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THE PUZZLE OF IVF

Dena S. Davis, J.D., Ph.D.*

I. INTRODUCTION

This essay seeks to address a puzzling element of the current political and legal struggles over abortion in the United States: if, as pro-life activists insist, embryos are morally equivalent to living persons, then why do these activists not oppose *in vitro* fertilization (IVF) as aggressively as they oppose abortion? IVF accounts for a significant number of destroyed embryos. Constitutionally, IVF appears to be a much more vulnerable target than abortion. However, legislative and political attempts to attack and restrict IVF are few,¹ while attempts to erode women's capability to terminate

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¹ See, e.g., Janet Dolgin, *Surrounding Embryos: Biology, Ideology, and Politics*, 16 HEALTH MATRIS 27 (2000).

For several decades, pro-life responses to IVF and embryo cryopreservation in the United States were muted. The Catholic Church has consistently opposed IVF, embryo cryopreservation, and other forms of infertility care that separate reproduction from sexuality. However, for the most part, neither the Catholic Church nor evangelical and fundamentalist Protestant churches actively opposed the development of the industry in infertility care, probably because the aim of assisting couples . . . to have children seemed praiseworthy.

Id. Susan Frelich Appleton makes this point in *Unraveling the Seamless Garment: Loose Threads in Pro-Life Progressivism*:

Why are those who profess the goal of protecting embryonic and fetal human life not also taking aim at the fertility industry and the practice of IVF in particular, including its purposeful creation and destruction of excess embryos? Consider a telling illustration from my own state, Missouri. When outspoken abortion-rights foe Catherine Hanaway became Speaker of the Missouri House of Representatives in 2002, she promised during the opening of the legislative session "to protect those children who would be killed even before they are born." Yet a contemporaneous biographical story in the local newspaper detailed her efforts to fight infertility, including IVF attempts using her own eggs and additional efforts using her sister's eggs.

2 U. ST. THOMAS L.J. 294, 301 (2005).

pregnancies are a constant feature of our political and legal landscape.

II. IVF AND ABORTION IN AMERICA

In 2002, the most recent year from which we currently have statistics, 1.29 million abortions took place in the United States, down from an estimated 1.36 million in 1996.² From 1973 (when *Roe v. Wade*³ was decided) through 2002, more than 42 million legal abortions occurred.⁴ Of those abortions, approximately 88% occur in the first twelve to thirteen weeks.⁵ However, it is a core belief of the pro-life movement that human personhood begins at conception;⁶ therefore an early abortion is as much the killing of a human person, a “little girl or little boy,”⁷ as one that occurs late in a pregnancy. In fact, pro-life activists have campaigned against the “morning-after pill” and other modalities for averting pregnancy that sometimes act as abortifacients.⁸ The Missouri statute preamble that was one of the many issues in *Webster v. Reproductive Health Services* states the “findings” by the Missouri Legislature that “[t]he life of each human being begins at conception, [and] unborn children have protectable interests in life, health, and well-being.”⁹ The

² See LAWRENCE B. FINER & STANLEY K. HENSHAW, GUTTMACHER INST., ESTIMATES OF U.S. ABORTION INCIDENCE IN 2001 AND 2002, at 7 (2005).

³ 410 U.S. 113 (1973).

⁴ GUTTMACHER INST., FACTS IN BRIEF: INDUCED ABORTION IN THE UNITED STATES (2006), http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited May 6, 2006) [hereinafter GUTTMACHER INST., FACTS IN BRIEF].

⁵ Susan Dudley, *Abortion After Twelve Weeks*, NAT'L ABORTION FED'N (2003).

⁶ Janet E. Smith, *I Knit You in Your Mother's Womb*, 8 CHRISTIAN BIOETHICS 125, 134 (2002) (stating “The Catholic Church . . . is among those who believe that the human being must be respected as a person at all stages of existence: as a zygote, an embryo, a fetus, an infant, an adolescent, an adult, and as a senior citizen.”); but see Margaret A. Farley, *Roman Catholic Views on Research Involving Human Embryonic Stem Cells*, 3 NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH: RELIGIOUS PERSPECTIVES D4, D4 (June 2000) (explaining the minority view that “the human embryo in its earliest stages . . . constitute[s] an individualized human entity with the settled inherent potential to become a human person,” and therefore its moral status is “not that of a person.”).

⁷ See, e.g., *Fresh Air from WHYY: Sen. Rick Santorum on Abortion*, (NPR radio broadcast Aug. 30, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3878884> (last visited Apr. 26, 2006).

⁸ Jeff Stryker, ‘Emergency’ Birth Control: Access Issues, N.Y. TIMES, Mar. 11, 2003, at 5; see also THE FREE DICTIONARY BY FARLEX (2005) (defining “abortifacient” as “a substance or device used to induce abortion”), available at <http://www.thefreedictionary.com/abortifacient> (last visited Apr. 26, 2006).

⁹ 492 U.S. 490 (1989).

opposition of the religious right to human embryonic stem cell research is grounded in the belief that these embryos are human lives that deserve the same moral and legal protections as you and I.¹⁰

It is difficult to produce a figure on how many embryos are destroyed yearly as a result of the use of IVF by infertile couples. The process of IVF, however, is almost guaranteed to produce embryo wastage.¹¹ IVF “involves removing a ripened egg or eggs from the female’s ovary, fertilizing it with semen, incubating the dividing cells in a laboratory dish and then placing one or more developing embryos in the uterus at the appropriate time.”¹² Because egg retrieval involves an invasive procedure for the woman, the laboratory processes are expensive, and fertility centers thrive on good success rates, often IVF is preceded by the use of ovulation-stimulating drugs to increase the number of mature eggs that can be retrieved and fertilized at one time.¹³ Freezing embryos allows physicians to choose how many embryos are transferred at one time, avoiding risky multiple pregnancies.¹⁴ Although cryopreservation of sperm is common, freezing unfertilized eggs remains experimental at this time.¹⁵ The decision of how many embryos to implant at one time is tricky and controversial. Because not all embryos implant, there is incentive to transfer a relatively large number (four or five) in the hope that one or two will “make it.”¹⁶ On the other

¹⁰ Maeve Reston, *The Two Faces of the Stem-Cell Debate: Arlen Specter and Rick Santorum*, POST-GAZETTE.COM, Dec. 20, 2005, <http://www.post-gazette.com/pg/05149/512508.stm> (last visited Apr. 26, 2006).

¹¹ See John C. Martin, *Embryos Implanted in IVF Fail More Often Than Not: Doctors*, FERTILITY NEIGHBORHOOD, Sept. 20, 2005, http://fertilityneighborhood.com/content/in_the_news/archive_1274.aspx (last visited Apr. 26, 2006); see also Andrea D. Gurmankin et al., *Embryo Disposal Practices in IVF Clinics in the United States*, 22 POL. & LIFE SCI. 4, 62 (2004) (noting that “a 2004 study of embryo disposal practices in U.S. IVF clinics found that 97% reported creating more embryos than would be transferred in a given cycle.”).

¹² RESOLVE: THE NAT’L FERTILITY ASSOC., ASSISTED REPRODUCTIVE TECHNOLOGY (2004), available at http://www.resolve.org/site/PageServer?pagename=lrn_wamo_ART (last visited Apr. 26, 2006).

¹³ See PREGNANCY-INFO.NET, IN VITRO FERTILIZATION (2005), http://www.pregnancy-info.net/infertility_in_vitro_fertilization.html (last visited Apr. 26, 2006).

¹⁴ ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 30 (1989).

¹⁵ Kate Johnson, ASRM: *Egg Cryopreservation Still Experimental; Egg, Ovarian Tissue Cryopreservation Should Not be Marketed to Healthy Women, According to a New Report*, Int’l Med. News Group & Gale Group (2004), available at http://www.findarticles.com/p/articles/mi_m0CYD/is_23_39/ai_n8581185/print (last visited Apr. 26, 2006).

¹⁶ Megan Rachele Leef, *The Infertility Industry: Inspiring Technology Gives Birth to Complex Moral Uncertainties* (2002), available at <http://leda.law.harvard.edu/leda/data/459/Leef.rtf> (last visited Apr. 26, 2006).

hand, multiple births pose very serious risks to the mother and the fetuses.¹⁷ Even twins are far riskier than singleton births. Women who find themselves carrying three or more embryos are frequently counseled by their doctors to selectively terminate one or more embryos.¹⁸ Thus, the only reasonably efficient way to conduct IVF is to retrieve as many ripened eggs as possible at one time from the woman, induce as many of those eggs as possible to be fertilized in the lab, and then freeze those fertilized eggs (or early embryos) that are not immediately transferred to the uterus.¹⁹ A small number of couples, for religious or moral reasons, insist on creating only as many embryos as will be implanted per cycle.²⁰ However, for most people who hope to become parents through IVF, the process is virtually guaranteed to produce significant numbers of stored embryos.

It is generally agreed that at least 400,000 human embryos are presently in storage in the United States.²¹ Most of those embryos will be abandoned or discarded.²² At least 5% of these embryos have been left behind in fertility centers by couples who moved and cannot be contacted.²³ In the United States, the fertility industry is

¹⁷ See generally ABC Health Matters, *IVF* (2006), <http://www.abc.net.au/health/features/infertility/ivf.htm> (last visited Apr. 26, 2006); see also Betty R. Vohr & Marilee Allen, *Extreme Prematurity: The Continuing Dilemma*, 352 NEW ENG. J. MED. 71 (2005) (commenting on the high rate of disability among children born prematurely and referencing the contribution of assisted reproductive technologies to this problem).

¹⁸ Lars Noah, *Assisted Reproduction Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 631 (2003) ("Ultimately, because they cannot or, for economic reasons, do not act to minimize the chance that numerous embryos will implant, physicians may have to recommend 'selective reduction' after the fact in order to avoid the maternal and fetal risks associated with multiple gestational pregnancies.").

¹⁹ The decision of how many embryos to implant at one time is tricky and controversial. Since not all embryos implant, there is incentive to transfer a relatively large number (four or five) in the hope that one or two will "make it." On the other hand, multiple births pose very serious risks to the mother and the fetuses. See generally Vohr & Allen, *supra* note 17, at 71 (commenting on the high rate of disability among children born prematurely and referencing the contribution of assisted reproductive technologies to this problem.). Women who find themselves carrying three or more embryos are frequently counseled by their doctors to selectively terminate one or more embryos.

²⁰ The Cleveland Clinic, for example, will work with couples who wish to follow this practice. Other infertility centers may not wish to do so, however, because it lowers their reported "success" rates. Author's interview with James Goldfarb, M.D. (Apr. 23, 2006).

²¹ Rick Weiss, *400,000 Human Embryos Frozen in U.S.; Number at Fertility Clinics is Far Greater than Previous Estimates, Survey Finds*, B. GLOBE, May 8, 2003, at A8.

²² Judith Graham, *Crowded Labs Feel Pressure to Discard Unwanted Embryos*, CHI. TRIB., Sept. 12, 2004, at C1.

²³ *Id.*

largely unregulated,²⁴ although some states, such as New Hampshire, do regulate how long embryos can be stored.²⁵ Only about 65% of embryos survive the thawing process, and only 14% of assisted reproduction cycles (that is, attempts to achieve the implantation of a viable embryo) involve cryopreserved embryos.²⁶

One state, Louisiana, has declared the *in vitro* embryo a “juridical person” that cannot legally be destroyed by its parents or the clinic, but seemingly must be used by its parents or donated to another couple.²⁷ However, because Louisiana law does not impose a time limit for how long embryos can be kept in their frozen state,²⁸ parents could presumably get around the law by keeping the embryos preserved indefinitely.

A very small number of stored embryos will be donated to other hopeful parents.²⁹ Nightlight Christian Adoptions, a non-profit organization that matches couples who have produced spare embryos with couples who wish to “adopt” an embryo, gestate it, and raise the resulting child, claims that ninety-nine babies have

²⁴ See Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2794 (2005) (tying lack of regulation to lack of federal funding).

²⁵ See Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MENN. J.L. SCI. & TECH. 505, 536–46 (2005). However, many other countries regulate how long embryos can be stored, fearing that they may degrade and be unsuitable for implantation. *Id.* at 545–59. The time limit in Australia, for instance, varies by state but cannot exceed ten years. Sheryl de Lacey, *Parent Identity and “Virtual” Children: Why Patients Discard Rather than Donate Unused Embryos*, 20 HUM. REPROD. 1661, 1661 (2005). In Denmark the maximum is twenty-four months, with the result that approximately 2500 embryos are destroyed there annually. S. Bangsbo et al., *Patients’ Attitudes Toward Donation of Surplus Cryopreserved Embryos for Treatment or Research*, 19 HUM. REPROD. 2415, 2415 (2004). In the United Kingdom, where the government recently imposed a five year limit (with a one-time five year extension for those embryos currently in storage for more than five years), many progenitors could not be contacted, and tens of thousands of embryos were destroyed. HUM. FERTILISATION & EMBRYOLOGY AUTH., EMBRYO STORAGE (May 2003).

²⁶ PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 29 (2004), available at <http://www.bioethics.gov/reports/reproductionandresponsibility> (last visited Apr. 26, 2006).

²⁷ The Louisiana statute states:

A viable *in vitro* fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An *in vitro* fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person.

LA. REV. STAT. ANN. § 9:129 (2005).

²⁸ See generally *id.*

²⁹ de Lacey, *supra* note 25, at 1661.

been born from its "Snowflakes" program to date.³⁰ President George W. Bush has publicly praised this program, and Congress has allocated approximately three million dollars in grants to promote "embryo adoption," much of it going to the Snowflakes program.³¹

However, there appear to be deeply seated reasons why most people who have created stored embryos are unwilling to donate them to other infertile couples (although they are more likely to be willing to donate them for research).³² A typical pattern reveals that prospective parents entering the IVF process, when asked for their preferences regarding possible unused embryos, will express an interest in donating the embryos to other infertile couples with whom they empathize.³³ But when these same couples complete their families through IVF, they now identify more as parents and less as infertile couples and view their unused embryos more like children.³⁴ Paradoxical as this may seem, the more these stored embryos come to seem like children to their "parents," the less willing the "parents" are to donate them to infertile couples and to imagine their children growing up in unknown circumstances.³⁵ Thus, however legally inappropriate "adoption" may be to describe what the Snowflakes program does,³⁶ donating embryos to other couples does come to feel more and more like giving up a child for adoption. A lawyer who works in this area described one couple's journey that began with eagerness to donate their extra embryos to friends in their neighborhood:

[A]fter really exploring what this might mean to their existing children, what it might mean for the resulting child, how they would deal with the children they were raising and this child who was going to be raised down the street, they couldn't reach a comfort level. The wife called me in tears: 'We want to do this, we want to be generous, I feel selfish, but I can't do this.'³⁷

³⁰ NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTIONS FACT SHEET 1, <http://www.nightlight.org/snowflakefactsheet.pdf> (last visited Apr. 26, 2006).

³¹ Susan L. Crockin, *Embryo Wars; How Do You 'Adopt' a Frozen Egg?*, B. GLOBE, Dec. 4, 2005, at D12.

³² See de Lacey, *supra* note 25, at 1664–65 (explaining the difficulty many couples have in deciding how best to dispose of their unused embryos).

³³ *Id.* at 1664.

³⁴ *Id.* at 1661.

³⁵ *Id.* at 1665.

³⁶ Crockin, *supra* note 31 (noting that "[t]here is no such thing as 'embryo adoption,'" because embryos are not children but "a collection of undifferentiated cells").

³⁷ Pam Belluck, *It's Not so Easy to Adopt an Embryo*, N.Y. TIMES, June 12, 2005, at D5.

Pro-life adherents, who often seem to feel that, if their pro-choice opponents could only “see what they see,” everyone would agree that “of course” human embryos are children,³⁸ must be deeply puzzled by this phenomenon. Studies consistently find that couples engaged in IVF do begin to think of their embryos as “virtual children” who “lacked physical presence but contained biology and spirituality,” but that the more the stored embryos are thought of as persons or “like an extended family you don’t see,” the less willing parents are to donate their embryos to other couples.³⁹ Parents worry that their embryos, if donated, may be brought up in families inappropriate for their personalities, or mistreated, or perhaps orphaned through the accidental death of their adoptive parents.⁴⁰ Couples describe themselves as “anguished” and torn, but nevertheless, almost always opt to discard embryos, or simply decide not to decide by keeping the embryos frozen indefinitely, rather than donate them to other couples.⁴¹

Infertility is a growing problem in America, in part because people are marrying and starting families later.⁴² Healthy newborn babies available for adoption are scarce.⁴³ Further, it is my view that the increasing emphasis on genetics, including genetic predispositions to behavioral as well as physical characteristics,⁴⁴ has made prospective parents more wary of adoption—whether of embryos or of children. Elizabeth Bartholet has described and criticized an attitude of “biologism” that makes adoption less attractive than IVF

³⁸ RONALD M. GREEN, *THE HUMAN EMBRYO RESEARCH DEBATES: BIOETHICS IN THE VORTEX OF CONTROVERSY* 47–48 (2001).

³⁹ de Lacey, *supra* note 25, at 1665, 1667.

⁴⁰ *Id.* at 1666.

⁴¹ *Id.* at 1664–65. Van Voorhis et al. described an embryo donation program which began with 365 couples in their IVF program; forty of those couples initially chose to donate spare embryos to other couples, but by the time couples on both sides of the procedure were screened for various physical and mental characteristics, the number had reduced to eight completed transfers and four pregnancies. Bradley J. Van Voorhis et al., *Establishment of a Successful Donor Embryo Program: Medical, Ethical, and Policy Issues*, 71 *FERTILITY & STERILITY* 604 (1999).

⁴² PLANNED PARENTHOOD OF AMERICA, *INFERTILITY*, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/pregnancy/pub-infertility.xml> (last visited Apr. 26, 2006).

⁴³ BONNICKSEN, *supra* note 14, at 24.

⁴⁴ See generally Erik Parens, *Genetic Differences and Human Identities: On Why Talking About Behavioral Genetics is Important and Difficult*, 34 *HASTINGS CTR. REPROD. SPECIAL SUPP.* S1 (2004).

and other fertility technologies.⁴⁵ The recent trend in America toward increasing vigilance over the fetal environment, including warning pregnant women to abstain entirely from cigarettes and alcohol,⁴⁶ probably makes prospective parents cautious about adopting a child whose mother may not have been vigilant about the fetus's health, or who may not even have known that she was pregnant until after the crucial first trimester.

From its inception in 1978, with the birth of the first "test-tube baby," and the first successful birth of a child from a cryopreserved embryo in 1984, IVF has "lost its ability to shock" and become so commonplace in infertility practice that it is now considered to be a first, rather than last, resort for tubal infertility.⁴⁷ Between 1978 and 1994, public acceptance of IVF in the United States increased from 60 to 75%.⁴⁸ IVF offers couples who have not been able to conceive in the usual manner an opportunity to have children who are genetically "theirs."⁴⁹ This is true even if the embryo created by IVF is gestated by a surrogate, or created by gamete donation, because at least one of the parents' genetic material is passed down to the child. At present, approximately 100,000 children have been born in the United States through IVF.⁵⁰ Some states now require health insurance plans to cover infertility treatment, thereby expanding the number of infertile people able to use assisted reproductive technologies.⁵¹ Thus, it appears that IVF will become even more common, and excess embryos will continue to be part of the American reproductive landscape for the foreseeable future.⁵²

⁴⁵ ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (1999).

⁴⁶ See, e.g., Jacquelyn Bertrand et al., *Guidelines for Identifying and Referring Persons with Fetal Alcohol Syndrome*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5411a1.htm> (last visited Apr. 26, 2006).

⁴⁷ BONNICKSEN, *supra* note 14, at 5.

⁴⁸ Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 283-84 (1997), quoted in Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 525 (2005).

⁴⁹ See Deborah Spar, *Business and Medicine: Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531 (2005).

⁵⁰ Nicholas Wade, *Clinics Hold More Embryos Than Had Been Thought*, N.Y. TIMES, May 9, 2003, at A24 [hereinafter *Clinics Hold More Embryos*].

⁵¹ According to RESOLVE, fifteen states have enacted some sort of fertility coverage law. RESOLVE: THE NAT'L FERTILITY ASSOC., STATE COVERAGE DESCRIPTIONS, http://www.resolve.org/site/PageServer?pagename=ln_ic_coverage (last visited Apr. 26, 2006).

⁵² The most recent statistics available from the Centers of Disease Control & Prevention are from 2001; live births through IVF or related technologies in 2001 were 16% higher than in

III. CONSTITUTIONAL PROTECTIONS FOR ABORTION AND FOR IVF

As we learned from the discussion above, IVF is an increasingly popular option for infertile couples in the United States. With very few exceptions, couples who make use of IVF are, at least potentially, generating embryos that they will later discard or donate for research.⁵³ Some couples use all their embryos in the process of attempting to have a family, but approximately 400,000 embryos now remain in storage, and that amount is expected to grow.⁵⁴ Most of the stored embryos will eventually be destroyed in some way—discarded, abandoned, or donated for research.⁵⁵ Time limits on embryo storage, such as those enacted in other countries, will reduce the number in storage at a specific time, but will not ultimately affect the number of embryos destroyed.⁵⁶

Why, then, is the pro-life movement virtually silent on IVF,⁵⁷ while continuing its unrelenting attack on abortion? This is especially puzzling when one considers that abortion, involving as it does an embryo or fetus within the body of a woman, is a much more difficult legal target than IVF. In the next pages, I will briefly discuss the constitutional protections for abortion and for the use of assisted reproductive technologies (ARTs), including IVF.

A. Abortion

By the end of the nineteenth century, almost all the states had laws restricting women's access to abortion.⁵⁸ Ironically, it was largely physicians who had lobbied for such laws,⁵⁹ but by the mid-

the previous year. CTRS. DISEASE CONTROL & PREV., ASSISTED REPRODUCTIVE TECHNOLOGY, <http://www.cdc.gov/reproductivehealth/art.htm> (last visited Apr. 26, 2006).

⁵³ See Rick Weiss, *400,000 Human Embryos Frozen in U.S.*, WASH. POST., May 8, 2003, at A10 (noting that although 87% of surplus embryos are "reserved for ongoing fertility efforts" by patients, many are unlikely to be used because the couple will either succeed in giving birth or simply give up) [hereinafter *400,000 Embryos Frozen*].

⁵⁴ *Clinics Hold More Embryos*, *supra* note 50.

⁵⁵ *400,000 Embryos Frozen*, *supra* note 53.

⁵⁶ See generally Andrea D. Gurmankin et al., *Embryo Disposal Practices in IVF Clinics in the United States*, 22 POL. & LIFE SCI. 2 (2004) (noting and analyzing the disposal practices of 217 IVF clinics in the United States).

⁵⁷ Steven Kotler, *The Final Frontier: Depending on Whom You Ask, Stem-Cell Research Is Either a Medical Godsend or Further Proof That God Is Dead*, L.A. WKLY., Jan. 31, 2003, quoted in Janet Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U.L. REV. 101 (2003).

⁵⁸ KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 15 (1984).

⁵⁹ *Id.* at 16.

dle of the twentieth century, it was physicians, in coalition with women's groups, liberal clergy, and others, who were in the forefront of the abortion reform movement.⁶⁰ Although a few states had already passed liberalized abortion laws by 1970, the dramatic change came in 1973, when *Roe v. Wade* overturned a restrictive Texas statute.⁶¹ Despite tremendous political pressure, changes in Supreme Court justices, and a number of Presidents who vowed to return the United States to its pre-*Roe* status, the basic right affirmed in *Roe* has never been overturned.⁶² The "essential" holding in *Roe* was upheld in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶³ where the Court held that state regulations that have the "incidental effect of increasing the cost or decreasing the availability" are permissible, so long as they do not place an "undue burden" upon the woman's ability to access an abortion.⁶⁴

The Court in *Casey* upheld obstacles to a woman's access to abortion, including mandatory twenty-four hour waiting periods and other impediments that made it more difficult for abortion clinics to operate or for women to get to them.⁶⁵ Pro-life groups responded with a strategy that built progressively higher walls between women and their access to abortion.⁶⁶ Young women, poorly educated women, and low-income women were, of course, the hardest hit.⁶⁷ In Mississippi, for example, there is now only one abortion clinic; 60% of Mississippians seeking abortion travel to another state, such as Georgia.⁶⁸ Georgia laws, which require that patients speak face-to-face with a physician at least twenty-four hours before the procedure, mean that these women must lose more days of work, travel twice or pay for lodging, organize complicated child-care, and so on.⁶⁹

⁶⁰ BERNARD N. NATHANSON, *ABORTING AMERICA* 46–68 (1979).

⁶¹ 410 U.S. 113, 164 (1973).

⁶² See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

⁶³ *Id.*

⁶⁴ *Id.* at 874.

⁶⁵ *Id.* at 885–87.

⁶⁶ See *The Last Abortion Clinic* (PBS television broadcast Nov. 8, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/clinic/etc/script.html> (last visited Apr. 26, 2006) (examining the parental notification laws for minors and the Partial Birth Abortion Ban Act of 2005).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Despite these obstacles, the right to abortion, at least in theory, remains strong in the United States. Most Court-watchers do not believe that even a Court that has moved significantly to the right is likely to overturn the basic premises of *Roe* and *Casey*.⁷⁰ Further, if a future Court overturned *Roe*, many states would continue to have liberal abortion laws.⁷¹

B. IVF

Some legal scholars, most notably John Robertson, have argued that the constitutional protection of procreative liberty protects the liberty *to* procreate (including procreation with technological assistance) as strongly as it protects the liberty *not to* procreate.⁷² Robertson claims that the right to procreate is regarded as a basic human right that is “respected because of the centrality of reproduction to personal identity, meaning, and dignity.”⁷³ He further argues that “noncoital, collaborative treatments for infertility should be respected to the same extent as coital reproduction is.”⁷⁴ However true that may be in theory, it is nonetheless the case that all the Supreme Court cases, and most relevant lower court cases as well, concern themselves with the liberty not to procreate.

The modern day privacy cases begin with *Griswold*⁷⁵ and *Baird*,⁷⁶ both of which protect a person’s right to use contraception to prevent pregnancy. *Roe* most famously follows, protecting a wo-

⁷⁰ See *id.*; Richard H.W. Maloy, *Will New Appointees to the Supreme Court Be Able to Effect an Overruling of Roe v. Wade?*, 28 W. NEW ENG. L. REV. 29 (2005) (arguing that “regardless of any agenda on the part of new appointees to the Supreme Court, it is very unlikely that *Roe* will be overturned in the near future”). Veteran Supreme Court analyst Linda Greenhouse stated that there is no way that even the newly constituted Court, with Chief Justice Roberts and Justice Alito, would uphold a state law that banned abortion across the board, with an exception only for the life of the mother. *Washington Week with Gwen Ifill* (PBS television broadcast Feb. 24, 2006).

⁷¹ GUTTMACHER INST., ABORTION POLICY IN THE ABSENCE OF *ROE*, http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf (last visited Apr. 26, 2006); Tom Strobe, *If Roe is Reversed, Abortion Would Still Be Legal in 40 States, Group Says*, BAPTIST PRESS, Apr. 12, 2006, <http://www.bpnews.net/bpnews.asp?ID=23026> (last visited Apr. 26, 2006); Susan Page, ‘*Roe v. Wade*’: the Divided States of America, USA TODAY, Apr. 17, 2006, available at http://www.usatoday.com/news/washington/2006-04-16-abortion-states_x.htm (claiming that, if *Roe* were overturned, 16 states and the District of Columbia would continue to have liberal abortion laws, while another 12 states are “in the middle”).

⁷² JOHN A. ROBERTSON, CHILDREN OF CHOICE 30 (1994).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

⁷⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1992).

man's right to terminate a pregnancy.⁷⁷ *Casey* speaks, it is true, about "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"⁷⁸ which appears to apply equally to the decision to be or not to be a parent, but the freedom at issue in *Casey* is the woman's freedom to have access to abortion.⁷⁹ "These cases suggest a right to reproduce through sexual intercourse, but do not necessarily suggest a constitutional right to reproduce using ART [assisted reproductive technology] or surrogacy."⁸⁰

The one Supreme Court case that upheld a person's right to procreate, *Skinner v. Oklahoma*, did so in the context of protecting the person from involuntary sterilization by the State.⁸¹ However, the decision in *Skinner* was not comprehensive enough to ground another prisoner's claim that he had a fundamental right to procreate from within prison by having his sperm transported to his wife for artificial insemination.⁸² Contrast that with a recent case that upheld a pregnant prisoner's right to be transported at state expense to a clinic where she could obtain a (privately funded) abortion.⁸³

Since 1992, courts have begun to grapple with the issues raised by extracorporeal embryos, which raise fundamentally different questions than do embryos within a woman's body.⁸⁴ All the cases involved frozen embryos that had been created by couples who hoped to become parents, but the embryos became objects of conflict when the couples subsequently divorced.⁸⁵ Courts initially fumbled with these challenging new issues, but appellate courts have consistently decided in favor of the party who does not want

⁷⁷ *Roe v. Wade*, 410 U.S. 113, 162 (1973).

⁷⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

⁷⁹ *See id.* at 869.

⁸⁰ JANET L. DOLGIN & LOIS SHEPHERD, *BIOETHICS AND THE LAW* 193 (2005).

⁸¹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁸² *Goodwin v. Turner*, 908 F.2d 1395, 1400 (8th Cir. 1990).

⁸³ ACLU, *ACLU APPLAUDS SUPREME COURT DECISION ALLOWING ACCESS TO REPRODUCTIVE HEALTHCARE SERVICES FOR MO PRISON INMATE* (2005), http://www.aclu.org/reproductive_rights/abortion/21229prs20051017.html (last visited Apr. 26, 2006); Nat'l Briefing, *Midwest: Missouri: Inmate Gets Abortion*, N.Y. TIMES, Oct. 22, 2005, at A18 ("The woman . . . was willing to pay for the abortion but said she could not afford transportation. The prison system refused to give her a ride because a state law forbids use of tax dollars for abortion.").

⁸⁴ *Davis v. Davis*, 842 S.W.2d 588, 589-94 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174, 177-79 (N.Y. 1998).

⁸⁵ *See id.*

to become a parent.⁸⁶ In 2000, the Massachusetts Supreme Judicial Court went so far as to state that, even if the couples had entered into a valid contract consigning disposition and control of the stored embryos to the party who wished to use them for procreation, the court would not enforce the contract:

[P]rior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions. This enhances the “freedom of personal choice in matters of marriage and family life”. . . . This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship In this case, we are asked to decide whether the law of the Commonwealth may compel an individual to become a parent over his or her contemporaneous objection. The husband signed this consent form in 1991. Enforcing the form against him would require him to become a parent over his present objection to such an undertaking. We decline to do so.⁸⁷

In sum, cases involving contraception, abortion, and extracorporeal embryos are more protective of one’s right not to become a parent than one’s right to procreate. The contraception cases, while comprehensive in scope and eloquent in their support for constitutional protection of “individual decisions in matters of childbearing from unjustified intrusion by the State,”⁸⁸ nonetheless, are, by their very nature, focused on the right to avoid procreation. Further, the contraception cases are uniquely respectful of sexual intimacy, as Justice Douglas stated in *Griswold*: “Would we allow the police to search the sacred precincts of marital bedrooms for . . . contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁸⁹

The right to obtain contraceptives was soon extended to unmarried individuals⁹⁰ and then to minors,⁹¹ but, as one scholar has

⁸⁶ This would not be the case in Louisiana, where state law requires that “[i]n disputes arising between any parties regarding the *in vitro* fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the *in vitro* fertilized ovum.” LA. REV. STAT. ANN. § 9:131 (2005); see Susan L. Crockin, *The ‘Embryo’ Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599 (2005). The author observes that:

[N]o high appellate court has enforced a prior recorded choice in which the couple had elected to use any leftover IVF embryos to have a child, or to donate the embryos so another couple could have a child, without the continuing agreement of both parties at the time the embryos are actually to be used.

⁸⁷ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000).

⁸⁸ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977).

⁸⁹ *Griswold*, 381 U.S. at 485–86.

⁹⁰ See *Baird*, 405 U.S. at 452–53.

⁹¹ *Carey*, 431 U.S. at 694–95.

pointed out, these cases still can be understood rather narrowly as protecting the intimate relationship of sexual intercourse, not the very public act of procreation in a clinic laboratory.⁹² The abortion cases, while their language appears equally protective of the right to procreate and the right to avoid procreation, are, nonetheless, all focused on women whose goals are to end pregnancies. In cases involving embryos, it appears that the person who wishes *not* to become a parent holds all the legal cards. Thus, it appears that procreative liberty has much stronger protections when one is seeking the means to prevent procreation, than when one is in need of technological and logistical assistance in order to procreate.

IV. POLITICAL CONSIDERATIONS

As we have seen, constitutional protections defending a woman's right to terminate a pregnancy have withstood decades of assault. In contrast, the "procreative liberty" to reproduce noncoitally has not been legally tested and may well prove to be a much weaker barrier to restrictive legislation. And yet, pro-life activists have virtually ignored what ought to be a tempting target in their quest to reduce the number of embryos destroyed in the United States. If these activists sincerely believe that every embryo is of equal value, and that every embryo is the moral equivalent of you and me, it would make sense for them to train at least some of their resources upon this relatively vulnerable target. Why have they not done so?

I suggest two possible answers to this question. First, the population that makes use of IVF has more political clout and is one to which conservatives are more likely to be sympathetic, than the population that makes use of abortion. Second, access to abortion is grounded in a worldview antithetical to the religious right and to social conservatives generally, whereas access to IVF primarily helps heterosexual middle-class couples build traditional families.

A. Demographics

America has one of the highest rates of abortion in the developed world.⁹³ Half of all pregnancies in America are unintended,

⁹² Matthew R. Eccles, Note, *The Use of In Vitro Fertilization: Is There a Right to Bear or Beget a Child by any Available Medical Means?*, 12 PEPP. L. REV. 1033, 1045 (1985).

⁹³ Lawrence Finer, *quoted in* GUTTMACHER INST., AN OVERVIEW OF ABORTION IN THE UNITED STATES, <http://www.guttmacher.com/media/presskits/2005/06/28/abortionoverview.html> (last visited Apr. 26, 2006).

and almost half of those are terminated by abortion (excluding miscarriages).⁹⁴ Teenagers account for 19% of abortions, and women between twenty and twenty-four obtained 33%.⁹⁵ Women of color are far more likely than white women to have an abortion: black women are almost four times more likely and Hispanic women two and a half times more likely.⁹⁶ Fifty-seven percent of women who have abortions are economically disadvantaged.⁹⁷ Two-thirds of all abortions are undergone by women who have never been married⁹⁸ (although, obviously, many of those women will later marry).

In contrast, 54% of women undergoing some form of assisted reproductive technology (IVF and related procedures) in 2002 were over the age of thirty-five.⁹⁹ We can also infer that most of these women are not economically disadvantaged, because of the related costs of undergoing fertility treatments. According to a 2005 survey by RESOLVE, cost and lack of insurance were the primary reasons couples did not pursue infertility treatment.¹⁰⁰ “Less than 50% of infertile patients seek treatment, and less than 10% use advanced reproductive technologies such as [IVF].”¹⁰¹ Since one cycle of IVF has an average cost approaching \$10,000,¹⁰² and many women attempt more than one cycle, it is obvious that lack of means is a significant barrier. Thirteen states mandate some form of insurance coverage for infertility, but more than 65% of employees are in plans exempt from state coverage under federal law.¹⁰³ According to the American Society of Reproductive Medicine, about a quarter of employee-sponsored plans have some sort of infertility benefits, but

⁹⁴ GUTTMACHER INST., FACTS IN BRIEF, *supra* note 4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ VICTORIA CLAY WRIGHT, NAT'L CTR. FOR CHRONIC DISEASE PREV. & HEALTH PROMOTION, Assisted Reproductive Technology Surveillance—United States, 2002, at 6 (2005), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5402a1.htm> (last visited Apr. 26, 2006).

¹⁰⁰ RESOLVE: THE NAT'L INFERTILITY ASSOC., NATIONAL SURVEY RESULTS REVEAL STARTLING LACK OF AWARENESS OF INFERTILITY EVEN AS NUMBERS CLIMB TO 7.3 MILLION (2005), available at http://www.resolve.org/site/PageServer?pagename=fmed_mcpr20051027 (last visited Apr. 26, 2006).

¹⁰¹ *Id.*

¹⁰² Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 221 (2005).

¹⁰³ Roxanne Nelson, *Financing Infertility*, CNN.COM (1999), <http://www.cnn.com/HEALTH/women/9905/19/financing.infertility/index.html> (last visited Apr. 26, 2006).

even those plans may exclude IVF or require an extremely high co-pay.¹⁰⁴

Even in Massachusetts, which mandates comprehensive insurance coverage for infertility services, disparities are sharp.¹⁰⁵ African-American and Hispanic/Latino women were underrepresented compared to their percentage in the state population, and especially so when one considers that non-Caucasian women reported infertility more often than their Caucasian counterparts.¹⁰⁶ None of the infertility patients had less than a high school diploma, and nearly half had advanced degrees.¹⁰⁷ Over 60% had an annual household income of more than \$100,000, compared to 17.7% in Massachusetts as a whole.¹⁰⁸

So, the typical couple (and groups such as RESOLVE are careful always to talk in terms of infertile “couples”) in need of IVF is older, married, white, educated, and financially well-off. Because IVF is virtually unregulated in the U.S.,¹⁰⁹ there are no consistent policies that include or exclude single women, lesbian couples, or unmarried heterosexual couples. However, some of the state laws that do mandate some form of insurance coverage restrict IVF to circumstances where an egg is fertilized by the husband’s sperm.¹¹⁰

If we contrast the person who is seeking an abortion with a person seeking to become pregnant through IVF, we see that the former is likely to be under twenty-five, economically disadvantaged, a member of a racial minority, and unmarried. The latter is likely to be over twenty-five, Caucasian, married, and middle-class. Thus, the constituency most hurt by laws outlawing IVF will be a constituency with considerable political power, while those most hurt by laws outlawing abortion are those who are already marginalized.

¹⁰⁴ *Id.*

¹⁰⁵ Jain & Hornstein, *supra* note 102, at 222.

¹⁰⁶ *Id.* at 222–23.

¹⁰⁷ *Id.* at 222.

¹⁰⁸ *Id.*

¹⁰⁹ PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 26.

¹¹⁰ Arkansas, Hawaii, Maryland, and Texas all require that “[t]he patient’s eggs must be fertilized with her spouse’s sperm.” AM. SOCIETY FOR REPROD. MED., STATE INFERTILITY INSURANCE LAWS, www.asrm.org/Patients/insur.html (last visited June 3 Apr. 26, 2006). Rhode Island law defines infertility as “the condition of an otherwise healthy *married* individual who is unable to conceive or produce conception during a period of one year” (emphasis added). *Id.*

B. The Meaning of the Embryo in Abortion and in IVF

In a brilliant essay, Janet Dolgin has argued that the debates over embryo destruction in abortion and in human embryonic stem-cell research have become publicly conflated in ways that tend to obscure their true discontinuity.¹¹¹ Dolgin's thesis is that, in the nineteenth and most of the twentieth centuries, antiabortion rhetoric focused on abortion's threat to the traditional family's distinct gender roles.¹¹² The debate about abortion "more or less openly paralleled a larger debate about the meaning of family and the scope of family relationships."¹¹³ However, by the end of the twentieth century, the traditional family had pretty much collapsed as the American norm, certainly statistically and to a large extent also as an ideal.¹¹⁴ Therefore, Dolgin argues, pro-life activists acted strategically by turning their focus away from the family and toward the embryo, stressing "the sanctity of fetal and embryonic life."¹¹⁵ I would add to Dolgin's thesis the observation that focus on the embryo was also enabled by growing technical ability to visualize intrauterine embryos and fetuses, as in the pro-life advocacy movies, *The Silent Scream*¹¹⁶ and *Ultrasound: A Window to the Womb*.¹¹⁷ Antiabortion activists have seized on advances in fetal imagery and incorporated them into their campaigns. The recent introduction of a three-dimensional ultrasound prompted one activist in England to declare: "Up until now babies in the womb have been unseen citizens. After this, everyone will see that abortion is as barbaric as killing a born baby."¹¹⁸

¹¹¹ Dolgin, *supra* note 57, at 101–03.

¹¹² *Id.* at 102–03, 118–21.

¹¹³ *Id.* at 115.

¹¹⁴ Dolgin ignores the ongoing hostility of many social conservatives to contraceptives even within marital relationships, a hostility that shows a continuing commitment to the traditional family in which women are always open to motherhood and therefore less identified with careers. LUKER, *supra* note 58, at 163–72.

¹¹⁵ Dolgin, *supra* note 57, at 115.

¹¹⁶ "Now for the first time, we have the technology to see abortion from the victim's vantage point. Ultrasound imaging has allowed us to see this." Bernard Nathanson, *quoted in SILENT SCREAM* (American Portrait Films 1984), available at <http://www.silentscream.org> (last visited Apr. 26, 2006).

¹¹⁷ *ULTRASOUND: A WINDOW TO THE WOMB* (Soundwaves Images 1991); for analysis of the video, see Joanne Boucher, *Ultrasound: A Window to the Womb?: Obstetric Ultrasound and the Abortion Rights Debate*, 25 J. MED. HUM. 7 (2004).

¹¹⁸ Nick Hopkins et al., *Visualising Abortion: Emotion Discourse and Fetal Imagery in a Contemporary Abortion Debate*, 61 SOC. SCI. & MED. 393 (2005).

While not disagreeing with Dolgin's thesis, I am going to turn its axis around and make a cross-cutting argument. With respect to the conservative attitude toward the embryo in the context of abortion and the embryo in the context of IVF, debates that ought to be conflated are, in reality, oddly *discontinuous*. In fact, there is little debate about IVF itself, despite the fact that the entire human embryonic stem cell research enterprise, the subject of enormous debate and political heat, is grounded largely on the availability of "spare" embryos created through IVF and no longer needed by their progenitors.¹¹⁹ I suggest the reason for this discontinuity is that, while the embryo in the abortion context is, as Dolgin shows, a stand-in or replacement for concerns about family life and structure, the embryo in the context of IVF exists primarily to allow married, heterosexual, economically stable couples to "complete" their families by having children.

Although it is certainly true that the "traditional" family in America has given way to a patchwork of living arrangements that include single parents, cohabitating couples, gay and lesbian families with and without children, and all sorts of divorced and reconstituted families,¹²⁰ it is not the case that the religious right has given up on the political fight to restore the centrality of the traditional family. The entire conservative fight against same-sex marriage has been couched in terms of its supposed threat to heterosexual marriage, as the very title of the "Defense of Marriage Act"¹²¹ trumpets.

Although it is not immediately obvious why allowing gays and lesbians to marry would threaten, rather than strengthen, the institution of marriage, the threat becomes clearer if one understands marriage as being based on the "complementarity" of male and female with distinct gender roles.¹²² The Family Reformation Ministry, for example, proclaims that:

- A husband is commanded to love his wife as Christ loves the church
- A wife is to submit to her husband as the Church is to Christ
- Children are to honor their parents - obeying them in the Lord
- Men are to take dominion of the world

¹¹⁹ See Kara L. Belew, *Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom, and Germany*, 39 TEX. INT'L L.J. 479, 480, 483-84 (2004).

¹²⁰ See Dolgin, *supra* note 57, at 127-28.

¹²¹ Defense of Marriage Act, 1 U.S.C.S. § 7, 28 U.S.C.S. § 1738C (LexisNexis 2005).

¹²² *The Homosexual Movement: A Response by the Ramsey Colloquium*, 41 FIRST THINGS 15 (1994).

- The Church is to make disciples of all Nations
- We are to remember that our strength comes only from the Lord
- The foundational covenantal unit, by God's design, is the family.¹²³

Same-sex couples cannot rely on tradition, religion, or some notion about what is "natural" to decide who will take out the garbage, use personal time to care for an elderly parent, or subordinate a career to the demands of childrearing. Same-sex couples do not get pregnant by accident; every child welcomed into their household is an expression of their deliberate choice to become parents. Social conservatives, as limned in Kristin Luker's portrait of pro-life activists, have a very different view:

[P]ro-life people see the world as inherently divided both emotionally and socially into a male sphere and a female sphere. . . . They see tenderness, morality, caring, emotionality, and self-sacrifice as the exclusive province of women; and if women cease to be traditional women, who will do the caring, who will offer the tenderness? . . . In this view, everyone loses when traditional roles are lost. Men lose the nurturing that women offer, the nurturing that gently encourages them to give up their potentially destructive and aggressive urges. Women lose the protection and cherishing that men offer. And children lose full-time loving by at least one parent, as well as clear models for their own futures.¹²⁴

Other evidence for the continuing struggle to preserve the traditional nuclear family can be seen in the home-schooling movement, which is largely based on rejection of the contemporary norm that, as children mature, they grow away from their families and become more focused on teachers and peer groups.¹²⁵ Home-schooling families want to ensure that their children absorb their values and spend most of their time with their families.¹²⁶ More evidence comes from the passing of "covenant marriage" laws that allow couples to enter into legal marriages that are extremely difficult to dissolve.¹²⁷

¹²³ FAM. REFORMATION, <http://www.familyreformation.com> (last visited Apr. 26 2006). The publisher of the magazine *Family Reformation*, James MacDonald, is also the publisher of *Home Schooling Today*.

¹²⁴ LUKER, *supra* note 58, at 163.

¹²⁵ Author's interviews. Records on file with author.

¹²⁶ Larry & Susan Kaseman, *Taking Charge*, HOME EDUC. MAG. (Nov.-Dec. 1997), http://www.homeedmag.com/HEM/HEM146.97/146.97_clmn_tkch.html (last visited July 15, 2006).

¹²⁷ See FRED LOWERY, COVENANT MARRIAGE: STAYING TOGETHER FOR LIFE (2002).

An interesting glimpse into conservative notions of gender roles is provided by an analysis of how gender is depicted in abstinence-only sex education curricula.¹²⁸ According to a report by Democratic Congressman Henry Waxman, the most commonly-used curricula emphasize “a domestic role for women, juxtaposed with a professional role for men.”¹²⁹ One abstinence-only textbook lists “Financial Support” as one of the “5 Major Needs of Women,” while “Domestic Support” is one of the “5 Major Needs of Men.”¹³⁰

Thus, even if social conservatives have no concern at all for the moral status of the human embryo, they may still oppose easy access to abortion because it threatens traditional marriage and distinctive gender roles. As a back-up for contraception, abortion allows people—married or not—to engage in sexual intercourse with little fear of pregnancy. That freedom allows people to choose whether or not to enter into marriage, and also allows them to put off marriage and childbearing until they have backpacked across the Himalayas or gotten a secure foothold in their careers.

Within marriage, access to abortion as a last-ditch defense when contraception fails¹³¹ is part of a worldview in which women see themselves as having—or trying to have—as much control as men have over their lives and careers.¹³² A woman who cannot plan when and how many children she will bear and raise is a woman who will have a difficult time pursuing a career (although she may work outside the home in a succession of jobs).¹³³ As Luker writes:

Women who oppose abortion and seek to make it officially unavailable are declaring, both practically and symbolically, that women’s reproductive roles should be given social primacy. Once an embryo is defined as a child and an abortion as the death of a person, almost everything else in a woman’s life must “go on hold” during the course of her pregnancy: any attempt to gain “male” resources such as a job, an education, or other skills must be subordinated to her uniquely female responsibility of serving the needs of this newly conceived person. Thus, when personhood is bestowed on

¹²⁸ SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF H.R. COMM. ON GOV’T REFORM, REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY PROGRAMS 16–19 (Comm. Print 2004), available at www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf (last visited Apr. 26, 2006).

¹²⁹ Nancy Leong, *Examining the Conservative Family Planning Agenda*, 7 GEO. J. GENDER & L. 81, 103 (2006).

¹³⁰ *Id.* at 103–04.

¹³¹ LUKER, *supra* note 58, at 179–81. Pro-choice activists are not in favor of abortion as the primary means of contraception. *Id.*

¹³² *Id.* at 176.

¹³³ *Id.* at 117–18.

the embryo, women's nonreproductive roles are made secondary to their reproductive roles.¹³⁴

Pro-choice women, on the other hand, see traditional women who do not work outside the home as "one man away from disaster."¹³⁵

Luker also shows how views about abortion and contraception and about gender roles cause women to invest in choices that further harden that worldview by making it more difficult to make radically different choices.¹³⁶ According to Luker, in 1984 the "average" pro-life activist woman was married at seventeen, had three or more children, and had some college education.¹³⁷ She was not employed for pay.¹³⁸ At the same time, the "average" pro-choice activist woman had some graduate education, married at twenty-two, had one or two children, and was employed outside the home.¹³⁹ The pro-life woman had essentially traded her own ability to fend for herself for the protection of traditional marriage, a choice that is difficult to reverse later on in life.¹⁴⁰ The pro-choice woman had traded early marriage and childbearing for professional advancement, also a choice that is difficult to reverse.¹⁴¹ Opportunity costs to stay home with the baby are a lot higher for the typical pro-choice woman; she may also have compromised her fertility by postponing conception until she is in her 30s.¹⁴²

Luker likens the life choices made by pro-life women to those made by the peasants of the Vendee, the part of France that remained loyal to the throne during the French Revolution, where relationships between nobles and peasants were still "satisfying" enough that the "brave new world" of the Revolution represented more loss than gain.¹⁴³ Andrea Dworkin put it more harshly:

Right-wing women see that within the system in which they live they cannot make their bodies their own, but they can agree to privatized male ownership: one-on-one, as it were. . . . They use sex

¹³⁴ *Id.* at 200.

¹³⁵ *Id.* at 176.

¹³⁶ LUKER, *supra* note 58, at 199–200.

¹³⁷ *Id.* at 197.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.* at 199–200.

¹⁴¹ *See id.*

¹⁴² VA. CTR. FOR REPROD. MED., FERTILITY UPDATE (Mar. 2005), http://vcrmed.com/news/newsletters/05-03_VCRM_newsletter.html (last visited Apr. 26, 2006).

¹⁴³ LUKER, *supra* note 58, at 201.

and babies to stay valuable because they need a home, food, and clothing.¹⁴⁴

It is worth quoting Luker at length on this point, even though the economic squeeze that has virtually required families to have two incomes in order to keep their toe-hold in the middle-class,¹⁴⁵ may have blurred some of these differences in the decades since Luker did her research:

Having made a commitment to the traditional female roles of wife, mother, and homemaker, pro-life women are limited in those kinds of resources . . . they would need to compete in what has traditionally been the male sphere, namely, the paid labor force In consequence, anything that supports a traditional division of labor into male and female worlds is, broadly speaking, in the interests of pro-life women because that is where their resources lie. Conversely, such a traditional division of labor . . . is against the interests of pro-choice women because it limits their abilities to use the valuable "male" resources that they have in relative abundance.

It is equally obvious that supporting abortion (and believing that the embryo is not a person) is in the vested interests of pro-choice women. Being so well equipped to compete in the male sphere, they perceive any situation that both practically and symbolically affirms the primacy of women's reproductive roles as a real loss to them. Practically, it devalues their social resources.¹⁴⁶

In sum, being opposed to abortion—and therefore ascribing high moral status to the human embryo—is connected to a number of constitutive social conservative goals: traditional families, distinct gender roles, nonacceptance of same-sex unions, and sex that is confined within marriage. As Dolgin writes, "At base, discourse about abortion concerns the parameters of relationships (especially within families), the significance of gender in understandings of personhood, and the comparative value of autonomous individuality and choice."¹⁴⁷ From this perspective, if the embryo did not exist, conservatives would have to invent it.

In contrast to women seeking abortions, people seeking IVF are fulfilling relatively traditional family roles. Although some will be lesbian and others will be single women, most are likely to be married, and they obviously have devoted a great many emotional and financial resources to the goal of having children.

¹⁴⁴ ANDREA DWORKIN, *RIGHT WING WOMEN: THE POLITICS OF DOMESTICATED FEMALES* 69 (1983).

¹⁴⁵ ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

¹⁴⁶ LUKER, *supra* note 58, at 200–01.

¹⁴⁷ Dolgin, *supra* note 57, at 154.

V. CONCLUSION

If pro-life activists were concerned solely with saving “the unborn” from destruction, IVF—with its virtually guaranteed wastage of human embryos—should be a tempting target. However, activists have almost ignored IVF, even though its constitutional protections have never been tested, and even though the same destruction of extracorporeal human embryos is the basis for the opposition to human embryonic stem cell research. If it were true that pro-life activists were motivated purely by concern for the embryo, we would expect to see anti-IVF activism.

The continued hostility toward abortion, even to the earliest form of possible abortion embodied in emergency contraception, coupled with the absence of attacks on IVF, can best be described as a relative indifference to the moral status of the embryo, but rather a great deal of hostility toward economic equality of women, sexual activity outside of marriage, and marriages that are not organized along traditional gender lines. When conservative activists see abortion, they see the destruction of embryos, yes, but they also see women who are insisting on their equality in the workplace and on marriages that are not organized around strong gender roles. When conservatives see IVF, they largely ignore the destruction of embryos, because they see heterosexual married couples going to great lengths to have children. Thus, it appears that the crucial variable in the equation is not the destruction of the embryo, but the behavior and roles and possibilities open to women.¹⁴⁸ Anti-abortion activists claim to be motivated purely by concern for the unborn, but in fact they are motivated primarily by concerns for the shape of society and for the preservation of traditional gender roles.

¹⁴⁸ Laurence H. Tribe makes a similar point when reflecting on the right-to-life response to the case of *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), involving the disposition of frozen embryos after divorce:

Many right-to-life advocates seem as unsure as others about the troubling issues raised by the judge's decision—about whether the frozen embryos should have been treated as though they were microscopic babies. Yet if one of those same embryos had been conceived in the usual fashion and was still inside Mrs. Davis, these same people would quickly insist that the embryo be brought to term. Why?

The answer must lie not in their views about the embryo as such but in their views about nature in general, “natural” sex roles and sexual morality.

LAURENCE H. TRIBE, *ABORTION: THE CLASS OF ABSOLUTES* 235 (1990).

