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One year ago, the U.S. Supreme Court declared that there was no constitutional right to abortion. Americans have good reasons to celebrate the rescinding of such a high-ranking entitlement to the murder of unborn children. Yet the Dobbs Decision provided no reason why such a right does not exist. Indeed, by "sending the question back to the states," SCOTUS suggested that there might well be one. It is as if, in the wake of the Civil War Amendments, the question about when Black people became human, or human enough to be protected under the law, were subjected to a vote. We recoil at the thought. Because we know there are some things that must simply be recognized as given. Our existence is one of them.

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FEATURE ARTICLES

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FEATURE ARTICLE

The Wages of Dobbs and the Confusions of Conservative Jurisprudence

HADLEY ARKES

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A year has now passed since the Supreme Court's decision last June in *Dobbs v. Jackson Women's Health Organization*, in which six conservative Justices finally overturned *Roe v. Wade* (1973). True to the code of what has been offered to us over the past 40 years as "conservative jurisprudence," the Justices accomplished that end while deliberately steering around the moral substance of the matter.

Conservatives spent years recoiling from judges with astounding new moral insights, who invented novel "rights" not to be found in the text of the Constitution. But instead of showing what was specious in the moral reasoning that produced those supposed new rights, the conservatives hit upon the strategy of maintaining their integrity as judges through the clever stroke of avoiding moral reasoning altogether. They settled into the glib notion that once a judge departed from the text of the Constitution, he was merely "looking inside himself," with judgments that were wholly "personal"—as though there were indeed no moral truths to be found outside the Constitution, even as vexing moral judgments remain, stubbornly, at the heart of our gravest cases. And in this manner, with the winds of doctrine at their back, five intrepid Justices and one reluctant recruit sailed into the task of slaying the Great White Whale of *Roe v. Wade*.

There was no inadvertence. It took a certain collegial art to craft the long majority opinion while taking care not to say anything decisive on the things that people on either side cared most deeply about: the human standing of the child in the womb and the rightness or wrongness of abortion. *Roe v. Wade* was decisively put away. That had to be regarded as a grand decision, stirring the deepest gratitude and joy in the tents of pro-lifers. And yet, it may be truly said of it what Robert Southey said of the Battle of Blenheim in his legendary poem of that name: "'Twas a famous victory." That line carried a certain edge, as it would now for the *Dobbs* case. Some of us, like our beloved late friends Michael Uhlmann and John Noonan, were writing and working for the pro-life movement before *Roe v. Wade*, but the decision in *Dobbs* did not accomplish what we had all set out so long ago to accomplish. For years pro-lifers

would gather in protest in Washington on the anniversary of *Roe*, and from the beginning the animating concern was with the dismembering or poisoning of babies. But that was not the problem of abortion as it was seen through the lens of conservative jurisprudence. And the remedy offered in the *Dobbs* case did not pretend to reach the depth of the wrong that we had worked over the years to overturn. Indeed, the holding actually worked to produce a political landscape now tilted against pro-lifers.

If it strikes us as utterly implausible to let people in the separate states register their beliefs and value judgments on when they're willing to regard blacks as human beings, it would seem to be quite as implausible to invite people to offer their value judgments on when human life begins in the womb.

And so, a year later, the pro-life movement finds itself blindsided, encountering unexpected defeats at the ballot box, even in pro-life states like Kansas, Kentucky, and Montana, and not knowing quite what to make of it. The pro-lifers, true to character, blame themselves, sure that something must have gone wrong with their "messaging." The only problem with their messaging was how to counter the bizarre claim, offered shamelessly to a public ever more credulous, that pro-lifers would actually bar a woman from obtaining an abortion when her life may be in danger. But there, of course, was where the pro-lifers could converge decisively with the defenders of abortion, taking as an anchoring point the primacy of the life of the mother. The remarkable political fact is how the proponents of abortion could put pro-lifers on the defensive to explain something they never thought they would need to explain.

But the deeper mistake for the pro-lifers came with the improvident alliance they made years ago with conservative jurisprudence. The *Dobbs* opinion offers a faithful reflection of the leading themes that have defined that jurisprudence. And its argument works now to withhold the premises that are truly decisive for the pro-lifers in making their case going forward, at the local as well as the federal level. To account for the current distress of the pro-life movement without reading closely the opinion in the *Dobbs* case is rather, as an old saying used to go, "like playing Hamlet without the first grave digger." But ironically, if there is a path of redemption or deliverance, it will likely come through the unsurpassed hand of Justice Samuel Alito, the Justice who had to pay a price to corral at least four conservative colleagues into an opinion that would finally overturn *Roe*.

A Moral Straitjacket

Roe v. Wade had swept away the laws in the land that barred or restricted abortion. But it had done far more than that—it changed the culture: abortion was converted overnight from something to be abhorred, discouraged, forbidden, into something to be approved, celebrated, promoted. The Court was teaching, in effect, that there was something profoundly good and morally right about a woman's freedom to order the killing (or disposal) of her child when she thought she needed or wanted it. It shouldn't have been astonishing that when the Court overruled *Roe*, there were women in the country who were certain that something of profound moral importance was being taken away from them. Something they regarded as an anchoring right of their personal freedom was being stripped from them, if they happened to live in the wrong state. For the conservatives, this moral teaching, embedded in the law, formed no part of their job description. The Justices quite deliberately held back from pronouncing any

judgment on the wrongness of abortion. Still less did they have anything to say of the vast moral good that may be done now in saving small, innocent human lives. And indeed, the conservative majority even held back from recognizing that nascent life in the womb is truly a human life, a real human being. And we need to be clear: *none of this was a matter of inadvertence*; it was part of the discipline of conservative jurisprudence that took it as a matter of high design and pride that the Justices would try to avoid any judgment on the moral substance of the issues before them.

Conservatives and ordinary folk looking on this matter for the first time may wonder how conservative jurisprudence had worked itself into this moral straitjacket. The explanation is quite straightforward. As the conservative line went, the Constitution said nothing about abortion. Therefore, federal judges could not possibly be in a position to proclaim any right to abortion emanating from the Constitution. Abortion could form no part of the business of the federal government. But the word "marriage" could be found nowhere in the text of the Constitution when the Court, in *Loving v. Virginia* (1967), struck down the laws that barred interracial marriage. And no conservative jurist has had the temerity to say that the Court should not have taken the case, or that the case should be revisited. What's more, as Notre Dame law professor Gerard Bradley has pointed out, the federal government in the past had found ample reason to make abortion part of its business. There was the question of whether abortions may be performed in military hospitals or in diplomatic outposts abroad—and beyond that, whether they were permitted in the territories of the United States and in the District of Columbia. And indeed, two years before *Roe*, the Court had sustained the laws that barred abortion in the District of Columbia.

In the aftermath of the *Dobbs* case, the conservative political class was still trying to get its bearings. The Court would return the issue of abortion to the "political arena"—but to what political arena? Senator Lindsay Graham of South Carolina, never passive on this issue, introduced a bill in the middle of September, three months after the *Dobbs* decision was handed down, which would simply affirm what the Court held in *Dobbs* when it sustained the original Mississippi statute. Graham would make a start by having the Congress forbid abortion after 15 weeks of gestation. The bill did not have a chance, of course, in a Congress controlled by Democrats. It was an effort to make a point and acknowledge the authority of Congress to act on this subject. But it brought forth in a flash the deep confusions among Republicans, who had picked up all too well the mantras of conservative jurisprudence.

The editorial page of *The Wall Street Journal*, the most important organ of conservative commentary in the country, exploded along the scale from low to high dudgeon. To take that line from P.G. Wodehouse, we wouldn't say that they were "disgruntled," since we don't know that they had even been gruntled in the first place. The editors inveighed against Graham for taking this issue instantly to the national level. They had been quick to make this point emphatically from the moment that the holding in *Dobbs* was released in June:

> Some in the pro-life movement want Congress to ban abortion nationwide. But that will strike many Americans as hypocritical after decades of Republican claims that repealing *Roe* would return the issue to the states.
>
> A national ban may also be an unconstitutional intrusion on state police powers and federalism. Imposing the abortion values of Mississippi or Texas on all 50 states could prove to be as unpopular as New York or California trying to do the same for abortion rights.

To put it mildly, the editors had bought deeply the line of conservative jurisprudence that this issue would be returned to the states, because the Constitution said nothing about a right to abortion. Last fall, some Republican candidates for the Senate, sensing panic in the land, moved to sign on to this new party line and promised their voters that, if elected, they would not use their office to flex any of the authority of the federal government to restrict abortions in the states. Just recently, a friend told me of a conversation with a Republican senator from the Midwest, who told him that, at last, *Dobbs* had now relieved him of the need ever to speak again of abortion. He had regarded the issue as solely the business of the courts. And once *Roe* was struck down, he was more than willing to wash his hands of the whole matter. In the meantime, the Biden Administration has never bought into the fable that the national government has no business in dealing with abortion, and so it has been giddily uninhibited in using every lever of federal power in reach to defend and promote abortion, even in the pro-life states. The White House is moving to firm up the right to perform abortions in military hospitals, in hospitals receiving federal aid, and in the provisions of Obamacare, insisting on the coverage of abortion in medical insurance. The administration will be trying, of course, to ensure that the mail will be unobstructed in shipping mifepristone, for chemical abortions, to women in pro-life states who happen to want it.

The decision in *Dobbs*, then, has imparted a new energy and resolve to the partisans of abortion to use the instruments of federal power as they've never felt confident enough to engage them before. At the same time it has confused and disarmed many Republicans. And in the cruelest irony, it has saddled the pro-life movement with a heavier burden of justification now in appealing to the Congress at the national level to brake, where it can, the engine seeking to rip through all restraints on abortion.

Facts and Values

But there is a need to step back and consider: what kind of legal genius ever talked educated people into the notion that abortion was a matter that could readily be confined to the states? How was it conceivable that women feeling aggrieved over the decision in *Dobbs* would not appeal to the federal government to weigh in against what they took to be a deprivation of freedom within the states? It was one of those unaccountable triumphs of a positivism lingering from the last century: many conservative writers and lawyers actually talked themselves into the notion that only people in elective office can cite moral reasons or moral truths as the ground of their judgments. As we follow the thread of this argument all the way down, the unborn child is never referred to, even by Justice Alito, as anything more than a "potential" human being. But Alito must have done it with a wink, for as he surely knows, it makes no sense: if there is nothing already *alive and growing*, an abortion would be no more relevant than a tonsillectomy. And if something is growing, it cannot be anything other than a developing, small human being. It may be a potential outfielder, but never a *potential* human being.

The opinion written by Justice Alito was an exacting, disciplined, workmanlike project, but the discipline in question here was the discipline of conservative jurisprudence as it has been defined over the past four decades. The Court deliberately held back from pronouncing any judgment on the rightness or wrongness of abortion. It deliberately held back from drawing on the mountain of empirical evidence, accumulated over many years by embryology, that bore precisely, and conclusively, on this matter. And so, it left that question truly open to the opinions and the free-floating beliefs of voters in the states— undergirded by no truth.

Even 50 years ago, in an exquisite brief offered in *Roe v. Wade*, lawyers from Texas drew on the most up-to-date findings in embryology to offer these critical points to the Court: that this

small being in the womb has never been anything but human from its first moments, that the child receives nourishment from the mother but has never been merely a part of her body. And as Princeton ethicist Paul Ramsey pointed out with most telling effect in his essay "Reference Points in Deciding on Abortion," everything that defines us genetically was already with us when we were no larger than the period at the end of this sentence. But neither the dissenters in *Roe* nor the conservative majority in *Dobbs* was ever moved to speak those words. If they did, they would have planted in the law the anchoring truth that the child in the womb is, of course, a human being, and with that premise in place there would be a clear justification for the Congress or for federal judges to act under the 14th Amendment. For in securing a right to abortion, blue states would be withdrawing the protection of the law from a whole class of human beings. Federal judges responding to this state of affairs would be acting much as federal judges and the Congress were moved to act in the 1950s and '60s, when the protections of the law had long been withdrawn from black people in the South.

But again, it was no accident that conservative justices held back from incorporating that inescapable truth in their legal judgments. The telling point here was revealed by one of my own friends, Justice Antonin Scalia, in his dissenting opinion in *Planned Parenthood v. Casey* in 1992, in which he wrote that

> the whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*.... There is of course no way to determine that as a legal matter; it is in fact a value judgment. [Emphasis in the original.]

A value judgment. In the crisis of his day, Abraham Lincoln said that the question was whether the black man "is not or is a man." If he's not a man, he who is a man may do with him as he pleases. But if he *is* a man, he should have the same right as any other man to govern himself. Harry V. Jaffa would observe later that whether the black man is not or is a man cannot be a value judgment, a term that came into vogue with Friedrich Nietzsche and Max Weber, when people lost their confidence in speaking of moral truths. They would now impute moral worth to things as we "valued" them. Would the human standing of the black man depend, then, on whether people in the states cared enough to "value" him as a member of their race and possibly a fellow citizen?

Now, if it strikes us as utterly implausible to let people in the separate states register their beliefs and value judgments on when they're willing to regard blacks as human beings, it would seem to be quite as implausible to invite people to offer their value judgments on when human life begins in the womb. What might they say? Life begins when the child in the womb begins to swallow and squint, at nine to ten weeks? When the fetal heartbeat can be detected by ultrasound at six weeks? But none of these measurements marks the beginning of human life; they simply mark, as we know, different phases in the development of the same small human being, powering and integrating its own growth.

All Process and No Substance

The conservative majority in *Dobbs* would send the issue back to the states, *but on the premise that there was no truth to be known on this matter*. That this was indeed where the issue was left was confirmed in the concurring opinion of Justice Brett Kavanaugh, in which he noted that "many pro-life advocates forcefully argue that a fetus is a human life"—*forcefully argue*, as though there has been no long-settled, empirical truth on this matter, found in all of the textbooks of embryology. In other words, in this mode of conservative jurisprudence *the*

judges must affect not to know the plainest objective truth that bears on the practical judgment here. That judgment is to be reserved perhaps to others, in elective office. Which is to say, conservative jurisprudence takes as its beginning point on the matter of abortion its willingness to live affably with a radical falsehood.

As the strands come together, the bleakness of the situation becomes clearer in this respect: that, for conservative jurisprudence right now, the life of the child in the womb does not supply the *ground of the constitutional argument* or the *object of official concern*. The dissenters in *Dobbs* actually nailed this point when they wrote that "the majority *takes pride* in not expressing a view 'about the status of the fetus,'"—that "the state interest in protecting fetal life *plays no part* in the majority's analysis" [emphases added]. The depth of the problem here is revealed again when we consider that long historical record that Justice Alito unfolded, showing how far back the common law cast its protections on the child in the womb. But that historical record was given radically different meanings by the dissenters as well as by the members of the conservative majority. For the conservative majority, the historical record fit the conservative argument over substantive due process: that the judges may act to create dramatic new rights under the due process clause only when there is a record of a right "long recognized in our tradition." What the historical record established for the conservatives was summed up by Justice Alito: that "we are aware of no common law case or authority…that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy" (emphasis in the original). And so, it was wrong for the Supreme Court in *Roe* to have intervened and snatched this matter from the states.

But for the defenders of abortion, and for the dissenters in *Dobbs*, the historical record revealed something notably different: it revealed what people in the 18th and 19th centuries only *believed* about abortion. For the defenders of abortion this was simply one set of *beliefs* set against others—for, after all, the conservative majority never said that the record revealed a firm understanding on the part of the medical profession about the objective truth of the growing life in the womb. For the defenders of abortion, those 19th-century laws were passed before it was understood how important abortion was to women. The historical record for them was mainly a record of what men were willing to impose on women at a time when women weren't voting.

The key to the problem was a variant of the old question in Plato's *Euthyphro*: was the old good because it was old, or had it become old because there was something about it enduringly good? Were those earlier laws to be respected because they were old or because they revealed an objective truth about the child in the womb that *is fully as true now as it was then?*

As Justice Kavanaugh's concurring opinion makes plain, the conservative majority didn't interpret the historical record as a recognition of the human standing of the child in the womb from its first moment. Otherwise, Kavanaugh couldn't have written in his concurrence that people in our own day simply have different beliefs about life in the womb. He couldn't have written those words if the majority had said that the historical record revealed a deepening objective truth about the life in the womb. This may be the price that Alito had to pay in order to get that fifth vote to overrule *Roe*.

And yet, it was even worse: in the passion to send the matter into the political arena and disclaim any grounds for the judges to deal with the moral substance of the issue, Kavanaugh declared that the Constitution was utterly "neutral" on the matter of abortion—that the right to abortion could be tenably voted up or down in the states. It apparently slipped his notice that he was offering a chilling echo of the famous encounter between Abraham Lincoln and Stephen Douglas in their 1858 debates. It was Douglas's position that the country could avoid

the vexing, divisive issue of slavery simply by leaving it to the settlers in the territories to vote slavery up or down as it suited their interests. In Indiana, he said, there were laws on cranberries, laws on oysters in Virginia, liquor laws in Maine; and some places found it useful to have…slave labor. But Lincoln thought there was something askew in placing slavery on the same plane as such "morally indifferent" things as oysters and cranberries.

For Lincoln, this was the degradation of the democratic dogma: to say that the regime was all process and no substance, that we were free to choose virtually anything we wished, to choose slavery or genocide, as long as it was done with the trappings of legality and the vote of a majority. Is the American regime, or the U.S. Constitution, truly neutral on the matter of genocide? Does a regime of law not begin by taking seriously the difference between innocence and guilt, that we visit punishment on people only after we show that they are guilty of wrongdoing and deserving of punishment? And that the natural right to life is the right of any ordinary person, innocent of wrongdoing, to be protected from a lawless, unjustified assault? How could anyone understand those moral premises underlying the law and think that those deep principles could possibly be neutral or indifferent on the question of whether the Constitution would license a regime of killing small, innocent human beings?

Taking the Next Step

And so, where does that leave us? We have women who are convinced that something of moral significance will be taken from them if 51% of the people around them happen to believe that the fetus just may be a human being or even a potential human being, for the Court never confirmed that these were real human lives at stake.

But despite an opinion that didn't go to the heart of the matter, there was a saving edge of brilliance provided by Justice Alito. He showed that there was no principled ground for the array of arguments offered so facilely to show that the fetus is not a human life, open to the protection of the law. Yes, after viability, there is a higher chance to sustain the life of the child detached from the mother, but as Alito noted, "[i]f, as *Roe* held, a state's interest in protecting prenatal life is compelling 'after viability,'…why isn't that interest 'equally compelling before viability'?" And when did we ever think that any human being ceases to be human when he cannot live on his own—when he suddenly becomes weak or ill and needing the care of others? Some academics take "consciousness" as a test of personhood, but babies in the womb show purposive behavior, and we don't think anyone around us ceases to be human when he loses consciousness, or finds his mind eroded by gender theory.

Justice Alito didn't draw the conclusions that spring from his penetrating argument. He has brought us to the threshold, he has teed up the matter, and he now leaves it to people in political or judicial office to draw the conclusions and take the next step. But the conservative political class, with rare exceptions, has shown itself befuddled, bereft of any imagination or skill in offering the necessary argument, and quite persistently disinclined even to talk about an issue that makes many of their voters—and donors— uncomfortable. Have we heard any Republican politician express excitement about the new supporters that will be drawn to the polls now that we have the chance to protect more babies in the womb? Or would Republicans rather switch the subject to…inflation?

But then there are the young conservative judges, newly appointed to the federal courts. Any one of them could have a case of a guardian *ad litem*, stepping in, in New York or Chicago, to protect a child from abortion. Taking his lead from Justice Alito, the judge could indeed conclude that a state is withdrawing the protections of the law from a whole class of human beings. And with that, the 14th Amendment comes into play. But from what we know of

conservative judges, they are deeply unsure that they could do such a thing, for it involves a moral judgment that they don't think fits into their theory of jurisprudence and what judges can rightly do.

The lawyers from Texas in *Roe v. Wade* were not encumbered by such an ingenious theory, known mainly to people who traffic in theories. They saw the matter, we might say, *naturally*. When a law is passed, the burden falls on those making the law to establish what there is in it that would make it justified and rightful even for people who disagree with it. Following that sense of things, the Texas lawyers amassed the findings of embryology, along with principled reasoning, and invited the Court to sustain the law in question as it has sustained many other laws over the years. And so, the Court could easily have found that a compelling case had been made to show why the laws of Texas were indeed justified in extending their protection to the small human being in the womb. The lawyers were making the case for those laws on a moral ground that ordinary people, unburdened with theories, could easily understand. And as the lawyers bore the burden of showing just why those laws protecting unborn children were justified, they did what a jurisprudence of natural law would require.

In *Dobbs*, then, the Supreme Court could have sent the matter back to the states with the premise that these laws on abortion protect real human beings—and invited the states to consider how the killing of these small human beings will be reconciled with their other laws on homicide. The conservative majority *had to go out of its way* to avoid saying something so simple, so direct, so decisive.

It may fall to Alito himself to take the next step coming out of his own argument, if politicians and judges are too diffident, too uncertain, to make that move. He has become, to my mind, a premier jurist in our time, to be rivaled only by Justices Scalia or Clarence Thomas, or by Robert Jackson in the last century. He has brought us this far; he alone may have the nerve and the skill to take us the rest of the way.

In the meantime, we can look ahead and conjecture. My own hunch—and I dare anyone to take the bet—is that 20 years from now, abortions will still be performed in staggering numbers in New York, Illinois, California, and other places. The devotees of originalism and conservative jurisprudence will be appalled, but they will quickly point out that they had *offered the only remedy they could supply*, and they made it clear over the years that they were never promising to do anything more.

It all brings back Robert Southey's poem from the 1790s on the Battle of Blenheim: "'Twas a famous victory," the old man told the children. "But what they fought each other for I could not well make out." And we'll be saying, 25 years from now, of the overruling of *Roe v. Wade*, that 'twas a famous victory: a notorious, bad case had been overruled. There was something else that was supposed to have been done, but that rather slips from memory. And after all, jurisprudence cannot do everything.

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FEATURE ARTICLE

Life and Law in the Wake of Dobbs

DAVID S. CRAWFORD

In overturning *Roe v. Wade*, *Dobbs* is rightly celebrated, both by legal conservatives and anyone who cares deeply about the unborn child. It is a victory wrought by decades of political and legal effort, devotion, and prayer by both groups. Yet, it has become increasingly apparent that the two groups do not *necessarily* overlap in their concerns, although of course many people belong devotedly to both groups. For the former, *Roe* was wrong because it represented an iconic and grotesque example of judicial overreach; for the latter, it was wrong because it precipitated the slaughter of tens of millions of unborn children. For the former the issue involved *how* constitutional questions should adjudicated; for the latter, the question was unavoidably about the *reality* and *truth* of the unborn child. This difference indicates that, in principle, the two reasons for disliking *Roe* could collide in their purposes. In fact, or so I will argue, they are in tension, at least from an analytical point of view.

To see my point, it is best to consider law's larger social purposes and meaning. Classical thinkers from Plato to Aquinas thought that law is irreducibly pedagogical in nature. This aspect of law has been downplayed or even rejected by modern thinkers (consider *Casey*'s notorious "mystery of life" passage), who tend to emphasize law's coercive element and its projection of power. Interestingly, however, law's pedagogical meaning has been reaffirmed in essence by legal anthropologists, such as Clifford Geertz, and more recently Fernanda Pirie, who argue that "law is 'part of a distinctive manner of imagining the real.'"[1]

From this latter perspective, *Roe* was wrong because it profoundly shaped our culture in ways both obvious and hidden. *Roe* did more than simply declare that abortion is a Constitutional right. It also served—like all law—as a kind of social pedagogy, as a way of "imagining the real."

Cardinal Ratzinger famously said that the unborn child is a model for all of us because it is the unborn child's radical dependency that characterizes the human condition; the unborn child makes explicit our relationship with God and those around us. If so, the denial of the unborn child's humanity *was always a substantial denial of our own humanity*. Everything is morally and *anthropologically* at stake in our legal and social disposition toward abortion.

Roe changed the way we would be permitted to think about ourselves and the things of our world. It cheapened human life and brought a fracture into the mother-child relationship. It

entailed an entire worldview from which none of us could entirely withdraw.

Law is inevitably pedagogical. To say that the humanity or personhood of the unborn child is the sort of thing we ought to vote on is not neutral regarding what we inevitably think about the unborn child or indeed ourselves.

If *Roe* taught us all these things, it is not fully clear what *Dobbs* teaches us. Perhaps a look backward will help to clarify *Dobbs*' pedagogy.

Personhood as a Legal Fiction

Consider a 1972 case from the New York Court of Appeals called *Byrn v. N.Y. City Health*. Here the court, one year before *Roe*, rejected a lawsuit seeking to defend the unborn from new and very *permissive* abortion legislation. To the plaintiff's argument that the unborn should be considered persons, the court responded in part by stating that legal personhood and natural personhood were entirely different questions. That a fetus might be a person from the natural point of view had no bearing on whether the fetus was a person in legal terms. As the court put it,

> 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 the rights and privileges of a legal person. The process is, indeed, circular, because it is definitional.

To illustrate its point, the court argued that just as a corporation's status in law as a person does not make it a person in nature, so too, the court concluded, the fetus' possible status in nature as a person has no bearing on whether it is to be considered a person in law.

On the one hand, we could say that this last argument suffers from an obvious *non-sequitur*. Corporate personhood is a legal fiction: Just because *it* cannot be read back into nature does not mean that personhood in the more fundamental sense ought not to be rooted in the reality of natural personhood.

But more fundamentally, the court's ruling effectively severs the idea of personhood from anything outside law itself. As the court says, the question of legal personhood is circular, definitional. Law seems in *Byrn* to be completely separate from natural things, such as fetuses or embryos.

Notice the implication of *Byrn*'s separation of law from nature. The pre-*Roe Byrn* case certainly does not preclude the idea that a future NY legislature could declare the unborn to be persons after all, and on that basis outlaw abortion. So, it does not preclude the possibility that natural personhood and legal personhood could be made to coincide in the case of unborn children. However, it is important to note that this coincidence would be—from the court's or the constitutional point of view—entirely adventitious or accidental. Moreover, by its comparison of fetuses and embryos to corporations as artificial persons, the court suggests that if New York law did, in fact, recognize the unborn child as a legal person, that recognition would, in effect, be the *equivalent* of a legal fiction, even if simultaneously the legislature were motivated by its

recognition of the unborn as natural persons. In fact, if we follow out this logic a little further, *Byrn* suggests that *all* legal personhood is something like a legal fiction. In this sense, it would appear that—again from the court's or the constitutional point of view—legal personhood or non-personhood is arbitrary.

In a scathing dissent, one of the judges pointed to the extreme danger posed by this arbitrary treatment of personhood, drawing on its sad historical legacy. Yet, for our purposes, *Byrn* makes clear a tendency in law where it touches vital human questions. The tendency is to avoid discussion of the object at stake—personhood, marriage, family, and so forth—and instead treat it as an unknowable from within law and to then decide the question solely as a resolution of competing rights and interests.

Now, one reason I mention this 1972, pre-*Roe* case is that it represents the mirror image of *Roe*. The *Byrn* court was *upholding permissive* legislation. Whereas *Roe* was *overturning restrictive* legislation. And yet, similar patterns of thought are to be found in *Roe*.

Recall, in this connection, that *Roe* dealt with two arguments from Texas. *Roe first* tackled the argument that the unborn are persons under the 14th Amendment and that on that basis Texas had not only the authority, but also the duty, to protect them. In its conclusion that the fetus is not a "person" under the 14th Amendment (i.e., is not a "Constitutional person"), it looked to history (albeit a false one) and text (albeit not very intelligently, as John Hart Ely pointed out). Thus, its judgment, like that in *Byrn*, was simply a matter of positive law avoiding any attempt to ground the word "person" as found in the 14th Amendment in nature. In ignoring the question of whether the unborn child is a natural person, the Court was in essence concurring with *Byrn*'s conclusion that legal personhood has little to do with natural personhood.

Texas' second argument, however, was that, notwithstanding the question of 14th Amendment personhood, states have an interest in protecting human life. After all, states were prohibiting homicide long before the 14th Amendment. So, the states' authority or power to pass laws protecting human life does not *depend* on the 14th Amendment. It is to this second argument that *Roe* responded—famously or infamously—by saying that Texas may not impose its own theory of when "life" begins. Of course, in rejecting the ability of Texas to say when life begins, the Court does not mean life in the "biological" sense. It is clearly not saying, for example, that Texas may not recognize a difference between living fetuses and dead fetuses or human fetuses and non-human fetuses. In rejecting Texas' ability to say when human life begins, the Court is clearly referring to life in its properly human dignity or, dare we say, in its *natural* character as personal. In effect, then, Texas was referring to its authority to protect the *natural* and proper *humanity* of the unborn child, even if the Court was unwilling to grant the unborn child *Constitutional* personhood. In rejecting this second argument, the Court was rejecting the idea that Texas could grant the protections of legal personhood on the basis of this pertinent sense of life.

Like *Byrn*, but from the opposite point of view, the *Roe* Court effectively severed law from nature.

Now *Dobbs* overturned the *second* argument or prong of the *Roe* decision, having to do with the protection of human life more broadly, and therefore allows states to protect life in this pertinent sense. But it *did not* overturn the *first* argument, having to do with Constitutional personhood, as is emphasized by Justice Kavanaugh in his separate concurring opinion. And, of course, *Dobbs* is perfectly compatible with *Byrn*, at least formally. So, unlike *Roe*, *Dobbs* enables legislatures to treat the unborn child as a natural person, and on that basis, a legal

person. . . . Or does it? Are we not left, as in *Byrn*, with the idea that the question of *legal* personhood for the unborn child, whatever good words a legislature might put in for it, is severed from the question of *natural* personhood?

The Concurring Opinion

Recall Kavanaugh's concurring argument that, because the Constitution says nothing about abortion, it is "neutral" regarding the issue, and therefore the Supreme Court should also be, as he says several times, "scrupulously neutral." Just as there were those amici, he tells us, who would have the Court uphold *Roe*'s abortion right, there were others who would have the Court declare the fetus a person under the Constitution, thereby requiring the states to prohibit abortion. The *Dobbs* decision, he continues, rejects both positions. The Constitution, he tells us, is neither pro-choice nor pro-life. With *Dobbs*, he concludes, the Constitution's and the Court's original neutrality is restored.

The problem is that Kavanaugh is wrong. *Dobbs* is anything but neutral to abortion. In fact, it remains stubbornly "pro-choice," indeed, just as "pro-choice" as *Roe*. It has only moved that choice from the individual woman to the "people and their representatives," as the Justices repeatedly put it.

Nor is it even *possible* for the Court to be neutral on abortion. While it is true that the Constitution does not mention abortion, *it does mention life.* Kavanaugh's position, then, entails that the *life* of the *newborn* child and the *life* of the *unborn* child are treated in entirely different ways. From a Constitutional point of view, the life of the latter would not qualify as life. Otherwise, the issue could not be turned over to legislative bodies. But the Constitution does not itself require Kavanaugh's implicit distinction between the born and the unborn. To put this back into the terms of *Byrn*, Kavanaugh is simply clarifying in his separate opinion that whether a legislature recognizes the full humanity of the unborn child is purely a matter of positive law.

Now, given the aftermath of *Dobbs*, I should probably acknowledge that it was nearly impossible that the Court could have decided that the unborn child is a person under the Constitution. The political backlash would almost certainly have threatened the Court's institutional integrity. However, it is important to note that this recognition and the consequent decision that the Court did in fact render are essentially based on a political judgment, rather than a strictly legal one.

Of course, Kavanaugh is not arguing that the unborn child is *not* a natural person (perhaps he even believes that it is), but he is assuming, like the *Byrn* court, that whether it is or is not has no real bearing on its status as a *legal* person. If we follow the logic laid out in *Byrn*, doesn't *Dobbs*' permission to legislatures to grant legal personhood amount to the granting of permission to enact what, from the Constitutional point of view, amounts to a *legal fiction*? To put it differently, such an enactment remains, from the Constitutional point of view, a purely positivistic deposit of law—a judgment with far-reaching consequences, since Constitutional interpretation provides a basic structuring and overarching conceptual element for our republic.

Now, the problem is this. Law, as I said, is inevitably pedagogical. To say that the humanity or personhood of the unborn child is the sort of thing we ought to vote on is not neutral regarding what we inevitably think about the unborn child or indeed ourselves. It turns it into a "policy" question. And yet, if the *Byrn* court or the *Dobbs* Court tell us, in effect, that the unborn are not fully human or personal from the legal point of view, we inevitably begin to think they are also

not from the natural point of view. And this is because our views of things depend on our actions and the actions of those around us, and these are shaped by law. It is simply not possible to separate law from its pedagogical effects.

Hence, this inability of courts or legal rationality to engage *real things* or the *nature* of things is *paradoxical*. The different treatment of born and unborn life amounts to a silent social judgment about what constitutes those very things. The judgment is that the life of the unborn child is not life in the pertinent sense, as fully *human* or *personal* life. So, the positivistic refusal to look at the nature of the unborn child paradoxically results in an implicit judgment about the *nature* of the unborn child.

Of course, the state laws that may be passed protecting life are themselves pedagogical, but so is the Constitutional law generated by the Court. And this Constitutional law then saddles state legislation, however excellent it may be, with the mark of arbitrariness.[2]

The Majority Decision

Now, unlike Kavanaugh's, Justice Alito's opinion for the court does not use the language of "neutrality," even if the basic judgment is ingredient in the result. Yet, the decision is ambiguous in important, perhaps fruitful, ways.

First, there is an architectonic ambiguity, which works like a fault line through the entire decision and is implicit in Kavanaugh's concurrence as well. The Court's argument is essentially "originalist." The question is whether "liberty" in the 14th Amendment fairly includes a right to abortion. And the answer is "no," when we carefully consider text and history, as Alito did so admirably. Yet this "originalist" argument proves too much.

An entire edifice of Supreme Court decisions, involving social/human issues, such as contraception, gay marriage, and sodomy, would seem to collapse like a house of cards if *Dobbs*' standards were applied to the whole. Culturally, to overturn all of these is a bridge too far, however much we might wish for it.

Alito's response is that abortion is different from all those others because it involves *life*. Yet, the introduction of life as the basis for distinguishing abortion from the other cases seems adventitious, a sort of *deus ex machina* in relation to the main originalist argument. Is the criterion "history and text *plus* life," as though the originalist argument alone is not enough? But if so, why life and not the other important human issues taken up in the other cases? And how is the originalist argument augmented by the addition of life? Is it just that the question of life is very important? But arguably, so are the others.

The problem is that originalism is an interpretive method; it is about *how* judges should decide cases and interpret law; in this sense, it is essentially formal and procedural in nature, rather than substantive. The appeal to life, on the other hand, is an appeal to *substance*; it is not related to how judges should decide cases or interpret law in general; it is about *what* a law governs: it is about the thing itself.

Sherif Girgis of Notre Dame has proposed that the Court's appeal to life is based on the idea that the issues in all the other cases are self-regarding, whereas abortion involves an "other." He proposes that the Court has incorporated something like Mill's "harm principle." But, while Girgis' proposal, as usual, is both helpful and suggestive, doesn't it simply *postpone* the question? Is it the originalist argument *plus* the application of Mill's harm principle, then? The originalist argument is not enough on its own? Moreover, the harm principle only applies if

there really is an "other," something *Roe* denied and to which the *Dobbs* Court certainly does not commit.

And yet, it is interesting that Alito characterizes the competing interests involved in abortion as those of the mother to autonomy and the fetus *to life*, again suggesting that the fetus is a subject of rights. *Roe* and *Casey* (and, interestingly, Justice Kavanaugh), on the other hand, carefully describe the competition of interests as that between the woman and *the state*, rather than the woman and the fetus.

If there is an ambiguity here, then I think it is this. Alito's opinion for the Court has in effect put two rational principles together that seem unrelated, one having to do with proper legal interpretation and one having to do with a subject matter of state law. In doing so, he seems to gesture, perhaps vaguely, toward some legally cognizable status, beyond that available in the *Byrn*-style of pure legal formalism.

Independence?

The second ambiguity is even more enlightening. It is Alito's very interesting critique of *Roe*'s viability standard, as essentially arbitrary. The standard, he complains, depended on factors external to the developing life in the womb.

The question of arbitrariness was also a major topic at oral argument. There, the two attorneys opposing Mississippi's law insisted that the viability standard is "*principled*" because it is "*reasonable*." It balances women's and states' interests. It gives the mother enough time to decide to have an abortion if she so chooses. But it also allows the state to exercise its interest in the "potential life" of the fetus as it becomes more developed. When pressed, the Solicitor General argued that the viability standard was reasonable because it represented a certain stage of fetal "*independence*" or "*separateness*" from the mother.

These considerations spawned what I thought was an especially interesting line of inquiry on the part of Justice Alito. To say that it strikes the right balance fails to provide a principle for saying *why* it is the right balance or *why* the Court should be balancing at all when it comes to such weighty matters. Alito seemed to grant the relevance of "independence" or "separateness" to the question of arbitrariness. But he also pointed out that the mother's "interest" in getting an abortion is the same immediately after viability as it was before, and that the "interest" of the fetus in "having a life" is the same before as after viability: so nothing seems to change in this regard at viability.

Recapitulating this colloquy, the *Dobbs* decision dismissed *Roe*'s appeal to viability on the basis of its arbitrariness. The viability standard, Alito complains, seems to depend more on the state and availability of medical technology *than on the fetus itself*. It does not seem very satisfactory to think that the status of the unborn child, and the states' interest in protecting its life, should hinge on the changing and variable conditions of medicine and medical technology. If such a consequential line is to be drawn regarding how we are to understand and treat the fetus, shouldn't that line be based on something *intrinsic* to the fetus itself?

The Solicitor General, on the other hand, took a principled distinction or dividing line to depend, not on the fetus itself, not on the nature of the thing itself, but, like the *Byrn* court, on an external weighing of interests, rights, and authorities.

Hence, by asking whether a principle can be found intrinsic to the fetus itself, Alito seemed to seek some anchor, some reality outside of law, and indeed outside the mere mediation or

balancing of “interests” or the circularity of the purely positivistic legal definition that we find in *Byrn*.

Perhaps it will help to ask ourselves precisely what is meant by “independence” or “separateness.” There are two possible senses.

First, independence or separateness might be understood in an “extrinsic” sense where personal existence develops and increases in relationships that are only *voluntary* in nature. By implication, if my survival or continued existence *requires* (nonvoluntarily) the cooperation or help of others, I have a less-than-full personal existence. I am less independent.

But there is a second sense of independence or separateness, which might be understood in an “intrinsic” sense. Perhaps this is what Alito is groping for. This sense of independence or separateness would refer to the wholeness and trajectory of the personal human organism, the arc of life, that is possessed by every individual member of the species. Here independence would simply point to the fact that the fetus, or the embryo or zygote, is a *whole* and not simply a part of another organism, such as the mother. It would mean possessing one’s nature as an individual organism, an individual instance of a nature. But when we are talking about *human* nature in the pertinent sense, is this not also what we mean by “person,” with its capacities for freedom, reason, and love?

In this sense of independence, though, dependency on the care and essentially non-voluntary relations of the family does not stand as a limitation of “independence” or “separateness.” Nor do they stand for a diminution of personal dignity.

Nor does the fact that none of us is truly independent in the first sense diminish our personal dignity. None of us would last long without the social context in which we live, since we certainly cannot provide everything needed for even physical life, let alone a *good* life, as Aristotle points out. (It is interesting in this regard that C.S. Lewis in *The Great Divorce* sees hell as an ever-increasing distance between the damned.)

Now the Solicitor General presupposed the first kind of “independence.” Presumably Alito also has the first sense in mind, too, when he speaks of the mother’s and the child’s interests as essentially outside each other and in competition. And yet, his search for a principle intrinsic to the fetus generates a certain ambiguity in this regard, perhaps even one that suggests a desire to surmount the tendency in this area of law to abstract itself from real things. If so, then Alito, however unconsciously, has echoed Ratzinger’s point about the unborn child’s iconic representation of the essential human condition.

Whatever we may think of these final points, Dobbs clearly expresses a hope that the decision will end the Supreme Court’s adventures in the vexed debate over abortion. And yet, at least on Kavanaugh’s reading, the decision has perpetuated the Court’s ambivalence regarding the status of the unborn child. It is an ambivalence that continues to obscure law’s foundation in the real things about which it must nevertheless pronounce judgment. Here we see the tension inherent between the objections to *Roe* and its progeny offered by legal conservatives and those who simply want to protect life. This obscurity is the fruit of legal conservativism’s diffidence about the unborn child, preferring the linguistic circle described by the *Byrn* court. And yet, this reticence, as we have seen, cannot help but to bear a pedagogy about the things it claims not to address, such as life in the womb. It unavoidably is a way of “imagining the real,” in this case as the fractured relationship between the mother and child and a fictional idea of personhood as an extrinsic separation or independence from others. And in this imagining, it perpetuates *Roe*’s assault on that essential element of our humanity to which Ratzinger had tried to draw our attention.

[1] Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013), 57, quoting Geertz, *Local Knowledge* (New York: Basic Books, 1983), 173.

[2] John Finnis and Robert George have argued on *originalist* grounds that the fetus' life should be considered life under the 14th Amendment. This is a noble effort to get at the problem on positivism's own terms. But shouldn't Constitutional rights be rooted in *real things*, such as what men, women, children, marriage, and, yes, the unborn child really are?

Humanum
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FEATURE ARTICLE

America After Dobbs

MICHAEL HANBY

Judging from the near universal testimony among pro-lifers that they never expected to see the end of *Roe v. Wade* during their lifetime, the *Dobbs* decision overturning *Roe* and *Casey* seems to leave us in the position of the dog who finally caught the car: Now what do we do? I do not think I can add to or improve upon what many have already said about the long guerrilla war that surely lies ahead: about the need to counter a tsunami of disinformation, to fight the battle legislature by legislature and state by state, and ultimately to extend the protections of the 14th amendment to the unborn. And in trying to get some sense of what *Dobbs* means within the broader dynamics of American politics, what I have to say may even be counterproductive with respect to those efforts, insofar as they require a positive and optimistic vision for a future without abortion, in which we can somehow still manage to have it all. Being hopefully pessimistic, this is, sadly, a vision I do not share. So, it's not clear that these reflections have any use except insofar as it may be useful not to be caught unawares by the future.

Roe and *Casey* raised to new levels of efficacy two presuppositions inherent in American liberal order from the beginning, but whose full implications were delayed by the role that the common law tradition continued to play in American jurisprudence and by the persistence of a residually Christian culture, historically and sociologically speaking. The first is that there is no given order, higher than the political, to which political order is responsible and over which it is not the final arbiter and judge. The Burger Court's exercise of raw judicial power in deciding *Roe*, its arbitrary invocation of the viability standard, and the slew of cases which followed codifying the anthropology of the sexual revolution as America's official natural philosophy, all illustrate this point, which is not altered by *Dobbs*'s decision to send the question back to the states. This nihilation is furthered by the primacy of liberty conceived as power or possibility—the second presupposition—the protection of which is the chief end of liberal government and which transforms the given, a priori realities of God, the moral order, and even my own nature, into possible objects of choice.

The absolutization of politics is fatal to the distinction between *auctoritas* and *potestas*, authority and power, on which any properly *political* society ultimately rests. And there is a case to be made that the crisis of authority that follows from the conflation of authority and power, a crisis that was painfully visible in the summer of 2020 but seems always to be lurking

just below the surface, is *the* crisis of modern politics as we pass into a post-political era, the crisis undergirding all the others. Of the innumerable harms inflicted upon the American body politic by *Roe*, which made control of the Supreme Court a life-or-death issue for at least two generations of Americans, its role as an accelerant of this crisis of authority is arguably the most easily overlooked.

Where there is no authority—no recognition of a common reality above and beyond politics to which we all belong and are beholden—there is no longer political society.

The distinction between authority and power merits an essay unto itself. For present purposes, it suffices to touch on just one aspect of this important distinction. In contrast to power, or at least power in the modern sense, which we can liken to a kind of force or the capacity to produce an effect through force, authority is essentially *symbolic.* That is, it derives its nature from the fact that it embodies and represents an order beyond itself that is true and real. But this means in turn that the efficacy of authority *qua* authority, in contrast to the power that acts principally from without, is identical to its capacity to elicit recognition and consent. Whereas power in this modern sense *compels* through the Hobbesian fear of punishment, authority *obliges.* It depends upon the willing acknowledgment of the order it represents. Authority in this sense, and not the Hobbesian fear of punishment, is the true source of law's efficaciousness. In the case of power, the efficacy of the law in compelling obedience extends only as far as the state's power of coercion extends. Whereas the true authority of law derives from its representation of an order that is really true, good, and just, which is why we generally comply with it willingly and without threat of punishment. We can push this further and say that authority, the recognition of a common order of reality to which we all belong and in which we all participate, is the foundation of every properly political community; it is the precondition for a politics that is not civil war conducted by other means. Where there is no authority—no recognition of a common reality above and beyond politics to which we all belong and are beholden, an order that comes to expression not only in law, but more fundamentally in the given order of relations between human beings and in speech and in the ideal form of a culture—there is no longer political society.

Two possibilities then follow, each of which accelerates a process of social disintegration that quickly takes on a life of its own. Both have been painfully obvious in recent years as we have discovered just how fragile the consensus is that undergirds our social order. Absent authority and the given order it represents, either adherence to law and indeed the semblance of basic social cohesion has to be extrinsically and forcibly compelled by legal and extralegal means, or those responsible for administering and enforcing the law simply cease to be *obliged* by it any longer, except insofar as it is a useful instrument in the achievement of ideological ends—the prosecution of one's political enemies, for example, or advancing the sexual revolution. That we now consistently see both suggests that these possibilities are not really alternatives so much as two sides of the same coin.

Seen in this light, one can hardly imagine a more robust declaration of the end of political society than the assertion by the *Casey* court that the right to liberty contains "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." For it effectively negates the common order of nature and truth on which political community depends. The welcome nullification of this absurd claim as a principle of

constitutional jurisprudence does not reverse the process of social disintegration catalyzed by the incorporation of this principle into the American social fabric. If the *Roe* court hastened the disintegration which follows from the conflation of authority and power by moving the authority of the Court wholly onto the "power" side of the ledger—and the *Dobbs* decision by the Trump-appointed majority only underscores the power of the Court and the stakes in having political control over it—then the *Casey* court further accelerated the process of disintegration by widening the chasm between law and an antecedent order of nature implicit in *Roe*, thereby confirming the latter's tacit re-conception of the order of nature as a field of biotechnical possibilities. There is much to be said about the latent anthropology of these decisions, how they realize the metaphysical presuppositions of liberalism and catalyze the biotechnical conquest of nature. Suffice to say that among the many poisonous and far-reaching effects of *Griswold*, *Roe*, *Casey* and other cases codifying the sexual revolution, the most intractable and enduring, the one that transcends the narrow confines of constitutional jurisprudence, is their elevation of a bifurcated conception of the human being to the status of a social and anthropological archetype. The normalization of contraception and abortion not only fundamentally transformed the archetypal relation between men and women, and parents and children, transforming marriage and procreation from a fundamental inclination of nature and the telos of responsible adulthood into one of many possible lifestyle choices, it transformed the archetypal relation of every human being, conceived principally as a self-defining act of will to his or her own body, now regarded as a field of biotechnical possibilities. This view of human nature, and the myriad social transformations that follow from it, are the conditions upon which *Obergefell* and *Bostock* could have even become possibilities. And their arrival heralds the arrival of a post-human and post-political future, an emerging biotechnocracy, impervious to human governance, in which law itself is increasingly the instrument of the extra-political fusion of bureaucratic administration, medicine, and information technologies. As we have seen again and again, the sexual revolution and the technological revolution are inseparable.

Abortion is an intrinsically evil act. The dethronement of this barbarism from its status as a constitutional principle is intrinsically good, and removing its essential falsehood from the pedagogical function of the law would have been the right thing to do even if it did not prevent a single abortion. But those of us who have likened *Roe* to *Dred Scott* should not forget that the price of nullifying *Dred Scott* was civil war, and we should be under no illusion that *Dobbs* will act as anything other than an accelerant to the crisis of authority, and thus the social and political disintegration and totalitarian reaction that is already manifestly underway. *Casey*'s "reliance test" as a ground for upholding *Roe* on the basis of *stare decisis* may be absurd as a matter of constitutional reasoning, but as an empirical and sociological observation, it seems to me profoundly correct, indeed much more profoundly correct than the Court realized. Our prevailing white collar proletarianism, an ideal, atomistic world populated by sexless, genderless, and childless pundits and programmers, depends as surely on abortion (and contraception) being reliable social facts as the cotton economy of the Old South depended on slave labor. One does not dismantle such peculiar institutions without overthrowing the reigning human archetypes, without upending an entire social structure, or without a fight.

Michael Hanby is the Associate Professor of Religion and Philosophy of Science at the John Paul II Institute at the Catholic University of America. He is the author of Augustine and Modernity *and* No God, No Science? Theology, Cosmology, Biology, *as well as numerous articles.*

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FEATURE ARTICLE

Defining Life, Defining Law

D. C. SCHINDLER

The background assumption of my brief essay is that there is a profound analogy between *life* and *legal authority*, in the strong, ontological sense of analogy. By that I mean that there is a connection, that they represent the same principle of order expressed in two different contexts. There is a lot that would need to be said to elaborate and justify such a conception, but that lies beyond our present scope. Instead, here, I will make a simple argument that has complex implications.

The argument is that, when the law reckons with the matter of life, it inevitably reckons with its *own* foundation and its own essence. This is so because the task of formulating the significance of human life in the juridical sphere, or, in other words, the task of recognizing life as a legal matter, defining it or at least its legal parameters, and establishing the specific obligations in its regard, is not just one matter alongside others, but is rather one that forces law, either explicitly or implicitly, to come to terms with the authority that constitutes law itself. When we attempt to define life in law, in other words, we are necessarily, though implicitly, defining law in an analogous sense at the same time. In this regard, the question regarding human life in the juridical sphere is similar to the question of religion and the claim it places on law. The reason for the similarity, and the reason why one cannot grapple with the life question or the religion question without determining at a fundamental level the nature of law, is that the originating principle of life, law, and religion is absolutely identically one and the same. What is this principle? The obvious, though somewhat facile, answer to this question is God. The answer is obvious because it is true, and its truth has been recognized by essentially every serious thinker who has reflected on the matter, from the figures at the origins of Western civilization (say, Thales, Moses, and Cicero), to those who sought to break from Western civilization (for example, Nietzsche). But it is also an answer that would require a great deal of work to elaborate its distinctive and analogous bearing in each of the realms of nature, politics, and religion.

What I want to do here is look at the matter that *Roe*, and now *Dobbs*, have put on the table from a perspective that seems to be the reverse of the more common approach, which considers what implications this juridical decision has for the question of life, not as a correction to that approach but as a complement to it. What I would like to reflect on here is

the following: What does the position taken on the question of life (or perhaps the non-position) imply for the law, the foundation of our legal system, and the rule of law as it is lived? My suggestion is that there is a profound connection between the failure with respect to the life question and the general collapse of what we might call the "legal force" of law that we are currently undergoing in the United States from the Supreme Court to the local police, both of which are essentially expressions of a crisis of authority.

By refusing to acknowledge life as a *given*, the institution of law not only denies its religious roots, it also denies that it itself possesses authority. It follows that we have very little evident reason anymore to obey the law.

Almost two decades ago, Stephen D. Smith wrote a book called *Law's Quandary* that garnered significant attention when it appeared due to the boldness of its central claim[1]: He argued that the law, as it generally understood itself in America, had been existing for some time in a state of what he called "nonsense," insofar as it ultimately rested on assumptions (for example, that there *is* such a thing as "justice," founded in an objective, transcendent order, that the law attempts to promote) that it explicitly denied, and that it could very well someday fall into crisis. It does not seem too far-fetched to think that that day is coming, if it is not already here.

The reality of life is something that the essentially quantitative methods that rule in science, as it is currently practiced, can only be *acknowledged* and never *demonstrated*, in the sense that they are wholly circumscribed within the horizon set by those methods so as to be exhaustively accounted for only within those terms. One can describe the functions normally associated with life in what are called "empirical" or "scientific" terms, but the question of the relationship of life to those functions is not itself an empirical one in this sense. What this means is that science must refer itself beyond this methodologically limited horizon in order to engage properly with life *as such*, to study it with the requisite rigor and adequacy. This "referring itself beyond" would connect science to authority in its various manifestations, both within the study of nature and beyond it. It is unsurprising, therefore, to discover that the practices of science prior to the systematic installation of an abstract empiricism beginning in sixteenth-century Europe occurred within an organic connection with other branches of learning, with the broader political community and, ultimately, with the Church. It is not possible to elaborate the point here, but it can be argued, and indeed has been argued, that the dissolution of this organic connection, and the methodological refusal of this self-transcending reference, has introduced a principle of disorder and fragmentation into the foundations of science, the consequences of which we are only beginning to deal with. One of the consequences directly relevant to the present argument is that, without an organic connection to *real* authority, science has made itself vulnerable to the pseudo-authorities of social and political ideologies, as but two examples.

Now, law faces a question—or perhaps a "crisis" in the etymological sense of the word, which is to say, a moment of decision in which the essence of the matter is at stake—that is similar (or analogous) to the one in science. There are numerous assumptions about what things are and what they mean that have to be taken in some respect as *given* as a foundation that makes legal reasoning and decision-making possible. For example, what is liberty? What is a person? What is property? What is marriage? What is power? What is justice? Or even simply: What is law? These are not questions that the law can determine itself, or, if circumstances require

that it attempt to do so in a particular case, it will always be on the basis of other things taken as authoritatively given. Among these given realities there is arguably none that is more fundamental than human life. These realities, and what they mean, can only be acknowledged as already established in some respect; they cannot be wholly accounted for and justified from within the system of law itself. So, what is it that grounds the assumption of these given realities, if the legal system cannot do so? What ultimately justifies a particular interpretation of their significance? This question is more radical than it may seem. Clearly, a reference to legal precedent simply defers the question in its ultimate sense. By its very nature, the "voice of the people," which generally has something of a sacred status in the US, *cannot* be an authority, not only because it cannot make any abiding claim (that is, any claim that could not be overturned the very next moment by the same voice), but also because the point of this voice's appeal is always to eschew authority as something *given* a priori. Until fairly recently, the Constitution represented something of an ultimate point of reference. But it cannot serve this function in a finally adequate way. Speaking against it is, of course, the increasingly common recognition of the unresolvable hermeneutical quandary: Who determines in the end what the Constitution means? But even if there were a way to establish a univocal meaning to the claims articulated in the Constitution, this would not suffice because the Constitution cannot logically establish its own authority. It may be the case that we have been able successfully for over two centuries to skate on the relatively thin ice covering over the deep abyss of what Smith called the "nonsense" that has always lain beneath our legal system. But we can all now see the cracks emerging. What does one say to those who are currently calling into question the foundations of American government as radically unjust? A purely pragmatic answer—such as, "if you don't like it, you can just leave"—by definition works only as long as it works. History is now summoning us to address this question in a more fundamental way.

Let us look at what is happening concretely with the question of human life. On August 27, 2022, NPR published a spot that addressed just this issue, which bore the title "When does life begin? As state laws define it, science, politics, and religion clash." The point of the little piece was to show that Dobbs has introduced a new instability into the political landscape because it has opened a question that had ostensibly been bracketed out and has required the states to give an *answer* to it. (Note how this *particular* issue lies so deep within, arguably at the very foundation of, the political order, so that to raise a question about this matter, compared to others, such as tax code or health care, is to disturb that order.) The task of giving an answer to the question of when life begins, however, inevitably entails, at the same time, determining the *grounds* for such a response. To what, or to whom, does one appeal in order to define what represents life warranting legal protection? The article first goes to what would appear to be the most obvious authority in this matter, namely, "science." But this move, however obvious it might seem, is not neutral, which is to say that it implicitly takes for granted assumptions about the nature of life without acknowledging that fact as constitutive of its nature. The appeal is made to science not just because it is assumed that life, at least as a factual matter, is most properly the matter of the objective and quantitative methodologies of biology, but also because it is assumed that such methodologies do not depend on any particular interpretation of the nature and meaning of life which means that their determination or judgments can be made outside of any fundamental philosophical or theological commitments. This is, moreover, assumed to mean the judgments are essentially "a-political." Science would appear to be a "value-free" and "metaphysical commitment-free" source for normative judgments.

First, it is worth pointing out that the hope of providing a "neutral" authority on these terms is frustrated. The NPR article itself explains that there is no "consensus" among scientists and doctors about when life, sentience, or personal life begins: "Medicine can answer the question

‘When does a biological organism cease to exist?’ But they can’t answer the question ‘When does a person begin or end?’ because those are metaphysical issues.” The appeal to science as an authority fails because science itself, as it currently understands itself, has no stable and unifying foundation that would allow it to provide a common standard for judgment. The abstraction from metaphysical commitments does not open up the possibility of universal consensus but, precisely to the contrary, makes such an intellectual communion impossible, leaving the supposed scientific “data” vulnerable to extra-scientific exploitation. My primary purpose here, however, is not simply to highlight the confusion and attempt to resolve it by marshaling evidence in favor of life. Instead, I am proposing that we step back and think about what all of this means for the political order and the rule of law more generally.

The NPR article expresses a pervasive sense that, if we need to define life in law, we ought to turn to science precisely because science represents a fund of knowledge that does not derive from any authority, and thus can operate strictly on its own terms, innocent of any transcendence and the tricky questions this would raise in a “pluralist” society. But this appeal to science is an appeal to an authority that is not organically connected to any source of authority, which is to say that what is being sought is *not* an authority but a functional *substitute* for authority. To the extent that the legal institution makes an appeal to such a pseudo-authority, it is in fact confessing its own refusal of authority in principle. What I am suggesting is that this radically de-natures law. It renders law essentially impotent and empty—or as Stephen Smith puts it, “just words.”

Let us look at the matter more closely. In a passage from his illuminating book, *On Power: The Natural History of its Growth*, written in 1945, Bertrand de Jouvenel observes that law can genuinely govern human affairs only insofar as it inspires what he calls a “religious veneration,” but what I would prefer to call real authority as distinct from mere power. Law can regulate human behavior *qua* human only if it directs human reason and the human heart, giving order to human passions—which is to say, only if it appeals to, informs, and illuminates the imagination. The great legal historian Harold Berman presented a profound understanding of this point when he argued for the religious roots of the law and the constitutive significance of the solemn ritual that attends its practice, and a similar point has been made from a very different perspective (and with a very different purpose) by the contemporary Italian political philosopher Giorgio Agamben in his book *The Kingdom and the Glory*. For his part, Jouvenel explains that law was able to *be* law only if it retained a connection to the transcendent, that is, to a dimension of existence beyond the flux of history and the fleeting storms of passion driven by immediate interests and reactionary opinion: “There had . . . to be a belief in the necessary character of the laws; they had to be looked on as inscribed in the nature of things, and not merely as a product of the human will.”[2]

Jouvenel goes on to argue that this belief faded in late modernity, and the consequences of its absence came to fruition in the mid-twentieth century in Europe. Whereas we in the US tend to interpret fascism as having some sort of causal lineage with the earlier tradition of absolute monarchy, Jouvenel presents it as a result of absolutized democracy, in which no aspect of existence, no publicly acknowledged “truth” about God, man, or world, is allowed to stand above political process. This he describes in another part of the book not so much as a determination of the “will of the people” through voting, as it is a submersion of all individual thought and judgment under the indomitable sway of parties in the “political machine” of the modern world:

> Whereas formerly only the choice of the rulers was committed to the strife of

> parties, there was now not a single rule of social life which did not depend for its continuance on the issue of an election. The life of democracies has been marked by a growth in the precariousness of laws. Kings, chambers of peers, senates, anything that might have checked the immediate translation into law of whatever opinion was in vogue, have everywhere been swept aside or rendered powerless. The law is no longer like some higher necessity presiding over the life of the country; it has become the expression of the passions of the moment.[3]

This description, which no doubt would have appeared to Americans in 1945 like the vision of a lonely prophet whose claim to divine inspiration is not obviously to be trusted, has become the dominant experience of our time, plain to everyone.

Now, I want to highlight the "as if" character of Jouvenel's interpretation of law: for it to function properly, he says, law must be regarded "as if" it were inscribed in the nature of things; law has to be "like some higher necessity." For Jouvenel, who is himself very much a modern in his intellectual commitments, it is not necessary for law actually *to be* related to a higher necessity, which draws its claim on the imagination from its actual inscription in the nature of things. For all practical purposes, it is enough that we think it so. Smith's book sought to bring to light precisely the dilemma generated by this "as if." In America, he explains, we do not have a single religious tradition that would unify us as a people and give an evident substance to those institutions that would seem to rest on that tradition and derive their authority therefrom. Instead, we have many religious, and even—increasingly—no religion at all. But this gap cannot but be filled, and among the viable candidates in America for "religion substitutes," he suggests, "law surely appears near the top of the list. Its power, its majesty, its imperial scope, its deep roots in tradition, and its well-honed ceremonies all fit it for the role."[4] America has been able to remain a nation in spite of the rigorous separation of its political institutions from an established religious tradition, because it has managed to find an alternative foundation for the common good. Key to American history in this regard "has been the substitution of law—or the 'rule of law,' or the Constitution—for traditional religion as a unifying force and an object of common loyalty."[5] Smith quotes in this context Pierre Schlag's observation that "modern law [is] 'the continuation of God by other means.'"[6]

A basic dimension of the argument Smith makes in his book is, first, that modern law turns out to be a very strange substitute for religion, insofar as, unlike most idols, it explicitly claims to be wholly without any religious significance; to the contrary, it insists on its secularity: "if contemporary law is a species of idolatry, it is a peculiar and confusing sort of idolatry, in which the devotees regularly *deny* that the idol has the transcendent qualities it would need to justify the uses they make of it."[7] And second, that the so-called "rule of law" has been able to survive so far in America in spite of what amounts to a self-contradiction at its roots. We have been able up till now to live with the "beneficent illusion" that law has a foundation, and, in a sense, itself *is* a foundation. Smith in fact quotes Antonin Scalia as having confessed this worrisome situation: "That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it."[8] Smith concludes his book with a kind of exhortation that is all the more disturbing for being offered in reassuring tones that come off as somewhat anxious: "Let's hope we can keep up the illusion," he effectively says, deriving some consolation from the fact that it has apparently worked in the past. And then Smith suggests that, eventually, if the time comes when the illusion no longer holds, we ought to consider the possibility of opening ourselves, in a leap of faith, to a higher reality.

I would like to respond by saying the dilemma, "Law's Quandary," goes even deeper than Smith's book allows, to the extent that the book assumes that a "beneficent illusion" could in any respect, even in primarily practical terms, be "good enough." "As if" language is the language of despair; it is Kant's adoption of such language as modernity settled in as the regnant form of thought in the West that led Nietzsche to give him the title "the Great Delayer," insofar as Kant sought to prop up the old values that governed existence in its social and political expression on useful fictions of reason. The sense that law can function "as if" it were an expression of some higher necessity as long as we recognize we are all better off—safer, more prosperous, etc.—for thinking it so, is a spell whose power over us has died. In the first place, it works only insofar as people actually believe they are better off for thinking it so, and second, much more profoundly, human beings cannot remain human if they allow the horizon of political life to be set merely by "what works." To think that law could at least *function* as a "beneficent illusion," is to misunderstand the nature of law, which is not a mere tool to control public behavior but is able to regulate human action in a proper sense only insofar as it first bears witness to the truth of things, and among these truths there is none more basic than the truth of human life. The regulation of behavior cannot but take its bearings, whether explicitly or implicitly, from the nature of things and the nature of things cannot be the nature of things only as a functional part of some practical project, no matter how noble its aims. Instead, the nature of things is their *truth*, and as such can be affirmed only as in some respect absolute, independent of public opinion, and relatively indifferent to practical consequences. This sort of truth is something that must be respected by science. It cannot be taken as the outcome of some experiment. Law can properly appeal to science for standards only if science itself rests on the tradition-sanctioned authority of truth.

The "rule of law" not only fails as a substitute for the religious tradition that grants unity to a people because it explicitly rejects this function, it also fails in practice by refusing to bear witness, in any authoritative way, to any truth about reality. The paradigm of this refusal is the refusal to acknowledge human life as a given reality to be respected. Note that the strongest statements in favor of life in the Dobbs decision speak of the "State's interest in protecting life": it is cast as a matter of the interest of a particular party, in this case, the State, rather than simply the acknowledgment of a good, a truth, a reality that speaks for itself. In other words, by refusing to acknowledge life as a *given*, the institution of law not only denies its religious roots, it also (and I would say: therefore) denies that it itself possesses authority. It follows that we have very little evident reason anymore to obey the law, to pretend to be a "people," and so forth. The lack of reason may have been there for a while—some, including myself, would argue it came with the foundation of the country—but it has become patent and effective in our age. The confessed incapacity to deal with the life question is a symptom of this absence of reason, and will no doubt also be a cause of its further disappearance.

It is in this sense that the question posed by *Roe v. Wade* and *Dobbs v. Jackson* introduces a *crisis* into law in the etymological sense we described: a moment of decision in which the essence of what decides is at stake. Where the question is directly posed, no illusion regarding the law, its nature and foundation, is possible, because responding to the question inevitably requires determining not just an answer, but the very standard by which to determine an answer. In this case, the standard by its very nature cannot be given *within* the law in the sense of deciding the relative weight of various precedents. Instead, the standard in this case can only be the ultimate one, or else it will prove to be a substitute for the ultimate one that cannot fulfill the function to which it inevitably pretends, that of being an idol, a representation of the transcendent order of things, that which opens human existence to its proper dimensions. The standard can be provided only by what is *actually* the ultimate principle of human existence, both in its biological and its socio-political sense. If the law does

not acknowledge an authority in this paradigmatic instance, this case of all cases, it thereby confesses its own lack of authority to which there can be no legal remedy.

[1] Stephen Smith, *Law's Quandary* (Cambridge, MA: Harvard University Press, 2007).

[2] Bertrand de Jouvenel, *On Power: The Natural History of Its Growth* (Carmel, IN: Liberty Fund, 1993), 307.

[3] Jouvenel, 307–08.

[4] Smith, 160.

[5] Ibid.

[6] Ibid., 161.

[7] Ibid., 164.

[8] Ibid., 163.

D. C. Schindler is Associate Professor of Metaphysics and Anthropology at the John Paul II Institute, an editor of Communio: International Catholic Review, *and the author of* The Catholicity of Reason *(Eerdmans, 2013) and* The Perfection of Freedom: Schiller, Schelling, and Hegel Between the Ancients and the Moderns *(Cascade Books, 2012), among others.*

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FEATURE ARTICLE

Producing the "Global Baby"

JEFF SHAFER

A predominating theme and school of contemporary political philosophy conceives of persons primitively as unattached individuals in a state of nature, whose subsequent attachments are chosen for autonomously designed ends.[1] Because the individual's rudimentary condition is one of loose isolation, justly free of heteronomous law or restraint, the so-called natural family must be remedially understood to be non-basic, and indeed a deviation from and impediment to full realization of the individual condition of freedom.[2] Thus relations such as marriage do not naturally beckon and then fulfill the person in his or her unchosen, created purpose; instead marriage and its extending family relations are deemed contractual attachments selected and modified in accord with individual preference based on non-embodied considerations such as will, affection, orientation, and utility. As, on this telling, bodies are mechanisms, with the locus of personal identity present in subjective interiority, the embodied connections of husband and wife, mother and child, father and child are only empirical or mechanical—not meaningful and defining. The family is a spectral and conventional rather than indelible institution; its frame is plastic rather than given and permanent. As a result, family can and should be configured in law in a form that matches its contingency as a social construct, and malleable within a range whose outer limits are subject to continuing cultural negotiation.

The notion of the untethered individual has been long in philosophical development and maturation. But its effects have been resisted and cabined by ancient and persisting family law standards enshrined in common law, statutory, and constitutional loci. Recent decades, however, have seen a strident and often successful effort to align family law with the precepts of this reductionistic anthropology. Thus the family—that natural community and symbol of *integration*—is being redesigned in law to conform to the precepts of *dis*integration marking our era. The law is explicitly adopting a mechanistic philosophical vantage as it cooperates with public and prominent biotechnical practices enacting that perspective. These include the pharmaceutical and surgical elimination of children in utero, as well as the manufacturing model of human reproduction by consumer selection.

As to the former, recall *Roe v. Wade*'s iconic national subversion of the law as the Supreme Court constitutionalized the idea that pregnant women are in non-relation to the fetal presence located within them, and as a result are free of responsibility to it. Whether a relation

and responsibility later come into being between them is attributable to the mother's choice or intent, not because of a preexisting, embodied truth.[3]

The ART/donor-gamete/surrogacy complex exists to decouple child-creation from conjugal relation, to segregate gestation from enduring maternal relationship, and to make blood ties irrelevant to legal child custody.

That is, *Roe* made official the conversion of motherhood from a natural and public fact to a private choice (or, after *Dobbs*, a legislative choice), thereby relocating the meaning and relationality of human persons from immutable nature to flexible option. The family (visibly represented in vital respect by mother and child) therefore is not a reality of creation or a radical aspect and expression of human identity, but a construct of selection, thus ultimately subservient to the State agencies that authorize and superintend those individual choices. *Roe* and its sequalae, prominently including *Obergefell v. Hodges*, disqualified in principle the natural family's public and legal authority—even if, at the moment, certain courts and other legal officers by tradition still often defer to it.

The mechanical reproduction trade is another outgrowth from the diseased taproot from which sprang *Roe*. The ART/donor-gamete/surrogacy complex exists to decouple child-creation from conjugal relation, to segregate gestation from enduring maternal relationship, and to make blood ties irrelevant to legal child custody. The fragmentation of persons, parts, and relations—and to subject them all to commercial negotiation—is the entrepreneurial essence and audacity of this technological regime performing a redefinition of human nature. In terms of its biotechnocratic and consumerist framework, the child comes into the world not *naturally* related to anyone, but only *transactionally* connected to the persons responsible for summoning him through purchase and technique.

The "global baby" (so-called) represents the paradigm and the central case of the industry precisely because it best symbolizes the disintegration of nature and organism accomplished by the ART project. This infant manufacture regimen represents and enables the abolition of relationality in reproduction and custody, and with that it establishes the irrelevance of the location of gametic, gestational, technical, and financial participants. The so-called sperm donor may live in Israel, the "ovum contributor" in Mississippi, the gestator in New Delhi; none speaking the same language, and the only one to lay eyes on the child is the customer in Denver who placed the order and picked it up. Classifying all aspects of reproduction in mere functional terms enables their commercialization, thereby qualifying them for offshoring and otherwise participating in the efficiencies and larger genetic and physiological resources of global markets. Liquid nitrogen freezers, air transportation, and information technology make geographic divides of no production consequence.

And because the ART baby is a project of *making*, it veritably demands the law apply a consumer paradigm in the later custody determination: The person hiring and directing the technicians to manipulate the biological material should receive the tailored product of his commissioning.

By permitting this technician-engineered form of reproduction, the law's own description of human meaning is on track to correspond to the mechanical features of this system. Once the law permits the will-based biotechnical making of children from the parts and efforts of

disbursed participants, the law already takes for granted and validates that the child (despite the visible realities of genealogy and filial origination), in fact, *ab initio*, belongs to no one in particular. Moreover, the law thereby abandons the grounding for its historic authority and practice to enforce maternal and paternal duties and claims grounded in the ontology, authority, and moral commands of those embodied offices.

The ART industry's coup, then, is not merely in the mechanical accomplishment of human reproduction, but in capturing the standards of the law itself. The law's failure to forbid at the front end the industrializing of reproduction ensures the law's submission thereafter to the mechanistic premises of that project. For the ART establishment is not just advocating for an unnatural anthropology; it produces vulnerable infants requiring resolution of their custodial placement—which demands the law's participation. And with that participation, alas, comes the law's validation of the deeds it inspects and then honors with rules fitted to their character. By pressure of the novel circumstance now before them, judges or other state officers are essentially compelled to stipulate a juridical principle elevating something *other than* the natural, integrated whole of maternity and paternity as the ground for the law's determination of an adult's custodial claim and duty to a child. Whatever the contrived resolution, the adjudicative task has been subordinated to the circumstance of industrial reproduction that the law has permitted, and whose human yields the law now confronts and must situate.

* * *

A sidebar: The question of "Which contributor to the process is the real mother?" is one perplexed and unanswerable. The unified maternal complex of conception, gestation, and childbirth has been partitioned. Is the mother the ovum donor or the gestator? There is no right answer to that question because its premise is unrecognizable: namely, that organic maternity can be mechanically captured and distributed in parts among two or more persons and thereafter emit or reasonably submit to a metric gauging "relative or preponderant motherness" among the fragments.[4]

But as pressing and certain is the answer to this question for certain emotionally invested ovum contributors and gestators, respectively—and later for the child himself—this confounding question is not one the *law* ultimately finds interesting. For within the terms of the permitted operation of the reproductive industry, both genetic and gestating contributors are deemed non-relational aspects of the technical venture in which they participate. The dividing and functionalizing of female physiological contributions has already defined them down to merely *material* relevance. Therefore, the law's predominate solution as referee from its new perch *within* this system has been that neither of these embodied aspects is the default of a valid custody role. It is instead one's intent to produce or obtain the child that is decisive.

* * *

Once conjugal procreation with its natural relational tether, duties, and claims is replaced in law and in fact with contract and genetic and mechanical outsourcing, of course the potential for conflicting claims to a child, or renunciation of claim to the child, is introduced. No such conflict is present with natural procreation and its settled participant responsibilities which society and the law throughout millennia acknowledged and responded to by deference and enforcement.

Consider the custody conflicts. For instance, not all women find they can be as emotionally distant and mercenary as they imagined when agreeing or succumbing to act as gestator-for-pay. Some grow to love the child within them and refuse to relinquish it to the purchasers after birth, or otherwise contest the custody rights of those who rented her body. (Recall the

infamous *Baby M.* case.) On the other hand, some purchasers of gametes and/or surrogacy services lose interest in raising the child whose immortal existence they've proximately initiated, and so abandon the child. (Incidentally, this sort of abandonment as a statistical occurrence is virtually invited and ensured by the foreign surrogacy markets wherein the consumer caprice endemic to commerce generally is further incited by the vast and humanly momentous geographic remove of customers from the gestating child.)

We can imagine other circumstances of disputed custody—though imagination is not necessary; only a willingness to read the reported court decisions showcasing the variety. I offer a few by way of illustration.

• In California, a man and his wife had purchased both donor sperm and egg for the lab conception of a child, and then paid for implantation of a resulting embryo in a surrogate. The commissioning couple then divorced, and the husband disclaimed paternity of the child carried by the surrogate. The court of appeals ruled his original intent and activating role in the child's making classified him a father.[5]

• A New York court ruled in a contest between a male couple over the custody of one of the men's twins that had been conceived by and born to the other man's sister using the first man's sperm. Though the first man is their father and the other man their uncle, the Court granted parental custody to the second man[6]—meaning, it seems, that under New York law the brother and sister are parents of the twins.[7]

• In a Tennessee case of a female same-sex divorce, the sperm-donor father of the child born to one of the women intervened in the divorce proceedings to petition a declaration of paternity and a visitation order with his daughter. To no avail, for the Tennessee court (unfazed by the barn-sized equivocation) ruled that the little girl was the "legitimate" child of the female same-sex marriage, having been born "in wedlock," so the petitioning man had no statutory avenue by which to pursue a paternity claim—such claims being limited to cases of children born *out* of wedlock.[8]

• A Hawaii woman in her same-sex divorce proceedings disclaimed parental relation to the child of artificial insemination conceived and born to her same-sex partner while the disclaiming woman was stationed on a military installation on the other side of the world. Her ex-partner wanted her to be deemed a co-parent. The state supreme court ruled that the statutory paternity presumption, combined with certain examples of the woman's text messages, established the unrelated woman as the child's parent.[9]

• An Arizona woman demanded legal parent status over the ART-conceived child to whom her ex-partner had given birth. The child's mother resisted that claim. The state supreme court deemed the unrelated woman to be the second mother because of the statutory paternity presumption which the court presumed *Obergefell* had gender-neutralized.[10]

• An Idaho woman similarly wished to be deemed the parent of her same-sex ex-spouse's child conceived by ART, over her former partner's objection. The Idaho Supreme Court ruled that she could have been the second parent, but in this case was not, because she had failed to sign the requisite paperwork and otherwise comply with the rules that the state legislature had enacted to make husbands into legal fathers after agreeing to their wives' insemination with another man's sperm. The Court breezily asserted it would be unconstitutional for Idaho statutes to treat maternity and paternity as different.[11]

• In *Pavan v. Smith*, the United States Supreme Court itself—two years after *Obergefell*—decided that the Constitution requires Arkansas to use birth certificates for a

purpose in conflict with their historic and statutorily defined purpose of identifying the child's maternal and paternal progenitors. The Court classified the content of Arkansas's birth records (and impliedly children themselves) as a "benefit" the State gives to adults who are licensed as civilly married.[12]

Not only in court cases such as these, but now also in proliferating statutes and regulations,[13] the system of disaggregation and renunciation of embodied relationality and meaning is being widely incorporated into the logic of the law's custody standards and thus its logic on the character of family relationality and its meaning more generally. The content of this legal posture in turn implicates the kind of arguments and claims that can be registered successfully once these precepts through multiple enactments and judicial precedents settle into positions of authority and defining legal rationality.

The legal order that renounces the meaning of generativity and blood ties has removed the foundation for the traditional legal rule whereby a child is received by default into the care of the two people responsible for his existence and identity. Going forward in terms of the intent-based framework, it is not clear how—or that—a mother and father would have a binding claim to the heirs of their body that the law (for that reason) would honor. The more likely point of contestation, though, is in a later dispute with the State over the mother and father's continuing custody of the child once their exercises of authority conflict with the preferences of state officials. For on the wane is the law's recognition of the family's politics-transcending and natural dimension that has authorized its substantial immunity from statist intervention.

In sum, then: The law's initial evasion—its failure to forbid operation of the ART industry—rather than being a flight from involvement, was a prelude to the law's full participation in it. This participation ultimately will oblige elimination from law of the standards of natural family that the mechanical model contradicts radically and irreconcilably. The current dissonance among principles old and new will not endure; a resolution is required.

The resolution ought to be in terms of the wisdom of the ages. Law has a fixed responsibility to human nature and the just shape of community order. The law's interdicts are needed to preserve in integrity the family and the relational identity of persons. And the law's vital role is not only in excluding from the social order those malevolent intrusions that would introduce chaos into the community and its self-understanding, but in excluding that which threatens the features of the law itself, such as that which would compromise its ability to retain and hold to its venerable precepts, and to a moral and metaphysical coherence.

[1] John Milbank's critique of liberalism's "fantastically peculiar and unlikely" anthropology finds a memorable formulation in his "Gift of Ruling," *New Blackfriars* 85, no. 996 (March 2004), at 2013.

[2] See David Crawford, "Family and the Identity of the Person," *Communio: International Catholic Review* 39 (Spring-Summer 2012), at 174: "the family presents a problem for the modern mind.... It is manifestly a given entailing factors that precede and determine the person. It is therefore a primal threat to the ideal of being most primitively free."

[3] The Supreme Court's recent ruling in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___(2022), though reversing Roe, left undisturbed its anthropological premises.

[4] Michael Hanby points out that markets in ova and gestational surrogacy "make possible a novelty unprecedented in human history: the ability to manufacture children for whom the once natural question—'who is my mother?'—has neither an obvious natural answer, nor even a legal one."

[5] *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

[6] *Joseph P. v. Frank G.*, 2017–08729 (unpublished) (Feb. 14, 2017), *aff'd*, 161 A.D.3d 1163 (NY 2d Dept. 2018). The rulings in this case were informed by the New York Court of Appeals' decision in *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), in which the New York high court altered the definition of "parent" in state law to encompass an adult unrelated to a child biologically or by adoption, but who agreed with a partner to participate in jointly raising a child to be artificially conceived by the partner.

[7] Of course, that circumstance is only troubling from a perspective informed by human nature; it is non-controversial and (more to the point) meaningless within the technological model whose mechanical premises can neither generate nor permit a significance in kinship. And therein, precisely, lies ART's utility.

[8] *Harrison v. Harrison*, No. M2020-01140-COA-R3-CV (Tenn. Ct. App. Oct. 15, 2021).

[9] *LC v. MG*, 430 P.3d 400 (Haw. 2018).

[10] *McLaughlin v. Jones*, 401 P.3d 492 (AZ 2017).

[11] *Gatsby v. Gatsby*, 495 P.3d 996 (ID 2021). Without saying so explicitly, this court, like so many others, appeared to read *Obergefell* as insinuating a constitutional right to ART-facilitated child-making. *See id.* at 1002.

[12] *Pavan v. Smith*, 582 U.S. ___, 137 S.Ct. 2075 (2017). The Supreme Court in its Pavan opinion twice referred to non-parents as "parents."

[13] Note especially the Uniform Parentage Act of 2017, adopted by six states (California, Connecticut, Maine, Rhode Island, Vermont, Washington), and pending in at least three others, including Hawaii, Massachusetts, and Kansas.

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FEATURE ARTICLE

The Metaphysics of Murder

DANIEL MOODY

That anti-abortionists and pro-abortionists talk past each other is no secret. Conflicting anthropologies stemming from conflicting cosmologies ensure one dictionary but two languages. Less out in the open but becoming clearer by the day is that we can sort anti-abortionists themselves into two competing camps.

On gradualism, ending the mass murder of God's children revolves around a two-part commandment: "Thou shall not mention God or murder." Gradualism meekly toils away within a "secular" framework (a pluralistic public square is no place for theological facts) and hands recruits a starter pack containing science, a valuable future, a burning IVF clinic, and a famous violinist. The worldview is humanistic, abortion is bad, the mother is a victim, and "lethal violence" against "the fetus" is "unconstitutional" because it has no deep roots in US history and tradition. The master plan is to formalize a specific interpretation of a clause in an amendment to a legal document. Slowly, slowly, catchy monkey.

On abolitionism, *God* and *murder* are indispensable terms in the anti-abortion vocabulary. America's legal environment welcomes religions; furthermore, "godless law" is oxymoronic. Abolitionism counters gradualism's anemia with confident blood-and-thunder preaching, unpacking abortion by unpacking identity and authority. The worldview is biblical, abortion is sinful, the mother is a criminal, and deliverance demands national repentance. The beast abolitionism tries to catch is no monkey and patience no virtue.

The future belongs to abolitionism. Its superior grasp of things means many organizations fighting the good fight must submit to a bout of soul-searching. However, tomorrow's anti-abortionists will be neither apologists nor lawyers—natural or besuited—but rather fishers of men, telling the truth, the whole truth, and nothing but the truth. For while the gradualism-dominated pro-life industry plows the bulk of its financial, emotional, and spiritual resources into lowering the number of abortions to zero, counterintuitively emphasizing the legal over the physical unveils an earth-shattering metaphysical truth that currently eludes gradualists and abolitionists alike. Here, I write of an invisible coup, something worse even than murder.

Abortion pierces the heart of human law, severs legality from reality, and is the

quintessence of our refusal to obey God, our purest "*Non serviam*."

To reveal why greenlighting murder in the womb is monstrous absent bloodshed, we must reacquaint ourselves with five oft-forgotten rudimentary facts.

First, human value is an illusion unless we reference God. Only a non-human person can endow value present at our zygotic stage. Second, the germane use of *person* communicates our essence, that which we cannot extract without leaving nothing. Context renders any alternative use specious. Third, human law exists precisely because humans are persons. Infinitely valuable, our sacred nature warrants protection by God's commandments alone or our rules in conformity with His. (Since manmade law owes its boundaries to our unchosen nature, we are impotent to reset them. Some things cannot be legal; others cannot be illegal.) Fourth, *murder* denotes the deliberate taking of an innocent person's life, where innocence is possible because morality is actual. And fifth, *abortion* is shorthand for murder modified by the victim's location, the womb. Again, any alternative use is specious. Morality transcends language.

Now, the physical world (*reality*) is not the world of human law (*legality*). Reality features three-dimensional items such as trees, creatures, and cars, whereas legality is immaterial, composed of facts and beliefs expressed via two-dimensional language. Similarly, the physical act (*abortion*) is not the legal Act (*Abortion*). Whether voted through by a legislative body, authorized by a court, or proclaimed by a king, Abortion withdraws earthly punishment for committing murder in utero, doing so on explicit grounds: "The fetus is not a person."

But the human creature at the earliest moment has no defining characteristic. We categorize him in terms of an age universal to being human. (Not everybody reaches ninety-nine, but we all "reach" conception.) Our understanding of the unborn child's value is thus our understanding of human value as such. Contra the stubborn myth, then, Abortion does not withhold legal protection from unborn children and leave everybody else undisturbed. No, "The fetus is not a person" translates to: "Humans are not persons."

In negating legality's raison d'être, Abortion exposes itself as an unadulterated lie. Reason then tells us gradualism's principles do not apply because there is no law to improve incrementally, only a hallucination to overcome. Measures that impede injustice (e.g., mandating admitting privileges) may be tolerable, but any "less bad" "law" that directly permits abortion (e.g., a heartbeat bill) is a lighter shade of lawlessness, sustaining murder by sustaining the hallucination.

Said differently, the pro-life movement has spent half a century trapped inside a question that presupposes an impossibility: "Should abortion be legal?" In truth, the *Roe* Court did not legalize abortion. Powerless to extract the child's essence, it perpetrated a linguistic sleight of hand and instituted a novel legal meaning of *person*. If that strikes you as altogether undramatic, observe that "personhood" scoured of God's thumbprint is personhood in name only. In virtue of unnaming persons for legal purposes, Abortion pierces the heart of human law, severs legality from reality, and is the quintessence of our refusal to obey God, our purest *Non serviam*.

Nemesis stalks hubris. Our refusal inevitably manifests, predominantly in the sphere of identity.

Personhood does not entirely capture human identity. We are a particular kind of person, the

embodied kind. And as human personhood and embodiment are inseparable, denying one in fact denies both. Accordingly, a post-Abortion legal system can undo every law apt for the human creature by obliterating any sign of maleness and femaleness, up to and including familial bonds. The chief unseen effect of Abortion was a revolution in legal anthropology, the body's banishment from human law.

A second revolution had to transpire eventually because abolishing ourselves in legality necessitated obscuring ourselves in the material realm. Just as an undersea earthquake expresses itself as a tsunami slamming into dry land, the logic of Abortion had to catapult into society, propelled by legality's unique and formidable powers of persuasion. Everywhere we look, boys, girls, men, and women are drowning under that invasion of lies, a state-imposed, all-encompassing social engineering project.

The Christian intelligentsia's best guesses notwithstanding, the legal execution of bodiless "identities" is not feminism gone wrong (or right), institutionalized psychiatric malpractice, a powdery amalgam cooked up by gnostic Marxist capitalists, or a surreal academic proposal careering through every kindergarten's front door. Those who imagine queer theory has penetrated the law's walls forget that our identity crisis occurs while the world of law refuses its subject a name. "Legalized murder" plucked corporeality from legality—not because queer theorists wanted it to but because how our Maker constructed the moral universe determines how it falls apart. All else is a powerful delusion arising from the presence of *gender*, the legal use of which symbolizes the body-shaped hole at the heart of post-Abortion law.

Lest anybody forget, the conventional term for sundering the human person from the body is *death*. Having failed to detect our legal demise, we are mindlessly resurrecting ourselves in the image and likeness of nothing. Then how can legality ignore public utterances that disclose embodied personhood? The second most pronounced curse courtesy of our absolute refusal is the breakdown of legal language.

Initially, nobody spotted the annihilation of his legal identity because the reflective veneer of linguistic continuity camouflaged the conceptual exchange of something for nothing. In plain English, everything vanished except the words. Nevertheless, starved of personhood and embodiment as twin structuring reference points, under the sheer weight of the irresistible tag team of coherence and time, post-Abortion legal language began to deform. Today, it is melting uncontrollably before our very eyes, a once-beautiful ice sculpture dripping ever faster from every extremity. See *her sperm* and *pregnant man*.

See also *male* and *female* melting into each other's arms to become two spellings of one thing. For where emptiness reigns, every word means the same thing, nothing. Hence, the rise of scare quotes and "circular definitions," respectively nullifying meaning and disguising nothingness.

As with language and the family, there is no such thing as half a legal system. Authentic law is on or off because the human creature is infinitely valuable or a modern incarnation of pond scum. Chillingly, in an imperceptible flash, Abortion converts law into anti-law, legal language into anti-words, and legal identities into a blasphemous anti-substance overnight. But while repudiating murder engenders an instant verdict, the sentence arrives in stages, as evidenced by the piecemeal collapse of legal language.

For those with ears that hear and a mind inclined to listen, time's quiet, steady voice whispers two lessons. Regarding the verdict's instantaneousness, time tells us that lowering the number of abortions to zero will not lift the curse because what sparks legality's divorce from reality is Abortion's nature, not the shedding of innocent blood. Regarding the drip-drip fashion of the

sentence handed down, time's lesson explains why the pit of our collective stomach reports anxiety, disequilibrium, and dread: We are in motion, yet to enter the land that is our darkest destination.

Our journey toward out-and-out nihilism is not mission creep. *Au contraire*, Abortion is perfecting itself, just as the young sunflower tilts its head to follow the sun. Legality is in transition. To be exact, it is dissolving language across three phases. During phase one, normality, different words represent different things. Without a change of trajectory, its trip will terminate at phase three, a no-man's-land where every word is totipotent, capable of representing anything for anybody for any reason and duration. In the meantime, our home is phase two, a blurred world that juxtaposes conceptual sameness with linguistic difference. For example, whereas yesterday had different restrooms with different names and tomorrow will tolerate identical nameless restrooms only, today taunts us with identical restrooms bearing different names.

Cognitive dissonance assaults us from every angle because phase two is the halfway mark of the process of deleting language in the wake of deleting meaning. Be not deceived; legality is slowly but surely rounding up the linguistic vestiges of personal identity and forcibly escorting them off the legal premises, manhandling us from presence, truth, difference, and language to absence, lies, sameness, and empty words. Foundational terms such as *male* and *female* live on borrowed time, leaves of a tree struck dead by lighting.

The *Dobbs* decision lifted not one finger to end the metaphysical violence. Why? Because the impossibility-presupposing question that traps the pro-life movement likewise traps the Supreme Court: "Should abortion be legal?" The *Roe* Court answered yes and surmised it had the final say, the *Casey* Court stripped *Roe* to a skeleton before applying fresh flesh, and the *Dobbs* Court blindly accepted the question but differed in respect of who votes.

Alas, press-ganging the states into opining unleashes a chain reaction that arcs 360 degrees and devours the Court's legitimacy. Spying the devil in the detail is as straightforward as asking and answering the question on the ballot: "Is murder possible?" If yes, the result is invalid precisely as the result of a vote. If no, legality has no shape that precedes and exceeds our desires and is merely a game wherein anything can be "legal" or "illegal." Yet no game can incorporate the rule: "Everybody must play." Incapable of presenting itself as a source of authority, the game—an atheistic desire-balancing mechanism—is an impostor with *law* emblazoned on its forehead.

Simply stated, since "This state permits murder" is a conceptual impossibility, so is "This Court permits that state to permit murder." As was always true of its elder siblings *Roe* and *Casey*, *Dobbs* is not legally binding because it is not a legal decision, just lawlessness with a smile.

It follows that abolitionism is entirely correct to analyze Abortion through the dependable lenses of identity and authority. After all, they match the radical claim undergirding the Abortion mentality: "Humans can choose the meaning of *meaning*, the definition of *definition*." Obeying the truth of definitions means operating them at the level of being: "The unborn child has a rational nature." The pro-abortion mindset operates them at the level of doing: "The fetus is not rationalizing." In the context of manmade law, where identity and authority converge, exchanging being for becoming is not arbitrary, accidental, or a failure to comprehend the relationship between actual and potential. It is the spirit of rebellion. Anchored to being, bona fide definitions affirm the goodness of Creation. Anti-definitions oppose said goodness by inserting an insulating layer between creature and Creator in the vain hope of fabricating a Goldilocks zone wherein being no longer restricts us, yet meaning

and value remain.

In short, beneath the excuses and legalese, attempting to disprove the possibility of murder is how we wage war against God, rejecting His personal nature by rejecting ours. Phrased positively, to defend the unborn child's infinite value is ultimately to defend that Christ entered this world as a Person. Ours is not the victory, though. To expect mankind to triumph over itself is to misidentify the combatants. Ours is to tell the truth—the whole truth—to the glory of the Lord, who teemed with life when a child in the womb.

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FEATURE ARTICLE

Casey's "Reliance Standard" and the Risk of Relying on Life

CAITLIN W. JOLLY

The landmark 1992 case *Planned Parenthood v. Casey* enshrined the notion that women's equal participation in the life of the nation depends essentially on their access to abortion. The plurality opinion articulated this dependence in terms of broad social reliance on the holding of *Roe v. Wade*, which affirmed a constitutional right to procure an abortion until the baby becomes viable. The idea, however, that a woman's full participation in society is safeguarded by the capacity to end her pregnancy in order to pursue her own vision of herself and her place in society prescribes an understanding of participation that eclipses its own foundation—namely, the created participation in God's being that he freely gives to each of us as our own act of existing. In contrast, openness to life, and especially to the risk of receiving a child, does not block participation but instead intensifies the original participation that is the form of every life. By educating us to participation in life as something first gratuitously given, and by offering us the chance to ratify our own participation in existence, every child confirms and intensifies the life of those who receive it.

Casey's "reliance standard" rests upon a significant revision of the principle's traditional application. Generally used in favor of *stare decisis*, "the inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."[1] Such reliance typically concerns economic interest, as in matters of property or contract law. While this economic element remains central in *Casey*, its plurality opinion introduces shifts in the meaning of reliance, both expanding it to include a wide cultural reliance on legal precedent and applying it to future actions rather than decisions already made. Thus, the text argues, it is not enough to measure people's reliance on abortion only in terms of "specific instances of sexual activity," for such reliance could be effectively eliminated by choices regarding specific acts of intercourse and reproductive planning. Indeed, to thus limit our understanding of reliance on abortion would be to refuse the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[2]

When the original endowment that is the creature itself is forgotten and thus "taken for granted," the human person is valued primarily in terms of his or her achievements.

Rather than specify actors and actions potentially affected by a change in law, *Casey* broadens the concept of reliance to present abortion access as a salutary condition of human sexuality, the determination of personal identity, and the relation between individual and community. The opinion thus amplifies abortion's significance and does so in a way that not only protects past reliance interests but encourages future reliance on its availability.[3] Though speaking of cultural phenomena taking place in the two decades before its composition, the text implicitly argues that abortion rights are good because they promote women's future participation in economic and social life. The cost to women of losing abortion access is counted with regard not so much to pregnancies already achieved but to each woman's ability to organize her intimate relationships and activities in the world with the assurance that she could abort a pregnancy were one to occur. *Casey* therefore argues for abortion as a good assuring each woman that, whatever her future choices and behavior, a child will not become an obstacle to her plans.

Dobbs v. Jackson Women's Health Organization (2022) rejected *Casey*'s expansion of the reliance standard, holding that the court lacks both "authority" and "expertise" to determine the effects of the right to abortion on women's lives.[4] It remains, however, that two such beliefs central to the reasoning in *Casey* still determine the popular understanding of what it means for a woman to flourish. These are the beliefs that a baby is a burden and that it is burdensome principally as a barrier to participation, where participation is conceived as a woman's ability to profit from economic and social activity extending beyond the activities of homemaking and childrearing.

The prevalence of these ideas is well-attested by *amici curiae* in the *Dobbs* case. The brief filed by the National Women's Law Center argues, for example, that "existing laws promoting gender equality" do not "remove the substantial economic, educational, and professional burdens of being forced to continue a pregnancy."[5] The *amici* also reject the claim that "people forced to carry a pregnancy to term will not face barriers to equal participation in social and economic life."[6] The brief on behalf of women athletes makes these claims more concrete: women rely on abortion to avoid "the physical tolls of forced pregnancy and childbirth" that "would undermine athletes' ability to actualize their full human potential."[7] The success of women's sports depends upon "the right to access safe and legal abortion care, and the ability of 'the woman to retain the ultimate control over her destiny and her body.'"[8] Without abortion, women would also be deprived of "collateral benefits . . . , including greater educational success, career advancement, enhanced self-esteem, and improved health."[9] What is presupposed in such views is that there is a mutual exclusivity between a woman's flourishing, on the one hand, and what is out of her control, on the other. It is only when one retains control over one's destiny, including the definition of "one's own concept of existence, of meaning, of the universe, and of the mystery of human life," that one can fully participate in what it means to be human.[10]

It would be naïve to deny the hardships and sacrifices that women—especially those already in a state of social and economic disadvantage—face on account of motherhood. In this regard, the concern voiced by many pro-abortion parties for the disproportionate effect of becoming a

mother on women lacking resources such as money for childcare, completed educational degrees, or a supportive spouse and extended family is legitimate. Yet without denying our responsibility to mothers in this regard, it is essential to note that the idea of participation espoused by *Casey*'s reliance standard comes too late: it overlooks the fact that our very existence is *already* a participation, and that this participation in being—by which we exist in and as ourselves and in communion with everything else—is not the product of our own actions but the universal condition of any personal achievement or perfection.

Openness to children, with all its risks and sacrifices, is one of the clearest manifestations and intensifications of our original participation in being.

Another way of saying this is that the foundation and paradigmatic form of our participation in anything, including social and economic life, is the reception of our being from the God who "is" absolutely. "To be" (*esse*) for the finite being is to participate in something given—namely, being. What this means regarding a woman's reception of a child is that she first has to receive herself, that is, accept that her very being-herself is something received from another. To the degree that she cannot ratify and complete this gift in an ever-deepening reception of herself, she will find the reception of another more challenging, because it will seem extrinsic to her own project of existing and thus to the way she experiences her profound desire to be and thrive. If a woman cannot affirm her own existence as the giving and receiving of another, her being will seem an original loneliness to be justified through subsequent participation in, for example, intimate relationships and professional activities.

In his little gem, *The Gift: Creation*, late philosopher Kenneth Schmitz fills out the picture of what it means for a finite being to receive herself *ex nihilo*: out of nothing, or, more positively, as pure relation to God.[11] A central point is that the radical dependency on God that creaturehood entails is not oppressive with regard to the creature's freedom and perfection. On the contrary, because perfection presupposes an existing subject that can become perfect, the gift of creation precedes and generates any claim of the creature to its own happiness.[12] When the original endowment that is the creature itself is forgotten and thus "taken for granted"—considered as a *given* rather than a gift, as a mere starting point for subsequent action, in which alone meaning is to be found—the human person is valued primarily in terms of his or her achievements. Schmitz associates such emphasis on human agency with a technological society, and it is not a stretch to see how exaggerated esteem for human action fosters reliance on the technologies of contraception and abortion in the search for one's own meaning and actualization.[13] Divorcing participation from the gift of being and associating it solely with certain freely chosen actions following upon this gift reflects a forgetfulness of the fullness we have all received simply in existing.

Schmitz also helps us appreciate that the very essence of gift radically challenges the claim that absolute control over one's destiny is essential to happiness. Every gift is a gift insofar as it is gratuitous, that is, given and received freely rather than under some obligation or necessity. The gratuity that delights us when someone sends flowers "for no reason" thus also characterizes the gift of personal being, which, like all gifts, includes not only surprise but also risk. Schmitz observes: "The term *gift* is rooted in a domain of significance that is charged with . . . risk, vulnerability and surprise."[14] To the extent that something is given when it did not have to be, its unexpected arrival asks that the one surprised by its presence make room to receive it. However welcome the gift, its free reception is thus not a safe affair: it means

vulnerability in openness “to the intention of the giver and to the significance of the gift.”[15] When we receive a gift, then, we also receive a purpose for it and for ourselves, a meaning that we did not originate. The gift stretches us beyond what we had foreseen and beyond what lies exclusively under our control. While at times uncomfortable, the reception of what is not simply our own is essential to the exercise of human freedom for the sake of happiness. For without the risk of received meaning, every good will eventually fall under the determination of the willing subject. Only a good that, coming from another, transcends subjective determination and control will liberate the human person from the confines of her own temporal circumstances and from the arbitrariness of choosing both anything and nothing. This happens profoundly when in receiving both herself and her child as gifts, a woman is placed, to her surprise, on a horizon of meaning that frees her for an end—a good—greater than what she would have prescribed for herself.

Recognizing this, it could still seem that acknowledging the gratuity of every true gift only exacerbates the problem of freely receiving it. Many women seek abortions because they do not feel free in regard to the presence of the child within them. This suffering, whether experienced in pregnancy or later as one faces a child’s daily demands, merits sincere attention. It also reveals all the more our need for children, who incessantly ask of us the generosity that is our life-blood. Even when we are not yet capable of receiving them with gratitude, children by their very presence reestablish this generosity as the criterion for human success. And to the extent that we can receive them freely, the gratuity of their presence spreads to all other areas of personal and family life. I have found, for example, that a position of openness to life brings with it the assurance that, as subject to the endowments of another, I am not solely responsible for the shape of my family, the arc of my career, or my relationship to my husband and the demands I make on him as a partner in the household. A certain recklessness in abandonment to God’s generosity thus affords me greater freedom and confidence in his fidelity to the gift and its goodness. Children also provide a path toward true leisure. All parents know the frustration of being pulled away from accomplishing one’s agenda. Yet when digging in the backyard instead of writing lectures, I have no choice, as it were, but to participate gratuitously in the task my toddler gives me. I am mercifully required to encounter the world in a way that transcends my immediate purposes, and in this, I sometimes discover anew the happiness of delighting in something together with my son and of knowing his delight in me despite my many imperfections as a mother. Children want to be with us, and in this desire they invite us to participation.

Though mistaken in its approval of abortion, *Casey* rightly upholds this fundamentally good desire for our own perfection through participation in a common life. Tragically, this longing is often wounded by some experience of a break in the dynamic of generosity that structures being and sustains human life. Abortion repeats and compounds this interruption of being, whereas the free reception of a child reopens those to whom it is given to the plenitude of being as gift. Openness to life is, then, not a merely moral obligation but something on which each of us relies radically *for the sake of our own lives*. Receiving a child undoubtedly requires an at least implicit trust in the goodness of an intention and power greater than our own—a plan for our lives, written by another, that is ultimately a plan for our good. Yet it is by welcoming the child that we are educated to this trust anew, above all because in being given a child, we are *given* life and released from the burden of having to build it up from nothing. The child is thus a living sign of the reality that each one’s existence is already a participation in the perfection that being is. Openness to children, with all its risks and sacrifices, is therefore one of the clearest manifestations and intensifications of our original participation in being.

All of us, therefore, rely most truly not on abortion access but on the gift of children, because

they are sacraments of the gratuity, risk, and plenitude that found true participation in human life. Olympic gold-medalist Chrissy Perham wrote as *amica* to the *Dobbs* court: "Women know what's best for our own bodies and lives, and our autonomy needs to be respected."[16] Yet we often do not know what is best for our lives, and we need the good to come from beyond our current capacity to evaluate what is best. Only the reception of a transcendent good allows us to grow and to take part in a reality that is truly common, like the life of a nation. Realism thus demands accepting that our lives are inevitably shaped by surprises, actors other than ourselves, and dependency. The child is, in this regard, prophet and guardian. His presence will perhaps necessitate the sacrifice of money, social visibility, career plans, physical health, and control. Yet it brings greater goods. The child recapitulates the gift of the mother to herself, affirming her own existence and inviting her to receive it more deeply. By ratifying the generosity made personally concrete in the child, she participates retrospectively in her own creation and becomes, in generosity, more like the Giver of all life. The child also brings meaning that can be sourced only in gratuitous gift. He therefore bestows freedom to relish the contingent, particular, and small, along with the freedom of depending on another instead of bearing absolute responsibility for the destiny of oneself and others. In her suffering, finally, a mother gains the love of a child and the wealth of being able to give the very gift of life to another. She thus participates essentially in the economy of human life by allowing others to do the same.

[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992).

[2] *Casey*, 505 U.S. at 856.

[3] Bradley Aron Cooper, "The Definition of 'Person': Applying the *Casey* Decision to *Roe v. Wade*," *Regent University Law Review* 19 (2006): 235–50, at 245–46.

[4] *Dobbs*, 597 U. S. at 65.

[5] Brief of *Amici Curiae* National Women's Law Center and 72 Additional Organizations Committed to Gender Equality in Support of Respondents, p. 20, *Dobbs*, 597 U. S. 1.

[6] Ibid., p. 4. b.

[7] Brief of Over 500 Women Athletes, the Women's National Basketball Players Association, the National Women's Soccer League Players Association, and Athletes for Impact Who Have Exercised, Relied on, or Support the Constitutional Right to Abortion as *Amici Curiae* in Support of Respondents, p. 4, *Dobbs*, 597 U. S. 1.

[8] Ibid., p. 3.

[9] Ibid., p. 4.

[10] *Casey*, 505 U.S. at 851.

[11] Kenneth L. Schmitz, *The Gift: Creation* (Milwaukee: Marquette University Press, 1982); see also Thomas Aquinas, *Summa theologiae*, I, q. 45, a. 3.

[12] Schmitz, *The Gift: Creation*, 31–34, 73–76. "Nothing is due to anyone, except on account of something already given him gratuitously by God." Aquinas, *Summa theologiae*, I, q. 25, a. 3, ad 3 in *Summa theologica: Complete English Edition in Five Volumes*, vol. 1, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981), 138.

[13] Schmitz, *The Gift: Creation*, 34–44, 63–87.

[14] Ibid., 44.

[15] Ibid., 48–49.

[16] Brief of Women Athletes, p. 5.

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RE-SOURCE: CLASSIC TEXT

The Child in the Womb Depicts the Essence of Human Existence

CARDINAL JOSEPH RATZINGER

The following excerpt is taken from Joseph Cardinal Ratzinger, "Truth and Freedom," Communio: International Catholic Review *23 (Summer 1996): 16–35, at 26–28. The article was translated by Adrian Walker and is re-printed here with permission.*

It has become evident that the critical point in the history of freedom in which we now find ourselves rests upon an unclarified and one-sided idea of freedom. On the one hand, the concept of freedom has been isolated and thereby falsified: freedom is a good, but only within a network of other goods together with which it forms an indissoluble totality. On the other hand, the notion itself has been narrowly restricted to the rights of individual liberty, and has thus been robbed of its human truth. I would like to illustrate the problem posed by this understanding of freedom with the help of a concrete example. At the same time this example can open the way to a more adequate view of freedom. I mean the question of abortion. In the radicalization of the individualistic tendency of the Enlightenment, abortion appears as a right of freedom: the woman must be able to take charge of herself. She must have the freedom to decide whether she will bring a child into the world or rid herself of it. She must have the power to make decisions about her own life, and no one else can—so we are told—impose from the outside any ultimately binding norm. What is at stake is the right to self-determination. But is it really the case that the woman who aborts is making a decision about her own life? Is she not deciding precisely about someone else—deciding that no freedom shall be granted to another, and that the space of freedom, which is life, must be taken from him, because it competes with her own freedom? The question we must therefore ask is this: exactly what sort of freedom has even the right to annul another's freedom as soon as it begins?

The child in the mother's womb is simply a very graphic depiction of the essence of human existence in general. Even the adult can exist only with and from another.

Now, let it not be said that the issue of abortion concerns a special case and is not suited to clarify the general problem of freedom. No, it is this very example which brings out the basic figure of human freedom and makes clear what is typically human about it. For what is at stake here? The being of another person is so closely interwoven with the being of this person, the mother, that for the present it can survive only by physically being with the mother, in a physical unity with her. Such unity, however, does not eliminate the otherness of this being or authorize us to dispute its distinct selfhood. However, to be oneself in this way is to be radically from and through another. Conversely, this being-with compels the being of the other—that is, the mother—to become a being-for, which contradicts her own desire to be an independent self and is thus experienced as the antithesis of her own freedom. We must now add that even once the child is born and the outer form of its being-from and -with changes, it remains just as dependent on, and at the mercy of, a being-for. One can, of course, send the child off to an institution and assign it to the care of another "for," but the anthropological figure is the same, since there is still a "from" which demands a "for." I must still accept the limits of my freedom, or rather, I must live my freedom not out of competition but in a spirit of mutual support. If we open our eyes, we see that this, in turn, is true not only of the child, but that the child in the mother's womb is simply a very graphic depiction of the essence of human existence in general. Even the adult can exist only with and from another, and is thus continually thrown back on that being-for which is the very thing he would like to shut out. Let us say it even more precisely: man quite spontaneously takes for granted the being-for of others in the form of today's network of service systems, yet if he had his way he would prefer not to be forced to participate in such a "from" and "for," but would like to become wholly independent, and to be able to do and not to do just what he pleases. The radical demand for freedom, which has proved itself more and more clearly to be the outcome of the historical course of the Enlightenment, especially of the line inaugurated by Rousseau, and which today largely shapes the public mentality, prefers to have neither a whence nor a whither, to be neither from nor for, but to be wholly at liberty. In other words, it regards what is actually the fundamental figure of human existence itself as an attack on freedom which assails it before any individual has a chance to live and act. The radical cry for freedom demands man's liberation from his very essence as man, so that he may become the "new man." In the new society, the dependencies, which restrict the I and the necessity of self-giving would no longer have the right to exist.