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**RESPECTING HUMAN LIFE IN 21<sup>ST</sup> CENTURY AMERICA: A  
MORAL PERSPECTIVE TO EXTEND CIVIL RIGHTS TO THE  
UNBORN FROM CREATION TO NATURAL DEATH**

CHARLES I. LUGOSI\*

I. INTRODUCTION

What does respect for human life in the Twenty-first Century require of us? When we consider the controversial bioethical debates between those who believe in the sanctity of life of the “unborn,”<sup>1</sup> and those who do not, it may require expanding our concept of what counts as human life. The Supreme Court has failed to take a position on when human life begins. How can law respect human life without understanding when a new human life is created?

In addressing the question of whether the unborn human being is a “person,” I contend there should be no distinctions in law and philosophy between human beings and persons and that human beings are endowed at creation with an inalienable right to life. This inalienable natural right cannot be conferred because it is the common heritage of all human beings that we all are created equal. The current American constitutional doctrine of classifying the unborn as “separate and unequal” is immoral and unjust. Thus, there is a moral imperative to confer the status of constitutional personhood upon the unborn, as an expression of society’s rejection of inequality and the discriminatory treatment of the unborn as biotechnological subjects in Twenty-first Century America.

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1. For the purposes of this article, “unborn” includes the unborn human being from the time of its creation, in or outside of the human body and encompasses all forms of its existence, growth and development, including zygote, pre-embryo, embryo and fetus.

This article assumes that it is immoral and unethical to take the life of an innocent human being, even if domestic law sanctions acts such as abortion and contraception. It further assumes that unborn human beings are by their very nature innocent, even if their lives were created because of culpable criminal conduct, such as rape or incest. This article also assumes that it is morally unacceptable for one human being to enslave or experiment upon another, even if that other person is an unborn human being and is not a constitutionally legally protected person.

First, this article will discuss the issue of abortion, as it is at the core of the moral debate concerning the constitutional depersonalization of the unborn. Second, this article will discuss how abortion is repugnant to and in conflict with the core values of liberal equality. Third, this article will review how philosophers use the device of depersonalization to justify abortion and to establish a new class of “separate and unequal” human beings in an attempt to morally justify the non-consensual use of embryos as biological subjects. Fourth, this article will briefly survey international ethical and legal standards that conflict with abortion. Fifth, this article will illustrate how moral questions plague scientific developments in cloning, embryonic stem cell research and vaccines, and consider whether those who benefit are morally complicit with evil. Finally, this article will argue for the abolition of the discriminatory treatment of the unborn by recognizing their humanity and conferring upon them constitutional personhood status from creation to natural death.

## II. ABORTION, THE MORAL DEBATE

### A. *Background*

The history of the common law reveals that laws against homicide protected all human beings, including unborn children. When a pregnant mother felt her baby move within her, called quickening, this was considered evidence that the woman was “with child.” Blackstone’s *Commentaries* describes the right to life as “a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.”<sup>2</sup> In Blackstone’s lifetime, legal protection of the fetus from homicide began at quickening, when it was assumed that life began for the unborn child.<sup>3</sup> In the Thirteenth Century, Bracton and Fleta ruled that killing an unborn child where there was evidence of quickening was homicide.<sup>4</sup> As

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2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 125 (1765).

3. *See id.* at 125-26.

4. Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229, 285 n.338 (1987). For a range of common law history pertaining to legal protection of the unborn, see Robert M.

the common law developed over several hundred years, famous legal authorities including Fleta, Staunford, Lambarde, Dalton, Coke, Blackstone, Hawkins, and Hale referred to the unborn human being as a child and never as potential life.<sup>5</sup> There was never an issue of personhood.

The common law historically protected the unborn child after quickening to the fullest extent possible in accordance with the medical knowledge of the day.<sup>6</sup> Before quickening, it was assumed that the fetus was not alive until it moved because medical knowledge was not advanced enough to determine if a woman was in fact pregnant before fetal movement.<sup>7</sup> The first American criminal law statutes, enacted between 1820 and 1840, prohibited only post-quickening abortions.<sup>8</sup> This was because the common law, as it existed at the time of the American colonies, criminalized abortion only after the time of quickening.<sup>9</sup>

Legal protection of the unborn from homicide expanded as medical knowledge increased.<sup>10</sup> In England, the advancement of medical science resulted in medical doctors believing that abortion before quickening was the killing of human life and therefore a crime.<sup>11</sup> As medical knowledge became more sophisticated, and the concept of quickening became obsolete, laws in England and the United States were enacted to prohibit abortion before quickening without regard to gestation. In England, Lord Ellenborough's Act of 1803 was the first statute passed that made abortions before quickening a criminal act (but not a capital crime like an abortion after quickening).<sup>12</sup> The Act was amended in 1837 by abolishing the quickening distinction and made abortion at any time during pregnancy a crime by both the doctor and the pregnant woman.<sup>13</sup>

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Bryn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807 (1972); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 *U. PITT. L. REV.* 359 (1978); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 *CAL. L. REV.* 1250 (1975); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 *VAL. U. L. REV.* 563 (1986); Shelley Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 *J. LEGAL HIST.* 20 (1984).

5. Horan et al., *supra* note 4, at 289–91 nn.359–78.

6. Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 *VAL. U. L. REV.* 469, 492–493 (1997).

7. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 203 (1989).

8. *Id.*

9. MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 160 (1985).

10. Forsythe, *supra* note 6, at 492–493.

11. JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW* 26–48 (1988).

12. GROSSBERG, *supra* note 9, at 161.

13. *See id.* at 162.

Francis Wharton, in *American Criminal Law*, writing in 1868, illustrates how medical science has informed the criminal law. As medical science advances, so has legal protection for the unborn:

There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder. If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide, even though the child is still attached to the mother by the umbilical cord. It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law.

...

It appears, then, that quickening is a mere circumstance in the physiological history of the foetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another . . . . [T]he infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards.<sup>14</sup>

Physicians and moral reformers in the United States who opposed abortion lobbied for the suppression of information about abortion.<sup>15</sup> These efforts culminated in 1873 with Congress passing the Comstock law that banned dissemination of material pertaining to abortion.<sup>16</sup> By 1887, abortion, which in early America was not a crime before the fourth or fifth month of gestation when there was evidence of quickening, had now become a crime against unborn human beings regardless of the age or size of the fetus.<sup>17</sup>

The early feminists strongly opposed abortion and saw it as a threat to motherhood and marriage.<sup>18</sup> In 1792, Englishwoman Mary Wolstonecroft urged that women must respect nature and let pregnancy take its course, as it

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14. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, AND VIRGINIA: WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES: TOGETHER WITH THE ENGLISH AND AMERICAN AUTHORITIES UPON CRIMINAL LAW IN GENERAL 210–216 (1846).

15. RHODE, *supra* note 7, at 204.

16. *See id.* The official name of the original Comstock Law was “An Act for the Suppression of, Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use,” Act of March 3, 1873, ch. 258, 17 Stat. 598–599 (making it a crime to sell, lend, give away, publish, or possess devices or literature pertaining to birth control or abortion).

17. *Lamb v. State*, 10 A. 208, 208 (Md. 1887).

18. RHODE, *supra* note 7, at 203.

was the first duty of a woman not to destroy the embryo in her womb.<sup>19</sup> Elizabeth Cady Stanton, a leader of the American Women's Rights movement, declared, "It is a mother's sacred duty to shield her children from violence from whatever source it may come."<sup>20</sup> Stanton rejected the hypocrisy of men who complained of social and economic oppression and "played the tyrant" at home over their women whom they treated as slaves.<sup>21</sup> Susan B. Anthony and Stanton dedicated their lives to emancipating women in Nineteenth Century America whom they viewed as depersonalized, for women were denied constitutional and legal equality to men.<sup>22</sup> Abortion was called "child murder" in Anthony's newsletter, *The Revolution*.<sup>23</sup> Stanton too opposed abortion, saying, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."<sup>24</sup>

It was not until Margaret Sanger led the way with her persuasive eugenics arguments that the issue of birth control and reproductive rights became a goal of the women's rights movement.<sup>25</sup> The liberalization of sexual mores, the political struggle for gender equality and the prominence of women in the workplace laid the groundwork for the use of contraceptives to be socially accepted as a private and personal decision of a woman.<sup>26</sup> Abortion was illegally practiced as a method of birth control, as women in their quest for equality with men sought control over their own destiny, and unwanted children who occupied their bodies had to be eliminated to avoid the consequences and the responsibilities of having and raising a child.<sup>27</sup>

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19. Mary Wolstonecroft, *A Vindication of the Rights of Women*, in *A VINDICATION OF THE RIGHTS OF MEN; WITH, A VINDICATION OF THE RIGHTS OF WOMAN, AND HINTS* 228 (Sylvania Tomaselli, ed., 1995).

20. Address by Elizabeth Cady Stanton on Woman's Rights, at <http://ecssba.rutgers.edu/docs/ecswoman4.html> (last updated July 12, 2001).

21. *See id.* *See also* Address by Elizabeth Cady Stanton on Woman's Rights, at <http://ecssba.rutgers.edu/docs/ecswoman5.html> (last updated July 12, 2001).

22. Susan B. Anthony voted in the 1872 presidential election. For that she was convicted of a crime. Her argument under the Fourteenth Amendment failed. Had she been a man, she would have been seen as fulfilling her civic duty and never would have been prosecuted. *See* Excerpts of Proceedings, *United States v. Anthony*, at <http://www.pbs.org/stantonanthony/resources/index.html> (last visited Nov. 16, 2003). *See also* Declaration of Sentiments (1848) Seneca Falls Convention, at <http://www.fordham.edu/halsall/mod/Senecafalls.html> (last updated Nov. 1998).

23. *The Revolution* 4(1):4 July 8, 1869. This was referenced by Serrin Foster, *The Feminist Case Against Abortion*, at [http://www.feministsforlife.org/hot\\_topics/commonw.htm](http://www.feministsforlife.org/hot_topics/commonw.htm) (last visited Nov. 16, 2003).

24. Letter to Julia Ward Howe, October 16, 1863, recorded in Howe's diary at Harvard University Library. *See also* *The American Feminist* 10:1 (Spring 2003) at 2.

25. *See id.* at 205. *See* BERNARD NATHANSON, *ABORTING AMERICA* 32 (1979).

26. RHODE, *supra* note 7, at 206–207.

27. *See id.* at 207–208.

Beginning in 1961, abortion laws were relaxed to accommodate abortions under the following circumstances: where the physical or mental health of the mother was in danger; where the unborn child had a serious physical or mental defect (such as a deformity like missing limbs as a side effect of the drug thalidomide, an anti-depressant medication), or where the child was conceived as a result of rape or incest.<sup>28</sup> In 1963, Betty Freiden, who in 1968 became a founder of the National Organization of Women (NOW), did not discuss the subject of abortion in the first edition of her book, *The Feminine Mystique*. Instead her focus was on achieving liberation and equality for women, whom she believed suffered at home in “comfortable concentration camps” and were subjected to “progressive dehumanization.”<sup>29</sup> According to obstetrician and gynecologist Dr. Bernard Nathanson, who in 1969 founded the National Association for Repeal of Abortion Laws (NARAL), it was another man, Lawrence Lader, who became the driving force behind the repeal of all legal restrictions of abortion.<sup>30</sup> Nathanson and Lader realized they had to recruit the feminists and allied themselves with Frieden.<sup>31</sup> Norma McCorvey and Sandra Bensing decided to join the battle to legalize abortion on demand and became known as the respective plaintiffs “Roe” and “Doe” in separate legal challenges to state laws that restricted abortion.<sup>32</sup>

The moral question of whether an unborn child, presumed to be a human being, was a constitutional person acquired national importance in 1973, when the Supreme Court in *Roe v. Wade*<sup>33</sup> ruled an unborn child was not a person until it was born.<sup>34</sup>

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28. *See id.* at 208.

29. BETTY FRIEDEN, *THE FEMININE MYSTIQUE* 282-309 (1963).

30. NATHANSON, *supra* note 25, at xi, 29-32, 50-55. Lader, who, in 1955 authored a biography of Margaret Sanger, advocated the idea that a woman had the right to control her own body. Although Sanger promoted birth control, she opposed abortion. Nathanson personally presided over 60,000 abortions and was at one time the director of the largest abortion clinic in New York City.

31. *See id.* at 32, 49.

32. Nathanson, McCorvey and Bensing (now known as Cano), are now all activists against abortion. *See Shake the Nation*, at <http://www.shakethenation.org/Factsheet.pdf>. McCorvey and Cano have filed legal actions seeking to reverse *Roe v. Wade*, and *Doe v. Bolton*. Both litigants face the hurdle of waiting too long to overturn these decisions. McCorvey's first attempt to re-open her case was unsuccessful. She wanted to introduce new scientific evidence to reevaluate whether *Roe* was still good law. *See McCorvey v. Hill*, No. 3:03-CV-1340-N, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex. June 19, 2003). Cano claims the underlying facts in *Doe* were a fraud upon the court. *See draft affidavit of Cano, in Cano v. Baker*, Civil Action No. 13676, U.S. Dist. (N.D. Georgia), at <http://www.operationoutcry.org/Affidavit%20-%20Sandra%20Cano%20Saucedo%20-%20KC%20Version.pdf>.

33. 410 U.S. 113 (1973). *See also Doe v. Bolton*, 410 U.S. 179 (1973).

34. *See Forsythe, supra* note 6, at 492-493.

### B. *The Turning Point*

The decision in *Roe v. Wade* opened the door for the legal termination of any form of unborn human life (embryo or fetus) at any time before birth within a woman's body. The Court engaged in a "trimester" analysis taking into consideration the biological development of the fetus.<sup>35</sup> However, Justice Blackmun, who authored the majority opinion, avoided answering the question of when human life begins:

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. *We need not resolve the difficult question of when life begins.* When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge,* is not in a position to speculate as to the answer.<sup>36</sup>

It was unnecessary to decide this question, as the answer did not matter, because the Court specifically held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."<sup>37</sup> An unborn being was therefore not a person and had no right to life. Personhood was to be conferred by operation of law only after a baby was fully born. The constitutional right to life was thus reserved for those children chosen by love or fate to be born. Justice Blackmun admitted that if the unborn were constitutional persons, the case for abortion would collapse.<sup>38</sup>

*Roe v. Wade* declared that unborn human beings were not persons and accordingly did not have any constitutional right to life and liberty.<sup>39</sup> This result was in line with the Court's review of history that disclosed "the unborn have never been recognized in the law as persons in the whole sense."<sup>40</sup> The decision also fully restored the freedom to have an abortion before quickening that existed at the time the Constitution was adopted.<sup>41</sup>

Even though the Court denied personhood to unborn human beings, the Court read into the Fourteenth Amendment and held that the right to privacy did not elevate the decision to have an abortion into a constitutional right and did not amount to an unqualified or absolute right.<sup>42</sup> The "right" to an abortion was subject to state interests in regulation. The Court identified two complementary state interests that become increasingly compelling as the fetus

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35. *See Roe*, 410 U.S. at 162–64.

36. *See id.* at 159 (emphasis added).

37. *See id.* at 158.

38. *See id.* at 156–57.

39. *See id.* at 158.

40. *See Roe*, 410 U.S. at 162.

41. *See id.* at 140.

42. *See id.* at 155.



develops biologically. First, the state has a valid interest in regulating the abortion industry by regulations that are “reasonably relate[d] to the preservation and protection of maternal health.”<sup>43</sup> This state interest commences at the end of the first trimester of pregnancy. Before this time, the decision to abort is unregulated and is the exclusive decision of the mother who presumably relies upon the advice of her abortion provider.<sup>44</sup> Second, a state interest is triggered at the point of fetal viability, when the fetus is presumed to have the capacity to have a meaningful life outside its mother’s womb.<sup>45</sup> In the third trimester, the state is permitted to “proscribe abortion” by regulation “except when it is necessary to preserve the life or health of the mother.”<sup>46</sup> In this manner, the Court balanced the complementary interests of the state and the pregnant woman but failed to consider the interests of the unborn.

The unborn is thus denied the right to life under the Constitution, because the unborn is not a constitutional person and is therefore legally unequal to a pregnant woman. As “things,” or quasi-property, the unborn are still subject to government regulation. Just as there are federal and state regulations that limit individual liberty to cut down trees, slaughter domestic animals, and control hunting and fishing seasons of wildlife, there are state laws that protect the health of pregnant women and regulate abortion. However, her assumed constitutional right of privacy gives a pregnant woman more personal freedom and preferred status in an “open season” to arbitrarily take the life of her unborn child than to take the life of wild or domestic animal, which are protected by laws against cruelty and excessive slaughter.

In the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the majority of the Supreme Court, led by Justices Souter, Kennedy and O’Connor, retained and reaffirmed the central holding in *Roe*. The Court stated:

*Roe’s* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become

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43. *See id.* at 163.

44. *See id.*

45. *See Roe*, 410 U.S. at 163.

46. *Id.* at 163-164.

a child. These principles do not contradict one another; and we adhere to each.<sup>47</sup>

In rejecting for the sixth time the invitation of both the amicus curiae and the United States to overrule *Roe v. Wade*,<sup>48</sup> the Court reaffirmed that it was “settled” that the Constitution places limits on a state’s rights to interfere with a person’s liberty to make decisions on family and parenthood.<sup>49</sup> “Person” of course means a pregnant woman, and “decision” means the pregnant woman’s choice to have an abortion.

Left unconsidered again were the life and liberty interests of the unborn. The Court in *Casey* did not engage in a balancing analysis between the inferior life interest of the unborn human being and the superior liberty interest of its mother. Departing from *Roe*, the Court abandoned the trimester framework as going too far, for it did not recognize enough the state’s legitimate interest in regulating abortion before fetal viability.<sup>50</sup> However, even though the Court recognized the state’s profound interest in “potential life” throughout the duration of pregnancy,<sup>51</sup> the Court chose once again not to confer constitutional personhood on the unborn.

Justice Stevens, in concurrence with the majority, correctly observed that there has never been a single dissent (let alone a majority opinion) by any Justice on the fundamental issue decided in *Roe* that the fetus was not a person within the language and meaning of the Fourteenth Amendment.<sup>52</sup> This is why the termination of life by abortion is not entitled to constitutional protection, nor is there a competing life and liberty interest to the life and liberty interest of the pregnant woman.<sup>53</sup>

Justice Blackmun made the same point in *Casey*, and added that even the Solicitor General in oral submissions before the Court did not question the constitutional non-personhood status of the unborn child.<sup>54</sup> The state interest in regulating the lives of unborn children is simply “a legitimate interest grounded in humanitarian or pragmatic concerns.”<sup>55</sup> Since *Roe*, the Supreme Court has not been presented with a challenge concerning the legal status of the personhood of an unborn human being. Instead, the cases have centered on

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47. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

48. *See id.* at 843.

49. *See id.* at 849.

50. *See id.* at 873, 878. The Court’s experience was that a pregnant woman was not deprived of the ultimate choice to have an abortion even when the state regulated abortion before fetal viability in the first trimester. *See id.* at 875.

51. *See id.* at 878.

52. *See Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part).

53. *See id.*

54. *See id.* at 932 (Blackmun, J., concurring in part and dissenting in part).

55. *Id.*

a multitude of state regulations that are designed to sway a woman's choice,<sup>56</sup> or chill a physician's willingness to provide abortion services.<sup>57</sup>

*Casey* lacked an investigation by the Court to answer the question posed in *Roe* of when a human being is created. Justice O'Connor candidly admitted, that one's beliefs would be affected by whether the unborn is a "life" or "potential life." She wrote:

Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, *depending on one's beliefs, for the life or potential life that is aborted.*<sup>58</sup>

Having stated this, the Court in *Casey*<sup>59</sup> followed *Roe*<sup>60</sup> and used the term "potential life" to describe the unborn. These references are evidence that the Court never has and does not presently recognize the unborn as alive.

The view that the unborn are not alive and represent only potential life is factually incorrect. Whatever term one might use to describe the unborn, there is no biological basis to deny that the unborn, from the first moment of their creation at conception, are fully alive and are fully human. This language of

56. *See id.* at 916–917 (Stevens, J., concurring in part and dissenting in part). *See also* *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *see also* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

57. *See* *Colautti v. Franklin*, 439 U.S. 379 (1979).

58. *Casey*, 505 U.S. at 852 (emphasis added).

59. *See id.* at 859. "Roe's scope is confined by the fact of its concern with post conception *potential* life." *Id.* at 859 (emphasis added). "On the other side of the equation is the interest of the State in the protection of *potential* life," and "the State has legitimate interests in the health of the woman and in protecting the *potential* life within her." *Id.* at 871 (emphasis added). "[R]egulations designed to protect the woman's health, but not to further the State's interest in *potential* life, are permitted during the second trimester" *Id.* at 872 (emphasis added). "Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the *potential* life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in *potential* life throughout pregnancy." *Id.* at 876 (emphasis added). "[T]he interest in protecting *potential* life is not grounded in the Constitution." *Id.* at 914 (Stevens, J., concurring in part and dissenting in part) (emphasis added). In part, Justice Stevens reached his conclusion by "weighing the State's interest in *potential* life and the woman's liberty interest." *Id.* at 916 (emphasis added).

60. *Roe v. Wade*, 410 U.S. 113, 162–163 (1973). The Court stated:

[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the *potentiality* of human life.

*Id.* (emphasis added). "With respect to the State's important and legitimate interest in *potential* life, the 'compelling' point is at viability." *Id.* at 163 (emphasis added).

“potential life” contradicts what people know to be true and defies indisputable evidence of the living unborn available to the public.<sup>61</sup> Justice O’Connor’s plurality opinion in *Casey* stated *Roe* could be reversed if its basic premises of

61. See J. Madeleine Nash, *Inside the Womb*, TIME, Nov. 11, 2002, at 68. See generally ALEXANDER TSIARAS & BARRY WERTH, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS (2002). Amazon.com promotes this book in the following manner:

[T]hrough Alexander Tsiaras’ remarkable achievements in medical imaging technology, parents can see, for the first time, the awe-inspiring process of a new life unfolding, in stunning, vivid detail . . . . As biologists have decoded the molecular basis of life, computer scientists have developed non-invasive, three-dimensional techniques for visualizing the body. Alexander Tsiaras has been a pioneer in merging these explorations and discoveries. He has created a virtual camera studio that enables him to view a human body or any part of it individually, scan it, enlarge it, rotate it, adjust its transparency so that we can view inside a living being, and light it from any angle. The result is an ability to illuminate the unseen elements that make us who we are, and the miraculous images in *From Conception to Birth*.

Editorial Reviews, Amazon.com, at [http://www.amazon.com/exec/obidos/tg/detail/-/0385503180/ref=pm\\_dp\\_ln\\_b\\_6/103-6505130-0674262?vglance&s=books&vi=reviews](http://www.amazon.com/exec/obidos/tg/detail/-/0385503180/ref=pm_dp_ln_b_6/103-6505130-0674262?vglance&s=books&vi=reviews). When a woman discovers she is pregnant (usually days after she has missed her menstrual cycle), there is a live human being within her that has a beating heart and can feel pain:

By the end of the second week of pregnancy, there is a distinct embryo present. The fetus has a developing brain and a rudimentary heart. By the end of the third week of pregnancy, the fetus has the beginnings of vertebrae, developing eyes and ears, a closed circulatory system (separate from the mother’s), a working heart, the beginnings of lungs, and budding limbs. By the end of the fourth week of pregnancy, the fetus has a developing nose, and a pancreas. By the end of the fifth week of pregnancy, the fetus has the beginnings of vertebrae, a bony jaw and clavicle, developing eyes, ears, and nose, a closed circulatory system, a working heart, lungs, limbs, hands, feet, and a pancreas. By the end of the sixth week of pregnancy, the fetus has a vertebral column, a bony jaw and clavicle, a primitive cranium, ribs, a developing nervous system, a closed circulatory system with a working heart, developing eyes, ears, and nose, lungs, limbs, hands, feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid body, and germs of teeth. By the end of the seventh week of pregnancy, the fetus has a vertebral column, a bony jaw and clavicle, a primitive cranium, ribs, femur, tibia, palate, upper jaw, developing nervous system, a closed circulatory system with a working heart, developing eyes, ears, and nose, lungs, arms, legs, hands, feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid body, germs of teeth, and the beginnings of muscles. By the end of the second month of pregnancy, the fetus has a vertebral column, a bony jaw, clavicle, and palate, a cranium, ribcage, femur, tibia, forearms that can be distinguished from arms, and thighs that can be distinguished from legs, a developing nervous system, sympathetic nerves (meaning the fetus can feel pain), a closed circulatory system and a working heart, eyes, developing ears and nose, lungs, arms and forearms, legs and thighs, hands and feet, a pancreas, a bladder, kidneys, a tongue, a larynx, a thyroid, germs of teeth, and developing muscles.

Gray’s Anatomy, *The Form of the Embryo at Different Stages of Its Growth*, at <http://www.yahooligans.com/reference/gray/15.html> (last visited Nov. 16, 2003). An embryo becomes known as a fetus (Latin for ‘young one or offspring’) at eight weeks of age. “Everything is now present that will be found in a fully developed adult.” *Your Right to Know the Facts Before Your Baby Is Aborted*, Diskbooks Electronic Publishing, at <http://diskbooks.org/factsabort.html> (last updated Sept. 9, 2003).

fact were erroneous or based on ignorance that rendered the Court's prior central holding to be unjustifiable.<sup>62</sup> It is a myth to pretend unborn human life is "potential life." The truth is that an unborn human being is a life with potential. Expounding the myth of "potential life" is the kind of major factual error that supports a reversal of *Roe*.

Nearly 30 years after *Roe*, the right to an abortion is entrenched in American law. Before viability, a pregnant woman has a right to choose to terminate her pregnancy.<sup>63</sup> "[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional."<sup>64</sup> An "undue burden [means] . . . a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>65</sup> After viability, the state may promote its interest in the fetus to regulate, and even proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>66</sup> These legal principles are the framework for the peculiar institution of abortion, where a mother is legally permitted to choose before her due date, which, if any, of her children will live or die.

Within these legal confines, the State of Nebraska attempted to proscribe a gruesome method of post-viability abortion known as a D&X or "partial birth" abortion. In this procedure, the person performing the abortion partially delivers vaginally a living unborn child before killing it and completing the delivery.<sup>67</sup> Nebraska's legislation criminalizing this procedure was held

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62. See *Casey*, 505 U.S. at 855.

63. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

64. *Id.* (quoting *Casey*, 505 U.S. at 877).

65. *Id.* (quoting *Casey*, 505 U.S. at 877).

66. *Id.* (quoting *Casey*, 505 U.S. at 879).

67. A vivid and graphic description how a partial birth abortion is done was given in testimony by a registered nurse, Brenda Pratt Shafer:

The mother was six months pregnant (26 ½ weeks). A doctor told her that the baby had Down Syndrome and she decided to have an abortion. She came in the first two days to have the laminaria inserted and changed, and she cried the whole time. On the third day she came in to receive the partial-birth procedure.

Dr. Haskell brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beating. As Dr. Haskell watched the baby on the ultrasound screen, the baby's heartbeat was clearly visible on the ultrasound screen.

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the baby's head just inside the uterus.

The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall.

unconstitutional because the law lacked an exception for the preservation of the health, not the life, of the mother, and it imposed an undue burden on a women's ability to choose a partial-birth abortion.<sup>68</sup> Cruelty to the fetus was irrelevant to the Court's determination of the constitutional issues. The Court ignored the key question of whether a fetus, and in particular a partially-born fetus, is a constitutional person. Again, not one Justice, even in dissent, referred to the fetus as life, as opposed to "potential life."

These cases suggest that it is time to think "outside of the box" and directly answer two questions: whether, as a matter of law, the unborn are living human beings and whether the law should confer constitutional personhood on unborn human beings from the time of conception until the time of natural death. In principle, individual states may amend their state constitutions to attain this objective. Individual states may enact criminal, tort and other laws that recognize the constitutional personhood of the unborn and pass laws outlawing abortion, embryonic stem cell research, and cloning. Legal challenges will inevitably lead to a decision by the Supreme Court, and the opportunity to reverse *Roe v. Wade* will again emerge.

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The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp.

I was really completely unprepared for what I was seeing. I almost threw up as I watched the doctor do these things.

Mr. Chairman, I read in the paper that President Clinton says that he is going to veto this bill. If President Clinton had been standing where I was standing at that moment, he would not veto this bill.

Dr. Haskell delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw that baby in a pan, along with the placenta and the instruments he'd used. I saw the baby move in the pan. I asked another nurse and she said it was just "reflexes."

I have been a nurse for a long time and I have seen a lot of death—people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed anything like this.

The woman wanted to see her baby, so they cleaned up the baby and put it in a blanket and handed the baby to her. She cried the whole time, and she kept saying, "I'm so sorry, please forgive me!" I was crying too. I couldn't take it. That baby boy had the most perfect angelic face I have ever seen.

I was present in the room during two more such procedures that day, but I was really in shock. I tried to pretend that I was somewhere else, to not think about what was happening. I just couldn't wait to get out of there. After I left that day, I never went back. These last two procedures, by the way, involved healthy mothers with healthy babies.

I was very much affected by what I had seen. For a long time, sometimes still, I had nightmares about what I saw in that clinic that day.

*Effects of Anesthesia during a Partial-Birth Abortion: Hearing before the Subcomm. of the Constitution of the Comm. on the Judiciary, 104th Cong. 313 (1996) (statement of Brenda Pratt Shafer, Registered Nurse, Franklin, Ohio).*

68. *Stenberg*, 530 U.S. at 929–30.

Anticipating this strategy in *Casey*, Justice Stevens cited Ronald Dworkin, who rejects the notion that states could “overrule the national arrangement” by declaring that fetuses are persons and ought be conferred constitutional rights competitive with pregnant women.<sup>69</sup> According to Dworkin, states do not have the power to increase the constitutional population by unilateral decision and thereby decrease rights the Constitution presently gives to women.<sup>70</sup> Justice Stevens omits any reference to the Ninth<sup>71</sup> and Tenth<sup>72</sup> Amendments to the Constitution, and relies on his reference to Dworkin to assert “as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have . . . a ‘right to life.’”<sup>73</sup>

Because it is not constitutionally prohibited to declare a fetus a person, and because the power to confer personhood upon a human being is not assigned by the states to the United States by the Constitution, there is a prima facie case that, notwithstanding any chilling effect created by Justice Stevens, the states may confer personhood upon fetuses and embryos. This is consistent with the decision of the Supreme Court in *Webster v. Reproductive Health Services*,<sup>74</sup> where a Missouri statute designed to protect unborn children in a non-abortion context was upheld to be constitutional. It is unrealistic to assume abortion will be totally banned, or that many pro-choice supporters will peacefully accept constitutional reform that grants civil rights to the unborn. What is possible is to elevate the rights of the unborn to equal the rights of those born alive, including pregnant women, so that in any balancing analysis, the right to life of the unborn will ordinarily prevail over the liberty interest of the pregnant woman unless her life is in real danger of imminent death.

Until then, a woman’s right to terminate her pregnancy continues as an exercise of her personal liberty. But there is a limit to personal liberty when its exercise is incompatible with not just the liberty of another, but the life of another person. Assuming one day unborn human beings will be conferred constitutional personhood from the time of conception, the liberty interest of the mother will then yield to the life interest of her unborn child. However, when the life of the mother is at risk, such as in an ectopic pregnancy (the embryo has implanted into the fallopian tube instead of its proper place in the womb), and it is inevitable that the unborn human being inside her will die, a

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69. *Casey*, 505 U.S. at 914 n.2 (Stevens, J., concurring in part and dissenting in part).

70. *Id.* (quoting Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI L. REV. 381, 400–01 (1992)).

71. U.S. CONST. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.*

72. U.S. CONST. amend. X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” *Id.*

73. *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part).

74. 492 U.S. 490 (1989).

strong moral case based on self-defense can be made to justify an abortion in this rare situation.<sup>75</sup>

If constitutional personhood is conferred upon the unborn, a woman's legal reproductive choice arguably ends at the time of conception. A woman in that case has a right to exercise her liberty and choose any method of contraception if that method does not harm another human being. For example, a condom satisfies this condition, unlike the "morning after pill,"<sup>76</sup> which prevents an embryo from adhering to the lining of the uterus, thereby causing its death.<sup>77</sup> Laws prohibiting abortion and permitting certain forms of contraception are consistent with the holding in *Griswold v. Connecticut*.<sup>78</sup> Choice is never absolute as a woman may become a victim of rape or birth control may fail. In every case, however, choice ends when a woman is pregnant, for she has already reproduced, as she is with child and is a mother.<sup>79</sup>

### C. *The Revival of Human Slavery*

*Roe v. Wade* did far more than legally permit abortion on demand. If unborn human beings were not people, or persons, they still had to be "something." The result was the relegation of unborn human life, principally embryos and fetuses, to property status as "things." Thus, the Supreme Court laid the foundation for the legalization of the slavery of unborn human beings who potentially could be legally and commercially exploited, consumed or destroyed as a by-product of well-intended scientific research designed to benefit the rest of humanity.

As biological subjects, the unborn are not able to give informed consent for clinical experimentation, nor is it ethically possible for anyone to give this consent on their behalf for any purpose that does not confer a direct therapeutic benefit. The unborn are coerced, subject to the will of another, and considered

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75. Assuming it is not yet medically possible to transplant the embryo to the womb or to another place where it can survive and thrive, the doctrine of double effect permits an operation to save the life of the mother even if its unintended effect is to cause the death of the embryo.

76. The morning after pill is not a contraceptive, but is an abortifacient that causes a chemically induced abortion. In its common form it contains estrogen and certain progestin hormones. *Emergency Contraceptive Pills (ECPs): The Truth, the Whole Truth and Nothing But the Truth*, LIFE INSIGHT, Sept. 1998, at 3. Planned Parenthood argues this pill is a contraceptive. *Emergency Contraception*, Planned Parenthood Fed'n of Am., Inc., at <http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html> (last visited Oct. 9, 2003).

77. It is factually wrong to suggest human life does not begin until implantation has occurred. Life begins earlier, at conception. See *Emergency Contraceptive Pills (ECPs)*, *supra* note 76, at 2.

78. 381 U.S. 479 (1965).

79. Rosemary Bottcher, *How Do Pro-Choicers "Fool" Themselves?*, in *PROLIFE FEMINISM: DIFFERENT VOICES* 57 (Gail Grenier Sweet ed., 1985).



as property. These features are the defining characteristics of a human slave.<sup>80</sup> At any time, the option to terminate exists by simply destroying and disposing of embryos and fetuses that have outlived their usefulness or have become unwanted as a matter of “choice.”

*Roe v. Wade* deprived unborn human beings of membership in the human family by drawing a legal boundary between unborn human beings and born alive human beings. The result was the creation of a class system that discriminated between human life forms on the basis of age, size, economic and political power. The arbitrary point at which human life is legally vested with the constitutional right to life is the complete emancipation of the fetus from the body of its mother at birth.<sup>81</sup> Until that occurs, unborn human beings, who are biologically tethered and contained in their mothers, will remain as a matter of law “separate and unequal.”

In Twenty-first Century America, there are two classes of human beings, one protected by constitutional law and the other not. Human beings fully protected by constitutional law are those individuals who have already been born, and are recognized in law as persons. I will refer to this first group as the “Chosen.” In the ordinary case, before birth, a member of the Chosen was a wanted child since the Court’s decision in *Roe*. The second group consists of the unborn, which I have defined as “the unborn human being from the time of its creation, in or outside of the human body and encompasses all forms of its existence, growth and development, including zygote, pre-embryo, embryo and fetus.” This class, I will refer to as the “Depersonalized Humans.” The law does not recognize these “humans” as persons. Judicial fiat institutionalizes this status of being “separate and unequal.” A Depersonalized Human is doomed unless it is wanted and chosen by its mother to be born alive.

Unlike a human who is one of the Chosen, embryos and fetuses have no constitutional protection from being destroyed, experimented upon or cannibalized for parts. Cloning and embryonic stem cell research represent modern forms of human exploitation by the powerful over the powerless and is no different in principle from traditional slavery rooted in ancient history. Slaves were historically used to achieve personal, societal, commercial and political goals. Slaves could be forced to perform tasks and undergo personal sacrifices to advance the civilization of past cultures. Slaves were

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80. DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 31 (1966).

81. Arguably, an embryo, which is created outside the body of its mother in a Petrie dish or extracted from the womb of its mother, may have a constitutional right to life. The Supreme Court has yet to decide this question. Still undecided is whether causing the death of embryos outside of the womb constitutes homicide. If these embryos are human beings, criminal liability might be imposed on doctors and others who kill or harm embryos used in medical research. See Forsythe, *supra* note 6, at 501. For another overview of the current legal status of the human embryo at this time see Daniel Avila, *The Present Standing of the Human Embryo in United States Law*, 1 NAT’L CATHOLIC BIOETHICS Q. 203 (2001).

dehumanized so they could do things that a citizen had a right to refuse. The arguments for slavery are the same arguments that are used today to justify the utilitarian exploitation of unborn human life.

Current regulations govern the abortion industry, just as once slave owners had to contend with laws that regulated the treatment of slaves.<sup>82</sup> A pregnant woman may now arbitrarily kill her fetus with greater liberty than an owner of African-American slaves who was not at liberty to arbitrarily kill his human slave.<sup>83</sup> An African-American slave was “not only property,” for that slave is also “entitled to the humanity of the Court.”<sup>84</sup> This way of thinking about slaves is similar to Justice Blackmun’s thinking that state interest in potential life is a “legitimate interest grounded in humanitarian or pragmatic concerns.”<sup>85</sup>

### III. ABORTION: REPUGNANT TO THE CORE VALUES OF LIBERAL EQUALITY

#### A. *The Liberal Quandary*

As a general matter, liberals believe that life itself is good and that killing is bad.<sup>86</sup> Liberals further believe that, in general, freedom is good and that coercion, such as slavery, is bad.<sup>87</sup> Is it then not a betrayal of liberal morality for a civil libertarian to support the killing of fetuses, experimentation on pre-embryos and embryos, the trafficking of live fetal tissue, the disposal of unwanted leftover frozen embryos from in-vitro fertilization, human cloning and embryonic stem cell research? William Galston, in contemplating opposing views on the issue of slavery that led to the Civil War, stated: “[W]e cannot be indifferent to fundamental (and decidable) questions of right and wrong.”<sup>88</sup>

Liberal equality at its core promotes the idea that basic political and civil rights belong equally to each person and should be protected by law. These rights have priority in our society.<sup>89</sup> That is why the idea of equal opportunity is so appealing in a society that values individual freedom. The prevailing

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82. For example, the Georgia Constitution of 1798 put the killing or maiming of a slave on the same level of criminality as killing or maiming of a white man. See DAVIS, *supra* note 80, at 58. By the 1850s, most states provided heavy fines for the cruel treatment of slaves. *Id.*

83. *See id.*

84. *Id.* at 248.

85. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 932 (1992) (Blackmun, J., concurring in part and dissenting in part).

86. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE 174 (1991).

87. *See id.* at 175.

88. *Id.* at 274.

89. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 56 (2002).

view of liberalism is that people's fate should be determined by their choices and not by the circumstances they happen to be in.<sup>90</sup>

Being morally equal to one another is integral to John Rawls' concept of the "Original Position." Central to Rawls' theory of justice<sup>91</sup> is the proposition that inequalities are allowed if they "improve" one's initial share of primary goods, such as life and liberty, but are not allowed if they "invade" one's fair share.<sup>92</sup> In his hypothetical of the Original Position, people are behind a "veil of ignorance" so that all are similarly situated, without knowing in advance one's future.<sup>93</sup> This forces people to choose principles of justice that are fair so that no one is advantaged or disadvantaged by the outcome of natural chance or the contingency of social circumstances.<sup>94</sup>

Take, for example, a fetus that does not know in advance whether it will be aborted or not. Behind the "veil of ignorance," a fetus would presumably choose principles of justice consistent with the goal of having an equal opportunity to be born. The same may be said of an embryo that seeks to avoid a fate of exploitation and destruction. Both the fetus and embryo are in the same position as people who entrust their moral equality to the government so they would be protected from being killed by any oppressor. The role of the justice system is to choose principles of justice that promote what individuals need or will want in order to lead the "good life."<sup>95</sup> However, to state the obvious, leading the good life is impossible when the principles of justice fail to protect life itself.

Anita L. Allen muses that a hypothetical fetus might be willing to sacrifice its life and accept its fate of abortion without abandoning its sense of equal worth, "simply through appreciation of the equal worth of the pregnant woman by whom it must be borne and her potential as a person."<sup>96</sup> The hypothetical fetus is "justified" in innocently placing its trust and life in its mother "because it does not have to believe itself less worthy of respect than other human beings in order to accept that the law will not compel women to see each pregnancy to term."<sup>97</sup>

Allen's hypothetical does not consider that the basic instinct of the reasonable fetus is to survive. Moreover, it may be the highest duty of the pregnant woman to subordinate her civil liberties and even sacrifice her life out of love for her fetus. How can taking the life of an innocent human being out

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90. *Id.* at 59.

91. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

92. KYMLICKA, *supra* note 89, at 55.

93. RAWLS, *supra* note 91, at 12.

94. *Id.*

95. KYMLICKA, *supra* note 89, at 64.

96. Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 487 (1987).

97. *Id.*

of necessity ever be justified in order to preserve the personhood potential of the woman from the responsibilities and joys of motherhood? Lord Coleridge, in finding Dudley and Stephens guilty of murdering a cabin boy on the high seas, feeding on his flesh and drinking his blood, rejected this kind of reliance on the defense of necessity.<sup>98</sup> The Court rejected “the choice” made by Dudley and Stephens that the cabin boy would hypothetically agree that their lives were more important than his and would be willing to die so they could carry on as breadwinners for their families:

Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another’s life to save his own. In this case the weakest, the youngest, the most unresisting was chosen . . . . [I]t is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.<sup>99</sup>

There is also an inherent conflict of interest when the decision to abort is left to the sole discretion of the pregnant woman, who stands to “profit,” like Dudley and Stephens, by terminating the life of a child.

There is an imbalance of legal, political, economic and social power between a fetus and its mother. This inequality is acceptable so long as in her constitutional exercise of personal liberty to improve her life, the pregnant woman does not abuse her power and extinguish the life of her innocent unborn child that has been entrusted to her protection. Individual conscience and self-regulation do not guarantee this power will not be abused.

If we are morally equal to one another, none of us are inherently subordinate to the will of others or are the property of another.<sup>100</sup> Birth marks the point at which the law says we are free and equal. What is stopping us from moving the marker back to the point of conception? Perhaps utilitarian goals such as embryonic stem cell research that can cure disease, cloning that can bring health and happiness, and abortion that can preserve a lifestyle prevail. These rational choices are fine if you are a member of the Chosen class. But if you are behind a veil of ignorance in the original position, you might feel differently if you are in the class of Depersonalized Humans and unlucky enough to be sacrificed for the common good of humanity. What if the marker that designates personhood is moved forward from birth and you find yourself downgraded and join the class of Depersonalized Humans?

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98. *The Queen v. Dudley and Stephens*, 14 Q.B. 273, 286–87 (1884).

99. *Id.* at 287–88.

100. KYMLICKA, *supra* note 89, at 61.

Utilitarian philosophy opposes constitutional protection for the unborn whose lives are vulnerable to the selfish needs or wants of the Chosen.<sup>101</sup> Liberal equality provides an answer to utilitarianism, if the legal system reflects principles of justice that are consistent with protecting the weakest, youngest and most vulnerable members of the human family.

Civil libertarians have a duty to oppose immoral and unethical conduct and laws that oppress and enslave members of the human family. This duty becomes more urgent especially when this oppression is legal and generally accepted in society. Consistent with the core values of what it means to be a civil libertarian, exists a moral imperative for liberals to speak out and take action to stop the destruction and exploitation of innocent unborn human beings.

In this author's view, a true civil libertarian is one who believes in the sanctity of all human life, that all living members of the species *Homo sapiens* are created equal, and that all human beings are persons, from the moment of conception until natural death. An activist government is necessary to choose principles of justice to protect Depersonalized Humans. Professor Robert George of Princeton University identifies what this author has termed a true civil libertarian as a "contemporary Rooseveltian."<sup>102</sup> Consistent with this view, Pope John Paul II qualifies as "an old fashioned liberal"<sup>103</sup> and has in fact been the champion of extending human rights to the unborn.<sup>104</sup>

On the other side, there are "personal liberationists" who also claim to be civil libertarians, but support abortion on demand in the name of women's equality, sexual freedom, tolerance and compassion.<sup>105</sup> By their actions, these liberationists advocate inequality and practice discrimination to advance a "quality of life" agenda. They believe in abortion, cloning, and embryonic stem cell research. Liberationists were instrumental in the creation and the promotion of the Depersonalized Human class. Liberationists believe that human beings are not persons until certain developmental criteria are met and that a human being exists only when certain personhood criteria have been satisfied. These pseudo-civil libertarians promote the oppression of unborn human beings for their own self-centered ends, and in the process undermine the fundamental principles of justice central to liberal equality.

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101. *See id.* at 65.

102. ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION AND MORALITY IN CRISIS 250–51 (2001).

103. *Id.* at 235, 240–47, 257.

104. *See* POPE JOHN PAUL II, DONUM VITAE, reprinted in MARILYN WALLACE & THOMAS HILGERS, THE GIFT OF LIFE app. at 224 (1990); 16.6.7 John Paul II, *Evangelium Vitae*, THEOLOGY DIG. (U.S. Catholic Conf., Wash., D.C.), Mar. 25, 1995, at 7.

105. GEORGE, *supra* note 102, at 253.

Both sides adamantly believe they are right. There appears to be no middle ground in this ideological war for philosophical, political, or legal compromise.

### B. *Choosing Sides*

There are common themes that appear today in this ideological war that dates back to the American Civil War when human slavery was legal. Both abortionists and those who supported slavery argue certain classes of human beings are not persons, have no constitutional rights to life and liberty and are property to be disposed of or exploited at will. Age, size, physical location, and other grounds have replaced race as permitted grounds of discrimination. Both reject the opposition of abolitionists who are despised for trying to impose their own morality on others, claiming this is interference with privacy and personal freedom in a democratic and pluralistic society. Huge financial profits were made from owning plantation slaves. Abortion providers profit from the business of operating an abortion clinic and selling fetal body parts. Slavery and abortion both attained institutional and legal standing, and won judicial approval from the Supreme Court.

Death, violence and doing harm to others is accepted as a means to further selfish interests of the Chosen in a narcissistic and hedonistic culture that promotes the quality of life of the Chosen over the sanctity of life of the Depersonalized Humans. Language is used to dehumanize members of the human family by using derogatory or clinical terms to depict people as property or as something less than human. For example, “product of conception” can mean to a pathologist an aborted human being. Focusing the argument on choice avoids deciding the morality of the underlying action of enslaving a fellow human being or killing an unborn child.

On September 22, 1862, when President Abraham Lincoln issued his Emancipation Proclamation,<sup>106</sup> his words did not free any slaves until the Union won the Civil War and the Thirteenth Amendment<sup>107</sup> to the Constitution freed the slaves on December 18, 1865. On January 14, 1988, President Ronald Reagan issued his Personhood Proclamation,<sup>108</sup> which has not yet

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106. ABRAHAM LINCOLN, SELECTED SPEECHES AND WRITINGS 368–69 (Library of America ed., 1st Vintage Books 1992).

107. U.S. CONST. amend. XIII § I. The Thirteenth Amendment reads: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” *Id.*

108. Proclamation No. 5761, 53 Fed. Reg. 1464-5 (Jan. 19, 1988). The Personhood Proclamation states:

We are told that we may not interfere with abortion. We are told that we may not “impose our morality” on those who wish to allow or participate in the taking of the life

accomplished its intended result to give the right to life to the unborn and to grant inalienable personhood to the unborn from the moment of conception to the time of natural death. So far, there has been no second Civil War or Right to Life Amendment to the Constitution, but there has been large scale civil disobedience, court battles, RICO civil actions, political battles over judicial appointments, political party polarization, violent crimes against abortion providers, restrictions against free speech, and a generally divided nation on the issue of abortion.<sup>109</sup> If President Lincoln is right that a nation divided

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of infants before birth; yet no one calls it “imposing morality” to prohibit the taking of life after people are born. We are told as well that there exists a “right” to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person’s fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality—that *they in fact are persons*. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the *personhood of the unborn be declared and defended* throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the “humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth.” This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby *proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death*, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America’s unborn children.

*Id.* (emphasis added).

109. For example, Operation Rescue was the largest peaceful civil liberties movement in American history. More than 70,000 arrests occurred between 1987 and 1994. Randall Terry, *A Walk Through History*, at <http://206.176.210.45:8834/home/index.cfm?page=2> (last visited Oct. 9, 2003). By comparison, the Civil Rights movement accounted for approximately 7,000 arrests between 1958 and 1968. *Id.*

against itself cannot stand,<sup>110</sup> what will the future bring, if compromise merely prolongs the inevitable victory by one side or the other?

Civil libertarians have championed the cause for the abolition of the slavery of the African-American, promoted the equality of women, fought for the abolition of the death penalty for convicted criminals, and campaigned for civil rights, gay rights, animal rights, environmental rights, and for the elimination of workfare that enslaves the poor. In all these efforts, civil libertarians have portrayed the underlying value of human, animal and biological life, rejected all forms of slavery, and assumed the moral obligation to respect those vulnerable interests in our society who cannot effectively overcome oppression and exploitation without help from the rest of us.

Consistency dictates that civil libertarians will choose to fight on the side of respecting unborn human life. Abortion is a civil rights issue.<sup>111</sup> To defend abortion today is in principle the same thing as defending the slavery of native-born African-Americans who were once denied citizenship and labeled as non-persons.

#### IV. DEHUMANIZING HUMANS WITH PERSONHOOD THEORIES

This article contends that a human being is a person from the time of conception. This article defines a person as a living organism of the species *Homo sapiens*. The definition applies to all persons living both inside and outside the womb. This definition draws a bright line intended to give constitutional legal protection to all human beings, from the beginning to the very end of life. This includes the inalienable rights to life, liberty and the pursuit of happiness. In this author's view, the unborn are human beings, and as such, are to be respected as persons from the first moment of their creation.

To accept that personhood is a legal right or moral status that may be conferred as opposed to an inalienable right, reduces the right to life to a privilege. The Chosen exercises the power of life and death over the members of the Depersonalized Humans through laws that separate personhood from biological reality. The result is pure discrimination. Inequality is thus institutionalized and philosophically rationalized. The practical result is the

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110. LINCOLN, *supra* note 106, at 131. President Lincoln stated:

A house divided against itself cannot stand. I believe this government cannot endure permanently half *slave* and half *free*. I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new* — *North* as well as *South*.

*Id.* (emphasis in original).

111. Mary Meehan, *Abortion: The Left Has Betrayed the Sanctity of Life*, THE PROGRESSIVE, Sept. 1980, at 34.



loss of respect for human life and the enslavement and destruction of millions of embryos and fetuses.

Personhood theories reveal a common theme—the depersonalization of members of the human family by cleaving personhood from the human being. Our children are inheriting a world rampant with new forms of discrimination against present classes of non-persons—embryos and fetuses, and possibly future classes of non-persons—infants, the physically and/or mentally disabled, the brain-injured, the elderly, those in a coma, and those who have incurable fatal illnesses.<sup>112</sup> This latest era of discrimination between members of the human family is based upon the degree of physical, psychic and social development of the human being.<sup>113</sup>

There are numerous identifiable boundaries in the lifespan of a human being that may be used by the courts and governments to decide when to confer personhood upon a human being. Where to draw the line causes disagreement, for in the real world of human nature and development, there are no borders or boundaries. Criteria to define personhood are mere philosophic distinctions that create illusions and serve political purposes.<sup>114</sup> They are all artificial and arbitrary concepts that purport to neatly and fairly divide the continuum of life that varies for each unique human being that is an impossible task.

Liberationists argue that the unborn are not human beings because they do not possess the characteristics of a human being. The common technique in this argument is to generate a list of characteristics that define when personhood begins. The following list represents many of these artificial boundaries, which correspond to physical, psychic and social development of the unborn at various stages of human development. They include:

1. Moment of *conception* (assignment of genetic identity);
2. Beginning of the *primitive streak* (after which time twinning is no longer possible);
3. *Implantation* of the embryo in the womb;

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112. Laura Palazzani, *The Meanings of the Philosophical Concept of Person and their Implications in the Current Debate on the Status of the Human Embryo*, in *IDENTITY AND STATUTE OF THE HUMAN EMBRYO: PROCEEDINGS OF THIRD ASSEMBLY OF THE PONTIFICAL ACADEMY FOR LIFE* 74, 88 (Juan de Dios Vial Correa & Elio Sgreccia eds., 1997).

113. *Id.* at 89.

114. *See id.* at 83–88; RONALD B. DWORKIN, *LIFE'S DOMINION* 23 (1993); CLIFFORD GROBSTEIN, *SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES* (1988); Francis C. Wade, *The Beginning of Individual Human Life from a Philosophical Perspective*, in *HUMAN LIFE AND HEALTH CARE ETHICS* 22 (James Bopp, Jr. ed., 1985); Gary B. Getler, *Brain Birth: A Proposal for Defining When a Fetus is Entitled to Human Life Status*, 59 *S. CAL. L. REV.* 1061 (1986); Agota Peterfy, *Fetal Viability as a Threshold to Personhood*, 16 *J. LEGAL MED.* 607 (1995); John A. Robertson, *Embryos, Families, and Procreative Liberty: the Legal Structure of the New Reproduction*, 59 *S. CAL. L. REV.* 942, 972 (1986).

4. Formation of the nervous system and *sentience* (the ability to feel pain);
5. Formation of the cerebral cortex of the brain (the ability to reason is a concern, as well as the logic of paralleling “brain life” with “brain death”);
6. *Quickening* (when the mother can feel the baby move);
7. When the fetus looks like what people expect a human being to look like (*morphological similarity*);
8. Fetal *viability* (when a premature baby can survive outside the womb with medical assistance and the help of others);
9. *Birth* (the moment of fully emerging from the mother’s body—as distinguished from partial birth);
10. Acquisition of *self-consciousness*;
11. Acquisition of ability to *reason*;
12. Demonstration of *intelligence* (a minimum I.Q.);
13. *Self-determination* (assertion of will);
14. *Socialization* (the formation of conscious relationships to other people);
15. *Memory* (the ability to remember), and
16. *Aspirations* (the ability to look forward to achieving hopes and dreams).

Some scientists claim it is morally acceptable to experiment upon embryos up to fourteen days after the time of conception.<sup>115</sup> In rejecting the argument that embryos younger than fourteen days of age are not human beings, Professor Alan Holland writes:

You and I are human beings. There is only one concept of ‘human being’—the biological one. A human being is simply a living organism of the species *Homo sapiens*. In contemplating embryo research we must describe accurately, honestly and without sentimentality what it is that we propose to do. We must not hide from ourselves (what I believe to be) the fact that when we experiment on human embryos we experiment on human beings.<sup>116</sup>

One might disagree with Holland by presuming that the proper form of a human being is what our imagination conjures up when we are asked to picture a human being in our minds. Most of us would think of a reflection of ourselves. Why would we not imagine a fetus, an ill or disabled person, or a person of a different race or sex? Our mental image of a human being changes when we realize an embryo can never be a future human being because *it already is a human being*.<sup>117</sup> An embryo is not only a human being, but also a

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115. See Alan Holland, *A Fortnight of My Life is Missing: A Discussion of the Status of the Human Pre-Embryo*, 7 J. APPLIED PHIL. 25, 35–36 (1990) (emphasis added).

116. *Id.*

117. See *id.* at 25.

person. Philosopher Diane Irving sums up the argument: “‘Personhood’ begins when the human being begins.”<sup>118</sup>

In attempting to identify the criteria needed to be a human being, the one thing that is relevant is ignored—an embryo already possesses all the characteristics it needs to qualify as a human being by its very nature, appropriate to its age and stage of development. To suggest an embryo must possess the characteristics found in a normal human being at a different age and stage of development is simply not a credible argument, even if one assumes such “characteristics” are readily definable.<sup>119</sup>

To be a person, it is enough just to be a living human organism of the species *Homo sapiens*.<sup>120</sup> Human development is a rational continuous process of generating the human organism as well as the rational process of degeneration before death. Medical doctors know there is an innate, organized and coordinated pattern to body functions in the living and in the stages of dying that by their very nature are rational activities.<sup>121</sup>

The science of embryology proves beyond any doubt that a new human life begins at the time of conception.<sup>122</sup> Still, many pro-choice advocates deny the

118. Diane Nutwell Irving, *Scientific and Philosophic Expertise: An Evaluation of the Arguments on “Personhood,”* 60 LINACRE Q. 18, 18 (1993).

119. *See id.* at 28.

120. Others disagree with this proposition. Clifford Grobstein argues that what matters is not the beginning of life, but of self. For unborn human beings, self begins when the embryo or fetus may be generally visually recognized as human, sufficient to evoke an empathetic response in the observer. CLIFFORD GROBSTEIN, *FROM CHANCE TO PURPOSE* 84 (1981). John Harris takes the position that what matters is not when life begins, but when life begins to matter morally. JOHN HARRIS, *THE VALUE OF LIFE* 12 (1985). Lawrence Becker will not confer the status of personhood until the fetus has completed its metamorphosis and assumed its basic morphology (just like the butterfly is not yet a butterfly when it is in the form of a caterpillar or pupa). Lawrence C. Becker, *Human Being: The Boundaries of the Concept*, 4 PHIL. & PUB. AFFAIRS 334, 337–338 (1975). Joseph Donceel believes a person cannot exist until the primitive streak develops (when the neurological system of the embryo begins to form into what becomes a spinal cord). Joseph Donceel, *Abortion: Mediate or Immediate Animation*, 5 CONTINUUM 167, 170 (1967).

121. *See generally* SHERWIN B. NULAND, *HOW WE DIE: REFLECTIONS ON LIFE’S FINAL CHAPTER* (1994); SHERWIN B. NULAND, *HOW WE LIVE* (1998) (originally published as SHERWIN B. NULAND, *THE WISDOM OF THE BODY* (1997)); PAUL BRAND & PHILIP YANCY, *FEARFULLY AND WONDERFULLY MADE* (1987).

122. ERICH BLECHSCHMIDT, *THE BEGINNINGS OF HUMAN LIFE* 16–17 (1977) (“This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum.”); CLARK EDWARDS CORLISS, *PATTEN’S HUMAN EMBRYOLOGY: ELEMENTS OF CLINICAL DEVELOPMENT* 30 (1976) (“It is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.”); KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED*

truth of this biological fact and maintain that fetuses are only potential life. Just as those who supported slavery refused to admit African-Americans were persons, zealous pro-choice advocates will never agree that the unborn are people or persons.

Judith Jarvis Thomson assumes for the sake of argument that a fetus is a human being and a person from the moment of conception.<sup>123</sup> Nonetheless, she defends abortion, arguing no woman has the moral obligation to carry her unborn fetus to term.<sup>124</sup> To illustrate her point, she invents a story about someone waking up to discover her body plugged into a male violinist who would die without life support from a fatal kidney disorder, unless the violinist remains plugged in over the next nine months.<sup>125</sup> The analogy is to an unwanted pregnancy.

Thomson decides it is morally permissible to unplug the violinist, without considering whether the mother has a fiduciary duty to be merciful as a “good neighbor” to her unborn child. Anita Allen supports Thomson and argues the hypothetical fact of “connection” to the violinist has no moral bearing on the woman’s right to choose to remain connected for the next nine months.<sup>126</sup>

Thomson is right that there is no constitutional obligation to be a good samaritan.<sup>127</sup> However, it is this aspect of unselfish love and service of “the least among us” that distinguishes us from barbarians, the proud, and the arrogant. It is our love for our neighbor and whether we care for and protect the poor, the helpless and the most vulnerable among us, which determines whether we live in a desirable, civilized society.

Michael Tooley, in support of searching for a moral justification of abortion and infanticide asks, “[w]hat properties must something have to be a person . . . [a]t what point in the development of the species *Homo sapiens* does the organism possess the properties that make it a person?”<sup>128</sup> Tooley uses the analogy of human slavery to make the point that most people would find slavery of adult human beings morally unacceptable because, at a minimum, adults have experiences and are capable of expressing thought with

EMBRYOLOGY 1, 14 (1982) (“This cell [zygote] results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is *the beginning of a human being*.”).

123. Judith Jarvis Thomson, *A Defense of Abortion*, in BIOETHICS: AN ANTHOLOGY 36, 45 (Helga Kuhse & Peter Singer eds., 2000).

124. *Id.* at 44.

125. *Id.* at 37. For a response to Thomson, see Francis J. Beckwith, *Personal Bodily Rights, Abortion, and Unplugging the Violinist*, 32 INT’L PHILOSOPHICAL Q. 105 (1992) and see ROBERT L. BARRY, *MEDICAL ETHICS: ESSAYS ON ABORTION AND EUTHANASIA* 39–63 (1989).

126. See Allen, *supra* note 96, at 468.

127. See Luke 10:25–37.

128. Michael Tooley, *Abortion and Infanticide*, in BIOETHICS: AN ANTHOLOGY 21, 23 (Helga Kuhse & Peter Singer eds. 1999); For a rebuttal, see PATRICK LEE, *ABORTION AND UNBORN HUMAN LIFE* 7–45 (1996).

language.<sup>129</sup> Tooley argues that an embryo, fetus or newborn infant has none of these properties and cannot be regarded as a person.<sup>130</sup> Tooley maintains that an organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity. This is known as the “self-conscious” requirement.<sup>131</sup>

Tooley thus justifies the legalization of infanticide and the euthanasia of the disabled in persistent vegetative states. What Tooley fails to recognize is that we humans at various times during our cycle of life move in and out of self-consciousness as fate and fortune determine our existence. The ability to enjoy self-consciousness in the case of the unborn is merely a transient state that lasts just a small fraction of one’s lifetime. While part of our society might accept the termination of the unborn, it is not ready to always accept Tooley’s position and routinely downgrade a member of the Chosen into the class of Depersonalized Humans.

Joseph Fletcher too has been greatly influential in advancing lists of criteria to remove fetuses from the human family. “What is critical is personal status, not merely human status.”<sup>132</sup> Fletcher makes no apologies for either his goal to promote abortion or his undisguised utilitarian philosophy. “The one [decision] which results in the greater good for people is the correct one. On this basis there is an open and shut case for abortion, obvious and overwhelming; it can be justified very often, sometimes for reasons of human health, sometimes for reasons of human happiness.”<sup>133</sup>

Fletcher admits that for him ethics is the business of providing rational critical reflection about the problems of the moral agent, whether that problem is in biology, medicine or law.<sup>134</sup> Ethics in Fletcher’s world are result-driven. When Fletcher wanted to put an end to compulsory pregnancy, the means to this end was the creation of a list of criteria to disqualify the fetus from personhood. The ethics of abortion itself, the killing of innocent human life, was irrelevant.

If we adopt the sensible view that a fetus is not a person, there is only one reasonable policy, and that is to put an end to compulsory pregnancy. The ethical principle is that pregnancy when wanted is a healthy process, *pregnancy when not wanted is a disease*—in fact, a venereal disease. The truly ethical question is not whether we can justify abortion, but whether we

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129. Tooley, *supra* note 128, at 23–24.

130. *Id.* at 23.

131. *Id.* at 24.

132. JOSEPH FLETCHER, HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS 11 (1979).

133. *Id.* at 136 (emphasis omitted).

134. *Id.* at 12.

can justify compulsory pregnancy. If our ethics is [sic] of the humane brand we will agree that we cannot justify it, and would not want to.<sup>135</sup>

So far, every philosopher who promotes a list of attributes needed to qualify as a person has made sure that they themselves fit the criteria they propose for others. These lists are designed to ensure that embryos, fetuses, and in some cases, neonates will fail the test of “personhood.” These lists are not designed to be inclusive of all members of the human family, but are instead meant to exclude classes of human beings who fail to meet the criteria of what a “person” is. While the designated criteria might be facially neutral, the motivations of the philosophers who advocate these lists are unashamedly biased.

The reason for this should be obvious by now. The goal of certain philosophers is to create an objective means to discriminate between human beings in order to transform an immoral act into a moral one. Abortion, selective reduction, embryonic stem cell research, cloning, the creation of human chimeras and active euthanasia might then be done with a clear conscience and with impunity.

Personhood theories will remain so long as there is prejudice against unborn human life and a desire to perpetuate an unequal class system in America. However, moral and immoral concepts have no coercive power unless they are embodied in law. Political and judicial institutions have the power to reject and hopefully the wisdom to recognize clever arguments that ask them to condone and sanction immoral acts. The story of the Emperor’s New Clothes is an apt reminder of the wisdom and power of an innocent child who spoke the truth that grown-ups lacked the courage to say.<sup>136</sup>

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135. *Id.* at 138.

136. Hans Christian Anderson, *The Emperor’s New Clothes*, at <http://www.deoxy.org/emperors.htm>. Anderson wrote:

Everyone said, loud enough for the others to hear: “Look at the Emperor’s new clothes. They’re beautiful!”

“What a marvellous train!”

“And the colors! The colors of that beautiful fabric! I have never seen anything like it in my life!” They all tried to conceal their disappointment at not being able to see the clothes, and since nobody was willing to admit his own stupidity and incompetence, they all behaved as the two scoundrels had predicted.

A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage.

“The Emperor is naked,” he said.

“Fool!” his father reprimanded, running after him. “Don’t talk nonsense!” He grabbed his child and took him away. But the boy’s remark, which had been heard by the bystanders, was repeated over and over again until everyone cried:

“The boy is right! The Emperor is naked! It’s true!”

The Emperor realized that the people were right but could not admit to that. He thought it better to continue the procession under the illusion that anyone who couldn’t

Supporters of the Chosen class oppose civil liberty for unborn children and hope there will never be a precise judicial answer as to what constitutes a person, claiming there is no answer to the question of when human life begins. It is actually an advantage for promoters of the Depersonalized Human class to have fluid definitions to suit new goals and fit circumstances as they arise.<sup>137</sup> Personhood is a concept like a rubber band that can be stretched to decide who is or is not presently eligible to be a member of the human family. Criteria to decide who is eligible to be a person are limited only by one's imagination.

This article rejects the arguments for personhood as these theories lack respect for human life. In a single lifetime, a human being will be at different times a person or a non-person. Fairness and equality require constant respect for human life throughout the continuum of human life in all its forms. We live in a community, share our common humanity and depend on one another. When someone is weak and vulnerable, this is our opportunity to demonstrate our love, mercy and kindness. It is immoral to depersonalize and then exploit or eliminate those who need and trust us the most.

## V. AN INTERNATIONAL PERSPECTIVE

### A. *Expanding the Class of Depersonalized Humans*

The class of Depersonalized Humans appears to be expanding. The Twenty-first Century is not only the beginning of a new millennium, but also a new era in history when a member of the Chosen may be downgraded to the status of the Depersonalized Humans. Being born alive is no longer a guarantee of escaping a destiny of being deliberately put to death. Disabled infants who are Chosen may lose their status and join the ranks of the Depersonalized Humans.<sup>138</sup>

In the case of the conjoined twins from Malta, the English Court of Appeal decided to permit physicians to take the life of "Mary," one of the twins, over the objection of her parents, who opposed an operation to separate the twins that would kill Mary. The court permitted the operation to go ahead, deciding Mary's "parasitic living" made her "designated for death" and she had "little right to be alive."<sup>139</sup> Being Chosen was not enough to save Mary, who was depersonalized and dehumanized by callous language in the court's opinion.

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see his clothes was either stupid or incompetent. And he stood stiffly on his carriage, while behind him a page held his imaginary mantle.

*Id.*

137. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 601 (1991).

138. This trend actually began in the Twentieth Century. See *Doe v. Bloomington Hosp.*, 464 U.S. 961 (1983) and other *Baby Doe* cases.

139. See *In Re A (Children) (Conjoined Twins: Surgical Separation)*, [2000] 4 All E.R. 961, 1010 (C.A.).

Mary's doctors, once they obtained legal protection from the Court of Appeal, knowingly and intentionally killed Mary, to extend the life of her twin sister, "Jodie." Utilitarian values triumphed over Mary's civil liberties. The result was the legalized murder of someone who had been a member of the Chosen class and was downgraded to the class of Depersonalized Humans.

In the United States, Princeton University's Bioethics Professor Peter Singer told an audience in Concord, New Hampshire that it was morally acceptable to terminate the lives of severely disabled newborns. "I do think it is sometimes appropriate to kill a human infant."<sup>140</sup> Utilitarian philosophy that rationalized abortion now condones the deliberate killing of a newborn baby. Singer's views are not as radical as they once seemed, as the case of Mary and Jodie suggests.

It was not long ago that European Jews were legally defined as non-persons in law and murdered in the Holocaust or forced to be subjects in Nazi medical experiments.<sup>141</sup> In the United States, descendants of liberated slaves suffered harm despite their legal status as persons. In Tuskegee, white doctors deliberately withheld medication that could have cured African-American males suffering from syphilis.<sup>142</sup> Both of these historical events resulted in public outrage and the creation of ethical codes of conduct to prevent these kinds of unethical conduct from happening again. The *Nuremberg Code*<sup>143</sup> responded to the Nazi experiments, and the *Belmont Report*<sup>144</sup> responded to the Tuskegee experiment.

Despite these ethical and legal precedents, some doctors continue to be complicit in doing harm to non-persons and persons alike. Dr. Leroy Carhart achieved notoriety as a pioneer in partial-birth abortions.<sup>145</sup> Dr. Wang Guoqi testified before Congress on June 27, 2001 regarding how he skinned alive a

140. Harry R. Weber, *Bioethicist Gets Respectful Reception*, Foster's Online, at <http://premium1.fosters.com/2001/news/october2/05/nh1005g.htm> (October 5, 2001). If the status of personhood no longer offers legal protection from murder, how soon will it be until disabled adults are also found wanting in the balance and condemned to death as "parasites?" Philosophers like Singer are not afraid or embarrassed to use clear words like "kill" to describe what could otherwise be more softly described as a "termination." *Id.*

141. See *Medical Experiments*, Jewish Virtual Library, at <http://www.us-israel.org/jsource/Holocaust/medtoc.html> (September 10, 2003); THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION (George J. Annas & Michael A. Grodin eds., 1992).

142. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1993).

143. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 181-82 (1949), available at <http://ohsr.od.nih.gov/nuremberg.php3>.

144. *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, at <http://ohsr.od.nih.gov/mpa/belmont.php3> (April 18, 1979).

145. *Stenberg v. Carhart*, 530 U.S. 914, 922-929 (2000).



dying prisoner who was legally executed and had his organs harvested for profit.<sup>146</sup> Dr. Josef Mengele no doubt also believed he was acting professionally when he performed, without consent, cruel and inhuman experiments on little children in the name of advancing the racial purity of the Aryan Super Race.<sup>147</sup> While these medical doctors acted legally, the repulsive nature of the acts they performed highlight their ability to detach their professional role from morally humane conduct.

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146. *Organs For Sale: China's Growing Trade And Ultimate Violation Of Prisoners' Rights: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 107th Cong. 116–18 (2001), available at [http://commdocs.house.gov/committees/intrel/hfa73452.000/hfa73452\\_0.htm](http://commdocs.house.gov/committees/intrel/hfa73452.000/hfa73452_0.htm). Dr. Guoqui testified:

Before execution, I administered a shot of heparin to prevent blood clotting to the prisoner. A nearby policeman told him it was a tranquilizer to prevent unnecessary suffering during the execution. The criminal responded by giving thanks to the government.

At the site the execution commander gave the order, "Go," and the prisoner was shot to the ground. Either because the executioner was nervous, aimed poorly or intentionally misfired to keep the organs intact, the prisoner had not yet died, but instead lay convulsing on the ground. We were ordered to take him to the ambulance anyway where urologists Wang Shifu, Zhao Qingling and Liu Qiyu extracted his kidneys quickly and precisely.

When they finished, the prisoner was still breathing, and his heart continued to beat. The execution commander asked if they might fire a second shot to finish him off, to which the county court staff replied, "Save that shot. With both kidneys out, there is no way he can survive."

The urologists rushed back to the hospital with the kidneys. The county staff and executioner left the scene, and eventually the paramilitary policemen disappeared as well. We burn surgeons remained inside the ambulance to harvest the skin.

We could hear people outside the ambulance, and, fearing it was the victim's family who might force their way inside, we left our job half done. The half dead corpse was thrown into a plastic bag onto the flatbed of the crematorium truck. As we left in the ambulance, we were pelted by stones from behind.

After this incident, I have had horrible, reoccurring nightmares. I have participated in a practice that serves the regime's political and economic goals far more than it benefits the patients.

I have worked at execution sites over a dozen times and have taken the skin from over 100 prisoners in crematoriums. Whatever impact I have made in the lives of burn victims and transplant patients does not excuse the unethical and immoral manner of extracting organs.

*Id.*

147. See Eva Mozes-Kor, *The Mengele Twins and Human Experimentation: A Personal Account*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* 53–59 (1992).

### B. Political Correctness Ruins the Law

The law is in a state of disarray.<sup>148</sup> The confusion in the law results from the lack of a consistent theory of the person, fed by political correctness that supports abortion on demand in favor of a woman's personal liberty and privacy. Case law abounds with bizarre judicial holdings that distort precedents to avoid undermining the right to an abortion. The problem is not confined to the United States. It extends to other Anglo-American jurisdictions where there is a legal right to an abortion. Canada is a prime example.

In 1988, the Supreme Court of Canada affirmed a woman's right to abortion and struck down unconstitutional provisions in the Criminal Code that regulated abortion.<sup>149</sup> Since then, that same court has decided that a mother is not liable for the pre-birth injuries sustained by her born-alive child as a result of her own negligence.<sup>150</sup> The Supreme Court of Canada also absolved a midwife found guilty of criminal negligence causing death, because the victim was a baby that was not fully emerged from the birth canal when it died.<sup>151</sup> There was no criminal liability because an unborn baby is excluded from the definition of a human being in the Criminal Code. The Supreme Court of Canada also found it was unconstitutional to make an order restricting the liberty of a pregnant mother who was addicted to a chemical substance that was harming her fetus.<sup>152</sup> All of these cases provoked public outrage and, in the opinion of those who favor the best interests of the child, brought the administration of justice into disrepute.

Canada has a shameful history of excluding people from legal personhood. The Canada Indian Act 1880 stated, "person means an individual other than an Indian."<sup>153</sup> The Canada Franchise Act 1885, defined a person as "a male person, including an Indian and excluding a person of Mongolian or Chinese Race."<sup>154</sup> In 1912, the British Columbia Court of Appeal held that women were not persons and therefore not eligible to enter the legal profession.<sup>155</sup> In 1928, the Supreme Court of Canada excluded women from the definition of person and held that women were not eligible for appointment to the Senate of Canada.<sup>156</sup> Justice was not done until 1930 when the Privy Council of England

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148. Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1759 (2001).

149. *R. v. Morgentaler* (No. 2), [1988] 1 S.C.R. 30 (Can.).

150. *Dobson v. Dobson*, [1999] 2 S.C.R. 253 (Can.).

151. *R. v. Sullivan*, [1991] 1 S.C.R. 489 (Can.).

152. *Winnipeg Child and Family Servs. v. G.*, [1997] 3 S.C.R. 925 (Can.).

153. *See* Indian Act of 1880, S.C. 1880, ch. 28.

154. *See* Electoral Franchise Act, S.C. 1885, ch. 40.

155. *Re Mabel French*, [1912] 17 B.C.R. 1.

156. *In the Matter of a Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1967*, [1928] S.C.R. 276. (Can.).

reversed the Canadian Supreme Court.<sup>157</sup> Lord Sankey observed that the burden of proof falls on those who would deny personhood to prove their case.<sup>158</sup> This arguably means there is a presumption that the unborn are persons and members of the human family unless proven otherwise. When the Supreme Court of Canada held in 1989 that a fetus was not a human being and denied personhood to the fetus, it did so without considering the proof suggested by Lord Sankey.<sup>159</sup>

Personhood in law is a fluid concept. In America, corporations, which are not human beings, enjoy the status of personhood,<sup>160</sup> and unborn children do not. The same judge may find a human being not to be a person for one purpose, but a person for another purpose. A human being is a person if it fits with the judge's objectives.

For example, Chief Justice Taney of the U. S. Supreme Court rendered what to us may seem like irreconcilable opinions.<sup>161</sup> In the case of African-American slave Dred Scott, he rejected Scott's claim to citizenship indicating that the law excluded him from that status on the basis of race.<sup>162</sup> Scott was determined not to be a person. Yet the same Justice Taney, sitting as a circuit court judge, found Amy, a young African-American woman slave, guilty of theft, rejecting her defense that she could not be guilty of a crime because only persons were within the jurisdiction of the court.<sup>163</sup>

Case law that offends legal precedent in the name of political correctness brings justice into disrepute and seriously undermines in the eyes of the public the credibility of the entire system of justice. *Roe v. Wade* has replaced *Dred Scott v. Sanford* as the classic contemporary example of political correctness going too far.

Professor Patrick Devlin warned of impending social disintegration when law is divorced from Judeo-Christian morality.<sup>164</sup> Lord Howe agreed, "while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure . . . ."<sup>165</sup>

Lord Denning earlier observed, "[a]lthough religion, law and morals can be separated, they are nevertheless still very much dependent on each other.

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157. *Edwards v. Att'y Gen. for Canada*, [1930] D.L.R. 98 (P.C.).

158. *Id.* at 138.

159. *Daigle v. Tremblay*, [1989] 2 S.C.R. 530. (Can.).

160. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990). Sanford A. Schane, *The Corporation is a Person: The Language of Legal Fiction*, 61 TUL. L. REV. 563 (1987).

161. Note, *supra* note 148, at 1748-1749.

162. *Dred Scott v. Sanford*, 60 U.S. (1 How.) 393 (1857).

163. *United States v. Amy*, 24 F. Cas. 792, 809-810 (C.C.D. Va. 1859) (No. 14,445).

164. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

165. *Regina v. Howe*, 1 A.C. 417, 430 (H.L. 1987).

Without religion there can be no morality: and without morality there can be no law.”<sup>166</sup>

Thomas Aquinas believed that when a law is contrary to reason it is unjust and lacks moral authority.<sup>167</sup> If a law is “at variance with natural law, it will not be law, but spoilt law.”<sup>168</sup>

Personhood theories violate the natural law.<sup>169</sup> Dividing the status of personhood from living human beings is an affront to human dignity and the essence of what it means to be human. Substance is what matters, not form. At the very core of our humanity, we are all equally living human organisms of the species *Homo sapiens*. Deviance from this creates inequality before and under the law, invidious discrimination and disrespect for human life.

What is new are the scientific accomplishments made possible by the advance of biotechnology, and the emergence of a new class of Depersonalized Humans. Using biotechnology and its possibilities as an opportunity and an excuse to create, destroy and manipulate human embryos is nothing less than legalized homicide under the mask of good intentions.<sup>170</sup> Just because something is scientifically achievable does not automatically mean that it is morally right.

### C. *Universal Human Rights*

The preamble to the 1948 Universal Declaration of Human Rights (Declaration) provides that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>171</sup> The Declaration eloquently articulates that fundamental human rights apply universally without discrimination to any member of the human family. Article 2.1 provides, “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”<sup>172</sup> There is no limitation to the definition of “everyone.” Presumably, “other status” could include embryos and fetuses.

166. SIR ALFRED DENNING, *THE CHANGING LAW* 99 (1953).

167. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* 99–107 (His Eminence Michael Cardinal Browne & The Most Reverend Father Aniceto Fernandez trans., 1963).

168. *Id.* at 105.

169. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

170. See Mauro Cozzoli, *The Human Embryo: Ethical and Normative Aspects*, in *IDENTITY AND STATUTE OF HUMAN EMBRYO: PROCEEDINGS OF THIRD ASSEMBLY OF THE PONTIFICAL ACADEMY FOR LIFE* 260, 286–87 (Juan de Dios Vial Correa & Elio Sgreccia eds., 1998).

171. *Universal Declaration of Human Rights*, in *International Instruments of the United Nations* 85 (Irving Sarnoff ed., 1997), available at <http://www.un.org/Overview/rights.html>.

172. *Id.* (emphasis added).

Article 3 of the Declaration provides, “*Everyone has the right to life, liberty and security of person.*”<sup>173</sup> Article 4 states, “No one shall be held in slavery or servitude; *slavery and the slave trade shall be prohibited in all their forms.*”<sup>174</sup> Article 5 reads, “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*”<sup>175</sup> Article 6 proclaims, “*Everyone has the right to recognition everywhere as a person before the law.*”<sup>176</sup> Article 7 says, “*All are equal before the law and are entitled without any discrimination to equal protection . . . against any discrimination in violation of this Declaration and against any incitement to such discrimination.*”<sup>177</sup>

The American Convention on Human Rights signed at the Inter-American Specialized Conference on Human Rights, in San José, Costa Rica, on November 22, 1969, defines “person” in Article 1.2 as “every human being.”<sup>178</sup> Article 4.1 grants every person the “right to have his life respected . . . from the moment of conception.”<sup>179</sup> Article 3 provides that “every person has the right to recognition as a person before the law.”<sup>180</sup> Article 6.1 forbids slavery “in all [its] forms.”<sup>181</sup>

The 1959 Declaration on the Rights of the Child recognizes in its preamble that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*”<sup>182</sup> Every child is to “enjoy special protection, and shall be given the opportunit[y] . . . by law . . . *to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.*”<sup>183</sup> The “*best interests of the child shall be the paramount consideratio[n]*” in the creation of laws to give each child this special protection.<sup>184</sup> Every child, without exception, is to enjoy these rights without “*distinction or discrimination [because of] . . . birth or other status.*”<sup>185</sup>

173. *Id.* (emphasis added).

174. *Id.* (emphasis added).

175. *Id.* (emphasis added).

176. *Universal Declaration of Human Rights*, *supra* note 171, at 85.

177. *Id.* (emphasis added).

178. *See American Convention on Human Rights*, Inter-American Commission on Human Rights, Organization of American States, at <http://www.cidh.oas.org/Basicos/basic3.htm> (Nov. 22, 1969).

179. *Id.*

180. *Id.*

181. *Id.*

182. *See Declaration on the Rights of the Child*, in INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS (Irving Sarnoff ed., 1997) (emphasis added), available at <http://www.unhchr.ch/html/menu3/b/25.htm>.

183. *See id.* at 217 (emphasis added).

184. *Id.* (emphasis added).

185. *See id.* (emphasis added).

“[M]ankind owes to the child the best it has to give.”<sup>186</sup> The subsequent 1989 Convention on the Rights of the Child, “bearing in mind” the child’s need for special protection before as well as after birth, declared in Article 6.1 “that every child has the inherent right to life” and in Article 6.2 that “States Parties [sic] shall ensure to the maximum extent possible the survival and development of the child.”<sup>187</sup>

Considering that before any of these foregoing international laws were enacted, it was a crime against humanity to order an involuntary abortion,<sup>188</sup> there is a case to be made that voluntary abortion is a crime against humanity. International law and war crime tribunals look beyond domestic definitions of persons and defenses based on obedience to domestic law.<sup>189</sup> Declaring something legal does not necessarily make it moral and immune from international judgment and punishment.

#### D. Equality and Self-Evident Truths

The legal distinction between person and human being must be abolished if there is to be true equality among all members of the human family. Justice requires that there be respect for the life of all human beings, from the very beginning to the very end of life. The alternative is to classify unborn human beings as non-persons who are mere objects over which to exercise dominion and control, to treat as a property to be harvested and grown for commercial, humanitarian or scientific purposes, to be disposed of at will, and as a means to an end. Scientists have an obligation to act morally and adhere to proper ethical standards even if domestic law and technology permit otherwise. Cozzoli writes:

The embryo cannot be reduced to an ‘object’ or ‘instrument’ of experimentation. *No matter how great the utility or how noble the intention of an experiment, it must not reduce a being having the ‘value of an end in himself’ to a ‘value of utility.’* This is true in every phase of the prenatal life, even in the simplest and most miniscule, as in the first two weeks, in which period today embryonic experimentation rages, at the price of an enormous

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186. See *Declaration on the Rights of the Child*, at <http://www.unhchr.ch/html/menu3/b/25.htm>.

187. See *Convention on the Rights of the Child*, in INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 232–33 (Irving Sarnoff ed., 1997). “Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49,” at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

188. See IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 608 (1949). See also V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 109 (1950).

189. For an international survey of how governments around the world regulate abortion, see Anita L. Allen, *Abortion: Contemporary Ethical and Legal Aspects*, in ENCYCLOPEDIA OF BIOETHICS 16–26 (Warren Thomas Reich ed., 1995).

spending of human lives. *This is an exploitation and a crime which the active and passive complicity of positive law cannot dissimulate.*<sup>190</sup>

Thomas Jefferson, author of the *American Declaration of Independence*, used the moral authority of natural law to assert for all time that all members of the human family are created equal and possess the fundamental right to life. He stated:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station *to which the Laws of Nature and of Nature's God entitle them*, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are *Life, Liberty and the pursuit of Happiness*. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>191</sup>

If all men are created equal, then it must follow that the living human organism, at the time of conception, is politically and legally endowed with the inalienable rights of life, liberty and the pursuit of happiness.<sup>192</sup> On this basis, the right of the unborn to life (no abortion, no harvesting of embryonic stem cells, no cloning), liberty (the right to be left alone, freedom from harm) and the pursuit of happiness (the right to autonomy, self-determination, development of full potential) is assured. Human beings are endowed at creation with an inalienable right to life. This natural right cannot be conferred, as it is the common heritage of human beings that all are created equal. It can be expressed as a matter of constitutional law.<sup>193</sup>

The emergence of a new class of Depersonalized Humans is evidence that there is diminishing respect for the sanctity of human life. Civil libertarians who believe in equality are morally compelled to speak for those who cannot speak for themselves to ensure all human beings are treated as ends and never

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190. Cozzoli, *supra* note 170, at 289 (emphasis added).

191. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776) (emphasis added).

192. See Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 824 (2001).

193. See James Bopp, Jr., *An Examination of Proposals for a Human Life Amendment*, in RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT 3–52 (James Bopp, Jr. ed., 1984).

as a means to an end. Once the human family is divided into persons and non-persons, every human being is at risk to become a member of the class of Depersonalized Humans.<sup>194</sup> The power to destroy other human beings leads to greater abuses as people become desensitized to immoral conduct. The killing and exploitation of the unborn are at the most basic level, acts of violence. Everyone, including scientists, businessmen, politicians, judges, clergy, voters, doctors or patients, who benefits from, or does any harm to Depersonalized Humans, is morally culpable. “Anyone who commands, directs, advises, encourages, prescribes, approves, or actively defends doing something immoral is a cooperator in it if it is done and, even if it is not in the event done, has already willed it to be done and thus already participates in its immorality.”<sup>195</sup>

#### E. *Moral Complicity: Neutrality is Impossible*

We must not underestimate how quickly we can unwittingly become participants in immoral conduct simply by benefiting from medical science that offers us life and health. Today, in many American states, a child is not permitted to go to public school without proof of being vaccinated against chicken pox.<sup>196</sup> What many parents do not know is that the chicken pox vaccine was made from a cell line that originated from an aborted fetus.<sup>197</sup> It is

194. Kevin O’Rourke, *Ethical Norms for Respect for Human Life*, in HUMAN LIFE AND HEALTH CARE ETHICS 52, 62 (James Bopp, Jr. ed., 1985).

195. John Finnis, *Abortion and Health Care Ethics*, in BIOETHICS: AN ANTHOLOGY 13, 18 (Helga Kuhse & Peter Singer eds., 1999).

196. See Pat Etheridge, *Pediatricians Push For Mandatory Chicken Pox Vaccine*, CNN, at <http://www.cnn.com/2000/HEALTH/children/01/11/chicken.pox.vaccine/> (Jan. 11, 2000).

197. Matthew D. Staver, *Compulsory Vaccinations Threaten Religious Freedom*, Liberty Counsel, at [http://www.lc.org/OldResources/compulsory\\_vaccinations\\_threaten\\_religious\\_freedom.htm](http://www.lc.org/OldResources/compulsory_vaccinations_threaten_religious_freedom.htm) (last visited Oct. 11, 2003). It has been discovered that:

During the Rubella epidemic of 1964, some doctors advised pregnant women who were exposed to the disease to abort their children. The resulting virus strain became known in the science world as RA/27/3. R stands for Rubella, A stands for Abortus, 27 stands for the 27th fetus tested, and 3 stands for the 3rd tissue explant. In other words, there were 26 abortions prior to finding the right “species” with the active virus. The Rubella vaccine was then cultivated from the 27th aborted baby on the lung tissue of yet another aborted infant, WI-38. WI-38 (Wistar Institute 38) was taken from the lung tissue of an aborted baby at 3 months gestation in the 1960s. A second human cell line known as MRC-5 was derived from a male at 14 weeks gestation in the 1970s. These two aborted cell lines have been used to provide an ongoing source for many widely-used vaccines, including Hepatitis-A and chicken pox. The chicken pox vaccine is known as Varivax. This vaccine was developed with the use of aborted fetuses. It uses both the human cell lines, known as WI-38 and MRC-5.

*Id.* See L. Hayflick & P. S. Moorhead, *The Serial Cultivation of Human Diploid Cell Strains*, 25 EXPERIMENTAL CELL RESEARCH 585 (1961); see also L. Hayflick, *The Limited In Vitro Lifetime*



argued that it is morally acceptable to use cell lines from aborted fetuses because the abortions would have happened anyway, without contemplation of future vaccine production.<sup>198</sup> The problem with this view is that moral culpability extends to the fruits of the underlying evil. Moral complicity cannot be wished away.

After Osama Bin Laden's September 11, 2001, attack on America, President George W. Bush took steps to purchase smallpox vaccine to prepare for the possibility of biological war. The first contract to produce millions of doses of this vaccine was awarded to a company that has tested ways to make smallpox vaccine from a cell line originating from an aborted fetus.<sup>199</sup> Historically, the vaccine used to rid the world of this terrifying plague was made from non-human sources.<sup>200</sup> The Center for Disease Control has adopted

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*of Human Diploid Cell Strains*, 37 EXPERIMENTAL CELL RESEARCH 614 (1965); J.P. Jacobs et al., *Characteristics of a Human Diploid Cell Designated MRC-5*, 227 NATURE 168 (1970).

198. Daniel P. Maher, *Vaccines, Abortions and Moral Coherence*, 2 NAT'L CATHOLIC BIOETHICS Q. 51, 59 (2002).

199. *New Smallpox [sic] Vaccine May Use Aborted Fetal Cell Line, MRC-5*, Free Republic, at <http://www.freerepublic.com/focus/fr/564123/posts> (posted Nov. 5, 2002). The article states that:

The Washington Post announced the award of a contract for the development of a new smallpox vaccine to Oravax/Acambis Corporation. The proposal presented to the CDC and FDA would encompass using "human fibroblasts."

We checked the proposed ingredients through the CDC and found they intend to use aborted fetal cell line MRC-5 as the cell substrate for growing the virus. The CDC report also stated that other established animal substrates such as chick embryo, (used in Rabies vaccine) Vero Cell Lines and FRHL-2 Cell lines were viable alternatives as well. Children of God for Life spoke with the FDA and they have verified the reports, but also indicated they would most likely use more than one manufacturer and no final decisions have been made. We do know that testing has already begun using MRC-5 in Phase 1 trials.

*Id.*

200. Steven R. Rosenthal et al., *Developing New Smallpox Vaccines*, 7 EMERGING INFECTIOUS DISEASES 921 (Nov.-Dec. 2001), available at <http://www.cdc.gov/ncidod/eid/vol7no6/rosenthal.htm>. The article explains:

The only commercially approved smallpox vaccine available for limited use in the United States is Wyeth Dryvax. This vaccine is a lyophilized preparation of live *Vaccinia virus* (VACV), made by using strain New York City calf lymph (NYC\_CL), derived from a seed virus of the New York City Board of Health (NYCBH) strain of VACV that underwent 22 to 28 heifer passages. The vaccine consists of lyophilized calf lymph containing VACV prepared from live calves. The animals were infected by scarification, and the skin containing viral lesions was physically removed by scraping. The lyophilized calf lymph type vaccine is reconstituted with a diluent containing 50% glycerin, 0.25% phenol, and 0.005% brilliant green. Vaccine prepared by this traditional manufacturing technique of harvesting VACV from the skin of cows (and sheep) was used in most regions of the world during the smallpox eradication campaign. The facilities, expertise, and infrastructure required for producing the virus in this way are no

a utilitarian separatist philosophy in its goal to develop the most effective, least toxic vaccine at the right price, even if it means exploiting cell lines derived from aborted fetuses.<sup>201</sup>

We may one day soon have to choose between sticking to our ethics and saying no to a life-saving medical treatment and face the certainty of death, or choosing to be willfully blind or hypocritical and participate as beneficiaries of morally repulsive conduct. Unless we act in the very near future to abolish forever the exploitation of Depersonalized Humans, there may soon be no alternatives to medical treatments or cures derived from sacrificed Depersonalized Humans.

#### VI. A NEW FRONTIER: HUMAN CLONING AND EMBRYONIC STEM CELL RESEARCH

Doctors Panos Zavros and Severino Antinori are in a race to see if they will produce the first cloned baby ahead of the Raelinians.<sup>202</sup> “Details of the first hybrid human embryo clone have been released,” proclaimed the BBC World Service on June 18, 1999.<sup>203</sup> The cloning occurred the previous November, but Advanced Cell Technology (ACT) delayed release of this information.<sup>204</sup> The news story reported the world’s first cloned human embryo was derived from a cell from a man’s leg and a cow’s egg.<sup>205</sup> The embryo was allowed to develop for twelve days before it was deliberately destroyed.<sup>206</sup> Dr. Robert Lanza, director of tissue engineering for ACT, said the embryo “could not be seen as a person before 14 days.”<sup>207</sup>

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longer available. Wyeth Laboratories discontinued distribution of smallpox vaccine to civilians in 1983.

*Id.* at 920.

201. *See generally id.* The article further explains:

The Food and Drug Administration (FDA) has licensed live-virus vaccines, such as varicella and rubella, prepared in diploid cell substrates (e.g., MRC-5, WI-38). *Recently, MRC-5 was used as a cell substrate for the preparation of an experimental smallpox vaccine under a Phase 1 trial.* Another diploid cell strain, FrhL-2, has been used as a cell substrate for rotavirus vaccine and other live-virus vaccines tested in human clinical trials. The FDA experience in evaluating live-virus vaccines prepared in these diploid cell substrates makes the selection and use of such cell substrates potentially suitable for manufacture of a smallpox vaccine.

*Id.* at 921–22 (emphasis added).

202. *See Race is on to Send in the Clones for the Desperate*, THE AUSTRALIAN, August 6, 2001, at 11.

203. *Details of Hybrid Clone Revealed*, BBC News, at <http://news.bbc.co.uk/1/hi/sci/tech/371378.stm> (June 18, 1999).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

On November 25, 2001, ACT once again made headlines, this time in a far more dramatic way, announcing that the company had succeeded in creating the world's first cloned human embryos derived from human eggs.<sup>208</sup> These embryos lived only for a few hours, long enough for one embryo to advance to the six-cell stage.<sup>209</sup> Ronald Green, chair of the company's ethics advisory board, preferred the term "activated egg" to "embryo," to describe ACT's creation of a new form of human life "never before seen in nature."<sup>210</sup> Green disagreed with the suggestion that this cloned embryo be given the same degree of respect and protection of a human being, even though he conceded the potential for this "activated egg" to develop into a full human being.<sup>211</sup> Green viewed this new biological entity not as a person, but as an organism that could be manipulated and exploited as a means to an end, to harvest stem cells and ultimately result in the discovery of scientific knowledge that might save or prolong the lives of adults and children. In justifying his conclusion, Green noted that the "activated egg" possessed none of the attributes of humanity; it had no organs, it could not think or feel and it was a cluster of cells "no bigger than the period at the end of this sentence."<sup>212</sup>

Not to be outdone, Claude (Rael) Vorilhon, leader of a religious cult that supports Clonaid and a competitor of ACT, claimed in a news interview that cloning human embryos was old news, having already been successfully achieved by Clonaid.<sup>213</sup> He declined for security reasons to divulge the whereabouts of Clonaid's laboratory and present research developments.<sup>214</sup>

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208. Press Release, Advanced Cell Technology, Advanced Cell Technology Reports Publication of Results of Human Somatic Cell Nuclear Transfer and Parthenogenesis (Nov. 25, 2001), at <http://www.advancedcell.com/2001-11-25.htm>.

209. Jose B. Cibelli et al., *The First Human Cloned Embryo*, ScientificAmerican.COM, at [http://www.sciam.com/article.cfm?articleID=0008B\\*F9-AC62-1C75-9B81809EC588EF21&catID=4](http://www.sciam.com/article.cfm?articleID=0008B*F9-AC62-1C75-9B81809EC588EF21&catID=4) (Nov. 24, 2001).

210. Ronald M. Green, *The Ethical Considerations*, ScientificAmerican.COM, at <http://www.sciam.com/article.cfm?articleID=000CE1B1-CC78-1CF4-93F6809EC5880000> (Nov. 24, 2001).

211. *Id.*

212. *Id.*

213. Reuters, *Canadian Cult Says It was First to Clone Embryos*, The Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements, at <http://www.rickross.com/reference/raelians/raelians21.html> (Nov. 26, 2001). See also *Controversy Over Human Embryo Clone*, BBC News, at <http://news.bbc.co.uk/2/hi/science/nature/1676234.stm> (Nov. 26, 2001). Korean scientists are also in the running for the distinction of creating the first human clone. "In December 1998, researchers at Kyunghee University in South Korea claimed to have produced the world's first human embryo clone. The scientists involved said they destroyed the object soon after seeing it divide several times." *Id.*

214. Reuters, *supra* note 213.

Clonaid announced that the world's first cloned baby was born on December 26, 2001, at a secret location outside of the United States.<sup>215</sup> The news has been greeted with much skepticism,<sup>216</sup> but also with great concern.<sup>217</sup>

The religious goal of the Raelians and their corporate partner Clonaid is not only to produce the world's first cloned human being, but also to enable an individual to live eternally through several human bodies by "downloading" a donor's memory and personality to its clone.<sup>218</sup> ACT scientists believe that cloning stem cells for use in medical research is ethical and moral, and draw an ethical boundary between themselves and the reproductive goals of the Raelians.<sup>219</sup>

The resulting global controversy regarding the creation of a cloned embryo has quickly brought strong condemnation against ACT by various opponents, such as the National Right to Life Committee, which has denounced ACT for engaging in immoral and unethical conduct that must be stopped.<sup>220</sup>

Who is right? Does it matter that ACT's goal is therapeutic (to grow embryos for a few days and then destroy them in the process of harvesting human stem cells for use in research)<sup>221</sup> or that Clonaid's goal is reproduction (to grow embryos to adulthood to create the possibility of eternal life on earth)? After all, morally there is no difference between these companies, because both are in the business of cloning and destroying the unborn in the process. Does embryonic stem cell research also destroy the unborn? From the time of conception, a new creation, the zygote, has come into existence. Serra & Colombo explain:

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215. *Cloned Baby Claim Met with Doubt*, BBC News, at <http://news.bbc.co.uk/2/hi/health/2608655.stm> (Dec. 27, 2002).

216. Michael Lasalandra, *Clone Claim Stirs Doubt*, BOSTON HERALD, Dec. 28, 2002, at 1. See also Deborah Smith, *To Humankind, a Clone-or a New-Born Fraud*, SIDNEY MORNING HERALD, December 28, 2002, <http://www.smh.com.au/articles/2002/12/27/1040511177310.html>.

217. *Human Cloning: 'One Shouldn't Do This.'* CNN.Com, at <http://www.cnn.com/2002/HEALTH/12/27/clones.ethics.legal> (posted on Dec. 27, 2002).

218. Reuters, *supra* note 213.

219. Joannie Fischer, *The First Clone*, U.S. NEWS & WORLD REPORT, Dec. 3, 2001, at 61 (discussing the inside story on how American scientists have made history by creating lifesaving embryo cells).

220. *US Looks to Outlaw Human Cloning*, BBC News, at <http://news.bbc.co.uk/1/hi/sci/tech/1676025.stm> (Nov. 25, 2001). The following statement was issued by NRLC in response to the report by persons associated with Advanced Cell Technology, a Massachusetts biotech firm, that they have created human embryos by cloning. NRLC Legislative Director Douglas Johnson stated, "this corporation is creating human embryos for the sole purpose of killing them and harvesting their cells. . . Unless Congress acts quickly, this corporation and others will be opening human embryo farms." *Id.*

221. See Kyla Dunn, *Cloning Trevor*, ATLANTIC MONTHLY, June 2002, at 31-52. (providing a sympathetic and emotional story that promotes the therapeutic uses of human cloning).

[O]nce the zygote had been formed, *there is a new organism*, different from the two gametes taken separately, but the same as the fetus, the child and the adult into which it develops. For there is no discontinuity in the process of embryogenesis from the zygote stage to the fetal stage and beyond. No substantial changes take place after fertilization. The neo-conceptus, i.e. zygote and the entity after the first cleavages, *is the same individual organism as the adult into whom it later develops.*<sup>222</sup>

The new genome, contained in the zygote, is internally activated by a biochemical process and assumes control of the whole morphogenetic process from the beginning of embryonic development.<sup>223</sup> The zygote divides from one cell into two, from two into four, and from four into eight.<sup>224</sup> These cells are called totipotent, because they have a full range of developmental capacity to turn into any type of tissues or organs that are part of the adult human body.<sup>225</sup> Totipotent cells are also able to differentiate differently in various environments, and are able to develop into a complete individual.<sup>226</sup> Once the eight-cell stage is reached, the cells lose their totipotency.<sup>227</sup>

The nature of totipotency is to execute a plan according to a given program.<sup>228</sup> Undisturbed by external intervention and left alone, totipotent cells will carry out the plan nature intended in an ordered, unique and coordinated process.<sup>229</sup> Given the right conditions, an isolated totipotent cell can start its own life cycle.<sup>230</sup> At that point, the cell could be considered a new biological identity.<sup>231</sup> Until then, totipotent cells remain part of the embryo without in any way diminishing its unique biological individuality.<sup>232</sup>

Assuming cell division, or cleavage, continues to occur, the resulting collection of cells is known as the morula.<sup>233</sup> The embryo continues to develop, and around the sixth day, a fluid-filled space forms within the morula.<sup>234</sup> A blastocyst forms as a hollow ball of cells with an inner and outer

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222. Angelo Serra & Robert Colombo, *Identity and Status of the Human Embryo: the Contribution of Biology*, in *IDENTITY AND STATUS OF HUMAN EMBRYO: PROCEEDINGS OF THIRD ASSEMBLY OF THE PONTIFICAL ACADEMY FOR LIFE* 128, 159 (Juan De Dios Vial Correa & Elio Sgreccia eds., 1998).

223. *Id.*

224. Holland, *supra* note 115.

225. *Id.*

226. Serra & Colombo, *supra* note 222, at 172.

227. Holland, *supra*, note 115, at 29.

228. Serra & Colombo, *supra* note 222, at 172.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Serra & Colombo, *supra* note 222, at 128–177.

234. Holland, *supra* note 115, at 29.

cell mass.<sup>235</sup> Stem cells are part of this inner cell mass.<sup>236</sup> They are pluripotent, or undifferentiated cells, potentially able to become a source for any type of human cell, and able to live indefinitely in culture as a cell line.<sup>237</sup>

Scientists who want to engage in embryonic stem cell research remove these stem cells from the blastocyst, and can grow them indefinitely in petrie dishes for use in medical research. The good news is that these stem cells hold the potential promise of cures for Parkinson's disease, spinal cord injuries, various cancers, and many other afflictions.<sup>238</sup> The bad news is that the removal of stem cells from a blastocyst destroys that embryo, and in the process kills the unborn. President George W. Bush's decision to permit limited federal funding for embryonic stem cell research was a step in the wrong direction.<sup>239</sup> One year after his historic speech to the nation, federally financed researchers have discovered that they are permitted by an unpublicized ruling to study new stem cell lines derived from embryos provided that the private money that pays for these experiments are not commingled with federal funds.<sup>240</sup> Germany passed the *Embryo Protection Act* in 1991<sup>241</sup> and it is time for the United States to do the same.

There is no need to push ahead with embryonic stem cell research if the same scientific goals may be accomplished without immoral methods. Adult stem cell research has proven to be successful and in the judgment of some scientists, offers just as many, if not more, possibilities of healing human diseases and conditions than embryonic stem cell research.<sup>242</sup> On this basis,

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235. Melissa Serravallo, *They Can Dish It Out, But Can We Take It? What the Culturing of Stem Cells Means for Our Future*, previously available at <http://www.gene-watch.org/magazine/vol13/13-2stemcell.htm> moved to <http://www.gene-watch.org/genewatch/archives.html> (copy on file with author and *Saint Louis University Law Journal*).

236. *See id.*

237. *See id.*

238. *See id.*

239. George W. Bush, Remarks by the President on Stem Cell Research (Aug. 9, 2001), at <http://www.whitehouse.gov/news/releases/2001/08/print/20010809-2.html>.

240. Sheryl Gay Stolberg, *Ruling by U.S. Widens Study Of Stem Cells*, N.Y. TIMES, Aug. 7, 2002, at A1.

241. *See infra* note 258.

242. *See, e.g.*, Yuehua Jiang et al., *Pluripotency of Mesenchymal Stems Cells Derived from Adult Marrow*, 418 NATURE 41, 41–49 (2002), available at [http://www.nature.com/cgi-taf/DynaPage.taf?file=/nature/journal/v418/n6893/full/nature00870\\_fs.html](http://www.nature.com/cgi-taf/DynaPage.taf?file=/nature/journal/v418/n6893/full/nature00870_fs.html). Adult stem cell research holds far more promise to benefit humanity than embryonic stem cell research. Moreover, adult stem cell research is ethically and morally uncontroversial. Adult stem cells might be the ideal source for the therapy of inherited or degenerative diseases. *Id.* Kathyjo A. Jackson et al., *Regeneration of Ischemic Cardiac Muscle and Vascular Endothelium by Adult Stem Cells*, 107 J. CLINICAL INVESTIGATION 1395, 1395–1402 (2001); Nadia N. Malouf et al., *Adult-Derived Stem Cells from the Liver Become Myocytes in the Heart in Vivo*, 158 AM. J. PATHOLOGY 1929, 1929–1935 (2001); A.P. Beltrami et al., *Evidence That Human Cardiac Myocytes Divide after Myocardial Infarction*, 344 NEW ENG. J. MED. 1750 (2001).

the best news of all is that no embryo needs to die to advance stem cell research.

It is wrong to participate in immoral scientific and medical research, even if the knowledge gained from such activities might ultimately bring positive effects. Human beings are not reducible to a mere sum of their biological parts. Prudence suggests that when it comes to irreversible decisions of life and death it is better to be morally safe now than sorry later.<sup>243</sup>

#### VII. THE MORAL IMPERATIVE TO PROTECT HUMAN LIFE FROM CONCEPTION

There is a moral imperative to affirm and constitutionally confer the status of personhood upon all living human organisms at the time of creation. This moral imperative represents our society's rejection of inequality and all forms of human slavery. Extending constitutional protection to all members of the human family is consistent with liberal equality. Civil libertarians must not hesitate when it comes to speaking out on the ethics of destroying and exploiting innocent unborn human beings. Not to do so, is sheer hypocrisy.

Pro-abortion feminists resent discrimination against all women on the basis of sex, yet they engage in wholesale discrimination against unborn human beings, including females, on the basis of age, size and power. These same feminists reject the notion that marriage results in ownership by their husband, but insist that they own their unborn children and may harm or kill them at their whim. Feminists love their freedom and hate having their fate decided by the choice of any other person, especially a man. Yet, these same women insist the decision whether or not to abort their unborn children is a matter of choice belonging exclusively to the mother and no one else.<sup>244</sup>

Women who do not understand that an abortion terminates the life of a human being cannot exercise choice responsibly and cannot give legally valid informed consent to an abortion. On October 29, 2002, in *Acuna v. Turkish*, the Appellate Division of the Superior Court of New Jersey allowed a common law tort claim for emotional distress by a twenty-nine-year-old mother of two children who gave her doctor consent to abort her eight-week-old fetus.<sup>245</sup> When the pregnant woman asked her doctor "if there was a baby already in [her,]" she received the answer, "don't be stupid, it's only blood."<sup>246</sup> At trial, the doctor testified, "a seven-week pregnancy is not a human being."<sup>247</sup> Rose Acuna's lawsuit against Dr. Sheldon Turkish was eventually dismissed by

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243. Ludger Honnefelder, *The Concept of a Person in Moral Philosophy*, in *SANCTITY OF LIFE AND HUMAN DIGNITY* 139, 155 (Kurt Bayertz ed., 1996).

244. Rosemary Bottcher, *Pro Abortionist Poison Feminism*, in *PRO-LIFE FEMINISM: DIFFERENT VOICES* 45 (1985).

245. *Acuna v. Turkish*, 808 A.2d 149, 150 (N.J. Super. Ct. App. Div. 2002).

246. *Id.* at 152.

247. *Id.* The plaintiff's claim for wrongful death was dismissed, because the Court followed *Roe* and denied personhood to the aborted fetus. *Id.*

Superior Court Judge Amy Chambers, who ruled in November 2003 that informed consent did not extend to answering a patient's question about whether she was about to terminate the life of a living human being.<sup>248</sup>

Does a pregnant woman who knows she is carrying unborn children have the legal right to kill someone who is attempting to harm her fetuses?<sup>249</sup> In *People v. Kurr*, Jaelyn Kurr was seventeen weeks pregnant with quadruplets when she stabbed and killed her abusive boyfriend who unlawfully punched her twice in the stomach during an argument regarding his cocaine use. She suffered a miscarriage a few weeks later. In Michigan, a person may kill someone in lawful defense of another. At trial, the judge withheld from the jury Kurr's defense of protecting "another," on the basis that her fetuses was not viable and therefore not human beings. She was convicted of voluntary manslaughter.

On October 4, 2002, the Court of Appeals ordered a new trial, because Kurr was wrongfully denied the defense of protecting another, and was thereby deprived of her constitutional right to due process.<sup>250</sup> The court held that non-viable fetuses are entitled to protection from unlawful assault, although not from a lawful assault as permitted by *Roe* during a medical abortion.<sup>251</sup>

Permitting Kurr this defense is consistent with the public policy behind Michigan's fetal protection statute.<sup>252</sup> The case has been appealed to the Michigan Supreme Court, which may hear arguments as to when human life begins.<sup>253</sup>

In the final analysis, all of us are compelled to return to biology to answer the question of when a human being is created. To not answer this question is itself an answer and places the power of life and death with those people who hold values inconsistent with equality and respect for the sanctity of all living human organisms. This is an invitation to social, political, and cultural disaster. Even the death of one unborn child makes a difference.<sup>254</sup>

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248. See Damon Adams, *New Jersey Obstetrician-Gynecologist Wins Informed Consent Case*, AMEDNEWS.COM, <http://www.ama-assn.org/amednews/2004/01/05/prsc0105.htm> (Jan. 5, 2004).

249. *People v. Kurr*, 654 N.W.2d 651, 653 (Mich. Ct. App. 2002).

250. *Id.* at 657.

251. *Id.* at 656.

252. *Id.* at 657.

253. Jeff Goldblatt, *Court May Tackle Question of When Life Begins*, FOX NEWS.COM, at <http://www.foxnews.com/story/0,2933,70997,00.html> (Nov. 21, 2002).

254. Francis Marsden, *Credo For Catholic Times*, at [http://stjosephs1.homestead.com/files/Ctime453\\_\\_Holy\\_Family\\_Sunday.htm](http://stjosephs1.homestead.com/files/Ctime453__Holy_Family_Sunday.htm) (Jan. 1, 2000) Consider the following case histories:

1. [There is] a preacher and wife who are living in dire poverty. They already have 14 children. Now the wife [discovers she is] pregnant [again]. Considering their strained [financial] circumstances and the excessive world population, would you [recommend] an abortion?



The United States Supreme Court will hopefully not squander another opportunity to stop the deaths of millions of unborn children and will declare that constitutional personhood begins from the time of conception.<sup>255</sup> The Court may benefit from the appointment of legal guardians to advocate for the civil liberties of the unborn.<sup>256</sup> The continued denial of legal personhood to the unborn is a means to achieve various utilitarian ends and invites judges to turn a blind eye to reality. Personhood is an imaginary status that cannot alter the biological fact of humanity:

And personhood is not a matter of fact. It is not a thing or a concrete property inhering in a thing. It is a status, legal and moral, that we confer as a normative matter at a certain point in human development. Stripped of any reifying (or theifying) premises, personhood is no different in its conceptual structure from another status conferred later in life: adulthood.<sup>257</sup>

2. A [man] is sick with syphilis. [His wife] has [tuberculosis]. They have four children. The first is blind, the second was stillborn, the third is deaf, and the fourth has TB. [Now their mother is] pregnant again. Given the high probability that the baby will be born congenitally handicapped, would you recommend abortion?

3. A teenage girl, 14-15 years old, is pregnant. [She is] not married. Her fiancé is not the father of the baby, and [he is] very upset. Would you [recommend] an abortion?

How did you answer? In the first case, if you said yes, you have just killed John Wesley, a great evangelist of the 18th century and founder of Methodism. In the second case, you would have killed Ludwig van Beethoven. If you said yes in the third case, you [would have] consented to the [death] of Jesus Christ.

*Id.*

255. As of January 11, 2004, since the decision in *Roe v. Wade*, the death count from abortion alone is 44, 219, 743. This figure does not include deaths of the unborn caused by contraceptives that destroy embryos, or the deaths of embryos in scientific or medical experiments or procedures. See American Life League, at <http://www.all.org/> (last visited Jan. 11, 2004).

256. See *In re Guardianship of J.D.S., v. Dept. of Children and Families*, No. 5D03-1921, 2004 Fla. App. LEXIS 161 (Fla. Dist. Ct. App. Jan. 9, 2004). In denying the appointment of a guardian for the fetus of a legally incompetent mother pregnant with a viable fetus, Justice Orfinger observed:

If a fetus has rights, then all fetuses have rights. And, if a fetus is a person, then all fetuses are people, not just those residing in the womb of an incompetent mother. If we recognize a fetus as a person, we must accept that the unborn would have the rights guaranteed persons under the Constitutions of the United States and the State of Florida.

*Id.* at \*18 (Orfinger, J., concurring). In dissent, Judge Pleus stated that a trial court has full authority to appoint a plenary guardian for an unborn child because that child is a minor, and because the State has a compelling interest in the health, welfare, and life of the unborn child. *Id.* at \*\*33-34 (Pleus, J., dissenting). Only a court-appointed guardian that is independent and impartial pursuant to a fiduciary relationship can protect the unborn from being at the mercy of others who may have interests conflicting with the unborn's presumed desire not to be aborted. Judge Pleus predicted that *Roe v. Wade* will one day be overturned and that the courts will no longer turn a blind eye to the reality that the unborn are persons from the moment of conception. See *id.* at \*\*33-44.

257. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 601 (1991).

Philosophy that is disconnected from biological truth is of little worth in the debate regarding the value of incipient human life. The legal and moral distinction between person and human being must be harmonized if there is to be true equality and fairness among all members of the human family. Justice requires that there be laws to uphold the sanctity of all human life, from the very beginning to the very end of life.

Wisdom comes at the price of suffering. It is very helpful to listen to what German scientists, sensitive to the evil potential of human medical experimentation, now say after the lessons of the Nazi regime:

The determination of the beginning of human life by another human being cannot be objective as this determination is a function of an individual value system and what that individual believes to be essential. The description of the human embryo in terms of a successively differentiating cell mass does not mean that this model can be used in the same way for questions involving moral judgment. Ethical statements always include the point of view and the value system of the person making the statement. To answer the question about the beginning of personal dignity does not mean describing a natural phenomenon but deciding on value in moral and ethical terms. Biological realities do not include moral standards. The status of an embryo is a dignity, which is bestowed on it. It is not based on its own inner quality but on an attitude towards the embryo from autonomous subjects.

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In Germany, the general opinion is, however, that despite the existence of different values and interests, unborn human life has an inalienable right to human dignity and protection. Because this dignity is not a fact which can be determined empirically, it is not bound to certain abilities or value judgments. Human dignity cannot be divided and is of value in principle from the very beginning.<sup>258</sup>

If bioethicists like Singer are successful in persuading Americans to maintain and expand the membership of Depersonalized Humans to attain utilitarian objectives, the cost will be the abandonment of those civil libertarian values upon which this nation was founded. It is not a matter of getting rid of values in a secular society; the war is between utilitarian philosophy and traditional ideas of liberal equality.

There is a moral imperative for all true civil libertarians to reject all attempts to classify human beings according to personhood criteria. "Quality of life" is no substitute for the "sanctity of human life." Sanctity of life offers the best approach to protect our civil liberties and to ensure dignity and respect

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258. H. W. Michelmann & B. Hinney, *Ethical Reflections on the Status of the Preimplantation Embryo Leading to the German Embryo Protection Act*, 1 SCI. & ENGINEERING ETHICS 145, 147-148 (1995).

for all persons—as this article define persons.<sup>259</sup> The most practical and effective first step to reach this goal is to vigorously defend the right to life of the unborn human.

The assessment of the right of a human embryo for protection according to utilitarian, genetic, morphological, or race-ideological points of view result in grading and limiting life protection. The protection of the individual human being has to be valid uniformly during its stages in the same manner and from the very beginning. It must not depend on phases of development, so-called “degrees of humanity,” because then they would be criteria of selection. Created life must always and under all circumstances have the right to be born.<sup>260</sup>

The abortion issue is at the core of the moral debate over exploitation and oppression of Depersonalized Humans. That is where the decisive battle against human slavery in the Twenty-first Century will continue to be fought and ultimately won. Either the unborn are human beings and are constitutional persons or they are not. How this question is ultimately answered will determine how our society will be judged by future generations.

#### VIII. CONCLUSION

The unborn are human beings and persons from the time of conception. The legal distinction between a person and human being must be abolished if we are to live in a society of equals. In a free and democratic society like America, there is no place for a class of Depersonalized Humans. Constitutional personhood and protection of all human beings must begin from the time of their creation and continue until natural death.

It remains to be seen whether civil libertarians will continue to abdicate their role as the guardian of all the oppressed and accept the challenge to abolish the laws that have revived a new form of human slavery in Twenty-first Century America.

“Whoever saves one, saves the whole human race; whoever kills one, kills mankind.”<sup>261</sup>

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259. This article defines person as “a living organism of the species *Homo sapiens*, whether created inside or outside a womb.”

260. Michelmann & Hinney, *supra* note 258, at 150.

261. EDMUND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 71 (1955).