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IS ROE V. WADE OBSOLETE?

> *As science races ahead, it leaves in its trail mind-numbing ethical questions*.[1]

Robert A. Destro

Kass v. Kass will never be as famous as *Roe v. Wade*, but the recent ruling by New York State's highest court may well be just as important.

Roe is, of course, the United States Supreme Court case that held that a woman has a constitutional right "to terminate her pregnancy before viability."[2] *Kass v. Kass*, by contrast, is a recent New York divorce dispute over the custody and control of frozen embryos before pregnancy begins.

Decided by the New York Court of Appeals on May 7, 1998, *Kass* raises an important question: *Does the holding in* Roe v. Wade *control the outcome of a case where no pregnancy yet exists*?

In a unanimous decision, the Court of Appeals said "No." *Roe v. Wade* is about *abortion* – the "termination of a pregnancy" *in utero*. By its very terms, *Roe* does not control a dispute between husband and wife over custody and control of unborn children who exist, or are capable of surviving, outside of the uterus of their mother.

Kass is thus a powerful reminder that the "central holding" of *Roe v. Wade* is limited by its facts. So is its holding that an unborn child is not a "person" entitled to equal protection of the laws. Advances in medical technology now make it possible for unborn children to survive independently from their mothers much earlier if a pregnancy "terminates" by premature birth or abortion in the later stages of pregnancy. Advances in

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[1] Kass v. Kass, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998).

[2] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860, 879 (1992), the Supreme Court held that *Roe* establishes that "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."

> Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate *her pregnancy* before viability."[2] (emphasis added).

biotechnology now make it possible for the child to "survive" indefinitely even before pregnancy begins.

Kass thus offers pro-life advocates a "window of opportunity." The New York Court of Appeals holds in *Kass* that that the custody of frozen embryos is controlled by the law of contract. For the first time since the adoption of the Thirteenth Amendment's prohibition of slavery, an American court has held that human beings are to be treated as chattel. We can accept the challenge and make a clearly articulated case for the humanity of the unborn, or we can concede the territory to those who view the unborn as property, to be created and disposed of, at will and for whatever price the market will bear.

I. *KASS V. KASS* AND THE "RULE" OF *ROE V. WADE* "ASSISTED REPRODUCTION" AND THE ABORTION DEBATE: HOW CAN YOU "TERMINATE" A PREGNANCY THAT HASN'T STARTED YET?

Kass v. Kass is a divorce case. The litigants were Maureen and Steven Kass, a New York couple afflicted by an all-too-common disability: infertility. Like thousands of other couples, they sought help from a medical sub-specialty that did not even exist at the time of *Roe v. Wade*: the "infertility specialist."

Their first attempt at "assisted reproduction" was decidedly low-tech: artificial insemination. When that was unsuccessful, the next step was *in vitro* fertilization (IVF) and embryo transfer. Unfortunately, IVF was unsuccessful as well, and shortly after their last IVF attempt ended in failure, they divorced. In *Kass v. Kass* the New York Court of Appeals had to decide what to do with all those "extra" embryos.

Because failure rates, and the physical, psychological, and economic costs of ovarian stimulation and egg harvesting, are so high, IVF specialists recommend the fertilization of many eggs and the cryopreservation of the "pre-zygotes" (the term used to describe embryos in the four- to eight-cell stage) that result from the process. If pregnancy does not occur after transfer of several of these embryonic human beings into the fallopian tubes of the mother, the others serve as "extras" who may be called upon to make another attempt at full-term development. If pregnancy does occur, they are simply "extras" preserved in liquid nitrogen, with an uncertain fate and an even more unsettled legal status.

For Mr. Kass, the frozen "pre-zygotes" were property and their disposition was governed by the property settlement and "informed consent"

forms signed by the couple as a precondition for their participation in the hospital's IVF program. Those forms stated:

> "III. Disposition of Pre-Zygotes.
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> We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF Program and applicable law. *In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.* Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage. (emphasis added)

Prior to their divorce, Mr. and Mrs. Kass had also drawn up and signed an "uncontested divorce" agreement. It included the following language:

> The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes.

Steven Kass argued that this contract language controlled the outcome of the case.

Maureen Kass had a different view. Relying on *Roe*, she argued that

> a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus, and that [she] had not waived her right either in the May 12, 1993 consents or in the June 7, 1993 "uncontested divorce" agreement.[3]

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[3] Kass v. Kass, 91 N.Y.2d at 561.

In a stunning blow both to Mrs. Kass, and to the broad "reproductive autonomy" reading of *Roe v. Wade* preferred by most abortion rights advocates, the New York appellate courts *unanimously* agreed on two "fundamental" (their term) propositions.

1. That a woman's right to privacy and bodily integrity are *not implicated* before implantation occurs; and
2. That when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

Each of these "fundamental" propositions is significant in its own right. Taken together, they make *Kass v. Kass* an enormously important case. I will discuss each, briefly, in turn.

A. Proposition One: A woman's right to privacy and bodily integrity are *not implicated* before implantation occurs.

The reason that New York's highest courts (the Court of Appeals and the Appellate Division of the Supreme Court) were unanimous in support of this proposition is simple. The literal words of *Roe v. Wade* cannot be read in any other way.

Roe v. Wade rests on an explicit "balance" struck by the Supreme Court between the interests of *pregnant* women and the right of the State of Texas to assert its sovereign power to protect the unborn from harm. Not only did this "balance" *affirm* (at least in theory) a limited power to protect the unborn after viability, it simply *assumed* that unborn children capable of existing outside the womb of their mother were within the protective ambit of State law.

> This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.[4]

Kass thus raises an intriguing question: Is *Roe v. Wade* obsolete? Is it an artifact that will someday be recognized as a tragic reminder of primitive medical technologies that force a "choice" between the interests of the mother and those of her child?

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[4] Id. 410 U.S. at 166

If so, *Kass* seems to affirm the Supreme Court's own position that advances in medical technology will render *Roe* increasingly irrelevant to the decisions of courts and legislatures called upon to reconsider the legal status of unborn children. Justice Sandra Day O'Connor was the first of the Justices to point out the technological "self-destruct mechanism" embedded in *Roe*'s reliance on medical technology. Observing that the holding in *Roe v. Wade* "is inherently tied to the state of medical technology that exists whenever particular litigation ensues,"[5] she warned that the Court's approach in *Roe*

> is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.[6]

In 1973, "termination of pregnancy" before 28 weeks gestation almost inevitably meant the death of the child. Today, it does not. Medical journals are filled with studies on the management and care of severely premature infants. "At some institutions, the fetal survival rate approaches 90 percent at 24 to 27 weeks of gestation,"[7] and a recently-published Baylor University actuarial study

> … confirms that survival data provided by traditional survival-from-birth analysis and actuarial analysis are quite different. For example, our survival from birth is 27% for infants born at 23 weeks' gestation and 51% for those born at 24 weeks' gestation. Because one-half of the deaths in these infants occur during the first few days, their actuarial survival rates by 6 weeks postnatal age increases to greater than 80% to 90%.[8]

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[5] Id.

[6] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 457-58 (O'Connor, J. dissenting)

[7] Beverly A. Von Der Pool, "Preterm Labor: Diagnosis and Treatment; Problem-Oriented Diagnosis," *American Family Physician*, May 15, 1998, Vol. 57; Pg. 2457, Section 10.

[8] Timothy R. Cooper, M.D., Carol L. Berseth, M.D., James M. Adams, M.D., Leonard E. Weisman, M.D., "Actuarial Survival in the Premature Infant Less Than 30 Weeks' Gestation", *Pediatrics* 101: 975-978 (1998)

At the other "end" of pregnancy, science is moving quickly as well. The first advances came, as they always do, in agricultural biology. IVF, embryo lavage and transport, intra-fallopian transfer, and cloning all had their genesis in the science of biotechnology. It was inevitable that specialists in human reproduction would seek to use that knowledge. Their spectacular success undoubtedly "leaves in its trail mind-numbing ethical questions."[9]

B. Proposition Two: When parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

At first glance, such a rule looks problematic. Seen in medical and legal context, however, it is clear that the New York courts simply do not know what to do. Because the "rule" (or "holding") of *Roe v. Wade* does not apply to many of the controversies that arise under the new reproductive technologies, the Court of Appeals would naturally look to state law. It too provides little guidance: Legislatures have not decided what should be done either.

Astute observers of the political scene have been aware of this policy vacuum for years. Until *Kass*, however, advocates for unfettered "reproductive autonomy" and fetal experimentation have had the advantage. Like Mrs. Kass, they argue that *Roe v. Wade* guarantees a right of "procreative autonomy," not simply the right to "terminate a pregnancy prior to viability." *Kass* levels the field, and puts pro-life and abortion-rights advocates in a roughly equal political bargaining position. If Mrs. Kass cannot rely on *Roe* to defend her "procreative autonomy" in a case involving her *own* offspring, the derivative claim of those who sell embryos to infertile and gay couples, or of those who produce them for experimental purposes is even weaker. Insofar as the new reproductive technologies are concerned, *Kass* marks a quantum shift in comparative political advantage.

II. *KASS V. KASS* AND THE POLITICS OF REPRODUCTIVE TECHNOLOGY

A political debate focused on the ethical and political dimensions of "assisted reproduction" techniques, including *in-vitro* fertilization, cloning, and the transfer and indefinite cryopreservation of embryos before implantation works to the advantage of pro-life forces.

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[9] Kass v. Kass, 91 N.Y.2d at 562.

First, the holding in *Kass* offers a golden opportunity for public education. Since "disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice," and pre-zygotes are not "recognized as 'persons' for constitutional purposes," the Court of Appeals' holding that "[t]he relevant inquiry thus becomes who has dispositional authority over them" [10] raises a whole series of unsettling policy questions with which the public is only vaguely familiar.

Just as the Supreme predicted, advances in biotechnology and neonatology make medical science "better able to provide for the separate existence of the fetus." In 1998, embryos are routinely conceived *in vitro*. The technology exists to "transfer" embryos from one woman into another during the earliest stages of pregnancy, and surgeons have successfully removed a fetus for surgery and returned it to its mother's womb. It will not be long before scientists successfully "clone" a human being, or create mixed life forms that have both human and animal or plant genes.

Setting aside the regulatory questions that will certainly arise as the public becomes aware of these practices, it seems rather clear that the embryonic human beings involved in them either have, or can have, a separate existence. It makes little difference whether that existence is *in vitro*, in a surrogate mother, or frozen in liquid nitrogen. The key point is that technology has made it possible for the "right to terminate a pregnancy" to coexist with the child's right to life in a small, but increasing number of cases. As long as doctors are able to "terminate the pregnancy" without harming the child in the process, "viability," as the Court defined it in *Roe*, has occurred. We have not yet reached the stage where physicians can extract and maintain a fetus in the first and mid-second trimesters, but Justice O'Connor was correct when she observed in 1983 that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."

Will pro-life advocates and policy experts be prepared to enter this "Brave New World"? They had better be. Otherwise, the battle will be over before they are aware that it is going on.

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[10] Kass v. Kass, 91 N.Y.2d at 564.

III. *KASS V. KASS* AND THE LEGAL STATUS OF HUMAN BEINGS PRIOR TO MATURITY

The most unsettling aspect of *Kass* is the New York Court of Appeals' reliance on contract principles to resolve the dispute between Mr. and Mrs. Kass over the custody of the embryos. For practical purposes this means that means that cryopreserved, unborn human beings are viewed – at least in New York – as a species of property that can be bought, sold, bartered, or traded on the open market. It is important to note, however, that nothing in either the United States Constitution or the Constitution of the State of New York requires that conclusion.

The existence of human embryos and fetuses *ex utero* raises a number of important ethical questions. Most, if not all of them, have been fleshed out in the debates over fetal experimentation, but the decision in *Kass v. Kass* provides an additional reason why pro-life advocates need to stake out, and defend, a clear position on these issues.

About six months prior to the decision in *Roe v. Wade*, the New York Court of Appeals held that New York's law permitting abortions up to 24 weeks was a constitutional exercise of legislative authority. Its decision, *Byrn v. New York City Health & Hospitals Corporation*[11], is significant for two reasons. First, *Byrn* was cited in, and relied upon, by the Court of Appeals in *Kass*. Second, *Byrn* holds that the legal status of the unborn is a question of law to be decided *by the legislature*, not the judiciary.

> The … real [debate] … turns on whether a human entity, conceived but not yet born, is and must be recognized as a person in the law. … It is not true, … that the legal order necessarily corresponds to the natural order. That it should or ought is a fair argument, but the argument does not make its conclusion the law. It does not make it the law anymore than that the law by recognizing a corporation or a partnership as persons, or according property rights to unconceived children, make these 'natural' nonentities facts in the natural order.
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> When the proposition is reduced to this simple form, the difficulty of the problem is lessened. What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it

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[11] Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

> the rights and privileges of a legal person. [citations omitted] The process is, indeed, circular, [whether] the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been 'legally' rendered. That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. *The point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence*.[12] (emphasis added)

Pro-life advocates need to take this admonition seriously, and to set aside their philosophical differences with those who reason in this fashion. *Roe v. Wade* does *not* hold that unborn children may *never* be counted as "persons" under the law. By its own terms, the Court's holding that a state may not, "by adopting one theory of life, … override the rights of the pregnant woman that are at stake"[13] is limited to cases in which her right to "terminate" *a pregnancy prior to viability* are involved. In all other cases, the legal status of the unborn is a question of state—not federal—law.

IV. DISTINGUISHING SYMBOL FROM SUBSTANCE: *ROE V. WADE* AS THE RHETORIC OF PRO-ABORTION POLITICS

The importance of *Kass*, in law and in politics, rests on its holding that the legal status of unborn children *remains* an "open" political question. This is an important development, but it requires that pro-life advocates distinguish clearly between the "symbolic" importance of *Roe v. Wade* (which is considerable) and the actual "rules" the Court wrote into American constitutional law.[14]

To abortion-rights advocates, the “central holding” of *Roe* is "a milestone on the path to full emancipation of women."[15] In their view, the alleged right

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[12] Id. 31 N.Y.2d at 201, 335 N.Y.S. 2d at 393.

[13] Roe v. Wade, 410 U.S. at 162.

[14] The ink on the opinion was hardly dry when Dean John Hart Ely observed that *Roe* was "a very bad decision ... because it [was] not constitutional law and [gave] almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

[15] 25 Iowa Advocate 18 (Fall/Winter 1986-87) (quoting Justice Harry Blackmun).

to "procreative autonomy" said to have been recognized in *Roe* validates the practice of selling or donating sperm and eggs, or both, to infertile and homosexual couples. Of necessity, it would also require legal acceptance of not only the practice of "surrogate motherhood," but also of the right of individuals to transfer their parental rights by gift, contract, or sale, even though the law almost universally frowns on baby-selling[16]

This is precisely what has happened. Practices such as these have become so widespread that it is fair to describe them as part of a "market" in which human beings are conceived, bought, and sold. Review of the statute and case law indicates that the courts find them "mind-numbing" indeed.[17]

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[16] *See, e.g.,* William Saletan, Commentary, "Culture Watch / At 25, *Roe* Decision Creaks into Brave New Worlds," *Newsday*, Sunday January 18, 1998, all eds., p. B6.

[17] A significant number of States (but still a minority) have legislation addressing surrogacy agreements. Some simply deny enforcement of all such agreements. (*e.g*., Arizona, Indiana, New York, and Utah). Others expressly deny enforcement only if the surrogate is to be compensated. (*e.g*., Kentucky, Louisiana, and Washington) Alabama, Iowa, and West Viriginia have exempted surrogacy agreements from provisions making it a crime to sell babies. A few have explicitly made unpaid surrogacy agreements lawful.. Florida, New Hampshire, and Virginia require a showing that that the intended mother is infertile; and New Hampshire and Virginia place restrictions on who may act as a surrogate, and require advance judicial approval of the agreement. Arkansas, by contrast, avoids all these issues by creating a statutory presumption that a child born to a surrogate mother is the child of the intended parents and not the surrogate.

The case law is developing, but sparse. The most famous "surrogacy" case is the New Jersey "Baby M." case, *Matter of Baby M.*, 109 NJ 396, 537 A.2d 1227 (1988), where the New Jersey Supreme Court invalidated a compensated surrogacy contract because it conflicted with the law and public policy of the State. The more recent case law is harder to describe, and appears to take the position that surrogacy is simply a "fact," and that it is the duty of the courts to "fit" the practice into an existing corpus of legislation. *See*, *e.g*., Adoption of Samant, --- S.W.2d ----, 1998 WL 304686 (Ark., Jun 11, 1998) (NO. 97-1358) (holding that Arkansas had jurisdiction to over the adoption of a child born to a surrogate mother in California, even though neither the child, the adoptive parents, nor the surrogate mother had any significant contacts with the State Arkansas); Doe v. Doe, 244 Conn. 403, --- A.2d ----, (1998) (holding that the Connecticut Superior Court has jurisdiction in a divorce case to decide a custody dispute between the husband, the father of a child born of a surrogate mother, and his wife, who had never adopted the child, even though the child could not be considered a "child of the marriage," or of the wife); In re Marriage of Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, (Cal. App. 4 Dist., 1998) [holding: 1) that California's artificial insemination statute applied to both intended parents, even though neither of them provided the genetic material necessary for the conception of the child, and that *both* would be were treated, in law, as natural parents; 2) the husband became the lawful father by causing conception of child, even though the wife allegedly promised to assume all responsibility for child's care, and thus, he was obligated to support child; and 3)

Because there is no New York law prohibiting such transactions, *Kass* implicitly allows human embryos to be sold or donated on the open market in New York, either for implantation or for experimental use. This "deregulated" state of affairs is perfectly congruent with the interests of advocates for "reproductive freedom" and fetal experimentation.[18] It is safe to predict that they will fight tooth and nail in the federal courts against any interpretation of *Roe* that would permit legislatures to declare human embryos *ex utero* to be "persons" subject to the normal rules of child custody and protection.

This is why the combined effect of *Kass* and *Bryn* are so significant. *Byrn* leaves open the possibility that states can regulate the "market" in human embryos *and* that it can do so by treating them as human beings who, by definition, should not be bought and sold like embryonic farm animals.

The current controversy over "partial birth" abortions contains some important lessons. Though there may be some room to quibble on the margins, most of the children subjected to this grisly procedure *are* "viable." The point of the procedure is twofold: to minimize the danger of a late term abortion to the woman, and to make certain that the child does not survive it.

Abortionists who challenge laws prohibiting partial birth abortions do so on two grounds: 1) that the laws are vague and thus might prohibit pre-viability abortions, and 2) that the "partial birth" procedure may be a "safer" alternative for the mother than other, more invasive, abortion techniques. Although it is important, we can safely skip a discussion of the vagueness issue[19], and proceed immediately to the major reason that partial birth

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the fact that written surrogacy contract had not been signed at time of conception and implantation did not abrogate husband's obligation to provide support to child.]

[18] *See, e.g., See, e.g.,* Stephen Smith and Bob Edwards, "Gays and Reproduction," National Public Radio, NPR Morning Edition (NPR 10:00 am ET), Friday, June 12, 1998 Transcript # 98061206-210; "Gay Couples Using Surrogate Mothers to Have Children," CNBC News Transcripts, Equal Time (7:30 PM ET), Thursday, June 25, 1998; "Margo Harakas, Staff Writer, "Increasingly, Same-Sex Households Are Opting for Parenthood, Whether by Adoption or Other Methods. They're calling it...'The Gayby Boom'", *Broward* (Fla.) *Sun Sentinel*, Monday, May 11, 1998, Broward Metro ed., "Lifestyle" section, p. 1D.

[19] Vagueness is an important legal issue. Legislation designed to eliminate partial-birth abortion must be as clear as possible given the inherent vagaries of predicting "viability." If a reviewing court sees the law as an attempt to do an "end-run" around *Roe v. Wade*'s protection for pre-viability abortions, it will be invalidated. Laws that make it clear that only *post*-viability "partial birth" abortions are prohibited allow the court to reach the real issue: state power to protect *viable* unborn children.

abortion statutes have the abortion-rights camp up in arms. Laws that prohibit specific *methods* of performing *post*-viability abortions are designed to protect the *children*, and may require both abortionists and pregnant women to take account of their interests.

Abortion rights advocates are aghast at the possibility.

> "This is just terrible," says Janet Benshoof, head of the Center for Reproductive Law and Policy. "Here you have a right-to-life district attorney determining what abortions can be performed. That is extraordinary. You have the Constitution being decided by a district attorney." By protecting some abortion rights, "he's admitting everything else is a free-for-all."[20]

To pro-abortion activists like Ms. Benshoof (who has served as chief, or co-counsel in many, if not most, key abortion cases, including the challenge to the Hyde Amendment), *Roe v. Wade* means that the states may *never* intervene to protect the life of an unborn child. If its mother chooses abortion, the welfare of the child is not a valid state concern.

But this is not what the Court *said* in *Roe v. Wade*. Its words – which have the force of law – speak for themselves.

> … [Jane Roe] and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.[21]
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> * * *
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> If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[22]

Partial-birth abortion legislation challenges the "broad" reading of abortion rights so prevalent in "progressive" circles, and it does so in a manner perfectly consistent with *Roe* itself. A woman is free to "terminate

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[20] Judy Mann, "Small Step From Partial Birth to Full Ban," *The Washington Post*, May 20, 1998, final ed., "Style," p. D16.

[21] Roe v. Wade, 410 U.S. 113, 153-154 (1973)

[22] Id., 410 U.S. at 163-164 .

her pregnancy," even after the point of viability, but the scope of the right ends with the decision to terminate. The abortionist's *implementation* of that decision is a matter of medical judgment subject to review by appropriate state authorities.

This, of course, is what has abortion rights advocates worried. If a state may "review" abortionist's decisions concerning "viability," and may prohibit post-viability procedures that guarantee the death of the infant, the "nose of the camel" is (at least in their view) "under the tent." To pro-abortion litigators like Janet Benshoof, the very *idea* that the state might protect an unborn child at or near the end of pregnancy is "totalitarian."

Histrionics aside, she had best get used to the idea. *Kass* demonstrates that *Roe v. Wade* is increasingly irrelevant at the "start" of pregnancy too.

Pro-life advocates also need to get used to this "brave new world." To most pro-lifers, the phrase "termination of pregnancy" is a euphemism designed to hide the grisly reality of abortion and to mask the exercise of what Justice Byron White, dissenting in *Roe*, called "an exercise of raw judicial power."[23]

The debate over "partial birth abortion demonstrates, however, that the phrase "termination of pregnancy" need not be viewed, in all instances, as a euphemism. "Termination of pregnancy" and the death of the unborn child are biologically separate events. It serves the interests of pro-abortion advocates to use the terms interchangeably. We must develop a new vocabulary.

We can begin that process by re-familiarizing ourselves with the Thirteenth Amendment, and with the lessons our Nation has learned from its experience with the evils of slavery and racial discrimination.

V. HUMANS AS "CHATTEL": HAS THE COURT IN *KASS* UNWITTINGLY RE-OPENED THE DEBATE OVER SLAVERY?

Advances in medical and biotechnology have put the courts in a bind. Because technology makes it possible to conceive and sustain life under circumstances where nature alone would not provide support, it has become necessary to determine what, if any, protection the law provides to individuals who find themselves in need of technology to survive.

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[23] Id., 410 U.S. at 222 (White & Rehnquist, JJ., dissenting).

On the "front end" of the biological continuum, the issue is whether or not the state may mandate care and protection for the unborn. Unfortunately, most courts do not accept the proposition that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights." Being creatures of positive law, they have accepted the proposition that the rights of human beings are conferred by the law. As a result, what (or "who") counts as a human being does not (in the words of the New York Court of Appeals) "necessarily correspond to the natural order." On the "back end" of the biological continuum are the "right to die" cases. In these cases as well, the courts have held that states are free, but not required, to withdraw the protection of homicide law from the handicapped (*i.e.* those who are "terminally ill").[24]

Although the case law on both ends of the biological continuum are heavily-freighted with rhetoric about "autonomy," the law must make a judgment. Unfortunately, the courts have made one that is all too common. They have decided, once again, that some human beings are "more equal" than others.

They have done this before, and we are still living with the consequences. In *Dred Scott v. Sandford*, the United States Supreme Court held that persons of African descent had no rights a white person or State was bound to respect. Chief Justice Roger Taney observed that:

> a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. . . . The legislation of the different colonies furnishes positive and indisputable proof of this fact. [25]

For the late Chief Justice, such treatment was dispositive:

> They [persons of Black African descent] had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which

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[24]. Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997); Lee v. State of Oregon, 891 F. Supp. 1429 (D. Or., 1995), *vacated and remanded*, 107 F.3d 1382 (9th Cir., 1997), *cert. denied*, Lee v. Harcleroad, 522 U.S. 927 (1997).

[25]. Dred Scott v. Sandford, 19 How. 393, 408 (1857).

> the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. . . . [They] were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection."
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> [A]nd it is hardly consistent . . . to suppose that they [the people of the states] regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . .upon whom they had impressed such deep and enduring marks of inferiority and degradation; . . . to include them in the provisions . . . .for the security and protection of the liberties and rights of their citizens."[26]

Several abortion rights advocates have noted the relationship between the Court's treatment of the unborn in *Roe* and its treatment of persons of African descent since *Dred Scott*. Some, like American University Law School's Professor Jamin Raskin, reject the analogy *in toto*. They will not even entertain the possibility that the interests of the unborn are in any way comparable to those of either the woman, or to persons of African descent. The cases are distinguishable, wrote Raskin, because "*Dred Scott* decided that African-Americans had no constitutional right to be treated like citizens, [and] *Roe* decided that women have a constitutional right of privacy."[27] Perhaps after *Kass* he will see the connection.

Others see it quite clearly. Professor Deborah Threedy of the University of Utah College of Law has written:

> In one sense, the reference to slavery in the abortion context is appropriate. Not since the national debates over slavery has this country found itself so divided over an issue involving fundamental concepts of personhood. Moreover, both issues have created intense disagreement whether the issue should be resolved

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[26]. 60 U.S. (19 How.) 393 (1857). Id. at 407, 410, 416. This holding was overturned by the Citizenship Clause. U.S. Const. Amend. XIV § 1 (1868).

[27] *See, e.g.,* Jamin B. Raskin, Roe v. Wade *and the* Dred Scott *Decision: Justice Scalia's Peculiar Analogy* in *Planned Parenthood v. Casey*, 1 Am. U. J. Gender & L. 61 (Spring, 1993).

> politically, by the elected representatives, or judicially, by the courts.
>
> * * *
>
> Pro-choice rhetoric analogizes the woman faced with an unwanted pregnancy to the slave. The logical appeal hidden within this analogy runs something like this: a slave is compelled to render services for another; prohibiting abortion compels the pregnant woman to render service to another, the unwanted child; therefore, a woman who is compelled to bear an unwanted child is a slave.
>
> Conversely, anti-abortion rhetoric analogizes the unborn child and the slave. The implicit logical appeal is: a slave is a living individual who is legally compelled to hold his life at the will of another; the unborn are living individuals whose lives are held at the will of others; therefore, unborn children are slaves.[28]

One need not go so far. Unborn children need not be classified as "slaves" in order to make the case that treating *any* human being as property that can be bought, sold, or bartered violates the Thirteenth Amendment. It provides

> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have power to enforce this article by appropriate legislation.

All commentators agree that legal recognition of an "ownership" interest in a human being is the functional equivalent of slavery. In *Dred Scott*, the Supreme Court defined the term broadly.

> The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the

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[28] Deborah Threedy, *Slavery Rhetoric And The Abortion Debate*, 2 Mich. J. Gender & Law 3, 12-14 (1994).

> municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person, when the master takes his life; while in others, the law may recognize a right of the slave to be protected from cruel treatment. *In other words, the status of slavery embraces every condition, from that in which the slave is known to the law simply as a *625 chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor.* Which of these conditions shall attend the status of slavery, must depend on the municipal law which creates and upholds it.[29] (emphasis added)

By recognizing the biological fact that a woman's "right to terminate her pregnancy prior to viability" is not involved in IVF situations, the court in *Kass* has changed the nature of the debate over the humanity of the unborn. The issue, after *Kass*, is whether or not the States are empowered to treat unborn children, including embryos and "pre-zygotes" as "persons" for purposes of the law of child custody and homicide. Nothing in *Roe*, not even its holding that an unborn child is not a "person" under the Fourteenth Amendment, stands for the proposition that they can be bought, sold, and traded on the open market like beef cattle.

VI. CONCLUSION: *KASS* AS A "WAKE-UP!" CALL FOR THE PRO-LIFE MOVEMENT

After *Kass*, the issue is whether the states may hold that the unborn are subject to the protection of their own laws in any case where federal law (*Roe*) does not prohibit them from doing so. Given the case law to date, States would be on strong grounds should they decide to grant such protection. No court – not even the Court in *Roe* – has ever ruled that the unborn offspring of human beings is anything *other* than a "human being." No court has ever held explicitly that human embryos are property. Even professional "bioethicists" fudge the issue by taking a utilitarian, or "pragmatic," approach to the question. The New York State Task Force on Life and the Law, to cite but one example, has urged that gamete bank regulations should require specific instructions regarding disposition, and that no embryo should be implanted, destroyed or used in research over the

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[29] Dred Scott v. Sandford, 60 U.S. 393, at 625.

objection of an individual with decision-making authority[30]. Were embryos simply "abandoned property," the Task Force would have had no occasion to consider the question.

In *Roe*, the Court explicitly denied that it was seeking to resolve

> … the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[31]

Instead, it decided to skirt the issue altogether. Like the New York Court of Appeals in *Byrne*, it drew a distinction between the *legal* status of the unborn and their biological identity as members of the human family. Although *Roe* holds that no state may "override the rights of the pregnant woman that are at stake" when she seeks to terminate a pregnancy, the post-*Roe* case law, both state and federal, makes it clear that *Roe* doe not control when the status issue arises in a case *other than* legal abortion. In many, if not most, of these cases, the unborn viewed by the law the same manner as any other "person in the whole sense."

Once the debate shifts to the rights of the unborn who are not, or need not, be dependent upon their mothers' bodies for nourishment and protection, the usual abortion rights argument no longer holds water. It will no longer be plausible to dismiss pro-life advocates as an unrepresentative group of religious "zealots" that either ignores or subordinates women to their idiosyncratic views on the humanity of the unborn. In the "Brave New World" of "assisted reproduction" and cloning, both men and women have exactly the same rights as women to avoid assuming the legal obligations of parenthood,[32] and precisely the same right to offer their offspring for sale to the highest bidder.

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[30] New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (April 1998) at 289 ["Assisted Reproductive Technologies "]

[31] Roe v. Wade, 410 U.S. 113, 159 (1973).

[32] In the abortion context, the decision to carry the child rests with the woman alone. The father's rights and obligations are thus contingent on the woman's decision to carry the child to term. In cases involving IVF, such as *Kass v. Kass*, and *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 113 S. Ct. 1259 (1993), the father has "equal" rights, and may deny his wife the right to have the embryos implanted.

We know from the polls that the public is overwhelmingly in favor of restrictions on partial-birth abortions. We know also that recent popular literature on abortion by women who have had "the procedure" attests to the gut-wrenching nature of the "choice" they have made. An abortion would not be a searing experience worthy of extended commentary in the Sunday *Washington Post Magazine* were there not something fundamentally wrong with viewing unborn children as masses of undifferentiated cells.[33]

The task of the pro-life movement is to make the case – convincingly – that Congress and state legislatures should provide protection to unborn human beings in every setting where a "literal" reading of *Roe* law permits it to do so. The arguments to the contrary will be ugly, and we can expect to learn quite a lot about the "need" for children "grown to order" for childless heterosexual and gay couples. We will learn as well that society has a pressing "need" for tissue derived from individuals bred or aborted specifically for that purpose, and that "humanity" will "benefit" if the law permits human cloning and the creation of chimeras whose genetic compliment makes them "less than" human. We have heard it all before.

In *Brave New World*, Aldous Huxley predicted that such a world would someday come to pass. In 1998, we have the right to "reproduce" *in vitro*, but no right to protect ourselves or the privacy of our homes, papers, books of account, and medical profiles against the intruding hand of government or its surrogates. We are nearly there.

But there is a bright spot. Technology is pushing *Roe v. Wade* toward the "dustbin of history." It is time for pro-life advocates everywhere to get with the program -- and *push*! If we do, we may find that we have more allies than we think.

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[33] R.C. Barajas, "The Procedure," *The Washington Post*, April 05, 1998, Sunday, Final Ed., Magazine; p. W15.