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The *Quarterly* invites submissions on any topic in the field of bioethics. We prefer electronic submissions by e-mail attachment. Submit to Louise A. Mitchell, Managing Editor (lmitchel@ncbcenter.org). When submissions are sent surface mail, they should include the work on a computer diskette. For a more detailed guide to style, please contact the *Quarterly* at the above address or by e-mail: lmitchell@ncbcenter.org.

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*Colloquy*: Letters to the editor are invited on matters discussed in the *Quarterly* and on topics of general interest to Catholic bioethics. Letters may be edited to fit the available space.

*Essays*: Short notices of approximately 2,000 to 4,000 words, these should touch upon contemporary issues in bioethics in such fields as law, politics, education, morality, nursing, medicine, religion, science, and other areas of human endeavor.

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*Case Studies*: We seek case studies from physicians, nurses, health care workers, lawyers, clergy, and others who have experience of particular cases that exemplify larger concerns in the field of bioethics. When necessary, names and identities should be altered to preserve confidentiality. Length may vary.

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*Colloquy*



### **The Colloquy Section**

We invite letters of commentary  
on topics addressed in previous issues,  
on matters currently in the news,  
and on any topic of interest to readers  
in the field of bioethics.

We are particularly interested in short debates  
or discussions conducted by scholars and others  
on current points of controversy.

### The Embryo Rescue Debate

I would like to make comments on two articles that have recently appeared in your journal, both on the topic of embryo adoption.

Nicholas Tonti-Filippini's essay, "The Embryo Rescue Debate" in *The National Catholic Bioethics Quarterly* 3.1 (Spring 2003), 111–137, in essence defends the proposition that it is *intrinsically evil* for a woman to allow herself to become pregnant by means other than the conjugal act and that it is therefore intrinsically evil for a woman, whether married or single, to allow herself to become pregnant by having a cryopreserved embryo transferred from the freezer to her womb to nurture it there. He claims that the act of a woman who allows herself to become pregnant in this way is akin to adultery. Hence, the good that she violates is the marital good. I think his analysis is weak for the following reasons.

First, if it is intrinsically evil for a woman to allow herself to become pregnant by means other than the conjugal act, then it follows that it is intrinsically evil for a woman, who has already had a child produced in the laboratory with her husband (homologous IVF), to have this child implanted into her womb. It seems to me, however, that she has an obligation to do this, and one *cannot* be morally obligated to do something intrinsically evil. In addition, *Donum vitae*, which unambiguously condemns as intrinsically immoral the *artificial generation of human life*, does not condemn embryo transfer as such. In fact, *Donum vitae*, I, n.5, in speak-

ing of "spare embryos" and the absurd fate to which they are exposed, refers to them as "embryos which are not transferred into the *body of the mother*" (emphasis added). They obviously would not have been exposed to this "absurd fate" had they been transferred into her body. Moreover, *Donum vitae* calls the woman who has had the child generated in vitro, by having her ovum fertilized there, the child's *mother*. Tonti-Filippini refuses to call her this.

Second, Tonti-Filippini maintains that the *good* violated in this act is the good of marriage, insofar as the woman's act is akin to marital infidelity. I find this difficult to understand. A married woman violates the marital good either by giving herself in sexual union to a person other than her husband (the *unitive good*) or by exercising her power to procreate human life with a person other than her husband (the *procreative good*). However, in the case at hand no marital act is involved. The woman does not give her body to one other than her husband in sexual union, and she does not exercise her power to generate life with someone other than her husband. So how does she violate the marital good?

It is interesting to note that Mary Geach, who like Tonti-Filippini, contends that it is intrinsically evil for a woman to allow herself to become pregnant by any means other than the conjugal act, identifies the *good* violated by acting in this way as the good of the woman's *reproductive integrity*, not the good of marriage. I disagree with Geach too, but need not show why here.

In “Gestating the Embryos of Others,” *The National Catholic Bioethics Quarterly* 3.2 (Summer 2003), 309–329, John Berkman gives reasons to show that it is not *intrinsically evil* (as Nicholas Tonti-Filippini, Mary Geach, and Msgr. William Smith hold) for a woman to allow herself to become pregnant with an unborn child who came into existence through in vitro fertilization and was then abandoned.

He further claims that a woman who allows this to happen is then morally required to serve not only as the gestational mother but also as the sociological mother by adopting the child. Berkman criticizes my argument that a woman who rescues a frozen embryo by having it transferred into her womb and nurtured there, and who gives it up for adoption after birth, is acting in a way analogous to a woman who conceives a child by fornication and then gives the child up for adoption after its birth. Berkman argues that the analogy here is not true because in the embryo rescue scenario the woman chooses to become pregnant “with the prior intention of giving up this child.”<sup>1</sup> To this I respond as follows.

While I (and Germain Grisez) draw some analogies with giving a child up for adoption after rape or fornication, our argument is not based on an analogy insofar as there are disanalogies involved also. Our argument is rooted in an analysis of the moral object specifying human acts. Human acts, as John Paul II unequivocally reminds us in *Veritatis splendor*, n. 78, are specified primarily by the moral object, i.e., by *what is chosen here and now*, i.e., the human act chosen as the *means* to an end. In the case in question the *object is not* (pace Berkman) to “give up the child,” but rather quite specifically “to transfer the child from the freezer to one’s womb and nurture it,” and this is a morally good object. The *end* is also good, namely, to “save the life of the embryo,” or “rescue

it.” The *further intention* or more *remote end*, to give it up for adoption, is not intrinsically immoral, insofar as it is not intrinsically evil to give a child up for adoption. But surely “giving it up for adoption” *cannot be the proper way to describe what the woman is doing in choosing here and now to have the embryo transferred into her womb so that she can nurture it as a means to save its life*. “Giving it up for adoption” is a *further intention*, and it is possible that she could change her mind and decide to adopt the child herself after birth. I readily grant that it is better for a married woman to have the embryo transferred into her womb, its first “adopted home,” and then after birth, have it formally adopted. This is the better solution. However, the “rescue” by a single woman is not intrinsically evil and can be justified. Thus, his argument does not, so it seems to me, falsify the position defended by both Grisez and myself.

St. Thomas says: “we offend God only by acting contrary to our own good.”<sup>2</sup> This is precisely what John Paul II affirms in *Veritatis splendor*, nn.12–13, 80. Thus, if a single woman is acting in a morally bad way and thus offending God if she chooses here and now to have an orphaned frozen embryo transferred into her womb and nurtured, for the purpose or end of saving its life, one must identify the *human good* she is violating intentionally in doing so. Moreover, if she chooses, after the child’s birth, to give it up for adoption by a married couple insofar as they can more adequately care for the child, what human good is she violating? I do not think that Berkman has shown this, and thus I conclude that his analysis does not falsify the Grisez-May view.

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<sup>1</sup>Berkman, “Gestating the Embryos of Others,” 317, note 23, emphasis added. Berkman criticizes the argument that I advance on page 108 of my book *Catholic Bioethics and the Gift of Human Life* (Huntington, IN: Our Sunday Visitor, 2000).

<sup>2</sup>“Non enim Deus a nobis offenditur nisi ex eo quod contra nostrum bonum agimus.” *Summa contra gentiles*, III, 122, emphasis added.

## Nicholas Tonti-Filippini Replies

Over many years, Professor William May has made a significant contribution to assisting us to understand the theology of the body and the dignity of marriage. I take very seriously his comment that my analysis of the intrinsic evil of heterologous embryo transfer is weak.

He argues that since no marital act is involved, there is no sexual union with a person other than the woman's husband and there is no generation of life with someone other than her husband, there is no violation of the marital good.

I respectfully suggest that in his brief treatment of the issue, Professor May has not dealt with the issue thoroughly, and in particular, he has failed to treat of the issue from the perspective of the acting person. One act at issue is that of a gynecologist or technologist who makes a woman pregnant by placing an embryo in her body. Thus, there would seem to be two acts to consider: a) the act of a technologist intervening to make use of a capacity that the woman has given completely in marriage to her union with her husband; and b) the woman's choice to have that capacity used outside of her marriage when she has given that capacity exclusively in marriage to her union with her husband.

A major question here is whether, in marriage, a woman gives her capacity to become pregnant exclusively to the union with her husband. In his reference to the marital good, Professor May narrowly defines it in terms of the unitive dimension of the marital act itself and to the procreative dimension of the initial generation of the embryo.

A married woman violates the marital good either by giving herself in sexual union to a person other than her husband (the *unitive good*) or by exercising her power to procreate human life with a person other than her husband (the *procreative good*). However, in the case at hand no marital act is involved. The woman does not give her body to one other than her husband in sexual union, and she does not exercise her power to generate life with someone other than her husband. (Page 9 above).

This seems to be a very narrow understanding of the unitive and procreative dimensions within marriage and not at all consistent with May's beautiful writings on the *communion of persons* that is marriage. The marital act (with no obstacles placed in its way) expresses the couple's union and is a means of participating in the goods and blessings of marriage. But it is not the totality of the unitive dimension or of the procreative dimension, and it is not the exclusive source of the goods and blessings of marriage. In the marital vow, a man and a woman give more than the sexual union and more than just the capacity of that act to cause an embryo to form. They also commit to share their lives together including their parenthood. The capacity to become pregnant with child belongs to the union; it is part of the gift of marriage rightly obtainable only through the marital act.

In heterologous embryo transfer (HET), a woman becomes the child's natural mother in a way that excludes her husband. I argued in my original paper, "The Embryo Rescue Debate," *The National Catholic Bioethics Quarterly* 3.1 (Spring 2003), 111–137, that this is not consistent with the gift that she made to their union in their marriage vows. I also argued that this was an ontological change to her, a change to her being which is radically different from the adoption of a child who is already born, because of the intimate physical and spiritual union that is formed in that motherhood union with the child before birth.

This is a most important matter because it is essential to the teaching of the Church in relation to the termination of pregnancy. The teaching against abortion does not permit the relationship of the woman to the child she carries to be considered a form of life support. Direct removal of the child prior to viability is abortion, not just the removal of life support. Removing the dependant child from the mother is not justifiable in the way in which removal of artificial life support might be. The burdensomeness of the pregnancy is not relevant in the way that the burdensomeness of life support might be. In my paper, I referred to the arguments of

Judith Jarvis Thompson on this matter in which she separated the issues of the status of unborn life and the issue of maintenance of life support.

The reality is that the mother-child relationship in pregnancy is a bond in which her role is much more than the provision of life support and her obligation to the child is different from that of any other person. Theirs is a unique relationship, and her becoming with child is an ontological change which carries the obligations of motherhood, even when it happens from acts not of her choosing, such as in rape.

When that life originates in the marital relationship, her husband shares in originating that new life within her and he becomes a father. But through HET she becomes a mother and forms that union—but not in union with her husband. She does not share this motherhood with her husband. The child is placed there by a technologist and the union is formed from outside the marriage. There are marital goods violated in this, the goods and blessings that are dependent on their shared relationship and the goods and blessings that are intrinsic to their marital giving, specifically, the capacity for her to become pregnant and thus become a mother and he a father exclusively through their union.

In relation to the technologist, I am convinced that the act of making a woman pregnant is simply not an appropriate act unless it is a conjugal act of mutual love within marriage, both generative and unitive, and an acceptance of the obligations that that act implies. The technologist's act violates the goods of her marriage.

What we must bear in mind in all of this is that we are dealing with technological circumstances that in themselves have fragmented the elements of marriage in a way that is evil and can be very confusing. Instead of seeing the divine gift of marriage as a continuous relationship between a man and a woman and between them and their children, the technological intrusion fragments it and leads us to deal with the fragments. This we must do, but not in ways that further fragment marriages, lessen the importance

to her marriage of a woman's capacity to become a mother, or diminish the intimate union of pregnancy. This further fragmentation is evident in the way in which Professor May, in order to deal with this fragmentation and with the good of the child in mind, has discarded his very rich understanding of marriage as a communion of persons and narrowed the unitive and procreative meaning of the gift of marriage so that he can claim that no marital good is violated by a woman allowing a technologist to make her pregnant in a way that excludes her husband from her becoming a mother.

*"Coniugum autem fidelitas, in unitate matrimonii, secumfert mutuam observantiam erga ius utriuslibet, ad hoc ut alter pater aut mater fiat solummodo per alterum."*<sup>1</sup> (The fidelity of the spouses in the unity of marriage involves reciprocal respect for the right to become a father and a mother only through each other.)

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<sup>1</sup>Congregatio pro Doctrina Fidei, *Donum vitae*, II, A., n. 1. (AAS, 87).

### John Berkman Replies

I am grateful for William May's careful and nuanced response to one part of my argument. Our disagreement arises from our different understanding of actions and their objects, and in this case, turns specifically on our differing descriptions of what Mary is doing in choosing to gestate the embryo. We agree that, assuming the embryo is successfully gestated to birth, Mary "plan[s] to give it up for adoption upon birth."<sup>1</sup> We further agree that prior to determining the morality of an action, we have to adequately

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<sup>1</sup>Berkman, "Gestating the Embryos of Others," 316.

describe it. Thus, although we may be able to say that abandoning one's child or selling one's children into slavery are both intrinsically evil acts, prior to making judgments about the morality of a parent's action in a particular case, we must be sure our description is apt, i.e., that the parents are indeed abandoning their child or selling them into slavery. Thus, the key to our disagreement is whether Mary's object in choosing to gestate her sister's embryo includes Mary's plan (before being impregnated with the embryo) to give up her baby for adoption. May thinks it does not. I think it does.

According to May, the object of Mary's act is "to transfer the child from the freezer to one's womb and nurture it," what Mary is "choosing here and now." For May, the end of Mary's act is to "save the life of the embryo," or to "rescue it." For May, the plan to give the baby up for adoption is a "further intention or more remote end," and thus not a part of Mary's object in choosing to gestate the embryo.

However, even if May wishes to call the plan to give the baby up for adoption a "further intention" or a "more remote end," he gives no reason for us to think that such ends and intentions are not part of the object of Mary's act. May seems to think that the object of a person's action cannot involve intentions that extend some significant period of time into the future. This is, I believe, false.

In seeking to answer the question "Is there any description which is *the* description of an intentional action?" G.E.M. Anscombe suggests that this can be "*any* description of what is going on, with [her] as subject, which is in fact true."<sup>2</sup> Clearly, in the example discussed, when Mary chooses to gestate the embryo, she is intending *both* to have the embryo implanted *and* to give up any baby that results from being impregnated in this way. Although the intention to give up the baby for adoption is not an intention that can be realized at present, it is certainly a present intention.

I have argued elsewhere that it is morally wrong to plan to conceive and/or gestate a child with the intent of giving the child up for adoption, because it is a basic failure of parental responsibility and can appropriately be described as child abandonment. Contrary to May, I would argue that Mary's decision to gestate with the plan of giving up for adoption is wrong, in that her intention is both to save and abandon, and the goodness of one description of her action does not render acceptable the other description of her action.

We can and do at times evaluate a person's action at one moment—and determine what constitutes its object—in relation to his or her intentions which extend into the future. Thus, with Mary, it is appropriate and necessary to describe her object as abandonment, since this is what best summarizes the near-term and long-term intentions that together reveal "the good towards which [Mary's] will deliberately directs itself."<sup>3</sup>

May notes that the object of an act is what is chosen "here and now." Mary, in choosing to gestate the embryo, is doing so at least in part because she is also choosing to give up the child when born. She is choosing to "give up" the child. While it is possible to create scenarios in which May's description of Mary's object could be accurate—e.g., if Mary decided to gestate the embryo with the intention of raising the child, but then, after giving birth, was subject to some grave and unfortunate circumstance and felt compelled to give up the child to others in a much better situation to raise her child—but that is not the situation presented either in Grisez's book or in my article. Mary has both short-term intentions (gestate the baby) and long-term intentions (give up the child to whom she plans to become a gestational mother), both of which are part of the object of her act understood as her nine-month project, that is, "gestate with the intent to give up," which is what I call abandonment.

As Anscombe rightly noted, one is not only responsible for one or two appropriate

<sup>2</sup>G.E.M. Anscombe, *Intention* (Ithaca, NY: Cornell University Press, 1957), 23.

<sup>3</sup>See *Catechism of the Catholic Church*, n. 1751.

descriptions of one's act, but *all* the appropriate descriptions of one's act. The object of an act is not limited to a few descriptions that an actor or other observers may specify, nor only to those immediate implications of one's act.

As I argued in my article, what seems to distinguish what May calls the "Grisez/May" view from my own is that whereas they give priority in the description to bettering *the situation* of the embryo (hence the language of "rescue"), I give priority in the description to the character of *the relationship* between the woman and the embryo.

Although Grisez/May do not begin by giving emphasis to the relationship, they acknowledge the need to describe the relationship by putting forth the description "foster parent." If they really saw the description of "rescue" as fundamental, why bother coming up with a description of the relationship between gestator and embryo? Who considers the relationship between the mine worker and the rescuer in deciding about the morality of rescue, or that between the drowning person and the rescuer? If rescue is really the appropriate moral paradigm, then Grisez/May should not need to even *address* the relationship between the gestating rescuer and the embryo(s) rescued. The fact that they do is at the very least evidence that this is not a straightforward rescue. As I argue in my paper, it is not best *described* as a rescue at all.

N.B. This is why I move from comparing the "adoption" vs. the "rescue" paradigm to discussing the "adoption" vs. "foster parent" paradigms. Comparing "adoption" vs. "rescue" is comparing apples and oranges. "Adoption" and "foster parent" (or even "wet nurse") are all attempts at finding the best analogy to describe the relationship between the gestating woman and the embryo.

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## Who Were Our First Parents?

Rev. Earl Muller, S.J., has served us well in the article "The Magisterium and Human Origins," *The National Catholic Bioethics Center* 3.3 (Autumn 2003), 501–515, by first presenting the teachings clearly and then offering us an illuminating commentary. I will present data to advance the dialogue where Muller left a challenging question mark: "*Homo sapiens*?" Were our first parents *Homo sapiens*? Yes, they could be no other.

Why not *Homo habilis*, who made stone artifacts in Ethiopia 2.5 million years ago? Or *Homo erectus*, like Peking man of five hundred thousands years ago? Or Neanderthal, who was for a time a contemporary with *Homo sapiens* some two hundred thousand years ago? The simple reason is that *Homo sapiens* alone could have possessed our advanced type of speech organs, whereas the others had linguistic deficits that disqualified them from taking part in the events of Eden. Lacking adequate linguistic abilities they lacked also the thinking abilities that are necessarily associated with the commission of original sin. Even though speech itself is not identified with thought, in effect, thought requires speaking ability through which to express and elaborate itself. God would not hold people responsible for original sin if they had not yet developed matching powers of reason; and reason develops in parallel with its supporting mechanism of adequate speech ability. Therefore *Homo sapiens* of some two hundred thousand years ago, who possessed modern speech organs, must be our immediate ancestor who committed original sin.

Theological inquiry into the fact of original sin must take into account pertinent findings in the fossil record. Careful evaluation of successive layers of fossils indicates, surprisingly, that for long periods of time *Homo sapiens* lived contemporaneously with *Homo erectus* in some areas (Java), and with Neanderthals in others (Europe),

though always in social isolation from each other. The artifacts characteristic to each are not found together.<sup>1</sup>

*Homo habilis*, *Homo erectus*, and Neanderthal fossils do not have the shape of the basicranium and upper vertebrae that can accommodate our very sophisticated type of speech organs and the neural substrate to support their functioning. This is verified in the anthropological sections of museum displays and is acknowledged by scientists. The type of comparatively primitive speech organs that *Homo habilis*, *Homo erectus*, and Neanderthal could have possessed were inadequate to produce our modern type of sophisticated, rapid, and well-articulated speech that can carry advanced spiritual thought.

The *Catechism of the Catholic Church* tells us that God “manifested Himself to our first parents from the very beginning” (n. 54). They were therefore capable of understanding this revelation, of cultivating it, and of teaching it to their children. The revelation included belief in God, in the afterlife, and in a code of commandments. *Homo sapiens* was capable, according to the fossil record, of advanced speech, and therefore of appropriating the primeval revelation and being responsible for its reception and transmission to the offspring.

We have what is called the two-tubed speech airway. This includes the vertically positioned larynx and pharynx extending from the trachea, then the sharp turn into the horizontal oral cavity. A constriction at the turn creates the two tubes. In them we format the “AAAH” vowels mainly in the pharynx, the “EEH” mainly in the oral cavity, and the “UUH” (sounds like “you”) in both

simultaneously. It also allows the formatting of the “GGGH” and “KKKH” stops, and of the articulation of consonants. For the meaningful calibration and articulation of rapid speech, these are absolutely essential.

The endowments of *Homo habilis*, *Homo erectus*, and Neanderthal lack this turn to the horizontal and the constriction into two tubes. Theirs is a long palate with a shallow tongue that allows for unrestricted breathing, but not for a sophisticated calibration of phonemes. If speech is slow and not properly articulated, only very short sentences can be understood. The meaning of long sentences would be lost because the beginning would fall out of the short-term memory by the time the end was spoken. Scientists ask us to test this by speaking a long sentence at one-tenth the speed at which we ordinarily speak.

We express thoughts by producing audible signals—formatted puffs of air is what they are—which are deciphered meaningfully by the hearer. When we engage in conversation our brains, speech organs, eyes, ears, faces, and our entire bodies get into the act. The billions of neurons of the brain—one hundred billion by recent estimate—become engaged or stand by for service if needed. Both the speaker and the listener keep track of the nuanced words and sentences in their short-term memories, anchor their thoughts upon them, and deduce meaning from them. The meaning of a sentence is usually not known until we hear the end of it. With the short-term memory to hold the entire sentence momentarily in view, we typically scramble the sequential verbiage into an emulsified whole, swirling together the subject, the predicate, the object, together with modifiers. Only then, with the entire sentence held intelligibly as in a bird’s eye view, with the concept in full comprehension of thought, do we grasp its meaning.

The speed at which all this is done is almost incredible. If one hundred muscles are engaged, and a speaker pronounces up to six syllables per second, and each syllable has 2.4 separate phonemes, the brain sends 1,400 stimuli in proper sequence and amplitude per second, and if so continued, 84,000

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<sup>1</sup>Documentation is available in Anthony Zimmerman, *Evolution and the Sin in Eden, A New Christian Synthesis* (Lanham, MD: University Press of America, 1998), now posted at: <http://www.CatholicMind.com/books/evolution/toc.htm>. See also Philip Lieberman, *The Biology and Evolution of Language* (Cambridge: Harvard University Press, 1984) and idem., *The Evolution of Uniquely Human Speech, Thought and Human Selfless Behavior* (Cambridge: Harvard University Press, 1991).

per minute, and 5,040,000 per hour to produce the speaker's thoughts. Shall we wonder that God bided his time until the human brain had developed adequately before He introduced Adam and Eve into the Garden which is a symbol of the initial endowment of sanctifying grace?

The non-*Homo-sapiens*, on the contrary, had a skull shape set upon the vertebrae with a configuration that could not accommodate our type of speech organs. Our type of tongue is thick and housed partially in the horizontal oral cavity and partially in the vertical air passage. If one were to place our tongue into a Neanderthal- or *Homo-erectus*-type body, the result would be a monster, with the "Adam's apple" or larynx in the chest. The long palates of *Homo erectus* and Neanderthal fossils indicate that they supported vocal tracts in which the tongue is long and thin and positioned almost entirely within the oral cavity.

Scientists do not claim that the earlier hominids were totally unable to speak, but that they lacked the ability to speak rapidly and to calibrate the phonemes audibly and sharply as we do routinely, so that both listener and speaker can connect subject, predicate, and modifiers in one conscious intellectual overview. The speech production by *Homo habilis*, *Homo erectus*, and Neanderthal could only have been limited, labored, and slow in comparison with that of *Homo sapiens*. So handicapped, they could not have compressed complex meanings into

the short-term memory. Their sentences were presumably short and simple.

When our Adam and Eve had achieved adulthood in speech ability, God called them and set them apart to be his favored people. As Genesis states it: "Then the Lord God planted a garden in Eden, in the east, and He placed there the man whom He had formed" (2:8). I think that the first human pair separated from other *Homo sapiens*, if such there were, and are the apex of our family tree. The human genome of each individual is over supplied with a wealth of genetic possibilities from which a random selection is made by sperm and ovum at meiosis in the early stages of development. In consequence, the incestuous congress of the offspring of our first parents was not a major biological problem. The random selections drew individuating genes from an immense bank of diversified genetic materials.

God called our *Homo sapiens* parents aside, revealed Himself to them, and endowed them with the gift of sanctifying grace. They lost it through original sin, but God forgave them after their confession, restored their gift, and helped our socially isolated *Homo sapiens* race with selective love from the time of our origins until today.

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*The National Catholic Bioethics Quarterly*  
introduces, in this issue, our quarterly political review.

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## Washington Insider

### **Congressional Impasse on Human Cloning**

Human cloning has been a serious public policy issue in the U.S. since the birth of “Dolly” the sheep in 1997. However, despite the introduction of several federal bills, considerable congressional debate, and approval of a human cloning ban by one chamber, Congress adjourned at the end of 2003 without taking final action on the issue.

A Human Cloning Prohibition Act (H.R. 2505) was overwhelmingly approved by the House of Representatives in 2001, but the Senate took no action, and the bill died when the 107th Congress adjourned at the end of 2002. In February 2003 the House again approved a similar bill (H.R. 534); but again the Senate took no action on this bill or its Senate companion (S. 245). These 2003 bills carry over into 2004, the second session of the 108th Congress, so only Senate approval (and the signature of President Bush, who supports a ban on cloning) would be needed for enactment.

Senators remain divided over two very different approaches to human cloning. S. 245, sponsored by Senators Sam Brownback (R-KS), Mary Landrieu (D-LA), and twenty-seven others, would ban use of the cloning procedure known as “somatic cell nuclear transfer” to create human embryos for any purpose. This is the policy now approved twice by the House. However, some senators instead support S. 303, a Human Cloning Ban and Stem Cell Research Protection Act, sponsored by Senators Orrin Hatch (R-UT), Dianne Feinstein (D-CA), and nine others. This bill would authorize use of the cloning procedure to mass-produce human embryos for research purposes, while seeking to prevent pregnancy and live birth involving cloned humans. Specifically, the Hatch/Feinstein bill would prohibit placing a cloned human embryo into “a uterus or the functional equivalent of a uterus.”

A number of scientific and patient advocacy groups oppose S. 245, claiming that it would block potentially promising medical research. The Catholic bishops’ conference, pro-life groups, and others opposed to human cloning oppose S. 303, seeing it as a case of two wrongs claiming to make a right: The bill would authorize human cloning itself, then prohibit the actions (implantation and gestation) needed to

allow a cloned human to survive. In effect, S. 303 would mark the first time a federal law defined a class of human beings it is a crime *not* to discard or destroy.<sup>1</sup>

This congressional debate has run largely, but not entirely, along lines already familiar from the abortion debate and from an earlier debate on federal funding of embryonic stem cell research. Some ethicists (including some members of the President's Council on Bioethics) and members of Congress favor some funding of research involving "spare" embryos from fertility clinics, but oppose specially creating human embryos solely to destroy them in research. Citing concerns similar to those expressed by environmental groups and watchdog groups that are critical of the biotechnology industry, some House members who claim a "pro-choice" position on abortion, such as Denis Kucinich (D-OH) and Bernie Sanders (I-VT), voted for the House-approved cloning ban; and Senator Mary Landrieu (D-LA), who generally opposes abortion restrictions, is an original co-sponsor of the companion Senate bill. At the other end of the spectrum, S. 303 is co-sponsored by Senator Orrin Hatch (R-UT), who has generally supported pro-life legislation. Senator Hatch has publicly argued that human embryos have no moral status as human beings unless they have resided in a mother's womb, and also that humans arising from the cloning procedure may not have the status of human beings even if they are born.<sup>2</sup>

While S. 245, the outright ban on human cloning, has more supporters than the rival bill, neither bill has acquired clear majority support in the Senate—not to mention the sixty votes needed to overcome a filibuster. The result is an impasse that may not end until events in the outside world convince Congress that it can no longer delay addressing this issue.

While federal action on cloning may be stalled, this has not stopped Congress from addressing the closely related issue of patents on human embryos. Nor has it put an end to legislative action on cloning in the states.

### **Federal Action on Human Patenting**

While many researchers have long wanted to use cloned human embryos to obtain genetically matched stem cells for possible future therapies, some have cited other uses for these embryos. For example, genetic material from patients with certain diseases might be used to mass-produce cloned embryos as "models" for those

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<sup>1</sup>See testimony of Richard M. Doerflinger on behalf of the U.S. Conference of Catholic Bishops before the Senate Commerce Subcommittee on Science, Technology, and Space, March 27, 2003, <http://www.usccb.org/prolife/issues/bioethic/cloning/test327.htm>.

<sup>2</sup>"I believe that human life begins in the womb, not in a petri dish." Statement of the Honorable Orrin Hatch, hearing before the U.S. Senate Judiciary Committee, March 19, 2003, [http://judiciary.senate.gov/member\\_statement.cfm?id=622&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=622&wit_id=51). "No doubt somewhere, some—such as the Ralians [sic]—are trying to make a name for themselves and are busy trying to apply the techniques that gave us Dolly the Sheep to human beings. Frankly, I am not sure that 'human being' would even be the correct term for such an individual heretofore unknown in nature." Statement of the Honorable Orrin Hatch, Hearing before the Senate Judiciary Committee, February 5, 2002, available at [http://www.senate.gov/~hatch/index.cfm?FuseAction=Topics.Detail&PressRelease\\_id=180430&Month=2&Year=2002](http://www.senate.gov/~hatch/index.cfm?FuseAction=Topics.Detail&PressRelease_id=180430&Month=2&Year=2002).

diseases, to be marketed to researchers in the same way that genetically tailored laboratory mice are now. To make such avenues commercially viable, some researchers would like to be able to patent cloned human embryos—or other embryos that have been created, or genetically modified, to have traits deemed useful by researchers.<sup>3</sup>

The U.S. Patent and Trademark Office (USPTO) has denied applications for patenting members of the human species, citing the Thirteen Amendment's ban on owning human beings. Its policy is to refuse patents on living organisms unless the adjective "nonhuman" is added. But an earlier USPTO policy against patenting living organisms in general was overturned in 1980 by the U.S. Supreme Court, which found no distinction between animate and inanimate inventions in the relevant federal statute.<sup>4</sup> And the current patent office has dropped its guard at least once, granting a patent on cloned organisms in 2001 that failed to add the qualifier "nonhuman."<sup>5</sup> In light of the growing pressure for marketable advances in cloning and genetic engineering, the policy against patenting humans could be highly vulnerable to a court challenge launched by biotechnology firms.

Responding to the challenge this summer was Congressman David Weldon (R-FL), a physician and prime sponsor of the House-approved cloning ban. On July 22, he offered an amendment to the Commerce/Justice/State appropriations bill for fiscal year 2004. The Weldon amendment, which was approved on the House floor by voice vote, reads: "None of the funds appropriated or otherwise made available under by [sic] this act may be used to issue patents on claims directed to or encompassing a human organism."<sup>6</sup>

The full Senate did not act on this bill. Instead, this and several other appropriations bills were combined into a Consolidated Appropriations Bill (H.R. 2673) near the end of 2003. Despite efforts by Senate conferees to derail or weaken the House-passed human patenting amendment, that provision remained in the final consolidated bill, which was approved by the House on December 8; the Senate will take up this bill when it resumes deliberations in January 2004.

The Biotechnology Industry Organization (BIO), a Washington-based umbrella group representing hundreds of biotechnology companies nationwide, led an unsuccessful effort to scuttle the Weldon amendment. In a September 2nd "fact sheet" attacking the amendment, for example, BIO claimed: "Investment and research into developing biotechnology products would halt if the amendment were enacted into law.... Treatments for tissue regeneration for burn victims, bone marrow regeneration after chemotherapy, and growth hormone deficiency are some conditions for

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<sup>3</sup>See Neil Munro, "The New Patent Puzzle," *National Journal* (March 2, 2002): 628–629.

<sup>4</sup>*Diamond v. Chakrabarty*, 447 U.S. 303 (1980). See testimony of Karen Hauda on behalf of the U.S. Patent and Trademark Office before the President's Council on Bioethics, June 20, 2002, <http://www.bioethics.gov/transcripts/jun02/june21session5.html>.

<sup>5</sup>Andrew Pollack, "Debate on Human Cloning Turns to Patents," *New York Times* (May 17, 2002), A12.

<sup>6</sup>See *Congressional Record* (July 22, 2003), H7274.

which lifesaving biotechnology therapeutics would not be available.”<sup>7</sup> Of course, none of these research areas rely on the ability to patent human embryos (or on the ability to use human embryos for research in general).

BIO’s fact sheet also claimed that the term “human organism” has no clear meaning and might be interpreted to encompass stem cells and tissues that are currently eligible for patenting. On this point, BIO apparently forgot that leading members of its own coalition had formerly stated that exactly the opposite is true. When Congress began considering federal funding of embryonic stem cell research in 1998, it had to decide whether funding of such research was prohibited by a federal law against funding experiments on human embryos (defined in that law as “human organisms” at a very early stage of development). At one hearing centering on this question, the most prominent embryonic stem cell researchers, NIH Director Harold Varmus and Thomas Okarma of the Geron Corporation (a leading member of BIO), testified that a stem cell is clearly not an “organism” and therefore not covered by the ban on funding embryo research.<sup>8</sup> BIO’s new claim that embryonic stem cells might be “organisms” in their own right ran directly counter to that testimony. Ironically, if BIO’s new claim were true, it would mean that federal funding for embryonic stem cell research violates federal law (because the research involves experimenting on stem cells which cannot clearly be distinguished from human organisms)—surely an unintended policy result of BIO’s new argument.

The real reason for BIO’s opposition to the Weldon amendment was that BIO does indeed want to treat some human beings as patentable “inventions.” This was apparent in a footnote to the BIO fact sheet, explaining the organization’s own stance on human patenting:

Only things that have been specifically altered in their physical make up through human intervention, and as a result differ from the corresponding products in their natural states, may be the subject of a U.S. patent claim. For example, a bacterium discovered in the wild may not be patented as a “thing,” but a purified composition containing the bacterium in a form distinct from how it is found in nature may be patented. Similarly, an animal or human produced by conventional reproduction—with no intervention by an “inventor”—would not qualify as a patentable “manufacture” because it is a product of nature. Living organisms that possess physical characteristics resulting from human intervention qualify for protection because such living organisms are no longer “products of nature.”<sup>9</sup>

The chilling implication of this policy stance is that any human created in ways other than “conventional reproduction,” and any human whose physical characteristics have been changed by technological intervention, should be seen not as a fellow

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<sup>7</sup>Biotechnology Industry Organization, fact sheet, “New Patent Legislation Sets Dangerous Precedent and Stifles Research,” September 2, 2003, <http://www.bio.org/ip/cloningfactsheet.asp>.

<sup>8</sup>*Stem Cell Research: Hearings before a Subcommittee of the Committee on Appropriations, U.S. Senate*, S. Hrg. 105-939 (Washington, D.C.: U.S. Government Printing Office 1999), 3, 7, 29, 71.

<sup>9</sup>See BIO “New Patent Legislation,” note 1.

member of the human race but as a “manufacture,” a commodity to be licensed, marketed, bought, and sold by the biotechnology industry. Groups lobbying in support of the Weldon amendment needed only to place BIO’s own language before members of Congress to prove that the amendment is urgently needed.

In a further irony, BIO enlisted the aid of patient groups that support embryonic stem cell research in its campaign to defeat the Weldon amendment. At BIO’s urging, the Coalition for the Advancement of Medical Research (CAMR) sent out alerts to the parents of children with devastating diseases, warning them that treatments for their children may be blocked by the amendment. These groups were still lobbying against the amendment even after BIO itself stopped opposing it ostensibly due to assurances by congressional sponsors that the amendment would not interfere with patents on stem cells. Yet the implication of BIO’s stance on human patenting was that biotechnology companies may want to assert an enforceable property interest in any human patient whose “physical characteristics” they have modified to prevent or cure disease. Patient groups lobbied vigorously for what they thought was an opportunity to have their children cured, never having been told that the real issue is whether their children may in effect be owned by a for-profit company. This was a new chapter in the continuing and tragic saga of patient groups lobbying against their own interests on this issue, by believing hyped promises for embryo research while ignoring or downplaying the real advances coming forward from morally noncontroversial cell therapies.

As of this writing, the fate of the Weldon amendment was tied to the ultimate fate of the end-of-year omnibus spending bill, which the U.S. Senate may or may not approve in January. If the omnibus bill falls, many federal programs will likely be funded by means of a continuing resolution that maintains 2003 spending levels and policies through September 2004, and this amendment would not go into effect.

### **Human Cloning Developments in the States**

The impasse on cloning in Congress has allowed individual states to set their own policies. In 2003, Arkansas and North Dakota approved complete bans on human cloning for any purpose, joining three other states that had already taken this approach (Iowa, Michigan, and Virginia). In addition, South Dakota, since 2000, has banned harmful experiments involving human embryos, including cloned embryos, and several other states may restrict research using cloned embryos depending on how their laws on embryonic and fetal research are interpreted.<sup>10</sup>

Beginning in 2002, states in several parts of the country began to consider strikingly similar bills to authorize human cloning for research purposes. What all these bills had in common was a commitment to allow the development of cloned human embryos into the fetal stage if that is demanded by the needs of research.<sup>11</sup> The California bill, for example—the only one of these bills to be enacted into law in 2002—stated that “research involving the derivation and use of human embryonic

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<sup>10</sup>See USCCB Secretariat for Pro-Life Activities, fact sheet, “Current State Laws on Human Cloning,” <http://www.usccb.org/prolife/issues/bioethic/statelaw.htm>.

<sup>11</sup>See Americans to Ban Cloning, “State Bills on Human Cloning,” March 26, 2003, <http://www.cloninginformation.org/info/ABC-State-Laws.htm>.

stem cells, human embryonic germ cells, and human adult stem cells from any source, including somatic cell nuclear transplantation, shall be permitted.” Since embryonic germ cells are obtained at about eight weeks of fetal development, and adult stem cells are generally obtained near or after birth, the implication of this bill was that researchers’ efforts to exploit cloned humans for their stem cells may move well beyond the embryonic stage. California’s chief restriction on cloning is that one may not use a cloned embryo to initiate a pregnancy that can result in “the birth of a human being.”<sup>12</sup> BIO was instrumental in promoting the California law as a model for other states in 2002 and 2003—ignoring its own June 2003 testimony to the President’s Council on Bioethics insisting that BIO does not support maintaining cloned human embryos past fourteen days of development.<sup>13</sup> This ever-expanding legal agenda may be partly due to recent scientific findings—several studies have found that “therapeutic” use of cloning to treat diseases in animals may require sustaining the cloned animals past the embryonic stage to harvest usable tissues.<sup>14</sup>

The end of 2003 saw further action along these lines. In December, the Massachusetts State Senate attached a provision, similar to the California law, to its version of a year-end budget bill, but the provision died when conferees from the state’s House of Representatives refused to accept it.<sup>15</sup> Finally, on December 15th, the New Jersey State Assembly gave final approval to a cloning bill that had already been

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<sup>12</sup>Ibid.

<sup>13</sup>See Illinois Biotechnology Industry Organization, “BIO State Government Relations Committee Meeting,” March 4, 2003, <http://www.ibio.org/upload/notesMarch4BIOlegismtg.doc> (reporting that national BIO was circulating the California law to its state affiliates as a model for other states); remarks of Michael Werner of BIO before the President’s Council on Bioethics, session 4, “Biotechnology and Public Policy: Embryo and Related Research,” June 12, 2003, <http://www.bioethics.gov/transcripts/jun03/session4.html> (BIO claims to support a fourteen-day legal limit on development of any cloned human embryo).

<sup>14</sup>See Robert P. Lanza et al., “Generation of Histocompatible Tissues Using Nuclear Transplantation,” *Nature Biotechnology* 20.7 (July 2002), 689–96. Regarding this effort to use cloning to produce functional kidney tissue for cows, the authors noted: “Because the cloned cells were derived from early-stage fetuses, this approach is not an example of therapeutic cloning and would not be undertaken in humans.” Ibid, 689. Lead researcher Robert Lanza later reversed his stand, insisting that this study in gestating and aborting cloned animal fetuses to obtain stem cells is indeed a model for human “therapeutic cloning.” See Do No Harm: The Coalition for Research Ethics, press release, “Reality Check: Proof of ‘Therapeutic’ Cloning?” March 10, 2003, [http://www.stemcellresearch.org/pr/pr\\_2003-03-10.htm](http://www.stemcellresearch.org/pr/pr_2003-03-10.htm). Another study, seeking to use cloning to correct an immune deficiency in mice, ultimately required developing the cloned mouse to the *newborn* stage to obtain therapeutically beneficial stem cells. See William Rideout et al., “Correction of a Genetic Defect by Nuclear Transplantation and Combined Cell and Gene Therapy,” *Cell* 109.1 (April 5, 2002), 17–27. For a critique of this study, see Americans to Ban Cloning, “Why the ‘Successful’ Mouse ‘Therapeutic’ Cloning Really Didn’t Work,” April 2002, [http://cloninginformation.org/info/unsuccessful\\_mouse\\_therapy.htm](http://cloninginformation.org/info/unsuccessful_mouse_therapy.htm).

<sup>15</sup>See Paul Nowak, “Mass. Budget Bill Passes without Embryonic Stem Cell Funding,” *LifeNews*, November 20, 2003, <http://www.prolifeinfo.com/bio148.html>.

approved early in 2003 by the State Senate, giving New Jersey the most extreme official policy on human cloning in the country.<sup>16</sup>

The New Jersey bill had been withdrawn from Assembly consideration in February 2003, after columnist Robert Novak and other observers publicly pointed out how potentially sweeping the bill's language is.<sup>17</sup> Yet the bill was revived without change in December and passed, after sponsors assured their colleagues that the bill is simply a show of support for "stem cell research." In fact, the New Jersey law has the same expansive language as the California law regarding the commitment to obtain embryonic, fetal, *and* adult stem cells from cloned humans. Potentially it is more extreme than California's law, because its only legal restriction on cloning is that researchers may not sustain a cloned human "through" the fetal *and* newborn stages to produce "a new human individual."<sup>18</sup> The implication here was that cloned fetuses may be aborted for their stem cells right up through the ninth month of pregnancy and that even a cloned newborn infant may not yet have the status of a human individual. On January 4, 2004, Governor McGreevey signed the bill into law.

The national leadership of BIO had gone out of its way to testify in support of the New Jersey bill.<sup>19</sup> This, and BIO's stance in support of patenting human beings who have been created or modified with technological assistance, should help clarify the issue that faces Congress. It is increasingly clear that the debate on human cloning is not just about the human embryo—it is not about disagreements on "when life begins." It is about an agenda for treating some classes of human beings, potentially at any stage of development, as "manufactures" and thus as mere commodities in an age of biotechnology. The prospect raised by these developments is nothing less than a new form of slavery, in which one class of humanity can produce and exploit (perhaps even buy and sell) other humans for profit, all in the name of human progress. It remains to be seen how many members of Congress will realize what kind of Brave New World is on the horizon—due in part to their own inaction.

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<sup>16</sup>Robert Schwaneberg, "Stem-Cell Research Bill Squeaks through Assembly," *Star-Ledger* (Newark), December 16, 2003.

<sup>17</sup>See T. Hester and K. MacPherson, "Stem Cell Bill Pulled after Flood of Dissent," *Star-Ledger* (Newark), February 11, 2003; R. Novak, "Christopher Reeve Republicans," February 5, 2003, <http://www.townhall.com/columnists/robertnovak/printrn20030205.shtml>.

<sup>18</sup>See Americans to Ban Cloning, "State Bills," note 11 above.

<sup>19</sup>Testimony of Michael J. Werner on behalf of the Biotechnology Industry Organization in support of New Jersey Senate Bill 1909, November 4, 2002, <http://www.bio.org/bioethics/tst200211.asp>.