

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 13 (2006-2007)  
Issue 1 *William & Mary Journal of Women and  
the Law*

---

Article 7

October 2006

## Embryo Donation: The Government Adopts a Cause

Jaime E. Conde

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Family Law Commons](#)

---

### Repository Citation

Jaime E. Conde, *Embryo Donation: The Government Adopts a Cause*, 13 Wm. & Mary J. Women & L. 305 (2006), <https://scholarship.law.wm.edu/wmjowl/vol13/iss1/7>

Copyright c 2006 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

# EMBRYO DONATION: THE GOVERNMENT ADOPTS A CAUSE

JAIME E. CONDE\*

## INTRODUCTION

- I. AN EMBRYO IN FROZEN LIMBO
  - II. ADOPTION OR DONATION?
  - III. SNOWFLAKES AND THE EMBRYO ADOPTION RHETORIC
  - IV. THE UNIVERSALLY ESTABLISHED EMBRYO DONATION TERMINOLOGY
  - V. THE BUSH ADMINISTRATION'S "CATHOLIC STRATEGY"
  - VI. EMBRIOLOGIA SACRA
  - VII. THE CATHOLIC STRATEGY
- ## CONCLUSION

## ABSTRACT

The disposition of cryopreserved supernumerary embryos has become a divisive issue that puts to test the tenets of the "culture of life" promoted by the Vatican and President George W. Bush. The Bush administration has spent millions of dollars to promote "embryo adoptions" while imposing restrictions on federal funding for embryonic stem cell research. On the other hand, contemporary Catholic moral theologians and philosophers disagree on the question of the morality of embryo "rescue" or "adoption" because the Church strongly opposes in vitro fertilization, the donation of gametes and embryo cryopreservation, as evidenced recently during the Italian fertility law referendum.

President Bush has relied on ideologically charged "culture of life" rhetoric to promote "embryo adoptions" as the only alternative to dispose of cryopreserved ("frozen") human embryos. In doing so, he has alienated an important segment of Christian pro-lifers who support embryonic stem cell research. From a Catholic perspective, the "culture of life" as conceived by Pope John Paul II vigorously opposes stem cell research, but embryo donation has not found its place within the Catholic "culture of life," and substituting the word "adoption" for "donation" does not solve the perplexing dilemma.

---

\* 2005-2007 University of Puerto Rico School of Medicine Saludpromujer Research Incentive grantee. B.F.A. New York University, 1984; J.D., magna cum laude, University of Puerto Rico, 2004; LL.M., Child and Family Law, Loyola University Chicago, 2005. The author wishes to thank Beatriz M. Grau for the immensity of her loving support.

## INTRODUCTION

The disposition of cryopreserved supernumerary embryos has become a divisive issue that puts to test the tenets of the "culture of life" promoted by the Vatican and the Bush administration. Even among those who propose personhood from the moment an oocyte is fertilized by a sperm, the question regarding the extent to which a cryopreserved embryo has a right to live is profoundly divisive. More than thirty years ago, the United States Supreme Court established that the use of the word "person" in the Constitution is such that it has application only postnatally.<sup>1</sup> Still, for more than a decade, the United States Court of Appeals for the Fourth Circuit has recognized, albeit *sub silentio*, that a frozen indeterminate embryo named Mary Doe has standing to seek appellate review.<sup>2</sup> Mary Doe opposes research with human embryos and intends to be unfrozen and implanted in the womb of an "adopting mother."<sup>3</sup>

The Bush administration has spent millions of dollars to promote "embryo adoptions" while imposing restrictions on federal funding for embryonic stem cell research. Perhaps with the appropriation of public funds for the promotion of "embryo adoptions" we are witnessing the revival of the governmental sanctioning of sacred embryology. A phenomenon of the Spanish Empire during the late 1700's and early 1800's, it would not be the first time the law has been used to warrant the salvation of imperiled "pre-born children" in parts of the U.S. and its territories.<sup>4</sup>

Contrary to modern governmental efforts to promote the implantation of ex vivo "pre-born children" and more concerned with eternal spiritual life than temporal earthly life, historic royal decrees mandated cesarean sections to extract the concepti from the bodies of women who died pregnant. The purpose was to save the creature's soul with the administration of baptism before what, in most cases, would be a certain death.<sup>5</sup>

The Vatican did not formally sanction these postmortem cesarean sections. Analogically, the Magisterium of the Catholic Church has not issued an authoritative opinion regarding what Catholic scholars have termed the "embryo rescue debate."<sup>6</sup> Contemporary moral theologians and philosophers disagree on the question of the morality of embryo "rescue" or "adoption" because the Church strongly opposes

---

1. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

2. See *infra* Part I.

3. See *infra* note 31 and accompanying text.

4. See *infra* Part VI.

5. See *infra* notes 186-88.

6. See *infra* note 192.

in vitro fertilization and gamete donation, as evidenced recently during the Italian fertility law referendum.<sup>7</sup>

The application of the adoption concept to the practice of embryo donation carries ideological connotations that inevitably relate to the abortion debate, even when framed within the context of embryonic stem cell research. President Bush has relied on ideologically charged "culture of life" rhetoric to promote "embryo adoptions" as the only alternative to dispose of cryopreserved (frozen) human embryos.<sup>8</sup> In doing so, he has alienated an important segment of Christian pro-lifers who support embryonic stem cell research. From a Catholic perspective, the "culture of life" as conceived by Pope John Paul II vigorously opposes stem cell research. Contrary to President Bush's conception, embryo donation has not found its place within Catholic doctrine, and substituting the word "adoption" for "donation" does not solve the dilemma.

### I. AN EMBRYO IN FROZEN LIMBO

Mary Doe was just a "pre-born child in being as a human embryo"<sup>9</sup> just over a decade ago when she brought an action for preliminary injunction on her own behalf and on behalf of what the Court then understood "to be some 20,000 human embryos currently in storage in various facilities around the United States."<sup>10</sup> She was seeking to prevent the National Institutes of Health Human Embryo Research Panel from issuing guideline recommendations for federal funding of human embryo research.<sup>11</sup>

Then under the Clinton Administration, the state argued, *inter alia*, that the plaintiffs lacked standing to pursue the suit.<sup>12</sup> In dismissing Mary Doe's suit on the sole ground of lack of standing, the United States District Court for the District of Maryland reasoned:

[T]he Supreme Court has made it clear that the word "person," as used in the Fourteenth Amendment, does not include the unborn. It has thus been held that embryos are not persons with legally protectable interests within the meaning of *Fed.R.Civ.P. 17(c)* such that appointments of guardians ad litem are warranted or required. The Court sees no distinction between fetuses in utero or ex utero.<sup>13</sup>

---

7. See *infra* Part VII.

8. See *infra* Part V.

9. See *Doe v. Shalala*, 862 F. Supp. 1421, 1423 (D.Md. 1994).

10. *Id.* at 1426.

11. *Id.* at 1423.

12. See *id.* at 1426.

13. *Id.* (citations omitted).

Mary Doe appealed and, finding that the case had become moot, the Court of Appeals for the Fourth Circuit vacated the judgment and order of the District Court and remanded with instructions that the action be dismissed.<sup>14</sup> The unpublished per curiam opinion did not address the issue of Mary Doe's standing to sue. It simply stated in a footnote that "Mary Doe, 'a preborn child in being as a human embryo,' opposes research on human embryos for obvious reasons."<sup>15</sup> The Supreme Court denied Mary Doe's petition for certiorari.<sup>16</sup>

By August 10, 1999, when she brought a new action for declaratory and injunctive relief, Mary Doe had become a human embryo "born" in the United States,<sup>17</sup> and thus, "a citizen of the United States [. . .] entitled to the equal protection of the laws."<sup>18</sup> Her purported attorney made this assertion with the caveat that after being born ("produced or brought into life") by in vitro fertilization, her life was suspended by cryopreservation.<sup>19</sup>

The United States Government, still under Clinton's presidency, cited *Roe v. Wade* in arguing that Mary Doe was "not a 'person' able to assert a claim under the Fourteenth Amendment."<sup>20</sup> Anticipating a change in policy with the incoming administration under newly elected George W. Bush, the district court ordered the administrative closure of the case.<sup>21</sup> Mary Doe appealed, and on February 7, 2002, the court of appeals dismissed for lack of jurisdiction, as the circuit court order was "neither a final order nor an appealable interlocutory or collateral order."<sup>22</sup> The opening sentences of the unpublished per curiam opinion stated:

Mary Doe, a human embryo "born" in the United States (and subsequently frozen in which state of cryopreservation her life is presently suspended), individually and on behalf of all other frozen human embryos similarly situated, and the National Association

---

14. *Int'l Found. for Genetic Research v. Shalala*, 57 F.3d 1066 (4th Cir. 1995). Full text of the unpublished per curiam opinion reported at No. 94-2367 1995 U.S. App. LEXIS 14790 (4th Cir. June 16, 1995).

15. *See id.* at note 2, n. 1.

16. *Doe v. Shalala*, 516 U.S. 1145 (1996).

17. *See* Appendix to Brief of Plaintiff-Appellant at A12, *Doe v. Thompson*, No. 03-2554 (4th Cir. 2004), available at <http://www.naapc.org/downloads/appendix.pdf>, [hereinafter Appendix to Brief of Plaintiff-Appellant].

18. *Id.* at A11.

19. *Id.* at A13.

20. Appendix to Brief of Plaintiff-Appellant, *supra* note 17, at A31 (Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment, filed January 5, 2000).

21. *Doe v. Shalala*, 26 Fed. Appx. 338, 339 (2002). Full text of the unpublished per curiam opinion reported at No. 01-1298 2002 U.S. App. LEXIS 1943 (4th Cir. Feb. 7, 2002). *See also* Appendix to Brief of Plaintiff-Appellant, *supra* note 17, at A47 (Defendants' Motion to Deny Plaintiffs' Motion for Contempt and Case Closure, filed October 25, 2002).

22. *Shalala*, 26 Fed. Appx. at 339.

for the Advancement of Preborn Children (collectively "Appellants") appeal the district court's order administratively closing their civil lawsuit challenging the Clinton Administration's policies regarding federal funding of human stem cell research.<sup>23</sup>

The Fourth Circuit decided the appeal on February 7, 2002, approximately six months after President Bush had made a nationally televised announcement of his decision to allow federal funding for limited human embryonic stem cell research, in what would be his first presidential address to the American people.<sup>24</sup> The Supreme Court denied the subsequent writ of certiorari.<sup>25</sup>

On July 3, 2003, the U.S. District Court for the District of Maryland issued a Final Order of Judgment denying Mary Doe's request to reopen the case, dismissing it as moot and ordering its closure.<sup>26</sup> After the Court denied a petition for reconsideration,<sup>27</sup> Mary Doe appealed. In affirming the judgment of the lower court in another unpublished per curiam opinion, the court of appeals concluded that Mary Doe's challenge was moot, as the policy implemented by President Bush for the federal funding of embryonic stem-cell research was limited to projects involving existing stem-cell lines, which did not pose a threat to her.<sup>28</sup>

Allegedly, Mary Doe "is a human embryo 'born', i.e., produced or brought into life, in the United States, by in vitro fertilization" and "[h]er life was thereafter suspended by the freezing of the embryo in liquid nitrogen, a process known as cryo-preservation."<sup>29</sup> In other words, she might be any of the more than 400,000 cryopreserved human embryos in the United States.<sup>30</sup> Her existence is not particularized. Her circumstances are not specified. Her persona is not

---

23. *Id.*

24. See Katharine Q. Seelye, *Bush Gives His Backing for Limited Research on Existing Stem Cells*, N.Y. TIMES, Aug. 10, 2001, at A1; see also Amy Goldstein & Mike Allen, *Bush Backs Partial Stem Cell Funding*, WASH. POST, Aug. 10, 2001, at A1.

25. *Doe v. Thompson*, 537 U.S. 815, 815 (2002).

26. See Appendix to Brief of Plaintiff-Appellant, *supra* note 17, at A50 (Final Order of Judgment).

27. See *id.* at A60 (Order denying Petition for Reconsideration).

28. *Doe v. Shalala*, 122 Fed. Appx. 600, 601 (4th Cir. 2004). Full text of the opinion reported at No. 03-2254 2004 U.S. App. LEXIS 25146 (4th Cir. Dec 7, 2004).

29. Brief of Plaintiff-Appellant at 4, *Doe v. Thompson*, No. 03-2554 (4th Cir. Feb. 17, 2004), available at <http://www.naapc.org/downloads/brief.pdf>.

30. The Society for Assisted Reproductive Technology conducted the first official inventory of frozen embryos in the United States in 2003 and determined that fertility clinics held some 400,000 frozen embryos in storage. See Rick Weiss, *400,000 Human Embryos Frozen in the U.S.*, WASH. POST, May 8, 2003, at A10; Nicholas Wade, *Clinics Hold More Embryos Than Had Been Thought*, N.Y. TIMES, May 9, 2003, at A24. Robert Schenken, president of the American Society for Reproductive Medicine, estimates there are 400,000 to 500,000 frozen embryos in the United States. Amanda Paulson, *Lawsuit Over an Embryo Fuels Debate on When Life Begins*, CHRISTIAN SCI. MONITOR, Mar. 23, 2005, at 2.

individualized. Her exact identifying factual information is not known. For example, the stage of her embryonic development, the date on which the egg that originated her was fertilized, the names of her genetic originators, which of several available methods was used to identify her sex, the date on which she was cryopreserved, her record number at the fertility clinic responsible for her cryostorage, the address of the facility where she is cryostored, and whether she is one of the less than three percent of cryopreserved human embryos available for research are all unknown.<sup>31</sup> Yet for nearly ten years, the Fourth Circuit Court of Appeals has completely ignored the issue of standing regarding Mary Doe.

Perhaps by vacating the original judgment and order of the district court and resolving all subsequent appeals on mootness grounds, the Fourth Circuit Court of Appeals has recognized *sub silentio* that Mary Doe has standing to seek appellate review. Coming from the Fourth Circuit, this holding would not be surprising. By 1999 it had "quietly but steadily become the boldest conservative court in the nation in the view of scholars, lawyers and many of its own members,"<sup>32</sup> and today is considered the "shrewdest, most aggressively conservative federal appeals court in the nation."<sup>33</sup> Empirical data has confirmed several studies which ascertain that a majority of the court's members "invoke the rehearing en banc mechanism to reverse three-judge panel opinions which the majority considers too liberal politically."<sup>34</sup>

Three of the six Fourth Circuit Court of Appeals judges who at some point have composed the three-judge panel overseeing one of Mary Doe's three appeals are President George H. W. Bush appointees. Of the remaining three, one was appointed by President Richard M. Nixon, one by President William J. Clinton, and one by President George W. Bush.<sup>35</sup> One of the George H. W. Bush appointees, J. Michael Luttig, sat on the panel in 1995 and then in 2004. He has been consistently mentioned in the short list of candidates to fill a vacancy in the Supreme Court since George W. Bush became president.<sup>36</sup> He not only is one of what legal scholars have termed the

31. David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY AND STERILITY 1063, 1066 (2003).

32. See Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

33. Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 40.

34. Carl Tobias, *A Note on the Neutral Assignment of Federal Appellate Judges*, 39 SAN DIEGO L. REV. 151, 152 (2002).

35. See Federal Judicial Center, U.S. Court of Appeals for the Fourth Circuit, Judges, <http://www.fjc.gov/history/home.nsf> (last visited October 15, 2006).

36. See, e.g., Stuart Taylor Jr., *Bush and the Supreme Court: Place Your Bets*, 34 NAT'L J. 3377, 3377 (2002); Michael Kirkland, *Analysis: Roberts Joins the Short List*,

“Bush Five,”<sup>37</sup> but his name was also on the short list of candidates for Chief Justice.<sup>38</sup>

## II. ADOPTION OR DONATION?

According to the brief of Mary Doe’s most recent appeal, modern science allows her to be unfrozen and implanted in the womb of an “adopting mother.”<sup>39</sup> The alluded process — embryo donation — has been a documented practice for more than two decades.<sup>40</sup> It involves the transfer of a third-party fertilized oocyte to a woman’s uterus, with the intention of her giving birth and raising any resulting child.<sup>41</sup> The first pregnancy established with a donated embryo was reported in 1983, although it did not result in live birth.<sup>42</sup> In the same year medical researchers achieved the first donor egg pregnancy and birth.<sup>43</sup> The world’s first frozen embryo baby was born the following year.<sup>44</sup> These three events occurred in Melbourne, Australia at Monash University’s IVF program.<sup>45</sup> The first human pregnancies from oocyte and embryo donations in the United States also occurred in 1983 at the University of California, Los Angeles (UCLA).<sup>46</sup> The first United States donor embryo transfer birth occurred at UCLA in 1984.<sup>47</sup>

On July 25, 2002, the Office of Public Health and Science (OPHS) of the Department of Health and Human Services (DHHS) published

---

UPI, May 3, 2005, *available in* LexisNexis, UPI File.

37. See generally Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 80-81 (2004).

38. See Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST, September 4, 2005, at A1; Todd S. Purdum, *Strong Ties Bind Players in Battle For Seat on Court*, N.Y. TIMES, July 18, 2005, at A1; Jeffrey Rosen, *The Brawl That May Erupt Over the High Court*, N.Y. TIMES, May 1, 2005, §4, at 3.

39. Brief of Plaintiff-Appellant, *supra* note 29, at 4.

40. See Gabor T. Kovacs et al., *Embryo Donation at an Australian University In-vitro Fertilisation Clinic: Issues and Outcomes*, 178 MED. J. OF AUSTL. 127, 127 (2003); see also John Leeton, *The Early History of IVF in Australia and Its Contribution to the World (1970-1990)*, 44 AUSTL. & N.Z. J. OBSTETRICS & GYNAECOLOGY 495, 495 (2004).

41. *Id.*

42. Leeton, *supra* note 40, at 497 (citing Alan Trounson et al., *Pregnancy Established in an Infertile Patient After Transfer of a Donated Embryo Fertilised In Vitro*, 286 BRIT. MED. J. 835 (1983)).

43. *Id.* (citing Peter Lutjen et al., *The Establishment and Maintenance of Pregnancy Using In Vitro Fertilization and Embryo Donation in a Patient with Primary Ovarian Failure*, 307 NATURE 174 (1984)).

44. *Id.* (citing Bruce Downing et al., *Birth After Transfer of Cryopreserved Embryo*, 142 MED. J. AUSTL. 409 (1985)).

45. See *id.*

46. John E. Buster, *Historical Evolution of Oocyte and Embryo Donation as a Treatment for Intractable Infertility*, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 1, n. 3-5 (Mark V. Sauer ed., 1998).

47. *Id.*



a notice in the Federal Register announcing the availability of funds and requesting applications for the development and implementation of public awareness campaigns on "embryo adoption."<sup>48</sup> Public Law 107-116, enacted on January 10, 2002,<sup>49</sup> granted DHHS one million dollars "to inform Americans about the existence of spare embryos and options for couples to adopt an embryo or embryos in order to bear children."<sup>50</sup> For the purposes of the announcement, DHHS defined "embryo adoption" as "the donation of frozen embryo(s) from one party to a recipient who wishes to bear and raise a child."<sup>51</sup> This definition reveals the interchangeability of the words adoption and donation.

According to Professor Paula J. Manning, the terms "embryo donation" and "embryo adoption" as used by certain fertility clinics are synonymous, but, she argues, "pro-life advocates prefer the emotionally charged term embryo adoption because they believe all embryos are potential children."<sup>52</sup> Not all service providers, however, use the terms interchangeably. For example, the National Embryo Donation Center, a nonprofit organization formed through an alliance of the Christian Medical Association, Bethany Christian Services, and Baptist Health Systems of East Tennessee, uses the term embryo donation from the perspective of the embryo donors, i.e., the genetic originators or genetic parents, who relinquish their frozen embryos for the benefit of an infertile couple for whom in vitro fertilization is not possible.<sup>53</sup> From the perspective of the embryo recipients, i.e., gestational recipients or intended parents, the Center uses the term embryo adoption.<sup>54</sup> In the same sense, Embryos Alive, "an adoption agency that matches donor embryos with hopeful and waiting parents,"<sup>55</sup> uses the terms "donor" in reference to the genetic originators of the embryo and "adoptive parents" in reference to the gestational recipients.<sup>56</sup>

---

48. Announcement of the Availability of Financial Assistance and Request for Applications to Support Development and Delivery of Public Awareness Campaigns on Embryo Adoptions, 67 Fed. Reg. 48,654 (July 25, 2002) [hereinafter *Financial Assistance for Campaigns on Embryo Adoptions*].

49. Depts. Lab., Health and Hum. Services, and Educ. and Related Agencies Appropriations Act, Pub. L. No. 107-116, 115 Stat. 2177 (2002).

50. H.R. REP. NO. 107-342, at 112 (2001) (Conf. Rep.). See S. Rep. No. 107-84, at 244 (2001).

51. *Financial Assistance for Campaigns on Embryo Adoptions*, supra note 48, at 48,654-55.

52. Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 678 (2004).

53. See National Embryo Donation Center, Embryo Donation Information, <http://www.embryodonation.org/donors.php> (last visited Nov. 10, 2006).

54. See National Embryo Donation Center, Embryo Adoption Information, <http://www.embryodonation.org/adoptions.php> (last visited Nov. 10, 2006).

55. Embryos Alive, <http://www.embryosalive.com> (last visited Nov. 10, 2006).

56. Embryos Alive, Donor Guidelines, <http://www.embryosalive.com/donors.php> (last

Both of these terms fall under the umbrella concept of “embryo adoption,” which they define as “the adoption of cryogenically frozen embryo’s [sic] from biological parents, to selected, approved adoptive birth parents.”<sup>57</sup> In other words, genetic originators *donate* their embryos, while gestational recipients *adopt* the embryos with the intent to procreate.

According to an online article published by Conceiving Concepts, Inc., a “fertility products and services company,”<sup>58</sup> the concepts of embryo adoption and embryo donation are somewhat different. Without really explaining in what way donation differs from adoption or what kind of agency participates in the process, the company implies that embryo donation does not provide the same safeguards as embryo adoption, and asserts that only in adoption an “agency actually matches the genetic parents of the embryos with the adopting couple into whom the embryos will be transferred.”<sup>59</sup> Thus, the company stresses “[t]he genetic family will know that the family they have chosen to parent their child has been screened for a criminal history and child abuse record as well as educated about how to parent an adoptee.”<sup>60</sup> According to the article’s implications, the difference between the two concepts seems to amount to embryo donation lacking social screening of potential recipients, as well as agency involvement in the matching of donors and recipients.

A clarification of this implication can be found at the website of Southern California’s Huntington Reproductive Center Medical Group, which claims to have “one of the largest and most successful third party reproductive programs in the world.”<sup>61</sup> After clearly establishing the involvement of an adoption agency, the difference between embryo adoption and embryo donation is explained in the following terms:

With embryo adoption, the [adoption] agency actually matches the genetic parents of the embryos with the adopting couple into whom the embryos will be transferred. Traditionally, when couples decide to donate their embryos to another couple, they usually entrust the doctor to select the couple to whom the embryos will be donated.<sup>62</sup>

---

visited Nov. 10, 2006).

57. Embryos Alive, Letter of Understanding of Process, <http://www.embryosalive.com/letterofunderstanding.php> (last visited Nov. 10, 2006).

58. Conceiving Concepts, <http://www.conceivingconcepts.com/> (last visited Nov. 10, 2006).

59. See Angie Boss, *The Basics of Embryo Adoption and Donation*, CONCEIVING CONCEPTS, <http://www.conceivingconcepts.com/learning/articles/embryo.html> (last visited Nov. 10, 2006).

60. *Id.*

61. Huntington Reproductive Center, Third Party Parenting and Embryo Donation, <http://www.havingbabies.com/embryo-donation.html> (last visited Nov. 10, 2006).

62. *Id.*

Some fertility clinics emphasize anonymity in embryo donation, which suggests a closed process as opposed to an open process as a possibly distinctive element. For example, Advanced Reproductive Health Centers/Chicago IVF describes embryo donation as "an anonymous process."<sup>63</sup> At the Embryo Donation Program at West Coast Fertility Centers in Southern California "[t]he donating couple and the embryo recipients will not meet,"<sup>64</sup> the donors relinquish "any claim for visitation and/or custody rights regarding any offspring resulting from the donated embryos,"<sup>65</sup> and the centers will select recipients "at their discretion."<sup>66</sup>

The social screening of potential recipients or the openness of the process do not seem to be clear defining characteristics of embryo adoption as opposed to embryo donation. Even when requiring, among other things, a home study and a criminal history check of potential recipients,<sup>67</sup> Embryos Alive offers "open, agency liaison, or anonymous adoption."<sup>68</sup> The National Embryo Donation Center (NEDC) at Knoxville's Baptist Hospital for Women also requires a current home study of potential recipients.<sup>69</sup> Through its program, NEDC "handles the medical, legal and social requirements of embryo donation and adoption."<sup>70</sup> It offers "from anonymous to completely open" donation (as used in relation to embryo donors),<sup>71</sup> and "both anonymous and 'open' adoptions" (as used in relation to embryo recipients),<sup>72</sup> which may include personal contact between the donors and the child or children born to the recipients as a result of the embryo transfer.<sup>73</sup> The Open Donation Agreement at NEDC states in part:

---

63. Advanced Reproductive Health Centers/Chicago IVF, Embryo Donation Program — Questions and Answers, <http://www.chicago-ivf.com/EmbryoDonation/QuestionsAnswers.aspx> (last visited Nov. 10, 2006).

64. West Coast Fertility Centers, Embryo Donation, [http://ivfbaby.com/embryo\\_donation.htm](http://ivfbaby.com/embryo_donation.htm) (last visited Nov. 10, 2006).

65. *Id.*

66. *Id.*

67. See Embryos Alive, Embryos Alive Application, Embryo Adoption To-Do Checklist, [http://www.embryosalive.com/popup\\_embryoapp.htm](http://www.embryosalive.com/popup_embryoapp.htm) (last visited Nov. 10, 2006).

68. Embryos Alive, Embryos in Storage?, <http://www.embryosalive.com/embryosstorage.php> (last visited Nov. 10, 2006). See Embryos Alive, *Embryo Adoption: Frequently Asked Questions*, <http://www.embryosalive.com/faq.php> (last visited Nov. 10, 2006).

69. See NATIONAL EMBRYO DONATION CENTER, APPLICATION TO ADOPT EMBRYOS 2 (2006), [http://www.embryodonation.org/downloads/pdf/NEDC\\_Application\\_to\\_Adopt\\_Embryos.pdf](http://www.embryodonation.org/downloads/pdf/NEDC_Application_to_Adopt_Embryos.pdf).

70. Embryo Donation Information, *supra* note 53.

71. *Id.*

72. Embryo Adoption Information, *supra* note 54.

73. See NATIONAL EMBRYO DONATION CENTER, OPEN DONATION AGREEMENT, 1 (2006), <http://www.embryodonation.org/downloads/pdf/OpenDonationNEDC.pdf>.

WHEREAS, the Embryo Donors wish to transfer all their cryo-preserved embryos (the "Embryos") to the Embryo Recipients for the sole purpose of implantation with the ultimate objective of one or more viable pregnancies for the Embryo Recipients; and WHEREAS, the Embryo Recipients desire to receive the transferred embryos for the aforesaid purpose; and WHEREAS, the identity of each party is known to the other parties and the parties wish to agree on certain terms and conditions relative to the communication and future contact between themselves and their related offspring; . . .<sup>74</sup>

In sum, not all providers use the terms "embryo adoption" and "embryo donation" in an interchangeable manner, and among those providers who actually make a distinction between the two concepts there is no definite consensus as to what are the differentiating factors. From a legal perspective, the use of the term "embryo adoption" is technically imprecise because, as one fertility clinic's glossary of terms candidly states, "[i]t implies that the [d]onated [e]mbryos are actually adopted."<sup>75</sup> In fact, if a pregnancy does not result after a donor embryo is transferred to a recipient's uterus, the purported adoption has no legal effect or consequence. A child born as a result of an embryo being transferred to a woman's uterus has a biological relationship with the gestational, i.e. birth, mother and generally, unless a surrogacy contract is involved, there is a presumption of parentage in favor of the birthmother.<sup>76</sup> This presumption would make the concept of "adoption" meaningless in the context of embryo donation.<sup>77</sup> Nevertheless, the ideological connotation is inevitable and thus results in the rhetorical debate.

### III. SNOWFLAKES AND THE EMBRYO ADOPTION RHETORIC

Testifying on July 17, 2001 before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House of Representatives Committee on Government Reform, JoAnn L. Davidson affirmed that "[e]mbryo adoption is better than embryo donation because it involves a thorough screening process designed to ensure that embryos are placed with stable families meeting the expectations

---

74. *Id.*

75. SPECIALISTS IN REPRODUCTIVE MEDICINE & SURGERY, ART GLOSSARY OF TERMS 2 (2002), [http://www.dreamababy.com/download\\_files/ART%20Glossary%20of%20Terms.pdf](http://www.dreamababy.com/download_files/ART%20Glossary%20of%20Terms.pdf).

76. See, e.g., Embryo Adoption Information, *supra* note 54; West Coast Fertility Centers, *supra* note 64.

77. *Id.*

of genetic parents.”<sup>78</sup> This statement implies that embryo donation does not involve social investigation as part of the screening process. This implication is misleading as open embryo donations are possible,<sup>79</sup> and there is no impediment for embryo donors and recipients to require a screening process that assures each party’s compliance with the other’s specifications and expectations.<sup>80</sup> Furthermore, there is no impediment to a screening process even when the parties choose to remain anonymous, i.e., closed donation.<sup>81</sup> To require a social investigation such as a home study as part of a screening process is well within the prerogatives of the parties.<sup>82</sup> Home studies, however, did not constitute the real concern behind Davidson’s appeal to Congress in favor of embryo adoptions. Delivered at a hearing on whether the Federal Government should fund human embryonic stem cell research, her testimony can be succinctly reduced to a question she posed: “Are we going to accept the effect of genocide as medical therapy?”<sup>83</sup>

Davidson urged Congress to “save every embryo”<sup>84</sup> by extending to “the smallest of humans in America the right to life, liberty, and the pursuit of happiness.”<sup>85</sup> According to her, such right would be achieved through embryo adoption.<sup>86</sup> She not only declared that “the intent is that every embryo be given the opportunity for life”<sup>87</sup> but claimed that “at least 12,600 to 35,000 children could be adopted, thawed, and successfully born from human embryos residing in what many call frozen orphanages.”<sup>88</sup>

In the long run, the problem with the “embryo adoption”<sup>89</sup> concept Ms. Davidson tried to advance is that it would require all frozen embryos to be put up for “adoption” or remain frozen *per saecula saeculorum*. In her view, the “massacre”<sup>90</sup> of thousands of “living

---

78. *Opportunities and Advancement in Stem Cell Research: Hearing Before the Subcomm. on Crim. Just., Drug Pol’y and Hum. Resources of the H. Comm. on Gov.*, 107th Cong. 76 (2001) (testimony of JoAnn L. Davidson, Director, Snowflakes Embryo Adoption Program for Nightlight Christian Adoptions).

79. See, e.g., National Embryo Donation Center, *supra* note 54; Embryos Alive, *supra* note 67.

80. See, e.g., National Embryo Donation Center, *supra* note 56; Chicago IVF and Infertility, *supra* note 63.

81. See, e.g., Embryos Alive, *supra* note 68.

82. See, e.g., Embryos Alive, *supra* note 67.

83. *Opportunities and Advancements in Stem Cell Research*, *supra* note 78, at 72.

84. *Id.*

85. *Id.* at 73.

86. *Id.*

87. *Id.* at 72.

88. *Id.* at 71.

89. *Opportunities and Advancement in Stem Cell Research*, *supra* note 78, at 73.

90. See *id.* at 74.

human embryos”<sup>91</sup> could be prevented by educating the public about embryo adoption, including the adoption option in the consent procedures of fertility clinics, enforcing and encouraging limitations on the numbers of embryos that are created, and banning federal funding for the “destructive human experimentation of the littlest humans.”<sup>92</sup>

In her quest to save every embryo in the exploding “frozen living human” population, Davidson decried the media for trying “to paint opposition to embryo stem cell research as another attempt to overturn *Roe v. Wade*” and declared that “[h]uman embryo adoption is not about abortion.”<sup>93</sup> It is naive to assume that anyone might believe that her rhetoric does not apply to a woman who decides to voluntarily terminate her pregnancy. If human embryonic stem cell research amounts to genocide and the destruction of 3,300 ex vivo human embryos in Britain amounts to a “massacre,”<sup>94</sup> no doubt induced abortion after an embryo has been implanted in a woman’s uterus must amount to murder. It is incredibly ingenious to assert that the implications at the core of the following statement do not pervade the anti-abortion discourse:

Every human embryo, even if he or she can no longer be cared for by their genetic parents, deserves to be nurtured and given a chance for a good life with an adoptive couple who will love and raise them [sic] to be welcome citizens of this country. Under these circumstances, a decision to authorize the federal funding of human embryo destruction is a decision to take the lives of at least 12,600 to 35,000 children who otherwise could have been born and raised by loving adoptive parents.<sup>95</sup>

One must note that at the time of her testimony at the stem cell research hearing, Davidson was Director of the Snowflakes Frozen Embryo Adoption Program run by Nightlight Christian Adoptions,<sup>96</sup> a nonprofit domestic and international adoption agency licensed by the State of California.<sup>97</sup> The Snowflakes program specifically prohibits selective abortion at any stage and for any reason after multiple embryo transfer.<sup>98</sup> This prohibition means that “adopting families”

---

91. *Id.* at 73.

92. *Id.* at 72.

93. *Id.* at 82.

94. *See id.* at 74.

95. *Opportunities and Advancement in Stem Cell Research*, *supra* note 78, at 78.

96. *Id.* at 71.

97. *See* Nightlight Christian Adoptions, Snowflakes Embryo Adoption Program, <http://nightlight.org/snowflakeadoption.htm> (last visited Nov. 10, 2006).

98. Nightlight Christian Adoptions, Snowflakes FAQs, [http://nightlight.org/snowflake\\_faqs.htm](http://nightlight.org/snowflake_faqs.htm) (last visited Nov. 10, 2006).

are required to agree not to selectively reduce the number of fetuses when multiple pregnancies occur.<sup>99</sup>

Ultimately, Congress bought into the rhetoric and six months later JoAnn L. Davidson's appeal paid back. With the enactment of Public Law 107-116, Congress appropriated one million dollars for the public awareness campaign promoting embryo adoption,<sup>100</sup> and DHHS awarded Nightlight Christian Adoptions a grant for \$506,875, more than half of the available funds.<sup>101</sup> In spite of the "pre-born children" rhetoric exuding from Nightlight web pages dedicated to the Snowflakes program,<sup>102</sup> the Embryo Adoption Awareness Campaign website produced by Snowflakes purports an unbiased approach in explaining the practical usage of the terms "adoption" and "donation:"

From a practical standpoint, the terms embryo donation and embryo adoption can be, and often are, used interchangeably, with the programs found in fertility clinics tending to use the term embryo donation and the programs found in adoption agencies tending to use the term embryo adoption. The difference in terminology is based upon the program model used and the viewpoint of the participants in the process. Under the law, both programs result in the legal change of parental relationship from the donors to the recipients.<sup>103</sup>

As a matter of fact, the informative web pages produced with Embryo Adoption Awareness Campaign funds by the other two grantees, RESOLVE: The National Infertility Association<sup>104</sup> and Women & Infants Hospital of Rhode Island<sup>105</sup> do not use the term "embryo adoption" at all. Instead, they use the term "embryo donation."<sup>106</sup> Furthermore, research conducted by RESOLVE as part of

99. *Id.*

100. Depts. of Lab., Health and Hum. Services, and Educ. and Related Agencies, H.R. Rep. No. 107-342, *supra* note 49, at 112.

101. Embryo Adoption Awareness Campaign, Grant Details, <http://www.embryo-adoption.com/grantdetails.asp> (last visited Nov. 10, 2006).

102. *See, e.g.*, Nightlight Christian Adoptions, *supra* note 98.

103. Embryo Adoption Awareness Campaign, Practical Usage of the Terms "Adoption" and "Donation," <http://www.embryo-adoption.com/GenPracticalUsage.asp> (last visited Nov. 10, 2006).

104. *See, e.g.*, Embryo Donation — A Family Building Option: An Online Guide for Potential Embryo Donors, [http://www.resolve.org/site/PageServer?pagename=lrn\\_wamo\\_pd](http://www.resolve.org/site/PageServer?pagename=lrn_wamo_pd) (last visited Nov. 10, 2006).

105. *See, e.g.*, Women & Infants Hospital of Rhode Island, Embryo Donation Information for IVF Patients at W&I, <http://www.womenandinfants.org/body.cfm?id=652> (last visited Nov. 10, 2006).

106. *See* Embryo Donation — A Family Building Option, *supra* note 104; *see also* Women & Infants Hospital of Rhode Island, *supra* note 105.

the campaign revealed that the majority of respondents from the United States “has either never heard of ‘embryo adoption’ or heard of it, but is not sure what it means,”<sup>107</sup> seventy percent “overwhelmingly think the term ‘embryo donation,’ as opposed to ‘embryo adoption,’ best describes this process.”<sup>108</sup>

#### IV. THE UNIVERSALLY ESTABLISHED EMBRYO DONATION TERMINOLOGY

The glossary of the nearly four hundred page World Health Organization report *Current Practices and Controversies in Assisted Reproduction*, published in 2002, defines assisted reproductive technology (ART) as:

all treatments or procedures that include the *in vitro* handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, *in vitro* fertilization and transcervical embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and *embryo donation* and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman’s partner or sperm donor.<sup>109</sup>

Embryo donation is defined in the glossary as “the transfer of an embryo resulting from gametes that did not originate from the recipient and/or her partner.”<sup>110</sup> The section of the report dedicated to gamete and embryo donation states that “[o]ocyte, spermatozoa and embryo donation are ethically and legally accepted forms of assisted conception in many countries,”<sup>111</sup> and “[e]mbryo donation is a well-established and successful form of assisted conception treatment when both partners are infertile.”<sup>112</sup> The only article that makes any reference to “embryo adoption” states that the current denomination of

---

107. HARRIS INTERACTIVE, EMBRYO DONATION RESEARCH: SELECT FINDINGS 10 (2003), <http://www.resolve.org/site/DocServer/EmbryoDonationResearchSelectFindings.pdf?docID=301>.

108. *Id.* at 13.

109. WORLD HEALTH ORGANIZATION, CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION xix (Effy Vayena et al. eds., 2002) [hereinafter WHO, CURRENT PRACTICES], available at <http://www.who.int/reproductive-health/infertility/report.pdf> (emphasis added).

110. *Id.* at xx.

111. Claudia Borrero, *Gamete and Embryo Donation*, in WHO, CURRENT PRACTICES, *supra* note 109, at 166.

112. *Id.* at 171.



embryo donation as "prenatal adoption" in some Latin American countries is deceptive. Florencia Luna, a professor of bioethics, has noted that "[t]he term prenatal adoption is deceptive and conveys the idea of an actual adoption. It is not a neutral term, much less in a region where the embryo is sometimes more protected than women."<sup>113</sup>

The 2002 Guidelines for Gamete and Embryo Donation issued by the American Society for Reproductive Medicine include the "minimal standards for screening, testing, and counseling of potential embryo donors and recipients."<sup>114</sup> The guidelines for cryopreserved embryo donation state, among other things, that "[i]t is acceptable for a practice or cryostorage facility to have conservatorship of embryos given up for potential embryo donation by patients whose gametes were used to generate the embryos."<sup>115</sup> Embryo donors must sign a document in which they should address the relinquishment of "all rights to the embryo(s) and any child or children that may result from the transfer of such embryo(s)."<sup>116</sup> Furthermore, recipients "must take full responsibility for the embryos and any child or children that may result from the transfer."<sup>117</sup> From an ethical standpoint, the American Medical Association has clearly stated in its policy that gamete providers should be able to donate their embryos for use by other parties.<sup>118</sup>

From a federal regulatory perspective, embryo donation is an established concept encompassed within assisted reproductive technologies. Pursuant to section eight of the Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA),<sup>119</sup> the Secretary of Health and Human Services has defined the term "assisted reproductive technology" (ART) as "all treatments or procedures that include the handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy."<sup>120</sup> Embryo donation is included among the treatments and procedures listed in the Secretary's definition.<sup>121</sup> The term "donor embryos" is understood as "embryos derived from oocytes previously fertilized for another couple's ART therapy that were subsequently donated."<sup>122</sup>

---

113. Florencia Luna, *Assisted Reproductive Technology in Latin America: Some Ethical and Sociocultural Issues*, in WHO, *CURRENT PRACTICES*, *supra* note 109, at 35.

114. THE AM. SOC. FOR REPROD. MED., *2002 Guidelines for Gamete and Embryo Donation: a Practice Committee Report*, 77 FERTILITY AND STERILITY S5, S9 (2002).

115. *Id.*

116. *Id.* at S10.

117. *Id.*

118. See AM. MED. ASSOC. CODE OF MEDICAL ETHICS E-2.141 (2004).

119. Fertility Clinic Success Rate and Certification Act § 8, 42 U.S.C. § 263a-7 (1992).

120. See Reporting of Pregnancy Success Rates from Assisted Reproductive Technology Programs, 65 Fed. Reg. 53,310, 53,313 (Sept. 1, 2000).

121. *Id.*

122. *Id.* at 53, 314.

The FCSRCA requires that all ART programs report annually to the Centers for Disease Control and Prevention (CDC) the “pregnancy success rates achieved [ . . . ] through each assisted reproductive technology.”<sup>123</sup> Among other data, clinics must report whether they have a “donor embryo program.”<sup>124</sup> The data submitted by ART programs is used to publish an annual report which includes clinic-specific success rates for all ART cycles using donor embryos.<sup>125</sup> An appendix to the report must contain a “consumer-oriented explanation of all medical and statistical terms used.”<sup>126</sup> According to the “consumer-oriented explanation” of the terms used in the 2003 report (the most recently published), donor embryos are “embryos that were donated by another couple who previously underwent ART treatment and had extra embryos available.”<sup>127</sup>

An interim Food and Drug Administration (FDA) regulation regarding the eligibility determination for donors of human cells, tissues, and cellular and tissue-based products entered into effect on May 25, 2005, furthering the fixation of the embryo donation concept in the federal regulatory scheme.<sup>128</sup> With certain specified exceptions, fertility clinics are now required to make a “donor-eligibility determination based on donor screening and testing for relevant communicable disease agents and diseases.”<sup>129</sup> The eligibility of both the oocyte donor and the semen donor must be determined in cases involving donor embryos.<sup>130</sup> The FDA treats semen, ova, and embryos as analogous to reproductive cells and tissues and as a result all can be donated.<sup>131</sup> Thus, a “reproductive donor” is “a donor of reproductive cells or tissue (including semen, oocytes, and embryos to which the donor contributed the spermatozoa or oocyte).”<sup>132</sup>

For the purpose of the rule, “there are three categories of reproductive donors, subject to three different sets of requirements: . . . the anonymous donor, . . . the directed reproductive donor, [and] the sexually intimate partner.”<sup>133</sup> The first and the third need no further

---

123. Fertility Clinic Success Rate and Certification Act, *supra* note 119, at § 2.

124. *See* Reporting of Pregnancy Success Rates, *supra* note 120.

125. *See id.* at 53, 316.

126. *Id.*

127. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUM. SERVICES, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 485 (2005).

128. *Id.*

129. 21 C.F.R. § 1271.45(b) (2006).

130. *Id.*

131. *See generally* Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products; Final Rule and Notice, 69 Fed. Reg. 29,786 (May 25, 2004).

132. *Id.*; 21 C.F.R. § 1271.3(l) (2006).

133. Eligibility Determination for Donors of Human Cells, *supra* note 131, at 793.

explanation. The second donates reproductive cells or tissue "to a specific recipient" and "knows and is known by the recipient before donation"<sup>134</sup> in what is termed a "directed donation,"<sup>135</sup> thus the nomenclature of "directed reproductive donor."

In the European context, the statements of the European Society of Human Reproduction and Embryology Task Force on Ethics and Law consistently use the term embryo donation with no mention whatsoever of the term "embryo adoption."<sup>136</sup> Legal measures like the European Union Directive regarding human tissues and cells<sup>137</sup> and the Spanish regulation of ART,<sup>138</sup> as well as agencies like the United Kingdom's Human Fertilisation and Embryology Authority,<sup>139</sup> solely use the term embryo donation. The *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*<sup>140</sup> and the proposed *Guidelines for the Practice of Embryo Donation for Reproductive Purposes* in New Zealand<sup>141</sup> are other examples of the standardization of the term embryo donation.

#### V. THE BUSH ADMINISTRATION'S "CATHOLIC STRATEGY"

Referred to as nascent human beings, nascent human lives, pre-born children, ex vivo embryos, ex utero embryos, pre-embryos, fertilized eggs, zygotes, et cetera, depending on the source, fertility clinics throughout the United States contain more than 400,000 cryopreserved human embryos.<sup>142</sup> At least under current scientific knowledge, it is a fact that human embryos do not have the capacity to develop independently *ex vivo*, or outside the body. This fact relates directly to viability as the line that determines the degree of constitutionally permissible governmental intervention with reproductive choices.<sup>143</sup> Still, the moral status of human embryos is at the core of

134. 21 C.F.R. § 1271.3(l).

135. Eligibility Determination for Donors of Human Cells, *supra* note 131, at 793.

136. See, e.g., Task Force on Ethics and Law, EUROPEAN SOCIETY OF HUMAN REPRODUCTION AND EMBRYOLOGY, *The Moral Status of the Pre-implantation Embryo*, 16 HUM. REPROD. 1046 (2001); *The Cryopreservation of Human Embryos*, 16 HUM. REPROD. 1049 (2001); *Gamete and Embryo Donation*, 17 HUM. REPROD. 1407 (2002).

137. Council Directive 2004/23, 2004 O.J. (L 102) 48 (EC).

138. L.E. CIV. 45/2003 de 21 de noviembre & L.E. CIV. 35/1988 de 22 de noviembre.

139. See, e.g., Human Fertilisation and Embryology Authority, For Donors, <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-927453EC/hfea/hs.sxl/368.html> (last visited Nov. 10, 2006).

140. INDIAN COUNCIL OF MED. RES., NAT'L ACAD. OF MED. SCI., *National Guidelines for Accreditation, Supervision and Reg. of ART Clinics in India* (2004), [http://icmr.nic.in/art\\_clinic/art\\_clinic.htm](http://icmr.nic.in/art_clinic/art_clinic.htm) (last visited Nov. 10, 2006).

141. ADVISORY COMM. ON ASSISTED REPROD. TECH., *Guidelines*, <http://www.newhealth.govt.nz/acart/guidelines.htm> (last visited Nov. 10, 2006).

142. See *supra* note 30.

143. Regarding viability in this sense see generally *Roe v. Wade*, 410 U.S. 113 (1973),

the ethical discussions surrounding the disposition of those conserved in frozen oblivion. As Sean Tipton, administrator of the public affairs office of the American Society of Reproductive Medicine, explained, "the political climate in this country makes the discussion of the disposition of frozen embryos nearly impossible."<sup>144</sup>

An Episcopal minister, member of the Republican Party, former United States senator from Missouri, and ex-ambassador of the United States to the United Nations, John C. Danforth has characterized the currently governing party's blending of politics with religion in the following manner:

By a series of recent initiatives, Republicans have transformed our party into the political arm of conservative Christians. The elements of this transformation have included advocacy of a constitutional amendment to ban gay marriage, opposition to stem cell research involving both frozen embryos and human cells in petri dishes, and the extraordinary effort to keep Terri Schiavo hooked up to a feeding tube.

Standing alone, each of these initiatives has its advocates, within the Republican Party and beyond. But the distinct elements do not stand alone. Rather they are parts of a larger package, an agenda of positions common to conservative Christians and the dominant wing of the Republican Party.<sup>145</sup>

According to Danforth, the problem does not reside with politically active people or churches but "with a party that has gone so far in adopting a sectarian agenda that it has become the political extension of a religious movement."<sup>146</sup> Voicing what probably is an increasingly growing preoccupation among a vast number of United States citizens, he cautions that "[w]hen government becomes the means of carrying out a religious program, it raises obvious questions under the First Amendment."<sup>147</sup>

What some have termed as the "Catholic strategy"<sup>148</sup> characterized the Republican presidential campaign both during the 2000 and 2004 elections. It sought to consolidate the electoral power of church-going Protestants and Catholics with the eradication of legalized

---

Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833 (1992), and Stenberg v. Carhart, 530 U.S. 914 (2000).

144. Gwen Mayes, *Frozen in Time: Disposition of Frozen Embryos Gives Rise to Ethical, Legal, and Yes . . . Political Considerations*, 8(1) MEDSCAPE OB/GYN & WOMEN'S HEALTH (2003), <http://www.medscape.com/viewarticle/456483> (last visited Nov. 10, 2006).

145. John C. Danforth, *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at A17.

146. *Id.*

147. *Id.*

148. See, e.g., Peter Steinfels, *The President, the Veteran Labor Priest and the Makings of a 'Catholic Strategy'*, N.Y. TIMES, May 26, 2001, at A11.

abortion at the top of the agenda.<sup>149</sup> Early in his incumbency, as heralded in the first Gore-Bush presidential debate,<sup>150</sup> President Bush pledged his allegiance to Pope John Paul II on the issue of abortion by adopting the Pope's hallmark concept of the "culture of life."<sup>151</sup> On March 21, 2002, at the dedication of the Pope John Paul II Cultural Center at Washington's Catholic University, the President remarked that "[i]n the culture of life we [ . . . ] must defend in love the innocent child waiting to be born."<sup>152</sup> On his first day in office, Bush reinstated Reagan's "global gag rule," denying family planning funding to foreign non-governmental organizations that perform legal abortions, provide counseling and referral for abortion, or lobby to legalize abortion or make it more available in their respective countries.<sup>153</sup> In 2002 the President decided to defund the United Nations Population Fund and has not honored the United States's commitment since.<sup>154</sup> The administration has used various United Nations population and reproductive rights fora to aggressively promote its "abstinence-only" policy and has unequivocally distanced the United States from the global consensus regarding reproductive and sexual health.<sup>155</sup>

One can better grasp the conceptual alliance between the United States and the Vatican on reproductive and sexual health issues when considering the fact that the Bush administration engaged John Klink, a former advisor to the Holy See Mission to the United Nations, as part of the United States delegation on family planning at international conferences.<sup>156</sup> Klink was the strategist and lead negotiator for

---

149. See, e.g., Julia Duin, *GOP Seeks Faithful Catholic Vote*, WASH. TIMES, Sep. 3, 2004, at A16; Richard N. Ostling, *GOP Rallies Catholics to Support Bush*, ASSOCIATED PRESS, Sep. 2, 2004, available in LexisNexis, Associated Press Online File.

150. Vice President Al Gore and Texas Governor George W. Bush, First Presidential Debate (Oct. 3, 2000) (transcript available at <http://www.pbs.org/newshour/bb/election/2000debates/1stdebate2.html>).

151. See Kenneth T. Walsh, *A Brand New Front in the Culture Wars*, U.S. NEWS & WORLD REP., Jul. 23, 2001, at 22.

152. President George W. Bush, Remarks at Dedication of the Pope John Paul II Cultural Center (Mar. 22, 2001) (transcript available at [http://www.usembassy.it/file2001\\_03/alia/a1032206.htm](http://www.usembassy.it/file2001_03/alia/a1032206.htm)).

153. See, e.g., Mike Allen, *Bush Reverses Abortion Aid*, WASH. POST, Jan. 23, 2001, at A1; Frank Bruni and Marc Lacey, *Bush Acts to Halt Overseas Spending Tied to Abortion*, N.Y. TIMES, Jan. 23, 2001, at A1.

154. See Christopher Marquis, *U.S. Cuts Off Financing of U.N. Unit for 3rd Year*, N.Y. TIMES, Jul. 17, 2004, at A6.

155. Susan A. Cohen, *The President's Overseas Reproductive Health Policy: Think Locally, Act Globally*, GUTTMACHER REP. ON PUB. POL'Y 1, 1 (2002); see also Colum Lynch, *U.S. Drops Abortion Issue at U.N. Conference*, WASH. POST, Mar. 5, 2005, at A13. See generally Susan A. Cohen, *U.S. Global Reproductive Health Policy: Isolationist Approach In an Interdependent World*, THE GUTTMACHER REP. ON PUB. POL'Y 7, 7 (2004).

156. See Cohen, *U.S. Global Reproductive Health Policy: Isolationist Approach In an Interdependent World*, *supra* note 155.

the Holy See at the Cairo International Conference on Population and Development in 1994 and at the Beijing World Conference on Women in 1995.<sup>157</sup>

President's Bush communion with conservative Catholics yielded its best results in the 2004 elections, as he won fifty-six percent of the white Catholic vote defeating John Kerry, a practicing Catholic.<sup>158</sup> Several American Bishops rallied their congregations to vote for Bush, based on "culture of life issues" such as abortion and embryonic stem cell research.<sup>159</sup>

As spelled out in a New York Times article, however, the issue of embryonic stem cell research kept "percolating on Capitol Hill."<sup>160</sup> On April 21, 2005, scarcely two weeks after Dr. Elias Zerhouni, Director of the National Institutes of Health, testified before a panel of senators that scientists believe the current restrictions on federal financing for embryonic stem cell research are hindering scientific progress,<sup>161</sup> a bipartisan group of senators members renewed efforts to expand federal funding for such research with the introduction of a new bill.<sup>162</sup>

The issue had divided anti-abortion conservatives, according to a Reuters news article that pointed to the fact that Republican Senator Orrin Hatch of Utah had signed on in support of federal funding for stem cell research with liberals such as Massachusetts Democrat Edward Kennedy.<sup>163</sup> For Hatch, sponsoring the bill is compatible with his opposition to abortion, as he does not believe that human life begins in a Petri dish, and "one of the best ways to be pro-life is to help the living."<sup>164</sup>

On May 20, 2005, as a bipartisan team in the House of Representatives gathered enough supporters for the legislation that would make federal money available for embryonic stem cell research, President Bush vowed to veto the bill if it used taxpayers' money "to promote science which destroys life in order to save life."<sup>165</sup> On May

---

157. *See id.*

158. *See* Robin Toner, *Pope May Color Debate in U.S. Over 'Life' Issues Like Abortion*, N.Y. TIMES, Apr. 21, 2005, at A1.

159. *See id.*; *see also* David D. Kirkpatrick & Laurie Goodstein, *Group of Bishops Using Influence to Oppose Kerry*, N.Y. TIMES, Oct. 12, 2004, at A1.

160. Sheryl Gay Stolberg, *Changes Are Weighed on Stem Cells*, N.Y. TIMES, Apr. 7, 2005, at A17.

161. *See id.*

162. *See* Julie Rovner, *U.S. Senators Push for More Stem Cell Research*, REUTERS HEALTH, Apr. 21, 2005, <http://www.hcdhealth.com/ViewNewsArticle.cfm?ID=19>.

163. Maggie Fox, *U.S. Panel Urges New Rules for Stem-Cell Research*, REUTERS, Apr. 27, 2005, available at <http://www.planetark.com/dailynewsstory.cfm/newsid/30570story.htm> (last visited Sept 16, 2006).

164. *See* Rovner, *supra* note 162.

165. Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (2005); Peter

24, the day the bill was scheduled for a vote on the House floor, the President made remarks supporting embryo "adoption" as the "life-affirming alternative."<sup>166</sup> Accompanied by twenty-one children born through the Snowflakes program, their parents, and Snowflakes representatives, he praised the program for matching biological parents with "adoptive" families to procreate a total of eighty-one children.<sup>167</sup> In spite of his direct admonishment of the bill being considered,<sup>168</sup> the House voted to repeal the President's funding restrictions on embryonic stem cell research.<sup>169</sup> The fissure within the Republican Party deepened a month later when Senate Majority Leader Bill Frist announced his support for the legislation.<sup>170</sup> Finally on July 18, 2006, in what has been characterized as a "political showdown" with President Bush, the Senate defiantly passed the bill only four votes short of the two-thirds majority needed to override the threatened presidential veto.<sup>171</sup> The following day, surrounded again by "Snowflakes families," President Bush issued his first veto since taking office in 2000.<sup>172</sup>

## VI. EMBRIOLOGIA SACRA

Perhaps we are witnessing the revival of the governmental sanctioning of sacred embryology with the appropriation of one million dollars per year in public funds for the promotion of "embryo adoptions" with Public Laws 107-116<sup>173</sup> 108-7,<sup>174</sup> 108-199<sup>175</sup> and 108-447<sup>176</sup> for fiscal years 2002, 2003, 2004 and 2005 respectively, and two million dollars for fiscal year 2006 with Public Law 109-149.<sup>177</sup> A legal phenomenon occurring during the late 1700s and early 1800s, it would

---

Baker, *President Vows Veto On Stem Cell Research*, WASH. POST, May 21, 2005, at A6.

166. President George W. Bush, Remarks on Bioethics at the White House (May 24, 2005) (transcript available at <http://www.keepermedia.com/pubs/PRNewswire/2005/05/24/867310>).

167. *See id.*

168. *Id.*

169. *See, e.g.,* Mike Allen and Ceci Connolly, *House Defies Bush on Stem Cells*, WASH. POST, May 25, 2005, at A1.

170. *See, e.g.,* Ceci Connolly, *Frist Breaks With Bush On Stem Cell Research*, WASH. POST, July 30, 2005, at A1.

171. *See* Amy Fagan, *Senate OKs Stem-Cell Bill*, WASH. TIMES, Jul. 19, 2006, at A1; *see also* Laurie Kellman, *Senate Approves Embryonic Stem Cell Bill, Sends to Bush for His First Veto*, ASSOCIATED PRESS, Jul. 19, 2006, available in LexisNexis, Associated Press File.

172. *See* Charles Babington, *Stem Cell Bill Gets Bush's First Veto*, WASH. POST, Jul. 20, 2006, at A4; Mary Dalrymple, *Bush Vetoes Bill Expanding Federally Funded Embryonic Stem Cell Research*, ASSOCIATED PRESS, Jul. 19, 2006.

173. *See supra* notes 49 and 50 and accompanying text.

174. Consolidated Appropriations Act, H.R. 2673, 108th Cong. (1st Sess. 2003).

175. *Id.*

176. Consolidated Appropriations Act, H.R. 2673, 108th Cong. (2nd Sess. 2004).

177. Dep'ts of Labor, Health and Human Serv., and Educ. and Related Agencies Appropriations Act of 2006 (2005).

not be the first time the law would be used regardless of ecclesiastical sanctioning to warrant the salvation of imperiled "pre-born children" in what today constitutes part of the United States and its territories, i.e., Alta California and Puerto Rico. Sacred Embryology was understood as that part of theology dealing with the embryo, the fetus, and the nascent child as capable subjects of baptism.<sup>178</sup> It concerned the obligations of priests, doctors, surgeons, midwives, and accoucheurs towards "the tender creatures that claim of them, at least, the spiritual life."<sup>179</sup>

In 1767, under the influence of Francesco Cangiamila's treatise on *Embriologia Sacra*, King Charles III of Spain mandated that post-mortem cesarean sections be performed throughout the kingdom.<sup>180</sup> Published in 1747, Cangiamila's treatise proposed that priests were obliged to perform cesarean sections on pregnant women after they died, so priests could baptize the fetus.<sup>181</sup> In 1772, the viceroy of New Spain, Antonio María de Bucareli y Ursúa, ordered the procedure be practiced throughout the viceroyalty.<sup>182</sup> As a result the first documented postmortem cesarean section in America<sup>183</sup> was performed in California by friars Joseph Viader and Joseph Viñals at the Santa Clara mission in 1779.<sup>184</sup> Following a royal decree by Charles IV in 1804 mandating the procedure throughout the Spanish empire, several postmortem cesarean sections were recorded in Puerto Rico between 1805 and 1808.<sup>185</sup>

178. INOCENCIO MARÍA RIESCO LE-GRAND, *TRATADO DE EMBRIOLOGÍA SAGRADA* 15 (1848), available at <http://www.filosofia.org/aut/irg/1848es.htm>.

179. *Id.* [translated by author].

180. See Juan Carlos Ruiz Guadalajara, *Con la Sangre de Todo un Dios, la Caridad del Sacerdote para con los Niños Encerrados en el Vientre de Sus Madres Difuntas, y Notas Sobre la Cesárea Postmortem en el Periodo Novohispano Tardío*, 24 RELACIONES, Spring 2003, at 201, 207; see also Martina E. Will de Chaparro, *De Cuerpo a Cadáver: el Tratamiento de los Difuntos en Nuevo México en los Siglos XVIII y XIX*, 24 RELACIONES, Spring 2003, at 60, 84, available at <http://redalyc.uaemex.mx/redalyc/src/inicio/IndArtRev.jsp?iCveNumRev=558&iCveEntRev=137>.

181. See generally RIESCO LE-GRAND, *supra* note 178, at 227-50; see also Adam Warren, *Pastoral Zeal and "Teacherous" Mothers: Ecclesiastical Debates about Cesarean Sections, Abortion, and Infanticide in Andean Peru, 1780-1810*, in WOMEN, ETHNICITY, AND MEDICAL AUTHORITY: HISTORICAL PERSPECTIVES ON REPRODUCTIVE HEALTH IN LATIN AMERICA 10 (Tamera Marko & Adam Warren eds., 2004), available at <http://repositories.cdlib.org/cilas/papers/21>.

182. See Ruiz Guadalajara, *supra* note 180, at 208; Will de Chaparro, *supra* note 180, at 84.

183. See Carlos Agustín Rodríguez Paz & Ramón Vázquez Ortega, *El Inicio de la Laparotomía en el Trauma Abdominal en México*, 23 CIRUJANO GENERAL 278, 279 (2001), available at [www.medigraphic.com/pdfs/cirgen/cg-2001/cg014k.pdf](http://www.medigraphic.com/pdfs/cirgen/cg-2001/cg014k.pdf).

184. See Arturo Juárez Azpilcueta et al., *Operación Cesárea Postmortem con Supervivencia Fetal*, 62 REVISTA MÉDICA DEL HOSPITAL GENERAL DE MÉXICO 132, 133 (1999), available at [www.medigraphic.com/pdfs/h-gral/hg-1999/hg992h.pdf](http://www.medigraphic.com/pdfs/h-gral/hg-1999/hg992h.pdf).

185. See José G. Rigau-Pérez, *Surgery at the Service of Theology: Postmortem Cesarean*



Contrary to the modern governmental sanctioning of sacred embryology, which promotes the implantation of all ex vivo "pre-born children," the historic decrees mandated extraction of the *concepti* from the bodies of pregnant women who died.<sup>186</sup> More concerned with eternal spiritual life than temporal earthly life, the mandated post-mortem cesarean sections had the purpose of saving the creatures' souls with the administration of the sacrament of baptism before what, in most cases, would be a certain death.<sup>187</sup> According to Catholic tradition only living human beings can be the subject of this sacrament,<sup>188</sup> and "conditional baptism would be applied in those cases where fetuses did not seem to be alive, as long as there were no evident signs of putrefaction or decomposition."<sup>189</sup> A 1772 Mexican translation of Cangiamila's treatise stated:

[T]he parish priest should have in his house for these unexpected accidents a blade, so that the birthing midwife or someone else capable of performing the operation in the absence of a surgeon may make use of it. In the case of pure and unavoidable necessity, in order not to send the miserable soul to Limbo, the priest himself in the name of God should extract the creature, and he will receive a duplicated reward for the duplicated fatigue and charity of extracting and baptizing the poor little creature.<sup>190</sup>

Due to the perpetual theological debate regarding when the human embryo became animated by the rational, spiritual soul, the Catholic Church did not hold a formal official posture endorsing the practice of postmortem caesarean section to save the spiritual life of the conceptus.<sup>191</sup> Throughout the eighteenth century and most of the nineteenth century the Church did not penalize abortion before the fetus quickened or animated,<sup>192</sup> which supposedly happened "about the one hundred and sixteenth day after conception."<sup>193</sup>

---

*Sections in Puerto Rico and the Royal Cedula of 1804*, 75 HISP. AM. HIST. REV. 377, 397-98 (1995).

186. *Id.* at 377.

187. *Id.*

188. See William H. W. Fanning, *Baptism*, THE CATHOLIC ENCYCLOPEDIA ONLINE EDITION 2 (2003), <http://www.newadvent.org/cathen/02258b.htm>.

189. See RIESCO LE-GRAND, *supra* note 178, at 240 (last visited September 15, 2006).

190. Warren, *supra* note 181, at 23.

191. See Ruiz Guadalajara, *supra* note 180, at 205; see also Warren, *supra* note 181, at 10.

192. See Childbirth by Choice Trust, *Abortion Law, History, and Religion*, [http://www.cbctrust.com/history\\_law\\_religion.php](http://www.cbctrust.com/history_law_religion.php) (last visited September 16, 2006).

193. See C. Coppens, *Abortion*, 1 THE CATHOLIC ENCYCLOPEDIA ONLINE EDITION (2003), <http://www.newadvent.org/cathen/01046b.htm>; see also RIESCO LE-GRAND, *supra* note 178, at 38-51 (discussing different views regarding animation).

With Pope Pius IX's bull *Apostolicae Sedis Moderationi* issued in 1869, the distinction between animate and inanimate fetuses was to some extent abrogated,<sup>194</sup> and abortion at any gestational stage was penalized with excommunication.<sup>195</sup> Still, in the context of therapeutic abortion, the value of the life of a fetus in relation to the value of the life of the pregnant woman remained ambiguous in the teachings of the Church at least until the end of the nineteenth century.<sup>196</sup> Finally, on July 24, 1895, abortion was condemned by name when the Vatican issued a ruling against medical, i.e., therapeutic, abortion.<sup>197</sup>

Furthering the analogy of government-sanctioned sacred embryology, currently the Magisterium of the Catholic Church has not yet issued an authoritative opinion regarding what has been termed the "embryo rescue debate."<sup>198</sup> Even among those within the Catholic Church who propose that human life exists from the moment an oocyte is fertilized by a sperm whether in vitro or in vivo, the question regarding the extent to which a cryopreserved embryo has a right to live seems to be profoundly divisive. Contemporary moral theologians and philosophers disagree on the question of the morality of embryo "rescue" or "adoption."<sup>199</sup> Although the Catholic debate is complex, perhaps it can be summarized by paraphrasing a question posed by Catholic syndicated columnist Grace MacKinnon: Can the lives of frozen embryos be saved when the only way of doing so involves taking part in an act condemned as immoral by the Catholic Church?<sup>200</sup>

The *Declaration On Procured Abortion* set out in 1974 by the Congregation for the Doctrine of the Faith after the *Roe v. Wade* decision states, *inter alia*, that "[t]he first right of the human person is his life" and "respect for human life is called for from the time that the process of generation begins," i.e., "[f]rom the time that the ovum

---

194. See *id.* The distinction remained in the context of incurring an "irregularity." A person procuring an abortion of a child after quickening would be hindered to receive or exercise "Orders in the Church," but such irregularity would not be incurred before quickening. *Id.*

195. See *id.*; see also Joseph G. Ryan, *The Chapel and the Operating Room: The Struggle of Roman Catholic Clergy, Physicians, and Believers with the Dilemmas of Obstetric Surgery, 1800-1900*, 76 BULL. HIST. MED. 461, 471 (2002).

196. See generally Ryan, *supra* note 195, at 471.

197. *Id.*

198. See generally Grace MacKinnon, *Can Frozen Embryos Be Saved?*, THIS ROCK, Jan. 2002, available at <http://www.catholic.com/thisrock/2002/0201fea5.asp>; see also Nicholas Tonti-Filippini, *The Embryo Rescue Debate: Impregnating Women, Ectogenesis, and Restoration from Suspended Animation*, 3 NAT'L CATH. BIOETHICS Q. 111 (2003).

199. See Mary Shivanandan & Joseph C. Atkinson, *Person as Substantive Relation and Reproductive Technologies: Biblical and Philosophical Foundations*, 7 LOGOS: J. CATH. THOUGHT & CULTURE 124, 137-38 (2004).

200. See MacKinnon, *supra* note 198.

is fertilized.”<sup>201</sup> In doing so, the Catholic Church officially adopted a passage from the *Apologeticus* authored by Tertullian in the year 197 C.E.:

To prevent birth is anticipated murder; it makes little difference whether one destroys a life already born or does away with it in its nascent stage. The one who will be a man is already one.<sup>202</sup>

The declaration “expressly leaves aside the question of the moment when the spiritual soul is infused”<sup>203</sup> and advances a right-to-life argument. In the more recent *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation — Replies to Certain Questions of the Day*, the Congregation for the Doctrine of the Faith expounds the Church’s moral opposition to in vitro fertilization, the donation of gametes between persons who are not legitimately united in marriage, and the freezing of embryos.<sup>204</sup> At the same time, it unequivocally states:

[T]he fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality. The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.<sup>205</sup>

The catechism of the Catholic Church states that “[t]echniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral.”<sup>206</sup> The debate within the Catholic church regarding the “rescue” of frozen embryos — or heterologous embryo transfer, as Australian Catholic ethicist Nicholas Tonti-Filippini<sup>207</sup> prefers to call it — raises issues such as “the right of the child to be

---

201. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION — REPLIES TO CERTAIN QUESTIONS OF THE DAY* (1987), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) (last visited Nov. 10, 2006).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. CATECHISM OF THE CATHOLIC CHURCH WITH MODIFICATIONS FROM THE EDITIO TYPICA, No. 2376 (1997), available at <http://www.vatican.va/archive/catechism/p3s2c2a6.htm>.

207. See generally Tonti-Filippini, *supra* note 198.

treated as a subject not an object, the right to be conceived in a marital union, and the right to life."<sup>208</sup>

American Catholic theologian William E. May argues that it is morally permissible from a Catholic perspective "to adopt prenatally a frozen embryo in order to rescue it from certain death and give it a chance at life."<sup>209</sup> Undoubtedly that is the view of Oreste Benzi, an Italian Catholic priest whose followers have embarked on a crusade to "save the lives" of what he calls "frozen orphans" put up for "adoption" by the Instituto Marqués, a fertility clinic in Barcelona, Spain.<sup>210</sup> The Italian women offering their wombs to "rescue" the relinquished supernumerary embryos stored at the Instituto Marqués are members of the Pope John XXIII Association founded by Father Benzi in 1968.<sup>211</sup> They are willing to do so not because they want offspring, as Father Benzi explains, "but to save beings who would otherwise be murdered."<sup>212</sup>

Tonti-Filippini, however, warns that "the rights of the child are not the only intrinsic issue" because "[t]he question of the unity of marriage, the dignity of the spouses, and their fidelity to each other are also at issue."<sup>213</sup> He also points out that "there is an issue of cooperation, or at least association, with the evils of reproductive technology programs,"<sup>214</sup> and in relation to each embryo, the debate focuses on "whether a woman should become involved with such a program in order to achieve a very small chance of saving the life of the embryo."<sup>215</sup> According to Tonti-Filippini, it is not acceptable that supernumerary embryos be kept in a "state of total suppression of dynamism and arrested development," or cryopreservation.<sup>216</sup> He asserts that there is an "obligation to return the embryo back to as normal a living state" as soon as possible.<sup>217</sup> This obligation requires "not to continue frozen storage, but to withdraw the embryo from storage and place it in a more natural environment in which it can rehydrate and thaw and thus resume its normal path of growth and

---

208. See Shivanandan & Atkinson, *supra* note 199, at 137.

209. See MacKinnon, *supra* note 198 (summarizing May's conclusion after studying the various positions of the leading moral theologians on the issue).

210. See Paco Rego, *La Primera Embarazada con un Embrión Adoptado*, EL MUNDO, Feb. 27, 2005, at 1, available at <http://www.elmundo.es/cronica/2005/489/1109458818.html>; see also Irene Hernández Velasco, *La Caravana de Italianas Adoptantes*, EL MUNDO, Feb. 27 2005, at 3, available at <http://www.elmundo.es/cronica/2005/489/1109458818.html> [trans. by author].

211. *Id.*

212. See Velasco, *supra* note 210.

213. See Tonti-Filippini, *supra* note 198, at 114.

214. *Id.* at 116.

215. *Id.* at 117.

216. *Id.* at 136.

217. *Id.*

development."<sup>218</sup> Restoration to "their natural dynamic state, a state more fitting their sacredness as human beings than the state of frozen and anhydrous suspended animation," he argues, "would constitute a rescue, albeit short-lived, because of the absence of any licit means ultimately of preventing death."<sup>219</sup> Thus death, he concludes, "would result because they would develop to a state of maturity in which their vital needs could not licitly be met."<sup>220</sup>

## VII. THE CATHOLIC STRATEGY

On December 11, 2003, the Italian Senate approved a controversial bill banning, among other things, gamete donation and embryo cryopreservation.<sup>221</sup> The measure was condemned by the European Society of Human Reproduction and Embryology (ESHRE) which represents 4,500 international fertility experts.<sup>222</sup> ESHRE chairman Professor Arne Sunde characterized the measure as "draconian,"<sup>223</sup> while other critics labeled it as "medieval" and "monstrous."<sup>224</sup> Supporters of the law argued that the rights of the embryos needed to be protected.<sup>225</sup> According to *Science & Theology News*, "The law closely resembles the Catholic Church's views on fertilization in vitro."<sup>226</sup> Newspapers in Italy stated that the law "was a Christmas gift to the Pope."<sup>227</sup> Professor Sunde considered it "beyond doubt that the Vatican ha[d] been working for years in order to have a conservative Italian law in this field."<sup>228</sup> An article in *The New York Times* highlighted the evident influence of the Catholic Church in the Senate's approval of the measure.<sup>229</sup>

---

218. *Id.*

219. *Id.*

220. *Id.*

221. See *Italy Bans Donor Sperm and Eggs*, B.B.C. NEWS, Dec. 11, 2003, <http://news.bbc.co.uk/2/hi/europe/3311031.stm> (last visited Nov. 10, 2006); see also Nicole Winfield, *Italian Senate OKs Law Restricting Fertility Treatments to Heterosexual Couples, No Donors Allowed*, THE ASSOCIATED PRESS, Dec. 11, 2003, available in LexisNexis, The Associated Press File.

222. Press Release, European Society of Human Reproduction and Embryology, European Experts Slam New Italian Fertility Rules (Dec. 13, 2003) [hereinafter ESHRE Press Release], <http://www.eshre.com/emc.asp?pageID=453> (last visited Nov. 10, 2006).

223. *Id.*

224. See *Italy Bans Donor Sperm and Eggs*, *supra* note 221.

225. *Id.*

226. See Chhavi Sachdev, *New Italian Law Banning In Vitro Resembles Pope's Edict*, SCIENCE & THEOLOGY ONLINE EDITION, Feb. 1, 2004, <http://www.stnews.org/rlr-929.htm> (last visited Nov. 10, 2006).

227. *Id.* (quoting Arne Sunde).

228. *Id.*

229. Jason Horowitz, *Italian Debate on Fertility Bill Raises Issue of Church Influence*, N.Y. TIMES, Dec. 14, 2003, at A36.

After staunch lobbying by some Roman Catholic groups<sup>230</sup> as well as the Vatican and Pope John Paul II,<sup>231</sup> the law was finally promulgated on February 19, 2004.<sup>232</sup> From being regarded as the "unregulated 'Wild West' of assisted fertility,"<sup>233</sup> Italy arguably became the European country with the most restrictive legislation on medically assisted reproduction.<sup>234</sup> Six months later, clinics in Spain, Austria, and Switzerland were reporting a twenty percent increase in Italian patients seeking donor treatment<sup>235</sup> in what has been termed "reproductive tourism."<sup>236</sup>

By January 2005, the Italian Constitutional Court had approved a series of referendums on easing the restrictions brought on by the law.<sup>237</sup> Cardinal Camillo Ruini immediately called on Italians to maintain the existing law, stating that it "does not correspond to the ethics of the Church but it has the merit of safeguarding certain principles and essential criteria."<sup>238</sup> Thus, the head of Italy's Conference of Catholic Bishops marked the start of an aggressive campaign urging Catholics to abstain from voting in the referendum.<sup>239</sup> The strategy was to assure the nullity of the process by undermining the constitutionally required participation of fifty percent of the voters plus one. According to Ruini, the only way effectively to maintain the

---

230. See *Italians to Vote on Fertility Law*, B.B.C. NEWS, Jan. 13, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4171837.stm> (last visited Nov. 10, 2006).

231. See Ian Fisher & Elisabetta Povoledo, *In Political Step, Pope Joins Fray On Fertility Law*, N.Y. TIMES, May 31, 2005, at A1.

232. Law of February 19, 2004, No. 40 Gazz. Uff. February 24, 2004, No. 45 (Law 40/2004, Norme in Materia di Procreazione Medicalmente Assistita).

233. See Richard Owen, *Italian Fertility Referendum Invalidated*, TIMES ONLINE, Jun. 13, 2005, <http://www.timesonline.co.uk/article/0,,13509-1653037,00.html> (last visited Nov. 10, 2006).

234. See Elisabeth Rosenthal & Elisabetta Povoledo, *Vote on Fertility Law Fires Passions in Italy*, N.Y. TIMES, Jun. 11, 2005, at A7.

235. See Tamsin Smith, *Fertility Laws Frustrate Italians*, B.B.C. NEWS, Aug. 9, 2004, <http://news.bbc.co.uk/2/hi/europe/3548242.stm> (last visited Nov. 10, 2006); see also *Italians to Vote on Fertility Law*, *supra* note 230.

236. See, ESHRE Press Release, *supra* note 222; see also Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 19 HUM. REPROD. 26, 89 (2004).

237. See *Italian Court Paves Way for Vote on Assisted Reproduction Law*, AGENCE FRANCE PRESSE, Jan. 13, 2005, available in LexisNexis, Agence France Presse English File; see also *Italians to Vote on Fertility Law*, *supra* note 230.

238. See *Italian Actress Calls for 'Yes' Vote in Fertility Referendum*, AGENCE FRANCE-PRESSE, May 6, 2005, available in LexisNexis, Agence France Presse English File; see also *Pope Wades into Italian Fertility Debate*, AGENCE FRANCE PRESSE, May 30, 2005, available in LexisNexis, Agence France Presse English File.

239. See, e.g., *Italian Church Leaps Into Italian Debate on Bioethics*, AGENCE FRANCE PRESSE, May 11, 2005, available in LexisNexis, Agence France Presse English File; see also *Pope Wades into Italian Fertility Debate*, *supra* note 238.

rigidity of the law was by not taking part in the vote.<sup>240</sup> In his own words, "a 'no' vote — given that it would contribute to reaching a quorum — would be a help, albeit involuntary, to the supporters of the referendum."<sup>241</sup>

Italians became sharply divided between those agreeing with the Catholic Church in supporting the original legislation and those who viewed the restrictive measures as detrimental to scientific research and as an infringement on reproductive freedom.<sup>242</sup> According to the B.B.C., the debate became "Italy's most divisive social issue in decades."<sup>243</sup>

Two weeks before the referendum scheduled for June 12 and 13, 2005, the recently proclaimed Pope Benedict XVI made his inaugural incursion into Italian politics and endorsed the Italian bishops' all-out campaign urging voters to boycott the referendum.<sup>244</sup> The ecclesiastical pressure, the complexity of the issues and the apathy of some sectors of the electorate accounted for a scarce turnout<sup>245</sup> which has been deemed as the new Pope's "first political victory."<sup>246</sup> Barely twenty-six percent of the voters participated in the referendum, rendering it null.<sup>247</sup>

The surviving regulation of medically assisted reproduction has been criticized, among other things, for its inconsistency with Italian abortion legislation.<sup>248</sup> The Vatican's campaign to retain the restrictive law which "guarantees the rights of . . . the conceptus"<sup>249</sup> has been viewed as a step towards the ulterior motivation of overturning legalized abortion in Italy.<sup>250</sup>

240. See Pope Wades into Italian Fertility Debate, *supra* note 238.

241. *Id.*

242. See Italian Church Leaps Into Italian Debate on Bioethics, *supra* note 239.

243. See Pope Backs Italy Embryo Boycott, B.B.C. NEWS, May 30, 2005, <http://news.bbc.co.uk/2/hi/europe/4593817.stm> (last visited Nov. 10, 2006).

244. *Id.*; Pope Wades into Italian Fertility Debate, *supra* note 236; Fisher & Povoledo, *supra* note 232.

245. See, e.g., Ian Fisher, *Italian Vote to Ease Fertility Law Fails for Want of Voters*, N.Y. TIMES, Jun 14, 2005, at A11; Giuseppe Benagiano, *Editorial: The Four Referendums Attempting to Modify the Restrictive Italian IVF Legislation Failed to Reach the Required Quorum*, 11 REPROD. BIOMEDICINE ONLINE 279, 279-80 (2005).

246. See Irene Peroni, *Fertility Vote Galvanises Vatican*, B.B.C. NEWS, Jun. 13, 2005, <http://news.bbc.co.uk/2/hi/europe/4087420.stm> (last visited Nov. 10, 2006).

247. See, e.g., Owen, *supra* note 233.

248. See, e.g., Smith, *supra* note 235; Giuseppe Benagiano & Luca Gianaroli, *Editorial The New Italian IVF Legislation*, 9 REPROD. BIOMEDICINE ONLINE 117, 117-18 (2004).

249. See Law of February 19, 2004, No. 40 Gazz. Uff. February 24, 2004, No. 45, Art. 1.1 [trans. by the author].

250. See, e.g., Peroni, *supra* note 246; Owen, *supra* note 233; Fisher, *supra* note 245.

## CONCLUSION

While imposing restrictions on federal funding for embryonic stem cell research, the Bush administration has spent millions of dollars to promote "embryo adoptions," which the President supports as the "life-affirming alternative." Given Bush's anti-abortion agenda, the ideological connotations are self-evident. For Republicans like Senator Orrin Hatch, sponsoring a bill to expand federal funding for embryonic stem cell research is compatible with his opposition to abortion, as he does not believe that human "life begins in a Petri dish," and "one of the best ways to be pro-life is to help the living."<sup>251</sup> On the other hand, the Catholic Church opposes both in vitro fertilization and gamete donation, and the Magisterium has not issued an authoritative Catholic opinion regarding what has been termed the "embryo rescue debate." The disagreement within the "pro-life" movement regarding the point or the conditions in which the conceptus is entitled to the right to live is, to say the least, perplexing. Injecting the concept of adoption into the embryo donation dilemma does not solve issues that have transcended the ideological rhetoric of abortion politics.

---

251. See Stolberg, *supra* note 160.