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# Lethal Experimentation on Human Beings: Roe's Effect on Bioethics

**Cover Page Footnote**

William L. Saunders, Jr., a graduate of Harvard Law School, is a Senior Fellow with the Family Research Council in Washington, D.C.

# LETHAL EXPERIMENTATION ON HUMAN BEINGS: *ROE'S* EFFECT ON BIOETHICS

William L. Saunders, Jr.\*

## INTRODUCTION

In *Roe v. Wade*,<sup>1</sup> the Supreme Court of the United States recognized a right under the federal constitution for a woman to terminate a pregnancy.<sup>2</sup> The Court held that a “fetus” was not a “person” for purposes of Constitutional protection.<sup>3</sup> In *Roe's* companion case, *Doe v. Bolton*,<sup>4</sup> decided the same day, the Supreme Court extended this new abortion right throughout all nine months of pregnancy, through the health exception that allows an abortion if either the “psychological” or the “physical wellbeing”<sup>5</sup> of the mother is jeopardized.

In *Planned Parenthood v. Casey*,<sup>6</sup> the Supreme Court affirmed the abortion right.<sup>7</sup> While noting the legitimacy of regulation due to the state's interest in the “life of the fetus,”<sup>8</sup> the Court holding was *not* based on a “privacy right,” as *Roe* itself had been, but under a “liberty interest” derived from the Fifth and Fourteenth Amendments.<sup>9</sup> In *Stenberg v. Carhart*,<sup>10</sup> the Court struck down a Nebraska statute prohibiting partial birth abortion.<sup>11</sup> By insisting on a health exception in every instance in which an abortion procedure is necessary to preserve the life or health of the mother,<sup>12</sup> the Supreme Court demonstrated that it would subject any state regulation of abortion to strict scrutiny.<sup>13</sup>

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1. 410 U.S. 113 (1973).

2. *See id.* at 164.

3. *Id.* at 158.

4. 410 U.S. 179 (1973).

5. *Id.* at 195.

6. 505 U.S. 833 (1992).

7. *Id.* at 846.

8. *Id.*

9. *See id.* at 846-53 (stating that a woman's decision of whether to have an abortion is a liberty interest similar to other liberty interests, such as using a contraceptive, that the Court has upheld in previous cases).

10. 530 U.S. 914 (2000).

11. *Id.* at 922.

12. *Id.* at 938.

13. In his recent book, Professor Arkes states that the power of whether abortion should be legal has been “removed from the hands of citizens and lodged in the hands

The thirty years since the decisions in *Roe* and *Doe* have witnessed a continuous public debate and political controversy over their legitimacy.<sup>14</sup> Despite a plea from the plurality in *Casey* to end this debate and to accept the decisions,<sup>15</sup> the argument continues.

For those who oppose *Roe*, the decision seriously distorts our federal system.<sup>16</sup> *Roe*'s opponents find no warrant in the federal constitution for a right to abortion. They view the *creation* of such a right by the Supreme Court as judicial usurpation of the functions that the Constitution allots to the legislature.<sup>17</sup> In the eyes of opponents, the worst consequence is that the decision removes the protection of the law from an entire class of human beings.<sup>18</sup>

For those who support *Roe*, the Supreme Court rightly recognized a woman's fundamental right to control her own body.<sup>19</sup> Many supporters view any restriction on such a fundamental right

of judges." HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 69 (2002).

14. See Sarah Weddington, *Wind Beneath My Wings: One Woman's Journey to Effectuate Change as an Attorney*, 20 THOMAS M. COOLEY L. R. 1, 16 (2003).

15. While the *Casey* plurality indicated that if the issue of the constitutionality of abortion had come to it de novo, it would have found no such right, nonetheless it urged American citizens to accept the legitimacy of the Supreme Court's rulings on abortion (including *Casey* itself) because the issue had been definitively decided by the Court. *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992). In other words, it is as if the Court said that, although *Roe* had been wrongly decided, American citizens should accept the legitimacy of abortion because the Supreme Court told them to do so! This is an extraordinary claim for the Court to make, and is one that is hardly likely to quell political debate.

16. *Roe*'s opponents included prominent legal scholars such as the recently-deceased, John Hart Ely, who, in a widely noted essay published in 1973 in the *Yale Law Journal*, said: "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure." Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES, Oct. 27, 2003, at B7 (quoting John Ely Hart, *The Wages of Crying Wolf: A Comment of Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973)).

17. See, e.g., *The Supreme Court 2000: A Symposium*, 106 FIRST THINGS 25-38 (Oct. 2000), available at <http://www.firstthings.com/ftissues/ft0010/articles/symposium-intro.html>. Robert Bork argues that the Supreme Court has disregarded doctrines of constitutional law to create a right to abortion and to further the liberal moral political agenda. *Id.* at <http://www.firstthings.com/ftissues/ft0010/articles/symposium-bork.html>.

18. See Michael M. Unlmann, *The Supreme Court 2000: A Symposium*, 106 FIRST THINGS 25-38 (Oct. 2000), at <http://www.firstthings.com/ftissues/ft0010/articles/symposium-uhlmann.html> (noting that "[l]izards and lousewort enjoy greater attention and legal protection" than the child *en ventre sa mère*).

19. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 788-91 (1989) (arguing that anti-abortion laws exert unconstitutional power over a woman's body and identity).

as unacceptable. Thus, after Congress passed the “Partial Birth Abortion Ban,”<sup>20</sup> but *before* President George W. Bush signed it into law and despite the fact that the law seeks to proscribe only a particular abortion procedure,<sup>21</sup> opponents filed lawsuits in several different federal district courts seeking to have the ban enjoined.<sup>22</sup>

The supporters of the *Roe*-related jurisprudence often argue that the right of a woman to control her body is at stake in all of these cases.<sup>23</sup> Indeed, Justice Harry Blackmun, who wrote the *Roe* opinion, stated: “We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .”<sup>24</sup>

Of course, the primary value of *Roe* and its progeny is the precedent it sets in cases involving abortion. The Supreme Court has rejected the logic of personal autonomy as a justification for a constitutional right to assisted suicide.<sup>25</sup> Nonetheless, I shall attempt to show that *Roe*’s effects have not been limited to the abortion context.<sup>26</sup> Rather, the legal fictions employed in the *Roe* jurisprudence that deny the protection of the law to one class of human beings have extended far beyond the abortion context to endanger other human beings in very different situations.

## I. HUMAN ORIGIN AND DEVELOPMENT

There is no mystery about when human life begins. It is only within the political and ideological context that this matter is contested.<sup>27</sup> When the matter is not being debated in a courtroom or on the floor of the Congress, when it is left for scientific analysis, the resolution is clear.

Human life begins, in the normal, ordinary case, at “conception,” that is to say, at fertilization.<sup>28</sup> It begins when the male germ cell,

20. Partial Birth Abortion Ban Act of 2003, 18 U.S.C.S. § 1531 (2004).

21. *Id.*

22. Sheryl Gay Stolberg, *3 [sic] Suits Filed to Block an Abortion Bill that Bush Intends to Sign*, N.Y. TIMES, Nov. 1, 2003, at A16.

23. *See, e.g.*, Rubinfeld, *supra* 19, at 788-91.

24. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

25. *See* *Washington v. Glucksberg*, 521 U.S. 702, 727-28 (1997) (stating that although “many of the rights and liberties protected by the Due Process Clause sound in personal autonomy [that] does not warrant the sweeping conclusion that any and all important, intimate and personal decisions are so protected and *Casey* did not suggest otherwise.” (citations omitted)).

26. *See infra* Part III-IV.

27. Dashka Slater, *HuMouse™*, LEGAL AFFAIRS, Dec. 2002, at 21, 26 (2002) (noting that the question of when life begins gets “caught in a philosophical and political thicket”).

28. *See, e.g.*, C.R. Austin, *Fertilization*, in *GERM CELLS AND FERTILIZATION* 103, 103 (C.R. Austin & R.V. Short eds., 1972).

the sperm, penetrates the female germ cell, the oocyte.<sup>29</sup> From that moment onwards, there is a unique, unified, self-directing, self-integrating organism.<sup>30</sup> The sperm cell and the oocyte no longer exist; rather their fusion has resulted in the creation of a new single-celled organism, which, at the single cell stage is called a zygote.<sup>31</sup>

While it is true that the sperm cell and the oocyte, prior to union, were living human cells, neither was a living human *organism*.<sup>32</sup> Left alone, each would simply die as it lived, as either a sperm or an oocyte.<sup>33</sup> It is their union that produces a new, distinct living organism. The growth of the organism will be *self-directed*.<sup>34</sup> The organism's chromosomes, half of which were supplied by the sperm cell and half by the oocyte,<sup>35</sup> will direct its growth. The organism is a complete and unitary being. While it is true that if the organism does not receive nutrition, hydration, and a hospitable environment, it will die, the same is true for every human being, no matter what its stage of development. Indeed, the need for food, water, and shelter is so fundamental that certain international treaties recognize it as a *right*.<sup>36</sup>

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29. KEITH L. MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 2 (6th ed. 1998) (stating that “[h]uman development is a continuous process that begins when an oocyte (ovum) from a female is fertilized by a sperm (or spermatozoon) from a male.”); *see also* T. W. SADLER, *LANGMAN'S MEDICAL EMBRYOLOGY* 3 (8th ed. 2000) (stating that “[d]evelopment begins with fertilization, the process by which the male gamete, the sperm and the female gamete, the oocyte, unite to give rise to a zygote”).

30. Robert P. George, *Public Reason and Political Conflict: Abortion & Homosexuality*, 106 *YALE L.J.* 2475, 2494 (1997) (stating that once conception has taken place, a “distinct self-integrating organism with a specifically human nature” comes into being).

31. KEITH L. MOORE, *ESSENTIALS OF HUMAN EMBRYOLOGY* 2 (1988).

32. George, *supra* note 30, at 2494. George states that:

[t]here will no longer be merely an egg, which was part of the mother . . . and a sperm, which was part of the father . . . there will be a genetically complete, distinct, unified, self-integrating human organism whose nature differs from that of the gametes—not mere human material, but a human being.

*Id.*

33. *See id.* (noting that an unfertilized egg, “however hospitable its environment . . . will ‘die’ as a human ovum, just as countless skin cells ‘die’ daily as nothing more than skin cells”).

34. *See id.* at 2493 (stating that “there comes into being at conception, not a mere clump of human cells, but a distinct, unified self-integrating organism which develops itself . . . in accord with its own genetic blueprint”).

35. JAMES E. CROUCH, *FUNCTIONAL HUMAN ANATOMY* 29 (3d. ed. 1978).

36. For example, The International Covenant on Economic, Social and Cultural Rights, which has been ratified by more than hundred nations, provides in its Eleventh Article: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . . .” G.A. Res. 2200, 21 U.N. GAOR, 21st Sess., Supp.

The organism created from the union of the sperm and the oocyte is the embryo.<sup>37</sup> The embryo is the first stage of human life.<sup>38</sup> Whenever (and by whatever means) a living human embryo is created, a human life begins. As the embryo develops, it passes into the fetal stage; it is born at the infantile stage; and its development continues, unless interrupted, through childhood and adulthood, until it dies.<sup>39</sup>

## II. SEMANTIC GYMNASTICS

In 1970, in what has become a famous editorial, *California Medicine*, the journal of the California Medical Association, candidly noted that in order for a right to abortion to be generally accepted, it would be necessary to undermine traditional Western ethics of respect for each human life and the equality of each human life.<sup>40</sup> The aim was to “separate the idea of abortion from the idea of killing.”<sup>41</sup> The editorial approved of what it called “semantic gymnastics” whose aim was to deny “the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death.”<sup>42</sup>

It is precisely this scientifically established fact that Justice Harry Blackmun ignored when he wrote the majority opinion in *Roe v. Wade*. Justice Blackmun claimed that “[i]t should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question.”<sup>43</sup> He then considered various religious, philosophical, and historical views.<sup>44</sup> He also discussed how the law had previously treated injuries to the fetus in a variety of con-

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No. 16, at 49, U.N. Doc. A/6316, available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm).

37. See Douglas Considine, 1 *VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA* 1142 (8th ed. 1995) (explaining that after fertilization of the egg, the “single-celled zygote becomes a multicelled embryo”).

38. See NAT'L INST. OF HEALTH, *STEM CELLS: SCIENTIFIC PROGRESS AND FUTURE RESEARCH DIRECTIONS F-3* (June 2001) [hereinafter *STEM CELLS*] (defining embryo as “[i]n humans, the developing organism from the time of fertilization until the end of the eighth week of gestation . . .”), available at <http://cmbi.bjmu.edu.cn/cmbidata/stem/progress/appendixf.pdf>.

39. For these reasons, the term “embryonic human being” is used in this paper to designate human beings in the embryonic stage of development.

40. Editorial, *California Medicine: The Western Journal of Medicine*, Sept. 1970, at 67, 68.

41. *Id.*

42. *Id.*

43. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

44. *Id.* at 160-61.

texts.<sup>45</sup> Blackmun found a lack of unanimity from these sources concerning “the difficult question of when life begins”<sup>46</sup> but noted that the Supreme Court “need not resolve” the question.<sup>47</sup> This conclusion enabled Justice Blackmun to set up his well-known trimester system for balancing the various interests of the state and the woman in the regulation of abortion.<sup>48</sup>

Significantly, Justice Blackmun failed to consider the answers provided by another discipline—that of basic embryology.<sup>49</sup> If he had, it would have been clear that the embryo is a developing human being from the very first day.<sup>50</sup> If it had been so recognized, Justice Blackmun would have had to consider its status in determining if it had protection under the Fifth and Fourteenth Amendments. By avoiding the scientific facts about the beginning of human life, Justice Blackmun was able to avoid the Constitutional dilemma presented by that fact. While we cannot know Justice Blackmun’s subjective intention, the holding enunciated in *Roe* engaged in precisely the “semantic gymnastics” upon which *California Medicine* had commented three years earlier.<sup>51</sup>

### III. HUMAN EMBRYONIC STEM CELL RESEARCH<sup>52</sup>

There has been a vigorous public debate for several years on the question whether human embryonic stem cell research should be permitted, whether it should receive federal funding, or whether it should be prohibited.<sup>53</sup> During the Clinton Administration, the Department of Health and Human Services proposed regulations permitting federal funding of such research under various conditions.<sup>54</sup> During the presidential campaign of 2000, Vice-President

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45. *Id.* at 161-62.

46. *Id.* at 159.

47. *Id.*

48. *Id.* at 164-65.

49. See *supra* notes 31-43 and accompanying text.

50. See MOORE & PERSAUD, *supra* note 29, at 2 (stating that human development is continuous from the point that the egg is fertilized).

51. See *supra* text accompanying note 42.

52. For more information, see generally DAVID A. PRENTICE, *STEM CELLS AND CLONING* (2003).

53. See White House Press Briefings (Aug. 9, 2001), at <http://www.whitehouse.gov/news/briefings/20010809.html> (last visited February 13, 2004) (relating the various opinions and discussions President Bush engaged in order to come to his policy decision on stem cell research).

54. See Testimony on Stem Cell Research, (Jan. 26, 1999), at <http://www.hhs.gov/asl/testify/t000907b.html> (last visited February 13, 2004) (announcing and briefly explaining NIH’s publication of *Guidelines* for stem cell research).



Al Gore supported human embryonic stem cell research and funding it through federal tax dollars; George W. Bush opposed it.<sup>55</sup>

On August 9, 2001, a little over six months after his inauguration, President Bush addressed the matter in a nationally televised speech.<sup>56</sup> The President decided that human embryonic stem cell research should not receive federal funding and ordered the National Institutes of Health not to make federal grants for this purpose.<sup>57</sup> The President's order did not *prohibit* such research. Whether or how to regulate the research was a matter left to the legislatures of each of the fifty states. The President's decision was a restriction on the *funding sources* for this research. Because much research is federally funded,<sup>58</sup> this restriction is significant.<sup>59</sup> Those wishing to pursue such research, however, are at liberty to seek non-federal sources, particularly from the venture capital markets.<sup>60</sup> It is noteworthy that the President's decision permits federal funds to be used for research using stem cells taken from human embryos *prior to* the date of the order.<sup>61</sup>

The President's decision did not quell the debate over the ethical propriety of using human embryonic stem cells and destroying the embryos from which they were taken during that process.<sup>62</sup> Indeed, supporters of such research, including members of the President's own party, regularly raise the possibility of overturning the ban by passing a law permitting federal funding.<sup>63</sup> Such efforts,

55. Mary Leonard, *Abortion Foes See Politics in Stem-Cell Study Policy*, BOSTON GLOBE, Aug. 24, 2000, at A1.

56. Text of speech on file with author. See also White House Press Briefings, *supra* note 53.

57. The National Institutes of Health issued guidelines incorporating the President's decision. See Notice of Criteria for Federal Funding of Research on Existing Human Embryonic Stem Cells and Establishment of NIH Human Embryonic Stem Cell Registry (Nov. 7, 2001), at <http://grants1.nih.gov/grants/guide/notice-files/NOT-OD-02-005.html>.

58. See DON DOIG, HE WHO PAYS THE PIPER: FEDERAL FUNDING OF RESEARCH (Mar. 17, 1983), at <http://www.cato.org/pubs/pas/pa022.html> (last visited February 13, 2004) (musing on the interplay between federal and private funding and considering the implications of federally-controlled funds).

59. AM. ACAD. OF PHYSICIAN ASSISTANTS, FEDERAL FUNDING FOR EMBRYONIC STEM CELL RESEARCH, at <http://www.aapa.org/policy/stem-cell-funding.html> (last revised Apr. 7, 2004) (expressing concerns about the current policy on funding stem cell research).

60. *Univ. of Cal., San Francisco Stem Cell Research Receiving a Groundswell of Financial Support from Private Philanthropists*, BUS. WIRE, Oct. 8, 2003.

61. See AM. ACAD. OF PHYSICIAN ASSISTANTS, *supra* note 59.

62. See Sheryl Gay Stolberg, *States Pursue Cloning Laws as Congress Debates*, N.Y. TIMES, May 26, 2002, § 1 (noting that the stem cell research debate continues).

63. For example, Senator Orrin Hatch (R-Utah), an abortion opponent, introduced legislation that would ban human cloning but "[u]nder prescribed guidelines, it

however, seem to stand little chance of success as long as Bush remains president and the Republican Party controls the Senate. While it might thus appear that the question has been settled in practical terms—at least until the next round of national elections—that is not the case. The debate has continued by proxy in the different, but related, context of human cloning.

#### IV. CLONING

One way in which human embryonic stem cell research can proceed is through cloning. Cloning creates an exact duplicate of an organ, tissue, molecule, or even an entire plant or animal.<sup>64</sup> The type of cloning that is in dispute is the duplication of a human organism. Human cloning is the artificial or asexual production of a human embryo.<sup>65</sup>

There are different techniques by which cloning might proceed<sup>66</sup> but the only kind of cloning currently considered viable is known as “somatic cell nuclear transfer.”<sup>67</sup> This procedure involves removing the nucleus from an oocyte (of person 1), substituting the nucleus from a somatic (or “body” or non-germ) cell from someone else (person 2), and stimulating the cell with an electrical charge.<sup>68</sup> Since the oocyte of person 1 now contains the nucleus (the chromosomes) of person 2, the resulting living human organism is a genetic duplicate of person 2.<sup>69</sup> Person 2 has been cloned.

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would allow nuclear transplantation on unfertilized embryonic human eggs up to 14 days old to grow stem cells . . .” Christopher Smith, *Hatch's Usual Allies Foes on Cloning: Hatch Bill at Odds with White House*, SALT LAKE TRIB., Feb. 6, 2003, at A1.

64. COMM. ON SCI., ENG’R, & PUB. POL’Y, NAT’L ACAD. OF SCI. ET. AL., SCIENTIFIC & MEDICAL ASPECTS OF HUMAN REPRODUCTIVE CLONING 261 (2002).

65. For instance, the National Bioethics Advisory Council, created under President Clinton, noted: “The Commission began its discussions fully recognizing that any effort in humans to transfer a somatic cell nucleus into an enucleated egg involves the creation of an embryo, with the apparent potential to be implanted *in utero* and developed to term.” NAT’L BIOETHICS ADVISORY COUNCIL, CLONING HUMAN BEINGS 3 (1997), available at <http://purl.access.gpo.gov/GPO/LPS439>.

66. Another type of cloning is called parthenogenesis. See, e.g., PRENTICE, *supra* note 52, at 26-27. During parthenogenesis, an oocyte or egg cell is immersed in a chemical bath. The aim is to stimulate the oocyte as if it had been fertilized. The nucleus of the oocyte has a complete set of forty-six chromosomes that theoretically would transform the oocyte into a living embryo, which would be a duplicate of the woman who provided the oocyte. Though there were claims a few years ago that research along these lines had been successful, those claims were never verified. No mammals created by parthenogenesis have been brought to birth, and it is questionable whether they could be. *Id.*

67. See *id.* at 21-22.

68. *Id.*

69. See *id.* at 20-21.

Immunological rejection is one problem faced in transplantation and similar treatments or procedures.<sup>70</sup> Since the transplanted organ is from a different human being than the one into whom it is being transplanted, the immune system of the recipient may attack or reject the organ.<sup>71</sup> This same problem would be present when using treatments utilizing human embryonic stem cells: the recipient's immune system might reject treatments developed from another person's stem cells.<sup>72</sup> One way to solve this problem is to clone the human being who will receive the treatment, extract stem cells from the cloned embryo, develop treatments utilizing those stem cells, and transfer or transplant the treatments derived therefrom back into the person from whom the clone was made.<sup>73</sup> The idea is to use the person's "own" (cloned) human embryonic stem cells to treat that person. The stem cells of the clone, bearing the same genetic composition as the patient, should then be accepted by the patient's immune system.<sup>74</sup>

As noted above, each human being begins life as a single-celled organism—as an embryo.<sup>75</sup> Removing stem cells from a human embryo kills that embryo.<sup>76</sup> Killing an embryo is killing a human being because the embryo is the first stage of human life. Removing stem cells from a cloned human embryo entails killing that cloned human being.<sup>77</sup>

## V. POLITICAL EVASIONS

Following President Bush's decision restricting federal funding for human embryonic stem cell research, cloning became the focus of a protracted political debate in the United States Congress.<sup>78</sup> On February 27, 2003, the House of Representatives passed the Human Cloning Prohibition Act of 2003 (the "Act").<sup>79</sup> The Act

70. JAMES T. BARRETT, *BASIC IMMUNOLOGY & ITS MEDICAL APPLICATION* 238 (2d. ed. 1980).

71. *See id.* at 238-41 (detailing the three main reactions to transplanted tissue).

72. NAT'L INST. OF HEALTH, *STEM CELL BASICS*, at <http://stemcells.nih.gov/info/center/StemCellBasics.asp> (last visited January 4, 2004).

73. *See STEM CELLS*, *supra* note 38, at 17.

74. *See id.*

75. *See STEM CELLS*, *supra* note 38, at F-3.

76. *Egan Says Using Embryo Cells in Research Is Evil*, N.Y. TIMES, Oct. 31, 2000, at B2.

77. Though it is genetically the same as the person from whom it was cloned, the clone is a separate human being.

78. Rick Weiss, *Debate About Cloning Returns to Congress*, WASH. POST, Jan. 30, 2003, at A9.

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

provided that “[i]t shall be unlawful for any person or entity, public or private . . . to perform or attempt to perform human cloning . . . to ship or receive for any purpose an embryo produced by human cloning or any product derived from such an embryo.”<sup>80</sup> The Act defined “human cloning” as “human asexual reproduction, accomplished by introducing nuclear material from one or more human somatic cells into a[n] . . . oocyte whose nuclear material has been removed or inactivated so as to produce a living organism . . . that is genetically virtually identical<sup>81</sup> to an existing or previously existing human organism.”<sup>82</sup>

In the months before the vote, there was a competing bill for the Members of the House to consider. This bill, H.R. 801, was titled the “Cloning Prohibition Act of 2003” (the “Bill”).<sup>83</sup> Section 2, itself titled, “Prohibition Against Human Cloning,” would have amended the Federal Food, Drug, and Cosmetic Act<sup>84</sup> to make it

unlawful for any person . . . to use or attempt to use human somatic cell nuclear transfer technology, or the product of such technology, to initiate a pregnancy or . . . to ship, mail, transport, or receive the product of such technology knowing that the product is intended to be used to initiate a pregnancy.<sup>85</sup>

“Human somatic cell nuclear transfer technology” was defined as “transferring the nuclear material of a human somatic cell into an egg cell from which the nuclear material has been removed or rendered inert.”<sup>86</sup>

When the Act and the Bill are compared, one notes that each claims to prohibit human cloning. A careful reading of the Bill, however, shows it prohibits cloning (“somatic cell nuclear transfer technology”) solely for the purpose of “initiat[ing] a pregnancy.”<sup>87</sup> The Bill does not prohibit cloning for any other purpose. The Act, however, is broader. Its prohibition is not effected by the *purpose*

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80. *Id.* § 302 (a)(1), (3).

81. The Act uses the phrase “virtually identical” for the following reason. Some DNA is contained in the cytoplasm of the oocyte—the mitochondrial DNA. Hence, even when the nucleus—or “genetic material”—of one of the donor’s cells is transferred into the oocyte from which its own nucleus has been removed, the resulting organism, retaining the original mitochondrial DNA in the oocyte’s cytoplasm, has a genetic composition that is not exactly the same as the donor. It is “virtually identical”, however, to the donor.

82. H.R. 534 § 301(1).

83. Cloning Prohibition Act of 2003, H.R. 801, 108th Cong. (2003).

84. 21 U.S.C. § 301 (2003).

85. H.R. 801 § 2(a)(1).

86. *Id.* § 2(a)(2).

87. *Id.* § 2(a)(1).

for which cloning is accomplished. It says: "It shall be unlawful for any person or entity, public or private, . . . to perform or attempt to perform human cloning."<sup>88</sup>

It is fair to wonder why the Bill prohibits human cloning solely for the purpose of initiating pregnancy. One might well ask for what other purposes cloning might be undertaken. The short answer is for research. Cloning might be undertaken to create embryos which could be used (and destroyed) in human embryonic stem cell research. Thus, the Bill would ban cloning if it were undertaken to initiate a pregnancy, but would permit it if it were undertaken to produce an embryo to be used in research.

In order to consider whether the Bill or the Act would be preferable as public policy, it would be profitable to reflect upon whether using the embryo in research should (per the Bill) or should not (per the Act) be permitted. Because the embryo is a human being in the embryonic stage of its development, its use in research should be evaluated under the provisions of the Nuremberg Code. The Nuremberg Code codifies acknowledged ethical principles regarding human experimentation, particularly the use of human subjects in research. Article Five of the Nuremberg Code mandates: "No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur."<sup>89</sup> Since human embryonic stem cell research upon a cloned embryonic human being kills the embryo in the process of extracting its stem cells, it results in the death of the human being and thereby violates Article Five. Consequently, it appears the House made the wiser choice and adhered to international law in passing the Act.

When the Act was subsequently introduced in the Senate, opponents countered by introducing an alternative bill entitled "Human Cloning Ban and Stem Cell Research Protection Act of 2003."<sup>90</sup> This alternative bill (the "Alternative") stated its purpose was "to prohibit human cloning and to protect important areas of medical research, including stem cell research."<sup>91</sup> The Alternative would amend the United States Code to prohibit "any person or other legal entity" from "conduct[ing] . . . human cloning."<sup>92</sup>

88. H.R. 534, 108th Cong. § 302 (2003).

89. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 182 (1949-1953).

90. Human Cloning Ban & Stem Cell Research Protection Act of 2003, S. 303, 108th Cong. § 1 (2003).

91. *Id.* § 2.

92. *Id.* at tit. I, § 101.

Human cloning was defined as “implanting or attempting to implant the product of nuclear transplantation into a uterus or the functional equivalent of a uterus.”<sup>93</sup> “Nuclear transplantation” was defined as “transferring the nucleus of a human somatic cell into an oocyte from which the nucleus . . . ha[s] been or will be removed or rendered inert.”<sup>94</sup>

As discussed above, the definition of “nuclear transplantation” (i.e., transferring the nucleus of a human somatic cell into an oocyte from which the nucleus has been removed) is the very definition of cloning. “Nuclear transplantation” is a synonym for “cloning.” The Alternative prohibits cloning if, and only if, there is also an attempt to implant the cloned human embryo “into a uterus or functional equivalent of a uterus.”<sup>95</sup> Outside of this context, cloning would not be prohibited under federal law.

The Alternative establishes no prohibition if the aim is to clone a human being to use that human being in research, even if that research is lethal human embryonic stem cell research. The Alternative is similar to the Bill in this regard. This was probably the intention of the framers of the Alternative whose stated purposes includes “protect[ing] important areas of medical research, including stem cell research.”<sup>96</sup> This stated purpose of the Alternative contravenes the Nuremberg Code, which, as noted above, prohibits research which is lethal to the human subject.<sup>97</sup>

## VI. ROE AND LETHAL EXPERIMENTATION ON HUMAN BEINGS

If, as I have attempted to demonstrate, cloning produces a human being, and cloning research kills that human being, and such killing is prohibited by the Nuremberg Code, how is it possible that members of both houses of Congress could have seriously considered enacting bills which would permit such research? The answer lies in *Roe v. Wade*.

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* § 2.

97. At the time of this writing, the Senate has not voted on the Act or the Alternative. President Bush has stated he will sign the Act into law if it passes the Senate. There appears, however, to be insufficient votes in the Senate to defeat a threatened filibuster against the Act. The issue is at an impasse and, consequently, the matter is left for to the individual states to decide. While some states such as South Dakota (S.D. CODIFIED LAWS § 34-14-16 to -20 (Michie 1967 & Supp. 2003)) and Michigan (MICH. COMP. LAWS § 333.16275 (2001)) have prohibited all forms of cloning, many states have not yet enacted laws on this matter.

Let us recall the reasoning in *Roe*. The Court found it did not need to determine when human life begins.<sup>98</sup> Having found a divergence among religious, philosophical, historical, and legal authorities on the question,<sup>99</sup> the Court was able to avoid the acute dilemma that would have resulted if it had relied on the only truly relevant discipline—basic embryology—which is unequivocal that human life begins as an embryo.<sup>100</sup> Had the Court relied upon the plain facts of human embryology, it would have been forced to squarely confront the question of the Constitutional “personhood” of that human being. It would have had to face the clear parallel to slavery (under which a certain class of human beings were denied Constitutional protection as “persons”).<sup>101</sup> At a minimum, the Court could not have pretended that the basic question of the humanity of the fetus was unsettled, and it could not then proceed to judicial balancing of other interests involved. By ignoring the science, the Court was able to avoid squarely confronting the legal question.

Why would the Court engage in such evasions? The only way, I believe, to understand *Roe* and related cases is to see them, contrary to what the Justices said in *Roe*, as reflecting a similar attitude to that of the plurality in *Casey*—as being decided in full recognition that the fetus is a human being—nevertheless, holding, as a practical political matter, that other concerns (e.g., the bodily integrity of the woman) were of such import that they must be given precedence over any “right” of the fetal human being. In other words, the way to understand *Roe* is to understand that the Court saw the case as many “abortion-rights” supporters saw it: as posing a tragic choice between two important rights—fetal life and a woman’s bodily integrity—that were in direct conflict.<sup>102</sup>

So understood, it was long argued that *Roe* and its related cases could be cabined to the abortion context. The broader principle that *Roe*’s opponents saw in the decision—namely the right of one human being to subject another to lethal violence—was not, it was

98. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

99. While the positions taken by religions or philosophies are interesting, in a pluralistic society, they do not resolve the question. Science does. Likewise, while it is interesting how unborn human beings were treated historically and in various legal contexts, it is hard to see their relevance to the question whether the fetus is a human being. Again, that answer is provided by science.

100. See *supra* notes 28-31.

101. See *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) (finding the Constitution did not grant people of African descent the rights of citizens).

102. Of course, this “understanding” is, as indicated, premised upon an evasion of the fundamental issue.

argued, a threat to the law as such. Rather, the principle of *Roe* was to be limited to the single “tragic” situation of a woman suffering an unwanted pregnancy. In that instance only could the developing human life be subjected to lethal violence.

The debate over human embryonic stem cell research and cloning has shown that argument to be false. The “principle” of *Roe* and its progeny cannot be cabined to the abortion context. The judicial refusal to recognize that the fetus is indisputably a human being has spread beyond the abortion context. It has led proponents of human embryonic stem cell research and of human cloning to distort scientific fact in order to achieve political ends.

## VII. CONCLUSION

The legacy of *Roe* is that our culture can no longer be honest about the dilemmas we face. We face a dilemma in human embryonic stem cell research: should we destroy human beings during research that promises cures for a variety of diseases and injuries? To evaluate the question, we must begin by admitting the facts that the embryo is a human being and that our culture has never countenanced the destruction of human beings (without their consent) for research aimed to benefit others. Those who wish to proceed with that research have the burden of persuasion that we should behave differently in this instance and permit the destruction of human beings. Perhaps they could present a convincing case. But that case is not being presented; the argument is not being engaged; the indisputable scientific facts are being obscured. The reason is because *Roe*, by ignoring scientific fact for practical political machinations, has taught us the way to avoid difficult moral dilemmas. One need only ignore science and then pretend the dilemmas do not exist.