SPEAK NOW, OR FOREVER
(BE FORCED TO) HOLD YOUR PEACE: THE
CONVENTIONS AGAINST ALL FORMS OF
DISCRIMINATION AND INTOLERANCE
AND THEIR CHALLENGE TO FREEDOM
OF EXPRESSION IN THE AMERICAS

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INTRODUCTION

In June 2013, the Organization of American States (the “OAS”) adopted the two sister Inter-American Conventions Against Racism, Racial Discrimination and Related Forms of Intolerance, and Against all Forms of Discrimination and Intolerance (hereinafter, “CAAFDI”). These new instruments greatly broaden the scope of the prohibited grounds of discrimination beyond that of all other treaties on the matter. Furthermore, these instruments create a wide range of state obligations and duties in promoting equality and eliminating discrimination and intolerance. At the time of this writing they have not been ratified by any state in the region.

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2 Id.

3 Id.

4 Status of Ratifications, OAS.org, http://www.oas.org/dil/treaties_signatories_ratifications_year_text.htm#2013 (last reviewed March 4, 2016). As of this writing, Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance, had been signed by 11 of the OAS members, and Inter-American Convention
Although there are many aspects of these treaties that may be subject to criticism in matters of both law and policy, this paper deals exclusively with the issue of “intolerance” as a forbidden act or expression, including the duties undertaken by the states with regards to this novel concept.

The central claim of this work is that the definition of intolerance and the state’s duties to combat it – under both Conventions – would fundamentally alter the content and protection of freedom of expression, as we have come to know it and protect it in the Inter-American Regional System.

By reviewing the projected CAAFDI under the standards set out by Inter-American Court and Commission on Human Rights, it becomes clear that this proposal would never pass muster if it were enacted as a matter of municipal legislation, for it would infringe on the core elements of freedom of expression.

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Against All Forms of Discrimination and Intolerance had been subscribed to by 9 of the member states, with no ratifications for either one.

To name a few, the Canadian delegation expressed reservations not only with respect to potential conflicts with freedom of expression, but also with freedom of religion and association. The decision of the negotiators to establish a threshold of only two ratifications for the entry into force of the Conventions under Article 20 is preposterously low, and it would not reflect a broad agreement among the states of the Americas on these issues that would justify enshrining them in international law as a multilateral treaty; and Article’s 4.viii provision on incorporation or integration of international jurisprudence into the Convention standards must receive proper attention by those called upon to vote on whether or not to adopt the conventions, keeping in mind the potential outcomes that his would entail and the substantive differences that exist between different regional regimes.

While it is true that several instruments have referred to intolerance in the past, it is the case that no resolution, declaration or binding agreement has previously attempted to define what intolerance means as a legal concept. The closest would be the 1995 United Nations Education and Scientific Cultural Organization (hereinafter “UNESCO”) Declaration of Principles on Tolerance, which in any case attempted to define the concept positively. See, UNESCO Res. 5.61, Declaration of Principles on Tolerance (Nov. 16, 1995); see also, United Nations General Assembly, G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 171 (Nov. 25, 1981), which considered “intolerance and discrimination” as a single action, and adopted language commonly used for the conceptualization of discrimination; World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, Agenda item 5, adopted on September 8, 2001 in Durban South Africa, U.N. Doc. A/CONF.189/5 (Sept. 8, 2001); Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001); Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001); Council of Europe, Comm’n against Racism and Intolerance, ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing, COE Doc. CRI (2007)39 (June 29, 2007).
This work is divided into three sections. The first part is devoted to a brief overview of the drafting history of the proposed Conventions. The purpose of the overview is to illustrate the concerns of the negotiating states with respect to the impact these instruments will have on freedom of expression and how they went unanswered throughout the process.

Part two looks at the way in which the Conventions are likely to be interpreted and applied in the states that become parties to them, showing that its provisions would directly undermine the core elements of freedom of expression, as clarified and expounded by the Commission and the Court.

The third and final section takes a look at the way in which these new Conventions would interact with the American Convention on Human Rights. This includes the possibility that the new Conventions may fundamentally alter the human right of freedom as it been acknowledged and protected to this day, and what this would mean for the ongoing project of international human rights as a whole.

I. BACKGROUND TO THE CONVENTIONS AND DISAGREEMENT OVER THEIR CREATION

In 2000, the General Assembly of the OAS (hereinafter the “General Assembly”) first adopted a resolution calling on the Permanent Committee on Political and Juridical Matters (hereinafter the “Permanent Committee”) to “consider the necessity” of drafting an instrument to “prevent, punish and eradicate racism and all forms of discrimination and intolerance.” This first resolution constituted a mandate for the Permanent Committee to test the waters and determine whether there was political will to create such an instrument.

Through Resolution No. 1774, the General Assembly instructed the Inter-American Juridical Committee (hereinafter the “Juridical Committee”) to draft an analysis of the issue of discrimination in support of the work that had been tasked to the Permanent Committee. This analysis should take into account the responses of states to the

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7 OAS G.A. Res. 1712 (XXX), Elaboración de un Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia, (June 5, 2000).
8 Id.
questionnaire⁹ issued by the Permanent Committee, as a way of gathering their views on the matter.

The United States, unsurprisingly in light of its general approach to international law, made a point of noting that it did not consider a new Convention to be necessary and that the OAS should concentrate on enforcement of the existing instruments on the matter.¹⁰ This position was mirrored by Antigua and Barbuda.¹¹ It is noteworthy that only 13 states from the entire region actually answered the inquiry from the Juridical Committee, and only 11 of those answered that they considered the idea of creating the new Conventions as worthy of their efforts.¹²

The conclusions of the Juridical Committee in its response to the Permanent Committee reads in part that “it is not advisable to undergo the venture of negotiating and concluding a general Convention to prevent, punish and eradicate racism and all forms of discrimination and intolerance, insofar that this may be redundant and would produce an overlap with the consequence of generating serious and inevitable problems of interpretation, and would generate doubts and confusion over the determination of which rights and duties of the states would be part of former agreements and the new one.”¹³

With regard to the definition of intolerance, the draft proposals for the Convention went through three distinct phases. One issue that proves to be prominent in the drafting history is how little attention was paid to the definition of “intolerance” itself in the course of the eight years of negotiations, especially when we consider that its prohibition and eradication is one of the centerpieces of the proposal and directly linked to the state duties of prohibition and punishment of expressions of intolerance.

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⁹ Department of International Law of the Secretariat for Legal Affairs of the Committee of Juridical and Political Affairs, Preparation of a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance (Background and Questionnaire), OEA/Ser.G CP/CAJP-1687/00 rev.2 (January 16, 2001).

¹⁰ Department of International Law of the Secretariat for Legal Affairs of the Committee of Juridical and Political Affairs, Elaboración de un Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia: Estudio del tema en el sistema interamericano y en otros sistemas internacionales, SG/SLA DDI/doc.6/01, 10 (July 12, 2001).

¹¹ Id. at 4.

¹² Id.

Ultimately, concerns over the vagueness and breadth of the definition, and the potential conflicts between punishment of intolerance and the exercise of free speech, were only raised by a handful of states and civil organization. It does not appear to have been taken to heart by the Drafting Working Group (hereinafter the “Working Group”), or the rest of the negotiating states. As shown by the travaux préparatoires, during the process several states requested the opinion of the Inter-American Commission on Human Rights (hereinafter the “Commission”) in regard to the potential “free speech and intolerance conflict,” with the purpose to consider it when settling on a definition. However, the final concept was adopted without the record showing that the Working Group ever received or considered the Commission’s thoughts on the matter.

A. First Draft and Canadian Objections

The Working Group adopted the first draft of the definition of intolerance in April 2006 after consulting with states. It read:

“acts or manifestations of intolerance are those that convey disrespect for, denial of, and contempt for human dignity and for the richness and diversity of the world’s cultures and the modes of expressing the qualities of human beings.”

The response (or lack thereof) from the negotiating states to this proposal is of little use in explaining what they thought of it. If they had concerns over the matter, the travaux préparatoires do not show them. The only recorded concerns were those of Argentina, which stated, “The proposed understanding of ‘intolerance’ in Article 1.5 is so broad that it could extend to criminal acts and to other acts that are discriminatory but not criminal.” However, it is not very useful since it is not clear whether

14 Translated by the author, as it appears in the first draft of the proposed Convention Against Racism and All Forms of Discrimination and Intolerance, Article 1.5. Committee on Juridical and Political Affairs, Anteproyecto de Convención InterAmericana contra el Racismo y Toda Forma de Discriminación e Intolerancia, OEA/Ser.G CP/CAJP-2357/06 (April 18, 2006).
15 State of Argentina, Comments by Member states on the Preliminary Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, OEA/Ser.G CAJP/GT/RDI-31/06 (November 3, 2006).
the delegation’s fears were aimed at the broadness of the definition and the possibility of its overreach, or that it did not reach far enough.

Although the official documents of the record do not show other states voicing hesitations on the matter, subsequent consolidated reports on the drafts prepared by the Working Group make a note of the concerns expressed by “some delegations.”16 The reports suggest that the problem shall undergo consultation with the Office of International Law on the proposed definition and its background. There is however no record of a response from the aforementioned Office.

The Canadian delegation’s official comments are particularly illustrative of the concerns with which we deal. Since the beginning, Canada consistently opposed the inclusion of a definition of intolerance to the draft Convention. Its commentaries and proposals show direct concern over the conflict that would arise between the proposal and existing human rights instruments.

In early 2008 the Working Group had prepared a consolidated draft proposal incorporating the comments and recommendations made by the states to the first drafts. By March, Canada had advocated for the elimination of “intolerance” as an operative concept.

In discussing then Article 5 – which would later on become part of current Article 4 of the CAAFDI on the duties of the state – Canada proposed a clause under which the identification of discriminatory acts and the appropriate responsive measures would be done “taking into consideration human rights and fundamental freedoms.”17 The footnotes in the Canadian Comment Report clearly illustrate their apprehensions to a proposed framework that favored prohibition heavily over other possible measures to combat discrimination and intolerance.18 Canada argued that the rationale for their newly proposed clause was “to ensure that any measures taken are consistent with states’ other human rights obligations.”19

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16 Committee on Juridical and Political Affairs, Preliminary Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, OEA/Ser.G CP/CAJP-2357/06 rev. 7, 8 (May 8, 2007). (consolidation of state responses)
18 Id. at 2, n. ii.
19 Id.
Dealing with the proposed Article 5(i) — which would then become current Article 4(i) — Canada commented negatively and suggested rewriting much of it since “The broad limitations called for in this paragraph could lead to clashes with other human rights, including freedom of expression (and in some cases freedom of religion)… What about personal views to that effect?” Further, Canada commented that, in general, the Convention should not consider the concept of “private activities” in the way in which it was currently being used throughout the proposal since “its scope is overly broad and could be construed as condoning, even calling for government action that would go beyond protecting people from discriminatory acts and their consequences to infringing guarantees of freedom of expression and belief as well as increase the role of the government in people’s private lives to an unacceptable level.”

Canada’s concerns were voiced consistently to no avail, as reflected in the final version of the CAAFDI that came out of the negotiations process. The lack of reception of its suggestions and concerns led to Canada’s official withdrawal from the negotiations on the treaty proposal by November of 2010, justifying its decisions by affirming that it “continue[d] to be concerned that many provisions of the current draft may undermine or be incompatible with international protection for human rights such as freedom of through, belief and expression.”

B. Second Version After the 2007-2008 Period

By May 2008 the drafts of the treaty had undergone a series of modifications prompted by the comments of states and civil society organizations alike. However, the original concept of intolerance set out in the preliminary draft was almost unchanged, with the exception of

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20 Permanent Mission of Canada, supra note 15, quoting from the consolidated text of the draft conventions at page 2, “For the purposes of this Convention, and based on the definitions in the preceding Article and the criteria set forth in Article 1.1, the following are among the measures or practices that must be classified as discriminatory and prohibited by the state: (i) Public or private state financing support provided to racist and of unlawful discriminatory activities; or that promote intolerance, including the financing thereof”.

21 Id. at 3, n. iii

22 Id. at 4, n. marked as (*)

minor modifications. Thus, the second iteration of the definition was stated as “the set of acts or manifestations that convey disrespect, rejection, or contempt for human dignity and the richness and diversity of the world’s cultures, religions, ideologies, traditions, and human forms of expression, quality, and ways of being.”

As stated, by this point in time Canada had already requested the deletion of this concept altogether. Some unidentified delegations had expressed their concern that “the limitation in this Article may be considered a restriction on freedom of expression....”

On January 22, 2009, the Working Group hosted Ariel Dulitzky – former Assistant Executive Secretary for the Commission – who offered his comments on the working document. In regard to the definitions, he cautioned that if the decision was made to keep the proposed definition of intolerance, “a greater conceptual effort is[would] needed to provide it with specific content and not transform it into an all-encompassing concept entailing the prohibition by this Convention of many legitimate behaviors in democratic societies,” in which political dissent will end up constituting a prohibited form of intolerance.

In a similar manner, and in reference to the same working definition of intolerance, the Juridical Committee weighed in on the matter through a written note issued on March 2010 to the Working Group. It echoed Dulitzky’s criticism in that the definition was “too broad and liable to be understood as including dissent, which is rather a characteristic of any democratic system.”

These observations were the first and most blunt criticisms to the proposal at that time. The concern was clear enough. As outlined, the prohibition of intolerance would no doubt involve a clash with the exercise of freedom of expression and perhaps other human rights. Yet, confronted with such warnings, the Working Group and the negotiating
states not only refused to back off; they doubled down and moved towards a definition that would place even greater and more direct restrictions on freedom of expression.

C. Final Version

Although not related with our discussed topic, it should be pointed out that by 2010 the negotiations had become deadlocked. The most contentious issue in the negotiations had been the scope of Article 1 with regards to the forbidden grounds or suspect categories of discrimination that were to be included in the final instrument. There was no agreement to be had between the states. Because of the impossibility to move forward with the negotiations, Antigua & Barbuda forwarded a proposal under which the existing draft convention would be split into two different instruments: a convention focusing on racism and racial discrimination and an additional protocol focusing on discrimination and all forms of intolerance. Thus, the negotiating parties adopted the decision to split the proposal which led to the approval of the two sister Conventions.\(^{28}\)

In April 2012, roughly a year before the final conventions were adopted, the Working Group continued to press on with the preparation of the drafts through “informal meetings” held in Washington, D.C. At the time, the definition of intolerance was unchanged from the previous iteration adopted in 2008.\(^{29}\) The Mexico representatives once more indicated that the delegations were awaiting a statement by the Commission on the scope of freedom of expression.\(^{30}\)

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\(^{28}\) See, Committee on Juridical an Political Affairs, Report of the Chair Presented to the Committee on Juridical and Political Affairs at the meeting of May 3, 2011, on the Activities of the Working Group during the period 2010-2011, CAJP/GT/RDI-175/11 rev. 5 (May 11, 2011). Although the official documents do not reflect the nature of the disagreement, some commentators have suggested that the impasse was reached on account of the inclusion of sexual orientation and gender identity and expression as forbidden grounds for discrimination. The states comprising the Caribbean Community (CARICOM) would not support the inclusion of said categories because of the lack of consensus on the issue of homosexuality within their countries and persistently objected throughout the negotiations process. See, Awaz Raoof, *The Inter-American Anti-Discrimination Conventions and the Concealed Challenges Ahead*, Oxford Human Rights Hub Blog (July 3, 2013), at: http://ohrh.law.ox.ac.uk/the-inter-american-anti-discrimination-conventions-and-the-concealed-challenges-ahead.

\(^{29}\) Supra, note 22.

\(^{30}\) It is unclear whether that statement by the Commission was in fact issued, but it is not available with the rest of the existing documentation on the drafting of the sister conventions. See, Committee
In March 2013, merely a month away from the adoption of the final version, the Mexican delegation presented its final definition suggestion, which would ultimately end up enshrined in the CAAFDI. Mexico’s proposal would consider as intolerance not only the disrespect, rejection or contempt for the dignity of human beings, but also for their “characteristics, convictions, or opinions.” This proposal would be accepted and agreed upon by the negotiating parties on April 2, 2013.

The negotiation process concluded after almost 8 years with the approval of the sister Conventions in June 2013. As we have seen through this brief outline, there were several instances in which the drafters were forewarned, both by the negotiating states and by independent third parties, that there were serious concerns with respect to the imminent conflict between the prohibition of intolerance and the exercise of freedom of expression.

It seems quite remarkable that, as late as a year before the agreement on the definition, and seven years deep into the negotiations process, the Working Group was still holding out for a statement on behalf of the Commission on whether or not the instruments would be compatible with existing human rights obligations. And yet, in spite of this, the Working Group chose to ignore the concerns and to press on and adopt a definition even more controversial than the previously criticized ones.

**D. Prohibition of Intolerant Actions and Expressions as Legitimate Restrictions on Freedom of Expression**

It is clear that most states either supported the inclusion of “intolerance” as a forbidden action or expression in the Convention or
were at least indifferent or oblivious to its possible effects. The *travaux préparatoires* show no state defending the definition in the face of the criticism raised against it throughout the process. To the best of our knowledge, the only organization that went on the record defending the definition of intolerance as a forbidden act or expression under the CAAFDI was the Inter-American Institute for Human Rights (the “IIHR”), an institution based in Costa Rica, which shares direct ties to the Commission and the Court, both of which are members of its general assembly.

The IIHR issued an extensive comment on the working document and on the second definition of intolerance adopted in 2008.³⁴ The comment acknowledged that the concept had a breadth that would make it difficult to implement. It also included that racism and discrimination would express or would be manifestations of intolerance. Lastly, it would be best if, instead of conceptualizing intolerance, the Conventions specified manifestations of it.³⁵

More importantly, the IIHR defended that the prohibition of manifestations of intolerance was not an unlawful restriction to freedom of expression since this restriction would fall under Article 13(5) of the American Convention.³⁶ This states that “the expression ‘any other similar (lawless) action’ found in the Convention would broaden the scope of this standard and transcend any apology and may be extended to other manifestations.”³⁷

Is the IIHR correct in its assessment? Its reasoning in favor of the penalization of ‘intolerance’ leads toward the question of what are the permissible limits or restrictions on freedom of expression under the

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³⁴ Supra, note 22.
³⁶ OAS, *American Convention on Human Rights*, Article 13(5), “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”
³⁷ Supra note 33, at 18.
American Convention. It also suggests the question of whether the proposed new restrictions of the CAAF DI are in line with those permitted, or if they go beyond them in ‘violation’\textsuperscript{38} of the already recognized right of freedom of expression.

II. FREEDOM OF EXPRESSION AND ITS PERMISSIBLE RESTRICTIONS

The legal structure of the right to freedom of expression in the American Convention is “probably the international framework that provides the greatest scope and the broadest guarantees of protection to the right of freedom of thought and expression”\textsuperscript{39} in any of the human rights regimes around the world. The Commission has pointed out that the wording of Article 13 “is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas.”\textsuperscript{40}

The high premium placed on the protection of freedom of expression stems from different grounds. Most importantly, this freedom is linked to the first and foremost of all liberties, “our right to think by ourselves and share our thoughts with others.”\textsuperscript{41} Also, both the Inter-American Court and the Commission have underlined that the “importance of freedom of expression within our catalogue of human rights stems from its structural relationship to democracy,”\textsuperscript{42} and that the exercise of this right is not only necessary for individual fulfillment of the individuals that express themselves, but also for the consolidation of truly democratic societies in which there can be a “public, plural and

\textsuperscript{38}Quotations are used in this case because, as discussed below, there is an unresolved issue on whether there can be a violation of the Convention if the new instruments have the same legal hierarchy than the American Convention itself.


\textsuperscript{41}Rapporteur Report, supra note 39, ¶ 7.

open deliberation about the matters that concern us all as citizens of a given state.”

Finally, and very much in line with the objections of the Canadian Delegation, the Inter-American case law explains that freedom of expression is a key instrument for the exercise of all other fundamental rights of association, religious freedom, education and many others.

The Inter-American System bodies have greatly clarified the types of protected speech under the right to freedom of expression. It includes “the right to speak, that is, to express one’s thoughts, ideas, information or opinions orally;” to write (and in particular, to write opinion pieces); and to disseminate spoken or written expressions in order to communicate them to the greatest number of people.

As a matter of principle, under the American Convention all forms of speech are protected by the right to freedom of expression, independently of their content and degree of government or social acceptance. This means that the protections afforded are extended to speech that is “offensive, shocking, unsettling, unpleasant or disturbing to the state or to any segment of the population.”

Further, there are certain types of speech that are specially protected under the American Convention, including political speech and speech involving matters of public interest, and speech that is an element of the identity or personal dignity of the person expressing them. All of them come into play with respect to the CAAFDi, in particular as it relates with religious speech. It is often deemed as offensive when touching upon issues of morality. The case law has emphasized that the right of freedom of expression is “the right of the individual and the entire community to engage in active, challenging and robust debate.

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43 Rapporteur Report, supra note 39, para. 8.
44 Id. at para. 9.
45 Id. at para. 22.
47 Rapporteur Report, supra note 39, para. 25.
about all issues pertaining to the normal and harmonious functioning of society."

To be sure, freedom of expression is not unlimited. While broadly and robustly protected under the American Convention, there are some types of expressions that are simply not protected as free speech. And, within the realm of the speech that is protected, states may still enact certain limitations, so long as they are acceptable under the Convention’s framework.

The unprotected speech exceptions seem to be inapposite to this case. This is because Article 13(5) excludes from protection specifically “propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any similar action.” It is a multipart requirement, insofar that it entails the “advocacy of hatred” be based on one of the explicit grounds (national, racial or religious). Such advocacy incites violence or similar actions of equally grave and illegal nature. This is a much higher and stricter threshold for the exclusion of protection than the one written into the CAAFDI.

The Commission has said that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence must be backed by “actual, truthful, objective and strong proof that the person was not simply issuing an opinion, but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective. Acting otherwise would mean admitting the possibility of punishing opinions, and all the states would be authorized to suppress any kind of though or expressions.”

As for the limitations admissible under Article 13(2), the Inter-American System bodies have developed a three-part test to control their legitimacy. This test is applicable to all manifestations of state authority that affect the full exercise of freedom of expression, including legal and constitutional provisions.

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The first requirement under the three-part test is that the limitations to freedom of expression must establish, restrictively and clearly, in the most specific terms possible, the conduct that is subject to liability. Indeed, “vague, ambiguous, broad or open-ended laws, by their mere existence, discourage the dissemination of information and opinion out of fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression.”

This is squarely applicable to the definition of intolerance in the CAAFDI.

It could be objected that the state has a duty to domesticate or incorporate the Conventions into the domestic legal order through its own legislation. Also, that it is at this point in time that it must clearly define the prohibited acts or expressions of intolerance. But even then, the state is bound by the definitions set out in Article 1 of the CAAFDI so that it cannot fundamentally alter or restrict the concept of intolerance as adopted in the conventions. There would be no point to there being a definition at all. Additionally, “laws that limit freedom of expression


54 CAAFDI, supra note 1, at Chapter III, Article 7.

55 This holds particularly true for states adhering to a regimes with mechanisms of direct incorporation or application of international human rights treaties to their domestic legal system in their constitutions, without need for a subsequent act of incorporation. For example, in the Colombian legal system treaty terms become constitutional rules in themselves by way of incorporation through Article 93 of the Colombian Constitution, so that constitutional rights are interpreted in light of the treaty norms. Under the direct application scheme of the Colombian Constitution, if the state becomes a party to the CAAFDI, its courts, resorting to the definition that has been put in place, could directly enforce the new right to protection from discrimination. On the other hand, when it comes to states under regimes that generally require explicit acts of incorporation, such as the United States or Chile, there are cases in practice where the incorporation statutes or understanding have differed from the terms defined in the treaty norms, but this has been protested by treaty monitoring bodies. One such example would be the United States understanding issued at the time of the Senate’s advice and consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, under which mental pain or suffering refers to “prolonged mental harm,” which is not part of the treaty’s definition under Article 1. This has been met with criticism from the Committee Against Torture, that in turn has ‘recommended’ the
must be written with such clarity that any sort of interpretation is unnecessary.” 56 Even specific judicial interpretations are not sufficient to compensate for overly broad formulations. 57

Second, in order for restrictions to be legitimate under the American Convention, the imposition of liability must constitute a necessity in order to protect the rights of others. The Commission has made it clear that ‘necessity’ is not synonymous with “useful, reasonable or convenient,” 58 but rather that there must be a clear and compelling need for its imposition, for the “objective pursued cannot be reasonably accomplished by any other means less restrictive to human rights.” 59 The Inter-American Court of Human Rights and the Commission have also affirmed that there is a stricter standard when it comes to the test for the necessity of limitations whenever dealing with expressions concerning matters of public interest, private citizens involved voluntarily in public affairs, or political speech and debate. 60

Third, the Inter-American system bodies have specified that in cases where limitations to freedom of expression are imposed for the protection of the rights of other, it is necessary for those rights to be clearly harmed or threatened. This must be demonstrated by the authority imposing the limitation or by the party requesting it. Of course, “if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary.” 61

United States that it “ensure[s] that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ as set out in the state party’s understandings...” Committee Against Torture, Conclusions and Recommendations Relating to Report Submitted by the United States, CAT/C/USA/CO/2 (July 25, 2006).


59 Id. at para. 85.


Finally, when it is concluded that a right to reply or correct is not sufficient to secure the rights of others, and legal liability must be imposed as a necessity, resort to this limitation of freedom of expression must in any case comply with the requirements that: i) there must be existence of genuine malice in which the author acted with the intent of causing actual harm, knowingly disseminating false information;\footnote{Id. at para. 109.} ii) that the party alleging harm must prove that the statements were false and that they effectively caused said harm\footnote{Rapporteur Report, \textit{supra} note 39, para. 109, citing \textit{Case of Herrera-Ulloa v. Costa Rica}, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 132 (July 2, 2004); \textit{Commission, Arguments before the Inter-American Court of Human Rights in the Case of Herrera-Ulloa v. Costa Rica, cited in Case of Herrera-Ulloa v. Costa Rica, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 101.2.1} (July 2, 2004); (Commission, \textit{Arguments before the Inter-American Court of Human Rights in Ricardo Canese v. Paraguay, cited in Ricardo Canese v. Paraguay, (ser. C) No. 111 ¶ 72.0-p) (Aug. 31, 2004).} and; iii) that only facts, and not opinions, are susceptible to judgments of truthfulness or untruthfulness.\footnote{Kimel \textit{v. Argentina}, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 93 (May 3, 2008); \textit{Tristán Donoso v. Panama}, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 124 (Jan. 27, 2009).} “For this reason, nobody may be punished for expressing opinions about other persons when such opinions do not imply false accusations of verifiable facts.”\footnote{Rapporteur Report, \textit{supra} note 39, paragraph 109.}

A. Would the CAAFDI Survive Under the American Convention Standards?

As adopted, intolerance is “an action or set of actions or expressions that denote disrespect, rejection, or contempt for the dignity, characteristics, convictions or opinions of persons for being different or contrary. It may manifest itself as marginalization and exclusion of groups in conditions of vulnerability from participation in any sphere of public or private life or violence against them.” States that ratify it acquire an obligation to prohibit and punish intolerance domestically. How do the CAAFDI and its anti-intolerance framework stack up if reviewed under the standards set by the Inter-American System for the protection of freedom of expression?

Intolerance is referred to as ‘an action or set of actions or expressions’ that ‘denote’ something. Because the conventions make this distinction of actions and expressions, we must conclude that the
definition’s scope reaches not only non-verbal acts, but also pure speech and opinions.\textsuperscript{66}

The definition of intolerance requires no actual damage or harm in order for the unlawful conduct to materialize. Also, it makes expressive actions and expressions in general illegitimate by their mere utterance. This is illustrated by the use of the “\textit{may manifest}” clause with regard to the possible effects, which implies that while these outcomes are possible or even probable, they need not exist for the act of intolerance to be considered as such.

With regards to the ‘targets’ of intolerant actions or words, the definition bundles together “dignity, characteristics, convictions or opinions.” The inclusion of ‘dignity’ is subject to criticism in terms of its vagueness. While human rights literature acknowledges its character as a basic principle of international human rights law, it is nonetheless true that this concept/idea/principle is one of the most debated and perhaps even controversial concepts in the field. This is primarily because of the “multiplicity of different understandings of dignity that diverge from and sometimes contradict one another.”\textsuperscript{67} This controversy and lack of agreement on what dignity entails and the ways in which it may be ‘disrespected or rejected’ leads to the conclusions that the term is hardly clear and unambiguous enough to pass the clarity test required for restrictions on freedom of expression.

The bundling of these four ‘targets’ also fails to acknowledge the differences in kind between personal characteristics on the one hand and convictions or opinions on the other. While the former may be considered as immutable\textsuperscript{68} and not subject to willful changes, both opinions and convictions are acts of the human will, and therefore are subject to transformation. Not only is it possible for these to change over time, but there is a recognized and protected human right of persons to be able to

\textsuperscript{66} To conclude otherwise would mean that the drafters incurred in redundancy, since everything besides speech would already have been covered by the reference to “\textit{actions or sets of actions}.” It can be reasonably assumed that different words are chosen for a reason and that they must mean different things.


\textsuperscript{68} A proposition that is of itself open to debate, since ‘characteristics’ involve distinguishing traits or qualities, of which many are not set and are open to change or variance by human will as is the case with personality, virtues, vices, etc.
alter them freely,\(^6\) which presupposes to some extent that the rights holders may be exposed to ideas different from their own. Also, they will be opposed, questioned and rejected as a necessary occurrence for change of one’s own views to occur. Furthermore, not only is this possible but we have even come to expect it in an open and pluralistic society.

The ‘message’ conveyed or denoted by expressive actions has to be one of “disrespect, rejection or contempt.” There seems to be a substantive difference between the three. Rejection as a term is not a qualifying adjective but a noun, which in turn is derived from the action of rejecting that merely refers to “refuse[ing] to believe, accept or consider” something.\(^7\) The meaning of the term ‘rechazar’ (to reject) which is used in the Spanish version of the CAAFDI – equally authoritative as the English version\(^8\) – means either “to contradict what someone expresses or not to admit what he or she proposes or offers” or “to show opposition or lack of appreciation of a person, group or community.”\(^9\) In either case, the term denotes no animus and simply refers to an action. Further, it is the very essence of what any debate or argument entails.

‘Contempt’ and ‘disrespect’ fare no better. Webster’s Dictionary defines contempt as “a feeling that someone or something is not worthy of any respect or approval” thereby linking it to disrespect or disapproval for someone or something. Colloquially the word is used to convey a higher level of dislike for that which is being assessed, or even disdain or scorn. In this sense, it appears as a more qualified concept than mere rejection, yet it still remains as an unclear notion for purposes of drawing a line of what sorts of actions or expressions fall in and out of bounds without sweeping too broadly in the restriction effort. Another interesting aspect is that the chosen words in the English and Spanish versions of the

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\(^6\) See American Convention on Human Rights, Article 12.1 on Freedom of Conscience and Religion; the same may be said for freedom of thought and expression, which can only be free if it is open to change in the face of error and in pursuit of truth.


\(^9\) “Contradicir lo que alguien expresa o no admitir lo que propone u ofrece” or “Mostrar oposición o desprecio a una persona, grupo, comunidad” [“To contradict someone’s idea or to disagree with their proposition” or “to show opposition or contempt to a person, group or community”], Real Academia Española de la Lengua [Royal Academy of Spanish Language], Rechazar [to reject], http://lema.rae.es/drae/?val=rechazar (emphasis added). OXFORD SPANISH DICTIONARY (4th ed. 2008).
CAAFDI don’t seem to capture the same meaning or gravity. The Real Academia Española de la Lengua – the official Spanish dictionary – defines its Spanish counterpart of contempt, ‘desprecio,’ as simply “lack of appreciation,” which seems of lesser severity than the meaning of ‘contempt’ as unworthy of any respect or approval.

Finally, ‘disrespect’ or ‘irrespeto’, in the English and Spanish versions respectively, both refer to lack of respect, which is to have a feeling of admiring someone or something that is good or valuable, or to which some deference is due. Respect is certainly an attitude (although it is defined as a feeling) that may arguably be owed to all persons insofar as they are persons. But to use it in reference to opinions or convictions is an open invitation for abuse since, if applied strictly, would require giving deference, or holding admiration as good or valuable to any idea for the mere fact that it is different from the ones held by the subject (i.e., totalitarian political ideas must be given deference out of the fact that they are different and therefore protected under the terms of the CAAFDI).

Under the duties of the state set out in Chapter III of the CAAFDI, the states “undertake to...prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of... intolerance,” the private support to activities that “promote” intolerance, including the financing thereof; the publication, circulation and dissemination, including through the...
internet, of any materials that “advocate, promote, or incite” intolerance. It adopts legislation that clearly defines and prohibits intolerance, applicable to the public and private sectors, to all authorities and individual natural and legal persons.76

With all of these elements considered, the domestic application and enforcement of the provisions of the CAAFDI have a clear and unambiguous effect. They turn illegitimate any action or expression of opposition or disagreement. This will lead to a lack of appreciation or deference to the convictions or opinions held by others for being different or contrary to those of the person expressing him or herself, with no discernible threshold of gravity or malice to limit its effect. They further outlaw as an intolerant action the dissemination in any way of those expressions or expressive actions that the state deems as intolerant. They also outlaw the support by any means, including financing, of those activities that the state now defines as acts of intolerance.

Was this the objective that the drafter had in mind? Perhaps not. However, whether this framework set out in the CAAFDI is the result of their conscious acts – which is plausible considering that they were forewarned of this issue and still proceeded – or defective legal writing, the language is there. It is open to be employed as is in future enforcement and litigation.

In applying the Convention there could be an effort to harmonize both the American Convention and the CAAFDI so as to punish only those acts of intolerance that reach the “higher” levels of “rejection, contempt or disrespect,” but to do so would give the CAAFDI less than its full force. It would also mean that there would have to be a great deal of interpretation and line drawing on behalf of judges in applying the conventions, which is precisely the kind of danger of abuse that the Inter-American System bodies have sought to avoid.77

We must also keep in mind that, as is commonly the case, the push for adopting legislation that would incorporate these standards into domestic law and practice will most likely be made by various activist and interest groups. These groups will advocate the positions most favorable to their causes, worldview and positions, and not necessarily for those positions that would best harmonize conflicting rights.

76 CAAFDI, supra note 1, Article 7.
77 Rapporteur report, supra, note 58.
Something similar could be said of populist political regimes that might abuse the CAAFDI for their own political agendas. Thus, it is not fanciful to expect a push in favor of applying the standards in the most stringent way possible which includes punishing even lesser forms of disagreement, leading to prosecutorial abuse in the near future.

B. Unreasonable Outcomes as a Matter of Policy

Another potential issue with the application of the CAAFDI is that, because of its broad-reaching definition of intolerance – which lacks the elements to discern between different expressions that may fall outside of the acceptance/rejection binary – it sets up a ‘vicious circle of intolerance’ that will inevitably exist in all discussions, agreements and debates.

At its most basic level, the CAAFDI proscribes relevant discussions in the public discourse. To give one example, the convention would forbid arguments under which immigrant persons unlawfully residing in a state (or even legal residents that are not citizens, distinguishing them nationals or citizens) should not be able to participate in national political processes or be the recipients of benefits reserved for nationals or citizens.78 This same example extends by analogy to any and all individuals insofar as their specific condition or characteristics is taken into consideration and actually expressed in the context of discussions for decision-making.

Taking it one step further, let us say for instance that during afterhours activity for parents at a local private Catholic school (or Jewish, Muslim, Mormon or Evangelical; for this example they are no different), the school Principal gives a lecture, which touches upon the Theology of the Body in the writings of Pope John Paul II. As part of the lecture, at one point the speaker directs the parents to point 2357 of the Catechism of the Catholic Church which refers to homosexual actions as

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“intrinsically disordered” and reiterates that such actions constitute a “grave depravity.”

In the meantime, the lecture is recorded and later uploaded to the school’s website, from where it gets picked up by local LGBT rights advocacy groups. These advocacy groups become enraged by what they claim to be a contemptuous opinion on their persons, their characteristics and, to many, their own convictions and opinions. They indeed would perceive it as an attack on who they are as persons. Rather, what they choose to do is beautiful and God-given. In his outrage, the spokesperson of one of the advocacy group states:

The Principal’s words and opinions are truly despicable and disgusting. He lacks all moral character and stature to even say things like this, seeing as he belongs to one of the most immoral and corrupt institutions on the face of the Earth, as is the Catholic Church. Hopefully, soon enough there will be no more people like him in our world.

These statements are followed by a barrage of messages posted online to the school’s website containing name-calling in various degrees of offensiveness to the Principal himself and of rejection toward his expressed convictions.

Our hypothetical, which is more real than imaginary in the current state of the public square, would come under the terms of the CAAFDI. The LGBT advocacy groups could ask for the prosecution of the Principal since private (non-governmental) speech is fully covered and the state has a duty to punish it. But since the threshold for intolerance is

80 Id.
81 See e.g., the writ of protection (“recurso de protección”) filed by an LGBT rights advocacy group against Deputies and Senators of the Chilean Congress for their expressions and arguments in opposing the reform of adoption legislation in Chile to allow for joint adoption of homosexual couples. Movilh, the organization involved, characterized their reasoning as a “showing of hate and an extreme disrespect, which constitutes violence especially towards the sons and daughters of same sex couples. The levity and disrespect towards others leads to the extreme of offending boys and girls and is not up to the standards of a civilized country” (author’s translation). CAMBIO 21, Movilh prepara demanda contra miembros de la UDI acusados de “homofobia” [Movilh prepares lawsuit against UDI members accused of ‘homophobia’], Feb. 19, 2014, available at http://www.cambio21.cl/cambio21/site/artic/20140219/pags/20140219121839.html (last visited, Mar. 4, 2016).
simply to reject the opinion or convictions of another, then all parties to the incident, including the LGBT activists, meet this low bar in equal terms, which means that they are all acting intolerantly with respect to each other.\footnote{And the structure of the example obviously extends further than issues involving sexual mores. For all intents and purposes, our hypothetical discussions could have been addressing the alleged incompatibility between Islamic tenets of faith and liberal democracy or an argument against the legitimacy of the continued existence of the State of Israel, both of which would likely be criticized as instances of “Islamophobia” or “anti-Semitism.” Incidentally, the University of California’s proposed policy against intolerance was criticized by Jewish student advocacy groups for not going far enough, and with them explicitly arguing for a position that would consider any criticism of the State of Israel and its existence as forbidden intolerance. Other examples of possibly forbidden speech that were discussed included the wearing of t-shirts with the Confederate Flag or celebrating Black Power. Tyler Kingcade, The University Of California May Violate The First Amendment To Outlaw Intolerance, THE HUFFINGTON POST, Sep. 16, 2015, http://www.huffingtonpost.com/entry/university-of-california-intolerance_55f71809e4b063ecbfa529ec (last visited Sep. 23, 2015); Michael McGough, Opinions can be as hurtful as slurs and insults, but they should be protected, LOS ANGELES TIMES, September 23, 2015, http://www.latimes.com/opinion/opinion-la/la-ol-uc-intolerance-antisemitism-20150922-story.html (last visited Sep. 23, 2015).}

It could be argued that in order for the expressions to be intolerant in a way that is forbidden by the CAAFDI, they must not only be directed against “dignity, character, convictions or opinions,” but also be based on the prohibited grounds or suspect categories for discrimination under Article 1.1. Alas, this would still not resolve the issue since these grounds were broadened to the point that they include “political opinions or opinions of any kind” as equally forbidden grounds or suspect categories.

Additionally, the CAAFDI do not clarify at all if the intolerant expressions must be directed towards a specific person. It also does not clarify if it encompasses expressions that are said in a general manner and without reference to anyone in particular, but that could be claimed as intolerance towards anyone who finds themselves within the scope of the expression or as a member of an identifiable class.

Thus, as we have seen, the terms of the CAAFDI fail to stack up to the freedom of expression protection standards of the American Convention, as the Court, the Commission and the American states have understood them to this date. The definition of intolerance is overbroad, reaching to all forms of expressions, including opinions, and lacks clarity and precision in giving proper notice of what kinds of ‘messages’ would be subject to punishment. Further, as a matter of policy, the CAAFDI is likely to produce unreasonable and broad reaching effects with enough
power to chill all debate and discussion in the public square because of its understanding of intolerance and the duty to punish it.

III. WILL THE CAAF DI ABROGATE FREE SPEECH? IS THIS EVEN POSSIBLE?

From what we have seen so far, the CAAF DI poses a direct challenge to our understanding and protection of freedom of expression, going well beyond the acknowledged and permissible limits and restrictions that have existed under the American Convention to date. If it enters into force, the duty of states to prohibit and punish actions and expressions of intolerance would at the same time put them in a position in which their full compliance with the CAAF DI would entail a transgression of freedom of expression. Thus, it apparently creates a conflict between the new “right of protection against intolerance,”83 and the right to freedom of expression, both of which must be duly protected by the state. However, this is not truly a conflict of laws.84 Because freedom of expression is always subject to being restricted when it is necessary to ensure the respect for the rights or reputation of others,85 the conflict may plausibly be avoided by interpreting it away as an admissible restriction under Article 13(2) of the American Convention. Any new rights that may be ‘created’ or ‘recognized’ can plausibly be considered further grounds for restrictions of freedom of expression. The problem with this approach is that, at least as a formal matter, there is nothing to stop states from eviscerating freedom of expression, or conscience (Article 12), assembly (Article 15), association (Article 16), movement and residence (Article 22), all of which have built in “restriction clauses”, by way of 11 crafting more and more new rights that

83 CAAF DI, supra note 1, Chapter II, Article 2.
84 Conflict of laws may be defined broadly as a relationship between two norms in which “one norm constitutes, has led to, or may lead to, a breach of the other” or restrictively, as in the case in which the state is bound by two contradictory obligations. See, Marko Milanović, Norm Conflict in International Law: Wither Human Rights? 20 DUKE J. COMP. & INT’ L L. 69, at 72 (2009).
85 The IIHR touched upon the issue by suggesting that the proposal would fall under Article 13.5, considering that intolerance would not be protected speech because it would constitute advocacy for hatred and incitement to lawless violence or similar actions. However, as we have seen throughout, the bar set by the definition of intolerance in the CAAF DI is much lower than is the case in the American Convention, and the expressions coming under the scope of its prohibition are far more than just those constituting advocacy for hatred and incitement to lawless violence. It is more adequately characterized as a possible case of restriction needed to protect the rights of others, namely, the new right to be protected from intolerance. See supra, note 37.
allow for further and further restrictions under the alleged need to do so for their protection.\textsuperscript{86}

In international law, unlike domestic legal systems, all sources of law are generally considered equal in their hierarchy. We say this generally because there are at least two rules of hierarchy or preference that have been expressly built into the system and recognized by the community of states.\textsuperscript{87} The first exception is the United Nations Charter, which, by virtue of its Article 103, possesses a “constitutional character”\textsuperscript{88} as the cornerstone of the international legal system developed after World War II. As such, it prevails over other conflicting obligations whenever these exist.\textsuperscript{89} The others are \textit{jus cogens} norms.\textsuperscript{90} Neither of these exceptions would allow for the American Convention to prevail over the CAAFDI if they came into force. The American Convention lacks the constitutional character of the United Nations Charter (at least in a formally recognized way) and the right to freedom of expression has not been recognized as a norm of \textit{jus cogens}.\textsuperscript{91} Further, even if viewed in light of some of the existing theories of hierarchy of rights,\textsuperscript{92} one could not prevail over the other since both treaties address human rights and their protection, and the new right to protection from intolerance is arguably a corollary to the rights to equality and non-discrimination, which are first generation rights as well as freedom of expression.\textsuperscript{93} So there seems to be no way of arguing for the primacy of the American Convention over the CAAFDI if they were to come into force. Thus, by introducing this ‘new right’ into

\textsuperscript{86} For instance, a right to live in communities free from all forms of intolerance may translate into restrictions to freedom of movement and residence, with the state being granted the power to regulate and restrict whether or not to allow for the settlement of a church or temple under its zoning regulations, by concluding that ensuring a tolerant community requires its exclusion based on its positions and moral judgments on various questions.


\textsuperscript{89} Supra note 83, at 76-77.

\textsuperscript{90} Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331 ("... norms that are accepted and the recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").


\textsuperscript{92} See generally, Theodor Meron, On a Hierarchy of International Human Rights, 80 AM. J. INT’L L. 1 1986.

\textsuperscript{93} Id. at 2.
the legal system, freedom of expression will subsist in name only restricted under the alleged necessity to do so in order to secure the right of all persons to be protected from intolerance. Yet, even if in the current landscape of international law this conclusion seems to be true as a formal matter, it nevertheless poses a challenge that goes directly to the heart of the international human rights project as a whole.

If the scenario that we have presented – an existing human right being fundamentally altered to the point of being deprived of its core content – occurs, it would pose a difficult and perhaps insurmountable challenge to the continued legitimacy of the human rights experiment. Can the state simply contract away existing human rights? As a formal matter, the answer is yes, but then what is left of the ‘inherent dignity’ and ‘inalienable rights’ of man? Did the American states not acknowledge, “[t]he essential rights of man are not derived from one’s being a national of a certain state (which concedes that the state is not the rights giver nor creator), but are based upon attributes of the human personality”? And when the Human Rights Committee argued in its general comment Nº 26 that “the rights enshrined…belong to the people living in the territory of the state party…once the people are accorded the protection of the rights under the Covenant, such protection…continues to belong to them, notwithstanding change in government…or any subsequent action of the state party designed to divest them of the rights guaranteed…” Was this nothing but empty and meaningless rhetoric?

It is likely that this issue has never been truly put to the test since the beginning of the international human rights regime in 1945. The process up to now has been characterized by the recognition of rights that did not formally contradict each other on paper. We may be in line to witness a true first in international human rights, for no state has yet attempted to abrogate or alter the contours of those rights heretofore

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97 U.N. Human Rights Committee, CCPR General Comment No. 26 (On issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights) Dec. 8, 1997 CCPR/C/21/Rev.1/Add.8/Rev.1.
recognized and protected directly by international law itself. And if this were to happen, what faith should the peoples of America place on a legal regime in which their inherent and inalienable rights are really neither inherent nor inalienable?

CONCLUSION

As we have seen, the proposed new human rights standards of the sister Conventions Against Racial and All Forms of Discrimination and Intolerance are fundamentally at odds with the way in which the American Convention has conceived the protection of freedom of expression, its limits and restrictions. Since its coming into force, the American Convention’s protection of this fundamental freedom has coexisted side by side with the rights to honor and reputation, as well as non-discrimination and equality. Yet it has never been the case that the respect for these rights of others allowed for the restriction of the very core of freedom of expression: the freedom to express one’s opinion freely.

If enforced, the CAAFDI will strike directly to the heart of freedom of expression by imposing the duty on all member states to prohibit and punish heretofore-protected opinions: a fundamental safeguard of free and unabridged debate.

The standards set by the CAAFDI lack the sufficient clarity and precision so as to constitute a fair notice of what can or cannot be expressed, and the framework that they propose to establish will produce patently unreasonable results in which any expression of rejection for the convictions or opinions of others may be subject to abusive prosecution and punishment.

The most troublesome outcome of the adoption of these conventions would be the blow against the legitimacy of the human rights experiment itself for, through the fundamental alteration of the right to freedom of expression as we have known it to date, the enforcement of these new treaties would indicate that human rights are not truly inherent nor inalienable, but an illusion which can be dispelled by the state through the stroke of a pen consistent with their changing policy preferences over time.
THE FAMILY: GROUND ZERO

E. Douglas Clark†

On the morning of September 11, 2001, I arose in my Manhattan hotel room and got ready for another day of the United Nations “PrepCom” (preparatory committee meeting) negotiations for the upcoming Special Session on Children. Representing a non-governmental organization accredited by the Economic and Social Council, I had been amazed at how divisive and protracted the meetings were becoming. Anticipating yet another long day inside the cavernous chambers of the United Nations, I relished the fresh air and crystal blue sky that greeted me as I left the hotel. Perfect fall weather on a peaceful day, I remember thinking.

As I came within sight of the UN building, I was surprised to see policemen and a large crowd gathered outside. I learned it had been evacuated because a jet had crashed into one of the Twin Towers of the World Trade Center, raising a security concern at the UN. Tension mounted as more uniformed officers arrived; we waited for permission to enter. Finally, an announcement came, indicating the building was closed for the day and we should all return home as quickly as possible.

I retraced my steps, but continued past my hotel to look south on 2nd Avenue. The street was filled with people streaming north, many walking briskly yet some running. I was stunned by their expressions of confusion and terror. The scene appeared nearly surreal. Behind them loomed a mushrooming cloud of smoke as if an atomic bomb had just exploded.

When I returned to Manhattan several weeks later, my colleague Richard Wilkins and I visited Ground Zero. The scene of devastation,

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combined with the stench of decaying human flesh, was overwhelming. Intuitively, I reached for my cell phone and called my wife, trying to describe in subdued tones what I was feeling. As I spoke, I noticed Richard had also grabbed his phone and was speaking with his wife. The coincidence struck me: in times of our greatest need and deepest emotion, we instinctively turn to family.

The name “Ground Zero,” as it was applied to the site of the fallen World Trade Center, is derived from the term’s definition, “the point on the surface of the ground . . . at which the explosion of an atom bomb occurs.” But there is an alternate definition: “the very beginning: square one.” Over time, I would come to understand that both definitions could refer to the family itself. Although these definitions are embattled in fiery debates in the United Nations and around the world, it remains square one for the progress and peace of civilization.

I. The Family In The Universal Declaration Of Human Rights

In the years since I stood at Ground Zero of the collapsed Twin Towers, I have looked back on that experience as a kind of microcosm of what had transpired decades earlier. In the wake of the global catastrophe known as World War II while mankind contemplated the horrible destruction, individuals turned to family—as memorialized in the Universal Declaration of Human Rights in 1948.

Three years earlier at the creation of the United Nations, the UN Charter had committed Member States to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” But in the ensuing months as the world learned of the wartime Nazi atrocities, it became apparent that human rights needed greater definition and articulation. In the first meeting of the UN Commission on Human Rights, it was charged with the “task of . . . following up in the field of peace the fight which free humanity had waged in the fields of war, defending against offensive attacks the rights and dignity of man and

2. Id.
3. Id.
establishing . . . a powerful recognition of human rights.”

A declaration of human rights had to be created.

The drafting and negotiation process proved complex and arduous, requiring nearly a hundred official (and numerous unofficial) meetings over 18 long months during which the delegates worked to produce a document “sufficiently definite to have real significance both as an inspiration and a guide to practice,” but “sufficiently general and flexible to apply to all men, and to be capable of modification to suit people at different stages of social and political development.”

The result was the Universal Declaration of Human Rights, adopted by the UN General Assembly in Paris on December 10, 1948. At its adoption, Eleanor Roosevelt, chair of the Commission and its Drafting Committee, told the United Nations:

We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.

And so it has been. Recognized by the Guinness Book of World Records as the most translated text in history, the Universal Declaration has become “the most universal document in the world.”

It “has been adopted in or has influenced most national constitutions since 1948,” and has “served as the foundation for a growing number of national laws, international laws, and treaties, as well as regional, national, and sub-national institutions protecting and promoting human rights.”

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At a more practical level, Harvard Law Professor Mary Ann Glendon notes:

The most impressive advances in human rights—the fall of apartheid in South Africa and the collapse of the Eastern European totalitarian regimes—owe more to the moral beacon of the Declaration than to the many covenants and treaties that are now in force. Its nonbinding principles, carried far and wide by activists and modern communications, have vaulted over the political and legal barriers that impede efforts to establish international enforcement mechanisms.10

Even so, continues Glendon, “time and forgetfulness are taking their toll” as “the Declaration has come to be treated more like a monument to be venerated from a distance than a living document to be reappropriated by each generation. Rarely, in fact, has a text been so widely praised yet so little read or understood.”11

Family is mentioned several times throughout the Universal Declaration,12 and is the primary focus of Article 16, beginning in the first two paragraphs with “the right to marry and to found a family,” and the “equal rights” of the spouses. Paragraph 3 then provides a facially simple description of the family’s relationship to society:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.13

According to human rights scholar Manfred Nowak, the intent behind the phrase “natural and fundamental group unit of society” was “to emphasize that despite various traditions and social structures, a pillar of all societies is the family as the smallest group unit,” while the language “entitled to protection by society and the State” was meant to “shield the family

10 GLENDON, supra note 6, at 236.
11 Id. at supra note 6, at xvii.
12 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). “No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence. . . . Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity. . . . Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. . . . Motherhood and childhood are entitled to special care and assistance. . . . Parents have a prior right to choose the kind of education that shall be given to their children.” Universal Declaration, arts. 12, 23, 25, 26.
as the cornerstone of the entire social order.”

This language, that became section 3 of Article 16, originated with a proposed amendment by Charles Malik, the first Lebanese ambassador to the US and the UN, and a man of tremendous talent recognized as “the pivotal figure in the work of the commission” and touted by his fellow delegates as the “driving force” behind much of the document. Malik’s proposed amendment read as follows:

*The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society.*

Malik explained his rationale: “He said that he had used the word ‘Creator’ because he believed that the family did not create itself . . . . He also contended that the family was endowed with inalienable rights, rights which had not been conferred upon it by the caprice of men.” Malik further “maintained that society was not composed of individuals, but of groups, of which the family was the first and most important unit; in the family circle the fundamental human freedoms and rights were originally nurtured.”

Speaking later of those key groups, “this whole plenum of intermediate institutions spanning the entire chasm between the individual and the State,” Malik declared he was convinced that they are “the real sources of our freedom and our rights.”

We speak of fundamental freedoms and of human rights; but, actually, where and when are we really free and human? Is it in the street, is it in our direct relations to our State? Is it not rather the case that

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15 Malik, a Greek Orthodox Arab, was not only the Commission’s Rapporteur (three years later he would succeed Eleanor Roosevelt as its chair) but also served on its Drafting Committee. During the drafting process he would also serve as president of the Economic and Social Council, and, of more direct importance to the outcome, as chairman of the Third Committee. Having studied under Martin Heidegger in Germany and under Alfred North Whitehead at Harvard, where he earned a Ph.D., Malik had been a professor of philosophy at the American University in Beirut, and later held professorship at a number.  
19 Id. at 255.
we enjoy our deepest and truest freedom and humanity in our family, in the church, in our intimate circle of friends, when we are immersed in the joyful ways of life of our own people, when we seek, find, see, and acknowledge the truth?20

Malik was articulating not only his personal view, but also that of other principal framers, who, “though they differed on many points, were as one in their belief on the priority of culture.” The French delegate René Cassin observed, “In the eyes of the Declaration’s authors, effective respect for human rights depends primarily and above all on the mentalities of individuals and social groups.” And Eleanor Roosevelt, who had directed the drafting process, asserted: “Where, after all, do universal human rights begin? In small places, close to home.” According to Mary Ann Glendon, these, and similar statements by others, reveal something important about the Universal Declaration.

Those convictions of the framers undergird one of the most remarkable features of the Declaration: its attention to the “small places” where people first learn about their rights and how to exercise them responsibly—families, schools, workplaces, and religious and other associations. These little seedbeds of character and competence, together with the rule of law, political freedoms, social security, and international cooperation, are all part of the Declaration’s dynamic ecology of freedom.21

This key premise underlying the Universal Declaration invests its family provision with colossal significance, for of all those “small places”—or, to use Malik’s words, among the “whole plenum of intermediate institutions spanning the entire chasm between the individual and the State”—the only one mentioned in the Universal Declaration as having rights per se is the family rights the State itself is made expressly responsible to protect. Adding to this emphasis on family are the Universal Declaration’s statements that, “Motherhood and childhood are entitled to special care and assistance,”22 and, “Parents have a prior right to choose the kind of education that shall be given to their children.”23

It is no exaggeration to say that in the Universal Declaration, the

21 GLENDON, supra note 6, at 239-240.
23 Id. at art. 26, ¶ 3.
family is at the very center of rights. The family is fundamental because it is the seedbed of all the other rights delineated in the Universal Declaration. To make the world new following the devastation of the most destructive war in history, the United Nations built its structure of universal human rights squarely on the foundation of the family.

The portion of Malik’s proposed family language that did not pass was the reference to the Creator, deleted by vote after the Soviet delegate objected. The Universal Declaration, he insisted, “was meant for mankind as a whole, whether believers or unbelievers.”

Likewise in Article 1, other proposed references to deity did not make it into the final text after an appeal by the distinguished Chinese delegate, Peng-chun Chang. As summarized by one scholar, Chang explained that his country “comprised a large proportion of humanity, and its people had ideals and traditions different from those of the West.” And as he had refrained from imposing Chinese ideals, “he hoped his colleagues would show similar consideration” and not mention God. Nor would this be a great loss to believers, for “those who believed in God, he suggested, could still find the idea of God in the strong assertions that all human beings are born free and equal and endowed with reason and conscience.”

Thus it happened the Universal Declaration was left with no express reference to deity, a fact Eleanor Roosevelt later commented:

Now, I happen to believe that we are born free and equal in dignity and rights because there is a divine Creator, and there is a divine spark in men. But, there were other people around the table who wanted it expressed in such a way that they could think in their particular way about this question, and finally, these words were agreed upon because they... left it to each of us to put in our own reason.

Reading one’s “own reason” into the Universal Declaration is easily done in the Article 16 provision calling the family “the natural and fundamental group unit of society... entitled to protection by society and State.” Although shorn of its proposed reference to a Creator, the

24 MORSINK, supra note 5, at 255.
25 GLENDON, supra note 6, at 146-147; MORSINK, supra note 5, at 30.
26 Id. at supra note 6, at 147.
27 G.A. Res. 217, supra note 13, at art. 16, ¶ 3.
language is, according to University of Chicago Professor Don Browning, “less than Malik wanted, but more than first meets the eye.” For “the words ‘natural,’ ‘fundamental,’ and ‘group unit’ were retained and are not meaningless. Furthermore, they point to some model of natural law.” And “since society and the state are to protect the family, it is clear that Malik’s formulation deprives society and state of the power to grant the family its basic rights. These rights are independent of these social entities.”

Those predisposed to believe that the rights mentioned in the Universal Declaration originate with a Creator can find ample support in its language echoing both the 1789 French Declaration of the Rights of Man (declared “in the presence and under the auspices of the Supreme Being”29) and the US Declaration of Independence (holding that all men are “endowed by their Creator with certain unalienable Rights”).30 And for the adherents of the world’s three Abrahamic religions who believe that the Creator created the family, the Universal Declaration family language is flexible enough to be thus read.

But just as Eleanor Roosevelt and the other framers intended, one need not embrace any theistic paradigm to appreciate the insights provided by the Universal Declaration regarding the “natural” function of the family in human civilization. According to Professor Richard G. Wilkins:

29 Declaration of the Rights of Man, National Assembly of France (Aug. 26, 1789) (The French delegate told the General Assembly that the Universal Declaration, like the French Declaration, “was founded upon the great principles of liberty, equality, and fraternity.”); See also MORSE, supra note 5, at 281.
30 Compare the following texts: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . Appealing to the Supreme Judge of the world for the rectitude of our intentions . . . That to secure these rights, Governments are instituted among Men . . .” THE DECLARATION OF INDEPENDENCE para. 2, 5 (U.S. 1776) (emphasis added); and “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience . . . They are endowed with reason and conscience . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Universal Declaration of Human Rights, G.A. Res 217 A (III) preamble, art. 16 (Dec. 10, 1948) (emphasis added).
Article 16(3) of the Universal Declaration of Human Rights embodies fundamental truths that, for too long, have not been given their deserved attention and respect . . . . As reflected in the precise and elegant terms of the Universal Declaration, the family is not merely a construct of human will or imagination. The family has a profoundly important connection to nature. This connection begins with the realities of reproduction (underscored by recent studies which demonstrate that children thrive best when raised by married biological parents) and extends to the forces that shape civilization itself. It encompasses, among other things, the positive personal, social, cultural, and economic outcomes that current research suggests flow from a man learning to live with a woman (and a woman learning to live with a man) in a committed marital relationship. The family, in short, is the “natural and fundamental group unit of society” precisely because mounting evidence attests that the survival of society depends on the positive outcomes derived from the natural union of a man and a woman.31

II. DISTILLED FROM THE ENTIRE COURSE OF HUMAN HISTORY

In addition, according to Wilkins, the *Universal Declaration* description of the family “expertly reflects wisdom distilled from the entire course of human history.”32 From China, the oldest continuous civilization on earth, comes timeless insight on the family by Confucius who happens to top the list of the ten all-time greatest thinkers as identified by eminent historian Will Durant. Confucius’s towering insight, says Durant, was the process by which human society can achieve maximum peace and bliss. Born in the sixth century B.C. after the ancient glory of China had declined, Confucius insisted that restoring the luster of his homeland would require a return to ancient and proven principles:

32 Id. at xiii-xiv.
The illustrious ancients, when they wished to make clear and to propagate the highest virtues in the world, put their states in proper order. Before putting their states in proper order, they regulated their families. Before regulating their families, they cultivated their own selves . . . . When their selves were cultivated, their families became regulated. When their families became regulated, their states came to be put into proper order. When their states came to be put into proper order, then the whole world became peaceful and happy.33

What was true in China was likewise true outside of China. Despite the inevitable iterations and variations in families across ancient civilizations,34 the natural order of family and its foundational role in civilization has been remarkably constant. Surveying the earliest records of Egypt and Mesopotamia, Professor John Gee explains:

The family as we know it historically, and not as some people have recently tried to redefine it, goes back at least as far as we have human records. It has been civilization’s most fundamental and enduring institution. The basic unit of the family is unchanged . . . . During periods of societal breakdown . . . the family is the one, and sometimes the only, unit of society to survive. When the family is destroyed . . . , the impact on society is catastrophic: society ceases to exist as a functioning historical entity.35

In ancient Judaism, and continuing down through today, family was the foundation for all human growth and progress, beginning with the divine creation of the first couple Judaism saw as a pattern: “The joining of Eve to Adam,” notes Harvard professor Gary Anderson, “will be a model for every subsequent human marriage.”36 Millennia later came Abraham and Sarah, to whom God promised abundant posterity who would bless all

34 See generally A HISTORY OF THE FAMILY, VOLUME ONE: DISTANT WORLDS ANCIENT WORLDS (André Burguière et al. eds., 1996).
nations. Thus, “in the beginning, the concept of the Jewish family merged with the history of one family, that of Abraham, whose itinerary established modes of thought and behaviour which invested the family with a major role in relation to both the temporal dimension and the history of mankind.”

Among the ancient Greeks, the learned Aristotle—student of Plato and tutor of Alexander the Great—“located the family between the individual and the city as a grouping necessary to the proper functioning of a political structure.” The Roman statesman Cicero held that “the family, itself the basic natural human association in which all things are held in common, is the foundation of the city and the nursery of the state.”

For the continent of Africa, the family has always been vital. Acclaimed author Richard Dowden tells that “the self-made man does not exist in Africa . . . . In Zulu, there is a saying: ‘One is a person through others’ . . . . Africans know who is family and know where they come in it, both vertically and horizontally. A man without a family is no-one. He is nothing.”

Referring to the family in sub-Saharan Africa, Mwelwa C. Musambachime, Zambia’s ambassador to the United Nations, explained:

> The family is not just a social symbol or a group through which one is identified with. It is a social system that binds, protects, supports, educates and takes pride in its own members . . . . Individually or in groups, members of each family perform many functions: economic production sometimes divided and based on gender, education and training, religious instruction . . . . What one has is regarded as belonging to all members of the clan. Food,

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39 Today, as in the past, everyday life for Jewish families and their individual and collective identity are based on an effective and symbolic kind of genealogical continuity and on their reference to a primordial history—starting with the creation of man and woman and continuing through the generations to the descendants of Noah and the destiny of the Patriarchs (Abraham, Isaac and Jacob) and Matriarchs (Sarah, Rebekah and Leah).” Id. at 156.
42 RICHARD DOWDEN, AF RICA: ALTERED STATES, ORDINARY MIRACLES 21 (Public Affairs 2009).
livestock or clothes are shared with as many as possible depending on need. This is reciprocal. Other members of the family do the same when they have the means, skills, time to give or share, or other comparative advantages . . . . [This] ensures cohesion among the members of each family and strengthens their bonds to each other . . . . Proverbs are used to teach the young the importance of family.43

Sir Winston Churchill – who although remembered mostly for his pivotal role as Prime Minister was also an accomplished historian – summarized the role of the family in Britain. “There is no doubt,” he insisted, “that it is around the family and the home that all the greatest virtues, the most dominating virtues of human society, are created, strengthened and maintained.”44

In the United States, President Ronald Reagan emphasized the family’s central role from the beginning:

The family has always been the cornerstone of American society. Our families nurture, preserve, and pass on to each succeeding generation the values we share and cherish, values that are the foundation of our freedoms . . . . [T]he strength of our families is vital to the strength of our Nation.45

In sum, the sweep of history bears overwhelming witness to the indispensable and irreplaceable role of the family, as noted by world historian Will Durant:

The family has been the ultimate foundation of every civilization known to history. It was the economic and productive unit of society, tilling the land together; it was the political unit of society, with parental authority as the supporting microcosm of the State. It was the cultural unit, transmitting letters and arts, rearing and teaching the young; and it was the moral unit, inculcating through cooperative work and discipline those social dispositions

43 Mwelwa C. Musambachime, The Institution of Family in Sub Saharan Africa: The Case of Zambia, Address to the World Family Policy Forum at the J. Reuben Law School of Brigham Young University.
45 Proclamation No. 4999, 47 Fed. Reg. 51547 (Nov. 12, 1982).
which are the psychological basis and cement of civilized society. In many ways it was more essential than the State; governments might break up and order yet survive, if the family remained; whereas it seemed to sociologists that if the family should dissolve, civilization itself would disappear.46

But perhaps the most telling descriptions of family are those contained in national constitutions throughout the world, those highest legal expressions of sovereign self-definition. The impressive thing is how readily and consistently those jealously sovereign nations acknowledge that the fundamental unit of society is not the State but rather the family—notwithstanding the vast cultural, religious and geographic differences between nations.

The constitutions of Malawi and Namibia track precisely the Universal Declaration language that “the family is the natural and fundamental group unit of society.” Similar language with slight variations (some prefer the words “constituent” or “element” rather than “unit”) are found in the constitutions of Burundi, Eritrea, Ethiopia, Iran, Ireland, the Kyrgyz Republic, Madagascar, Moldova, Portugal, São Tomé and Príncipe, and Seychelles.47

Several other nations use similar language but with some elaboration. Cape Verde calls the family the “fundamental element and basis of all society.” Costa Rica terms it “the natural element and basis of society.” East Timor refers to it as “society’s basic unit and condition for the harmonious development of the person.” Iran designates it “the fundamental unit of society and the main centre for the growth and edification of the human being.” Ireland dubs it “the natural primary and fundamental unit group of Society, and... a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all

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positive law.”

Other nations employ biological imagery to assert the autonomous and indispensable nature of the family. “Families are the cells of society,” says the constitution of Vietnam, while Burkina Faso describes the family as “the basic cell.” Cuba and Ecuador call it “the fundamental cell” of society, while Armenia terms it “the natural and fundamental cell.” Sometimes the family is described in terms emphasizing its central and controlling role. Qatar, Saudi Arabia, and Yemen proclaim the family to be the “nucleus” of society. For Angola and Colombia, the family is the “basic nucleus,” and for Chile and Nicaragua it is the “fundamental nucleus.” Guatemala’s terminology is similarly evocative of life and growth, but using a fuller description: the family is “the primary and fundamental genesis of the spiritual and moral values of the society and the State.”

Yet, other countries view the family as a kind of footing or support. Bahrain, Egypt, Estonia, Lithuania, Somalia, United Arab Emirates, and Uruguay all recognize the family as the “basis of society.” El Salvador and Papua New Guinea classify it as the “fundamental basis of society.” Rwanda calls it the “natural basis of Rwandan society,” while the Central African Republic refers to it as “the natural and moral basis of the human community.” Chad similarly depicts it as “the natural and moral base of the society.” Estonia describes it as “fundamental for the preservation and growth of the nation, and as the basis for society.”


Still other constitutions prefer to speak of the family as “the foundation of society,” as do Azerbaijan, Brazil, Equatorial Guinea, Haiti, Libya, Paraguay, Tajikistan and Turkey. Andorra designates the family as “the basic foundation of society,” while Cameroon acknowledges it as “the natural foundation of human society.” The Philippines calls it “the foundation of the nation,” while Niger affirms it to be “the natural and moral foundation of the human community.”

Perhaps the most poignant imagery comes from nations literally built on the ageless solidarity and stability of stone. The desert nation of Kuwait describes the family as “the corner-stone of Society,” while Greece, whose ancient cities were often built on or around rocky hills, which served as natural citadels, describes the family as “the cornerstone of the preservation and the advancement of the Nation.”

Such expressions are hardly empty rhetoric, but iceberg-like manifestations of deep and enduring experience. In the case of Vietnam, for example, the constitutional provision calling families “the cells of society” reflects the underlying reality as recently described by that nation’s Permanent Representative to the United Nations:

In Viet Nam, the family has always been conceived as a cell of society, as a place where family members receive, inherit and pass on the nation’s invaluable traditional values such as patriotism, love of freedom, national pride, self-reliance, assiduity, creativity and love and care of each other. Throughout the 4,000-year history of Vietnam, the family has played an essential role in national defense, socio-economic development and in the preservation and
promotion of cultural values.\textsuperscript{53}

This chorus of constitutional statements provides a clear warning that the family is not to be subordinated to any political agenda, but should be diligently protected and empowered—as most of these same constitutions insist. Sovereign nations must at all costs preserve their most precious asset and the very basis of their society, the family.

Sometimes the significance of family becomes most obvious in times of greatest tribulation. No continent on earth has been plagued with greater challenges to human existence than Africa. How her people have managed to survive is attested to in a remarkable declaration by the African Union:

In Africa, due to its multiple roles and functions, the centrality, uniqueness and indispensability of the family in society is unquestionable. For generations, the family has been a source of strength for guidance and support, thus providing members with a wide circle of relatives on whom they can fall back. In times of crisis, unemployment, sickness, poverty, old age, and bereavement, most people rely on the family as the main source of material, social and emotional support and social security. Therefore, the African family network is the prime mechanism for coping with social, economic and political adversity in the continent.\textsuperscript{54}

One poignant example comes from the story of Immaculée Ilibagiza, Tutsi survivor of the Rwandan holocaust. Her unforgettable chronicle demonstrates it was from her family while growing up that she had received the inner strength needed not only to survive the horrific genocide, but also eventually to forgive those who had murdered her people—including her family.\textsuperscript{55} To her family she dedicates her book: “You make heaven a brighter place, and I will always love you.”

\textsuperscript{53} Intervention by H.E. Ambassador Le Luong Minh, Permanent Representative of Viet Nam to the United Nations, Address at the Brigham Young University, Provo, Utah: The 7\textsuperscript{th} annual World Family Policy Forum (July 10-12, 2006).


\textsuperscript{55} IMMACULÉE ILLIBAGIZA, LEFT TO TELL: DISCOVERING GOD AMIDST THE RWANDAN HOLOCAUST 3-12, 95-98 (2006). See especially her portrait of family life growing up (pp. 3-12) and the incident regarding accusations against her father (pp. 95-98).
In such times of trouble, family can indeed be “an anchor in life, a base to which one can always return,” as has been the case in Poland. Several years ago in Poland, I heard an articulate Catholic priest tell of the challenges his nation had endured, including, in the twentieth century, everything from Nazi decimation to Soviet tyranny. How had they weathered these terrible storms? It was the strength of Polish families, he stated, that had seen them through. Poland had survived thanks to her strong families.

His words reminded me of something I had heard years earlier, when a colleague and I had the honor of traveling with Her Excellency Ellen Sauerbrey, U.S. Ambassador to the Commission on the Status of Women, through Central America. In one country we were told by a courageous woman about the ordeal her family had suffered during a terrible revolution. Many had chosen to flee abroad, she explained, but she and her husband had decided that the greatest thing they could do for their country was to stay and endure—as a family. Doing so, they found that the last bastion of hope and strength was precisely their family.

On that same trip, in another country, as we sat with the nation’s president in his office surrounded by his staff, he spoke of the foundational role the family played in his country. One statement he made was particularly memorable: Every major problem his nation was facing—and the problems were legion and seemingly intractable—stemmed directly from the breakdown of the family. The importance of family had become clear only when society was literally unraveling because of the breakdown of the family.

The same phenomenon was seen more recently in the wake of the wanton destruction of property in Britain by hordes of young rioters. According to Prime Minister David Cameron, it was clear that the riots were not about race, not about government cuts, nor even about poverty. So “the question hangs in the air: ‘Why? How could this happen on our

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57 The World Congress of Families is sponsored by the Howard Center for Family, Religion and Society, and is the world’s largest conference of pro-family leaders and grass roots activists. World Congresses have convened in Prague (1997), Geneva (1999), Mexico City (2004), Warsaw (2007), and Amsterdam (2009), with the next one scheduled for Madrid (2012). There have also been nineteen regional meetings of the World Congress of Families. The World Congress of Families X, http://www.worldcongress.org/default.htm (last visited March 14, 2016).
streets and in our country?”\textsuperscript{58} The answer was that “this was about behavior . . ., people with a complete absence of self restraint . . . So this must be a wake-up call for our country. Social problems that have been festering for decades have exploded in our face.”\textsuperscript{59} The solution must begin at home:

The question people asked over and over again last week was “where are the parents? Why aren’t they keeping the rioting kids indoors?” Tragically that’s been followed in some cases by judges rightly lamenting: “why don’t the parents even turn up when their children are in court?” . . . . Well, join the dots and you have a clear idea about why some of these young people were behaving so terribly. Either there was no one at home, they didn’t much care or they’d lost control . . . . If we want to have any hope of mending our broken society, family and parenting is where we’ve got to start.\textsuperscript{60}

III. THE FAMILY REMEMBERED AND FORGOTTEN IN ANNIVERSARIES AND DEVELOPMENT GOALS

Nearly a half-century after adoption of the \textit{Universal Declaration}, as the twentieth century was drawing to a close and people were preparing for a new millennium, many paused to take stock. World population had risen from 1.6 billion in 1901 to 6.1 billion by 2000, despite the terrible toll taken by war, genocide, and mass murder.

Contributing to that devastation was the new and brutally effective weaponry of mass destruction, while advances in science, technology, and medicine had lifted much of humanity to an unprecedented standard of living and comfort. Developed countries were enjoying increased affluence, while a billion of earth’s inhabitants languished in extreme poverty, often in the squalor of nightmarish slums scattered across Africa, Asia, and Latin America.

Not surprisingly, the greatest burdens fell upon women, often


\textsuperscript{59} Id.

\textsuperscript{60} Id.
oppressed and marginalized. Compounding these problems was the unduly high rate of illiteracy among the world’s poor, effectively keeping them locked in their prison of poverty. Meanwhile, Africa was a special case—decimated by corruption and conflict while ravaged by famine, malaria, and the alarming AIDS pandemic that threatened entire populations and orphaned literally millions of children.

Acting to alleviate the world’s suffering, and with special focus on helping children, the United Nations convened the largest gathering of world leaders in history. Representing 189 Member States, the Millennium Summit met in September 2000 at UN headquarters in New York, and adopted the United Nations Millennium Declaration—a commitment to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women. Building on that declaration, those same leaders then adopted eight specific objectives—the Millennium Development Goals—to be achieved by the year 2015.61

This colossal commitment was grounded, as the Millennium Declaration expresses, in the principles of not only the UN Charter but also the Universal Declaration, which the signers resolved to “respect fully and uphold.”62 Implicit, then, in the achievement of the Millennium Development Goals was the basic premise that the family is the natural and fundamental group unit of society, entitled to protection by society and the State. Remarkably, however, this point remained unexpressed in both the Millennium Declaration and the Millennium Development Goals themselves.63

Even so, in 2004, powerful voices in the United Nations and around the world trumpeted the fact that any successful development effort must begin with the family. The occasion was the 10th anniversary of the International Year of the Family. On July 23, 2004, Secretary-General Kofi Annan presented a report in preparation for the anniversary, stating:

Families have major, albeit often untapped potential to contribute to national development and to the

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62 G.A. Res. 55/2, art. 25, United Nations Millennium Declaration (Sept. 8, 2000).
63 Id. at art. 26 (explaining that the only inclusion of the world “family” or “families” in the Millennium Declaration is in the commitment in paragraph 26 to protect “migrant workers and their families,” and in the generalization in the document’s last paragraph 32, that “the United Nations is the indispensable common house of the entire human family.”).
achievement of major objectives of every society and of the United Nations, including the eradication of poverty and the creation of just, stable and secure societies.64

At the actual celebration of the 10th anniversary on December 6, 2004, Secretary-General Annan spoke at length about the indispensable role of the family:

Concern for the wellbeing of families dates back to the earliest days of the United Nations. The Universal Declaration of Human Rights proclaims the family to be the “natural and fundamental group unit of society . . . entitled to protection by society and the State.” Our long-standing work for children, for the advancement of women, for health, for literacy and for social integration reflects an enduring, system-wide commitment to families.

The International Year of the Family was meant to intensify this focus and to promote greater awareness of what families contribute to economic development and social progress in all societies all over the world. Indeed, the Year’s most far-reaching achievement was to raise the profile of a family perspective, which had never received attention commensurate with its importance . . . .

This anniversary is an opportunity to reaffirm the importance and centrality of the family. But it should also incite us to do more to address the challenges that families face . . . . In spite of strains and adversity, families are proving resilient, often in remarkable ways. They are doing their best to pull together and to continue serving as a source of strength and inspiration for their members. But they need help. Governments need to do more to help families adapt and thrive, so that they can, in turn, fulfil their social, cultural and economic roles.

One major challenge is to integrate family concerns with broader development and poverty eradication efforts. We must not forget that the family is a vital partner in efforts

to achieve the Millennium Development Goals and the many other objectives set by the international community during the last decade.

Strong, healthy family structures are essential for human well-being as well. Families are often our first line of support. Policies and programmes must recognize such contributions. The United Nations, for its part, will continue to draw attention to family issues and to support Governments and civil society in their efforts to address them.65

In the same session, US Representative Wade Horn focused on how the family is instrumental in human development at a personal level:

Throughout the ages, political philosophers, social historians, and civic and religious leaders have praised the family as the foundation of the social order, the bedrock of nations, and the bastion of civilization . . . . The fact is that family is a universal and irreplaceable community, rooted in human nature and the basis for all societies at all times. As the cradle of life and love for each new generation, the family is the primary source of personal identity, self-esteem, and support for children. It is also the first and foremost school of life, uniquely suited to teach children integrity, character, morals, responsibility, service, and wisdom . . . . The state’s foremost obligation . . . is to respect, defend, and protect the family as an institution.66

Another speaker, Bangladesh Ambassador Iftekhar Ahmed Chowdhury, emphasized the connection between family and successful development.

Values and cultures are not static. They change with time. They differ from place to place. They vary with ethnic origins and religious affiliations. But despite these differences, one element remains constant in all. It is the belief that the family is society’s core component . . . . The

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66 Id. at 19-21.
attainment of every Millennium Development Goal must begin with the family. The family is the main instrument of societal transformation.67

Among the major events celebrating family during the 10th anniversary were two sponsored by very different entities, the African Union and the Doha International Institute for Family Studies and Development. Notably, their conclusions about the role of family are similar.

At the Regional Conference of the Family in Africa held on July 27-28, 2004, in Cotonou, Benin, the African Union adopted the Plan of Action on the Family in Africa. From the multitude of factors that the African Union might have chosen as the core of its continent’s desperately needed development process, it chose the family, as stated in the opening paragraph:

Recognition that the family is the basic and most fundamental unit of society, a dynamic unit engaged in an intertwined process of individual and group development, justifies the need to place the African family at the core of society which needs to be strengthened as part of Africa’s development process.68

Later the document describes how the family has been Africa’s means of survival throughout the continent’s sundry trials:

It is the principal focus for socialization and education of children and is central to the process of human rights education. In all societies, the family is the setting for demographic reproduction and the seat of the first integration of individuals to social life. As a result, the family is at the centre of the dynamics which affect all societies. Traditionally, Africa’s development has been a result of the strength of the family. Large families were a source of labour and an indication of prosperity. The extended family system ensured that the poor families were generally supported by the rich. The unity within the family ensured its survival in cases of internal conflicts,

67 Id. at 24-25.
68 Plan of Action on the Family in Africa, supra note 54, at 1.
crises and adversity.\textsuperscript{69}

As the African Plan of Action looked toward the future, the family remained pivotal to progress and development:

The family continues to play a crucial role in Africa’s development and development efforts that are family-centered are key to sustainable socio-economic development . . . . It is imperative that the African family be well positioned to play a crucial role in the implementation of the Millennium Development Goals.\textsuperscript{70}

What the African Union knew to be true about the family in Africa, the Doha International Conference on the Family found to be true about the family worldwide. Organized under the patronage of the nation of Qatar, the conference included regional meetings in Mexico City, Stockholm, Geneva and Kuala Lampur, with the final session in Doha on November 28-29, 2004. The conference “brought together a unique group of international actors from strikingly diverse cultures, political systems, and faiths,” resulting in “extensive evidence” demonstrating that “all peoples and cultures of the world are united by shared understandings related to the natural family.”\textsuperscript{71}

Among the participating scholars was Dr. Maria Sophia Aguirre, Associate Professor from the Department of Business and Economics of the Catholic University of America. To the question she posed at the outset—“Is the family relevant for economic development?”—she gave this answer:

Data from across countries and sciences seem to clearly suggest that the family should be the point of reference if sustainable development is to be achieved. This is not so because the family is a problem to economic development—it is the solution. It is within the family where human, moral, and social capital, all \textit{sine qua non} conditions for an economy to develop, are either encouraged and nurtured or hampered. Children develop best within a family that is functional, i.e., with a mother and a father in a stable marriage. This means that the

\textsuperscript{69} Id. at 13-14.
\textsuperscript{70} Id. at 14, 31.
\textsuperscript{71} Wilkins, \textit{supra} note 31.
family is a necessary good for economic development, and thus it should be promoted and protected if sustainable development is to be achieved. At the same time, data across sciences also show that the breakdown of the family damages the economy and the society since human, moral, and social capital is reduced and social costs increased.\(^2\)

Perhaps the most distinguished scholar to participate in the Doha process was University of Chicago Professor Gary S. Becker, recipient of the 1992 Nobel Prize for Economics and the US Presidential Medal of Freedom in 2007. Despite what Dr. Becker called the “revolutionary alterations” in the family over the last fifty years, it yet remains “the one institution that is ultimately crucial to the functioning of society.” Pointing to the example of Asia, Becker noted that although its nations “have not been immune” to the sweeping change in the family, yet “they have, during the process, maintained a strong reliance on the family. I think,” continued Becker, “there is a connection there—not yet proven by economists, but I believe some day it will be proven that there is a connection—between the rapidity of the Asian economic growth and the fact that they have had this very powerful attachment to the family.”\(^3\)

The culmination of the Doha conference was the issuance of the Doha Declaration stating: “the academic, scientific and social findings collected for the Doha International Conference . . . collectively demonstrate that the family is not only the fundamental group unit of society, but is also the fundamental agent for sustainable social, economic and cultural development.”\(^4\) But the clearest statement of what the Doha conference demonstrated was made by the conference organizer, Her Highness Sheikh Moza Bint Nasser, Consort of His Highness The Emir of Qatar, Chairperson of Qatar Foundation for Education, Science and Community Development. Her words are also a call to action:

Safeguarding the family, as noted in Article 16(3) of the Universal Declaration of Human Rights, is a prerequisite


\(^3\) Gary S. Becker, *The Role of the Family in Modern Economic Life*, in *The Family in the New Millennium* 4 (Loveless and Holman, ed., 2007). At the University of Chicago, Dr. Becker has been professor of economics and sociology, and professor in the graduate Booth School of Business. He has also been a senior fellow at Stanford University’s Hoover Institution.

for promoting national progress . . . . Accordingly, there is an urgent need for a new mentality that sees the family as part of the solution rather than part of the problem. In other words, what is required is a mentality that does not treat the family as an impediment to social progress and development, but rather as the driving force behind it. Such an approach, in my opinion, requires adoption of references and standards that will safeguard the rights of the family and ensure its integration as an effective and constructive factor in all national, regional, and international development programs.75

IV. MOVING FORWARD WITH FAMILY-CENTERED DEVELOPMENT

At the outset of her acclaimed book The March of Folly, historian Barbara Tuchman observed:

A phenomenon noticeable throughout history regardless of place or period is the pursuit by governments of policies contrary to their own interests. Mankind, it seems, makes a poorer performance of government than of almost any other human activity. In this sphere, wisdom, which may be defined as the exercise of judgment acting on experience, common sense and available information, is less operative and more frustrated than it should be. Why do holders of high office so often act contrary to the way reason points and enlightened self-interest suggests? Why does intelligent mental process seem so often not to function? Why, to begin at the beginning, did the Trojan rulers drag that suspicious-looking wooden horse inside their walls despite every reason to suspect a Greek trick?76

And why, it might also be asked, is there not now a conscious and ardent effort at every level to acknowledge and strengthen the family as (what Sheikha Moza Bint Nasser rightly called) the “driving force” behind all development? For example, after all that was attested and

75 Preface of Her Highness Sheikha Mozah Bint Nasser, in 1 THE FAMILY IN THE NEW MILLENNIUM, (Loveless and Holman, ed. 2007).
affirmed about the family’s pivotal role in development, how is it that the Millennium Development Goals\textsuperscript{77} failed to mention the family’s role in development? The same failure persists in the Sustainable Development Goals, despite what Secretary-General Ban Ki-Moon stated in his December 2013 report regarding preparations for the 20th anniversary of the International Year of the Family in 2014: “Focusing on families offers a comprehensive approach to solving some of the persistent development challenges,” while “the economic status and stability of families and the quality parenting are vital for children’s well-being and the quality of family life is itself an important contributor to a future society which responsible, just and equal.”\textsuperscript{78}

The striking absence in both the Millennium and Sustainable Development Goals of any acknowledgment of the key role of family and the need to protect it arises from the highly divisive debates in the United Nations over the definition of “family,” as many seek to depart from what the Universal Declaration acknowledges “the family” to be and always have been: “the natural and fundamental group unit of society.”\textsuperscript{79} Such absence in these key documents calls for at least the following three suggestions:

\textbf{First, do no harm.} This famous phrase (from the Latin \textit{primum non nocere}) is one of the principal tenets of medical ethics and a guiding principle for emergency medical services around the world. It is equally essential for policy decisions affecting the family. Decades ago in Minnesota, the annual conference of the Association of Family Conciliation Courts heard this statement by Ted Bowman, Family Development Coordinator of the Family and Children’s Service in Minneapolis:

If you were to ask me to focus on one issue that stands out above all others for concern relative to family life, I would quickly speak of the tension between intimacy and individualism . . . . From the early sixties to the present . . . and the end is not yet in sight . . . there has been movement after movement that has fostered individual


\textsuperscript{79} G.A. Res. 217, \textit{supra} note 13, at art. 16, ¶ 3.
rights and self-expression . . . . While the injustices which these social movements have been addressing needed and deserved our attention and change, we have, in responding to individual needs, neglected assisting persons with another need . . . that for intimacy.\textsuperscript{80}

Bowman astutely identified the very concept that would become a divisive reality at the international level: the troubled intersection of individual rights with the rights of the family. Richard Wilkins has pointed out the “curious new development” as the UN has, in the last two decades, concerned itself with social policy. “In order to improve the social and political standing of women—a goal that is quite laudable—international law has become unusually hostile to long-standing notions of marriage, the natural family and the rearing of children.”\textsuperscript{81} Muslim scholar Farooq Hassan likewise deplores the “clear tendency to sacrifice the rights of the family and much of its historically based privileged status in favor of narrow and newly developed human rights.”\textsuperscript{82}

This phenomenon of viewing individual rights in isolation can, ironically, threaten the entire structure of rights, according to Professor Glendon:

The [Universal] Declaration’s ability to weather the turbulence ahead has been compromised by the practice of reading its integrated articles as a string of essentially separate guarantees. Nations and interest groups continue to use selected provisions as weapons or shields, wrenching them out of context and ignoring the rest . . . . Forgetfulness, neglect, and opportunism have thus obscured the Declaration’s message that rights have conditions—that everyone’s rights are importantly dependent on respect for the rights of others, on the rule of law, and on a healthy civil society.\textsuperscript{83}

A healthy civil society rests squarely on the wellbeing of its “natural and fundamental group unit”—the family. To pursue any

\textsuperscript{81} Richard G. Wilkins, \textit{International Law, Social Change, and the Family}, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES.
\textsuperscript{82} Farooq Hassan, \textit{Analysis of Islam and Muslim States’ International Support for Family}, 3 THE FAMILY IN THE NEW MILLENNIUM, 349 (Loveless and Holman, ed., 2007).
\textsuperscript{83} GLENDON, supra note 6, at 239.
agenda that undercuts or undermines the family—even in the name of rights—will in the end prove a march of folly. The first principle for development must be to “do no harm” to the family.

**Second, provide the widest possible protection and assistance to the family.** Building on the *Universal Declaration* language that the family is “entitled to protection by society and the State,” a number of United Nations treaties and conference documents have stated that the family is entitled to “comprehensive protection and support.” But the strongest language comes from the *International Covenant on Economic, Social, and Cultural Rights*: “The widest possible protection and assistance should be accorded to the family.”

This is surely the standard for every nation seeking to protect and assist the institution that is the very key to its development and success. The US representative to the General Assembly on the 10th anniversary of the International Year of the Family may well have been correct when he proclaimed that “the State’s foremost obligation . . . is to respect, defend, and protect the family as an institution.”

Such support must not be an afterthought or left to chance. One example of what is possible at a national level is what President Ronald Reagan did for the United States in 1987. By executive order, he established criteria with which the formulation and implementation of all federal policies and regulations must be assessed as to their potential impact on the family.

**Third, place the family squarely at the center of development.** President Reagan further declared:

> It is a time to recommit ourselves to the concept of the family—a concept that must withstand the trends of lifestyle and legislation. Let us pledge that our institutions

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and policies will be shaped to enhance an environment in which families can strengthen their ties and best exercise their beliefs, authority, and resourcefulness.\footnote{Ronald Reagan, \textit{Proclamation 4882: National Family Week}, The American Presidency Project (Nov. 3, 1981), http://www.presidency.ucsb.edu/ws/index.php?pid=43204&st1=#axzz1UFK6CmLz.}

He was speaking to America, but his words have universal relevance. As what historian Will Durant calls, “the ultimate foundation of every civilization known to history,”\footnote{\textsc{Durant, supra} note 46, at 395-396.} the family remains the very key to development.


The family truly is “ground zero” in both senses of the definition: one of the most explosive social issues of our time, while remaining square one as the irreplaceable foundation for the development and progress of civilization.
WORLD FAMILY DECLARATION

We the people of many lands and cultures reaffirm the truth enshrined in the Universal Declaration of Human Rights,¹ and echoed in international treaties² and many of our national constitutions,³ that “the

² See e.g., International Covenant on Civil and Political Rights, G.A. 2200 A (XXI), U.N. Doc. A/RES/2200(XXI) art. 23 (Dec. 16, 1966) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); International Covenant on Economic, Social and Cultural Rights, G.A. 2200 A (XXI), U.N. Doc. A/RES/2200(XXI) art. 10 (Dec. 16, 1966) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”).
³ National constitutional provisions echoing Article 16, Paragraph 16 of the Universal Declaration of Human Rights: The Constitution of the Islamic Republic of Afghanistan January 26, 2004, art. 54 (“Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother.”); The Constitution of the Republic of Albania Nov. 22, 1998, art. 53 (“Marriage and family enjoy special protection of the state.”); Constitution of the People’s Democratic Republic of Algeria Feb. 23, 1989, art. 58 (“The family shall enjoy the protection of the State and of the society.”); The Constitution of the Principality of Andorra April 28, 1993, art. 13 (“The public authorities shall promote a policy of protection of the family, which is the basic foundation of society.”); The Constitution of the Republic of Angola Jan. 21, 2010, art. 35 (“The family is the basic nucleus of social organisation and shall be the object of special protection by the state.”); The Constitution of Antigua and Barbuda Oct. 31, 1981, art. 3 (“Every person in Antigua and Barbuda is entitled to… protection for his family life.”); The Constitution of the Republic of Armenia May 7, 1995, art. 35 (“The family is the natural and fundamental group unit of society.”); The Constitution of the Armenian Republic Nov. 12, 1995, art. 17, 34 (“Family as a basic element of society is under special protection of the state…. Family and marriage are protected by state. Maternity, paternity and childhood are protected by the law.”); Constitution of the State of Bahrain May 26, 1973, art 5 (“The family is the basis of society, deriving its strength from religion, morality and love of the homeland. The law preserves its lawful entity, strengthens its bonds and values, under its aegis extends protection to mothers and children, tends the young and protects them from exploitation and safeguards them against moral, bodily and spiritual neglect.”); Constitution of the Republic of Belarus of 1994 Oct. 17, 2004, art. 32 (“Marriage, family, motherhood, fatherhood, and childhood shall be under the protection of the State. On reaching the age of consent a woman and a man shall have the right to enter into marriage on a voluntary basis and found a family.”); Constitution of the Republic of Benin Dec. 2, 1990, art. 26 (“The State shall protect the family and particularly the mother and child.”); Bolivia (Plurinational State of)’s Constitution of 2009 Jan. 25, 2009, art 62-63 (“The State recognizes and protects the family as the fundamental nucleus of society, and guarantees the economic and social conditions necessary for its full development…. The marriage between a man and a woman is formed by legal bond.”); Constitution of the Federative Republic of Brazil Oct. 5, 1988, art. 226 (“The family, which is the foundation of society, shall enjoy special protection from the State…. For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage.”); Constitution of the Republic of Bulgaria Prom. SG 56 Jul. 13, 1991, art 14, 46 (“The family, motherhood, and childhood shall enjoy the protection of the State and society…. Matrimony shall be
a voluntary union between a man and a woman.”); The Constitution of Burkina Faso June 2, 1991, art. 23 (“The family is the basic unit of society. The State has the duty to protect it. Marriage is founded on the free consent of the man and of the woman.”); The Constitution of the Republic of Burundi March 9, 1992, art. 30 (“The family is the natural base cell of society…. Family and marriage are placed under the particular protection of the State.”); Constitution of the Republic of Cameroon Jan. 18, 1996, preamble (“The Nation shall protect and promote the family which is the natural foundation of human society.”); The Constitution of the Republic of Cape Verde Aug. 5, 1992, art. 86 (“The family is the fundamental element and the basis of all society. The family must be protected by society and by the State to create conditions for the accomplishment of its social function and for the personal fulfillment of its members… The State and social institutions must create conditions to assure the unity and stability of the family.”); Central African Republic’s Constitution of 2004 Dec. 5, 2004, art. 6 (“Marriage and the family constitute the natural and moral basis of the human community. They are placed under the protection of the State.”); Chad’s Constitution of 1996 March 31, 1996, art. 37 (“The family is the natural and moral basis of society. The State and the decentralised [sic] territorial collectivities have the duty to see to the well-being of the family.”); Political Constitution of the Republic of Chile Oct. 21, 1980, art. 1 (“The family is the fundamental nucleus of society. It is the duty of the State to… provide protection for the people and the family, to promote the strengthening of the latter.”); Constitution of the People’s Republic of China March 14, 2004, art. 49 (“Marriage, the family and mother and child are protected by the state.”); Political Constitution of Colombia July 4, 1991, art. 5, 42 (“The state… protects the family as the basic institution of society…. The family is the basic nucleus of society. It is formed on the basis of natural or legal ties, through the free decision of a man and woman to contract matrimony or through the responsible resolve to comply with it. The State and society guarantee the integral protection of the family…. The family’s honor, dignity, and intimacy are inviolable.”); Constitution of the Republic of Congo Jan. 20, 2002, art. 31-32 (“The State has the obligation to assist the family in its mission as guardian of the morality and of the values compatible with the republican order…. Marriage and family are under the protection of the law.”); Political Constitution of the Republic of Costa Rica Nov. 7, 1949, art. 51-51 (“The family, as a natural element and foundation of society, has the right to the special protection of the State… Marriage is the essential basis of the family.”); Constitution of the Republic of Cote D’Ivoire July 24, 2000, art. 5 (“The family constitutes the basic unit of the society. The State assures its protection.”); Constitution of the Republic of Croatia Dec. 22 1990, art. 61 (“The family shall enjoy special protection of the state.”); Constitution of the Republic of Cuba Feb. 24 1976, art. 35, 36 (“The State protects the family, motherhood and matrimony. The State recognizes in the family the fundamental cell of the society, and attributes to it essential responsibilities and functions in the education and training of the new generations. Marriage is the voluntary established union between a man and a woman.”); Constitution of the Czech Republic Dec. 16, 1992, art. 32 (“Parenthood and the family are under the protection of the law.”); The Constitution of the Democratic Republic of Congo Feb. 18, 2006, art. 40 (“The family is the foundation of the society and it is the basic space for the integral development of persons…. The State guarantees the protection of the family…. The State shall promote and protect the family organization based on the institution of marriage between a man and a woman.”); Dominican Republic Constitution, Jan. 26, 2010, art. 55 (“The family is the foundation of the society and it is the basic space for the integral development of persons…. The State guarantees the protection of the family…. The State shall promote and protect the family organization based on the institution of marriage between a man and a woman.”); Constitution of the Democratic Republic of Timor-Leste May 20, 2002, section 39 (“The State protects the family as the society’s basic unit and condition for the harmonious development of the person.”); Constitution of the Republic of Ecuador Oct. 20, 2008, art. 67 (“The State shall protect it as the fundamental core of society and shall guarantee conditions that integra
cally favor the achievement of its goals…. Marriage is the union of man and woman.”); Constitution of the Republic of Equatorial Guinea Jan. 17, 1995, art 21 (“The state shall ensure the protection of the family as the foundation of the society and shall secure the moral, cultural and economic conditions favorable to the achievement of objectives.”); Constitution of the Republic of El Salvador Dec. 20, 1983, art. 32 (“The family is the fundamental basis of society and
shall have the protection of the State... The legal foundation of the family is marriage."); The Constitution of Eritrea May 23, 1997, art. 9, 22 (“The State shall encourage values of community solidarity and love and respect of the family.... The family is the natural and fundamental unit of society and is entitled to the protection and special care of the State and society."); Constitution of the Republic of Estonia July 3, 1992, art. 27 (“The family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state."); Constitution of the Federal Democratic Republic of Ethiopia Dec. 8, 1994, art. 34 (“The family is the natural and fundamental unit of society and is entitled to protection by society and the State."); Constitution of the Gabonese Republic March 26, 1991, art. 1 (“The family is the basic natural unit of society; marriage is the legitimate support of it. They shall be placed under the particular protection of the State."); Basic Law for the Federal Republic of Germany May 23, 1949, art. 6 (“Marriage and the family shall enjoy the special protection of the state."); The Constitution of the Republic of Ghana April 28, 1992, art. 28 (“The protection and advancement of the family as the unit of society are safeguarded in promotion of the interest of children."); The Constitution of Greece May 27, 2008, art. 21 (“The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State."); Political Constitution of the Republic of Guatemala May 31, 1985, preamble, art. 47 (“Recognizing the family as the primary and fundamental genesis of the spiritual and moral values of the society and the State.... The State guarantees the social, economic, and juridical protection of the family."); Haiti’s Constitution of 1987 (rev. 2012) March 10, 1987, art. 259 (“The State protects the family, which is the foundation of society."); The Constitution of Republic of Honduras Jan. 20, 1982, art. 111 (“The family, marriage, motherhood and childhood are under the protection of the State."); The Fundamental Law of Hungary [Constitution] April 25, 2011, National avowal, art. L (“We hold that the family and the nation constitute the principal framework of our coexistence.... Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival."); The Constitution of the Islamic Republic of Iran Oct. 24, 1979, preamble, art. 10 (: “The family unit is the basis of society, and the true focus for the growth and elevation of mankind. Harmony of beliefs and aspirations in setting up the family is the true foundation of the movement towards the development and growth of mankind. This has been a fundamental principle. Providing the opportunities for these objectives to be reached is one of the duties of the Islamic Government.... Since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programs must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations."); Constitution of Ireland July 1, 1937, art. 41 (“The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."); The Constitution of the Italian Republic Dec. 22, 1947 (“The Republic recognizes the rights of the family as a natural society founded on marriage."); The Constitution of the Republic of Kazakhstan Aug. 30, 1995, art. 27 (“Marriage and family, motherhood, fatherhood and childhood shall be under the protection of the state."); The Constitution of the Republic of Kenya Aug. 4, 2010, art. 45 (“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State."); Constitution of the Republic of Kosovo June 15, 2008, art. 37 (“Family enjoys special protection by the state in a manner provided by law."); Constitution of Kuwait Nov. 11, 1962, art. 9 (“The family is the cornerstone of Society.... Law shall preserve the integrity of the family, strengthen its ties, and protect under its support motherhood and childhood."); Constitution of the Kyrgyz Republic June 27, 2010, art. 36 (“Family shall be the foundation of the society. Family, paternity, maternity and childhood shall be the subject of care of the entire society and preferential protection by law."); Constitution of Latvia Feb. 15, 1922 (reinst. 1991, rev. 2007), art. 110 (“The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child."); The Constitution of Libya Feb. 17, 2011, art. 5 (“Family shall be the basis of society and shall be protected by the State. The State shall
The family shall be the basis of society and the State. Family, motherhood, fatherhood and childhood shall be under the protection and care of the State. Marriage shall be concluded upon the free mutual consent of man and woman.""); The Constitution of Luxembourg Oct. 17 1868 (rev. 2009), art. 11 ("The State guarantees the natural rights of the human person and of the family."); Constitution of the former Yugoslav Republic of Macedonia Nov. 20, 1991 (rev. 1992), art. 40 ("The Republic provides particular care and protection for the family."); The Constitution of the Republic of Madagascar Aug. 19, 1992, art. 20-21 ("The family, natural and fundamental element of the society, is protected by the State. "The family, the natural and fundamental element of society, is protected by the State.""); Constitution of the Republic of Malawi May 16, 1994, ¶ 22 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); The Constitution of Mauritania July 12, 1991 (rev. 2012), preamble, art. 16 ("The family is the basic unit of the Islamic society.... The State and the society protect the family."); Constitution of the Republic of Moldova July 29, 1994, art. 48 ("The family is the natural and fundamental constituent of society, and as such has the right to be protected by the State and by society. The family is founded on the freely consented marriage of husband and wife."); Constitution of Mongolia Jan. 13, 1992, art. 16 ("The State shall protect the interests of the family, motherhood and the child."); The Constitution of the Republic of Montenegro Oct. 19, 2007, art. 72 ("Family shall enjoy special protection."); Constitution of the Republic of Mozambique Nov. 16, 2004, art. 119 ("The family is the fundamental unit and the basis of society."); The Constitution of the Republic of Namibia Feb. 9, 1990, art. 14 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); Political Constitution of the Republic of Nicaragua Jan. 1, 1987 (rev. 2005), art. 70 ("The family is the fundamental nucleus of society and has the right to protection by society and the State."); Constitution of Niger Oct. 31, 2010, art. 21 ("Marriage and family constitute the natural and moral foundation of the human community. Both are placed under the protection of the State."); Socialist Constitution of the Democratic People's Republic of Korea Dec. 25, 1972 (rev. 1998), art. 78 ("Marriages and the family shall be protected by the State. The State pays great attention to consolidating the family, the basic unit of social life."); The Basic Statute of the State [Constitution] Nov. 6, 1996 (rev. 2011), art. 12 (Oman) ("The family is the basis of society, and the Law regulates the means of protecting it, safeguarding its legal structure, reinforcing its ties and values, providing care for its members, and creating suitable conditions for the development of their aptitudes and capabilities."); The Constitution of the Islamic Republic of Pakistan Aug. 14, 1973, art. 35 ("The State shall protect the marriage, the family, the mother and the child."); The Political Constitution of the Republic of Panama Oct. 11, 1972 (rev. 2004), art. 56 ("The State protects marriage, motherhood and the family."); Constitution for the Independent State of Papua New Guinea Aug. 15, 1975, preamble art. 1 ¶ 5 ("We... call for... the family unit to be recognized as the fundamental basis of our society, and for every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family."); The Constitution of the Republic of Paraguay June 20, 1992 (rev. 2011), art. 49 ("The family is the foundation of society. Its complete protection will be promoted and guaranteed. It includes the stable union of a man and a woman, the children, and the community formed with anyone of their progenitors and their descendants."); Political Constitution of Peru Dec. 29, 1993 (rev. 2009), art. 4 ("The community and the State... protect the family and promote marriage, which are recognized as natural and fundamental institutions of society."); The Constitution of the Republic of the Philippines Feb. 2, 1987, art. 2 sec. 12, art. 15 sec. 1-2 ("The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution.... The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State."); The Constitution of the Republic of Poland April 2, 1997, art. 18 ("Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."); Constitution of the Portuguese Republic April 2, 1976, art. 67("As a fundamental element
in society, the family shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfillment.”); The Constitution of Qatar April 9, 2004, art. 21 (“The family is the nucleus of society…. The law regulates the means capable of its protection, maintaining its structure, strengthening its ties, and safeguarding motherhood, childhood, and old age within its framework.”); Constitution of the Russian Federation Dec. 12, 1993, art. 38 (“Maternity and childhood, and the family shall be protected by the State.”); The Constitution of the Republic of Rwanda May 26, 2003, art. 27 (“The family, which is the natural foundation of Rwandan society, is protected by the State. Both parents have the right and duty to bring up their children. The State shall put in place appropriate legislation and institutions for the protection of the family and the mother and child in particular in order to ensure that the family flourishes.”); Constitution of Saint Lucia Feb. 22, 1979 (rev. 2006), art. 1 (“Every person in Saint Lucia is entitled to… protection for his family life.”); The Constitution of Sao Tome and Principe Nov. 5, 1975 (rev. 1990), art. 50 (“As the fundamental element of the society, the family has the right to the protection of the society and of the state.”); Basic Law of Governance [Constitution] March 1, 1992 (rev. 2005), art. 9-10, (“The family is the nucleus of Saudi Society…. The state shall aspire to promote family bonds.”); Constitution of the Republic of Senegal Jan. 7, 2001, art. 17 (“Marriage and the family constitute the natural and moral base of the human community. They are placed under the protection of the State.”); The Constitution of the Republic of Serbia Sept. 30, 2006, art. 66 (“Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection.”); The Constitution of the Republic of Seychelles June 18, 1993, art. 32 (“The State recognises that the family is the natural and fundamental element of society and undertakes to promote the legal, economic and social protection of the family.”); Constitution of the Slovak Republic Oct. 1, 1992, art. 41 (“Matrimony, parenthood, and family shall be protected by the law.”); The Constitution of the Republic of Slovenia July 14, 1997, art. 53 (“The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection.”); The Federal Republic of Somalia [Constitution] Aug. 1, 2012, art. 28 (“Marriage is the basis of the family, which is the foundation of society. Its protection is a legal duty of the state.”); Transitional Constitution of the Republic of South Sudan July 9, 2011, art. 39 (“Family is the natural and fundamental unit of society and shall be protected by law. All levels of government shall promote the welfare of the family and enact the necessary laws for its protection.”); The Spanish Constitution Dec. 6, 1978 (rev. 2011), art. 39 (“The public authorities shall ensure the social, economic and legal protection of the family.”); The Constitution of the Democratic Socialist Republic of Sri Lanka Sept. 7, 1978 (rev. 2015), art. 27 (“The State shall recognize and protect the family as the basic unit of society.”); Constitution of the Republic of Sudan July 1, 1998 (rev. 2005), art. 15 (“The family is the natural and fundamental unit of the society and is entitled to the protection of the law; the right of man and woman to marry and to found a family shall be recognized.”); Constitution of Suriname Sept. 30, 1978 (rev. 1992), art. 35 (“The family is recognized and protected.”); The Constitution of the Kingdom of Swaziland Act 2005 July 26, 2005, art. 27 (“The family is the natural and fundamental unit of society and is entitled to protection by the State…. Society and the State have the duty to preserve and sustain the harmonious development, cohesion and respect for the family and family values.”); Constitution of Syrian Arab Republic March 13, 1973 (rev. 2002), art. 20 (“The family shall be the nucleus of society and the law shall maintain its existence and strengthen its ties; the state shall protect and encourage marriage.”); The Basic Law of the Republic of Tajikistan [Constitution] Nov. 6, 1994 (rev. 2003), art. 33 (“The state shall protect the family as the basis of society.”); Constitution of the Fourth Republic of Togo Sept. 27, 1992 (rev. 2007), art. 31 (“The state shall have the obligation to assure protection of marriage and the family.”); Constitution of the Republic of Turkey Nov. 7, 1982 (rev. 2002), art. 41 (“Family is the foundation of the Turkish society… The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children.”); Constitution of the Republic of Uganda Oct. 8, 1995, art. XIX (“The family is the natural and basic unit of society and is entitled to protection by society and the State.”); Constitution of Ukraine March 13, 2014, art. 51 (“Marriage shall be based on free consent between a woman and a man…. The family, childhood, motherhood, and fatherhood shall be under
family is the natural and fundamental group unit of society and is entitled to protection by society and the State.© Hence the family exists prior to the state and possesses inherent dignity and rights which states are morally bound to respect and protect.

We declare that the family, a universal community based on the marital union of a man and a woman, is the bedrock of society, the strength of our nations, and the hope of humanity. As the ultimate foundation of every civilization known to history, the family is the proven bulwark of liberty and the key to development, prosperity, and peace.

The family is also the fountain and cradle of new life, the natural refuge for children, and the first and foremost school to teach the values necessary for the well-being of children and society. The family truly is our link to the past and bridge to the future.®

Children are our future, and we gratefully acknowledge the selfless service rendered by parents, grandparents, guardians, and other caregivers who provide opportunities, as prescribed in the Declaration of the Rights of the Child, for children “to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”®

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© William James Durant (1885–1981) was a prolific historian and author. With his wife, Ariel, he wrote an eleven-volume history of the world entitled The Story of Civilization. They were awarded the Pulitzer Prize for General Non-Fiction and the US Presidential Medal of Freedom. WILL DURANT, THE MANSIONS OF PHILOSOPHY: A SURVEY OF HUMAN LIFE AND DESTINY 395 (Simon & Schuster, 1st ed. 1929) (“The family has been the ultimate foundation of every civilization known to history.”).

® ALEX HALEY TRIBUTE CITE, http://www.alex-haley.com/ (last visited April, 4 2016) (“In every conceivable manner, the family is link to our past, bridge to our future.” Alex Haley (1921-1992, author of Roots: The Saga of an American Family)).

Recognizing that, as stated in the Universal Declaration of Human Rights, “motherhood and childhood are entitled to special care and assistance,”7 and, as stated in the Declaration of the Rights of the Child, every child should, “wherever possible, grow up in the care and under the responsibility of his [or her] parents,”8 we declare that a functional, nurturing family founded on marriage between a man and a woman provides the surest safeguard of the special care and assistance to which children are entitled.

Gravely concerned by the escalating calamities afflicting children and society due to the rapid decline of marriage and family, we recall the sobering observation that “throughout history, nations have been able to survive a multiplicity of disasters— invasions, famines, earthquakes, epidemics, depressions— but they have never been able to survive the disintegration of the family.”9 We affirm the ancient wisdom that the world cannot be put in order without first putting in order the family.10

We call for a culture that honors and enables faithful, fulfilling, and resilient marriages; that recognizes and protects the uniquely valuable contributions of both mothers and fathers to the lives of their children; and that encourages the values and vision necessary for young people to look forward to and prepare for successful marriage and parenting.

We call upon officials and policymakers, internationally, nationally, and at all levels of government, to immediately establish policies and implement measures to preserve and strengthen marriage and family.

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7 Universal Declaration of Human Rights supra note 1, at Art. 25.
8 Declaration of the Rights of the Child supra note 6, at Principle 6
10 K’UNG-FU TZU, CONFUCIUS: THE GREAT LEARNING (Forgotten Books 2007) (Confucius (551-479 BC; Chinese teacher, politician, and philosopher): “The illustrious ancients, when they wished to make clear and to propagate the highest virtues in the world, put their states in proper order. Before putting their states in proper order, they regulated their families. Before regulating their families, they cultivated their own selves.... When their selves were cultivated, their families became regulated. When their families became regulated, their states came to be put into proper order. When their states came to be put into proper order, then the whole world became peaceful and happy.”); see also Durant, supra note 4, at 24; see also WING-TIST CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 86-87(Princeton University Press 1969).
We urge citizens, leaders, and people of influence everywhere to place as their highest priority the protection and strengthening of the family as the irreplaceable foundation of civilization and our only hope for prosperity, peace, and progress.
ABORTION: THE CONFLICT OF POSITIVE LAW WITH NATURAL LAW AND AQUINAS

Ulyana Yuryevna Altbregen†

INTRODUCTION

Mamma, please don’t hurt me; I’m helpless and so small. If you don’t choose to keep me safe, then I’ve no one at all. I’m not a thing to be destroyed - in private, secretly. I’m growing here beneath your heart, I’m real, I’m yours, I’m me! Perhaps your heart is troubled, filled with fears or filled with shame. But Mamma, try to understand; I’m not the one to blame! I’ve never, ever hurt you, so you’ve nothing to forgive. Why should I have to die before I’ve had my right to live . . . Remember that when you were just as small and frail as I, your mother didn’t make the choice to have her baby die. You had your chance to live, so, please let me have my chance, too. I can’t escape; I can’t cry out . . . My life depends on you.2

The legal right to an abortion3 has been an ongoing controversial debate not only in the United States (“U.S.”), but also the rest of the

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3 Abortion is defined as “the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus” through miscarriage or when induced by a doctor. Merriam-Webster Dictionary, M-W.COM, available at http://www.merriam-webster.com/dictionary/abortion (last visited Sept. 16, 2012) [hereinafter Merriam-Webster]. Abortion is generally referred to procured abortion, “the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to
world. Abortion is not only a conflict within the law, but also a conflict deeply intertwined with what people perceive to be moral and how it affects their view on abortion. The idea influencing this view is “what seems on the surface to be a merely legal issue about discrimination [of person’s rights] depends upon making an underlying moral judgment.” Thus, morality heightens the dilemma on abortion. Although the legal argument for a woman and her rights as a human being may be more morally conclusive, the argument that would give a fetus legal rights presents a problem due to the diverse opinions as to when life begins. It is this uncertainty that produces the ultimate legal and moral conflict of whose rights shall prevail.10

Through the view of Saint Thomas Aquinas (“Aquinas”)11 on morality and reason, this paper will use natural law12 to show how the

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4 Abortion remains a politically divisive issue within the United States and the world, with activists on both sides of the debate advocating for legislation that supports their respective arguments.” Janessa L. Bernstein, The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash, 73 BROOK. L. REV. 1463, 1473-74 (2008).
5 “The existence of a moral problem presupposes some conflict of values or goals or interests.” L. W. SUMNER, ABORTION AND MORAL THEORY 5 (Princeton Univ. Press 1981); “It could seriously be argued that this tension between considering abortion a serious moral evil that takes life, and the desire to avoid a categorical or even broad prohibition, captures the ambivalence of perhaps the largest segment of the American public.” David M. Smolin, The Religious Root and Branch of Anti-Abortion Lawlessness, 47 BAYLOR L. REV. 119, 123 (1995).
7 “Moral standing has thus far been defined in terms of the right to life, and a case has been made for connecting possession of this right with sentence.” SUMNER, supra note 5, at 161; see also, Bernard Gert, The Definition of Morality, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012), available at http://plato.stanford.edu/archives/fall2012/entries/morality-definition (referring to morality as a code of conduct which applies to individuals and society as a whole). “In the normative sense, morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral considerations. All of those who use “morality” normatively also hold that, under plausible specified conditions, all rational persons would endorse that code.” Id.
8 A fetus is defined as “an unborn or unhatched vertebrate especially after attaining the basic structural plan of its kind; specifically, a developing human from usually two months after conception to birth.” Merriam-Webster, M-W.COM, available at http://www.merriam-webster.com/dictionary/etus (last visited Sept. 30, 2012). Fetus is generally referred as the “term given to the developing organism” throughout the last seven months of pregnancy. MARIA COSTA, CONTEMPORARY WORLD ISSUES, ABORTION: A REFERENCE HANDBOOK 241 (ABC-CLIO, Inc., 1991) (1951).
9 DAVID BOONIN, A DEFENSE OF ABORTION 1 (Cambridge Univ. Press 2003).
10 Id.
11 Aquinas was born in approximately 1225 A.D. into a politically noble family in the castle of Roccasecca, Province of Frosinone, Italy. SAINT THOMAS AQUINAS, THE TREATISE ON LAW 3-7 (R. J. Henle, S. J. eds., & trans., Univ. of Notre Dame Press 1993). On his fifth birthday he was sent to Monte
positive law\textsuperscript{13} that legalizes abortion directly conflicts with our fundamental inclination towards the continuation of life.\textsuperscript{14} Through his writings, Aquinas transformed the way philosophy and theology was and has been viewed.\textsuperscript{15}

Aquinas has written a number of works “provid[ing] an ideal background for understanding . . . moral philosophy such as the nature of human action, virtue, natural law, and the ultimate end of human

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\textsuperscript{12} Natural law is “a rule of reason, promulgated by God in man’s nature, whereby man can discern how he should act.” CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS & WHY WE NEED IT 51 (Ignatius Press rev. ed. 1999) (1993). “Just as the maker of an automobile builds into it a certain nature and gives directions for its use so that it will achieve its end—that is, to be dependable transportation—so God has built a certain, knowable nature into man to follow if he is to achieve his final end, which is eternal happiness with God in heaven.” Id. “Natural law guides human beings through their fundamental inclinations toward the natural perfection that God, the author of the natural law, intends for them.” Peter Koritansky, Thomas Aquinas: Political Philosophy, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Dec. 27, 2007), http://www.iep.utm.edu/aquinas/.


beings.” In his well-known *Summa Theologica*, Aquinas explains that law is “nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”

According to Aquinas, law is broken down into four parts, eternal law, divine law, natural law, and positive law.

Aquinas holds eternal law “as the highest order of law, which is the governance of divine reason over the universe and everything in it.” Eternal law refers to God for He is eternal, and God’s plan for creation of the universe. Divine law derives from eternal law and refers to law provided by God directing man to his righteous path through divine commands. Divine law is separated into two parts: the old, which commanded man through fear, and the new, which commands man

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17 Summa Theologica was Aquinas’ most influential writing consisting of three parts, the first discussing God and proof of his existence, the second discussing ethics and the virtue of man, and the third which he died before able to finish, discussing Christ and salvation. INTERNET ENCYCLOPEDIA OF PHILOSOPHY, supra note 11.

18 Summa Theologica, supra note 14, at I-II, q. 90, a. 4. Promulgation is “the application of the law to those whom it is applied and the communication of this law to them, it is essential to the nature of the law. The natural law is promulgated by God: ‘God has instilled it into human minds so as to be known by them naturally.’” Jan Edward Garrett, Aquinas on Law, http://people.wku.edu/jan.garrett/302/aquinlaw.htm (last visited October 13, 2012). “Aquinas equates God with the common good, [therefore] the common good [for the sake of the community] supersedes the good of the individual.” EMILY WESTON, The Resuscitation of St. Thomas Aquinas: Catholic Bioethics and Abortion in the United States, 69 (May 2009), http://wakespace.lib.wfu.edu/jspui/bitstream/10339/14683/2/Weston_Thesis.pdf.

19 RICE, supra note 12, at 50.

20 WESTON, supra note 18, at 66.

21 “[A] law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident . . . that the whole community of the universe is governed by Divine Reason. Wherefore the very idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason’s conception of things is not subject to time but is eternal . . . therefore it is that this kind of law must be called eternal.” SUMMA THEOLOGICA, supra note 14, at I-II, q. 91, a. 1.

22 According to Aquinas, divine law is necessary for four reasons: natural and positive laws are not enough in order for man to reach eternal happiness; positive law is not always certain and in order for man to know with certainty what is good and what is evil there is a need for a law from God because such a law cannot be an error; man is not sophisticated enough to make law based on the interior so there exists a need for God to provide such law; and lastly divine law is necessary to make sure that all evil deeds are forbidden. RICE, supra note 12, at 54-55; see also SUMMA THEOLOGICA, supra note 14, at I-II, q. 91, a. 4.
through love.\textsuperscript{23} Natural law is a “dictate of reason commanding something.”\textsuperscript{24} It is discoverable by the use of reason to discern what is good and what is evil.\textsuperscript{25} Natural law is a rational man’s participation in God’s wisdom, and God’s wisdom is the eternal law because it ordains and directs the man to the ultimate end, which are happiness and the common good.\textsuperscript{26} When God created man, He provided man with natural instincts that should be used through reason to lead him towards good.\textsuperscript{27} Therefore, “[m]an can know, through the use of his reason, what is in accord with his nature and therefore good.”\textsuperscript{28} Positive law\textsuperscript{29} refers to laws made by man, and according to Aquinas all positive law is derived from natural law.\textsuperscript{30} Aquinas explains that positive law is an “integral part of God’s plan . . . designed to promote the common good and help man attain his highest end of happiness.”\textsuperscript{31} Since positive law is derived from natural law and natural law is derived from eternal law, it is logical to conclude that all laws are derived from eternal law.\textsuperscript{32}

\textsuperscript{23} \textit{Summa Theologica}, supra note 14, at I-II, q. 91, a. 5 c.

\textsuperscript{24} Id. at I-II, q. 92, a. 2 c. See also, FULVIO DI BLASI, \textit{God and The Natural Law: A Rereading of Thomas Aquinas} I (David Thunder, trans., St. Augustine’s Press 2006) (1999).

\textsuperscript{25} Di Blasi, supra note 24, at 1.

\textsuperscript{26} RICE, supra note 12, at 31-32. Common good is that “each and everyone’s well being, in each of its basic aspects, must be considered and treated favorably at all times by those responsible for coordinating the common life.” Di Blasi, supra note 24, at 2; see also, JOHN FINNIS, \textit{Natural Law and Natural Rights}, 214 (Oxford Univ. Press 1980). Aquinas refers to the common good as the common benefit for all the community as a whole rather than for each individual separately. \textit{Summa Theologica}, supra note 14, at I-II, q. 90, a. 2.

\textsuperscript{27} RICE, supra note 12, at 30.

\textsuperscript{28} Id.

\textsuperscript{29} \textit{Summa Theologica}, supra note 14, at I-II, q. 91, a. 3, (using reason from the precepts of natural law, man can proceed to make “particular determinations of certain matters” and this is how positive law is formed).

\textsuperscript{30} Positive law derives from natural law in two ways. Id. at I-II, q. 95, a. 2. There are things that derive from natural law principles through conclusions, for example “that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man’. Id. There are also things that derive from natural law principles through determination, for example that natural law provides that someone who does evil should be punished but the manner in which that someone should be punished is a “determination of the law of nature.” Id.

\textsuperscript{31} RICE, supra note 12, at 61. “Law principally and properly seeks the common good. Planning for the common good is the task of the whole people or of someone ruling in the person of the whole people. Thus lawmaking is the task of the whole charge of the whole people; for in all other matters direction toward an end is the function of him to whom the end belongs”, Paul Halsall, \textit{Aquinas on Law}, FORDHAM UNIV. (David Burr trans., 1996), available at http://www.fordham.edu/halsall/source/aquinas2.asp.

\textsuperscript{32} \textit{Summa Theologica}, supra note 14, at I-II, q. 93, a. 3; see also, RICE, supra note 12, at 54. An analogy might help: imagine that for your birthday, you get a new iPad but when you open the package it is missing the manual, so you ask a friend who works at an electronic store to help you figure out how to work your new iPad. Your friend then tries to play with the applications and settings and then
Part I of this paper will delineate the conflict between natural law and the current positive law. Part II will introduce the history of positive law with regards to abortion in the U.S. by focusing on three seminal cases. Through Roe v. Wade, Planned Parenthood v. Casey, and Stenberg v. Carhart, the Supreme Court announced that a woman’s right to choose to terminate her pregnancy is a fundamental right under the Ninth and Fourteenth Amendments of the U.S. Constitution. Part III will provide the arguments made by the parties that are for abortion staying legal, as well as the parties that are against abortion staying legal. This section will provide an explanation regarding the manner in which each side uses natural law to justify its’ view regarding whether abortion should remain legal, or become criminalized again. Part IV will provide an analysis on the future if the positive laws from Roe, Casey, and Carhart remain precedent. Finally, in Part V, I will provide my recommendations as to how the conflict should be resolved in order for the U.S., as a people, to move towards the fundamental inclination of the continuation of life.

I. Delineating the Conflict Between Natural Law and Positive Law, as well as, the Conflict within Natural Law

“There is too much at stake to leave the lives of so many millions of Innocents - both women and unborn children - up to mere personal whimsy or political bartering.” Societal views in the U.S. have been “shattered and stretched to the limit.” By continuing to follow the
positive law on abortion, people as a society are drifting further apart from their natural inclinations, having their reason distorted. Since Roe v. Wade, society has begun valuing the right of choice over the right to life, and seemingly protects privacy over protecting life itself. In essence, society’s value system has created a chain of events that has led society to split in two.

Pro-life advocates follow the view of Aquinas, arguing that the positive law legalizing abortion contradicts the natural law, which preaches the continuation of life as a fundamental principle. On the other hand, while pro-choice advocates also follow the view of Aquinas, they argue that a woman’s right to choose to terminate her pregnancy is a right provided under the Constitution, which upholds the natural law

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41 Halsall, supra note 31 (providing an explanation on how reason works, recognizing that natural law may fail “because the reasons of some are distorted by passion, evil habits, or evil natural disposition.”). “[P]assion causes us not to consider in a particular instance what the reason knows in general to be wrong; the passion distracts the reason, opposes it, even fetters it, thus giving the reason contradictory distorted propositions,” by analogy, passion has distorted the reason into thinking that abortion is good. Key Ideas in Summa I-II: Questions 71-77 (Vices) & 90-97 (Law), available at http://www3.dbu.edu/mitchell/summa6.htm (last visited Nov. 12, 2012).

42 Roe v. Wade, 410 U.S. 113 (1973) (Holding that a woman’s right to choose to terminate her pregnancy is a protection provided under the Fourteenth Amendment, that the state shall not interfere with a woman’s choice before the end of the first trimester, and in later stages of the pregnancy, the state shall only have limited power to interfere such as when the life of the woman is in grave danger). Justice Blackmun acknowledging in the majority opinion that “[o]ne’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.” Id. But then the Justice goes on to say that the Court must make a decision that is “free from emotion.” Id.

43 Although there are many points of view on abortion, society has finely been split into two, the pro-choice and the pro-life. Both Sides of the Abortion Debate, STUDYWORLD.COM, available at http://www.studyworld.com/moral_issues/abortion/both_sides_of_the_abortion_debate.htm (last visited Oct. 31, 2006). “A pro-choicer would feel that the decision to abort a pregnancy is that of the mother . . . A pro-lifer would hold that from the moment of conception, the embryo or fetus is alive . . . imposes[ing] on [society] a moral obligation to preserve it.” Id. “The simple idea is this: Abortion is regarded by many, probably the overwhelming majority, as an evil. But it is also regarded by many, probably a somewhat different majority, as an unavoidable or even a necessary evil that our society is not yet prepared to abolish and cannot abolish without severe disruptions to the fabric of society. Few regard abortion as a “positive good. Those who do are rightly regarded as extremists.” Michael Stokes Paulsen, Prospective Abolition of Abortion: Abortion and the Constitution in 2047, 1 U. ST. THOMAS J.L. & PUB. POL’Y 51, 52 (2007).

44 See infra text accompanying note 113.

45 SUMMA THEOLOGICA, supra note 14, at I-II, q. 95, a. 2.

46 See infra text accompanying note 114.
principle of self-preservation. With both sides justifying their view on abortion with natural law, the dilemma on which side is right is more important than ever.

According to Aquinas, positive laws must not only fall in accordance with natural law, but that all positive law is actually “derived from the law of nature,” and if positive law contradicts natural law then it should not be considered law at all. However, whether positive law contradicts natural law is not what determines the validity of that law but rather that its contradiction makes it an unjust law from a moral standpoint and therefore, such law “do[es] not bind the conscience...” Based on this, Aquinas would argue that the positive law legalizing abortion directly contradicts the natural law, because natural law sees the continuation of life as a fundamental principle. Since abortion is essentially ending life, and is the opposite of a fundamental tenet of natural law, it follows that positive law allowing such an act is an unjust law. Positive law must conform to natural law, and abortion is not a legal act under Aquinas’ view of natural law.

Aquinas provides that the main precept of natural law is “that good is to be done and pursued, and evil is to be avoided.” From this

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47 See Stenberg v. Carhart, 530 U.S. 914, (2000); See also Planned Parenthood v. Casey, 505 U.S. 833 (1992); See generally Roe v. Wade, 410 U.S. 113 (1973) (holding that although not explicit, the Constitution extends the right to privacy to include a woman’s right to terminate her pregnancy).

48 “Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” SUMMA THEOLOGICA, supra note 14, at I-II, q. 95, a. 2. Assuming this is true it would mean that all laws no matter the jurisdiction would be the same, all derived from natural law but we know that this is not true. AQUINAS, supra note 11, at 16. To resolve this statement Aquinas provides two ways that laws arise out of natural law. Id. “One by way of conclusion. Thus the general precept ‘harm no person’ the prohibition of murder can be deduces. The second way is by way of determination. Thus, reckless driving is against the natural law since it endangers life and limb.” Id. From this different jurisdictions decide how to regulate or punish the wrongdoers. Id.


50 SUMMA THEOLOGICA, supra note 14, at I-II, q. 94, a. 2.

51 Gregory, supra note 15, at 386 (explaining that according to Aquinas, when positive law conflicts with natural law it becomes “a perversion of law,” in the sense that the law is no longer “an ordinance of reason for the common good”).

52 Matthew Ion Radu, Incompatible Theories: Natural Law and Substantive Due Process, 54 Vill. L. Rev. 247, 274 (2009). ”[N]atural law proscribes the direct, intentional killing of innocent human persons. Aquinas declared that “therefore it is in no way lawful to slay the innocent.” See also, SUMMA THEOLOGICA, supra note 14, at I-II, q. 64, a. 6.

53 SUMMA THEOLOGICA, supra note 14, at I-II, q. 94, a. 2. ”The good preceded the right, and hence there is no “right” to choose evil, or to define that which is by nature evil, as good.” Smolin, supra note 5, at 129. Precept is defined as “a command or principle intended especially as a general rule of action.” Merriam-Webster, http://www.merriam-webster.com/dictionary/precept (last visited Oct. 13, 2012).
precept, Aquinas explains that three primary fundamental principles of man are derived.54 The first fundamental principle is the natural inclination of self-preservation by warding off evil and maintaining our existence.55 The second fundamental principle is the natural inclination to procreate and to nurture our offspring.56 The third fundamental principle is the natural inclination towards the good, to live amongst others within society.57 “For Aquinas, there are also secondary principles, which are derived from the primary principles and ‘contribute to public and private moral good.”58

The first two inclinations have been used to argue for and against abortion.59 The inclination of self-preservation includes the continuation of life in a general aspect and has been used to argue for abortion, while the inclination to continue life, specifically procreating and nurturing for children has been used to argue against abortion.60

These two natural-law precepts relate differentially to the abortion issue. While the law of “respect for life” includes one’s offspring in a general way, the second law, related to having and caring for offspring, if it be acknowledged to prevail, is much more relevant to the case of abortion — since it is diametrically opposed to a woman’s extermination of her own child in utero. An intentional extermination would seem to

54 “Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.” SUMMA THEOLOGICA, supra note 14, at I-II, q. 94, a. 2.

55 Id.
56 Id.
57 Id.
58 WESTON, supra note 18, at 67; see also, CHARLES E. CURRAN, CATHOLIC MORAL THEOLOGY IN THE UNITED STATES: A HISTORY 67 (Georgetown Univ. Press 2008).
60 Id.
belong preeminently to the category of sins deemed “contrary to nature”.

The issue is that positive law, currently holding abortion legal, contradicts the natural law and its inclination towards the preservation and continuation of life. In addition, there is an issue within natural law itself; views are split between those who see the natural law inclination of self-preservation as a valid reason for woman’s rights versus those who see the natural law inclination of continuation of life as contradicting abortion. However, natural law holds that human life should be preserved regardless of what condition or stage the life is in; thus the right to life is above anything else. So if society as a whole does not fix the contradiction between positive law and natural law in regards to abortion, it will never be able to reach its ultimate end.

II. A LOOK INTO THE HISTORY OF ABORTION AND ITS’ PAST TRENDS

\[\text{Id.}\]

\[\text{See SUMMA THEOLOGICA, supra note 14, at I-II, q. 95, a. 2.}\]

\[\text{See supra note 47.}\]

\[\text{Garrett, supra note 18. See also, Michael J. Perry, The Morality of Human Rights: A Nonreligious Ground, 54 EMORY J.L. 97, 135 (2005). “The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the . . . processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge. The horror we feel in the willful destruction of a human life reflects our shared inarticulate sense of the intrinsic importance of each of these dimensions of investments”. Id.}\]

\[\text{Germain Grisez, The True Ultimate End of Human Beings: The Kingdom, Not God Alone 39 (2008), available at http://www.twotlj.org/ult-end.pdf (according to Aquinas the ultimate end is in God, and that all man is directed towards the good but not all reach it in the same way). A man cannot attain towards more than one end at a time, “[s]ince everything tends to its own perfection, what human beings tend toward as their ultimate end must be something that they tend toward as a good that is perfect and utterly fulfills them.” Id. at 40; See also, SUMMA THEOLOGICA, supra note 14, at I-II, q. 1, a. 5. “Ultimate ends of human action are mutually incommensurable . . . if man, objectively speaking, has several ultimate and incommensurable ends to pursue, his particular moral choices will depend in the end on a subjective and arbitrary element-just as a ship that simultaneously has two possible routes, one toward Naples and the other toward Palermo, cannot sail until it chooses one of the options arbitrarily...where the rejection of an ultimate end capable of justifying an objective hierarchy guiding individual ethical choices leads to the positing of a subjective hierarchy among values as the necessary premise of every concrete action”. DI BLASI, supra note 24, at 16; see also, FINNIS, supra note 26, at 92-93.}\]
In order to understand how society has arrived at the present day’s conflict on abortion, one must take a look into abortion’s history. Abortion laws in the U.S. have only begun to be widely discussed over the past forty years. It was not until Roe v. Wade, a 1973 case, in which the Supreme Court single handedly took the power away from the states and recognized that a woman’s right to choose to terminate her pregnancy is protected under the Constitution, that abortion became a highly noted topic. However, the conflict concerning abortion dates back to eras as early as the Roman Empire (around 753 BC) and has been in dispute long before the U.S. was formed and the Supreme Court began addressing it. The following two subsections will provide a look into abortion before and after it became legal through Roe.

A. Abortion: Before Roe

During the Roman Empire, abortion was not considered to be murder because the Romans valued the rights of the father over the rights of the fetus, completely ignoring the rights of the mother. However, for

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66 COSTA, supra note 8, at xi.
67 Jane Roe (Roe), a pregnant single woman, brought a class action suit, naming District Attorney Henry Wade (Wade) as the defendant, challenging the constitutionality of a Texas statute that prohibited a woman’s right to terminate her pregnancy, punishable by imprisonment except in those cases where a physician’s medical opinion shows that the termination of the pregnancy is necessary to save the life of the mother. See Roe v. Wade, 410 U.S. 113, 120 (1973). In addition to Roe, there were two other plaintiffs; a married couple with no children, known as John and Mary Doe (Does), and James Hallford (Hallford), a licensed physician who had previously violated the Texas statute being challenged. Id. at 120-121. Roe alleged that she was not able to terminate her pregnancy because the pregnancy did not threaten her life. Id. at 120. The Does alleged that because the wife was diagnosed with a disorder that would put her life in danger if she were to get pregnant, she wanted to make sure that she would be able at that time to safely and legally terminate her pregnancy within the state of Texas. Id. at 120-122. Hallford alleged that the Texas statute was vague and uncertain, violating his patient’s and his own right to privacy. Id. at 121. The Supreme Court dismissed Hallford’s and Doe’s claims but in the matter of Roe, the Court held that Roe along with all women in the U.S. had the right to choose whether or not to terminate their pregnancies. Id. at 126-129, 152-156. The Supreme Court then provided some boundaries as pertained to the different trimesters of a pregnancy. Id. at 164-165. During the first trimester, a pregnant woman’s doctor shall make the medical judgment. Id. During the second trimester, a state may regulate abortion procedures when those interests are related to the woman’s health. Id. During the third trimester, a state may regulate or even prohibiting abortion, except when necessary to preserve the life or health of the mother. Id.
68 Id.
69 COSTA, supra note 8, at xii.
70 “[L]egal regulation of abortion as exists in the Roman Empire at this time is aimed at protecting the rights of the fathers, not of fetuses.” COSTA, supra note 8, at 1. During this era, abortion was legal but it did not give women a right to choose because a woman was not able to abort her fetus without the consent of her husband, and failure to obtain consent would result in exile. Id.
almost two thousand years after this era, the universal consensus agreed that abortion was “a horrendous evil which would seriously lead to hell.” Further, during the 1200s, the Roman Catholic Church adopted the view of Aquinas, which said that abortion goes against the natural law of man, deeming abortion illegal in the eyes of God. Although not everyone shares the same religion, according to Aquinas, everyone “possess[es] the same human nature and the same desire for justice. All people belong to the human race and are endowed with the gift of reason and born with a conscience, an innate moral law that is God-given and natural,” therefore everyone could agree that abortion was morally wrong.

Moving forward to the early years of the U.S., there were no explicit statutory laws prohibiting abortions. The first anti-abortion regulation or law to pass in the U.S. occurred in 1821, in the state of Connecticut, which held abortions to be illegal if they were done after the quickening. But it was not until the 1840s, two decades later, when other states joined in and began to pass similar laws. The likely reason for the sudden state involvement was due to the skyrocketing numbers of abortions being performed throughout the U.S.

[T]he average American woman bore seven children in 1800, three and a half by 1900. Estimates of abortions ranged between one-fifth and

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71 Kalpakjian, supra note 12, at 3.
72 COSTA, supra note 8, at 3. Roman Catholic Church adopted Aquinas’ writings as their own because he wrote about the truths of God and explained the principles of reason that interlocked with the Church’s view. John Dempsey, Thomas Aquinas, CHRISTIAN HISTORY FOR EVERY MAN, available at http://www.christian-history.org/thomas-aquinas.html (last visited Oct. 28, 2012). In the 14th century, Aquinas was crowned a saint by the Church and in the 15th century, as a doctor of the church with a recognized holiday in his honor. Id.
73 Kalpakjian, supra note 12, at 3.
74 COSTA, supra note 8, at 3.
75 DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT (Twayne Publishers 1994). Quicken ing is defined as “the point at which a pregnant woman could feel the movements of the fetus (approximately the fourth month of pregnancy).” LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 8 (Univ. of Cal. Press 1997). Before advanced medical expertise came to light, it was extremely difficult to tell at which point of a pregnancy a quickening occurred. Id. “Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the nineteenth century, there was otherwise little agreement about the precise time of formation or animation.” Roe v. Wade, 410 U.S. 113, 132-134, 138 (1973).
77 Id.
one-third of all pregnancies. Before, abortion had been the refuge of desperate, unmarried women; now most abortions were by married women, using it as birth control.78

Within the next thirty-five years, every state had passed some form of law that either made abortion illegal or regulated it with exceptions, such as in circumstances when a woman’s life was considered by her physician to be in grave danger.79

B. Abortion: After Roe

“Until the 1960s, all but four of the fifty states had statutes that prohibited abortion except when necessary to save the life of the mother.”80 However, the cultural disorder provided by the 1960’s and 1970’s sexual revolution, along with the advancement in birth control and the availability of the birth control pill, created a time where family planning and safe sex needed to be controlled in order to bring society back into order.81 Due to the multicultural characteristic of the society “with a wide spectrum of opinions”, it was held that “no one individual or group should impose its opinion or morality on others.”82 This in effect led to those with power, to take action.

And so American history on abortion changed drastically in 1973 when the Supreme Court took the power into its’ own hands and held

78 Id.
79 COSTA, supra note 8, at 4-9, 15; see generally, BLANCHARD, supra note 75. At this time, abortion laws were being implemented around the world. Center for Reproductive Rights, REPRODUCTIVE RIGHTS ORG., available at http://worldabortionlaws.com/about.html (last visited Oct. 28, 2012) (providing that most countries have liberalized their laws on abortion between 1950 and 1985). For example, the Ethiopian Penal Code of 1957 only permitted an abortion when it was necessary to save the pregnant woman from death or a permanent danger to her health, and even then it was only permitted after it was attested by two physicians that there was no other way to avert the danger. ETHIOPIAN PENAL CODE 158 ART. 534 (1957), available at http://cyber.law.harvard.edu/population-abortion/Ethiopia.abo.html.
81 Gerard V. Bradley, The Pro-Life Movement, Forty-One Years After Roe (Jan. 2014), available at http://www.thepublicdiscourse.com/2014/01/11929/ (asserting that “[w]omen’s care centers will have to discover new ways to step between pregnant women and the temptation to abort by taking a pill. The argument about abortion from this point forward is about ethics, not status. It is about justice, not about “personhood.” It is about establishing that, even if an abortion would be advantageous (up to a point) for a woman – and even if abortion rights are a boon to women’s general social prospects – abortion is always gravely unjust. For that reason, it is not to be done. A just society must prohibit it.”).
82 Kalpakgian, supra note 12, at 1-2.
anti-abortion statutes to be unconstitutional in its *Roe v. Wade* decision.\(^{83}\) With this ruling the Supreme Court “changed the traditional, time-honored meanings of good and evil, allowing the killing of pre-born children on the basis of a woman’s right to privacy, reversing 2,000 years of custom, tradition, law, and religion . . .”\(^{84}\)

Following *Roe*, there has been an ongoing dispute on whether *Roe* should be overturned, making it illegal to obtain an abortion.\(^{85}\) Individuals have initiated and supported more than 330 Human Life Amendment proposals that would reverse the ruling in *Roe*.\(^{86}\) These Human Life Amendments have been introduced to Congress, in order to implement them to the U.S. Constitution.\(^{87}\) In 1983, the Hatch-Eagleton Human Life Federalism Amendment\(^{88}\) was proposed, and became the closest Human Life Amendment to becoming adopted, but as of yet, no Human Life Amendment has been successfully adopted thus far.\(^{89}\) Although the Human Life Amendments previously proposed have not specifically mentioned Aquinas or natural law outright, all have emphasized that human life begins at conception and the fetus should have all the rights afforded to human beings which follows in accordance to Aquinas’ view of conception.\(^{90}\)

\(^{83}\) *Roe*, 410 U.S. 113.

\(^{84}\) Kalpakgian, supra note 12, at 1-2.

\(^{85}\) REAGAN, supra note 75, at 14-15.

\(^{86}\) “The proposed amendments have aimed at making abortion unconstitutional by legally defining human life or ‘personhood’ to include the fetus, granting it the due process protection of the Fourteenth Amendment.” WESTON, supra note 18, at 48; see also, Human Life Amendment, NAT’L COMM. FOR A HUMAN LIFE AMEND http://www.nchla.org/ issues.asp?ID=46 (last visited Sept. 24, 2012).

\(^{87}\) NAT’L COMM. FOR A HUMAN LIFE AMEND, supra note 86 (providing that approximately 330 Human Life Amendments have been either initiated, proposed, or submitted thus far).

\(^{88}\) The Hatch-Eagleton Human Life Amendment was a reversal amendment “specifically designed to abolish the constitutionally protected right to abortion found originally in *Roe v. Wade*.” RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT 27 (James Bopp, Jr. ed., Brigham Young Univ. Press 1984). The Amendment would work to take the power away from Congress, and place it back into State hands. Id. at 28.

\(^{89}\) WESTON, supra note 18, at 49 (the Hatch-Eagleton Human Life Federalism Amendment was the only Human Life Amendment to receive a formal vote in Congress, and failed by eighteen votes from the Senate). Id.; See also, Reid, supra note 81, at 2 (failing because it did not meet the criteria provided for an amendment to be successful which is at least a two-thirds vote by Congress followed by the ratification of the amendment by at least three-fourths, approximately thirty-eight out of the fifty states).

Almost twenty years after the Supreme Court ruled on Roe, the Court reaffirmed its decision in a 1992 case, Planned Parenthood v. Casey. Although the Supreme Court upheld the ruling in Roe, preserving the constitutional protection for a woman’s right to choose to abort, the Court adopted a new and some would say weaker test for evaluating restrictive abortion laws, giving the power to regulate abortion back to the States, allowing States to restrict access to abortions, as long as, women who sought abortions, were not unduly burdened.

Individuals, disappointed by the Court’s unwillingness to overrule Roe in their decision in Casey, have since changed their strategy of trying to get the Court to make abortion illegal again, and instead “they are trying to make it impossible” to have an abortion. Many restrictions have been placed between a woman and an abortion, such as

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91 Five abortion clinics and a physician brought a class action suit, challenging five provisions of a Pennsylvania Abortion Control Act. See generally Casey, 505 U.S. 833. The Act required a woman seeking an abortion to provide informed consent prior to an abortion; specified certain information that a woman must be provided with 24 hours prior to an abortion; required that if the woman was a minor, parental consent had to be provided before an abortion were to be carried out; and required a married woman to have signed consent from her husband. Id. In addition, the Act required facilities that carried out abortions to provide reports of the abortions provided. Id. If a facility failed to report the required consents, a physician that performed the abortion could have his or her license revoked and could be liable in damages in cases where consent from a husband was not provided. Id. The Supreme Court in this case found it “imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.” Id. The Supreme Court in this opinion reaffirmed the holding in Roe with three specific principles: (1) a woman has the right to choose and obtain the termination of her pregnancy without undue interference from the State as long as it is before the viability stage; (2) States are restricted from placing restrictions on abortions prior to the viability stage; and (3) States have an interest in protecting the health of a woman and fetus from the outset of a pregnancy. Id. The Supreme Court provides an undue burden test, a weaker test for evaluating restrictive abortion laws, stating that so long as a State does not place a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”, State regulations will survive a constitutional review. Id.

92 Linda J. Wharton, Preserving The Core of Roe: Reflections on Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317 (2006) (“Supreme Court backed away from affording women the highest level of constitutional protection for the abortion choice”); see also Casey, 505 U.S. at 877 (Supreme Court defining that an undue burden is placed on a woman seeking to terminate her pregnancy when “a state regulation has the purpose or effect of placing a substantial obstacle” on the woman and that such a regulation would not be valid because states may not hinder a woman’s right). Id; But see Facts on Induced Abortions In The United States, GUTTMACHER INSTITUTE (Aug. 2011), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (Casey’s ruling “significantly weakened the legal protections previously afforded women and physicians by giving states the right to enact restrictions that do not create an “undue burden” for women seeking abortion.”); The test was weaker because, the restrictions granted to the states “severely limited access to abortion.” BLANCHARD, supra note 75, at 111.

93 Bernstein, supra note 4, at 1473.
“mandatory waiting periods before an abortion may be performed, parental-consent and parental notification laws, and refusal laws that allow doctors and hospitals to decline to perform abortions.”

Eight years later, in 2000, the Supreme Court in *Stenberg v. Carhart*, debated what would constitute the most humane way to dismember a fetus so that the law would consider this act an abortion rather than a murder. The Supreme Court used the undue burden test, established in *Planned Parenthood* to hold a Nebraska partial-birth abortion ban unconstitutional for two reasons. First, the Court held that because the ban did not include a health exception it inevitably threatened women’s health if a woman needed an abortion due to a health reason. Second, the Court held the ban used language allowing abortion to be the most common method for the second trimester and creating an undue burden because it created a substantial obstacle for women seeking abortions. With this ruling, *Stenberg* effectively invalidated a majority of similar bans nationwide.

94 Id. (listing a number of restrictions placed between a woman and an abortion, to name a few others: “abortions be performed in a hospital after a certain point in the pregnancy or that a second doctor be present for the procedure” as well as “restrictions on public funding of abortions and on private insurance availability.”).

95 *Carhart*, 530 U.S. at 922.

96 Nebraska Statute § 28-328(9) defined partial-birth abortion as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” Id. Further the statute defines “partially delivers vaginally a living unborn child before killing the unborn child” as the “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” Id.

97 Dr. Leroy Carhart, a Nebraska physician brought a lawsuit alleging that a Nebraska Statute on partial-birth abortion violated the Constitution and sought an injunction against its enforcement. Id. The Statute banned all partial-birth abortions unless the woman seeking one fell within the exception. Id. The exception provided that a partial-birth abortion may be carried out if it was necessary to save a woman’s life, whether from the pregnancy itself or from some physical disorder, illness of injury. Id. The Supreme Court did not revisit the issue of whether a woman has a constitutional right to terminate her pregnancy if she so chooses, instead the Court used its precedent from *Roe* and *Planned Parenthood* to apply to the case in *Stenberg*. Id. In applying *Roe* and *Planned Parenthood*, the Supreme Court affirmed the Court of Appeals, stating that the Nebraska Statute was unconstitutional on two reasons: (1) the ban failed to include a health exception; and (2) the ban created an undue burden by forming a substantial obstacle for women seeking abortions during the second trimester. Id.

98 *Carhart*, 530 U.S. at 930.

99 Id.; Dawn Stacey, *D&E (Dilation and Evacuation)*, ABOUT.COM (Apr. 5, 2011), available at http://contraception.about.com/od/abortion/g/Dande-Dilation-And-Evacuation.htm (providing that the most common method for abortion in the second trimester is the dilation and evacuation procedure).

In 2004, President George W. Bush signed into law a federal Unborn Victims of Violence Act.\textsuperscript{101} The Act protects the unborn child\textsuperscript{102} by criminalizing and punishing “as a separate offense, conduct that violates specified federal statutes or military laws, and thereby causes death or bodily injury to an embryo or fetus,” punishing the offender in the same way that the offender would be punished “had the offense been committed against the woman carrying the embryo or fetus.”\textsuperscript{103} However, the Act provides a section that excludes abortions from being a punishable offense.\textsuperscript{104}

A number of states had their own Unborn Victims of Violence Acts prior to the Act of 2004, but many came on board after.\textsuperscript{105} As of November 2011, thirty-seven states across the U.S. currently hold a type of Unborn Victims of Violence Act.\textsuperscript{106} These Acts are all similar in nature after the Supreme Court struck down the Nebraska Ban, and in effect similar bans throughout the states, President Bush in 2003 had signed a federal Partial-Abortion Ban Act into law but it has yet to have seen any enforcement. Id. “The Court, in Gonzales v. Carhart, upheld the Act, distinguished it from the Nebraska statute struck down in Stenberg, and determined that it neither imposed an undue burden on a woman’s right to choose to have an abortion nor required a health exception. It found that the Act clearly only prohibited one type of abortion, intact D&E, and did not prohibit the D&E procedure where the fetus is removed in parts.” Id.; see also, Stacey, supra note 99 (explaining the dilation and evacuation abortion procedure). Usually performed after the 12th week of the pregnancy, a dilator is inserted into the cervix in order to help the cervix open up, after which forceps are used to clamp and pull out the fetus, then the lining of the uterus are checked to make sure than no parts of the fetus were left behind. Id.\textsuperscript{107}

\textsuperscript{101} \textit{President Bush Signs Unborn Victims of Violence Act into Law, After Dramatic One-vote Win in Senate, NATIONAL RIGHT TO LIFE COMMITTEE,} (Apr. 6 2004), http://www.nrlc.org/Unborn_Victims/BushsignsUVVA.html (President Bush signing in the federal Unborn Victim of Violence Act also known as Laci and Conner’s Law.); \textit{Wendell Goller, Bush Signs Lacial Conner’s Law, FOXNEWS.COM,} (Apr. 23 2004), http://www.foxnews.com/story/0,2933,115825,00.html (naming the Act after Laci and her unborn child Conner Peterson who were brutally murdered by Laci’s husband Scott Peterson).

\textsuperscript{102} Amy J. Sepinwal, \textit{Defense of Others and Defenseless “Others”,} 17 \textit{YALE J.L. \& FEMINISM} 327, 339 (2005) (defining unborn child as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”).

\textsuperscript{103} Id. (protecting violent acts against pregnant women, with the effect of providing a protecting for the unborn child).


\textsuperscript{106} Johnson, supra note 105 (providing that North Carolina was the 37th state to adopt an Unborn Victim of Violence Act).
and provide that the fetus is an unborn child in the womb. Most of the Acts apply to the unborn child at any stage of its development. Some states even go as far as stating that “[f]or purposes of establishing the level of punishment, a victim who is "an unborn child shall be treated like a minor who is under twelve years of age." In some ways, although the Unborn Victims of Violence Acts came about in order to deter violence against pregnant women, they in effect brought about the classification that killing a fetus is murder, and “and necessarily imply[ing], if . . . not directly stat[ing], that the fetus is a ‘person’ under the law.”

Since the Roman Era, society has gone from viewing abortion as “sinful, immoral, and evil to the idea that abortion is a right and a way of life around which people organize their futures and careers.” For over forty years now, the Supreme Court has consistently held that “[w]omen should have the right to terminate inconvenient pregnancies so that they can emphasize portions of their lives other than childbearing and child raising.”

III. IDENTIFYING THE PARTIES INVOLVED

Whether an individual has been personally affected by abortion does not change the fact that almost everyone has some sort of observation on how they view its existence. In general and for purposes of this paper, people with opposing views on abortion are divided into two main parties: those who are pro-life and those who are pro-

\[107\] State Homicide Laws that Recognize Unborn Victims, NATIONAL RIGHT TO LIFE COMMITTEE, (July 5 2011), https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/ (providing a breakdown of twenty-seven out of the thirty-seven states who have adopted an Unborn Victims of Violence Act, and summarizing the states’ individual Acts).

\[108\] Id. (explaining for example that Arizona is one of the states to hold that an unborn child victim is viewed as a minor under the age of 12 under the law in that state).


\[110\] Kalpakgian, supra note 12, at 12-13; See also, Casey, 505 U.S. at 856. “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.” Id.


\[112\] “It is a fact that at least 40 million abortions have occurred since 1973 . . . everyone is touched by abortion, whether they know it or not.” Who is Affected by Abortion, RAMAH INTERNATIONAL, http://www.ramahinternational.org/who-affected-abortion.html (last visited Oct. 13, 2012).

\[113\] Pro-life refers to persons who oppose abortion. BOONIN, supra note 9, at xiii. Pro-life supporters are usually viewed to be on the conservative side, and believe that conception deems the beginning of a human life; therefore, abortion is murder of a human being who has individual rights, separate of
choice. Both sides have lengthy arguments, reasoning why abortion should be made illegal or why it should stay legal. The following subsections will illustrate how pro-life and pro-choice advocates use natural law and positive law in order to justify the argument of abortion in their favor.

A. Pro-life Stance on Abortion

Individuals most commonly argue against the legal right to an abortion on the claim that a human fetus has an individual right to life. Individuals believe that a fetus is in itself a human being and since human beings have a right to life, a fetus shall have a right to life as well. In accordance with this view, aborting a fetus is killing a human being, and this goes against what people who are pro-life perceive as morally right. Individuals argue that the uncertainty as to when human life begins should be presumed at the time of conception, meaning that a fetus is an individual apart from the woman. Further, they argue while


Boonin, supra note 9, at xiii. Pro-choice supporters are usually viewed to be on the liberal side and usually have the belief that a woman has the right to choose whether to terminate her pregnancy and that a fetus does not have individual rights because it is not a human being on its own. DIVIDED STATES, supra note 113.


Id. at 14.

Id. at 15.

Id. at 15.

Samner, supra note 5, at 17-18.

When does human life begin? PROLIFE PHYSICIANS.ORG, http://prolifephysicians.org/app/?p=62 (last visited Oct. 8, 2015). “According to [an] elementary definition of life, life begins at fertilization, when a sperm unites with an oocyte. From this moment, the being is highly organized, has the ability to acquire materials and energy, has the ability to respond to his or her environment, has the ability to adapt, and has the ability to reproduce (the cells divide, then divide again, etc., and barring pathology and pending reproductive maturity has the potential to reproduce other members of the species). Non-living things do not do these things . . . . Genetically, a new human being comes into existence from the earliest moment of conception.” Id.
the stage when human life begins may be uncertain, it is a sin to kill and this includes the killing of a fetus.\textsuperscript{120}

In order to argue that a fetus’ rights should be protected, individuals rely on one of natural law’s fundamental inclinations: the continuation of life, to care and provide for one’s offspring.\textsuperscript{121} First, the life growing inside the mother must be considered a human being. Examining Aquinas’s theory on the conception of the soul and how the soul correlates with human creation provides an assessment as to when such human life begins.\textsuperscript{122} Due to the era in which Aquinas lived, he lacked the knowledge that modern science and technology provides today.\textsuperscript{123} Therefore, according to Aquinas “human life began and ensoulment took place, not at conception, but some time later, probably 40 days later for males and 80 for females,” which has been referred to as the moment of quickening.\textsuperscript{124} However, if Aquinas were living in today’s modern world, he would have accepted the “scientific reality that human life begins at fertilization” and therefore would have held abortion as a homicide from the moment the soul enters the fetus which today happens simultaneously with fertilization at conception.\textsuperscript{125}

More recently, individuals have argued that abortion is in contradiction with the Unborn Victims of Violence Acts\textsuperscript{126} across the country. These Acts provide that the murder of an unborn child during a crime on the expecting mother is a punishable crime.\textsuperscript{127} At the same time, positive law today allows women the right to choose to terminate their pregnancy, in other words murder their unborn child without

\textsuperscript{120} “Abortion always involves “the deliberate and direct killing . . . of a human being in the initial phase of his or her existence.” Thus, society must resist the temptation to engage in obfuscation and denial. Instead, we must have the courage to look the truth in the eye and to call things by their proper name. “The hard truth that abortion calls us to “recognize [is] that we are dealing with murder” because “[t]he one eliminated is a human being at the very beginning of life.” John H. Breen, Modesty and Moralism: Justice, Prudence, Abortion – A Reply to Skeel & Stuntz, 31 HARV. J.L. & PUB. POL’Y 219, 248 (2008).

\textsuperscript{121} See supra text accompanying note 56.

\textsuperscript{122} WESTON, supra note 18, at 62.


\textsuperscript{124} Rice, supra note 123, at 76; see supra note 75 (defining quickening).

\textsuperscript{125} Id.


\textsuperscript{127} Crist, supra note 109, at 853.
punishment.\textsuperscript{128} Pro-life scholars suggest that "it makes no sense for courts to say an 'abortion' of an unborn child is legal, but the 'wrongful death' of the same child by someone other than the mother is not legal."\textsuperscript{129} There are still individuals that strictly follow the view from a natural law prospective, arguing that the fetus should be saved no matter what because it is a sin to kill.\textsuperscript{130}

\textbf{B. Pro-choice Stance on Abortion}

Pro-choice advocates most commonly argue in favor of the right to an abortion on the claim that a woman’s right to choose whether or not to terminate her pregnancy is a fundamental right provided by the U.S. Constitution.\textsuperscript{131} They also use the uncertainty as to when human life begins, arguing that the fetus is just another part of a woman’s body, and not a human being; therefore abortion is not the killing of a child.\textsuperscript{132} These advocates suggest that although a fetus has potential to become a human being, like a blue print to a house, the fetus does not have a mind of its own and cannot yet think.\textsuperscript{133}

Pro-choice advocates argue that everyone has a right to make choices to their body, so a woman should not be denied her sole rights to the freedom of reproduction.\textsuperscript{134} In this regard, pro-choice advocates use

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\textsuperscript{128} Id. The argument made by individuals basically asks, if three-fourths of the States recognize a fetus as a person in order to charge someone of murder of the fetus during a crime, why is it okay for a woman to commit that murder, and better yet, why is the fetus then not recognized as a person having a right to live.

\textsuperscript{129} Crist, supra note 109, at 853.

\textsuperscript{130} It is always wrong to intentionally kill another because “the basic good of human life gives rise to a moral norm which singles out and forbids all actions contrary to it . . . human reason has a natural inclination to understand that life is “a good to be pursued” and that which is contrary to it “a bad to be avoided.” Christian Brugger, Aquinas and Capital Punishment: The Plausibility of the Traditional Argument, 18 Notre Dame J. L. Ethics & Pub Poly 357, 362 (2004). Therefore “intentional destruction of human life is a bad to be avoided.” Id.

\textsuperscript{131} “[R]ight of privacy, whether it be found in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . [or] in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Roe, 410 U.S. at 153.


\textsuperscript{133} ALCORN, supra note 133 (analogizing that a fetus must develop into a human being like a blue print must be developed into a house before it can stand on its own).

\textsuperscript{134} See generally Roe, 410 U.S. at 152-153 (1973) (although the Constitution does not outwardly provide for an explicit right to privacy, the Supreme Court in an array of decisions dating back as far as 1891, has acknowledged that “a right of personal privacy, or a guarantee of certain areas or zones of

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one of natural law’s fundamental inclinations, self-preservation, to argue that a woman has a right to privacy about her decision to have an abortion. Pro-choice advocates hold that a woman’s right to privacy is part of her right to self-preserve herself and her quality of life; including the woman’s choice to terminate her pregnancy.

Pro-choice advocates are not of the opinion that the Unborn Victims of Violence Acts provides that the fetus is viewed as a human being. In their view, these Acts reflect “ambivalence about the status of the unborn insofar as it exempts harm to the fetus caused by its mother’s conduct . . . demoti[ng] embryos and fetuses to the status of less-than-persons . . .” In fact, pro-choice advocates are not against the Acts, and on the contrary hold that the Acts provide a balance allowing a woman a right to chose and at the same time protecting the woman from harm’s way of a third-party.

These advocates are especially adamant about having the right to an abortion when the woman’s health or extreme circumstances are involved. Pro-choice advocates argue that women facing health risks should freely be able to get abortions, and women who have been raped or subject to incest should not have to live with the trauma incurred after such a psychological and physical invasion of the body. In addition, pro-choice advocates make a point to emphasize that abortions today are

privacy, does exist under the first, fourth, fifth, fourteenth and fifteenth amendments of the Constitution).

135 ALCORN, supra note 133.
138 Id. at 339.
139 “[T]he position embodied in many criminal codes that feticide is murder in some circumstances and legal abortion in others balances a pregnant woman’s right to make a choice that affects her body and life in profound ways with the need to punish a third-party killer who has no legitimate interest in causing the death of the fetus.” Ramsey, supra note 105 at 724.
141 ALCORN, supra note 133. Austin Ruse, Reflections on Rape and Abortion (Aug. 24, 2012), available at http://www.thecatholicthing.org/2012/08/24/reflections-on-rape-and-abortion/ (explaining that some have argued and research has shown that forcing a woman to carry the child of a rapist or as result of incest, will cause an emotional and psychological trauma which may even cause the mother to see the baby as a threat to her life).
easily performed and the health risks that were associated with abortions have substantially decreased over the years; therefore, striking down individuals who preach that abortions pose serious health risks for the women during and in the aftermath of the procedure.  

IV. PROJECTING FUTURE TRENDS

When the Supreme Court made abortion legal in 1973, the opinion provided a seven to two majority decision, with three justices concurring on different issues. The decision in Roe was held by five republican appointed justices and two democratic appointed justices. However, as the justices of the Roe decision retired and new ones were appointed by different Presidents, the Supreme Court cut down its aggressive approach on limiting state regulation on abortion. Today, the justices who made up the Roe decision are no longer on the bench.

As of early 2006, “[f]ifteen of the nineteen justices who have served on the Supreme Court since the Roe decision, have voted to uphold it.” Since 2006, two new justices were appointed by President Barack Obama: Sonia Sotomayor (“Sotomayor”) in 2009 and Elena Kagan (“Kagan”) in 2010. In their recent capacity as Supreme Court Justices, neither Sotomayor nor Kagan have yet to decide on a case dealing with

142 Facts on Induced Abortion in the United States, GUTTMACHER INSTITUTE (Aug. 2001), available at http://www.guttmacher.org/pubs/fb_induced-abortion.html#11 (providing from a source in 1999, that the risks associated with abortions were reported to be fewer than 0.3%).
144 Policraticus, Were Republican-appointed Justices who favored Roe in 1973 “liberal”? (May 22, 2008), available at http://vox-nova.com/2008/05/22/were-republican-appointed-justices-who-favored-roe-in-1973-liberal/ (providing that at the time of the Roe decision, the justices on the Supreme Court were made up of six republican appointed justices and three democratic appointed justices); see, Roe, 410 U.S. 113. Harry A. Blackmun wrote the majority opinion, joined in by Warren E. Burger, William O. Douglas, William J. Brennan Jr., Potter Stewart, Thurgood Marshall, and Lewis F. Powell, Jr. Id. However, Burger, Douglas and Stewart wrote concurring opinions on some issues. William H. Rehnquist and Byron R. White dissented. Id.
145 What the Supreme Court Has Said about Abortion, NATIONAL RIGHT TO LIFE NEWS VOL. 33, I, (Jan. 2006), available at http://www.nrlc.org/news/2006/NRL01/HTML/SCAboutAbortionPage11.html (providing that the Supreme Court was aggressive in limiting state abortion regulation from 1973 after the decision of Roe, up until the mid 1980s.).
146 Id.
147 Wilson, supra note 111, at 714.
abortion. However, Justice Sotomayor, in her previous capacity as a Judge for eleven years, had “never ruled directly on whether the Constitution protects a woman’s right to an abortion” and Justice Kagan is thought to follow the view on abortion after her mentor, former Justice Thurgood Marshall, who was part of the majority in the original Roe decision and “strongly supported the right to an elective abortion and even believed that states should be compelled to fund elective abortions for indigent women.” Today, conservatives and liberals, democrats and republicans alike appear to presume that both Sotomayor and Kagan, if presented with the chance, will uphold the decision in Roe.

Therefore, today the Supreme Court is made up of justices who primarily have already upheld Roe, or will likely uphold it in the future. Based on this, abortion will continue to stay legal. Justice Blackmun, who wrote the majority opinion in Roe, sixteen years later in a dissent of a 1989 case, asserted that abortion, may not be legal for long. “For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.” However, as the Supreme Court stands today, abortion may continue to be legal much longer than Justice Blackmun predicted.

Inevitably, abortion laws will continue to contradict natural law’s fundamental principles of the continuation of life. According to Aquinas, when positive law contradicts natural law, it should not be considered

150 Id.
151 Id.
153 Webster v. Reproductive Health Services, 492 U.S. 490, 560 (1989) (holding that none of the challenged provisions of a Missouri legislation that placed a number of restriction on abortions were unconstitutional). The legislation provided a preamble which stated that “[t]he life of each human being begins at conception, and the law codified . . . public employees and public facilities were not to be used in performing or assisting abortions unnecessary to save the mother’s life; encouragement and counseling to have abortions was prohibited; and physicians were to perform viability tests upon women in their twentieth (or more) week of pregnancy.” Id. at 501.
154 Robert J. Araujo, Abortion, Ethics, and the Common Good: Who are We? What Do We Want? How Do We Get There?, 76 MARQ. L. REV. 701 (2003) (asserting in a 1989 case that abortion may not be legal in the long run, but as of today, the long run still seems far away); see also Webster, 492 U.S. at 560.
law at all. Meaning that its contradiction makes it an unjust law from a moral standpoint and therefore such law “do[es] not bind the conscience . . .” However, “[p]ositive laws have their peculiar force, vigor, from the fact that they have been instituted by human authority . . . they are arbitrary in the sense that they could have been different, but the fact that they have been enacted is the immediate reason why they are obeyed.” Therefore, society will continue to follow that abortion is legal until the balance of the Supreme Court is such that Roe can be overturned.

V. EVALUATION AND RECOMMENDATION

According to the theories set out by Aquinas and his view of the reason leading man on the path to the ultimate end, both sides of abortion have attempted to justify their view as the correct one. Aquinas explained that man’s reason and law would lead the individual and the community to the “ultimate happiness.” Each individual has a goal to reach the good and each individual is part of the community, which seeks the common good. Therefore, it follows, in order for individuals to achieve reaching their good they must be following a law that is in essence concerned with the common good of the community. The law currently followed goes against the common good. Therefore, the ultimate end will never be achieved for society.

Taking into account Aquinas’ theory which sets out the most basic fundamental principle from all other principles derived, that good is to be done and evil is to be avoided, the reasoning used by individuals justifying that abortion should not be legal is clear. The killing of

155 SUMMA THEOLOGICA, supra note 14, at I-II, q. 95, a. 2.
156 Soper, supra note 49, at 2396.
158 SUMMA THEOLOGICA, supra note 14, at I-II, q. 90, a. 2.
159 An example of how principles are derived from the fundamental principle:

Many proponents and critics of Thomas Aquinas’s theory of natural law have understood it roughly as follows. The first principle of practical reason is a command: Do good and avoid evil. Man discovers this imperative in his conscience; it is like an inscription written there by the hand of God. Having become aware of this basic commandment, man consults his nature to see what is good and what is evil. He examines an
another is an evil; therefore it should be avoided. According to current scientists and theologians, a fetus is considered life at the time of conception; killing a fetus is killing another life and goes against the most fundamental principal. In addition, one of the main principles that derive from doing good and avoiding evil is that as individuals and as a society, there is an innate inclination to continue life, to care and nurture offspring.\textsuperscript{160} Justifying that abortion is plain wrong, individuals follow that abortion, by ending the life of a fetus is in contradiction of the inclination to continue life.

On the other hand, implementing Aquinas’ explanation of the common good, the reasoning used by pro-choice advocates reveals that they see a woman’s right to privacy as the good that will lead to the ultimate end because the right to privacy ties in with the ability to self-preserve. The right to privacy extends to the right to choose to terminate a pregnancy, in effect providing women with the power to do what they will with their bodies. Therefore, a woman may chose to preserve herself over the fetus she is carrying, or to preserve her own quality of life. Pro-choice is justified in the sense that by promoting self-preservation, it is also promoting the common good of society because women will be able to have the quality of life they seek.

However, after looking at the justifications of both pro-life and pro-choice, it is in this author’s opinion that pro-choice advocates’ reason has been perverted and they are pursuing a false good.\textsuperscript{161} “[N]o one should act for the purpose of harming (one or another aspect of) the well-being of another, because to do so would be to act contrary to the

\textit{action in comparison with his essence to see whether the action fits human nature or does not fit it. If the action fits, it is seen to be good; if it does not fit, it is seen to be bad. Once we know that a certain kind of action—for instance, stealing—is bad, we have two premises, “Avoid evil” and “Stealing is evil,” from whose conjunction is deduced: “Avoid stealing.” All specific commandments of natural law are derived in this way.}


\textsuperscript{160} Supra text accompanying note 56.

\textsuperscript{161} “In some the reason is perverted by passion, or evil habit, or an evil disposition of nature.” \textit{SUMMA THEOLOGICA, supra} note 14, at I-II, q. 94, a. 4. Society that sides with pro-choice has become perverted because they have chosen social convenience over life.
requirement “of fundamental impartiality among the human subjects who are or may be partakers of [the basic human goods].”\textsuperscript{162}

The author of this paper holds that individuals’ reason is in fact a true good because it is in sync with the view of natural law followed and provided by Aquinas. The abortion law is unjust because it violates God’s eternal law of protection of innocent life, as well as, contradicting with the fundamental inclination under natural law to continue life, therefore, any attempt to end life after conception is a violation of natural law.

Furthermore, although abortion should be illegal because it contradicts natural law, there are three circumstances in which abortion should be permitted. These three circumstances are in cases of rape, incest or when the expecting mother is in danger of a viable health risk. This author holds that a greater common good exists in preserving the physical and psychological well being of a woman faced with one of these circumstances, than the good that exists in the continuation of life.

This author provides that women who have been subjected to rape or incest should be free to terminate their pregnancy if they so choose. The reason for this is because these women involuntarily are forced to endeavor a mentally exhaustive and psychologically traumatic experience; it would be detrimental if they were forced to keep the outcome of this ordeal. There is a good preserved reason allowing women in these situations to have an abortion. The author agrees with pro-choice advocates in this matter because the fundamental inclination to self-preserve the woman’s quality of life by aborting a fetus of rape or incest in the long run will benefit the common good of society. The author elaborates that if women are to be forced to carry to term, the scaring from the initial ordeal may worsen, the pregnancy would be a constant reminder, and the mental health of the woman could worsen, as well as play an effect on the surrounding community. Individuals are compared to the community as a whole. A child from the product of a rape or incest does not affect only the mother, but the society around her as well. Therefore, a rape or incest victim should be able to terminate her pregnancy because by preserving the psychological well being of the individual, by not making the woman go through with the pregnancy, the common good of society as a whole is being preserved.

However, abortion due to rape or incest should not be absolute. At a certain point, the mother must take the scaring and deal with it,

\textsuperscript{162} Perry, \textit{supra} note 64, at 131. \textit{See also} FINNIS \textit{supra} note 26, at 107.
putting the child ahead of the incident of rape itself. It is in this author’s opinion that once the child is able to sustain life on its own if taken out of the womb early, even if with help of machines, then it is too late for an abortion. This provides the victim of rape or incest a viable time frame in which she can make a decision that will best suit her.

In addition, it is in this author’s opinion that although abortion should be illegal, it should be available to a woman who is in a circumstance of viable health risks due to her pregnancy. In this situation, the author follows the theory of self-defense provided by Aquinas. According to Aquinas, it is lawful to cut off a decaying limb in order to preserve the whole body. Therefore, a woman should lawfully be able to terminate her pregnancy when the fetus presents health risks that jeopardize the woman’s body and her life. When there exists a health risk, the fetus is considered an innocent aggressor. For instance, if a person of mental incapacity is running at you with a knife and to protect yourself you must shoot him, that would be an example of killing an innocent aggressor. Therefore, following Aquinas, it is morally justifiable to kill an innocent aggressor if that is the only way to defend a person’s life.

Some individuals will argue that allowing abortions for any reason goes against natural law and therefore should not be upheld.

163 SUMMA THEOLOGICA, supra note 14, at II-II, q. 64, a. 2, 5. “For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away.” Id. at II-II, q. 64, a. 5.

164 “Accordingly the act of self-defense may have two effects, one is the saving of one’s life, the other is the slaying of the aggressor. Therefore this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in “being,” as far as possible.” SUMMA THEOLOGICA, supra note 14, at II-II, q. 64, a. 6-7 (asserting that it is unlawful to kill an innocent person unless it is done in self-defense).

165 See infra Section ii. Pro-choice Stance on Abortion. “An unborn child is a unique human being who, by nature, is the bearer of certain rights. . . among them the right to life, may never be abrogated, not even in furtherance of another good, attempting to ease the terrible pain of a rape victim.” Ruse, supra note 142. Norma McCorvey, who was “Jane Roe” in Roe v. Wade, and once hailed her legal victory as “the beginning of a glorious era of women’s reproductive freedom and happiness,” had in the intervening years become a noted antiabortion activist. Thirty years after Roe, she requested . . . [to] vacate Roe based on the argument that women are psychologically traumatized by abortion. Affidavits featured women’s claims of trauma and of coercion to have abortions. She argued that “because most women injured in abortion are not able to deal with the psychological issues until decades after the abortion, it has taken long periods of time for women to . . . be able to testify as to the physical and psychological effects of abortion.” The implication was that the period of delay corresponded to a period of traumatic repression. Though unsuccessful . . . the case produced a concurring opinion that acknowledged that “studies by scientists . . . suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions.” Jeannie Suk, The Trajectory of Trauma:
Meanwhile, pro-choice advocates will argue that this resolution as a whole will infringe on women’s rights to choose what to do with their bodies, but they will agree that abortion should be allowed in the three circumstances mentioned.166

Finally, this author holds that natural law must be followed in order for individuals and the community to reach the ultimate end. Society as a whole must strive to continue life, to nurture and care for their offspring and that includes the offspring in the making. However, society must allow the choice to terminate a pregnancy to those women who fall under the three categories of rape, incest or viable health risks.

“The Supreme Court’s legalization of abortion has undermined the philosophy of God-given rights that made our progress as a nation possible.”167 The founding fathers of the U.S. have once “embraced natural law”, but “few legal thinkers do so today”.168 Luckily, natural law once held a high place in the American legal system and may again return to that high place if society is put back on its track towards the ultimate end.169 "The purpose of law is to lead man to virtue, and, ultimately, to a better understanding of God and nature.”170 Therefore, lawmakers hold the burden to make sure that the laws individuals follow are in accordance with the common good for the community as a whole.171

Ronald Reagan once said, “Evil is powerless if the good are unafraid.”172 Let society not be afraid to strive towards the ultimate end any longer and then "perhaps within some our lifetimes, we will see

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166 Gallup.com, see supra note 130.
168 Arkes, supra note 137.
169 Wayne House, Influence of the Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the United States Constitution, 2 Liberty U. L. Rev. 725, 728 (2008) [hereinafter Natural Law Influence on Constitution]. As early as 1798, the Supreme Court has recognized natural rights from natural law during its decision making, “claim[ing] that even laws not expressly restrained by the Constitution” should be struck down if they violate natural rights. Id.
170 Gregory, supra note 15. “[N]ature inclines us toward good habits, but it is not without our own efforts, the prompting of our parents, and the precepts of the law that we are able to acquire the proper habitual disposition. Success in doing so puts us in the possession of moral virtue.” Id. at 396; See also, St. Thomas Aquinas, On Law, Morality, and Politics XIX (William P. Baumgarth & Richard J. Regan, S.J. eds., 1988).
171 Gregory, supra note 15; See also Westberg, supra note 158, at 6.
(even if we do not enter) the promised land in which every human being is welcomed in his or her most fundamental right - the right to live."\(^{173}\)
PRENATAL “ADOPTION” AS AN ALTERNATIVE TO ABORTION: LEGAL AND ETHICAL CHALLENGES††

Jennifer Kimball Watson†

INTRODUCTION

Adoption as a legal practice has origins that go back to ancient times.¹ For modern adoption, what was normally instituted for the preservation of the family in the local spirit of solidarity and subsidiarity² has moved to national and international policy. Regulations involving human rights, abortion, determination of personhood and advancements in reproductive technologies bring into question the legal framework for adoption and its definitions. While many respond to the call to adopt those children who are left without parents or abandoned, the process of legal adoption is often too long, overly restrictive, and detrimental to the child. In some circumstances it creates a financial burden on both the adopting parents and the birth parents as this paper will point out. Such an involved process may be found to incentivize mothers and couples to seek recourse to abortion as a solution for relief from the expecting child.

Death is only one of the harms that may follow poor adoption laws. For those fortunate children brought to term, their fate may be a long wait in a state of life where, though the basic needs of sustenance

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†† An earlier version of this paper was first presented to the 2015 International Pro-Life Festival in Moscow, Russia. Information available at http://prolife-fest.ru/.
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¹ Leo Albert Huard, Law of Adoption: Ancient and Modern, 9 VAND. L. REV. 743 (1955) (discussing the history of adoption law).
may be met, their need for love, affection and human attachment are more often wanting. In fact it has become a growing concern fueled in part by psychological studies that have shown long-term mental and emotional harms to institutionalized children who do not experience affective touch and love during the initial months after birth (attachment disorders). Aimed to safeguard the child and promote responsible families, some adoption policies, as this paper hopes to demonstrate, in effect may also serve to cause an incentive for abortion over adoption.

Abortions continue with growing legal expansion to advance the agenda for population control, by offering women an alternative to bringing their children to term and live birth. This alternative is the intentional and willful death of innocent human life when it is not wanted. It becomes a matter of moral logic to seek to reduce recourse to abortion by making adoption a more viable and expedient alternative. Amending adoption policy to enable the process for adoption, including formal adoption to take place prior to the birth of the child has entered the discussion as a possible means to deter abortions and readily secure the needs of children upon birth. However, noble and worthy a notion, prenatal adoption demands a broader look into the many and somewhat external laws that come to bear.

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8 Email from Pavel Byzov, International Director of the 2015 International Pro-Life Festival in Moscow, Russia, to Jennifer Kimball Watson, Executive Director of the Culture of Life Foundation in Washington, D.C. (June 10, 2015) (on file with author).
Identifying harms in adoption policies is necessary to bring about a change in policies to favor adoption over abortion. In seeking to reduce recourse to abortion, adoption policy is presented with three main obstacles: first, family policies that place economic burdens on parents wishing to give their child for adoption; second, policies that treat the retention and revocation of parental rights, custody, and obligations of birth parents; and third, the treatment of the unborn as non-persons in most countries.

I. Prenatal Adoption as Possible Aid

Where mothers may consider abortion in first, second or third trimester pregnancies, the notion of “adoption” prior to birth, if made available, can easily be thought to assist with four moral demands: first, provision for proper care and assistance to the mother and the unborn; second, reduction in recourse to abortion; third, accelerate the timeline by allowing the process to begin prior to birth; and fourth, avoidance of long waits in orphanages for those abandoned, consequentially limiting psychological, emotional and other harms to the child.\(^9\)

While the impact to unborn or abandoned children may be seen as positive where the moral demands can be enhanced, numerous legal and semantic challenges surrounding adoption of both prenatal and born children remain. As we will see shortly, adoption policy itself does not always serve to reduce abortions.

A. Adoption Policy and the Incentive to Abort

Some countries permit expedient and private adoptions for the placement of born children while others do not.\(^{11}\) Russia,\(^{12}\) for example, binds those parental obligations and duties of the natural parents even after relinquishment of the child to authorities or institutions, especially where private adoption is not permitted. The parent and child have been

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\(^9\) The term “adoption” is placed here in quotes in reference to the fact that such a use of the term prenatally is new and, therefore, cannot not validly be applied prior to the birth of a child.

\(^{10}\) Zeanah, supra note 3.


legally divorced from each other though the parent must pay alimony for the continued support of the child while the child retains claim to rights of property and housing, to assets and inheritance, from the natural parents. The child’s alimony (child support) is determined with the deprivation of parenthood\(^\text{13}\) (removal of custody), from one fourth to one half of their monthly salary, depending on the number of children.\(^\text{14}\) Such a “deprivation of parenthood” \(^\text{15}\) is similar to our understanding of divorce in the U.S. Intervention in the spirit of solidarity and subsidiarity\(^\text{16}\) at the community level, such as private adoption by members of the same community, are all but denied while unwanted or unable parents are bound to their children.

Where child alimony is determined by the state or governing bodies, current adoption policies may be said to incentivize a choice to abort over bringing the child to term for adoption. Though the intent of the state in imposing child alimony upon parents who want to relinquish the child may very well be to preserve the family, promote responsible paternity, protect the welfare of all members of society, and other worthy goods; abortion may serve as the only available means to avoid the burden of the child.

**B. The Term Adoption for Prenatal Children**

Generally, when speaking of adoption we are speaking of the transfer of custody of a known and nascent human person\(^\text{17}\) as a prenatal child cannot be considered an orphan and/or the mother incapable of caring for the child while gestating.\(^\text{18}\) However, with prenatal adoption, or in some literature “fetal adoption,”\(^\text{19}\) the child departs in circumstance from normal adoption, where a born child is outside of the mother’s

\[^{13}\] Id. at art. 70, ¶ 3. 
\[^{14}\] Id. at art. 81, ¶ 1. 
\[^{15}\] Id. at art. 70, ¶ 3. 
\[^{16}\] Schneck, supra note 2. 
womb. The prenatal individual for adoption is presented prior to birth, either *extra-utero* (out of the womb), as with in-vitro fertilization (IVF) and other forms of assisted reproductive technologies (ART), or *in utero*, (in the womb of the maternal mother). In either circumstance, the human individual is presented for adoption without the legal recognition of the fundamental human rights accorded to persons. To speak of prenatal adoption policy then is to speak of the prenatal individual in various stages of development and circumstances, which are not recognized by state, national, and international adoption policies and regulations.

The use of the term “adoption” to describe transactions both *in utero*, and prior to birth *extra utero*, such as with reproductive technologies more commonly referred to as *embryo adoption* has caused a considerable amount of debate. Abortion proponents find the term “adoption” problematic because they fear it affords the fetus or embryo a legal status they seek to challenge. Pro-Life advocates prefer the term adoption in order to avoid treating the embryo or fetus as something non-human, as a commodity or mere property. Importantly for our discussion, current laws and policies are bound to consider these vulnerable human beings according to the contracts that bind them. The contracts that bind the pre-nascent (preborn *extra utero* and *in utero*) do not fall under national or international adoption regulations. The notion to institute or promote adoption prenatally would be subject to embryo disposition policies as well as those that protect the unborn.

**C. Nature and History of Adoption**


21 Both of these terms—even though they do raise some different issues—can also be referred to as “fetal adoption”.


25 The author’s search for adoption policies that apply to or account for unborn children rendered nothing.
Current national and international child adoption laws apply after childbirth and govern the act of adoption. Peter Conn of the Oregon State History Department is quoted in his research stating that, “adoption is among the oldest and most widespread of human social practices. The Code of Hammurabi, promulgated in the 18th century BCE, includes a definition of adoption.” For centuries, communities of peoples had written and oral practices for the placement of children otherwise displaced from their families by war, famine, plagues and natural causes or to balance the perpetuation of heirs. Adoption has a long history of being both a private and public agreement, and it has a history where arrangements for the unborn regarding parenting and the power of ascendants were recognized. Thus, prenatal arrangements for adoption are nothing new.

Roman Emperor Justinian issued the Digest or Pandects in 533 that recognized adoption, but denied the relinquishment of the natural father’s rights while he was still living. Interestingly, it allowed property rights, as with the rights and interests of natural born children, to be granted to the adopted progeny by the adopting father. This happened even while that child’s natural father retained paternal rights to the child and the child retained its rights to the goods of his natural father. Also under Justinian, adoption was allowed as a means to free slaves by their owners.

During that time in Rome, adoption took place in two ways: either by imperial rescript, or by the authority of the Magistrate. The imperial rescript gave a power to adopt called arrogatio. Under the authority of the Magistrate, persons would be adopted in the power of an ascendant, whether in the first degree, as sons and daughters, or in an inferior degree, as grandchildren or great-grandchildren. Even during Roman times, all efforts to retain the bond of family and of Roman heritage were

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26 Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, supra note 11.
28 Id.
29 Id.; see also Huard, supra note 1.
30 Huard, supra note 1.
32 Id.
33 Conn, supra note 27.
34 Id.
made. This tradition is alive and well in many countries today, particularly in Russian Family Law.

The current western interpretation and enactment of adoption began in 1851. The Commonwealth of Massachusetts in the United States enacted the first modern adoption law. It recognized adoption as a social and legal matter requiring state supervision. This law removed adoption from the community or private level and placed it at the discretion of state authorities.

Though such a recent enactment does not account for the history of the moral tradition of adoption, it nonetheless marked the first verifiable modern-day regulation of adoption, shifting adoption from common and localized applications of solidarity and subsidiarity to a far removed and authoritative institutional level, the state. The United Kingdom enacted legislation regulating adoption in 1926. The Hague, in 1993, enacted the first international treaty on the Protection of Children and Cooperation in Respect of Inter-Country Adoption.

Thus, while pre-nacent children may have an ancient history of being promised to other members of society, modern day adoption regulations account only for born children who are already recognized as persons by state, federal, and international authorities. Additionally, western adoption policy can rarely be seen to aim at preserving natural family duties, obligations or inheritance.

D. “Fetal Adoption” Consent and Custody Considerations

The idea of fetal adoption as an alternative to abortion is not new. In 1980, prior to the rise of ART in western society, Robert A. Freitas, Jr. published in The Humanist a theoretical proposal to reduce abortion and unwanted pregnancies by offering mothers the ability to donate their fetus during the first, second, and third trimesters. This would offer

35 Huard, supra note 1.
38 Id.
39 Conn, supra note 27; see also University of Oregon’s The Adoption History Project, http://pages.uoregon.edu/adoption/timeline.html (last visited June 30, 2015).
40 Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, supra note 11.
41 Id.
42 Freitas, supra note 19.
surgical transfer to the wombs of adopting mothers and/or to incubators (artificial wombs). To quote a summary of his earlier publication:

The reluctant prospective mother simply visits the local Fetal Adoption Clinic, undergoes surgery for removal of her viable fetus, signs legal documents, and exits a free woman. At the same time, the developing embryo is preserved. Fetuses removed during the first trimester are transplanted into the appropriately-prepared uterus of a surrogate or infertile adoptive mother and carried to term in the usual manner. Second trimester fetuses are nurtured in warm, organic artificial wombs until the third trimester, when conventional modern incubation techniques can be brought into play. Fetuses taken during the third trimester are transferred directly to the incubator, an existing medical technology often used to save the lives of infants born up to three months premature.

For Freitas, the brave new world was almost here. Yet even today, technology is not capable of supporting the transfer of the fetus cross-utero (heterologously) or extra-utero, to artificial wombs or “incubators.” Freitas’ theory remains unrealized even thirty-five years later, as does the effort to rescue those who would otherwise be destroyed or abandoned. The answer seems to lay not so much with technology, but with the enactment of policies to protect and support prenatal human life.

Internationally, the media’s focus on fetal adoption is limited almost exclusively to disputes over rights to the subject child and centers commonly on surrogacy and embryo donation cases. Though captured under the banner of “adoption,” these cases fail to address the underlying legal framework whose absence is the fundamental source of the conflict.

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43 The aim to create “artificial wombs” continues to make progress within the scientific community. The term refers to what is called “ectogenesis”, the ability to gestate, with the help of technology, an embryo or fetus outside of the human body. See Carlo Bulletti, et al., The Artificial Womb, 1221 ANNALS N.Y. ACAD. SCI. 124-28 (2011).
44 Freitas, supra note 19.
47 A general Google search on news journals covering the topic of “embryo adoption” and “surrogacy” will render numerous articles covering disputes and issues but not necessarily citing scientific literature.
Currently “only two U.S. States (Alabama and Hawaii) allow the birth mother to consent [to adoption] before the birth of her child; however, the decision to consent must be reaffirmed after the child’s birth.” 48 Neither state, however, will grant final decrees of adoption before birth even if both natural parents and adoptive parents are willing. 49 Therefore, the language of cases and statutes of all U.S. states regarding disputed custody is largely moot for the purposes of fetal adoption since they do not countenance fetal adoption agreements. 50

In 2003, Colorado’s legislature passed an amendment to its adoption law that includes provisions for a woman to relinquish her parental rights prior to the child’s birth, 51 thereby moving the process towards adoption one step further, conceivably opening the door to fetal adoption. What is interesting about this legislation is that, while it may allow for prenatal adoption to take place, it mirrors a woman’s constitutional right to relinquish her rights to the child and abort. 52 The key factor of recognizing the personhood of the unborn seems primary to parents obtaining the ability to relinquish parental rights and duties. Arguably, without a well-established right to life for the unborn, parental rights are without bearing to the good of the child.

48 Consent to Adoption, https://www.childwelfare.gov/pubPDFs/consent.pdf. (Alabama offers a birth mother five days after birth to revoke consent for an adoption before birth. Hawaii requires a renewed petition and ten days if a party requests); see also Regulation of Private Domestic Adoption Expenses, https://www.childwelfare.gov/pubPDFs/expenses.pdf, which offers a capsule summary of adoption laws relating to birth expenses. The rest of the manual goes state-by-state (including territories), outlining in brief each state’s laws regarding fetal adoptions, especially with regard to expenses.

49 Regulation of Private Domestic Adoption Expenses, supra note 48.

50 Email from Benjamin Bentrup, Esq., to Jennifer Kimball Watson, Executive Director of the Culture of Life Foundation in Washington, D.C. (June 24, 2015) (on file with author).

51 Colorado General Assembly, http://tornado.state.co.us/gov_dir/leg_dir/olls/digest2003a/CHILDRENANDDOMESTICMATTERS.htm (last visited June 30, 2015) (emphasis added to the word “towards” to clarify that the relinquishment language, while in the context of adoption law, does not constitute the actual adoption of a fetus but only eliminates paternal and maternal relinquishment of parental rights from the adoption process once the child is born).

II. ABORTION LAW AND THE PROBLEM OF PERSONHOOD

The greatest challenge to the formation and implementation of prenatal adoption comes from legalized abortion. In most countries, and in Western Europe, abortion has become permissible or legalized as a “necessary evil” where matters of health, physical and mental, of both the mother and the fetus are seemingly weighed against the good of new human life to society. In Ireland, for example, “The Offenses Against the Person Act of 1861 (originally enacted by the United Kingdom but parts of which are still active in Ireland) banned abortion in all circumstances. Later court decisions established an exception to save the mother’s life.” But it was not until 1983 that, by a constitutional amendment, Ireland established a fetus’ right to life, equating it with a woman’s right to life. Still, the issue of the “necessary evil,” or legalized abortion, gained ground in 1992 when a 14-year-old rape victim sought to travel to Great Britain to terminate her pregnancy. Her travel was granted “only after the Irish Supreme Court ruled that requiring the girl to have the child might lead her to commit suicide.” The Council of Europe, responsible for enforcing the European Convention on Human Rights, requires that all 47-member states, including Poland and Ireland, make access to abortions readily available in countries where they are legal. This attempts to decide for doctors what is good for the health of the mother, creating a legal and ethical juggernaut for many countries attempting to retain the recognition of personhood for the unborn.

This European basis for the justification of abortion differs from what we have in the United States, where abortion has been made legal as a matter of personal privacy to the body and reproductive rights of the mother, creating a constitutional right. No right to life was recognized for the unborn as civil rights. Indeed, they were not awarded to persons

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54 Id.
55 Id.
56 Id.
58 Id. (emphasis added to the word “might” given that such a prognosis would only be speculative at best).
59 Council of Europe Closes Case Against Ireland on Abortion, supra note 57.
60 Id.
until after live birth in the U.S. And though the question regarding the beginnings of human life was raised, it has yet to be answered by most courts. Even though science had affirmed it then, and continues to affirm it now, human life begins at the moment of conception, when the identity of a distinct and self-directing human individual comes into being. “How would a human individual not be a human person?”61 62

A. Implications of the Human Embryo’s Non-Recognition as a Person

When considering fetal adoption, the fetus’s status of the personhood, which is denied largely by abortion law,63 raises a significant question to the formation of adoption regulation: Can an individual, not legally recognized as a person, be the subject of adoption? In countries such as Ireland and Poland, which account for the personhood of the unborn, it may be feasible though certain ethical considerations would surely come to bear. In the United States, laws would prevent any form of valid adoption of “non-persons” regardless of when the relinquishment of parental rights and duties would be permitted.64

B. Persons and Property Amridst Pro-Abortion Policies

Adoption of a child prenatally can better be divided up into two legal considerations: one, human life in-uto; and two, human life extra-uto. For the purpose of this discussion, this paper is better directed to the adoption of persons in-uto.

Legal considerations for persons extra-uto, (e.g. embryos) however, come to bear upon the legal and contractual standing of subjects for prenatal adoption in-uto. The unborn, unlike the abandoned child after birth, rests in a tangled web of policies surrounding his or her treatment as a non-person or human not bearing the rights of personhood.

63 Roe v. Wade, supra note 52.
64 It must be noted that a woman relinquishes her parental rights when she chooses to abort as well. She does this because the fetus in her womb is not a recognized person with natural born rights.
The earliest embryo disposition cases were *Nahmani v. Nahmani* in Israel and *Davis v. Davis*, in the state of Tennessee. The holding in *Davis* resulted from a “custody” dispute by a divorced couple over their frozen embryos created and held in storage after failed attempts to become pregnant by means of In-Vitro Fertilization (IVF). The court ruled that “preembryos are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life.”66

Where placement of progeny would normally have been determined under custody statutes, *Davis* determined that pre-nascent children, and in this case children extra-utero, would not be treated as persons but rather as a form of property.67 In addition, it also established that a “gamete provider”68 are “owners” of their “interests”69 in the frozen embryos, and bear a “constitutionally protected right not to beget a child where no pregnancy has taken place” holding that “there is no compelling state interest to justify ordering implantation against the will of either party.”70 Here a distinction is between being a parent, becoming a parent, and becoming pregnant in order to distance the initial court’s ruling that progenitors were parents, the embryos were human persons and the dispute was one of custody.71 This decision broke from the mold of natural custody disputes among parents of in-utero or born children and severed parental rights and duties from progeny extra-utero.

In both cases, (*Nahmani* and *Davis*), the absence of a legal definition of an embryo, and its status (i.e., “person” or “property”),72

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66 The term “preembryo” was created during this case as a means to form a distinction between and embryo extra-utero as a clump of cells (though scientifically identified as a self-directing human individual) and an embryo in-vivo and attached to the uterus. The aim was to diminish, by way of obfuscation in terms, the human nature and viability of the embryo. The term arrived from case proceedings and not from scientific literature. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), (emphasis added), http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm.

67 Id.

68 It must be noted that if either party were acknowledged as a “parent” then the embryo would have to be a child.

69 A word which should have meaning but from which all meaning was stripped.

70 *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) 17, http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm

71 Id.

72 See Breen-Portnow, *supra* note 65, at 276.
lead to problems of judicial classification. Current international policies, as a result of rising rates of IVF, are moving to treat the unborn as a form of personal property (commodities or non-persons) as well.

C. Brief Ethical Considerations

When taking into account the circumstances above, ethical consideration for all subjects involved must be included. Therefore, it is necessary to first look to the rights, duties, and dignity belonging to the primary subject, the child. Next, the maternal mother will merit a review. Then, the paternal father where applicable will need to be another focus in this matter. Also, the adopting parents will deserve some study. And finally, the good of the community will also be of great importance in this discussion. The right to personal life of the child, born or unborn, is crucial to the rights and duties of parents.

Ethically, every human life, whether born or unborn, is the bearer of fundamental human rights. The first of these rights is the right to life, which presupposes certain basic goods necessary to sustain it, such as nutrition and hydration. In the case of human lives extra-utero, the most basic good necessary to their survival is an environment proper to their biological development followed by those goods necessary for personal development. Both nutrition-hydration and environment in the womb reside within the natural law, which it would normally provide through natural parents and within the natural order of procreation. For human lives in-utero, their right to life is just as valid and necessary, and presupposes a right to the maternal womb in which they develop until live birth places them in an altogether different environment and circumstance. At that time, other goods come into play along with other risks to the provision of those goods.

On a local level, the principal of solidarity and subsidiarity demands that others, beginning with family and extending where

73 *I.e.* whether or not to use contract law principles when interpreting disposition agreements among parents and other interested parties.
75 Personal analysis as an ethicist.
76 The womb biologically matched to them.
77 Schneck, *supra* note 2.
necessary to the broader community, step in to meet the needs of the vulnerable where those needs either cannot be met by themselves or those who bear responsibility. Extraction of child support from parents who choose to give a child up for adoption denies the exercise of this principle by others in the community who would happily take on the responsibility for the children. As with any application of this just principle, the natural law, natural rights and duties must be strengthened. All efforts to secure and protect these rights and duties must have been exhausted before other parties take upon themselves the task to provide them. With prenatal adoption, compliance with the principle of double effect must also be considered along with a full account of the circumstances surrounding the unborn.

The principle of double effect comprises of a four-part framework for deciphering the moral and ethical value of an intervention that is likely to carry with it an unavoidable negative outcome: first, the act itself must be good; second, the only thing that one can intend is the good act, not the foreseen but unintended bad effect; third, the good effect cannot arise from the bad effect, otherwise, one would do evil to achieve good; and fourth, the unintended but foreseen bad effect cannot be disproportionate to the good being performed.

Formal fetal adoption, unlike a mere promising of persons, requires that the maternal mother, prior to the birth of the child, relinquish her rights and duties to her progeny. Though such a relinquishment may enable the goods for the child to be secured by the adopting parents, it can also been seen to serve other harms where a mother relinquishes her rights and responsibilities to her preborn child, such as found in surrogacy contracts, abortion, frozen embryo disposition cases and wrongful life, wrongful birth cases, causing a pejorative of the harms it seeks to overcome.

81 Roe v. Wade, supra note 52.
82 Breen-Portnoy supra note 65.
Herein lies the broader ethical problem: while abortion remains legal and the unborn are denied the status of persons, can we conclude that the number of abortions prevented by prenatal adoption will be proportionate to other harms that currently exist as well as those that can be foreseen? In a case where a mother would otherwise terminate the life of the child, and where such a termination is verifiably probable and otherwise unavoidable, only then should an alternative that replaces maternal responsibility be presented in the form of fetal adoption. Where no other means to prevent the innocent killing of human life are available, prenatal adoption may serve as the good that is possible. The ethics, however, extend to considerations within the legal community and must be considered case by case in order to meet the test of the principle of double effect.84

In those countries where government authority is unilateral and the voice of the people renders no change in the law, adoption prenatally may be the “only possible alternative”.85 A full ethical inquiry into the problem would most likely result in a negative ethical analysis for prenatal adoption where all possible efforts to prevent abortion in the law have not been met. It is the responsibility of the broader community, not only to protect the vulnerable among us, but also to prevent the offences against them from promulgation.

CONCLUSION

The key to prevent prenatal persons from treatment as property or mere “interests” is to reestablish strong language surrounding personhood for the unborn in abortion policies, reproductive technology regulations, adoption codes, securing parental rights and having duties to the unborn. The key to prevent unborn children from death by abortion is first to make abortion illegal. Then, implement or amend adoption laws that incentivize natural parents to give the child for adoption and reduce the burdens that turn couples and/or expectant mothers to abortion, such as the extraction of child support. Lastly, the promotion of prenatal adoption informally (i.e. without formal legal contract to the

84 Weigel, supra note 79.
child as property or “interest”) will most certainly lead to the expedient adoption of children into the arms of waiting parents by those whose rights and duties are not relinquished during gestation but would retain the ability to relinquish those rights directly to those who can and would bear them. This would thereby reduce the likelihood of children suffering those harms that come with the long waits in the extensive institutional process.
DESIGNER EUGENICS: GERMLINE’S FUTURE INTERESTS

Lawrence E. Gill†

INTRODUCTION

Germline engineering¹ and relevant complementary technologies are at the brink of changing mankind’s future, permanently. But, has the United States adequately considered the implications of germline engineering technology, and are the current policies sufficiently qualified to remain viable as germline engineering advances in the future? Conservatives and liberals have weighed in; it is now the duty of the U.S. government to provide clarity to its position and take action accordingly. Germline engineering is ripe for definitive reformation, but Congress’ inaction and laissez-faire approach to this technology has left the territory amorphous. Currently, the technology and its practitioners are regulated by unstructured agencies; subject to quick regulatory change often at the discretion of an agency administrator; and, burdened by the inability to seek recourse for quick change. It is time for the U.S. to get in the driver’s seat and declare a stance, both on moral and policy grounds.

This article submits that, under the current regulations, the U.S. is unprepared and vulnerable to drastic consequences that are inherent in this technology’s potential abuse. From a scientific standpoint, the U.S. lacks a fundamental legal basis to support or appropriately limit germline engineering’s promulgation; from a policy standpoint, the U.S. apathetically throws out-of-date regulations at an emerging technology;

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¹ For the purposes of this note, “germline engineering” is defined as the process by which the DNA in a young embryo (of age less than 3 to 5 days) is manipulated so that new physical characteristics are inherited by the resultant human, impacting – not only the resultant human – but all future DNA of the resultant human’s progeny.
and, from a moral standpoint, the U.S. has remained silent on declaring any principles or standards that address the rationale for its policy. It is, therefore, necessary that the U.S. temporarily restrict all germline engineering technology until clear definitive regulations are in place.

In Part I, this article examines the current state of germline engineering technology and presents the moral positions on the conservative and liberal ends of the spectrum. Part II reviews the legislative and regulatory environments of selected countries (exclusive of the United States) that maintain robust biomedical institutions for research and healthcare, and attempts to place these countries within the moral position spectrum. Part III considers the history of the current legislative and regulatory environment in the United States and makes recommendations where necessary to give clarity to an articulated moral position; and advocates that the U.S adopt a conservative stance on germline engineering.

By comparing the consequences that are implicit within the conservative and liberal moral positions, this article lays a foundation that strongly submits that the U.S. actively advance a conservative moral position. Additionally, this article will attempt to provide a legal counterargument to the liberal justification of germline engineering, as the technology is void for policy reasons rooted within the Anglo-American common law Rule Against Perpetuities.

I. THE TECHNOLOGY AND ETHICS

The field of eugenics entered its renaissance with the Human Genome Project (HGP). Launched in the mid 1990’s and declared complete in 2003, the HGP provided the vehicle whereby international researchers identified and characterized the 3.2 billion nucleotide base pairs that comprise human deoxyribonucleic acid (DNA). Data from HGP was made publically available and free, thus spawning applications in medicine, pharmaceuticals, forensics, anthropology, agriculture,

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animal husbandry, archeology, biofuels, and a myriad of other disciplines.3

A. State of the Technology

Some of the earliest applications of the knowledge and information gleaned from the HGP involved genetic testing. Genetic testing techniques, including genome-wide association studies (GWAS) and next-generation sequencing (NGS), were developed to facilitate diagnosis of rare genetic diseases, to select cancer treatments based on the molecular makeup of cancerous tumors, and to track outbreaks of infectious diseases.4 As such techniques and technology advanced, the uses of genetic testing in medicine moved the diagnosis of a disease to its earliest possible point before clinical manifestation, and moved the testing of individuals to earlier points in their lives: at birth (newborn screening), in utero (prenatal diagnosis), or preconception (carrier testing).5 As research progressed further, genetic testing spawned genetic manipulation, most often for the prevention of disease.

In 2014, a new technique, labeled CRISPR/Cas9, became widely adopted as a way to genetically manipulate DNA sequences in cells and organisms. CRISPR/Cas9 was simple, inexpensive, and effective.6 The technique was used to correct genetic defects in “whole” animals or change DNA sequences in embryonic stem cells so that those stem cells produced specific defect-free tissues that could be transplanted into patients.7 But, it was also possible to use the CRISPR/Cas9 technology “to carry out genome modification of fertilized animal eggs or embryos … so ensuring that the changes will be passed on to the organism’s progeny. Humans are no exception – changes to the human germ line could be made using this simple and widely available technology.”8 The practice is commonly called germline engineering.

3 Id.
5 Id. at 5.
7 Id.
8 Id. at 37.
In April 2015, Chinese researchers published findings from their efforts using CRISPR/Cas9 in human embryos.9 Although the embryos used in the effort were abnormal before editing, and the majority of the altered embryos were “mosaic” (containing a mix of repaired and unrepaired genes),10 the process of germline engineering of human embryos survived its proof of concept. The researchers acknowledged that their work “highlights the pressing need to further improve the fidelity and specificity of the CRISPR/Cas9 platform”;11 but those same researchers never entertained a moratorium or suspension of the research that would inevitably lead to genetically engineered humans.

The biotechnology research race continued when, in September 2015, a team of researchers within the Francis Crick Institute in London submitted an application to pursue CRISPR/Cas9 genome-editing research in viable human embryos.12 The application cites that the intent of the research is to gain “fundamental insights into early human development” and look for answers to more basic questions about the human embryo.13 The wait is now over. As of February 1, 2016, London scientists were granted approval through the UK Human Fertilisation and Embryology Authority (HFEA) to “use genome-editing technique CRISPR/Cas9 in healthy human embryos.”14 The London research team, led by biologist Kathy Niakan, is “interested in early development”, but plans to “stop experiments after seven days, after which the embryos will be destroyed.”15 With the UK now holding the flag, developmental biologist, Robin Lovell-Badge at the Crick Institute says, this “decision

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10 Id.
11 Id.
15 Id.
will give scientists confidence to either apply to their national regulatory bodies, if they have them, or just go ahead anyway.”\textsuperscript{16} (emphasis added).

B. Ethics and Moral Positions

The ethical issues surrounding germline engineering are monumental, and run the gamut of moral and philosophical positions.

1. The Conservative Position

The conservative position and the moral authority from which it draws, well-articulated by Dr. Dianne N. Irving in her address at the John Carroll Society Rose Mass, are based on Natural Law and Divine Law. By virtue of this theological basis, the conservative position “transcends different cultures, times, ethnic backgrounds, etc. – and is therefore truly applicable to all people at all times.”\textsuperscript{17} Within the conservative position, a human being is considered a “whole”, not the sum of its parts, and “requires to be treated as a whole in society.”\textsuperscript{18} There is no distinction between “human” and “person”. Moreover, when judging whether a particular action is “right”, the conservative position requires that three conditions must be held as ethical: [1] the \textit{kind} of action; [2] the \textit{intention} for doing the action, and; [3] the \textit{circumstances} under which the action is done.\textsuperscript{19} Such conditions do not preclude the use of human material in medical experimentation as a \textit{kind} of action, “with the \textit{intention} of helping to cure diseases … as long as certain \textit{circumstances} prevail, e.g., the person has given informed consent and any harm sustained is proportionate to the medical good that can be derived.”\textsuperscript{20} But the three conditions do preclude people from “volunteer[ing] to mutilate or otherwise seriously harm [them]selves.”\textsuperscript{21} Similarly, the conservative position draws the line whenever any one of the three conditions cannot be met: an ethical \textit{kind} of medical action does not mean that early embryos may be destroyed to

\begin{footnotes}
\item[16] Id.
\item[18] Id.
\item[19] Id.
\item[20] Id.
\item[21] Id.
\end{footnotes}
help others. “It is inherently wrong to intentionally kill an innocent human being – regardless of the intention or the circumstances” (emphasis added).

While it could be argued that the manipulation of DNA in germline engineering does not “kill an innocent human being”, the conservative position’s holding of the human being as a “whole” suggests the contrary. In manipulating certain characteristics of a human, a “new” person is created and the “former” person is lost. The “new” person will enjoy advantages that the “former” person cannot, and live a better existence (presumably) than the “former” person will ever realize. It is destruction of life.

2. The Liberal Position

The liberal position, well-articulated by Nicholas Agar in his book, *Liberal Eugenics: In Defence of Human Enhancement*, seeks to protect and extend reproductive freedom beyond the choices of whether or not to reproduce, with whom, when, how often, and “adds the choice of certain of [the] children’s characteristics to this list of freedoms.” The liberal position sees the practice of genetic selection as an extension of parental decisions made after a child is born, such as decisions regarding schooling, activities, discipline, diet, or religious instruction. The position goes so far as to call not only for parents to be free to make the best decisions for their children including selecting genetic characteristics, but that it is a moral obligation incumbent upon parents to make the best choices.

The liberal position is adamant that the extension of freedoms is not absolute or unconstrained, suggesting prohibitions on “reproductive choices that are morally defective in some significant way” or prohibiting the introduction of abilities that are not inherent in humans,

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22 Id.
26 Id. at 249
such as detecting ultraviolet light or possessing the olfactory powers of dogs.\textsuperscript{27} The liberal position is equally adamant in rejecting \textit{governmental authoritarian} eugenics, that is, “the idea that the state should have sole responsibility for determining what counts as a good human life.”\textsuperscript{28} This separates the position of “liberal eugenics” from Nazi practices, the forced sterilization efforts in the United States in the early 20\textsuperscript{th} century, and other government-based initiatives.\textsuperscript{29} But by rejecting governmental authority, the liberal position vests the authority to the parents by default preserving \textit{parental} “liberty, autonomy, and freedom.”\textsuperscript{30} Thus, the liberal position recognizes parents’ rights to choices, as subjective as those choices may be, superior to the rights of their progeny.

3. Other Considerations

Running parallel to the moral positions surrounding physical characteristics are issues involving familial, social, and cultural institutions. In some germline editing techniques, such as CRISPR/Cas9 technology, abnormal (or undesirable) DNA sections could be replaced by normal (or desirable) DNA sections \textit{provided by a donor}.\textsuperscript{31} The resulting “person” would, therefore, be a DNA “offspring” of the provider of the egg, the provider of the sperm, and the provider(s) of the donated DNA sections. Complexities in current family law involving parentage, custody, surrogacy, inheritance, and liability for choices made or not made, would become even more complex.\textsuperscript{32}

II. INTERNATIONAL RESPONSE

Although the Human Genome Project was well underway in 1997, the announcement in February that year of the cloning of Dolly, the

\textsuperscript{27} Agar, supra note 23, at 17.
\textsuperscript{28} Id. at 5.
\textsuperscript{29} See Agar, supra note 23.
\textsuperscript{30} Girard Kelly, Choosing the Genetics of our Children: Options for Framing Public Policy, 30 SANTA CLARA HIGH TECH. L.J. 303, 323 (2014).
\textsuperscript{31} Liang, supra note 9.
sheep, awakened the international community to the imminent possibility of human engineering.

A. Europe

The European Union Convention on Human Rights and Biomedicine was the first major international institution to react. The resulting treaty, known as the Oviedo Convention, completed in 1997, declares the EU’s moral position in the opening sections by stating that “the interests and welfare of the human being shall prevail over the sole interest of society and science” and that parties to the Convention “shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.” From a practical perspective, the Convention banned any alteration of the human genome that would “introduce any modification in the genome of any descendants.” The body further extended its position in 1998 by banning cloning in its statement prohibiting “intervention seeking to create a human being genetically identical [i.e. sharing the same nuclear gene set] to another human being whether living or dead.” To date, the Oviedo Convention has been signed by 35 European countries; 29 have ratified it. Through this response, the European Union, and the countries that have signed and/or ratified the Oviedo Convention have demonstrated a predominately conservative moral position in their recognition that a human is a “whole” and not the “sum of its parts.” The EU, however, continues to

34 Id. at 4.
36 Convention on Human Rights and Biomedicine, supra note 33.
allow constituents the freedom to conduct research and experiments on embryos that will never develop into “persons.”

B. Canada

Canada drove a stake into the moral spectrum near the conservative end with its passage in 2004 of the Assisted Human Reproduction Act (AHRA) stating in the opening section that “human individuality and diversity, and the integrity of the human genome, must be preserved and protected.”37 Moreover, the AHRA reflects a deliberate and careful weighing of competing interests by declaring “the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions.”38 Yet, the AHRA leaves room for the benefits “for individuals, for families, and for society in general” as long as the technology ensures appropriate measures “for the protection and promotion of human health, safety, dignity, and rights.”39 Under Section 5, the AHRA prohibits (among many actions) germline engineering procedures that “alter the genome of a cell of a human being or in vitro embryo such that the alteration is capable of being transmitted to descendants” or “create a human clone by using any technique.”40 The collective prohibitions in Section 5 leave room for the medical community to assist women with complications from in vitro fertilization (IVF)41 and to conduct academic medical research by allowing the creation of an in vitro embryo for the purpose of “creating a human being or improving or providing instruction in assisted reproduction procedures.”42

Although Canada is among several countries banning germline engineering and/or human cloning, it is one of the few to articulate

38 Id.
39 Id.
40 Id.
41 A technique of assisted reproductive technology (ART), under a process where a woman’s egg is removed from her ovaries; the egg is then fertilized (embryo) outside the woman’s body; and, then is implanted in the same or another woman uterus with the intention of establishing a successful pregnancy.
42 Assisted Human Reproduction Act, supra note 37.
criminal penalties for those who do not comply. Individuals who are found guilty of contravening any of the prohibited procedures enumerated under Section 5 of the AHRA are subject to imprisonment for up to 10 years and/or an imposition of a fine up to $500,000.43

C. Australia

Like Canada, Australia has passed legislation that bans germline engineering and human cloning. The Research Involving Human Embryos Act (RIHEA) of 2002, the Prohibition of Human Cloning Act (PHCA) of 2002, and the consolidated and amended Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act of 2006 (hereafter the “2006 Act”) specifically prohibit any person from altering “the genome of a human cell in such a way that the alteration is heritable by descendants of a human whose cell was altered”44 and prohibit “creating or developing a human embryo by fertilization that contains genetic material provided by more than 2 persons.”45 Any violation of these prohibited offences carries a maximum penalty of 15 years imprisonment.46

Unlike Canada, however, the Australian acts do not bear a set of “principles” which establish its moral position. The most that the Australian Acts offer is a commitment to investing in high quality research, support in transitioning and commercializing medical discoveries into available healthcare options, and rigorous guidelines framing research worthy of public trust.47 Additionally, Australia maintains a licensing body authorized to grant licensed variance to some activities that it bans in the 2002 and 2006 Acts. The National Health and Medical Research Council (NHRMC) can issue a license whereby the applicant can (among other activities): create a human embryo other than by a process of fertilization of a human egg by a human sperm; create a human embryo containing genetic material provided by more than 2

43 Id.
44 Id.
45 Id.
46 Id.
persons, or; create a “hybrid embryo.”48 The awarding of licenses for these activities is dependent on the availability of embryos already conceived and released by the conceiving parents and the likelihood of significant scientific results from the use of such embryos.49 But, the door is ajar for germline engineering, albeit heavily monitored and regulated, putting distance between the Australian position and the conservative moral position.

III. DISPOSITION OF GERMLINE ENGINEERING IN THE UNITED STATES

A. Evolution of the regulations

As with Europe, the cloning of Dolly, the sheep, motivated a response by the United States. In 1997, President Bill Clinton commissioned a report from the National Bioethics Advisory Commission to “review the legal and ethical issues associated with this [cloning] technology” and then issued instructions to his department and agency executives that “no federal funds shall be allocated for the cloning of human beings” until the results of the report were known.50 Later that year, in defiance of the President’s position, physicist Richard Seed publically announced his intention to clone a human being in a privately funded effort.51 In the rhetorical disturbance that followed, Carl Feldbaum, President of the Biotechnology Industry Organization (BIO), suggested to the Secretary of Health and Human Services (HHS), Donna Shalala, that cloning could be interpreted as a “biological product” and would, therefore, fall within the regulatory jurisdiction of HHS’s Food and Drug Administration (FDA).52 Acting FDA Commissioner, Michael Friedman, agreed with BIO’s interpretation of the law, further adding that human cloning is an “investigational technology” and, therefore, “it cannot be attempted unless the researcher has submitted an

49 Id.
52 Id.
investigational new drug (IND) application.” By requiring the IND application, the FDA asserted its jurisdiction and thwarted Dr. Seed’s effort, adding that the FDA would reject every IND application associated with human cloning, in effect banning all reproductive human cloning in the United States.

In spite of President’s Clinton’s repeated calls for legislative action, the U.S. Congress has remained silent on its position on human cloning and its successor technologies in germline engineering, thus avoiding any political entanglement. The absence of legislation has essentially left the Department of Human Health and Services as the controlling authority. Of the eleven agencies potentially involved, two have policies in place regulating gene therapy and germline engineering: National Institute of Health (NIH), and the aforementioned Food and Drug Administration (FDA).

The NIH oversees “gene-transfer”, a broadly defined term that includes germline engineering for regulatory purposes, and the funding of applications associated with gene-transfer. The NIH’s Recombinant DNA Advisory Committee (RAC) is “responsible for ethical review of all NIH-funded research proposals that involve putting genes into human beings” and makes a stand that it is, “as a matter of policy, not reviewing any proposals that seek to modify gametes or embryos.” The FDA, which is chartered specifically for (among other actions), regulating the introduction of “genetic material into the body to replace faulty or missing genetic material … for the treatment or cure of a disease” considers its authority to extend to any gene-therapy product that contains “genetic materials administered to modify or manipulate the expression of genetic material or to alter the biological properties of living

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54 Id.
55 Susannah Baruch, et. al., Human Germline Genetic Modification: Issues and Options for Policymakers, 39 (Genetics and Public Policy Center 2005).
56 Pete Shanks, Extreme Genetic Engineering and the Human Future 37 (Center for Genetics and Society 2015).
57 Baruch, supra note 55.
58 Kelly, supra note 30, at 336-7.
59 Id. at 337-8.
60 Id.
cells” regardless of the end purpose. But, the FDA’s authority may be limited because it can only regulate safety and effectiveness and only on human subjects; an embryo does not receive human subject protection until it is implanted through IVF.62

Although the regulatory policies of the NIH and FDA manifest a ban on germline engineering, the “ban” is merely an administrative policy, subject to licensing exemptions and indeterminate oversight. The moral position, therefore, is purely an administrative position, and not a firm stand along the moral spectrum. The only authoritarian moral position offered by the U.S. government was the conservative position within President George W. Bush’s Executive Order 13435, issued in 2007, which stated that “human embryos and fetuses, as living members of the human species, are not raw materials to be exploited or commodities to be bought and sold.”63 Executive Order 13435 prohibited federal funding for any research conducted on embryos created or fertilized after the date of the order. President Obama removed the prohibition, and the associated conservative moral position, in his Executive Order 13505, issued in 2009.64

B. Critique of the position or lack of position

In understanding an absolute moral truth, Gilbert Keith Chesterton said, “Morality is always dreadfully complicated to a man who has lost all his principles.” Once principles are established, decisions become just. Where are the U.S. principles? Europe’s Oviedo Convention and Canada’s AHRA clearly articulate principles that defend the conservative moral position. The conservative position is that germline engineering techniques which alter human cells, such as embryos, may only be certified for medical advancements and research; provided that no human being is created as a result of such a technique. The conservative approach draws on an objective truth that germline modification is wrong; forbidding, unequivocally, any creation of genetically modified humans. At the same time, however, the

61 Id.
62 Id. at 338-9.
64 Id.
importance and value of the technology is not discounted, as the purpose of the technology is to further the discovery of medical advancements and preventative care treatment, limiting any risk of any future harm.

On the other hand, the liberal position calls for much more than germline engineering’s exploitation of research and medical advancements, giving way for the introduction of genetically created human beings, i.e., “designer babies.” The liberal justification for its position is less concerned with the social, moral, and legal issues, but rather places more emphasis on parental rights and freedoms to make choices on behalf of their progeny. The liberal position rejects the conservative moral objective principles, instead supplanting them with the “harm principle.”

This harm principle, serving as the liberal validating principle, implies that the use of the technology is limitless except in a case where it could “directly harm offspring, families, women, society, or others.” This theory is highly subjective.

The subjectivity of the liberal approach is well-illustrated by the example of Sharon Duchesneau and Candace McCullough. Sharon and Candace, wanting a child of their own, sought out deaf sperm donors with the intention of conceiving a deaf child. Both deaf, Sharon and Candace did not perceive congenital deafness as undesirable because “they believed that they would make better parents to a deaf child, because they would be better able to guide them.” In this case, the harm principle is imperfect and is swallowed by the nature of the subjectivity of parental right of authority. The liberal stance in essence is unbridled and the risks are unlimited; the U.S. should not adopt this hazardous position.

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65 RONALD HAMOWY, THE ENCYCLOPEDIA OF LIBERTARIANISM xxi (SAGE Publications, Inc. 2008) (“It is a basic principle of libertarian politics that no one should be forcibly prevented from acting in any way he chooses provided his acts are not invasive of the free acts of others.”).

66 Kelly, supra note 30, at 323.

67 Couple ‘Choose’ to have Deaf Baby, BBC NEWS, April 8, 2002, http://news.bbc.co.uk/2/hi/health/1916462.stm; See also Agar, supra note 23, at xxx.

68 BBC NEWS, supra note 67.
C. Public Policy Considerations

The legal argument surrounding germline engineering, in any form that would produce viable progeny, starts with the legal status of the embryo. The legal status of the embryo, as the starting point of life, has sparked much debate among bioethicists, theologians, scientists, and legal scholars, and remains within the purview of the States, varying per jurisdiction.\footnote{Angela K. Upchurch, \textit{A Postmodern Deconstruction of Frozen Embryo Disputes}, 39 \textit{Conn. L. Rev.} 2107, 2019-20 (2007).} Courts have categorically labeled a frozen embryo’s legal status as “property, property deserving of special respect, [or] human life.”\footnote{Id. at 2120.} Courts that hold the legal status of the embryo as property or property deserving special respect, apply contract and property law principles.\footnote{Id.} Loosely aligning with the liberal position, courts “consider the decision to beget children as being a significant and intensely personal choice to be made by the progenitors”,\footnote{Id. at 2135.} similar to that of parental liberty, autonomy, and freedom.

From a morally conservative standpoint, advanced by this article, if the legal status of the embryo is “human”, germline engineering or modification is forbidden because germline modification is the destruction of life. However, even if one were to concede the point at which the embryo obtains human legal status, germline engineering cannot stand, because in applying simple Anglo-American property law principles, the technology is void under the Rule Against Perpetuities.\footnote{“The traditional common law Rule Against Perpetuities limiting the time period within which contingent remainsders interest must vest is currently in effect either by statute or by judicial adoption in only a few states.” The Law Of Trusts And Trustees § 214 (2015). “The unmodified Uniform Statutory Rule Against Perpetuities (USRAP) is currently the law in roughly one-third of the states.” Lynn Fosler, \textit{Fifty-one Flowers: Post-Perpetuities War Law and Arkansas’s Adoption of USRAP}, 29 \textit{U. Ark. Little Rock L. Rev.} 411 (2007).} The common law language of the Rule states, “an interest in property is void unless it will necessarily vest, if at all, within a life in being and twenty-one years.”\footnote{George L. Haskins, Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 \textit{U. Pa. L. Rev.} 19 (1977).} While the language itself is not directly applicable to germline engineering, the underlying rationale behind the Rule provides
guidance. The rationale behind the Rule Against Perpetuities involves an understanding of the “dead hand”, i.e., the ability under which a grantor may control future ownership of property, specifically land, for a measurable length of time after a conveyance. Simply put, if the interest in land was tied up for too long, whatever measurable length that is, then the interest would amount to perpetuity and would thus be void. The policy, historically, intended to “remove the threat to the public welfare from family dynasties built on great landed estates or on great capital wealth.” Analogously, in editing or modifying the germline, the progenitors are effectively controlling the germline of their progeny that by its nature will remain in perpetuity. As such, from a policy standpoint, germline editing should be held void. A fortiori, in applying this doctrine, each individual’s germline is his own fee simple estate, his transferable germline, to “hold to him and his heirs forever; generally, absolutely, and simply ...over which the [progenitor] has unlimited power of disposition in perpetuity without condition or limitation.”

Germline engineering cannot even stand when examined under long-standing property principles, if the liberal position insists on such.

CONCLUSION

Germline engineering is at the doorstep. Failure to address and implement clear regulations leaves the U.S. unprepared to proceed with this technology. There have been many arguments on both sides of the germline engineering debate regarding social, economic, cultural, anthropological, and environmental impacts of a future containing genetically engineered humans. But, suppose the technology was 100% successful; suppose it was available to all; suppose that genetically engineered humans were social equals to non-genetically engineered humans; and suppose all of the peripheral issues surrounding germline engineering were rendered moot. The fundamental question still remains: Is it right?

76 31 C.J.S. Estates § 12.
Many countries believe not and have driven legislative or regulatory stakes into the ground to mark their moral positions. The United States has not; ambiguous regulatory authority and executive orders that sway depending on the political ideology of the executive are not viable substitutes for an articulated moral position – any moral position.

A. Solution

As a world leader, it is now incumbent on the United States to take action and to compel other countries to follow a morally conservative path, calling for an international ban on all germline editing techniques that result in the creation of a human being. In the 2015 Center for Genetics and Society’s report, Extreme Genetic Engineering and the Human Future, key researchers called for “explicit and expansive public engagement ... including considerations of not just safety thresholds, but also social and ethical concerns...” with an “ongoing, transparent, democratic process” holding “scientists and entrepreneurs accountable to responsible regulations.” Ultimately, it is critical that the Congress’ legislation center on how to minimize potential environmental, health and social risks, while maximizing the use of this technology for the preventing and curing of diseases.

At a minimum, until a suitable resolution has come to pass in the United States, a moratorium should be issued on germline engineering techniques. A moratorium is clearly needed because the current regulatory framework fails to: [1] adequately articulate moral principles that would inform a governmental position; [2] hermetically regulate the technology; and [3] define and organize accountability at all levels through top-down regulation, including the imposition of criminal, civil, and monetary damages for violations within the private and public sectors.

For now, it makes sense to pause: The U.S. should enact a clear prohibition of germline engineering for the purpose of creating a human. How it chooses to do so and how it chooses to sanction noncompliance should be the focus of the immediate debate. All of the other issues,

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77 Shanks, supra note 56, at 6.
including moral positions and/or the protection or extension of parental choices, can be debated subsequently. It is far easier to prohibit and later allow than it is to allow and later deny. And, during germline engineering’s abeyance, the integrity of the human germline is preserved for the subsequent generations whose views on the choices could differ. In this case, too, a moratorium on germline engineering would be erring on the side of natural human biology.