). The statute provided, among other things, that state employees be precluded from performing abortions and that abortions not be performed in public facilities when such abortions were not needed to save the woman's life (even if the pregnant woman paid for the abortion). *Id.* at 501. A number of states also passed a variety of spousal and parental consent requirements. *But see* Bellotti v. Baird (Bellotti II), 443 U.S. 622, 643 (1979) (plurality opinion) (allowing state to mandate parental involvement in minor's abortion decision only if state also provided for judicial bypass option); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69, 74 (1976) (striking down spousal consent requirement and blanket provisions requiring parental consent).

opponents of abortion have relied on embarrassment,<sup>195</sup> shock tactics,<sup>196</sup> and violence,<sup>197</sup> including murder and threats of murder.<sup>198</sup> Moreover, pro-life adherents have been supported by a variety of legal provisions premised on the personhood of embryonic and fetal life.<sup>199</sup>

Thus pro-life adherents are more reluctant than ever to compromise their position with regard to fetal and embryonic status. Their rhetoric, their tactics, and their underlying agenda all have come to depend increasingly on the notion that abortion constitutes murder because fetuses and embryos are people.<sup>200</sup> Many people believe that this view is centuries old.<sup>201</sup> In fact, it developed only in the last half of the nineteenth century and became the singular theme of the

For the most part, the Court supported a limited right to abortion or moved more hesitantly than pro-life forces would have liked in further limiting the right to abortion. Cases involving funding of abortions are an exception to this broad pattern. Beginning in 1977, in *Maier v. Roe*, 432 U.S. 464, 474 (1977), the Court upheld a Connecticut regulation that withheld Medicaid benefits for non-therapeutic abortions. *See also* *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (upholding St. Louis, Missouri municipal funding restriction); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (upholding Pennsylvania abortion funding restriction). In *Harris v. McRae*, 448 U.S. 297, 302, 316-18 (1980), the Court upheld federal legislation limiting federal funding for abortions. The legislation precluded Medicaid from paying even for medically necessary abortions unless the pregnancy had resulted from rape or incest or the life of the mother was at stake. *Id.* at 302 (quoting Hyde Amendment, Pub. L. No. 96-123 § 109, 93 Stat. 926 (1980)). Then in 1989, in *Webster*, 492 U.S. at 511-13, the Court upheld Missouri's prohibition on state funding for abortions unless the mother's life was endangered.

195. Joseph Scheidler, who helped form Operation Rescue, authored a manual in 1983 called *Closed: Ninety-Nine Ways to Stop Abortion*. The manual instructed antiabortion groups in confrontational tactics. Among other things, Scheidler suggested that abortion opponents intimidate women going into clinics. HULL & HOFFER, *supra* note 125, at 212.

196. *See* *Jones*, *supra* note 192, at A22. In 2002, six states (Alabama, Florida, Louisiana, Mississippi, Oklahoma, and South Carolina) agreed to sell automobile license plates reading "Choose Life." Jay Krall, *Pro-Life License Plates Spark Controversy*, WALL ST. J., June 12, 2002. In the two years after Florida introduced the plates, it raised one million dollars (at twenty dollars surcharge per plate). *Id.* The money has been slated for funding counseling centers that discourage abortion and paying expenses of women with unwanted pregnancies who plan to give birth and then surrender the babies for adoption. *Id.*

197. In 1982 an abortion clinic was bombed for the first time in the United States. Within two years over twenty additional bombings occurred at abortion clinics. HULL & HOFFER, *supra* note 125, at 210. Within the next few years, hundreds of abortion clinics were bombed, burned, threatened, or vandalized. *Id.* at 210-11. In the early 1980s, a Benedictine novice, Joseph Scheidler, and a Pentecostal minister, Randall Terry, joined to form Operation Rescue, an organization engaged in tactics of "massive confrontation." *Id.* at 212-13.

198. *See id.* at 261, 269 (describing murder of Dr. David Gunn and Dr. Barnett Slepian). A number of additional murders followed. *Id.*

199. *See, e.g., Webster* 492 U.S. at 501 (1989) (upholding provision of Missouri law that stated that "[t]he life of each human being begins at conception") (quoting MO. REV. STAT. § 1.205.1(1), (2) (1986)); LA. REV. STAT. ANN. §§ 9:121-24 (West 2002) (referring to "in vitro fertilized human ovum" as a "juridical person" and as a "biological human being").

200. LUKER, *supra* note 90, at 228.

201. *Id.* at 14.

movement to oppose abortion in the aftermath of *Roe*.<sup>202</sup> It has been essential to the survival of the pro-life movement as that movement has faced a society and a legal system that have largely conceded tradition to modernity (with its promise of apparently unending choice) in family settings. In the notion of fetal and embryonic personhood, the pro-life movement located a focus that elided, while harmonizing with, an interest in safeguarding old-fashioned family life.

#### IV. LEGAL RESPONSES TO EMBRYOS, CLONING, AND STEM CELLS

By the last years of the twentieth century, the right-to-life movement faced two broad challenges—the first essentially social and the second essentially scientific. The social challenge, consisting of broad demographic and ideological changes in American family life, occurred first.<sup>203</sup> The movement adapted to these changes with moderate success in the years following *Roe* (itself a reflection of the ideological change).<sup>204</sup> It did this by focusing on and elaborating arguments about the sanctity of fetal and embryonic life and by limiting engagement in widespread public debate about the scope of family life. The scientific challenge developed later—only in the last couple of years of the twentieth century. This second challenge threatens to undermine the movement's claims about the sanctity of embryonic and fetal life. Therefore, it may emerge as a significant stumbling block for the right-to-life movement. In particular, therapeutic cloning and embryonic stem cell research are heralding a new age in medicine that promises cures for a wide variety of painful, debilitating conditions.<sup>205</sup>

Claims about the sanctity of embryonic life, comparatively effective in the debate about abortion,<sup>206</sup> are meeting unfamiliar rejoinders in the context of embryonic research. In a society that views health as tantamount to salvation,<sup>207</sup> it is difficult to dismiss san-

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202. The nineteenth-century right-to-life movement, spearheaded by physicians engaged in a struggle to upgrade the status of their profession, attributed personhood to embryos and fetuses. *Id.* at 14-18, 31-32. However, at that time, this claim was connected expressly to claims about the sanctity of traditional family life within which women were expected to serve as nurturers to treasured children and husbands (assumed to suffer from the tensions of the marketplace), and men were expected to work as breadwinner for the family. See HODGE *supra* note 112, at 32-33 (delineating women's motives for abortion to include "indisposition to have the care, the expense, or the trouble of children, or some other motive equally trifling and degrading") (quoted in LUKER, *supra* note 90, at 22); MINTZ & KELLOGG, *supra* note 121, at 50.

203. See *supra* notes 135-45 and accompanying text.

204. See *supra* notes 169-71 and accompanying text.

205. Zitner, *supra* note 85, at A1; see *supra* notes 62-63 and accompanying text.

206. See *supra* notes 169-71 and accompanying text.

207. MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHEOLOGY OF MEDICAL PERCEPTION* 198 (A.M. Sheridan Smith trans., Vintage Books 1975) (1963).

guinely research that promises to provide cures for a host of deleterious, often fatal, or seriously debilitating illnesses and disabilities.<sup>208</sup> This Part summarizes society's and the law's changing responses to embryos (and, by implication, to fetuses) as the debate about abortion merges with the debate about embryonic stem cell research and cloning for the production of research embryos.

A. *The Law and the "Embryo" in the Decades Immediately Following Roe*

At least since *Roe* was decided in 1973, those working to overturn the Court's decision, or at least, to limit a woman's right to abortion have premised their arguments on an understanding of the ontological status of embryos and fetuses as moral beings.<sup>209</sup> In this frame, the interests of a pregnant woman to control her body, and her maternity, are balanced by the interests of the developing fetus. Thus, within the politics of abortion, claims about the sanctity of embryonic and fetal life oppose claims grounded in a woman's right to autonomous choice.<sup>210</sup>

In sharp contrast, within the context of debate about therapeutic cloning and embryonic stem cell research, claims about embryonic life are opposed by claims about the value of promised therapies for people suffering from an array of illnesses that remain largely incurable and unexplained (including Parkinson's, Alzheimer's, diabetes, and multiple sclerosis).<sup>211</sup> As a result, legal limits on the right to abortion and on funding for research on embryos and fetuses, imposed in the last decades of the twentieth century, have been opened to intense new debate and to reexamination. This Section first briefly summarizes some limits imposed on the right to abortion after *Roe*. Further, it describes the advent of human *in vitro* fertilization about two decades before the appearance of therapeutic cloning and the isolation of embryonic stem cells. The Section then reviews legal re-

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208. PRESIDENT'S COUNCIL CLONING INQUIRY, *supra* note 50, at 91. The President's Council on Bioethics, while recommending a moratorium on research cloning (called *cloning-for-biomedical-research*) asserted:

American society and human communities in general have an obligation to try to heal the sick and relieve their suffering. This obligation, deeply rooted in the moral teaching of "love of neighbor," lies heaviest on physicians and health-care professionals who attend to individual patients. But it also guides the activities of biomedical scientists and biotechnologists whose pioneering research and discoveries provide new and better means of healing and relieving those who suffer.

*Id.* at 97-98.

209. See *supra* notes 159-61 and accompanying text.

210. HULL & HOFFER, *supra* note 125, at 7 (noting that the lawyer for *Roe* framed her arguments around a woman's right to end a pregnancy while the lawyer for the state framed arguments around the *rights* of the unborn).

211. See Auerbach, *supra* note 3, at 1567 n.2.

sponses in the context of debate about embryonic stem cells and cloning for research.

In the 1970s and 1980s, the pro-life movement achieved some success in limiting the right to abortion. In particular, some states and the federal government passed laws that restricted access to abortion services and laws that precluded state funding for abortion.<sup>212</sup> Among the laws that limited the abortion right were those that restricted a minor's access to abortion without parental notification and/or consent.<sup>213</sup> Among the state laws that prevented the state from paying for abortions were those that placed limitations on Medicaid coverage for abortion.<sup>214</sup> The abortion rate dropped dramatically in those states that precluded the use of state funds to pay for abortions.<sup>215</sup>

At the same time, the right-to-life movement began to lobby against research on fetal tissue; that effort paralleled the movement's work to restrict funds for abortions.<sup>216</sup> Pro-life adherents voiced concern that *Roe* would result in the abuse of aborted fetuses in research settings.<sup>217</sup> The call to stop public funding of fetal research was actively supported by abortion opponents, was taken up by a group of largely conservative state and federal lawmakers, including several presidents,<sup>218</sup> and from the start, was openly premised on conclusions about the morality of abortion.<sup>219</sup>

Research using fetal tissue *ex utero* had actually begun in the 1930s.<sup>220</sup> However, the research did not become the subject of social and legal controversy until after *Roe*.<sup>221</sup> Soon a series of restrictions on federal funding for fetal research flowed from a variety of congress-

212. HULL & HOFFER, *supra* note 125, at 195.

213. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 625, 643 (1979) (plurality opinion) (allowing limitation on minor's access to abortion).

214. See, e.g., *Harris v. McRae*, 448 U.S. 297, 302, 316-18 (1980) (holding no entitlement to even therapeutic abortions on economic grounds); *Maher v. Roe*, 432 U.S. 464, 466, 474 (1977) (finding no "unduly burdensome interference" with decision to terminate a pregnancy).

215. Kate Zernike, *30 Years After Abortion Ruling, New Trends but the Old Debate*, N.Y. TIMES, Jan. 20, 2003, at A1.

216. See *supra* text accompanying note 194 (describing Court's upholding statutes restricting state funding for abortion).

217. See John C. Fletcher, *The Stem Cell Debate in Historical Context*, in THE HUMAN EMBRYONIC STEM CELL DEBATE: SCIENCE, ETHICS, AND PUBLIC POLICY, *supra* note 2, at 27, 27.

218. See Ellen J. Flannery & Gail H. Javitt, *Analysis of Federal Laws Pertaining to Funding of Human Pluripotent Stem Cell Research* (commissioned paper), in II ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH (National Bioethics Advisory Commission 2000) [hereinafter NBAC 2000].

219. See LORI B. ANDREWS ET AL., GENETICS: ETHICS, LAW AND POLICY 131 (2002) (noting "[i]n a society deeply divided over the moral and legal status of embryos, any scientific or medical project using tissue or cells from the unborn is bound to raise serious philosophical and social concerns").

220. NBAC 1999, *supra* note 62, at 29.

221. *Id.*

sional, presidential, and administrative decisions.<sup>222</sup> In the 1970s, as the federal government began to restrict funding for fetal tissue research,<sup>223</sup> some states also passed laws regulating such research.<sup>224</sup> A few states prohibited all research using fetal tissue.<sup>225</sup>

In 1974, Congress imposed a moratorium on federal funding for fetal research.<sup>226</sup> Congress provided that the moratorium could be lifted pending a report by the newly created National Commission for the Protection of Human Subjects of Biomedical and Behavioral Re-

222. Beginning in the mid-1970s, compliance with federal regulations was required of all research supported by the Department of Health, Education, and Welfare (DHEW), renamed the Department of Health and Human Services (DHHS) in 1979. Nicolas P. Terry, "Alas! Poor Yorick," *I Knew Him Ex Utero: The Regulation of Embryo and Fetal Experimentation and Disposal in England and the United States*, 39 VAND. L. REV. 419, 444 (1986). Regulations promulgated in 1975 by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research required that risks to the fetus be minimized. 45 C.F.R. § 46.206(a)(2) (1985); Terry, *supra*, at 444. Under the regulations, research on dead fetuses was generally left to the states. Terry, *supra*, at 444-45 (citing 45 C.F.R. § 46.210 (1985)). Research on *ex utero* fetuses was allowed only in cases where the research would not alter the *duration* of fetal life. *Id.* at 445 (quoting THE NAT'L COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS, *reprinted in* 40 Fed. Reg. 33,530 (1975)). Significant limitations were placed on nontherapeutic fetal research. *Id.* at 445-46.

223. In late 1973, the National Institutes of Health released guidelines regarding funding for fetal tissue research. Jonathan Hersey, Note, *Enigma of the Unborn Mother: Legal and Ethical Considerations of Aborted Fetal Ovarian Tissue and Ova Transplantations*, 43 UCLA L. REV. 159, 170 (1995). A number of important legislative responses followed. *Id.* The first provided for an executive order or a federal statute to preclude federal agencies from carrying out research on fetal tissue or to prevent federal funding of private facilities carrying out such research. *Id.* The regulation defined *fetal tissue* as an *abortus*. *Id.* (citing 38 Fed. Reg. 31,738 (1973)). That term was defined as a "fetus . . . expelled whole, whether spontaneously or as a result of medical or surgical intervention to terminate a pregnancy, prior to viability." *Id.* at 170 (quoting 38 Fed. Reg. 31,747 § 46.31 (1973)). A second legislative response relegated decisions about fetal tissue research to any applicable state and local law. 45 C.F.R. § 46.210 (1994). Further, in 1974, Congress appointed the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Fletcher, *supra* note 217, at 27. The National Commission was authorized by the National Research Act of 1974. Hersey, *supra*, at 170. The Commission promulgated a series of rules, passed by Congress in 1975, that applied to research funded by the Department of Health and Human Services. *Id.* at 171 (restricting guidelines reach to federal agencies and federally funded researchers).

224. Terry, *supra* note 222, at 446-47. Some state laws required consent for experiments with fetal tissue. *Id.* Other states limited research on aborted fetuses or limited payment to research that might encourage abortion. *Id.* Other states allowed research on dead fetuses only under certain circumstances. *Id.* at 448.

225. *Id.* at 448. *But see* Lifchez v. Hartigan, 735 F. Supp. 1361, 1363 (N.D. Ill. 1990) (citation omitted) (finding unconstitutional a provision in Illinois abortion law prohibiting experimentation on a fertilized human egg "unless such experimentation is therapeutic to the fetus thereby produced"). The law at issue in *Hartigan* concerns embryos, and thus was among a small number of state laws that spoke to research involving embryos. Terry, *supra* note 222, at 462-63.

226. National Research Act of 1974, Pub. L. No. 93-348, § 202(b), 88 Stat. 342, 348 (1974). The rule was to be effective until the DHHS received a report by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. *Id.* The DHHS response followed delivery of that report.

search.<sup>227</sup> The Commission's report, submitted in 1975, became the basis for regulations issued by the Department of Health, Education, and Welfare (DHEW) about research involving pregnant women, fetuses, and human *in vitro* fertilization.<sup>228</sup> These regulations, codified at 45 C.F.R. § 46,<sup>229</sup> have been adopted by most federal agencies and are at the center of the present debate about federal funding for embryonic research.<sup>230</sup> The regulations permitted research on nonliving fetuses, but subjected such research to applicable state laws.<sup>231</sup>

The regulations further required that no research involving *in vitro* fertilization (IVF) could receive federal funding before an Ethical Advisory Board (EAB), appointed by DHEW, approved the research.<sup>232</sup> In 1978, after the first birth of a baby conceived through IVF, Joseph Califano, then Secretary of DHEW, asked the EAB to review the legal and ethical implications of human IVF.<sup>233</sup> The resulting report found such research ethically acceptable as long as several conditions were met by researchers.<sup>234</sup> Califano never acted on the EAB Report,<sup>235</sup> and DHEW dissolved the Advisory Board in 1980.<sup>236</sup>

By then, Ronald Reagan had been elected to office with the assistance of abortion opponents.<sup>237</sup> Reagan immediately sought to preclude federal funding for research on fetal tissue. He announced that because research on fetuses would promote abortion, using taxpayer

227. NBAC 1999, *supra* note 62, at 29-30.

228. *See id.*; NBAC 2000, *supra* note 218, at D-3 (citing 40 Fed. Reg. 33,526, 33,530 (Aug. 8, 1975) (establishing Subpart B of 45 C.F.R. § 46)).

229. Creation of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research followed revelation of a number of scandals including the Tuskegee syphilis study. Anne Wood et al., *The Crisis in Human Participants Research: Identifying the Problems and Proposing Solutions*, The President's Council on Bioethics, at <http://www.bioethics.gov/background/emanuelpaper.html> (last visited Aug. 23, 2003). The Commission's proposal (known as the *Common Rule*) is codified at 45 C.F.R. § 46 (2003). *Id.*

230. *See* NBAC 1999, *supra* note 62, at 30, 38 n.5.

231. NBAC 2000, *supra* note 218, at D-4.

232. NBAC 1999, *supra* note 62, at 34 (quoting 45 C.F.R. § 46.204(d), *repealed by* National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, § 121 (c)).

233. *Id.* at 34.

234. ETHICS ADVISORY BOARD, REPORT AND CONCLUSIONS: DHEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER (May 1979). The Board's report proposed conditioning such research on informed consent, use of embryos no more than fourteen days after fertilization, and an interest in serving a research goal "not reasonably attainable by other means." *Id.* at 106-07. The EAB Report provided for *informed consent* and advised that research occur before the fourteenth day after fertilization. NBAC 1999, *supra* note 62, at 34.

235. NBAC 1999, *supra* note 62, at 34.

236. *Id.*

237. HULL & HOFFER, *supra* note 125, at 207. Reagan, who had favored a right to abortion when he served as Governor of California, became a vociferous opponent by the time he ran for president. Hull and Hoffer report that in the 1980 election, Reagan transmitted personal messages to pro-life adherents, such as the National Right to Life Committee and Jerry Falwell, informing them that he supported their cause. *Id.*

funds to support such research would implicate the public in fetal deaths.<sup>238</sup> Accordingly, Reagan banned the use of federal funds for research involving fetal tissue.<sup>239</sup> The ban was preserved during the administration of the first President Bush.<sup>240</sup> Louis Sullivan, Secretary of the Department of Health and Human Services (DHHS, previously DHEW) during the Bush administration, explained that providing for research on fetal tissue would encourage elective abortions.<sup>241</sup>

After the EAB was disbanded in 1980, the Department did not appoint a second board. In consequence, no research involving human embryos was funded pursuant to the 1979 EAB report to Secretary Califano.<sup>242</sup> Nothing changed until 1993, when Congress passed the Revitalization Act.<sup>243</sup> Under the Act, EAB approval was eliminated as a prerequisite for IVF research.<sup>244</sup> As a result, Harold Var- mus, Director of the National Institutes of Health (NIH), set up a Human Embryo Research Panel to review “areas of research involving the ex utero human embryo” and to consider which areas were appropriate for federal funding.<sup>245</sup> Among other things, the Panel concluded that research involving embryonic stem cells was ethical and could be funded as long as the donating couple had consented to the research.<sup>246</sup> No such funding was provided, however, because in 1995 (and in subsequent years) Congress attached a rider to its

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238. Nelle S. Paegel, Note, *Use of Stem Cells in Biotechnological Research*, 22 WHITTIER L. REV. 1183, 1199 (2001) (citing Alexander Morgan Capron, *At Law: Good Intentions*, HASTINGS CTR. REP. 26 (Mar. 1, 1999)).

239. Carly Goldstein, Note, *Dipping Into Uncle Sam's Pockets: Federal Funding of Stem Cell Research: Is it Legal?*, 11 B.U. PUB. INT. L.J. 229, 237 (2002).

240. *Id.* (citing Lionel Van Deerlin, *Politicians Give Way to the Researchers*, SAN DIEGO UNION TRIB., Feb. 7, 2001, at B7). President Bush vetoed congressional efforts to provide for such funding. Other proposed statues providing for funding were not passed. See H.R. 2507, 102d Cong. (1991) (amending Part G of Title IV of the Public Health Service Act); H.R. 5495, 102d Cong. (1992) (amending Part G of Title IV of the Public Health Service Act).

The funding moratorium was lifted in 1993 during the administration of President Clinton. NBAC 1999, *supra* note 62, at 31. However, in the same year, Congress promulgated legislation that regulated research on fetal tissues for transplantation. *Id.*; National Institutes of Health Revitalization Act of 1993, 42 U.S.C. § 289g-1(b)(2) to g-2(b) (1994).

241. NBAC 1999, *supra* note 62, at 31 (citing letter from Louis Sullivan to William Raub (Nov. 2, 1999)). Louis Sullivan, Secretary of Health and Human Services during the Bush administration, declared an indefinite moratorium on funding fetal tissue transplantation research. *Id.*

242. *Id.* at 34.

243. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 (1993).

244. Auerbach, *supra* note 3, at 1575 (citing NBAC 1999, *supra* note 62, at 43 n.55).

245. *Id.* (quoting 59 Fed. Reg. 45,293).

246. *Id.* at 1576 (citing NBAC 1999, *supra* note 62, at 34).

DHHS appropriations bill<sup>247</sup> that prohibited federal funding of research involving embryos.<sup>248</sup>

*B. The Law and the “Embryo” in the Age of Cloning*

Debate about embryos has grown much more intense and has gained widespread public attention in the last several years as society has considered the implications of promising new forms of healthcare that depend on research with, and therapeutic uses of, embryonic stem cells.<sup>249</sup> In this new context, lines of ideological debate are merging, the embryo-as-symbol is gaining new meanings, old alliances are breaking apart, and new ones are forming.

The political struggle to ban therapeutic cloning and embryonic stem cell research has been actively supported by pro-life advocates whose central arguments were constructed in the politics of abortion. The challenge is formidable because concessions about embryonic status in the context of research threaten to undermine pro-life arguments regarding abortion.<sup>250</sup> In opposing embryonic research, and thus therapeutic cloning, pro-life advocates have been joined by an unexpected combination of feminists, concerned with a view of women as “egg bearers,”<sup>251</sup> and intellectual neo-conservatives in whose view cloning is a risky, untoward defiance of nature.<sup>252</sup> Famil-

247. The Balanced Budget Downpayment Act I, Pub. L. No. 104-99, tit. I, § 128, 110 Stat. 26, 34 (1996). The rider has been introduced as an addition to the 2003 appropriations bill. H.R. 246, 108th Cong. (1st Sess. 2003).

248. NBAC 1999, *supra* note 62, at 35. The amendment defined a *human embryo* as “any organism . . . derived by fertilization.” *Id.* at 42 n.59.

249. See *supra* notes 205-08 and accompanying text.

250. The United States Conference of Catholic Bishops, for instance, has a *Pro-Life Activities* website that argues in a large set of information sheets about cloning, that cloning for any purpose creates “an early human embryo,” United States Conference of Catholic Bishops, *Fact Sheet: What is Human Cloning?*, at <http://www.usccb.org/prolife/issues/biethic/clonfact202.htm> (last visited Aug. 23, 2003), that the term *therapeutic cloning* is a “euphemism for experimental cloning in which embryos are created to be destroyed,” *id.*, and that “[c]loning is the ultimate dehumanizing of human reproduction,” United States Conference of Catholic Bishops, *Fact Sheet: Human Cloning Prohibition Act of 2003*, at <http://www.nccbuscc.org/prolife/issues/bioethic/clonfact1201.htm> (last visited Aug. 23, 2003) [hereinafter *Fact Sheet on 2003 Prohibition Act*].

As Congress began to consider legislation regulating human cloning, President George W. Bush, the Catholic Church, and a variety of active lobbyists from the antiabortion movement, among others, strongly supported Congress’s imposition of a complete ban on human cloning. Aaron Zitner, *Cloning Receives a Makeover*, L.A. TIMES, June 17, 2002, at A1.

251. R. Alta Charo & Laurie Zoloth, *Commentary; Stem Cell Research: Issue for Women*, L.A. TIMES, Aug. 12, 2002, at B11.

252. *Id.* Charles Krauthammer, who served on President George W. Bush’s Council on Bioethics, opposed reproductive cloning on the ground that cloning threatens “dehumanization of human life.” Ponnuru, *supra* note 88. Krauthammer is one among a number of neo-conservative intellectuals who have opposed research cloning or have sought strictly to monitor or postpone its actualization but whose positions are not predicated on religious beliefs or on a pro-life position regarding abortion. Others in this group include Leon Kass,

iar political positions are further scrambled in that some pro-life adherents support cloning undertaken to produce embryos for research and therapy.<sup>253</sup> And others who would provide for at least some research on embryos produced through IVF disfavor cloning for research and therapy.<sup>254</sup> Thus, as the social and legal debate about embryos extends into the context of therapeutic cloning and stem cell research, lines of ideological affiliation shift. As this new debate about embryonic status merges with that constructed in reference to abortion, the term *embryo* is being redefined.

New interpretations of embryonic status emerge in the evolving discourse about embryonic stem cell research and cloning.<sup>255</sup> Interpretations formulated in this context then inform understandings of the *embryo* in the context of the debate about abortion. When decisions about scientific research are rendered openly ideological and families are redefined through metaphors constructed within the universe of science and health care, the result is ambiguity and confusion.

The next Section examines two sets of legal responses to embryonic stem cell research and cloning for the production of embryos. The first is a form of regulation developed in the 1970s with regard to research on fetal tissue. This approach sets limits on federal funding for fetal and embryonic research. The second approach involves banning or restricting cloning as a source of embryonic stem cells.

### 1. *Funding for Embryonic Stem Cell Research*

The complicated weave of legal responses to embryonic research is reflected in George W. Bush's August 2001 decision to provide federal funding for limited embryonic stem cell research.<sup>256</sup> Bush was elected less than a year earlier as a pro-life candidate, yet he provided for the use of federal funds to do research on embryonic stem cell lines that existed in August 2001. Some background is helpful in interpreting Bush's decision. Beginning in 1995, Congress had relied on riders to annual appropriations bills to block federal funding for research that would result in the destruction of embryos.<sup>257</sup> However,

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who chaired President Bush's Council on Bioethics, Francis Fukuyama, who served on the Council, and William Kristol. Arthur L. Caplan, *Attack of the Anti-Cloners: Morality and Human Cloning*, THE NATION, June 17, 2002, at 5.

253. See *infra* notes 308-16 and accompanying text.

254. *Politics and Policy, Human Cloning: House OKs Ban, Rejects Research Amendment*, AM. HEALTH L., Aug. 1, 2001 [hereinafter *House OKs Ban*].

255. Charo & Zoloth, *supra* note 251.

256. See *infra* notes 265-76 and accompanying text; Teresa R. Wagner, *Stem Cell Storm*, 17 WORLD AND I 62 (2002).

257. See NBAC 1999, *supra* note 62, at 42 n.59 (citing Pub. L. No. 104-99, tit. I, § 128, 110 Stat. 26, 34 (1996)) (noting as well that a similar rider was attached to congressional appropriations for the Department of Health and Human Services in subsequent years).

the General Counsel to the Department of Health and Human Services, Harriet S. Rabb, authored a memorandum in 1999 concluding that these congressional riders did not preclude federal funding for research using human pluripotent stem cells because “such cells are not a human embryo within the statutory definition.”<sup>258</sup>

Rabb’s position was controversial and angered pro-life groups.<sup>259</sup> Many in both the House and the Senate voiced opposition to Rabb’s memorandum.<sup>260</sup> Nevertheless, NIH Director Harold Varmus resolved to prepare agency guidelines for funding embryonic stem cell research.<sup>261</sup> The guidelines, issued in August 2000,<sup>262</sup> provided that NIH funds could not be used to derive stem cells from embryos but

258. Memorandum from Harriet S. Rabb, General Counsel, Department of Health and Human Services, to Harold Varmus, M.D., Director, National Institutes of Health on Federal Funding for Research Involving Human Pluripotent Stem Cells (Jan. 15, 1999) [hereinafter Rabb Memorandum], reprinted in ANDREWS ET AL., *supra* note 219, at 138. The Rabb Memorandum interpreted language in the congressional appropriations rider that precluded the use of federal funds for:

- (1) the creation of a human embryo or embryos for research purposes; or;
- (2) research in which a human embryo or embryos are destroyed, discarded or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.208(a)(2) and section 498(b) of the Public Health Service Act.

*Id.* (quoting Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-227, § 511 (1999)). *Embryo* was defined in the statute as “any *organism*, not protected as a human subject matter under 45 CFR 46 . . . that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells.” *Id.* (emphasis added). Rabb based her conclusion that pluripotent stem cells are not human embryos on the determination that pluripotent stem cells are not a human organism and thus do not fit within the statute’s definition of human embryos. *Id.* Rabb further explained that a human embryo, as that term is virtually universally understood, has the potential to develop in the normal course of events into a living human being. *Id.* Rabb offers the definition of embryo found in the McGraw-Hill Dictionary of Scientific and Technical terms. According to that definition an embryo is “[t]he product of conception up to the third month of human pregnancy.” Pluripotent stem cells, however, do not have the capacity to develop into a human being, even if transferred to a uterus. Rabb Memorandum, *supra*.

Rabb further considered the legal limits on the use of human fetal tissue. In this regard, she noted that stem cells derived from primordial germ cells fit into the definition of human fetal tissue under Section 498A of the Public Health Service Act. 42 U.S.C. § 289g-1(g) (1994); Rabb Memorandum, *supra*. The Act places certain limits on the use of such tissue including prohibition of its sale, restrictions on its use in fetal tissue transplantation research if the research is supported by federal funds, and prohibition on the transplantation of such tissue to specific individuals. Rabb Memorandum, *supra*.

259. Wagner, *supra* note 256.

260. *Id.* More than sixty representatives and nine senators wrote to then Secretary of DHHS, Donna Shalala, opposing Rabb’s analysis. *Id.*

261. Sharon M. Parker, Critique, *Bringing the “Gospel of Life” to American Jurisprudence: A Religious, Ethical and Philosophical Critique of Federal Funding for Embryonic Stem Cell Research*, 17 J. CONTEMP. HEALTH L. & POL’Y 771, 778 (2001) (citing letter from Christopher Smith, Congressman, to Donna E. Shalala, Secretary of Health and Human Services (Feb. 11, 1999)) (on file with author).

262. Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976 (Aug. 25, 2000).

could be used to study embryonic stem cells derived without federal support.<sup>263</sup>

When George W. Bush came to office in January 2001, pro-lifers expected him to move quickly to prohibit federal funding of stem cell research.<sup>264</sup> Yet, Bush did not respond immediately to the debate about embryonic research. Rather, he announced that he would review the issues. In the meantime, he appointed Tommy Thompson to head DHHS. Thompson had long opposed abortion but, as Governor of Wisconsin, had publicly supported stem cell research at the state university.<sup>265</sup>

In August 2001, Bush announced a compromise that allowed limited federal funding for embryonic research. His announcement referred expressly to the concerns of those opposed to abortion and of those not necessarily opposed to abortion but anxious to safeguard the sanctity of life (which they saw as threatened on other grounds by embryonic stem cell research).<sup>266</sup> Bush provided for the use of federal funds for research on sixty stem cell lines that existed on the date of his remarks.<sup>267</sup> With regard to these cell lines, he explained, a

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263. *Id.* at 51,979. In response to the guidelines issuance, a group of plaintiffs, represented by the public interest law firm of the Christian Legal Society, sued NIH. *Nightlight Christian Adoptions v. Thompson*, No. 01-CV-502 (D.D.C. as of Jan. 18, 2002). Plaintiffs asserted that DHHS's issuance of the guidelines "violate[d] the federal law prohibiting the use of DHHS appropriations to fund research in which human embryos are knowingly destroyed or discarded or are unnecessarily subjected to more than minimal risk." *Id.*; Omnibus Consolidated Appropriations Act of 2001, § 510 (Dec. 21, 2000) (citing Pub. L. No. 106-554); *Nightlight Christian Adoptions v. Thompson*, Complaint for Declaratory and Injunctive Relief (D.D.C. filed Mar. 8, 2001).

264. Arthur Allen, *Politics Feature: Will Thompson, Bush Clash Over Human Embryo Research?*, Salon.com (Dec. 29, 2000), at <http://dir.salon.com/politics/feature/2000/12/29/embryo/index.html> (last visited Aug. 23, 2003). Bush's spokesman, Scott McClellan, asserted in December 2000, shortly before Bush's inauguration, that Bush had "consistently opposed federal funding for research that requires embryos to be discarded or destroyed." *Id.*

The issue of embryonic stem cell research was rarely considered during the 2000 campaign. Rick Weiss, *Biomedical Research Goes Where Candidates Dare Not*, WASH. POST, Oct. 29, 2000, at A23. On one occasion, however, in August 2000, soon after the promulgation of NIH guidelines that provided for funding of such research, the Democratic candidate, Albert Gore, supported the new rules while George Bush opposed them. *Id.*; see also Mark Kukis, *Bush White House Would End Stem Cell Research*, UNITED PRESS INT'L, Sept. 22, 2000 (noting that if elected, he would end federal funding for stem cell research).

265. Allen, *supra* note 264. In July 2002, Tommy Thompson noted that the NIH had begun to issue grants for embryonic research. Thompson explained: "[W]e're already beginning to realize the promise of this kind of research . . . . I am passionate about moving forward with this kind of research [on adult and embryonic stem cells] within the guidelines established by President Bush. Tommy G. Thompson, *Global Promise*, DAILY DEAL, July 16, 2002.

266. See Press Release, White House Office of the Press Secretary, President's Embryonic Stem Cell Research Policy (Aug. 9, 2001) [hereinafter Bush Remarks], available at <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html> (last visited Aug. 23, 2003), reprinted in ANDREWS ET AL., *supra* note 219, at 141.

267. *Id.* In July 2002, Tommy Thompson reported that DHHS had distributed embryonic stem cell lines to laboratories for research. Thompson, *supra* note 265.

“life and death decision has already been made.”<sup>268</sup> He precluded federal support for work on stem cell lines not yet developed.<sup>269</sup>

Bush’s justification for his compromise position suggests the framework within which public debate about embryonic stem cells is being constructed. Bush invoked two essential interests. First, explaining that his conclusions were “shaped by deeply held beliefs,” he described one set of concerns:

I’m a strong supporter of science and technology, and believe they have the potential for incredible good—to improve lives, to save life, to conquer disease. Research offers hope that millions of our loved ones may be cured of a disease and rid of their suffering. I have friends whose children suffer from juvenile diabetes. Nancy Reagan has written me about President Reagan’s struggle with Alzheimer’s. My own family has confronted the tragedy of childhood leukemia. And, like all Americans, I have great hope for cures.<sup>270</sup>

This part of Bush’s statement reflects two themes embedded in the American health care system and in public responses to that system. The first is the notion that health care promises salvation.<sup>271</sup> Second, the comments suggest the individualization of health care. Bush focused on *individuals* whose lives and welfare, or whose family members’ lives and welfare, appeared to depend on the success of stem cell research.<sup>272</sup>

Then Bush outlined a second, contrasting set of convictions:

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268. Bush Remarks, *supra* note 266.

269. *Id.* In May 2002, the NIH awarded federal funds for stem cell research on fetuses to John Gearhart and other researchers at Johns Hopkins University School of Medicine. Jeremy Manier, *U.S. Quietly OKs Fetal Stem Cell Work; Bush Allows Funding Despite Federal Limits on Embryo Use*, CHI. TRIB., July 7, 2002, at 1. The rules for research on fetal, as opposed to embryonic, tissue were promulgated during the administration of President Clinton. However, the grant to Gearhart’s laboratory is the first use of federal funds for fetal stem cell research. *Id.*

Gearhart, who isolated germ cells from fetal gonads in 1998, proposed working with fetuses, not embryos. However, the administration’s approval of the grant represents the first use of federal funds to study stem cells isolated from fetal tissue. *Id.* In April 2002, DHHS announced that it planned to award grants worth a total of \$3.5 million to four institutions to assist in distributing existing human embryonic stem cells. Antonio Regalado, *U.S. Awards Grants to Extend Rolls of Stem-cell Researchers*, WALL ST. J., Apr. 29, 2002, at B6. The grants went to BresaGen Ltd. in Australia; ES Cell International Pte. in Singapore; the University of California, San Francisco; and the Wisconsin Alumni Research Foundation (affiliated with the University of Wisconsin). *Id.* In July 2002, Tommy Thompson, Secretary of DHHS, announced that fourteen laboratories had been given authorization to do research using government funds with the embryonic cell lines that existed on August 11, 2001 (the date of President Bush’s remarks). Thompson, *supra* note 265. “We have,” declared Thompson, “begun issuing grants to companies and academic institutions to study the stem-cell lines we have approved.” *Id.*

270. Bush Remarks, *supra* note 266.

271. FOUCAULT, *supra* note 207, at 198.

272. Bush Remarks, *supra* note 266. *See infra* note 279 and accompanying text (noting genomic medicine as metaphor for individualization of health care).

I also believe human life is a sacred gift from our Creator. I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world. And while we're all hopeful about the potential of this research, no one can be certain that the science will live up to the hope it has generated.<sup>273</sup>

Here President Bush, sounding more like the old pro-life candidate Bush, focused on the ontological status of the embryo. Then, as if presuming to expand on the significance of valuing life, he qualified his initial valuation of stem cell research by observing that the therapeutic developments to which he had referred were still not actualized and might never be actualized. Here, in noting that “no one can be certain that the science will live up to the hope it has generated,” Bush seemed to suggest that were the hope actualized the balance between allowing embryonic research and safeguarding embryonic life would shift clearly to favor research.<sup>274</sup>

Bush's rhetorical balancing of concern for science and concern for embryonic life, surprising from a President publically committed to opposing abortion,<sup>275</sup> represents a turn in the debate about the ontological status of the embryo and thus implicates the central assertion on which the pro-life position about abortion has been grounded for several decades. In particular, Bush's implicit suggestion that embryonic research might become more appealing if early research results bear out current promises undermines the notion of embryo-as-person. Even more, Bush's compromise on funding embryonic research reflects a new diversity of viewpoints *among pro-life adherents* with regard to the status of the embryo.<sup>276</sup>

As a concrete response to the ideological pressures shaping the debate about embryonic stem cell research, Bush's compromise satisfied almost no one,<sup>277</sup> but it did preclude an immediate escalation of

273. Bush Remarks, *supra* note 266.

274. *Id.*

275. During the 2000 campaign Bush told the U.S. Conference of Catholic Bishops (in response to a questionnaire they transmitted to him): “I oppose using federal funds to perform fetal tissue research from induced abortions.” Manier, *supra* note 269.

276. Wagner, *supra* note 256.

277. Professor Kevin P. Quinn, S.J., J.D, concluded, just before Bush issued his August 2001 remarks, that a solution permitting research on stem cell lines already derived through use of private funds would

render the serious moral considerations attributed to early human embryos—a view taken by several important official bodies—morally meaningless. Embryos will be treated merely as replenishable resources and, in this context, talk of “respect” invoked to constrain research is deeply misleading. . . . One clear starting point in the debate about the ethics and policy of stem cell research is the moral status of the early human embryo.

Kevin P. Quinn, *Embryonic Stem Cell Research as an Ethical Issue: On the Emptiness of Symbolic Value*, 13 ST. THOMAS L. REV. 851, 854 (2001) (footnote omitted).

activist tactics and rhetoric from both advocates and opponents of embryonic stem cell research. In the end, Bush's remarks may prove more important as an indication of the parameters of the debate than as a scheme for regulating federal funding of embryonic stem cell research.

In the context of embryonic research, claims about the sanctity of embryonic and fetal life are not opposed—as they are, though often implicitly, in the debate about abortion—by claims about equality and the need to safeguard autonomous choice. Rather, autonomous choice is assumed and claims about embryonic personhood are countered by claims about cures for sick children, dying adults, and people suffering from an array of serious, debilitating conditions. Such claims are compelling in a society committed to the notion that health brings salvation.<sup>278</sup> The mode of cure suggested by embryonic stem cell therapy—a uniquely *individual* form of therapy—provides a metaphor for a society increasingly committed to autonomous individuality.<sup>279</sup> That Bush should countenance the use of embryos, even pre-existing embryos in research and that he should prize, almost by accident it would seem, the individualization of health care, even to the very limited extent described in his August 2001 statement, is startling.

Previously, the Bush administration had consistently sided with pro-life interests.<sup>280</sup> Soon after his election, for instance, Bush announced that he would preclude the distribution of federal funds to international family-planning organizations that provided for forced abortion.<sup>281</sup> In 2002, the administration extended government health

When Bush's decision was announced, it was not heralded by the pro-life movement. Many pro-lifers saw the President's compromise as a *step back* because it provided governmental support to research involving embryonic destruction. Wagner, *supra* note 256. Some expressly characterized Bush's decision as "morally unacceptable." *Id.* (quoting the response of Bishop Joseph Firenze, President of the United States Conference of Bishops, to Bush's August 9, 2001 statement on federal funding for embryonic stem cell research). However, others focused on the President's preclusion of further embryonic destruction in federally funded work. Those favoring embryonic stem cell research hoped that Bush would extend the availability of federal funds to support work on embryonic stem cell lines not yet derived. *Id.* Some expressed gratitude that the President had not foreclosed federal funding for the research. *Id.*

278. FOUCAULT, *supra* note 207.

279. See, e.g., Charo & Zoloth, *supra* note 251 (opinion piece supporting embryonic stem cell research and therapeutic cloning from feminist perspective and noting potential of the research to provide individualized cures).

280. Often, support of the Bush administration for the pro-life positions has occurred, as Gary Bauer, a conservative activist, has described it, "under the radar." Karen Tumulty & Viveca Novak, *Under the Radar*, TIME, Jan. 27, 2003, at 38; Adam Clymer, *U.S. Revises Sex Information, and a Fight Goes On*, N.Y. TIMES, Dec. 27, 2002, at A17.

281. Tumulty & Novak, *supra* note 280; Todd S. Purdum, *U.S. Blocks Money for Family Clinics Promoted by U.N.*, N.Y. TIMES, July 23, 2002, at A1 (Bush administration announces it will not contribute to United Nations Population Fund because the Fund is said to help agencies in the Chinese government that force women to terminate pregnancies).

benefits to *unborn children*.<sup>282</sup> Also in 2002, information was removed or altered on some of the federal government's medical websites, including those of the National Cancer Institute and the Centers for Disease Control and Prevention.<sup>283</sup> All these changes reflect the administration's broad support for a pro-life agenda.<sup>284</sup>

## 2. *Legal Responses to Therapeutic Research Cloning*

That support is reflected in the administration's position on therapeutic cloning. Bush has steadfastly refused to countenance the production of embryos for stem cell research. In practice, therapeutic cloning is distinct from reproductive cloning.<sup>285</sup> However, the two are often presented in legislative deliberations and popular appeals as indistinguishable.<sup>286</sup> And so, for the Bush administration, the notion of providing for any sort of cloning using human cells is anathema.<sup>287</sup> In part, that conflation in discourse of therapeutic and reproductive cloning reflects an essentially theological position that presumes the personhood of embryos.<sup>288</sup> In part, it reflects the powerful symbolism still evoked by use of the term *cloning*. Even for scientists, cloning is multivalent, sometimes even suggesting a social world gone awry.<sup>289</sup>

The suggestion that therapeutic cloning is no different than reproductive cloning, or that it will inevitably lead to reproductive cloning, has been compelling to many who might otherwise have been

282. Amy Goldstein, *Bush to Extend Health Care Benefits to Fetuses; New Rule Stirs Abortion Debate*, WASH. POST, Sept. 28, 2002, at A4. The change, the result of an amendment to a DHHS regulation, affects the State Children's Health Insurance Program, which had covered health care for children from birth to age nineteen. *Id.*

283. Clymer, *supra* note 280.

284. For instance, information was deleted on the National Cancer Institute's website that reported the absence of a connection between breast cancer and abortion. *Id.* Soledad O'Brien, *Representative Tom Allen and Former Deputy Assistant Secretary of Health and Human Services Patrick Fagan Speak About Changes on Some Government-run Medical Web Sites*, NBC News Transcripts, Dec. 28, 2002 (available in LEXIS).

285. The laboratory techniques used to clone somatic cells are the same regardless of the use to which the resulting embryonic cells will be put. Ron Seely, *Abortion Debate Shifts; Stem Cells Could Become a Factor Before the Supreme Court; Roe v. Wade 30th Anniversary*, WIS. ST. J., Jan. 19, 2003, at A1. Embryonic stem cells only exist during the earliest part of embryonic development. Editor's Choice, *Cell Biology: MIT Research Helps Find Elusive Adult Stem Cells*, STEM CELL WK., Jan. 20, 2003, at 1.

286. Therapeutic (or research) cloning results in embryos for use in research. Reproductive cloning would result in a cloned baby. Coby S. Nixon, Note, *Human Cloning and the Commerce Power: In Light of United States v. Lopez, Congress Can—But Should Not—Regulate Human Cloning*, 37 GA. L. REV. 295, 297 (2002).

287. See Rick Weiss, *New Status for Embryos in Research*, WASH. POST, Oct. 30, 2002, at A1 (noting the Bush administration's altering of the charter of the federal advisory committee concerned with safety of research volunteers to include embryos as *human subjects*).

288. See Nixon, *supra* note 286, at 297.

289. Kotler, *supra* note 39 (quoting Irv Weissman, a Stanford biology professor, who claimed that "[c]loning has as many meanings to a scientist as *ice* to an Eskimo or *love* to Oprah Winfrey").

willing to support therapeutic cloning. Scientists, anxious to proceed with therapeutic cloning have pleaded that therapeutic cloning be given a new name to differentiate it from cloning for the creation of a person.<sup>290</sup> In any event, the association between therapeutic and reproductive cloning has discouraged support for therapeutic cloning.<sup>291</sup> Further, the use of therapeutic cloning to produce embryos for research has implicated stem cell research in the debate about therapeutic cloning.<sup>292</sup>

Pro-life adherents have worked actively to oppose therapeutic cloning. They seek legal prohibitions on embryonic research by linking that research to a slew of horrors suggested by cloning. They argue that therapeutic cloning entails the creation and destruction of living humans, and even worse, that therapeutic cloning is only the top of a slippery slope that leads to reproductive cloning.<sup>293</sup> Such arguments have proved compelling to many. In 2001, the House of Representatives passed a bill that would have criminalized all forms of cloning.<sup>294</sup> The President lauded the bill,<sup>295</sup> which passed by a vote of

290. Weinberg, *supra* note 14, at 57 (referring to an article published in *Science* in early 2000 in which three scientists asked that therapeutic cloning be called “nuclear transplantation” or “stem cell research”).

Others have connected therapeutic cloning to the abuses of eugenics in earlier decades. *Id.* at 59 (quoting Jeremy Rifkin who asserted that “[t]he problem with therapeutic cloning is that it introduces commercial eugenics from the get-go”).

291. PRESIDENT’S COUNCIL CLONING INQUIRY, *supra* note 50, at 27 (criticizing use of term “therapeutic cloning” on the grounds that the only distinction between research and reproductive cloning “is based entirely on the differing goals of the cloners”); Lesko & Buckley, *supra* note 69 (noting that “reproductive cloning” is the “most controversial” type of cloning).

292. Kotler, *supra* note 39.

293. See, e.g., Fact Sheet on 2003 Prohibition Act, *supra* note 250. The *fact sheet* explains that “[c]loning is the ultimate dehumanizing of human reproduction.” *Id.* It then denies the validity of a distinction between research and reproductive cloning:

Such a ban [on reproductive cloning only] does not actually ban cloning. It waits until the cloning procedure is finished, then forbids live birth of the resulting clones. It would be highly ineffective even at achieving its own goal—once cloned embryos are readily available in the laboratory, transfer to wombs is easily done; any effort to enforce the law once this occurs would require forced abortions, violating sound moral principles as well as the Constitution.

*Id.*

294. Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong. § 302 (2001). The bill was introduced by Representative Dave Weldon (R.-Fla.). The bill also would have banned the importation of cloned products for research. *Id.*

The Report of the Committee on the Judiciary on the Human Cloning Prohibition Act of 2001 noted:

H.R. 2505, the “Human Cloning Prohibition Act of 2001,” amends Title 18, United States Code, by establishing a comprehensive ban on human cloning and prohibiting the importation of a cloned embryo, or any product derived from such embryo. Any person or entity that is convicted of violating this prohibition is subject to a fine or imprisonment of not more than 10 years, or both. In addition, H.R. 2505 provides a civil penalty of not less than \$1,000,000 for any person who receives a monetary gain from cloning humans. However, H.R. 2505 does not pro-

265-162.<sup>296</sup> But by the summer of 2002, when the Senate entertained a similar bill, sentiment against prohibiting all forms of cloning had cooled in the face of the strong consortium of lobbyists that included patient advocates, scientists, and representatives of the biotechnology industry. The Senate bill<sup>297</sup> was not passed by the 107th Congress, but a similar bill has been reintroduced in the 108th Congress.<sup>298</sup> In early 2003, the House once again passed a bill that would criminalize all forms of cloning using human cells and that would make it illegal for patients to import medical therapy dependent on embryonic stem cells.<sup>299</sup>

Supporters of the House bill in the 107th Congress expressly connected the need to prohibit all human cloning with the abortion debate, in general, and with sanctity of embryonic life, in particular. Representative Henry Hyde (R.-Ill.), for instance, declared that “[a]n embryo is a human life. It is not a speck of dust. Is it appropriate to create human life in a petri dish and then destroy that life to get at a cell? I say no.”<sup>300</sup> But even in the House, where The Human Cloning

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hibit the use of cloning technology to produce molecules, DNA, cells, tissues, organs, plants, or animals.

Report 107-170 (to accompany H.R. 2505), Committee on the Judiciary, 107th Cong. (1st Sess. 2001). Human reproductive cloning is banned in about two dozen countries including France, the United Kingdom, India, Japan, and Brazil. See Daniel J. Kevles, *Cloning Can't Be Stopped: Human Clones Are Fodder for Horror Films and Heated Debate*, 5 TECH. REV. 40 (2002). A number of states, including California, Louisiana, Michigan, Rhode Island, and Virginia have statutes that prohibit human cloning. Maria S. Quintero, *Cloning Californians?: Report of the California Advisory Committee on Human Cloning and Recent Cloning Related Legislation*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 417, 423 (2002). These state statutes all provide exceptions for scientific research. *Id.* In addition, Missouri limits state funding of human cloning research. *Id.*

295. Marcia Coyle, *Cloning Laws Challenges Research Clones Another Quagmire?*, NAT'L L.J., May 13, 2002, at A1 (reporting that President Bush supported a complete ban on reproductive and on research cloning of human embryos).

296. See Kim Coghill, *House Goes Even Further in Attempt to Ban All Cloning*, BIO-WORLD TODAY, Mar. 2, 2003, at 14.

297. S. 1899, 107th Cong. (2002).

298. S. 245, 108th Cong. (2003). The bill, introduced by Senator Brownback is cosponsored by one Democratic and twenty-one Republican Senators. 2003 Bill Tracking S. 245. The bill was designed to avoid being entertained by the Senate Judiciary Committee because its Chair, Senator Orrin Hatch, supports therapeutic cloning. Emily Pierce, *Leaders Circumvent Hatch; Brownback Writes Bill to Avoid Judiciary*, ROLL CALL, Feb. 5, 2003. Instead, Brownback's bill is being entertained by the Senate Health, Education, Labor and Pensions Committee, chaired by Senator Judd Gregg. *Id.*

299. H.R. 534, 108th Cong. (2003). The bill would ban all cloning using human cells and would make it illegal to import a cloned embryo or any product that came from one. Mary Agnes Carey, *Cloning Debate Undiminished Despite House-Passed Ban*, CQ WKLY., Mar. 1, 2003; see also Ellen Goodman, Editorial, *Outlawing Science*, WASH. POST, Mar. 8, 2003, at A23 ( lambasting the House bill that would ban therapeutic cloning). At present, it does not seem that the companion bill in the Senate (S. 245), sponsored by Sam Brownback (R.-Kan.), has enough support for passage. Carey, *supra*.

300. *Therapeutic Cloning in Danger of Being Outlawed in US as Lawmakers Race to Ban Cloning of Human Beings*, TRANSPLANT NEWS, Aug. 30, 2001, at 11.

Prohibition Act of 2001<sup>301</sup> was passed by a strong margin,<sup>302</sup> representatives recognized inconsistencies in the law's understanding of embryos. How, they wondered, was President Bush consistently able to sanction research on embryos produced through IVF while strongly opposing therapeutic cloning for the purpose of making embryos available to researchers.<sup>303</sup>

Representative Peter Deutsch (D.-Fla.) clarified his own decision to oppose research cloning but support embryonic research on embryos produced through IVF. That combination of decisions, he explained, "gives [people] the ability to say, 'I'm a reasonable person, I'm not a crazy, I don't want human cloning.'"<sup>304</sup> The parameters of the confusion suggested by Deutsch's explanation became evident as the Senate prepared to vote on the bill (proposed by Senators Brownback (R.-Kan.) and Landrieu (D.-La.)) that mirrored the 2001 House bill.<sup>305</sup> Mary Landrieu, one of the proposed bill's sponsors, described herself as pro-choice and denied that positions about cloning implicate positions about abortion.<sup>306</sup> However, for the bill's author, Senator Brownback, concern about cloning *is* concern about the "legal status of a young human" (Brownback's description of a cloned embryo).<sup>307</sup> Moreover, as a partial result of intense lobbying efforts by the alliance of representatives of the biotechnology industry, scientists, and patient groups, a number of pro-life Senators disentangled the debate about research cloning from the debate about abortion.<sup>308</sup>

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301. H.R. 2505, 107th Cong. (2001).

302. See *supra* note 300 and accompanying text; see also *House OKs Ban*, *supra* note 254.

303. *House OKs Ban*, *supra* note 254.

304. *Id.*

305. The bill provided for establishing a comprehensive ban on human cloning and prohibiting the importation of a cloned embryo or any product derived from such embryo. Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong. § 302 (2001). Any person or entity that is convicted of violating this prohibition is subject to a fine or imprisonment of not more than ten years, or both. *Id.* at § 302(c)(1). In addition, H.R. 2505 provides a civil penalty of not less than \$1,000,000 for any person who receives a monetary gain from cloning humans. However, H.R. 2505 does not prohibit the use of cloning technology to produce molecules, DNA, cells, tissues, organs, plants, or animals. Report 107-170, Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong. 1st Sess. (2001), at 2.

306. Kristen Philipkoski, *Cloning Bill Bans Abortion Too?*, WIRED NEWS, May 30, 2002, at <http://www.wired.com/news/medtech/0,1286,52838,00.html> (last visited Aug. 23, 2003).

307. *Id.* (citation omitted).

308. Zitner, *supra* note 85. In large part, the lobbying campaign was led by Michael Manganiello, president of the Coalition for the Advancement of Medical Research. *Id.* The Coalition is composed of about seventy groups that favor therapeutic cloning. Kristen Philipkoski, *Invasion of the Cloning Lobby*, WIRED NEWS, Mar. 5, 2002, at <http://www.wired.com/news/medtech/0,1286,50834,00.html> (last visited Aug. 23, 2003); see also Ceci Connolly, *Waging the Battle for Stem Cell Research; As Senate Vote Approaches, Coalition Intensifies Year-Long Lobbying Effort*, WASH. POST, June 9, 2002, at A6. The Coalition for the Advancement of Medical Research (CAMR) lobbied actively to defeat a Senate ban on cloning. *Id.* CAMR and other activists supporting research cloning focused on two

Their choices and their explanations of those choices suggest a new vision of the *embryo* that contrasts sharply with most pro-life images of embryonic life. Senator Orrin Hatch's decision to support therapeutic cloning is illustrative.<sup>309</sup> Hatch (R.-Kan.), a firm abortion opponent,<sup>310</sup> shifted the debate about cloning, and by implication the debate about abortion, when he joined with liberal Senators Kennedy (D.-Mass.) and Feinstein (D.-Cal.), who had introduced a bill in the 107th Congress that provided for medical research cloning.<sup>311</sup>

Hatch made the implications of his choice explicit. He first stated unambiguously that support for research cloning, though he avoided use of that term, was consistent with a pro-life stand.<sup>312</sup> Almost as an afterthought, he redefined all the rules when he characterized research cloning (which he labeled "regenerative medicine") as "*pro-life and pro-family*."<sup>313</sup> Suddenly, in Hatch's new understanding, *support for embryonic research* substitutes for *opposition to abortion* as an agenda that favors life and safeguards families. The shift is staggering.

Hatch definitively separated moral conclusions about embryos in the context of cloning for the production of embryonic stem cells from moral conclusions about embryos in the context of abortion. He invoked science to mediate the apparent gap between his *pro-life* characterization of research cloning and his *pro-life* position in the debate about abortion. New science, he implied, produces a new embryo. Personhood, in Hatch's new view, can no longer be equated with any *embryo*. He elucidated:

It used to be a fertilized egg was a human being. Now, it's an unfertilized egg, as long as you put a skin cell in that gives 46 chro-

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points: "the credibility of science and the power of the patient." *Id.* (quoting Kevin Wilson, director of public policy at the American Society for Cell Biology). In addition, forty Nobel laureates signed a statement supporting research cloning and the National Academy of Sciences issued a report documenting the promising use of such research. *Id.*

309. Adriel Bettelheim, *Divided Senate Examining Research Value, Moral Issues As It Ponders Vote on Cloning*, CQ WKLY., May 4, 2002, at 1154. In April both Orrin Hatch and Strom Thurmond (R.-S.C.), two conservative senators, announced that they would "break with anti-abortion colleagues and support" research cloning. *Id.*

310. Seely, *supra* note 285.

311. Bettelheim, *supra* note 309. Senator Hatch had not supported a bill that Senators Kennedy and Feinstein had introduced previously. Rick Weiss, *Hatch to Support Bill Allowing Stem Cell Study; Decision on Embryo Cloning is a Setback for Conservatives*, WASH. POST, May 1, 2002, at A2. That bill was highly tolerant of research cloning. Rather, he joined with Kennedy and Feinstein in a new bill that required that all cloning research (whether or not funded by the federal government) receive approval from a scientific and ethics advisory board. *Id.*

312. Connolly, *supra* note 308.

313. *Id.* Connolly attributes Senator Hatch's decision to support research cloning to a coalition of "scientists, patient advocates, Hollywood liberals and biotech executives." *Id.*

mosomes. To me, it's a big stretch . . . Every day you shower, you shower off millions of living human cells.<sup>314</sup>

Others in the Senate reached similar conclusions. Senator Connie Mack (R.-Fla.), also an opponent of abortion, explained that, with cloning, “[y]ou’re using an egg that has never been fertilized by sperm and is never placed in a uterus. The words that we’re using were defined in a former age.”<sup>315</sup>

Thus Senator Mack, like Senator Hatch, suggested that new science requires new language<sup>316</sup> and that new language defines a new vision of moral reality. For Senator Mack, as for Senator Hatch, an embryo produced through cloning does not bear the moral status of an embryo produced in other ways. The terms of this new language transform moral reality. In a broader sense than Mack may have intended, the language of debate about abortion (*embryo*, *fertilization*, and *reproduction*) as interpreted by a *former age* was grounded in different underlying assumptions and concerns than the language of debate about research cloning.

Not surprisingly, other pro-life advocates in the debate about abortion have disagreed with Senators Hatch and Mack. But in disagreeing, they have been forced to contend with a new form of rhetoric about embryos. The Family Research Council, a group committed to shaping public debate to “value[] human life and uphold[] the institutions of marriage and the family,”<sup>317</sup> characterized Hatch’s formulation of the issues as “morally vacuous and scientifically inaccurate.”<sup>318</sup> The Council, in effect, deconstructed Hatch’s effort to harmonize his positions about research cloning and abortion:

If human life ‘begins in a mother’s nurturing womb, not in a petri dish,’ according to Hatch, then location is what determines the personhood of the human embryo. That’s nonsensical! The cloned human embryo Hatch wants to tinker with and destroy for research has all the genetic components that a human embryo inside a mother’s womb has. No scientist would argue with that.<sup>319</sup>

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314. Adriel Bettelheim, *Cloning by Any Other Name: A Defining Battle*, CQ WKLY., June 15, 2002, at 1596, 1597.

315. Zitner, *supra* note 85.

316. *Id.* Zitner explains Mack’s decision to support therapeutic cloning to have developed as a result of his “experience with cancer.” *Id.*

317. Family Research Council, *Family Research Council Mission Statement*, at <http://www.frc.org/aboutfrc.cfm> (last visited Aug. 23, 2003).

318. Press Release, Family Research Council, *Attack of the Human Hatch-Eries Coming this May to a Lab Near You?* (April 30, 2002), at <http://www.frc.org/search.cfm> (Document Search, FRCCODE=P02D12) (last visited Aug. 23, 2003).

319. *Id.*

Yet, even for those, such as the Family Research Council, committed to understandings of embryonic life, originally elaborated with reference to pro-life positions on abortion, the medical promise of stem cell research proves compelling. The Family Research Council proposed committing funds to those conducting research on adult stem cells, who, the

Thus, in denying the validity of Hatch's assessment, the Council also looked to science, but it interpreted science differently than Hatch had.<sup>320</sup>

Yet, by the summer of 2002, it became clear that the Brownback-Landrieu bill had not garnered adequate support for passage.<sup>321</sup> The 108th Congress is considering several bills about cloning.<sup>322</sup>

At present, the transformation of discourse about embryos appears to be the most fateful consequence of the Senate's response to therapeutic cloning. Appeals to science, especially by pro-life adherents, have proved compelling to many in the debate about abortion.<sup>323</sup> They lose much of their force, however, in the debate about therapeutic cloning. Theory has not changed but technology has. The *constructed embryo* can be distinguished from the *embryo produced sexually*. But at base, the debate about therapeutic cloning, as the debate about abortion that preceded it, is cultural, theological, and sentimental. And so the language of science, as it enters popular discourse, is reinterpreted and reshaped to suit changing assumptions about what is considered right and what is considered wrong. As culture and sentiment shift, understandings of the *embryo* shift. In the debate about cloning, science is ready to oblige opposing voices. And so in this new context, pro-life senators justify support for therapeutic cloning by distinguishing research embryos from other embryos.

The new age (as Senator Mack has labeled the age of cloning and stem cell research)<sup>324</sup> differs from the age that preceded it. The new age suggests new visions of personhood, family, and community. Among the consequences is a new debate about embryos and, thus, about abortion. The next Part summarizes some social implications of these changes.

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Council explained, "out of respect for America's moral leadership are pioneering the ethical avenue of research." *Id.* This position received support in 2002 as researchers showed that adult bone marrow stem cells could be transformed into functioning liver cells. Tom Majeski, *Bone Marrow Stem Cells from Adults Form Tissues*, PITTSBURGH POST-GAZETTE, June 21, 2002 (Sooner Edition). Catherine Verfaillie, director of the Institute at the University of Minnesota that conducted the research, explained that, despite this success, it is not yet clear whether embryonic or adult stem cells will prove more useful in therapy and research. *Id.*

320. Further, researchers lobbying *in favor* of therapeutic cloning have openly suggested that an entirely new vocabulary is needed to discuss cloning's products. They would rename the embryo created through cloning, calling it an "activated egg[]" or a "nuclear-transfer-derived blastocyst." Bettelheim, *supra* note 314, at 1596.

321. Sheryl Gay Stolberg, *Total Ban on Cloning Research Appears Dead*, N.Y. TIMES, June 14, 2002, at A31. Republican and Democratic leaders disagreed on the order in which the Senate would vote on the cloning bills. *Id.*

322. Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong. (2003).

323. See *supra* notes 106, 170-75 and accompanying text.

324. See Zitner, *supra* note 85 and accompanying text.

V. FROM ABORTION TO THERAPEUTIC CLONING:  
THE END OF AN "AGE"?<sup>325</sup>

In the debate about abortion, arguments constructed around understandings of fetal and embryonic status have worked moderately well for pro-life adherents. By emphasizing the notion of embryonic personhood, the movement muted its preference for traditional families and its opposition to gender equality and choice within the domestic sphere. This served the pro-life movement well during the last half of the twentieth century as Americans, in fact, became increasingly committed to understandings of family that provided for divorce, egalitarian marriage, contraception, and negotiated choice.<sup>326</sup> Ironically, however, this success is threatened as pro-life groups enter the debate about therapeutic cloning in order to safeguard the notion of embryonic personhood—itsself only one aspect of the large set of underlying beliefs and values at stake in the battle about abortion.

A. *Embryos and "Embryos"*

That the debate about cloning is often merged with the debate about abortion follows from the centrality of the *embryo* to each discourse. Abortion opponents, committed at least since *Roe*<sup>327</sup> to a platform that features the personhood of embryonic life, have, at least in part, entered the debate about cloning to safeguard that platform. But the questions at stake in the debate about cloning encourage new understandings of embryonic life, even among groups of people long associated with antiabortion politics.<sup>328</sup> As the embryo is reexamined and redefined in reference to cloning, the debate about abortion is encompassed by, and ultimately transformed into, a debate that assumes individuality and choice. The irony is clear: in safeguarding the pretext<sup>329</sup> (the personhood of embryos), pro-life adherents may be sacrificing the underlying text (a traditional way of life that eschews choice and autonomy).

At base, discourse about abortion concerns the parameters of relationships (especially within families), the significance of gender in understandings of personhood, and the comparative value of autonomous individuality and choice. In contrast, discourse about cloning largely *assumes* autonomy and choice and concerns the parameters of personhood in light of that assumption. Thus, cloning

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325. *Id.* (quoting Senator Connie Mack as observing that "[t]he words that we're using were defined in a former age").

326. *See supra* notes 137-44 and accompanying text; *see also* WESTON, *supra* note 164, at 206-07 (noting importance of "choice" in construction of same-gender families).

327. 410 U.S. 113 (1973).

328. *See* Zitner, *supra* note 85.

329. *See supra* note 131 (defining *pretext*).

discourse reflects the extent to which the debate about family, underlying the debate about abortion, has been resolved in favor of individual autonomy and choice.

Moreover, the debate about cloning is part of a wider discourse about reproductive technology, genetic engineering, and genetic information. Each of these developments has contributed to the medicalization<sup>330</sup> and commodification of families and has thus facilitated a form of family increasingly distinct from that prized by many pro-life adherents. Moreover, these developments contribute to an understanding of the *embryo* that elides or openly dismisses the notion of embryonic personhood. Thus, participation in the debate about cloning threatens both the text and the pretext of the pro-life movement.

This result is already evident in social and legal responses to reproductive technology and, in particular, in several courts' responses to cases involving frozen embryos. A number of state courts, asked to resolve disputes about cryopreserved embryos, have, for instance, looked to contractual agreements among infertility clinics and gamete donors.<sup>331</sup> In looking to contractual agreements, these courts have presumed that embryos are not persons. In some cases, courts have, in effect, defined embryos as commodities despite their own protestations. For instance, in *Davis v. Davis*, the Tennessee Supreme Court concluded that embryos are owed "special respect" because of their "potential for human life."<sup>332</sup> The court explained:

[P]reembryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.<sup>333</sup>

Despite this characterization of embryonic status, the Tennessee Supreme Court evaded the issue of how to pay respect to the eight cryopreserved embryos at issue in the case. Instead, the court turned to the comparative interests of the disputing adult progenitors. The court noted that in the absence of a contract between the parties about the fate of the embryos should they not be used for their in-

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330. See KAJA FINKLER, EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER 175-76 (2000). Finkler defines *medicalization* as "the drawing into the biomedical domain of physical aspects and behaviors such as antisocial conduct that could be understood alternatively as a sin, a crime, a moral fault, or a disease." *Id.* at 175 (citing TRISTRAM H. ENGELHARDT, JR., THE FOUNDATION OF BIOETHICS 191 (1986)).

331. See cases cited *supra* note 27 and accompanying text.

332. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

333. *Id.*

tended purpose, the interest of the party anxious to avoid procreation should prevail.<sup>334</sup> The court then ordered that the embryos be delivered to that party (in this case, the husband, who announced that he had had the embryos destroyed).<sup>335</sup> The court provided no explanation of the apparent discrepancy between its categorizing the embryos as *special* and then facilitating their destruction.<sup>336</sup> Since *Davis*, a number of state courts have considered similar cases. Most of them have echoed the preference of the *Davis* court for a contractual analysis<sup>337</sup> in resolving disputes between divorcing couples about frozen embryos.<sup>338</sup>

As a group, these cases suggest a complicated vision of embryos. Rhetoric about the *special respect* owed embryos because of their potential for human life suggests they cannot be treated like commodities. Yet, the willingness of state courts to enforce contracts about the disposition of embryos or to determine the fate of disputed embryos in light of the interests of the progenitors suggests that, at base, embryos lack a moral status. The jurisprudence that has developed around *spare embryos* produced through IVF reflects a society often ready to define embryos instrumentally<sup>339</sup> but anxious at the same time to mask that fact from itself.

A similar result may ensue as society answers questions raised by therapeutic cloning and embryonic stem cell research.<sup>340</sup> This is suggested by pro-life adherents who support therapeutic cloning and stem cell research and who mediate the apparent inconsistency by redefining the term *embryo* or by separating conclusions about embryonic status in one context from conclusions about that status in other contexts.<sup>341</sup> The result might be termed the *fractionated embryo*. The process of redefining embryos is being encouraged by pro-

334. *Id.* at 604.

335. Mark Curriden, *Embryo Fight Yields Few Answers: Disposal Disclosed: Embryos Are Discarded in a Tennessee Case, but Legal and Ethical Questions Remain*, ATLANTA J.-CONST., June 14, 1993, at A1.

336. See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 160-73, 222-25 (1997) (considering decisions in *Davis* more fully).

337. Despite the preference of the *Davis* court, a contractual analysis was not possible there because the parties had not entered into an agreement about the disposition of the embryos if the Davises failed to use them during marriage for implantation in Mary Sue's uterus. *Davis*, 842 S.W.2d at 598.

338. See cases cited *supra* note 27.

339. A few state courts have been less ready to rely on a contractual approach to resolving disputes between progenitors about cryopreserved embryos. See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (agreements that compel a party involuntarily to become a parent are against public policy and cannot be enforced).

340. Public opinion polls report that a majority of the American public favors therapeutic cloning. See Kevles, *supra* note 294, at 43.

341. See Zitner, *supra* note 85. Others, once hesitant to sanction the use of embryos in research, have more simply decided that the promise of embryonic stem cell research must mute concern for embryonic life. *Id.*

research lobbyists who have constructed a new language within which, and a new set of images through which, to contemplate the uses and the meaning of embryos.<sup>342</sup>

In the context of the abortion debate embryos are confused with fetuses and both are viewed as small people. One scientist, who asked people to draw an embryo, was presented with portraits of “a fetus with a face.”<sup>343</sup> In contrast, in the context of the debate about embryonic research and cloning, embryos are being reimagined. In this context, embryos can be portrayed as cells, of significance not in and of themselves, but because of their potential to help cure disability and treat disease. Pro-research lobbyists have consistently associated embryonic stem cells, and cloning to produce them, with moving images of sick children and famous, disabled, or ill adults for whom stem cell research promises relief from illness and debility. Christopher Reeve, for instance, known for his acting role as Superman and paralyzed in a horseback riding accident in 1995, has actively campaigned against a ban on therapeutic cloning.<sup>344</sup> Moreover, a number of children, some the offspring of active proponents of research cloning, have spoken to legislators and journalists. Hollywood producer Jerry Zucker arranged a meeting between one senator (whom he declined to name) and his thirteen year-old daughter Katie, who suffers from juvenile diabetes. Zucker summarized Katie’s words to the Senator: “as far as I know a skin cell doesn’t suffer the way I suffer and a skin cell inserted into an egg cell doesn’t have dreams like I have.”<sup>345</sup> Similarly, pro-research lobbyists have focused on Tessa Wick, the daughter of a therapeutic cloning activist, who asked how Senator Brownback could prefer “a bunch of cells” to her. “It’s so scary to me,” she said, “that this guy I don’t even know could do that. It’s like he’s killing me.”<sup>346</sup> Such stories, including at least one that he heard personally from a four-year-old with diabetes, convinced Senator Orrin Hatch that therapeutic cloning is “pro-life and pro-family.”<sup>347</sup> With a similar focus on individuals’ tales, Governor Jeanne Shaheen, then running for the United States Senate from New Hampshire, was surrounded by a five-year old with diabetes, a man with a spinal cord injury, and the widow of a Parkinson’s victim, as she announced, in August 2002, that she favored federal funding

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342. *Id.*

343. Kotler, *supra* note 39 (quoting Irv Weissman).

344. See, e.g., ‘Superman’ Fights Cloning Chaos: Actor Reeve Calls for Immediate Action on Cloning Laws, *AGENCE FR. PRESSE*, June 16, 2002; Sulaiman Beg, *Cure for Paralysis Getting Closer*, *J. NEWS* (N.Y.), July 5, 2002, at A1.

345. Connolly, *supra* note 308. Zucker further reported that the Senator whom Katie addressed, “looked away and said something about defending unborn babies.” *Id.*

346. *Id.*

347. *Id.*

for embryonic stem cell research.<sup>348</sup> The images produced by such narratives can provide alternatives to and thus displace pro-life images of fetuses and embryos. In the face of images of embryos-as-salvation for individual, sick children and disabled heroes, assertions about embryonic personhood may pale. And thus, ironically, pro-life adherents refer to therapeutic cloning as pro-family even as the pro-life movement continues to displace discourse about families with discourse about embryos in the debate about abortion.

The implications extend beyond strategy. Lobbying (as is the case for advertising generally) can create needs, but to be compelling, and thus effective, lobbying (as with advertising) must be supported by people's willingness to believe that these needs will satisfy deeper longings.<sup>349</sup> Embryonic stem cell research is presented as a means of satisfying the need for health and the yearning for physical well-being. In the contemporary context, the satisfaction of that need and that yearning suggests a new form of individual salvation.

In large part, the promise of embryonic stem cell research is the promise of *individualized* medical care. Stem cells derived from therapeutic cloning mimic the genome of the person cloned. Alta Charo and Laurie Zoloth describe some of the implications for *individual* cures that may result from stem cells produced from cloned embryos:

This basic science is not just another way to patch damaged organs. Remove the nucleus from a donated egg and replace it with the nucleus of a body cell from someone with a genetic disease. Shock this egg so that it begins to divide. In a few short days, derive genetically identical stem cells that will grow into small laboratory sample tissue of the diseased organs. Now you can learn how the genetic mutation causes illness and test drugs to cure it. No other form of stem cell research can be used for this work.<sup>350</sup>

Embryonic stem cell research with cloned embryos thus promises a mode of therapy that harmonizes stunningly with the underlying desires of a society concerned with safeguarding individual autonomy

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348. Harry R. Weber, *Shaheen Supports Stem Cell Research*, VALLEY NEWS (AP story), Aug. 2, 2002, at A3.

349. For instance, a company that manufactures shampoo can convince people that they *need* shiny hair and that Shampoo X will give it to them. The underlying message of the advertisement, generally not expressed, must explain why they *need* shiny hair. So, for instance, an effective shampoo advertisement will convince people that shiny hair will make them attractive, that being attractive will make them popular, and that being popular will render their everyday lives meaningful. In short, the advertisement succeeds by appealing to people's interest in thinking better of themselves and their lives; it creates a need (for Shampoo X) only by first convincing people that shiny hair will fulfill more fundamental goals. I am grateful to Professor Steven Barnett for this illustration of the relation between the commercial creation and satisfaction of needs.

350. Charo & Zoloth, *supra* note 251.

in an wide number of social settings. For a society increasingly committed to individualism in virtually all social settings, therapeutic cloning provides a remarkably compelling context within which to redefine the *embryo* that was defined in the debate about abortion.

### B. Mediating Confusion

In consequence, the debate about therapeutic cloning grounds a wider, less explicit debate about the contours of personhood. In shifting from a focus on the embryo as the subject of abortion to a focus on the embryo as the object of stem cell research, society is re-conceptualizing the moral implications of embryonic status. That re-conceptualization reflects a more encompassing ideological transformation as a society constructed in response to the Industrial Revolution adjusts to a new set of scientific and technological developments and the economic interests that support and further them.<sup>351</sup>

As this transformation proceeds, society and the law suffer from confusion and ambivalence. The fractionalization of responses to embryonic status in contexts<sup>352</sup> not directly concerned with abortion provides a telling illustration of the effort to make sense of change. By mediating between old understandings and new ones, the embryo-as-symbol projects the illusion of continuity and thus social stability. The continuity of the symbol, despite its shifting interpretations, allows society to construct new interpretations of personhood without openly abandoning old ones. New understandings of *embryo* implicate old understandings. And the process of social change is blurred by the presumption that *embryos* in one context are no different from *embryos* in other contexts. Or, to add mightily to social and legal confusion, the opposite presumption, that embryos in one context (therapeutic cloning, for instance) are unlike embryos in other contexts (abortion, for instance),<sup>353</sup> allows pro-life adherents to become

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351. Central among these developments is the advent of electronic media and new understandings that are resulting from the work of molecular biologists (including the so-called new genetics).

352. Discrepant understandings of *embryo* have developed in a variety of legal contexts. Some understanding, such as those developing in the context of the debate about therapeutic cloning, counter a pro-life agenda. Others support that agenda. For instance, the administration of George W. Bush has proposed defining a child as "an individual under the age of 19 including the period from conception to birth," in the context of the federal State Children's Health Insurance Program. State Children's Health Insurance Program; Eligibility for Prenatal Care for Unborn Children, 67 Fed. Reg. 9,936-01, 9,939 (Mar. 5, 2002) (codified at 42 C.F.R. § 457.10 (2003)). The definition would result in the program's paying for the care of the fetus but not of the pregnant woman carrying the fetus. See Michelle Hibbert, *Fetus as Person: Woman As . . . ? : The Bush Administration's Redefinition of "Child,"* LAW & BIOETHICS REP., June 2002, at 10.

353. Zitner, *supra* note 85 (referring to lawmakers asserting that cloned embryos are different from embryos created through fertilization of egg with sperm). Senator Connie Mack (R.-Fla.), for instance, opined that cloning does not lead to the creation of embryos:

supporters of embryonic research without openly reexamining the implications of the battle over abortion.

The developing panoply of responses to the meaning of *embryo* or *fetus* suggests a society ready for change but ambivalent about the implications of the process. At present, *embryos* and *fetuses* may continue to symbolize a vision of family, an understanding of maternity, a source of life, and a view of woman (and, by implication, of man), but alternative referents begin to displace that vision. Diverse frames of social reference establish the primacy of one, or several, meanings for various purposes, but other less explicit meanings inevitably influence responses and direct society's complicated efforts to understand the meaning of embryos and fetuses and thus, the meaning of personhood, and in a sense, the meaning of society itself.

## VI. CONCLUSION

The debate about abortion is a product of the nineteenth and twentieth centuries during which time personhood was defined through a bifurcated reference to home and community, on the one hand, and to work and autonomy, on the other. In that cultural context, pro-life images of the aborted fetus—representing women's unnatural *choice*—suggest a desecration of the forms through which social and familial life are presumed most felicitously to proceed. In contrast, the debate about embryonic research is a product of a different time and a different culture, one within which personhood is being widely reconstructed. Increasingly, individual autonomy is valued, and the gap between home and work blurs.

The new debate about embryonic research resembles the debate about abortion in extending a discursive context within which society can reflect on itself and on its understandings of self and other. However, it rests on new assumptions and raises new questions. The central social questions underlying the debate about abortion have largely been settled in social practice. During the last decades of the twentieth century, society opted widely and often enthusiastically for autonomy and choice in familial settings.<sup>354</sup> Many continue to argue about values and systems of belief relevant to the domestic sphere, but the demographic reality belies the presumed purpose of extended debate. Although the wisdom of the transformation of family that occurred during the last century can be, and is still, questioned in public discourse, the development seems deeply entrenched and is unlikely soon to be undone.<sup>355</sup>

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"You're using an egg that has never been fertilized by sperm and is never placed in a uterus. The words that we're using were defined in a former age." *Id.*

354. See *supra* notes 162-68 and accompanying text.

355. See *supra* notes 136-45, 163-64 and accompanying text.

In contrast, the most important questions arising within the debate about embryonic research and therapeutic cloning (and more widely about genetic information and its uses) concern the character of the *individual* person in a universe with the capacity to prolong life long beyond current expectations, to alter people's minds and bodies—and perhaps their souls—through technology, and to select physical and affective traits prenatally.

And so, in the debate about embryonic research and therapeutic cloning, one side (often, but not always, synonymous with the pro-life side<sup>356</sup> in the abortion debate) continues to define embryos as people but begins to justify and qualify that definition.<sup>357</sup> Another, opposing group, responds more variously. Here, in contrast to most discussions about abortion, at least some voices publicly define embryos as cells without a moral status, at least until they are used.<sup>358</sup> Thus, by suggesting a moral use for these cells—by connecting such cells with the salvationist promise of long life and health—the *moral* position becomes the one that favors embryonic research and therapeutic cloning. Pro-life placards and articles featuring images of aborted fetuses have horrified many people generally unsupportive of the broad pro-life agenda. Even for a society that has in practice largely abandoned the world of traditional family that underlies the pro-life movement's focus on embryonic and fetal status, those images have proved profoundly discomfoting. Strangely, pro-choice adherents have rarely constructed compelling responses.<sup>359</sup> But in the context of embryonic stem cell research, the embryo, as presented in the public assertions of pro-life groups, meets its nemesis: images of sick children, suffering adults, and grieving relatives, whose salvation is presumed to depend on a new understanding of the term *embryo*.<sup>360</sup> These images suggest hapless luck and undeserved pain and in that, as well, they

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356. The debate about abortion is not composed of clear sides. Again, the discussion is intended to be illustrative and suggestive rather than comprehensive.

357. Even the United States Conference of Catholic Bishops, in public relations literature distributed through the Internet, has conceded the potential importance of stem cell research. In arguing for the preclusion of *embryonic* stem cell research, the Conference does not suggest giving up stem cell research generally. Rather, it suggests that research with adult stem cells promises more effective therapies than research with embryonic stem cells. United States Conference of Catholic Bishops, Pro-Life Activities, *Stem Cell Reality Check #1: Myth: "Embryonic Stem Cells Are the Most Effective for Treating Disease,"* at [www.nccbuscc.org/prolife/issues/bioethic/stemfax1.htm](http://www.nccbuscc.org/prolife/issues/bioethic/stemfax1.htm) (last visited Aug. 23, 2003).

358. Zitner, *supra* note 85. In the context of the abortion debate, pro-life adherents define embryos and fetuses as people and have sketched their own ideological antagonists as unnatural women, more interested in the incidents of choice than in the preservation of woman's fit role as *mother*. See LUKER, *supra* note 90 and accompanying text. Pro-choice adherents have characterized the right to abortion as the essential right of women to equality and freedom, but have hesitated to define embryos at all. See Saxton, *supra* note 170 and accompanying text.

359. See Saxton, *supra* note 170, at 380-81.

360. See *supra* notes 343-48 and accompanying text.

counter pro-life portraits depicting the torture endured by aborted embryos.

In short, comparison of the assumptions underlying the debate about embryonic research and therapeutic cloning with assumptions underlying the debate about abortion suggests a broad shift in American ideology. Some commentators have concluded that the debate about embryonic stem cell research is a boon to pro-life adherents.<sup>361</sup> If so, that success may prove itself short-lived. Over time, the conflation of the debate about abortion with the debate about embryonic stem cell research may be the undoing, rather than the revivification, of the pro-life movement. Or alternatively, the meaning of the embryo may become more and more fractionalized, thereby allowing each debate to continue largely unaffected by the other. Should that occur, the battle about abortion will be neither won nor lost as society and the law respond to embryonic research. Or perhaps, instead, the battle about abortion will slowly be encompassed by other concerns as the ideological frame within which society understands itself shifts.<sup>362</sup>

Both the debate about abortion and that about embryonic research are also debates about social transition. The future is murky, but these conflated debates provide the analyst with a view of society contemplating itself and its most deeply held convictions.

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361. See, e.g., Kotler, *supra* note 39 (noting that according to some, the debate about “the process of culling stem cells is the best thing to happen to the religious right’s anti-abortion crusade in decades”).

362. This possibility seems unlikely to be actualized soon as the 108th Congress moves toward enacting legislation that will make so-called *partial birth abortion* illegal. In March 2003, the Senate passed a bill that would prohibit the procedure. An Act to Prohibit the Procedure Commonly Known as Partial-Birth Abortion, S. 3, 108th. Cong. (2003) (passed with amendments and renamed “Partial-Birth Abortion Ban Act of 2003” by the House). Kate Michelman, president of NARAL Pro-Choice America, assessed the legislative initiative in light of what may turn out to be a short window of opportunity for pro-life groups to encourage a sympathetic Congress to limit a woman’s right to abortion. Jennifer A. Dlouhy, *First Abortion Ban Since ‘73 Just a House Vote Away*, CQ WKLY., Mar. 15, 2003, at 616.