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# To Whom Do We Refer When We Speak of Obligations to “Future Generations”? Reproductive Rights and the Intergenerational Community

Sherry F. Colb\*

## *Introduction*

Ordinarily, consideration of future generations' interests takes for granted that there will *be* future generations to have interests. It is, in other words, wrong to despoil the environment or fail to keep the social security system solvent because our children, grandchildren, and their descendants will inhabit this earth and have basic needs that will go unfulfilled if we do not maintain our world in habitable condition. As long as people continue to exist, there are things they will need to survive and thrive, and it is generally understood to be our obligation—as current inhabitants of the planet—to live in a manner consistent with their survival and thriving.

In some sense, we are merely “renting” all that we have, like students who occupy a desk in a classroom and must accordingly be prepared to “return” it forward in good condition to those who will take our place. If there were to be no future generations, we would have no obligation to leave the planet habitable. The earth would then be a disposable commodity. If we knew that tomorrow at noon, all existing lives would end and never be replaced, we would, by definition, no longer have to preserve anything for future earthlings.

The question we generally do not ask, in considering what we ought to do for our descendants, is this: must we bring those descendants into existence? That is, do we have an obligation—as a group of human beings or individually—to reproduce? If we have any such obligation, what are its contours? To put the questions in a different

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frame, do potential people have a cognizable interest in coming into existence in the first place?

This set of questions is crucial to our thinking about reproductive rights in the context of meeting our obligations to future generations. If we do not owe it to potential people to bring them into being, then who can make claims upon us (to preserve the earth, etc.)?

This Article argues that an analysis of reproductive rights in the context of future generations yields three insights. First, potential people (who may or may not come into being) do not—by any prevailing approach to morality—have a right to be created by us. They may therefore be ethically “prevented” from coming into existence with what I call the “Offspring Selection Interest” (“OSI”). Second, the OSI is often conflated with the distinct reproductive rights interest in protecting one’s body against unwanted intrusion, the “Bodily Integrity Interest” (“BII”), with resulting confusion for reproductive rights discourse. And third, once we distinguish the OSI from the BII, we find a surprising amount of agreement, even among present-day abortion opponents, with the premise of abortion rights: that the BII is both weighty and directly implicated in the abortion decision.

To find evidence of consensus regarding the OSI, this Article turns to western religious traditions as well as to modern legal rules. To find consensus on the BII, this Article relies on accounts of abortion that animate the pro-choice and pro-life communities within the United States. The goal of the Article is largely descriptive rather than normative: it aims to identify two interests that underlie modern reproductive rights and to demonstrate that both interests are widely accepted by groups that otherwise appear to fall on opposite ends of the reproductive rights spectrum.

### *I. The Offspring Selection Interest (OSI) and Basic Reproductive Rights*

The possibility of reproductive rights rests fundamentally on the assumption that we lack any obligation to potential people to bring them into existence and may therefore legitimately make choices that either intentionally or incidentally prevent many potential people from becoming actual people. Is this assumption warranted?

#### *A. Prohibitions Against Rape*

Rather than venture immediately into the area of abortion, which is complicated in a number of ways, let us begin by analyzing a much more modest “reproductive rights” agenda. Most people in the

United States would likely agree that a person has the right not to engage in undesired sexual activity, even though such sexual activity might yield human offspring who would otherwise never have come into existence. This right to avoid unwanted sexual contact is implicit, for example, in the unanimous adoption of criminal laws against rape in the United States.

One risk to which a male rapist exposes his female victim is the possibility of a pregnancy through which she will unwillingly assist him in producing a child. The right against rape thus also—at least incidentally—protects a right against nonconsensual reproduction. Choosing not to have sex is therefore, at one level, the exercise of a reproductive choice with which no one takes serious issue.

It is significant to note, however, that even the right against rape—particularly as it has historically been defined—does not fully guard a right to control one's own fertility. Until very recently, for example, married women could lawfully be compelled by their husbands to have marital intercourse.<sup>1</sup> Without female access to contra-

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<sup>1</sup> Under the so-called marital rape exemption, “the woman, once married, gives herself up to her husband, thereby endowing the husband a ‘sexual entitlement to his wife.’” Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 246–47 (1997).

This exemption is codified in the Model Penal Code definition of rape, which refers to “[a] male who has sexual intercourse with a female not his wife” as a predicate to committing the offense. MODEL PENAL CODE § 213.1 (1962) (“A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious; or (d) the female is less than 10 years old.”). Commentary to the Model Penal Code explains, “[The exemption] avoids [an] unwarranted intrusion of the penal law into the life of the family.” MODEL PENAL CODE § 213.1 cmt. 8(c) (Official Draft & Revised Cmts. 1980).

Since the mid-1970s, twenty-four states and the District of Columbia have abolished the marital immunity for sexual offenses. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1485 (2003); see also Lauren M. Hayter & Victor Voronov, *Domestic Violence and the State*, 8 GEO. J. GENDER & L. 273, 277–78 (2007) (“In other states, there is absolutely no marital rape exemption. There has been an effort among those opposed to the marital exemption to push states into following the lead of the majority and completely abolishing any marital rape exemption.”) (no citations provided).

Although the rape laws of most states criminalize spousal rape to a greater or lesser extent, most states continue to treat spousal rape as less serious than rape by someone other than a victim's spouse. See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 260 n.45 (2003) (“[D]espite recent reforms, the marital rape exemption continues to exist in some form in the majority of states.”).

“Fifteen states grant marital immunity for sexual offenses unless requirements such as

ception and abortion, a man could (until a few decades ago) thus force his wife to have sex without legal consequences and by the same act force her to bear children she might not want to have. As a result, it would be most accurate to say that, at least for women, the legal prohibition against rape tended to protect the right to select with whom one would have children (by deciding whose marriage proposals to accept) but not necessarily to choose whether or when to have offspring.

Consistent with this claim—that women held the right to select their offspring by choosing with whom to have offspring—we find that at common law, the one way in which a man could still render himself criminally responsible for the rape of his wife was by forcing her to have sex with a *different* man.<sup>2</sup> This “exception” to the marital rape immunity confirms that a person (or at least a married woman) traditionally had no right to avoid reproducing with her husband but *did* have a right to avoid reproducing with someone else. Even this very limited and transparently sexist protection corresponds to an understanding that every person has the right to determine, in one respect, which of his or her potential offspring will or will not be born, by choosing (or choosing to reject) a particular sexual (marital) partner. Though a married woman’s bodily integrity found little protection

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prompt complaint, extra force, separation, or divorce are met.” Anderson, *supra*, at 1471–72. Some states still require force in cases of spousal rape. Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN’S L.J. 269, 282–84 (2007) (“Mississippi still provides a marital exemption for sexual battery if the spouses are living together at the time of the incident unless use of force and lack of consent can be shown.”); Hayter & Voronov, *supra*, at 277 (“In some states, a certain level of violence is required to be present in order for a spouse to be convicted of rape.”) (citing MD. CODE ANN., CRIM. LAW § 3-318 (West 2009) (“A person may be prosecuted under [sexual offense provisions] of this subtitle for a crime against the person’s legal spouse if . . . the person in committing the crime uses force or threat of force and the act is without the consent of the spouse.”) and OKLA. STAT. ANN. tit. 21, § 1111 (West 2009) (“Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.”)).

Prompt reporting is required in four states. Woolley, *supra*, at 283 (“Four states still require prompt complaint (usually within three months) for spousal sexual offenses but not for other rapes. For example, in California, the spouse-victim must report the incident within one year, but this requirement can be overcome with corroborating independent evidence. In South Carolina, spouse-victims of criminal sexual battery must report the incident within thirty days.”).

<sup>2</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1403 (2000) (quoting 2 THOMAS W. WATERMAN, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE 306 (New York, Banks, Gould & Co. 6th ed. 1853) (“A husband could be found guilty of rape ‘as a principal in the second degree,’ by assisting another person to commit a rape upon his wife; for though, in marriage, the wife has given up her body to her husband, yet he cannot compel her to prostitute herself to another.”)).

against her husband, respect for her OSI explains the narrow case in which her husband was prohibited from subjecting her to rape.

### *B. Traditional Sexual Prohibitions*

In addition to illuminating the law of rape, the notion of an OSI—an interest in controlling the composition of our offspring—helps organize many of the traditional sexual rules that have found expression in religious communities within the United States and elsewhere around the globe.

Consider prohibitions against sexual relations outside of marriage (adultery), with people to whom one is not married (fornication), with close relatives (incest), and with people outside the faith or nation (intermarriage). The English word “adultery” literally suggests an undesirable *adulteration* of a husband-wife line. And the branding of some children as “illegitimate” implies that these are people who should never have been brought into being. By observing prohibitions against these sexual practices, a person thus directly and consciously alters the composition of future generations by avoiding the creation of people who would have resulted from the prohibited relationships. And the observance of these rules is considered not only acceptable but mandatory within many communities.

### *C. Arranged Marriage*

Consider as well the traditional practice of arranged marriage (which prevents individuals from choosing a spouse). This practice ordinarily involves parental interference with children’s spousal selection process and thus might appear to contradict rather than exemplify the OSI. Contrary to appearances, however, arranged marriage paradoxically affirms the value a community places on controlling who comes into existence. A society, culture, or family might understand its interest in avoiding creation of the “wrong” offspring to be so important that reproduction cannot be left to the vicissitudes of romantic love (which may lead to poorly selected mating partners), but must instead rest within the control of the older and wiser originators of the reproductive material. Arranged marriages, therefore, retain with the potential grandparents the right to decide, even after their children are grown, which potential people will ultimately come into existence from their lines. A parent who vetoes a child’s choice of a mate is accordingly exercising a (decidedly unmodern) form of reproductive choice.

#### D. *An Interest in Being “Child Free”?*

In theory, the person who has a right to decide whom to marry could find that no one is acceptable and decide not to reproduce at all. Does this suggest that traditional societies recognize a right to childlessness? Not quite.

To link sexuality and reproduction closely, as traditional western religions do, is necessarily to impose great costs on the individual who chooses not to have children. If you do not want to have children in such a system, you can pursue that desire only by forsaking all sexual contact. Indeed, Judeo-Christian religious injunctions against “spilling seed” (through masturbation) and forms of sexual union that cannot produce a child (such as homosexual relations) may well reflect the “penalty” for childlessness—sexual frustration as the destiny of those who refuse to reproduce.<sup>3</sup>

When the Vatican adopted its *Humanae Vitae* in July of 1968, it took the position that couples are prohibited from using “artificial” birth control and that “each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.”<sup>4</sup> Under Catholic doctrine, then, abstinence is the only legitimate form of birth control, and the price of sex is the possibility of procreation.

Very few people would be willing to forgo all sexual contact just to avoid procreation, even if they had a strong preference for childlessness. And if we look to Judeo-Christian Biblical commandments to be fruitful and multiply, we see little to suggest a basic right to choose not to reproduce *at all*.<sup>5</sup>

If we limit ourselves to traditional societies that operate within the Judeo-Christian model, then, we observe a consensus around the idea that people who exist in the present have an interest in choosing the composition of future generations—by marrying a chosen mate or by selecting a child’s mate—and that the individual has not only a “right” but an affirmative responsibility to avoid giving existence to people who would result from adulterous, non-marital, and incestuous relationships as well as from marriages that cross religious or other cultural boundaries. At the same time, however, we see that tradi-

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<sup>3</sup> See generally Cardinal Franjo Šeper, *Persona Humana* (1975), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19751229\\_persona-humana\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html) (declaration on sexual ethics).

<sup>4</sup> Paul VI, *Humanae Vitae* (1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html) (encyclical letter on the regulation of birth).

<sup>5</sup> See *Genesis* 1:28.

tional Judeo-Christian cultures do not look favorably upon the choice of childlessness and permit it only at the cost of celibacy.

From pre-modern and some existing religious traditions, one can thus infer the broadly accepted principle that human beings hold an OSI—an interest in exercising some control over their reproductive futures, through choice of (their own or a child's) mate, but that they hold no right to avoid a reproductive future altogether. On this approach, the answer to our question about the “rights” of potential lives is that traditional societies, with values similar to those espoused by the Catholic Church, do not extend to potential individuals a cognizable interest in coming into existence.

The potential offspring that would result from a union between *X* and *Y*, in other words, might never come into being, because *X* and *Y* do not find each other attractive or because *X*'s parents will not agree to the marriage of *X* and *Y*. No religious or ethical tradition tells us that *X* and *Y* commit a wrong against their potential offspring by not coming together to produce a child. We have no obligation to bring into existence (or even to try to create) every possible human being by every possible combination of egg and sperm cells. Indeed, strict religious rules of sexual union suggest a much more deliberate and designed set of unions in which diversity of partners is strongly discouraged. It is possible to lose sight of this widely shared OSI acceptance if we focus exclusively on rules against “artificial” birth control and abortion.

#### *E. Modern, Secular Acceptance of the OSI*

What are we to take from these traditional approaches? In modern, enlightened times, we surely must resort to more than a citation of Christian practice (or a mention of tradition) to justify a position as a normative matter. It seems, however, that at least one reproduction-related view survives modern, secular moral thinking and thus provides for a cross-temporal consensus. It is the view that people do have an important interest in exercising some control (at least by way of mate selection) over the form that their offspring and descendants will take. And at least that modest appreciation for reproductive rights—captured in the OSI—appears nearly universal.

The modern U.S. constitutional embodiment of this interest finds expression in the right not to procreate in the substantive due process protection for contraception, articulated for married couples in *Gris-*



would v. *Connecticut*<sup>6</sup> and for unmarried individuals in *Eisenstadt v. Baird*.<sup>7</sup> These cases together stand for the proposition that people may do more than simply choose a particular life-partner and thereby rule out the offspring they would wish to avoid having with other people. They may also control reproduction within their chosen relationships.

From a secular point of view, *Griswold* and *Eisenstadt* represent logical extensions of the undisputed right to avoid unwanted procreation.<sup>8</sup> Without the notion that God has commanded us to be fruitful<sup>9</sup> (but has also ordered us to limit ourselves to one partner<sup>10</sup>), there appears to be no reason to distinguish between a right to avoid procreating with *Y* (an undesired mate) and a right to avoid procreating with anyone, even our chosen soul-mate, at any given time. Neither the hypothetical children of alternative couplings nor the hypothetical children of the actual couplings that have materialized have the right to go from being potential people to becoming actual people.

In fact, given the dangers and harms of overpopulation, it is arguably in no one's interest (whether existing in the present or in the future) to prevent people from voluntarily reducing their own repro-

6 *Griswold v. Connecticut*, 381 U.S. 479 (1965). Although the majority opinion bases the right to use contraceptives on the "penumbral rights of 'privacy and repose,'" *id.* at 485, Justice Harlan's reasoning in his concurring opinion, basing the right on the Due Process Clause of the Fourteenth Amendment, *id.* at 500, was followed by later courts.

7 *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Describing and extending the right against procreation first recognized in *Griswold*, the Court said in *Eisenstadt*:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453.

8 Further embracing the right to avoid unwanted maternity or paternity is the case of *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), discussed at length at *infra* Part II.B.

9 *Genesis* 1:22 ("Be fruitful and multiply, and fill the waters in the seas, and let birds multiply on the earth.").

10 The seventh of the Ten Commandments states, "Thou shalt not commit adultery." *Exodus* 20:14; see also *Proverbs* 6:32 ("But whoever commits adultery with a woman lacks understanding: he that does it destroys his own soul."); *Matthew* 5:27-28 ("You have heard that it was said, 'You shall not commit adultery;' but I say to you, that everyone who looks on a woman to lust for her has committed adultery with her already in his heart.").

ductive contribution to the world to something less than what is physically possible. To put the point differently, reproductive rights rest on the legitimate assumption that although there will be people who exist in the future, we give no right to any of the countless potential people to become one of those who ultimately have the attribute of existence.<sup>11</sup>

#### F. A Secular Obligation "Concerning" Children

What about a right to have no children at all? Some individuals and couples decide not to procreate, and such people—even in secular environments—frequently face negative social consequences. People often assume that childless individuals are physically unable to have children. On the basis of this assumption, some might recommend fertility treatments. If the recommender learns that the couple is "childless by choice,"<sup>12</sup> however, he or she may not be satisfied with this revelation. Though it would seem (and in fact be) totalitarian to compel any individual to have children, the "childless by choice" draw a stigma that is distinct from that of the infertile—they are viewed by some as "shirking" their obligations.<sup>13</sup>

It is worth asking, "obligations to whom"? Could it be that the person offering a judgment in this scenario ("Judge") believes that the childless couple, consisting of *X* and *Y*, is violating the interests of their own potential children by not bringing them into existence? This seems unlikely, given that no particular offspring of *X* and *Y* has a

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<sup>11</sup> Cf. RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 137–39 (George Heffernan ed., Univ. of Notre Dame Press 1990) (1641) (arguing for the existence of God by reference to our being able to imagine the perfect being, coupled with the claim that a truly perfect being would have to have the attribute of existence).

<sup>12</sup> This phrase represents a term of art currently used to describe those who decide not to have children and wish to own that decision rather than have it attributed to infertility. There is a growing literature surrounding the modern phenomenon of "childless by choice." See, e.g., JANE BARTLETT, *WILL YOU BE MOTHER?: WOMEN WHO CHOOSE TO SAY NO*, at ix–xi (1994) (preferring the term "child-free"); JOAN BRADY, *I DON'T NEED A BABY TO BE WHO I AM: THOUGHTS AND AFFIRMATIONS ON A FULFILLING LIFE*, at xi–xvi (1998); ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 7 (2000); MARDY S. IRELAND, *RECONCEIVING WOMEN: SEPARATING MOTHERHOOD FROM FEMALE IDENTITY*, at vii (1993); CAROLYN M. MORELL, *UNWOMANLY CONDUCT: THE CHALLENGES OF INTENTIONAL CHILDLESSNESS*, at xiii (1994); Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 287, 289 (Joyce Trebilcot ed., 1983) (arguing that women should not feel forced to have children); Irene Reti, *Introduction*, in *CHILDLESS BY CHOICE: A FEMINIST ANTHOLOGY* 1–3 (Irene Reti ed., 1992); Lisa Belkin, *Your Kids Are Their Problem*, *N.Y. TIMES*, July 23, 2000 (Magazine), at 30, 33; Enid Nemy, *No Children. No Apologies.*, *N.Y. TIMES*, Apr. 6, 1995, at C12.

<sup>13</sup> See Nemy, *supra* note 12.

right to come into existence (and few would maintain that *X* and *Y* must conceive and give birth to the absolute maximum number of children they could possibly produce).

More plausibly, Judge believes that *X* and *Y* have an obligation to create and raise upstanding citizens who will join Judge's children in maintaining and improving the lives of those in their own generation. Judge therefore sees an obligation to those people in the next generation who *will* exist to provide them with fellow citizens with whom to share the pleasures and burdens of life.<sup>14</sup> In addition to taking care of one another and others of the same generation, *X*'s and *Y*'s offspring could some day help take care of *X* and *Y* as well as other members of *X*'s and *Y*'s generation.

More generally, as one generation ages, it needs a younger population to provide for it, whether directly, by taking care of an elderly parent, or indirectly, by providing the manpower (and womanpower) to perform the services and produce the goods that the elderly population will need but will be unable to produce on its own. One concern in Japan at the present time is that with such a low rate of reproduction (far below replacement), there will come a time when—absent immigration—almost everyone who lives in Japan will be elderly, and there will be virtually no one to run the economy and provide older citizens with necessary goods and services.<sup>15</sup> This will also have the effect of creating an extreme burden on the few existing young people to take care of so many, analogous to the experience of a single parent who must care for ten children.<sup>16</sup>

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<sup>14</sup> My colleague Chantal Thomas raised an interesting analogy to parents who decide to have a second child to provide friendship and companionship (as well as an assistant in later caring for elderly parents) to the first child.

<sup>15</sup> [Japan's] fertility rate (the estimate of the total number of children a woman will bear in her lifetime) stands at 1.25 . . . . Demographers suggest that a country needs a fertility rate of 2.1 to maintain a stable population, balancing deaths with births. Some might suggest that fewer people would be a good thing, especially on Tokyo's crowded subways, but absent immigration, low fertility means fewer new workers to take over for those who retire, fewer people to care for an aging population, and, perhaps of greatest concern to governments, fewer income earners to pay for social services and government expenditures through their taxes.

Irene Bloemraad, *Citizenship and Pluralism: The Role of Government in a World of Global Migration*, 31 FLETCHER F. WORLD AFF. 169, 171–72 (2007).

<sup>16</sup> However, as Michael C. Dorf has suggested, an advanced system of robots could some day take the place of young people in taking care of the aged. See Caitrin Nicol, *Till Malfunction Do Us Part*, NEW ATLANTIS, Winter 2008, at 126 ("Japan—the country with the world's highest percentage of elderly people and lowest percentage of children—has been at the forefront of this domestic-robot trend. In 2005, Mitsubishi released its 'Wakamaru' robot to considerable fanfare. The three-foot-tall machine, its appearance something like a yellow plastic snowman, was

We have thus far observed the following uncontroversial, widely (and intergenerationally) shared intuitions about the morality of reproductive rights: (a) people have some right to determine their reproductive futures, including (b) choosing one mate over others. If one takes a secular approach, these first two intuitions logically extend to including a right to exercise control over the timing and frequency of pregnancies.

If one accepts the first two premises, it necessarily follows that potential people do not have a right to become actual people. Nonetheless, those potential people who *do* become actual people (like the individuals who already comprise our own generation) have interests that include the existence of other people in the same generation who can assist them in caring for themselves and the older generation, and the existence of a younger generation of people who can assist them in their own old age.<sup>17</sup> To the extent that people in our generation have an obligation to have children at all, then, this obligation is one that “concerns” children.<sup>18</sup> It is owed *not* to the potential people whom we would bring into existence but to other people whose existence lies completely outside of any particular individual’s or couple’s control. And the obligation is to ensure that there are people around; it does not entail the creation of any *specific* assortment of people.

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designed to provide limited home care to the aged. It can ‘recognize’ up to ten human faces, respond to voice commands, deliver e-mail and weather forecasts from the Internet, wheel around after people in their homes, and contact family members or health care personnel when it detects a potential problem with its ward.”); Shinichi Terada, *Robot Development Takes a Homeward Turn*, JAPAN TIMES, Sept. 23, 2008, at 11 (discussing how as society ages, there will be a growing market in Japan for home health-care robots); Rhodri Marsden, *Tomorrow’s World Today*, INDEPENDENT, Aug. 27, 2008, at 8 (describing a robot available in Japan designed primarily to provide company for the elderly). According to one source,

As baby boomers hit retirement age, the need to monitor and assist seniors will create a surge in demand for personal-care robots, experts say. Since 2001, the Japanese government has spent \$210 million on research to meet its goal of deploying robots to support its aging workforce. (It’s [sic] timeline specifies that bots should be able to straighten a room by the end of this year, make beds by 2013, and help with baths and meals by 2025.)

Katie Baker, *Why Should We Be Friends? As Japan builds a new generation of robot companions, U.S. firms focus on pragmatics*, NEWSWEEK, Aug. 25, 2008, at 30.

<sup>17</sup> Note, however, the caveat that if robots could carry out all of the functions that people now do, it might be morally acceptable for the entire population to stop reproducing. See Nicol, *supra* note 16. But cf. WALL-E (Walt Disney Pictures 2008) (implying that a system of robotic assistance could breed an unhealthy sloth in the human population).

<sup>18</sup> Cf. Gary L. Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 RUTGERS L. REV. 721, 751–52 (1994) (describing much of the law regarding animals as consisting of obligations that “concern” animals, such as a prohibition against harming another person’s ox, rather than obligations *to* animals, such as a prohibition against killing or harming an animal for consumption as food).

If our obligation is not *to* any particular potential person to make sure she comes into existence and not even *regarding* any particular person's or people's existence, it is appropriate to consider the obligation to be one that we owe together, as a group, rather than individually. It does not matter, on this approach, whether you have no children, two children, or sixteen children, as long as the sum total of children created by your generation does not significantly fall short of, or exceed, the number needed by people who exist now and will exist in the future. The effort to populate future generations, then, is collaborative rather than individual. Indeed, the very fact that there are such phenomena as "overpopulation" and "underpopulation" underscores the importance of viewing reproductive obligations as communal rather than individual and as dynamic rather than static.<sup>19</sup> Unlike the obligation to avoid pollution, our obligations concerning children are complicated and go in both directions. Coercive programs (intended to "enforce" the obligation either to procreate or not to, at the individual level) could thus backfire in their outcomes, quite apart from the human rights abuses inherent in attempts to mandate the course of an individual's reproductive life.<sup>20</sup>

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<sup>19</sup> One can imagine scenarios in which we perceive a need to increase the number of people coming into existence and therefore create incentives for reproduction (including, for example, mandatory coverage for fertility medicine, generous parental-leave laws, dependent deductions, and tax credits for offspring). One can imagine the converse in an environment understood as overpopulated (including subsidies for birth-control—or distribution of free birth control—and a failure to provide tax benefits to people with many children). Among those who criticized the Aid to Families with Dependent Children ("AFDC") system that existed before President Clinton ended "welfare as we know it" were commentators who suggested that compensating unwed mothers at higher levels for larger numbers of children would perversely motivate them to have more children and thereby maximize their welfare benefits. See Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J. L. & PUB. POL'Y 289, 297 n.27 (2004) ("Some critics have also argued that welfare benefits encouraged the increase in unwed mothers and fatherless homes. Given the statistical predictions of impoverished life chances for children raised in single parent homes (all other things being equal), this ripple effect of welfare benefits, if true, would be among the most destructive consequences of the welfare state because of its intergenerational consequences."); CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980*, at 17–19 (1984). Such concerns were present from the beginning of the AFDC program. See Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 FUTURE OF CHILD. 28, 30 (1997) (citing J.C. BROWN, *PUBLIC RELIEF 1929–39*, at 309 (1940)), available at [http://www.princeton.edu/futureofchildren/publications/docs/07\\_01\\_02.pdf](http://www.princeton.edu/futureofchildren/publications/docs/07_01_02.pdf) ("Concerns about whether the AFDC subsidy inadvertently encouraged unwed motherhood arose early on in some states.").

<sup>20</sup> For a fascinating treatment of what has ensued when organizations and governments around the globe have attempted to control reproduction (in both directions), see generally MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* (2008).

Considered in this light, our children are, at one level, resources that will be available to our generation as well as to their respective generations, to take on responsibilities that might otherwise go unmet or that might pose an extreme hardship to a small number of people. The potential resources themselves—the hypothetical children we might or might not have—however, do not have a cognizable interest in coming into existence.

A common exchange between teenagers and their parents usefully illustrates this idea. The conversation typically takes the following form: Mother: “You should be grateful for all of the things your father and I provide for you.” Child: “Why? I never asked to be born.” The implicit message in this exchange is that parents have not granted any affirmative benefit to the child by bringing her into existence and that, on the contrary, whatever the parents do for the child simply fulfills the duty that the parents assume when they create a person who will be dependent for some period of time. On this approach, parents owe their children from the very beginning because they created them (rather than having *created* them because they owe them existence).

Though perhaps, in part, a product of teenage narcissism, the idea captured in this “conversation” is powerful. It is impossible to compare the experience of existing, as our children do, with the experience of never having come into existence. I can be grateful, then, that *you* exist, because your presence enhances my life, but being grateful that *I* exist as opposed to never having existed is a somewhat incoherent proposition. Stated differently, we have children for ourselves and for others who may benefit from our children’s existence, but we do not (and have no obligation to) have children for their own good.

If nonexistent persons lack any right to come into existence, then who exactly is in a position to make claims on us, the present generation, and demand that we preserve and create resources for the future? One answer is that whether or not any one of us chooses to reproduce, we can with confidence predict that there will in fact be people in the future and thus accept the moral proposition that those people, once they are here, will have as much of a right to fulfill their own needs as we have to fulfill ours. We therefore project our imaginations into the future and keep that future in mind as we protect the interests of those who will exist later (but whose composition, as a population, remains indeterminate at the present time).

## II. *Conflation of the OSI with the BII*

A second interest that arises in the context of reproductive rights is the interest in bodily integrity. That is, people who support reproductive rights generally rely not only on the OSI but also on the BII, the interest in controlling access to our own bodies. In *Planned Parenthood v. Casey*,<sup>21</sup> for example, the U.S. Supreme Court identified the original right to abortion in *Roe* as arising from the limits on the government's ability to interfere with "a person's most basic decisions about family and parenthood, as well as bodily integrity."<sup>22</sup> The Court here invoked first the OSI and second the BII. Yet it felt no need to separate the two, given that both lines of precedent provide support for the right at issue. In other words, the Court treated the two interests together. This makes perfect sense if one is concluding that there is a right to abortion—both the OSI, the interest in determining whether or not to give rise to particular offspring, and the BII, the interest in guarding one's bodily integrity against unwanted occupation, point in the same direction. It may thus seem unnecessary to delineate sharply between the two separate interests.

If we consider other examples of a person's interest in bodily integrity, we see a similar phenomenon. First, consider the right not to have sex with an undesired partner. This, as described earlier, protects the OSI because if one must have sex with undesired partners, one may well be forced to create unwanted children with those partners. The right against unwanted sex is also, however, a significant expression of the right to bodily integrity. What could be more central to bodily integrity than the capacity to exclude unwanted bodies from inside one's own? Once again, in the case of prohibiting rape, both the OSI and the BII provide support for the prohibition.

Birth-control functions similarly. Under the OSI, a person has an interest in avoiding the creation of unwanted offspring. From a secular point of view, such an interest includes the right to use contraception. In addition, however, the BII includes a right to prevent sperm cells from leaving (in the case of a man) or entering (in the case of a woman) one's body. Again, we see the OSI and the BII pointing in the same direction. Is it therefore truly a problem to conflate the OSI and the BII, given that they so frequently operate together to ground various interests?

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<sup>21</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>22</sup> *Id.* at 849 (internal citations omitted).

The answer is yes. Though they often coincide, they do not invariably do so. When they do not, moreover, it is important to identify which interests are at stake if one is to make an informed decision about a proposed right. Mischief can result from a failure to distinguish the two interests from each other.

Consider again the case of rape law. Historically, it is no doubt true that the right against rape was very much tied to the OSI. After all, women were not understood to enjoy much of a bodily integrity interest. That is clear from their husbands' unfettered sexual access to them.<sup>23</sup> In modern times, however, the right against rape is much more appropriately considered a right concerning the BII. The crime of rape is not, for example, more serious when its victim is a fertile woman rather than an infertile woman. Neither is it more serious when its perpetrator is a fertile man than when he is an infertile man. Indeed, though gradations of rape in the law continue to reflect sexist ideology,<sup>24</sup> they do not differ on the basis of whether or not a child is—or is likely to be—conceived in the process. It is therefore useful to distinguish between the OSI and the BII in the case of rape, because the distinction illuminates the changing perception of what makes the crime harmful.

Consider now some variations on the right to abortion, that make clear the need to separate the OSI from the BII.

### A. *Abortion Conflicts*

In life as we know it, a pregnant woman in the United States is legally entitled to terminate her pregnancy, even if the man who inseminated her does not want her to have an abortion. In *Casey*, in fact, the one portion of Pennsylvania's abortion regulation that failed to survive the Supreme Court's "undue burden" standard was the husband-notification provision.<sup>25</sup> The Court held that compelling a woman to notify her husband prior to obtaining an abortion would pose an unconstitutional obstacle in the path of women seeking abortions.<sup>26</sup>

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<sup>23</sup> See *supra* note 1.

<sup>24</sup> See *supra* note 1 (discussion of how certain states still treat rape between married individuals differently); NEV. REV. STAT. § 200.373 (2007) (marriage is a defense to a charge of sexual assault, unless the assault involved force or threat of force); cf. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, at tbls.43 & 43a (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus0602.pdf> (showing that 68.9% of female victims were raped by nonstrangers and that 10.5% of single-offender rapes were committed by the victim's spouse).

<sup>25</sup> *Casey*, 505 U.S. at 895.

<sup>26</sup> *Id.* at 895–97.



By the same token, a man may not compel a woman whom he has impregnated to terminate her pregnancy against her will. In fact, the latter proposition highlights one of the few areas of absolute overlap between those who believe abortion is constitutionally protected and those who do not: opposition to coerced abortions.<sup>27</sup>

If one views both contraception and abortion as rights that draw equally on the OSI and the BII, however, it might seem unfair that women win, regardless of whether they want to keep or terminate a pregnancy. The man, on the other hand, loses, whether or not his choice would be to have the child. The reason that the woman wins in both cases, however, is that the BII almost always trumps the OSI. The man has already had sex with the woman and impregnated her, so he does not stand to suffer any further loss of bodily integrity. His only remaining interest is therefore the OSI. The woman, however, relies on the BII to defend her decision whether to remain pregnant or to terminate her pregnancy. It is only by disentangling the two interests that we can make sense of this result and respond to critics who charge sex discrimination in not extending the same rights to men (whether it is the right to terminate, as Michael Newdow has implicitly defended,<sup>28</sup> or the right to keep the child that pro-life men and their supporters have claimed). The right of abortion is premised much less on the OSI than on the BII.

### B. *Embryos Outside the Womb*

Consider now the case of contraception. As we have discussed, the right to contraception implicates both the OSI and the BII, but there are cases that resemble contraception that quite clearly do not implicate both interests.

In frozen-embryo cases decided until now, many courts have privileged the right not to procreate, as this right is explicated in *Griswold*<sup>29</sup> and *Roe*.<sup>30</sup> The problem with such reliance, however, is that

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<sup>27</sup> See *id.* at 980 n.1 (Scalia, J., dissenting) (“There is, of course, no comparable tradition barring recognition of a “liberty interest” in carrying one’s child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court’s contention, *ante*, [505 U.S.] at 859, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.”).

<sup>28</sup> Sherry F. Colb, *Should Men Have the Right to a “Financial Abortion”? A Biological Father Cries Sex Discrimination when Forced to Pay Child Support for an Unwanted Baby*, FINDLAW, Mar. 21, 2006, <http://writ.news.findlaw.com/colb/20060321.html> (referring to Susan Dominus, *The Fathers’ Crusade*, N.Y. TIMES, May 8, 2005 (Magazine), at 26).

<sup>29</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

the BII—an important part of the right to contraception or abortion—has little or no role to play in resolving frozen-embryo controversies.

When two people decide to create frozen embryos for later implantation, they also create the potential for later conflict. If the couple splits up, for example, one member might still want to implant the embryos while the other would prefer not to have children in the world that belong to the defunct couple.<sup>31</sup> How should such disputes be resolved?

The first thing to note is that only one of the two reproduction-related interests has relevance to such a dispute: the OSI. One of the parents wants to have a child and is willing to and interested in pursuing implantation. The other does not want a child but will suffer no bodily integrity loss either way. The OSI is an interest in determining which children one will and will not have and thus applies to both the party that wants implantation to occur and the party that does not. There is therefore no *a priori* reason to prefer the woman over the man in this situation, in the way that there was in the case of continuing versus terminating a pregnancy. And there is, by the same token, no reason to privilege the party that wants to *avoid* reproduction over the party that wants to *pursue* it, as there might be in the case of contraception.

Some cases appear to acknowledge the unusual equality of party interests in the case of frozen embryos, holding that the parties should accordingly be bound by whatever agreement they made at the time of embryo creation.<sup>32</sup> Other cases, however, either aim for consensus (and privilege the status quo of no implantation) or privilege the right not to procreate over the right to procreate. This last approach rests on the view that frozen-embryo cases are like contraception cases, in which the Court protects the right not to procreate, a right with both OSI and BII components. Rarely, by contrast, is the Court called on

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<sup>30</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>31</sup> See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1053 (Mass. 2000).

<sup>32</sup> E.g., *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001); *Litowitz v. Litowitz*, 48 P.3d 261, 270–71 (Wash. 2002); see also FLA. STAT. ANN. § 742.17 (West 2005) (mandating that couples sign contracts indicating their preferences for disposition of frozen embryos in the event of divorce and providing that in the absence of such contracts, the couple must jointly determine the disposition of embryos); Jessica L. Lambert, Note, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 542–45, 555 (2008) (discussing the above statute and cases). But see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057–58 (Mass. 2000) (holding that it would be against public policy to enforce a contract requiring someone to become a parent against his or her will).

to protect the right *to* procreate.<sup>33</sup> Even privileging the status quo (of no implantation) implicitly treats the situation as though it mirrors a case of contraception.

When an embryo already exists, however, the case is quite different from what it would be if one member of a couple wanted to conceive a child and the other did not (and in which the one that did not would have the right to use contraception). Because there is no BII at stake, it “stacks the deck” to rely decisively on case law that directly involves the BII. Similarly, the refusal to permit implantation is the obvious answer only if we ignore the OSI of the party favoring implantation and attend exclusively to the OSI of the party opposing it. It is, in other words, questionable to select non-implantation as the default outcome, because the OSI—the only basis on which either party can rely in a frozen-embryo dispute—is a right to decide *whether* to maintain the status quo or *whether* to change it by having a child. If one wishes to favor the right not to procreate over the right to procreate, one must be careful to articulate a reason for that choice. By conflating the OSI and the BII, however, it is far too easy to believe that such a decision arises logically out of the Supreme Court’s precedents regarding contraception and abortion. In reality, the Supreme Court has never decided a case that definitively resolves such frozen-embryo disputes.

In *Davis v. Davis*,<sup>34</sup> a frozen-embryo case that I discussed in detail elsewhere,<sup>35</sup> the trial court took an approach that reveals an alternative path one might take in response to the vanishing BII in such cases: the path of treating the embryo as a person.<sup>36</sup> If one cannot invoke the BII to oppose implantation of a frozen embryo in the other party, which we have seen one cannot do, then the OSI is all that is left. But the OSI, when invoked by a person who does *not* want children, is specifically an interest in *preventing* the creation of people whom the individual (or group) does not wish to create. If an embryo is simply reproductive material—mere “potential people”—then it enjoys no greater interest in coming into existence than the countless

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<sup>33</sup> *But see* *Skinner v. Oklahoma*, 316 U.S. 535, 535 (1942) (involving forced sterilization as a punishment for crime, which also implicates both the OSI and the BII (in part because of the surgical process involved)).

<sup>34</sup> *Davis v. Davis* (“*Davis I*”), No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev’d*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990), *aff’d*, 842 S.W.2d 588 (Tenn. 1992).

<sup>35</sup> Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy*, 72 B.U. L. REV. 101, 117–25 (1992).

<sup>36</sup> *See Davis I*, 1989 Tenn. App. LEXIS 641 at \*13.

other “potential people” whom we choose not to create. On the other hand, if an embryo is a person already, then one cannot deploy the OSI to block implantation in a willing party. The OSI expires, in other words, at the point of personhood, when one is no longer seeking to “prevent” but instead to “kill.” The OSI, an interest in controlling our genetic legacy, does not entitle us to kill our children.

The couple in *Davis* divorced after having created frozen embryos together by the process of in vitro fertilization.<sup>37</sup> After their divorce, the man remarried, but his ex-wife still wanted to implant the embryos that she and her ex-husband had created together.<sup>38</sup> Her ex-husband strenuously objected, arguing his right not to procreate against his will.<sup>39</sup>

The trial court decided to allow the woman to implant the embryos, stating that she would make the better custodial parent because she had a uterus that she planned to use to “house” the embryos, while her ex-husband lacked any such suitable “home” for them.<sup>40</sup> Although a fetus is not a person under Supreme Court precedent,<sup>41</sup> the trial court’s rhetoric nonetheless implicitly accepted the view that an embryo is already an entity with interests and that its interest in survival militates in favor of ruling for the woman who plans its implantation rather than for the man who plans its destruction.<sup>42</sup> With this approach, if the preferences were reversed and the man wanted his new wife to implant the embryos but his ex-wife objected, the court would presumably have taken the man’s position—the embryos’ interests are better served by implantation than by destruction.

If we accepted the view that an embryo is a person, entitled to the same protection as any other person, then the trial court’s resolution of the issue would have made the most sense. The battle would then be one over whether to save the life of the embryo (as the aspiring implanter wished to do) or whether to refuse to save the life of the embryo (as the implanter’s opponent wanted to do). With neither an

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<sup>37</sup> *Davis I*, 1989 Tenn. App. LEXIS 641, at \*5–6.

<sup>38</sup> *Id.* at \*36–37. By the time the Tennessee appellate court considered the case, the appellee had remarried and no longer wished to have the embryos implanted in her. *Davis v. Davis*, (“*Davis II*”), 1990 Tenn. App. LEXIS 642, at \*1 n.1 (Tenn. Ct. App. Sept. 13, 1990) (“[H]er intention should the Court uphold the lower court’s judgment is not to implant the embryos, and she wants authority to donate the embryos so that another childless couple may use them.”).

<sup>39</sup> *Davis I*, 1989 Tenn. App. LEXIS 641, at \*36–37.

<sup>40</sup> *Id.*

<sup>41</sup> *Davis II*, 1990 Tenn. App. LEXIS 642, at \*7 (“Without live birth, the Supreme Court has said, a fetus is not a ‘person’ within the meaning of the statute.”).

<sup>42</sup> *Davis I*, 1989 Tenn. App. LEXIS 641, at \*36–37.

OSI nor a BII to arm the opposing parties, the best interests of the “child” would be decisive, and—except perhaps in extreme cases—rescue better serves the “child’s” interests than a refusal to rescue.

On appeal, in both the appellate court and the Supreme Court of Tennessee, the judges rejected the notion that the embryo’s “best interests” ought to count (any more, I would add, than another potential person’s “interest” in coming into existence should count in such a dispute). Instead, the courts viewed the embryo as reproductive material and accordingly focused on the competing OSIs of the two parties, the woman and the man.<sup>43</sup> Both courts concluded that the man’s interest in avoiding parenthood trumped the woman’s interest in pursuing it.<sup>44</sup> If the embryo were a person, then this resolution would have been unacceptable.

### C. *Abortion Assumptions*

In addition to clarifying what is truly at stake (and thus forcing us to make authentic arguments) in the case of conflicts between parties over abortion or frozen embryos, the conflation of the OSI and the BII helps explain the pro-life assumption that the abortion controversy can be resolved simply by determining when life begins.

Those who describe themselves as “pro-life” take the position that a person has come into existence (with all of the entitlements this entails, including the right to continue existing) at the moment of conception.<sup>45</sup> On the pro-life view, neither an egg cell nor a sperm cell exists yet—considered either individually or together—as a person with rights, but once the two combine to form a zygote, we now have a person with interests.<sup>46</sup> It is on the basis of this initial premise that pro-life advocates oppose not only abortion (the termination of an extant pregnancy after implantation) but also intra-uterine devices (“IUD’s”), which interfere with implantation after fertilization, and the “morning-after pill,” which can do the same.<sup>47</sup> Use of these proce-

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<sup>43</sup> See *Davis II*, 1990 Tenn. App. LEXIS 642, at \*7–9; *Davis v. Davis (“Davis III”)*, 842 S.W.2d 588, 597 (Tenn. 1992).

<sup>44</sup> See *Davis II*, 1990 Tenn. App. LEXIS 642, at \*9; *Davis III*, 842 S.W.2d at 604.

<sup>45</sup> See, e.g., National Right to Life, *When Does Life Begin?*, <http://www.nrlc.org/abortion/wdlb/wdlb.html> (last visited July 26, 2009) (“A new individual human being begins at fertilization, when the sperm and ovum meet to form a single cell.”).

<sup>46</sup> *Id.* For an excellent challenge to the moral distinction between egg and sperm, on the one hand, and zygote, on the other, see PETER SINGER & DEANE WELLS, *MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION* 74–75 (1985) (disputing that embryos have rights).

<sup>47</sup> A Department of Health and Human Services proposed rule, for instance, would have broadly defined abortion as any procedure that terminates the life of a fertilized egg in utero, even before implantation occurs. Brian Todd, *Plan Calls Pill, IUDs Abortion*, CNN.COM, Sept.

dures and medications deliberately terminates the life of any zygote that might come along and therefore, in the eyes of the pro-life observer, constitutes an abortion.<sup>48</sup> For similar reasons, members of the pro-life movement oppose embryonic stem-cell research, because it involves the destruction and use of cells that qualify as persons under their definition of personhood.<sup>49</sup>

In the case of frozen-embryo disputes, as we saw above, the view that a person exists from the moment of conception necessarily leads to the selection of the parent who wishes to implant an embryo over the parent who wishes to destroy it. In such cases, if an embryo is a “person,” there is no OSI, and a pro-life individual can forcefully oppose assertion of a right “not to procreate” in such circumstances, provided he can convince the decisionmaker of his view of the embryo’s status. Similarly, embryonic stem cell experimentation would be improper, no matter how many lives it might save, if it involved the destruction of an actual living person for the sole purpose of advancing the search for medical knowledge.

The pro-life theorist makes a questionable inferential leap, however, when she concludes that if the embryo is a full human being, then it must be the case that IUDs, the morning-after pill, and abortion are and ought to be treated as murder. To assume that abortion is tantamount to murder if the embryo is already a person is to believe that just because the OSI has expired (due to the graduation of a “potential person” to personhood), the BII has necessarily expired as well. That is, one must say more than that an embryo is a person as a prelude to pressing the view that abortion should be criminalized and doctors who perform them subjected to harsh penalties.<sup>50</sup> The failure to note the gap between fetal personhood, on the one hand, and the

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25, 2008, <http://www.cnn.com/video/#/video/us/2008/08/01/todd.defining.abortion.cnn?iref=videosearch> (discussing the potential implications of a “conscience” provision allowing health care workers to opt out of assisting with any procedure that could terminate the life of a fertilized egg in utero, prior to or after implantation); Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law, 73 Fed. Reg. 78,072, 78,077 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88) (responding to comments to proposed rule, 73 Fed. Reg. 50,274 (Aug. 26, 2008), by declining to adopt a definition).

<sup>48</sup> See Todd, *supra* note 47.

<sup>49</sup> See, e.g., National Right to Life, Killing Human Embryos, [http://www.nrlc.org/killing\\_embryos/index.html](http://www.nrlc.org/killing_embryos/index.html) (last visited July 25, 2009).

<sup>50</sup> At least in the United States, pro-life advocates tend to oppose direct prosecution of the women obtaining abortions but seek instead to limit criminalization to providers. See Emily Blistein, *Revisiting Roe: The Language of Privacy and Isolation in U.S. and Vermont Case Law*, Vt. B.J., Spring 2008, at 2; Feminists For Life of America, Frequently Asked Questions, <http://www.feministsforlife.org/FAQ/index.htm#criminalize> (last visited July 25, 2009); Sherry F. Colb,

propriety of classifying abortion as murder, on the other, reflects a conflation of the OSI (which rightly drops out of the equation at the point of personhood) and the BII.

Pro-life advocates are not the only ones to conflate the OSI and the BII in thinking about the legality of abortion. The pro-choice community has tended to argue against the view that in the course of a pregnancy, a “person” has at some point come into existence, on the apparent assumption that personhood negates the right to abortion. Yet it is difficult to imagine that many pro-choice advocates seriously believe that a woman about to give birth is carrying an entity with no moral status. More likely, if one accepts a right to an abortion until the very end of pregnancy, one rests—at least at the end—on notions of self-defense rather than a commitment to the fetus’s non-personhood.

Pro-choice theorists are on firmer ground when they argue that terminating a very early pregnancy does not end the life of a person. By contrast to a late-term fetus, a zygote or embryo does not appear to most secular theorists to share any of the relevant characteristics of personhood.<sup>51</sup> That is, if one asks the question “why does anyone have rights?” the answer cannot be “because he or she has human DNA.” To invoke DNA is to provide a tautological response, not a moral argument. Yet it is only human DNA and its potential that distinguishes a human zygote from an amoeba.<sup>52</sup> Presumably, most people would invoke human *capacities* rather than membership in the human species when arguing that we ought to have rights: perhaps the capacity to feel pain and sorrow and the capacity to feel love and pleasure. The embryo lacks any of these capacities. It is either one cell or a group of relatively undifferentiated cells.<sup>53</sup>

But if it is difficult to defend the personhood of a zygote or embryo—other than by tautological invocations of the fact that it is a human because it is not a zebra or a moose,<sup>54</sup> it is equally difficult to

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*Who Wants to Imprison Pregnant Women for Having Abortions?: Not Necessarily the Pro-Life Community*, FINDLAW, Aug. 22, 2007, <http://writ.news.findlaw.com/colb/20070822.html>.

<sup>51</sup> See SINGER & WELLS, *supra* note 46, at 74–75.

<sup>52</sup> *Cf. id.* at 74 (making the same type of comparison to a tadpole).

<sup>53</sup> *See id.* at 74.

<sup>54</sup> See Sherry F. Colb, *The U.S. Court of Appeals for the Eighth Circuit Approves An “Informed Consent” Requirement for Abortions: The Slippery Quality of Statutory Definitions*, FINDLAW, June 9, 2008, <http://writ.news.findlaw.com/colb/20080709.html> (criticizing a South Dakota law requiring a doctor to inform a pregnant woman “that the abortion will terminate the life of a whole, separate, unique, living human being” and then defining “human being” as “an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation”).

defend the non-personhood of the fetus just prior to birth. This fetus shares virtually all the characteristics of a newborn baby, save the ability to breathe air, which, like the possession of human DNA, is not relevant to any judgment about one's moral entitlement to the rights accompanying personhood.

We see here that line-drawing—in this as in other contexts—necessarily seems arbitrary at the boundaries. In the abortion debate, however, one can take the pro-choice position without having to draw either line, by relying firmly on the BII. If women could, on the other hand, terminate their pregnancies without terminating the lives of fetuses, the need to draw lines would become more pressing, difficult as it might be. One could no longer say, as *Casey* did, that a pregnant woman may decide for herself when she believes life begins.<sup>55</sup> That only makes sense if the life in question is posing a threat to the woman's bodily integrity. Once it no longer is, because it lives inside an artificial womb, the woman is no more entitled to determine when that life begins than is the sperm donor or, for that matter, the rest of us.

Many understand personhood to begin well before the end of nine months post-conception. Reactions to late-term abortions—including strong approval ratings for so-called “partial-birth abortion” legislation—suggest that by the third and perhaps even the second trimester of pregnancy, people believe there to be an entity with interests at stake.<sup>56</sup>

Another datum from which to infer people's sense of a fetus's entitlements is the passage of legislation that treats as murder (in certain circumstances) a nonconsensual assault on a pregnant woman that results in the death of her fetus.<sup>57</sup> I have elsewhere argued that as long as a woman is willing to carry her pregnancy to term, “viability” should be understood to occur—for purposes of a third party's attack—as early as conception.<sup>58</sup> Viability, after all, refers to the capac-

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<sup>55</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

<sup>56</sup> To respond to bodily integrity concerns, if one is inclined to prohibit late abortions, one could in theory invoke the failure to terminate at an earlier point, although such arguments are, in theory, susceptible of extension back to the failure to use birth control or to abstain.

<sup>57</sup> Thirty-five states have such laws. National Right to Life, *State Homicide Laws That Recognize Unborn Victims*, available at [http://www.nrlc.org/Unborn\\_Victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html) (last visited July 25, 2009).

<sup>58</sup> Sherry F. Colb, *Is Killing an Undiscovered First-Trimester Fetus Murder in California? The Answer Probably Is, and Should Be, “Yes,”* FINDLAW, Jan. 28, 2004, <http://writ.news.findlaw>.



ity to continue to live without compelling anyone's sacrifice of bodily integrity. One could therefore decide to define even an embryo, if wanted by its mother, as viable with respect to other people. On this theory, however, one could also define a container of live sperm and a nearby container of ova as a person (or as many people), if there are willing parents prepared to implant and gestate the union of those sperm and ova. In the event of a conflict, it might therefore (on reflection) be more sensible to draw the line at a point that actually coincides with an entity's acquisition of interests and entitlements rather than at viability, however defined.

Laws that classify third-party assaults on pregnant women that result in the death of the fetus as homicide, sometimes require that the fetus have reached a particular stage.<sup>59</sup> This suggests that even when a zygote's existence does not threaten anyone's bodily integrity, a large sector of the population does not believe that its life as a person begins at conception. At the same time, however, the prevalence of fetal-homicide laws throughout the country represents some evidence of a widely shared view that a person's life begins sometime prior to birth, perhaps long before birth. That is, in part, why abortion remains a vexing and painful issue rather than one which is subject to a self-evident answer that everyone can easily accept. With an artificial womb, one aspect of the problem—the direct conflict between a fetus's life and a woman's bodily integrity—would virtually disappear, only for another—the status of the disconnected but live fetus at various stages of development—to become salient and inescapable.<sup>60</sup>

Until that time, however, members of both the pro-choice and pro-life communities should recognize that their respective stands on fetal personhood are either unnecessary (in the case of the pro-choice perspective) or insufficient (in the case of the pro-life perspective) to the task of defining the moral status of abortion. The belief that fetal personhood is incompatible with abortion rights is based on the con-

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com/colb/20040128.html (arguing that “a fetus whose mother is going to stay pregnant is as ‘viable’ against the mother's assailant as the truly viable fetus is against a woman who seeks a late term abortion”).

<sup>59</sup> Ten states have laws that require the pregnancy to have progressed beyond a particular point before the death of the fetus will qualify as a homicide. National Right to Life, *supra* note 57.

<sup>60</sup> Another example of maternal-fetal conflict that does not necessarily reflect a view about the personhood of the fetus arises in the case of fetal-protection legislation (punishing women who give birth to a child after having ingested substances harmful to babies). WIS. STAT. ANN. §§ 48.193, .205 (West 2009); S.D. CODIFIED LAWS § 34-20A-63 (2008). For further discussion, see *infra* Part IV.C.

flation of the OSI, which cannot provide support for a right to kill a full person, with the BII, which might well support the choice to terminate a pregnancy.

### *III. Consensus on the BII and Abortion*

We have observed the conflation of the OSI and the BII and the various contexts in which this conflation prevents us from properly and thoroughly analyzing difficult cases. Partner conflicts over abortion and over frozen-embryo implantation represent two such contexts. The debate over the morality and legality of abortion more generally revealed a similar conflation, which led to an assumption that the OSI and the BII necessarily coincide and that when the OSI disappears, so then must the BII.

Perhaps in part because of such conflation, people who debate about abortion have failed to see a startling consensus among both pro-life and pro-choice theorists in the U.S. about the importance of the BII and, specifically, its central role in understanding pregnancy. Proponents and opponents of a right to abortion have not only missed the significance of the BII in grounding a right to abortion, leading to bizarre and unnecessary fights over third-party fetal-homicide law. They have also missed the reality that they both largely embrace a vision of a woman's bodily integrity—as it is compromised by a pregnancy—that is the fundamental foundation of a right to abortion.

Readers will likely wonder whether I can possibly be serious in asserting that pro-life and pro-choice theorists agree at all about the BII and pregnancy. To appreciate the degree of consensus, we turn now to the “life of the mother” exception to bans on abortion.

Although pro-life advocates view the embryo as a full person, many nonetheless accept the legitimacy of a “life of the mother” exception to the criminal bans on abortion that they propose.<sup>61</sup> In one respect, such a concession seems quite modest. Unlike those who

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<sup>61</sup> See Sherry F. Colb, *Abortion, Sarah Palin's Amniocentesis, and the Pro-Life View of Sex*, *FINDLAW*, Sept. 15, 2008, <http://writ.news.findlaw.com/colb/20080915.html> (assessing the argument that taking the risk of pregnancy, by having sex, constitutes consent to pregnancy and birth); Sherry F. Colb, *What Proponents of the "Rape Exception" Teach Us About Abortion*, *FINDLAW*, July 11, 2007, <http://writ.news.findlaw.com/colb/20070711.html> (discussing the “life of the mother” exception to proposed abortion bans). I thank Walter Weber of the American Center for Law and Justice for e-mail correspondences in which he clarified that he, at least, does not believe that one may directly kill a fetus to save its mother's life but that he does allow for the possibility that it may be acceptable to remove a live (but nonviable) fetus or embryo from a woman, where pregnancy threatens the woman's life, even though removal will necessarily result in fetal death.

stand firmly in the pro-choice camp and believe that a woman ought to have a nearly-unfettered right to terminate a pregnancy for any reason, the “life of the mother” concession provides only that a woman who will die without an abortion need not remain pregnant. In what respect can the two approaches be said to share a common premise, apart from the fact that those who believe abortion should always be permissible would obviously agree that a woman whose pregnancy threatens her life should have the option of terminating it?

Yet the two views share a central premise. The position that a woman may justifiably terminate a pregnancy to save her own life concretely exposes the assumption that, at some level, pregnancy is something that a fetus does to its mother, something against which the mother must—at least in extreme cases—be allowed to defend herself.

To see that this premise—that a fetus, by developing inside a woman, does something *to* the woman—is implicit in the “life of the mother” exception, consider a different sort of case. This time, a mother who is separate from her child can survive only if she kills that child. Perhaps, for example, the mother needs a vital organ that only her child can provide. Or perhaps a third party is threatening to kill the mother if she does not kill her own child. In these cases, where a non-pregnant woman can survive only by killing her child, it is clear that she nonetheless may not justifiably do so.<sup>62</sup> Even to preserve our own lives, we do not have the right to kill others, unless those others are somehow threatening our lives. That is, we may justifiably kill in self-defense those who pose a threat of grave harm to us, but we may not kill those who pose no threat but whose death would help us survive. We might describe the distinction between such cases as that between repelling threats, on the one hand, and using another’s life as a mere resource, on the other.

To view an abortion that would save a mother’s life as justifiable self-preservation, notwithstanding the full personhood of the embryo or fetus, is to accept that the embryo or fetus “threatens” the woman’s life. The fetus does not occupy the status of simply co-existing with the woman but rather acts upon her in a manner that could, in appropriate circumstances, justify defensive aggression.

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<sup>62</sup> In some states, MASS. GEN. LAWS ch. 279, § 69 (LexisNexis 2002), 42 PA. CONS. STAT. ANN. § 9711 (West 2009), one can invoke a duress defense after killing an innocent person in response to a threat by a third party. Such a defense is not, however, a justification but rather falls into the category of an excuse. And indeed, most states do not even allow this excuse for homicide. 22 C.J.S. *Criminal Law* § 59 (2009).

To see this logic explicitly employed, consider the approach of Jewish law to abortion. Within traditional Jewish doctrine, the Talmud—the crucial “oral tradition” that accompanies the “written law” to comprise the fundamentals of Jewish observance—does not consider a fetus to be a full person.<sup>63</sup> Nonetheless, Moses Maimonides, an important Twelfth Century thinker and commentator on Jewish law, did not rely on a rejection of fetal personhood to determine the proper scope of permissible abortion to save a mother’s life. Instead, he viewed the fetus in such a case as an aggressor against the life of the mother (in Hebrew, “rodef,” one who pursues) and believed that the mother has a right to repel that aggression.<sup>64</sup>

It may sound odd to call an abortion “self-defense,” given that an embryo or fetus, unlike the ordinary aggressor against a person’s life, cannot be described as “culpable” in any way. To the extent that its actions threaten the life of its mother, the threat is a non-responsible or “innocent” one. In law and in moral philosophy, however, it is widely accepted that the justification of self-defense does not depend on the guilt or culpability of the “attacker.”

Consider George Fletcher’s (and now also Luis Chiesa’s) scenario of the psychotic aggressor.<sup>65</sup> In the scenario, a psychotic aggressor who is, by hypothesis, innocent of any wrongdoing, initiates a lethal attack against an (utterly) innocent person.<sup>66</sup> The question is whether the person under attack has the right to kill the psychotic aggressor in

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<sup>63</sup> See DAVID FELDMAN, BIRTH CONTROL IN JEWISH LAW 254–55 (1968); Dena S. Davis, *Method in Jewish Bioethics: An Overview*, 20 J. CONTEMP. L. 325, 335 n.50 (1994) (“A fetus is not a human being (nefesh) in Jewish law.”); Daniel Eisenberg, *Stem Cell Research in Jewish Law*, JEWISH LAW, 2001, <http://jlaw.com/Articles/stemcellres.html> (“To gain a clear understanding of when abortion is sanctioned, or even required, and when it is forbidden, requires an appreciation of certain nuances of *halacha* (Jewish law) which govern the status of the fetus. The easiest way to conceptualize a fetus in *halacha* is to imagine it as a full-fledged human being—but not quite. In most circumstances, the fetus is treated like any other ‘person.’ Generally, one may not deliberately harm a fetus, and sanctions are placed upon those who purposefully cause a woman to miscarry. However, when its life comes into direct conflict with an already born person, the autonomous person’s life takes precedence.”).

<sup>64</sup> See THE CODE OF MAIMONIDES: THE BOOK OF TORTS 196–97 (Julian Obermann ed., Hyman Klen trans., Yale Univ. Press 1954).

<sup>65</sup> George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 371 (1973); see also George P. Fletcher & Luis E. Chiesa, *Self-Defense and the Psychotic Aggressor*, in CRIMINAL LAW CONVERSATIONS (Paul H. Robinson ed., 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1157614](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157614).

<sup>66</sup> The hypothetical example reads:

Imagine that your companion in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposively in the sense that his means further his aggressive end. He does not act in a frenzy or in a fit, yet it is clear that his conduct

self-defense. Fletcher (and now Chiesa) argue that he does have such a right, despite the fact that the aggressor is not criminally responsible for the threat he poses to the life of his would-be victim.<sup>67</sup> The right rests on a vision of personal autonomy and bodily integrity on the part of the person who is threatened. One could understand an embryo or fetus inside its mother's womb, threatening her life, as analogous to the psychotic aggressor.<sup>68</sup>

Now change the scenario. Instead of the psychotic aggressor threatening the victim's life, he instead threatens the victim's bodily integrity.<sup>69</sup> Even if we assume that the attacker is both an innocent *and* a full moral person, one could maintain that each and every person is entitled to protect her bodily integrity from invasion by another person and that this entitlement includes the right to expel the innocent aggressor who has occupied the body of another person. This is true even when such expulsion will inevitably cause the innocent aggressor's death.

In the abortion context, the fetus is the innocent aggressor. Through no fault of its own, it now occupies the body of the unwillingly pregnant woman. Whether or not it is a "person" (by contrast to the separated sperm and egg, which everyone agrees are not a person or persons), the woman may thus be entitled to expel it from her uterus. At the present time, it is generally impossible to expel the fetus, prior to viability, without also terminating its life. Therefore, it may be permissible to terminate a person's life in this case.

If this seems an unwarranted extension of the narrow "life of the mother" exception, note that self-defense law—at least in the U.S.—does not draw a line between "death" and "substantial bodily harm" in allowing a threatened individual to defend herself. The law of vir-

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is non-responsible. If he were brought to trial for his attack, he would have a valid defence of insanity.

See Fletcher, *supra* note 65, at 371.

<sup>67</sup> *Id.* at 371–80.

<sup>68</sup> Although Fletcher and Chiesa suggest that the innocent aggressor must harbor some moral responsibility for his "acts" to trigger a right of self-defense, I dispute this claim in my own response to the Fletcher/Chiesa text and argue that the distinction fails to reflect shared intuitions about legitimate self-defense. See Sherry F. Colb, *Justifying Homicide Against Innocent Aggressors Without Denying Their Innocence*, in *CRIMINAL LAW CONVERSATIONS* (Paul H. Robinson ed., 2009), available at <http://www.law.upenn.edu/cf/faculty/phrobins/conversations/status/>.

<sup>69</sup> In Judith Jarvis Thompson's famous example, a gifted violinist who needs to use someone else's kidney for nine months has been surgically connected (through no fault of her own) to a non-consenting donor. See Judith Jarvis Thompson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47, 48–49 (1971).

tually every state, for example, permits a person who is facing an imminent rape to respond with deadly force.<sup>70</sup> This is true even if the victim does not fear for her life and even though the punishment for rape may not include the death penalty.<sup>71</sup> One's justifiable use of force, in other words, need not correspond or be proportionate to the desert of the offender.

Though a rapist is culpable for his crime, the victim's moral right to use deadly force to defend herself need not turn on that culpability. What matters, for self-defense purposes, is that every person—including every woman—has the right not to be physically occupied by another being, whether or not that being is a moral person (as a rapist is and an embryo or fetus might not be) and whether or not that being is at fault in physically occupying her. When a pro-life advocate recognizes the legitimacy of abortion to save the life of the mother, she implicitly accepts that an embryo or fetus occupies a woman's body in a manner that may call for aggression in self-defense. If she accepts that deadly self-defense extends—as it does, under law—beyond threats to life to include threats to bodily integrity, it follows that a woman's BII gives her the proper authority to expel an unwanted fetus from inside her body, even though such expulsion necessarily and always terminates the life of the innocent invader.<sup>72</sup> The notion of

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<sup>70</sup> *E.g.*, ALA. CODE § 13A-3-23 (2008); ARIZ. REV. STAT. ANN. § 13-411 (2008); COLO. REV. STAT. § 18-1-704 (2004).

<sup>71</sup> The relevance of the penalty provision is that it suggests that even though a culpable rapist may not be deserving of the death penalty, this conclusion has no necessary effect on the measures a victim may take to protect herself against being violated. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–51 (2008).

<sup>72</sup> In *Creation and Abortion*, Frances Kamm suggests that the person defending against the invading embryo or fetus—if we assume the latter is a moral person—must herself be innocent of fault in bringing about the situation in which she is occupied by the embryo or fetus, if abortion is to be justified. F.M. KAMM, *CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* 47 (1992). One could argue, as I have discussed elsewhere, Sherry F. Colb, *Abortion, Sarah Palin's Amniocentesis, and the Pro-Life View of Sex*, FINDLAW, Sept. 15, 2008, <http://writ.news.findlaw.com/colb/20080915.html>; Sherry F. Colb, *What Proponents of the "Rape Exception" Teach Us About Abortion*, FINDLAW, July 11, 2007, <http://writ.news.findlaw.com/colb/20070711.html>, that having sexual relations represents "fault" in bringing about the fetal invasion that abortion aims to terminate. Kamm responds to this argument that it would be too much to demand that a person remain celibate to avoid an unwanted pregnancy (a demand which the "sex as consent to pregnancy" view implicitly makes of women). *See KAMM, supra*, at 153. Kamm also states that the embryo would be no better off if the sex had not occurred because it would not then be in a position to come into existence either. *See id.* My response to the assumption-of-risk argument is that the odds of a pregnancy are slim enough and the consequences great enough to make the assumption-of-risk notion inapposite to the sexual context. One would, however, face a harder case—if one believed an embryo or fetus to be a person—if someone had chosen to implant an embryo in her uterus but later wished to abort. There, the "odds" argument changes considerably (fifty to seventy-five percent in some cases), the notion

abortion as self-defense, even when the mother's life is not in danger, thus demonstrates the legitimacy of extending the uncontroversial idea of the "life of the mother" exception to the assault on bodily integrity that a pregnancy represents. And it does so without having to take a position on the worth or moral personhood of a fetus.

Pro-life advocates who support a life-of-the-mother exception might here object that when a woman seeks an abortion for a reason other than to save her life, her reason may have nothing to do with the physical intrusions inherent in pregnancy. Though the stated *rationale* for the right to abortion is a woman's bodily integrity, the actual *decision* to have an abortion often rests on the desire to prevent a baby from coming into existence at all—the same desire that motivates the use of contraception.

To see this point, consider some common reasons for a woman to choose to have an abortion. Perhaps she is still virtually a child herself and wants to become educated and grow up before taking on the responsibilities of caring for a child. Perhaps she is not interested in a long-term involvement with the man who impregnated her but does not wish to raise a child alone. Maybe she was raped and does not want to bring into the world a child who resulted from that violent attack. Or maybe she already has several children and cannot afford to take care of them if she adds another to their number.

All of these reasons for abortion operate, on their face, independently of the physical burdens of pregnancy. The women in these examples are choosing not to have their children exist, thereby expressing a preference that appears to sound more in the OSI than in the BII, and therefore seem vulnerable to the pro-life critique of asserting a right to *prevent* children from coming into existence when one is actually *terminating* the life of an existing child. At least in the case of such abortions, a pro-life critic might claim, one must confront the question avoided explicitly in *Planned Parenthood v. Casey*, of when life (in the sense of moral personhood) begins.<sup>73</sup>

In response to this argument, which appears to have some force, it is worth exploring once again the right to repel a rape by deadly force. In some cases, a woman who refuses to consent to sex does not feel like having the interested man inside her body because she finds him unattractive. In other cases, however, a woman might simply

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of "fault" becomes more plausible, and, for Kamm's purposes, the embryo might have indeed been better off without implantation because someone else could have implanted it and taken the pregnancy to term.

<sup>73</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

want to wait until she knows the man better before having sex (even though she desires sex with him already). And in still other cases, a woman might reject a man's advances—though she is attracted to the man—because she and he are of different racial groups, and she believes interracial sex is immoral.

As we see in these examples, a woman can have a variety of motivations for refusing to have sex, some of which concern bodily integrity but others of which are either relatively trivial or downright offensive. Regardless of her basis for refusing to have sex, if a man nonetheless goes ahead and attempts to force her, she has the right to use deadly force—if necessary—to stop him. In the intimate realm, reasons matter much less than the ultimate decision. When the decision is to refuse consent, it must be honored, period.

Reasons that would be inappropriate or even actionable in other contexts, in other words, do not undermine a woman's right to protect her own bodily integrity against a sexual intrusion. Though a woman cannot fire a man for his race, she can refuse to have sex with him for this or any other reason. Because her bodily integrity is at stake, the motive for her actions becomes irrelevant.

If the man in question were instead applying for a job as an underwear model, the woman's reasons for refusing to hire him would now become not only relevant but potentially dispositive. It is sensible to refuse to hire a person as an underwear model if that person is extremely unattractive. If, on the other hand, the woman refuses to hire the man because she finds him attractive and wants to sleep with him (but may not do so if he works as her subordinate), that reason would be less appropriate and might even violate the law against sex discrimination.<sup>74</sup> Finally, if the woman chooses not to hire the man on account of his race, despite the fact that he is very attractive and therefore highly qualified for the job, such a choice would plainly constitute illegal race discrimination.<sup>75</sup> Once we exit the intimate realm, the reasons for our actions—and their perceived legitimacy—become highly relevant to crafting an appropriate legal response.

Returning to abortion and the alternative world in which a fetus develops inside an artificial womb instead of a woman's body, a woman's reasons for wanting to terminate the life of a fetus might well become salient if the fetus were at a stage of development at which moral personhood attaches.

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<sup>74</sup> See generally Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66; *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-67 (1986).

<sup>75</sup> See generally Civil Rights Act of 1964 § 703, 78 Stat. at 255-57.



It may be, of course, that like the woman deciding whether or not to hire a man, a woman who wanted an abortion because she did not feel ready for a child, etc., would feel differently if she did not have to be pregnant for that child to develop from a fetus into a baby. That is, she might experience a pregnancy as too burdensome to endure if she truly does not want to keep the child, but she might have no objection to the child's coming into being in an artificial womb, if she does not have to have anything to do with it.

A pregnancy not only imposes a serious intrusion on a woman, but it also compels a level of intimacy that can result in bonding. If a woman does not want to have or keep a child, then such bonding and attachment could prove devastating to her when she gives up the child for adoption.<sup>76</sup> Alternatively, she might find herself unable to give up the child after carrying it to term and could therefore face the problems that motivated her to want an abortion in the first place (inability to afford the child, a lack of commitment from—or a desire to avoid entanglement with—the father, etc.).

The artificial womb, then, could help facilitate the feeling in a woman that she is not the “mother” of the entity coming into being. This could explain, for example, the experience of people who donate sperm or eggs and feel that they are doing something nice for people who want children (or that they are making some money)<sup>77</sup> but do not consider themselves to have had and then lost a child.

It is quite possible, then, that a woman who seeks an abortion for reasons unconnected to the physicality of pregnancy might nonetheless lose the desire to terminate the life of her fetus once pregnancy is no longer a factor. If, on the other hand, she still wanted to terminate its life, then she could no longer invoke the BII. Relying exclusively on the OSI would, in this context, mean that much would turn on when the zygote graduates from being a potential person—unentitled

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<sup>76</sup> Cf. ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* *passim* (2006) (detailing the trauma experienced by women, prior to *Roe v. Wade*, 410 U.S. 113 (1973), who were compelled to surrender their babies for adoption).

<sup>77</sup> See Peggy Orenstein, *Your Gamete, Myself*, N.Y. TIMES, July 15, 2007 (Magazine), at 37–38, available at <http://www.nytimes.com/2007/07/15/magazine/15egg-t.html?sq=Orenstein%20egg%20donation&st=cse&scp=1&pagewanted=all>. Of course, some women voluntarily serve as gestational surrogates as well. See Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 30, 2008 (Magazine), at 42, available at <http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html>.

to come into existence—into a moral person with the same rights as a baby.<sup>78</sup>

We thus see that despite the moral controversies surrounding birth-control and abortion, there exists an important consensus between embattled groups about the two essential elements of reproductive freedom: the OSI, encompassing an interest in deciding to prevent the existence of children that one does not want to have, and the BII, encompassing a construction of pregnancy that acknowledges the embryo or fetus as an occupying (though innocent) force inside its mother that will—at least in some cases—justify its expulsion and consequent death. As I argue, the basis for a “life of the mother” exception articulated by many within the pro-life movement, coupled with the modern view of self-defensive homicide as extending to threats against bodily integrity, leads to a far more expansive freedom to abort for a woman facing an unwanted pregnancy than one limited to the case when termination is necessary to preserve her life. And this analysis does not turn on how we understand the status of the fetus.

#### IV. *Does the OSI Preclude Regard for Future Generations?*

In the last three sections of this Article, we have examined the moral consequences of consensus about the OSI and the BII and have concluded that we have no obligation to create future generations and may have rights of destruction vis-à-vis existing people, to the extent that they pose a threat to a pregnant woman’s life or bodily integrity. To suggest that we do not have to create future generations, however, might seem to entail the proposition that we do not have to do anything *for* future generations. After all, future generations—whether defined to include embryos or not—might seem to have no interests

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<sup>78</sup> A moral acknowledgment of fetal personhood in the artificial womb could thus contribute to overpopulation, depending on where the line is drawn, but this problem is hardly unique to societies that identify fetal personhood prior to birth. See April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 791–92 (1996) (discussing how China’s one-child policy results in a situation where abortion is not only permitted but encouraged and sometimes compelled); Kathleen Fackelmann, *It’s a Girl! Is Sex Selection the First Step to Designer Children?*, 154 SCI. NEWS 337, 350 (1998) (discussing how the technology could affect China’s policy, given the preference for boys); Patrick Goodenough, *China’s ‘One-Child Policy’ Results in Forced Abortions, Infanticide*, CNSNEWS.COM, Feb. 14, 2001, <http://cnsnews.com/public/content/article.aspx?RsrcID=10007>; cf. Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 293, 323 (1985) (most recent approved text at Pub. L. No. 107-115, 115 Stat. 2118, 2121 (2002) (targeting China’s one-child policy by refusing funds to “any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization”)).

right now, if they do not even have an interest in coming into existence.

#### A. *Preserving a Borrowed Resource*

In thinking about as-yet-nonexistent people making claims on us, it is useful to consider an analogy. Jake is a student in a first-year law school class. He sits at a particular desk when he takes contracts, and he decides to use a pen-knife to carve obscenities into his desk whenever he has trouble following what his professor is saying. By the end of the year, his desk is covered with his artwork. It is clear that he has done harm to the law school, which owns the desk.

In addition, however, he has harmed the future occupants of his desk. They will see—and perhaps be offended by—what he has carved in a desk that was only on loan to him. He has acted wrongfully toward those future 1L's, even though their identities have yet to be determined. One might say that most of those future law students have not yet even come into existence as law students. Nonetheless, he has violated their interests, and he has done so at the moment that he began his vandalism.

Despite Jake's having violated someone's cognizable interests or rights (those of the persons to be seated at his desk), it is also the case that no one person has a *right* to get into the law school where Jake had occasion to carve obscenities into his desk. Unlike potential people, of course, potential law students (or at least a large number of them) do have *some* interests (in the ability to obtain food, shelter, and arguably a fair process by which they will be either selected or rejected by Jake's law school). What they lack, however, are interests *as law students*, because none of them has yet been selected for that status.

Nonetheless, whoever among them will be selected and will go to Jake's law school and will sit in Jake's seat (all of which will be determined in the future) has demands that she can make of Jake now, and one of those demands is that Jake not deface the desk at which she will be sitting for a semester of her life.

If the student sitting next to Jake notices him carving and says, "Hey, don't do that; it's not fair to the next occupant," he is championing that demand on behalf of someone who—like people who do not yet exist—is in no position to articulate her own interests or needs. Though the future status of the law student is, therefore, contingent, her interest in having a clean and obscenity-free desk in the future is not. This is, of course, how it can be coherent (notwithstand-

ing Justice Scalia's suggestion otherwise<sup>79</sup>) to extend standing to a spokesperson claiming that it is wrong to despoil the environment in a manner that will hurt people, even if most of those people have yet to materialize. Future persons necessarily require someone other than those future persons to speak out on behalf of their interests.

### *B. Endowing Future Persons with Rights*

Legal debates about maternal-fetal conflicts outside of the abortion context provide a useful illustration of how one might consider the interests of people who do not yet exist. Let us assume, for purposes of this discussion, that an embryo or fetus is *not* a moral person and therefore has no more of a right to come into existence than any other potential person. The OSI therefore allows for the destruction of the fetus. Let us also put to one side the BII of the mother, which—as we saw in the context of our earlier abortion discussion—can trump the interests of even an extant person.

### *C. Fetal Endangerment by the Non-Aborting Mother*

A number of states have provided for the criminal prosecution of women who expose themselves to harmful substances during pregnancy.<sup>80</sup> It might appear that anyone who opposes the criminalization of abortion on the basis of the OSI would necessarily oppose criminalization of a pregnant woman's fetal endangerment (through the ingestion of harmful substances during pregnancy, for example). If one is permitted to kill another entity, after all, then doesn't it follow *a fortiori* that one is allowed to injure that entity nonlethally?

The short answer is no. As I note elsewhere, one might permit killing under some circumstances (for punishment of crime) while simultaneously prohibiting torture or mutilation under those same cir-

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<sup>79</sup> In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992), Justice Scalia wrote for a majority of Justices that “[the imminence requirement] has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control.”

<sup>80</sup> “Under a legal theory known as fetal rights, more than 20 states have enacted laws that target women for actions taken during pregnancy.” Mark Reutter, *Laws About Pregnant Women and Substance Abuse Questioned*, INSIDE ILL., Dec. 15, 2008, at 8, available at <http://news.illinois.edu/ii/05/1215/1215.pdf>; see also, e.g., FLA. STAT. ANN. § 415.503(9)(a), (g) (West 1989) (repealed 1998); 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 1992); IND. CODE ANN. § 31-6-4-3.1 (Burns 1993); MINN. STAT. ANN. § 626.5562 (West 2003); NEV. REV. STAT. ANN. § 432b.330 (Michie 2006); OKLA. STAT. ANN. tit. 10, § 1101 (West 1993); *id.* tit. 10, § 7102-04; UTAH CODE ANN. § 62A-4-404 (1989).

cumstances.<sup>81</sup> In the contrast between abortion and fetal endangerment, however, the “greater includes the lesser” argument fails for an additional reason as well.

In having an abortion, a woman does one of two things: she either *prevents* a moral person from coming into existence or she *kills* an existing moral person. If one believes that she does the first—merely prevents a person’s existence—then one ought to find abortion unobjectionable. (If, on the other hand, one believes that she does the second—kills an existing person—then the issue becomes more difficult.<sup>82</sup>) Assuming one takes the view that a fetus is not a moral person until birth and that abortion therefore has no moral dimension—that one’s OSI continues to be dispositive—could one nonetheless support a fetal-endangerment statute?

Consider what occurs during fetal endangerment. A pregnant woman ingests a harmful substance that does not kill the fetus. She thereby increases the odds that the baby to whom she will give birth will suffer physical or mental deficits. Accordingly, the harm she inflicts affects not only a fetus but a future baby, whose later moral status will be relatively uncontroversial. If, in other words, Jane Roe drinks alcohol and consequently gives birth to a baby with fetal alcohol syndrome, she has thereby inflicted harm on the baby, a moral person, regardless of whether or not the fetus had any individual moral entitlements.

A pregnant woman who will not terminate her pregnancy but who ingests harmful substances, then, is behaving in a manner that violates her obligation to future generations. When her baby is born exhibiting the signs of that violation, a fetal-endangerment statute accordingly seeks to punish her for that disregard, despite the fact that her actions preceded the presence (and rights-holding status) of her baby, by hypothesis. For this reason, the most destructive fetal-endangerment conduct would tend to occur in the earliest stages of pregnancy, when the possibility of harming development (and thus the future baby) is at its greatest, while the moral personhood of the fetus is most strongly disputed (and thus the OSI most compelling). Fetal endangerment, understood in this way, is primarily an offense against the future baby rather than the present fetus. It thus resembles the act of a corporation that releases huge amounts of greenhouse gases

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<sup>81</sup> Sherry F. Colb, *Why Is Torture “Different?” and How “Different” Is It?*, 30 *CARDOZO L. REV.* 1411, 1415 (2009).

<sup>82</sup> For a discussion of how one might be pro-choice despite the view that a fetus is a moral person, see *supra* Part III.

into the air, where the greatest harm is committed against future persons.<sup>83</sup>

### *Conclusion*

We have observed that despite the apparently intractable divisions between disputants on questions of reproductive rights, there is a surprising amount of consensus on its two foundations: the Offspring Selection Interest (“OSI”) and the Bodily Integrity Interest (“BII”). Across the centuries and the political spectrum, there is broad agreement that potential persons do not have a right to come into existence and that people have an interest in selecting with whom to have their future children. And in the United States in modern times, there is a widely shared belief, even among the pro-life, that in pregnancy, an embryo or fetus acts upon a woman’s bodily integrity in a manner that, at least in extreme cases, justifies termination in self-defense. As I argue, this position necessarily embraces the BII and its application to pregnancy and, in light of self-defense principles that animate American law, leads quite naturally to a more general recognition of abortion rights.

We have seen as well that there is a tendency to conflate the OSI and the BII and thus to generate confusion about which rights people ought to have and why such rights exist. Areas including intra-couple frozen embryo and abortion disputes as well as debates over fetal-

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<sup>83</sup> In reality, as it turns out, both pro-life and pro-choice advocates have strong misgivings about fetal-endangerment laws of this sort. Pro-life individuals worry, with good reason, that if abortion is legal but fetal endangerment is not, then a woman who uses harmful substances can most effectively escape criminal sanctions by obtaining an abortion. See Sherry F. Colb, *Woman on Trial for Delivering Cocaine to Her Unborn Child: A Surprisingly Difficult Case*, FINDLAW, Aug. 11, 2004, <http://writ.news.findlaw.com/colb/20040811.html> (stating that those that wish to protect unborn children would not want to prosecute a pregnant mother for drug use, because that would encourage abortions). Pro-choice individuals find offensive the notion of closely regulating pregnant women in the manner that such statutes entail. See NARAL Pro-Choice Missouri, A Legislative Analysis of S.B. 766, <http://www.prochoicemissouri.org/issues/factsheets/200801162.shtml> (last visited July 25, 2009) (stating criticisms of a fetal-endangerment statute). And both groups worry that such legislation will deter drug-addicted women from seeking medical assistance and thereby, paradoxically, increase the exposure of fetuses to harmful substances. The Rutherford Institute, a pro-life-oriented group, and the National Abortion Rights Action League both opposed a hospital’s policy of drug testing pregnant women and turning over positive results to the police. See Brief for The Rutherford Institute as Amicus Curiae in Support of Petitioners at 20, *Ferguson v. City of Charleston*, 52 U.S. 67 (2001) (No. 99-936) (noting that the stress of a prosecution “elevates the burden” on the “fetal patient”); Brief of the NARAL Foundation et al. as Amici Curiae in Support of Petitioners at 2, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936). The Supreme Court ultimately invalidated the policy as an unreasonable search or seizure under the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 68 (2001).

protection legislation expose the impact of such conflation and the importance of bringing clarity to these discussions so that we may better understand what is at stake and how to apply the OSI and the BII to new problems that we face in the technological age.

Finally, we have addressed the question of how we can owe anything to future generations if we have no obligation—as per the OSI—to create these generations. The answer at which we arrived is that though we need not create people, we can anticipate that whatever our own individual reproductive behavior, there will in fact *be* people in the future, and those people will have entitlements as against us, much in the way that a future occupant of a classroom desk has entitlements as against the present occupant. On the assumption that such people will in fact come into existence, we must not act in a way that will deprive them of the ability to thrive. Putting aside the bodily integrity interest, I argue that it is this entitlement—of the people who *will* exist—that animates at least some prosecutions against women who ingest harmful substances during pregnancy. Even if we assume that a fetus is not a person and the OSI thus permits us to kill a fetus with impunity, it does not necessarily follow that we may harm fetal development in a way that impairs the lives of later children who will be born.

Some day, someone will likely invent a successful means of gestating a human embryo through fetal development outside the human body. When this occurs, reproductive rights conflicts will rightly center on the question of when “life” or “personhood” begins, because this is the point at which the OSI vanishes. This question will then represent the site of fierce but necessary ideological battles. Until then, however, our shared beliefs in the OSI and the BII and their connection to reproductive rights should allow us more successfully to navigate the rocky journey toward reproductive rights.