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Can the Seamless Garment Be Sewn?
The Future of Pro-Life Progressivism

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Progressivism

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Fides et Iustitia

ARTICLE

UNRAVELING THE “SEAMLESS GARMENT”:*
LOOSE THREADS IN PRO-LIFE
PROGRESSIVISM

SUSAN FRELICH APPLETON†

What specific political goals and priorities characterize the “pro-life progressive” position on the subject of abortion? In particular, do principal objectives include overturning *Roe v. Wade*¹ and enacting abortion restrictions? What do these goals and priorities reveal about respect for women as full, responsible, and equal decision-makers in our society?

For me, the sole unapologetically pro-choice participant in this symposium, the central question concerns whether the pro-life progressive position on abortion freedom dooms the entire project as an oxymoron. I consider women’s reproductive self-determination an indispensable element of gender equality and gender equality an indispensable element of a progressive agenda. If the “pro-life” part of the project’s name signals a commitment to overturn *Roe* and impose restrictions on abortion, then I would conclude that the “progressive” part of the name is contradictory and disingenuous.

* The title of my essay responds to the title of the conference at which I presented the ideas in this paper, *Can the Seamless Garment Be Sewn? The Future of Pro-Life Progressivism*, at the University of St. Thomas School of Law, on March 11, 2005. For more information about the “seamless garment,” also known as “a consistent ethic of life,” see e.g. Fr. James Scullion, *The Seamless Garment: The Call to a Consistent Ethic of Life*, <http://www.wau.org/about/authors/scullion1.html> (2002). My essay’s title also came to mind, however, because of Frances Olsen’s excellent 1989 essay on *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989), which in turn invoked attorney Frank Susman’s comment during the oral arguments of that case. Frances Olsen, *Comment: Unraveling Compromise*, 103 Harv. L. Rev. 105, 105-07 (1989) (noting how Susman responded to the Solicitor General’s stated effort just “to pull one thread” from the Court’s abortion precedents: “It has always been my personal experience that when I pull a thread, my sleeve falls off.”).

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1. 410 U.S. 113 (1973).

I. "PRO-LIFE" OR "PRO-CHOICE"²

Not all proponents of a "pro-life" stance explicitly advocate reversal of *Roe* or new restrictions on abortion. For example, Sally Winn, vice president of Feminists for Life, has been visiting college campuses to rally feminists to a pro-life position, but important aspects of the approach she articulates might well be described as "pro-choice." In part, she challenges the obstacles that tip the scales toward abortion for women who might otherwise choose to carry their pregnancies to term. In the speech that I heard, she pointed to the difficulties that pregnant college students face: no coverage of prenatal care in student health insurance (despite coverage of abortion procedures), no dorms for students with babies, and no on-campus childcare available to undergraduates.³ Whether Winn would take additional steps, such as pressing for laws criminalizing or restricting abortion, was left unsaid.

Winn's words sounded pro-choice to me. I would enthusiastically join her in criticizing the policies and structures that impair a woman's freedom to decide to carry her pregnancy to term, just as I would criticize the policies and structures that impair a woman's freedom to decide to have an abortion. That is why, in past publications, I have challenged both public funding schemes that subsidize prenatal care and childbirth for indigent pregnant women while withholding such financial assistance for their abortions⁴ and also welfare reforms, such as "family caps," that create financial pressures for poor women to terminate their pregnancies even when they would prefer to carry to term.⁵ In fact, in my very first publication as a law professor, I emphasized the problem in withholding public funds for poor women's abortions by asking readers to imagine the mirror-image situation:

2. Of course, the terminology itself carries substantial political baggage. See e.g. Frances Kissling, *Is There Life after Roe? How to Think about the Fetus*, <http://www.catholicsforchoice.org/conscience/current/LifeAfterRoe.htm> (Winter 2004-2005) (sidebar on terminology).

3. The flyer for her talk, which took place at Washington University School of Law on February 24, 2005, advertises a lecture, followed by Q & A, by Sally A. Winn, vice president, Feminists for Life of America, "Refuse to Choose: Reclaiming Feminism." For additional information about the "College Outreach Program," see Feminists for Life of America, *College Outreach Program*, <http://www.feministsforlife.org/cop/lectandwork.htm> (accessed June 12, 2005). Feminists for Life attracted attention after the President nominated John Roberts to the Supreme Court of the United States. Jane Sullivan Roberts, his wife, has performed pro bono work for the organization. See e.g. Lynette Clemetson & Robin Toner, *Anti-Abortion Advocacy of Wife of Court Nominee Draws Interest*, N.Y. Times A1 (July 23, 2005).

4. Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 Colum. L. Rev. 721 (1981).

5. Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 Geo. L.J. 155 (1996).

a legislative decision to subsidize abortions but to defund medical care for poor women who want to carry to term.⁶

II. FEMINISM, CHOICE, AND EQUAL RESPECT FOR WOMEN

A. *Why Women Must Choose*

For me, a core principle of feminism requires respect for women's *own choices*, especially in matters concerning their bodies and their reproductive destinies.⁷ This principle requires freedom from not only explicit barriers (such as criminal abortion laws) but also other policies and structures that pressure women to follow one path or another.

Four primary reasons lead me to regard as nonnegotiable requirements of feminism a woman's freedom to make important decisions about her body, her health, and her reproduction.⁸ First, I reject the paternalism inherent in laws that communicate distrust for women's decision-making.⁹ Such laws signal the belief that women lack the capacity to make moral and ethical choices.

Second, I accept the reality that, even today, the male norm best establishes a baseline for the equal respect owed to women. That is, our laws and our society are structured to reflect men's experiences and to address

6. Susan Frelich Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 Mich. L. Rev. 1688 (1979).

7. I appreciate the limits of invoking "choice" as the rubric for reproductive rights. See generally e.g. Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States* (Hill & Wang 2001). Solinger explains the thesis of her book, a critique of "the language of choice," as follows:

This book is about the complexities of "choice" in the United States after *Roe v. Wade*. What happens when the special guarantee for all women—the promise that women can decide for themselves whether and when to be mothers—is expressed by the individualistic, marketplace term "choice"? How can users of such a term avoid distinguishing, in a consumer-culture fashion, between a woman who can and a woman who can't afford to make a choice? What aspects of "rights" were masked or lost when the language of choice replaced the language of rights at the heart of women's special guarantee?

Id. at 6.

8. Linking abortion rights with feminism has proven controversial over the years. See e.g. Carole Joffe, *Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe v. Wade* 133-34 (Beacon Press 1995). Linda Gordon explains the rise of anti-abortion sentiment after *Roe v. Wade* this way: "What did happen [after *Roe*] was the spread of a feminist understanding of abortion as a right of self-determination to which all women were entitled, replacing the previously dominant view of abortion as, alternatively, a form of medical treatment or an unpleasant and risky but often necessary private solution to a personal problem." Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* 300 (U. Ill. Press 2002).

9. Cf. Kristin Luker, *Abortion and the Politics of Motherhood* 22 (U. Cal. Press 1984) (describing physicians' campaign to criminalize abortion in late 1800s, which portrayed women who terminated pregnancies as "inadvertent murderesses" who did not appreciate what they were doing). For a more contemporary critique of paternalistic policies, see e.g. *Turner v. Safley*, 482 U.S. 78, 99 (1987) (invalidating prison's restrictions on marriage for female inmates because of, *inter alia*, "excessive paternalism").

men's needs. So, if we cannot imagine legislatures substituting their opinions for doctors and patients when it comes to men's medical treatment, then we should not tolerate such legislative actions when it comes to women's medical treatment.¹⁰ In one telling illustration of this male norm, note how we needed to await the "Viagra revolution" to win insurance coverage for women's contraceptives—pharmaceuticals that were once excluded from coverage as "lifestyle choices."¹¹

Third, the pervasive male norm and women's reproductive capacities have combined to support the systematic subordination of women. Although neither inevitable nor unavoidable, such subordination has been real. We see it in the way that our legal tradition has treated the roles of men and women in marriage.¹² And, just in case there was room for doubt, consider how women's subordination was regarded as so obvious, so unquestionable, and so "natural" that it was invoked by analogy to justify the subordination of African Americans in slavery.¹³ This subordination continues today, as we can see everywhere from women's second-class citizenship in some Middle Eastern countries to the depiction of women in American popular culture¹⁴ and the musings of Harvard University President Lawrence Summers about women's unsuitability for careers in science and mathematics.¹⁵

Fourth, this subordination has a distinct sexual component, reflected in a persistent double standard and gendered concept of sexual pleasure—male. Return to the "Viagra revolution" mentioned before. The relentless advertisements for male sexual performance drugs assume that pleasure for men is so expected, so utterly ordinary, that all media consumers will understand the utility of these products. True, one might discern a connection between male performance and female pleasure, with some of the advertise-

10. Cf. Olsen, *supra* n. *, at 129-30.

11. See e.g. *In re Union Pacific R.R. Empl. Practices Litig.*, 378 F. Supp. 2d 1139 (D. Neb. 2005); Lisa A. Hayden, *Gender Discrimination within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & Health 171 (1999); Breena M. Roos, Student Author, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives*, 82 B.U. L. Rev. 1289 (2002).

12. See e.g. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 896-97 (1992). In striking down a spousal-notification requirement for abortion, the majority recalled and explicitly rejected "the common-law understanding of a woman's role within the family," which precluded her "full and independent legal status under the Constitution." *Id.* at 897 (citation omitted). See also Catharine A. MacKinnon, *Women's Lives—Men's Laws* 127-46 (Belknap Press 2005) (disentangling women's social inequality from women's and men's different biological roles in reproduction).

13. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 61 (Harv. U. Press 2000).

14. See e.g. Maureen Dowd, *Taming of the Shrews*, N.Y. Times 4.13 (Mar. 6, 2005) (op-ed column). Even apart from the depiction of women, consider the insult popularized by Governor Arnold Schwarzenegger and used throughout the election season of 2004: "girlie man." See e.g. Frank Rich, *How Kerry Became a Girlie-Man*, N.Y. Times 2.1 (Sept. 5, 2004).

15. See e.g. Sara Rimer & Patrick D. Healy, *Furor Lingers as Harvard Chief Gives Details of Talk on Women*, N.Y. Times A1 (Feb. 18, 2005).

ments even suggesting this link;¹⁶ nonetheless, methods of freeing women to enjoy sex without fear of procreative consequences are not regarded as a similar entitlement. The continuing battle over abortion and the new struggle over emergency contraception¹⁷ demonstrate this point. To the extent, then, that a woman's confidence in controlling reproduction (despite the risk of contraceptive failure) unlocks for her the sexual enjoyment so prized among men, the mere availability of abortion becomes an important element of a full, free, and equal life.¹⁸

16. These commercials often present "teasers," that is, suggestions about the medication's use, in place of explicit descriptions. Stuart Elliott, *Pfizer Plans to Show Teaser Ads for Viagra*, N.Y. Times C3 (Aug. 11, 2004) (reporting campaign based on slogan "Get back to mischief."); see also Stuart Elliott, *Viagra, With a Wink and a Nudge, Joins Its Racier Rivals on Their Turf*, N.Y. Times C1 (Aug. 17, 2004). The manufacturer halted one such advertising campaign, depicting Viagra users as "devilish," after the F.D.A. disapproved the commercials' failure to state the drug's purposes and side effects. Stuart Elliott, *F.D.A. Criticizes Viagra Ads, Prompting Pfizer to Halt Them*, N.Y. Times C6 (Nov. 16, 2004). Some commercials for these products (which include not only Viagra, but also Levitra and Cialis), picture the male consumer's female partner and ask, "If the moment is right, will you be ready?" Michael Lollar, *Viagra, Its Cousins, Drawing Younger, Fitter Men Too—Drugs Getting Use for "Recreation" in Addition to Therapy*, Com. App. A1 (Memphis, TN) (Apr. 26, 2005). Legislative efforts to restrict such advertising on television have not yet succeeded. Representative Jim Moran, who has for the second time introduced a bill to limit the hours when such ads can air on television and radio, faults the excessive "sexual innuendo." Nonetheless, he concedes, "When it comes to family values versus corporate profits, corporate profit prevails. You don't accomplish much more than exposing the hypocrisy of some of those religious-right extremists." *Erectile Dysfunction: Bill Would Restrict Air Time for Rx Ads*, 10 Am. Health Line 9 (Mar. 21, 2005). More recently, pharmaceutical industry guidelines have limited such advertising. See Stephanie Saul, *Drug Makers to Police Consumer Campaigns*, N.Y. Times C7 (Aug. 3, 2005).

17. See e.g. Gardiner Harris, *Official Quits on Pill Delay at the F.D.A.*, N.Y. Times A12 (Sept. 1, 2005); Gretchen Ruethling, *Illinois Pharmacist Sues Over Contraceptive Rule*, N.Y. Times A1 (June 10, 2005); Monica Davey, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. Times A1 (Apr. 19, 2005); cf. *Helping Rape Victims: New Bill Would Change Justice Department Decision to Exclude Morning After Pill from National Treatment Guidelines*, U.S. Fed. News (Mar. 10, 2005).

18. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 225 ("People have a strong affirmative interest in sexual expression and relationships. Through sexual relationships, we experience deep connection with another, vulnerability, playfulness, surcease, connection with birth and with death, and transcendence."); see also Casey, 505 U.S. at 856 ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."); *id.* at 860 ("An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society."); Laura Rosenbury, *Some Thoughts On Sex Negativity* (unpublished ms. Apr. 4, 2005) (copy on file with author); Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus: Another Foundation for the Right to an Abortion*, 63 Brook. L. Rev. 1051 (1997); cf. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 Colum. L. Rev. 181, 199-200 (2001) ("The failure of legal feminists to articulate and press a viable positive domain of non-reproductive sexuality has left such a domain overdetermined as either lesbian territory or the site of surplus male sexuality that is in need of taming, if not excising altogether, through juridical means."). One might well ask whether the Supreme Court's opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), protecting gay intimacy from criminal punishment, inaugurates a general sex-positive jurisprudence. For a critique along these lines, see Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555, 1582 (2004).

Given my reading of *Roe v. Wade* as a decision about decision-making¹⁹ and my understanding of respect for women's own decisions as essential for their full equality,²⁰ it follows that efforts to overturn *Roe* or to enact restrictions on women's reproductive decisions necessarily reveal a preference for gender inequality. Although I did not hear Ms. Winn explicitly advocate such measures, I take issue with the message communicated by the title of her recent campus campaign, "Refuse to Choose." The full flourishing and equal respect contemplated by feminism and other progressive initiatives *require* women to choose how they want to lead their lives. Making ethical decisions and taking responsibility for them are essential to citizenship. Whether women choose to abstain from sexual intimacy with men, to engage in sexual acts just for fun, to use birth control, to terminate a pregnancy, to try to conceive, or to carry a pregnancy to term, it is critical that they make choices and that they take responsibility for these choices.²¹

No doubt, some readers will contend that my analysis, emphasizing why women must choose, conveniently omits any reference to the embryo or fetus. In reply, I would invoke the *Roe* Court's reasoning that, given the burdens imposed on women by the denial of choice and the genuine disagreement about the moral status of the fetus, a pregnant woman must resolve this issue according to *her own* conscience and ethical standards.²² Further, I follow those scholars who have shown that anti-abortion laws single out pregnant women for physically demanding Samaritan duties, an argument that succeeds even if one concedes the legal personhood of the fetus.²³ I would add the observation that the law never asks the parent of a child to provide, say for example, a kidney or bone marrow for transplantation even if the child would die without the donation, because even recognized duties to rescue steer clear of such physical invasions and risks.²⁴

19. 410 U.S. 113; *see generally e.g.* Laurence H. Tribe, *Foreword: Toward a Model of Roles In the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973). *See also* Kissling, *supra* n. 2, at 11 ("The most powerful of pro-choice messages has been the multi-faceted 'Who Decides?' which highlights both women's rights and keeping government out of the bedroom without ever mentioning either.").

20. *See generally e.g.* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984).

21. *See Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); *see also Speak Out: I Had an Abortion* (Gillian Aldrich & Jennifer Baumgartner 2005) (documentary). For more information about the film, *see* SpeakOut Films, *Speak Out: I Had an Abortion*, <http://www.speakoutfilms.com/> (accessed Aug. 7, 2005).

22. *Roe*, 410 U.S. at 153-62.

23. *See e.g.* Donald H. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979); Judith Jarvis Thomson, *A Defence of Abortion*, 1 Phil. & Pub. Aff. 47 (1971); *see also* Suzanna Sherry, *Women's Virtue*, 63 Tul. L. Rev. 1591, 1593 (1989) (describing the Samaritan argument as the "best argument" for abortion freedom because it gets to the "real question," which is "not the importance of the dependent life involved" but rather whether the pregnant woman "may be compelled to provide the aid" without which the fetus will die).

24. *See e.g. In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. Cir. 1990) (en banc).

Finally, I note that restrictions designed to protect potential life inevitably reflect value judgments, as Frances Olsen has persuasively shown,²⁵ and our society, which systematically devalues women, remains most comfortable with judgments that underrate burdens imposed exclusively on the female half of the population.²⁶

B. Choices in Context

Of course, I recognize the difficulty—perhaps the impossibility—of knowing with confidence whether we can identify a particular woman's *true choice*, apart from the context in which it is embedded, a context that includes her family life, her financial situation, the cultural setting, the societal norms, and the subordination I mentioned before.²⁷ How can we disentangle what a woman might *really* want to do from all the social forces and value judgments that shape her way of looking at the possibilities? Although Winn focused on all the contextual pressures tilting women toward abortion, one must recognize as well all the forces of “repronormativity”²⁸—that is, the messages that make pregnancy and motherhood icons in our understanding of what it means to be female.

1. The Case of In Vitro Fertilization

To see repronormativity at work, as well as some of the biases and blind spots in the contemporary pro-life position, consider the booming and almost completely unregulated business of assisted reproductive technology. Clinics treating infertility recruit egg and sperm donors, lobby for laws mandating insurance coverage,²⁹ market their services, and perform in vitro fertilization (IVF)³⁰—a process which, as practiced today, routinely entails creating outside the body far more embryos than the number that will actually be transferred to a woman's uterus to help her become pregnant.³¹ Although the unused embryos might be donated to others, by far the majority of them are destroyed outright or destroyed after use for research,

25. Olsen, *supra* n. *, at 126-33.

26. *Id.*

27. E.g. Catharine A. MacKinnon, *Feminism Unmodified* 93-97 (Harv. U. Press 1987).

28. See Franke, *supra* n. 18, at 183-84.

29. See e.g. Solinger, *supra* n. 7, at 206.

30. See generally Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. Chi. Leg. Forum 393.

31. See The President's Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* 46 (2004) (available at <http://www.bioethics.gov/reports/reproduction-and-responsibility/>) (noting that “large numbers of embryos die at all stages of assisted reproduction,” that “[a]n unknown number of additional embryos are discarded when it is determined that they are no longer needed or desired,” and that “[t]housands of embryos are cryopreserved for indefinite periods of time”); Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 56 (1999) (“[F]rozen embryos are now being accumulated at the rate of tens of thousands per year in the United States alone.”).

at the request of those who "own" them—the progenitors or those who commissioned their creation.

Given the stated pro-life agenda, I have often wondered about the exclusive focus on anti-abortion efforts. Why are those who profess the goal of protecting embryonic and fetal human life not also taking aim at the fertility industry and the practice of IVF in particular, including its purposeful creation and destruction of excess embryos? Consider a telling illustration from my own state, Missouri. When outspoken abortion-rights foe Catherine Hanaway became Speaker of the Missouri House of Representatives in 2002, she promised during the opening of the legislative session to work "to protect those children who would be killed even before they are born."³² Yet, a contemporaneous biographical story in the local newspaper detailed her efforts to fight infertility, including IVF attempts using her own eggs and additional efforts using her sister's eggs.³³

With all the time, attention, and resources devoted to halting or impeding abortions, how can we explain the silence of pro-life activists about the fertility industry?³⁴ Why do anti-choice legislators come up with phony safety requirements for abortion providers but never suggest even the most minimal regulation of the practice of IVF?³⁵ Why do protestors picket and harass patients at Planned Parenthood but not at IVF clinics?³⁶ Even in the

32. Bill Bell, Jr., *GOP Control of Missouri House Gives Optimism to Abortion Foes*, St. Louis Post-Dispatch B2 (Jan. 10, 2003).

33. Virginia Young, *Passion, Pragmatism Drive New Speaker; In '98, Hanaway Homed in on Retaking Missouri House*, St. Louis Post-Dispatch A1 (Nov. 10, 2002).

34. For a rare exception to the silence, see Helen M. Alvaré, *The Turn toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 Stan. L. & Policy Rev. 135, 155-63 (2005).

35. See e.g. Matt Franck, *Federal Judge Blocks New Abortion Law*, St. Louis Post-Dispatch 13 (Sept. 17, 2005) (reporting temporary injunction against regulations singling out abortion clinics).

36. See e.g. Kim Bell, *Burke Leads Anti-Abortion Protest*, St. Louis Post-Dispatch C7 (Jan. 16, 2005). For example, at Planned Parenthood of the St. Louis Region (PPSLR), located at 4521 Forest Park Avenue in St. Louis, Missouri, protestors typically show up every Tuesday, every Wednesday, and some Fridays, with a particularly large crowd every Saturday. Further, on one Saturday each month, the Cathedral of St. Louis (seat of the Catholic Archdiocese of St. Louis) sends worshippers to PPSLR to protest immediately after a pro-life mass. "[T]he picketers always show up on days when [PPSLR] provide[s] procedures." E-mail from Paula M. Gianino, President & CEO, PPSLR, to Professor Susan Frelich Appleton (June 20, 2005, 08:41 a.m. CDT) (copy on file with author). By contrast, no such protests occur at the Infertility and Reproductive Medicine Center, the site of IVF procedures, located just a few blocks away from PPSLR at 4444 Forest Park Avenue. According to one of the physicians: "To my knowledge, we have never had a pro-life demonstration. I have not heard of this type of protesting from any of the other centers either." E-mail from Randall R. Odem, M.D., Professor of Obstetrics and Gynecology, Chief, Division of Reproductive Endocrinology and Infertility, Washington University School of Medicine, The Infertility and Reproductive Medicine Center, to Professor Susan Frelich Appleton (June 20, 2005, 04:30 p.m. CDT) (copy on file with author).

current debate about stem-cell research,³⁷ we hear much opposition to the use of excess embryos for research,³⁸ but we hear little concern about whether those embryos should have been created as an initial matter, given the knowledge that they would not all be used.³⁹ Certainly, one can easily imagine alternatives to the laissez-faire regime, with Italy's controversial restrictions on assisted reproduction providing one illustration.⁴⁰

By contrast, supporters of the pro-choice position face no such inconsistency. The notion of reproductive self-determination comfortably embraces access to medical techniques that allow one either to achieve or to avoid procreation.⁴¹ Moreover, those supporting reproductive rights do not see the embryo or fetus as a person, although many regard it as entitled to special respect⁴² and they appreciate the intimate relationship between the pregnant woman and the developing life that she nurtures.⁴³ I save for another day several questions about the way infertility is treated and the relationship of this treatment to adoption.⁴⁴ For now, my central focus is the inconsistency in the agenda of many pro-life activists—a loose thread in the seamless garment, to borrow the metaphor.

I find resistance—even hostility—to feminism to be the most compelling explanation for this “disconnect” in the pro-life agenda. Destruction of embryonic life must be a price worth paying when it will make more wo-

37. Of course, there are sound feminist reasons to oppose stem-cell research, given the burden on women to provide the eggs for the process. See e.g. Sheryl Gay Stolberg, *Some for Abortion Rights Lean Right in Cloning Fight*, N.Y. Times A25 (Jan. 24, 2002).

38. For example, in opposing federal funding of stem-cell research that uses excess embryos left after IVF, President Bush has touted the option of “embryo adoption” without acknowledging the difficulties of this rarely used opportunity. Pam Belluck, *It's Not So Easy to Adopt an Embryo*, N.Y. Times 4.5 (June 12, 2005) (citing couples' discomfort with this option); Melissa Moore Bodin, *The Eggs, Embryos and I*, Newsweek 14-15 (July 28, 1997) (comparing donating embryos to relinquishing children for adoption). Still, I have seen no reports of presidential criticism of the practice of IVF itself, despite his professed support for a “culture of life.” See Sheryl Gay Stolberg, *House Approves a Stem Cell Bill Opposed by Bush*, N.Y. Times A1 (May 25, 2005).

39. See e.g. Gordon, *supra* n. 8, at 314.

40. Elisabeth Rosenthal & Elisabetta Povoledo, *Vote on Fertility Law Fires Passions in Italy*, N.Y. Times A7 (June 11, 2005) (noting restrictions, including prohibition on freezing and testing embryos, ban on use of donated eggs, and limit on harvested eggs to three). A referendum to repeal the law failed because the requisite 50 percent of eligible voters did not participate after the Vatican urged a boycott. Ian Fisher, *Italian Vote to Ease Fertility Law Fails for Want of Voters*, N.Y. Times A11 (June 14, 2005).

41. But see Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 248 (Pantheon 1997):

Radical feminists have powerfully demonstrated that the new reproduction enforces traditional patriarchal roles that privilege men's genetic desires and objectify women's procreative capacity. They make a convincing case that new reproductive technologies serve more to help married men produce genetic offspring than to give women greater reproductive freedom.

42. See e.g. Ethics Committee of the American Society for Reproductive Medicine, *Donating Spare Embryos for Embryonic Stem-Cell Research*, 78 *Fertility & Sterility* 957, 958 (2002).

43. See e.g. Robert D. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* (U. Cal. Press 1988).

44. See Appleton, *supra* n. 30.

men into mothers, but it cannot be tolerated when undertaken to avoid motherhood.⁴⁵ From this vantage point, the inconsistency should come as no surprise. It reflects quite precisely the division that Kristin Luker found in her insightful book, *Abortion and the Politics of Motherhood*,⁴⁶ published in 1984, well before we were thinking carefully about the widespread practice of assisted reproduction.⁴⁷

Luker's research reveals that the passionate split of opinion on abortion rights rests on sharply contrasting conceptions of what it means to be a woman. The abortion-rights debate generates so much controversy because "it is a referendum on the place and the meaning of motherhood."⁴⁸ In the main, the pro-choice position embraces feminist and progressive objectives; translated and summarized, these objectives include equal opportunities for men and women in education and employment, freedom from gender-based assumptions and stereotypes, and the elimination of paternalism. Luker writes:

It is in this context that we can understand what women activists meant when they claimed that they had a *right* to their own bodies. As they came to expect to work much or most of their adult lives, just as men did, an unplanned pregnancy came to be seen as a tragedy. And for men, or the state, or physicians to have control over whether pregnancy would take place—and for women to suffer alone the consequences that decision would have for their careers, or education, or social status—came to seem eminently wrong and cruelly oppressive.⁴⁹

Those on the other side of the clash do not regard equality as a primary value because "[they] believe that men and women are intrinsically different . . . [with] different roles in life."⁵⁰ Luker found that "[p]ro-life activists believe that motherhood—the raising of children and families—is the most fulfilling role that women can have."⁵¹

45. Of course, one can find exceptions to my generalizations. The Vatican has long opposed assisted reproduction as well as abortion and contraception. See e.g. Alvaré, *supra* n. 34, at 162-63; Fisher, *supra* n. 40; Rosenthal & Povoledo, *supra* n. 40. Further, the issue of stem-cell research has divided the anti-abortion community, perhaps because of the commercial interests implicated by restrictions on scientific research. See e.g. John C. Danforth, *In the Name of Politics*, N.Y. Times A17 (Mar. 30, 2005); see also e.g. Susan Frelich Appleton & Helen Kornblum, *Danforth's Right: Mingling Religion, Law is Dangerous*, St. Louis Post-Dispatch B4 (Apr. 10, 2005); Z. Dwight Billingsly, *Sore Winner: Former GOP Sen. John Danforth is Out of Line in Deriding the Republican Party for Standing on Principle*, St. Louis Post-Dispatch B7 (Apr. 28, 2005).

46. See generally Luker, *supra* n. 9.

47. Luker explains her methodology, including reviews of literature published by organizations taking positions in the abortion debate, interviews with 212 activists on both sides of this debate, and observations of meetings of pro-choice and pro-life groups. *Id.* at 247-56.

48. *Id.* at 193 (emphasis in original).

49. *Id.* at 118; see also Solinger, *supra* n. 7, at 3-4 (summarizing initial favorable reaction to decision in *Roe v. Wade*).

50. Luker, *supra* n. 9, at 159.

51. *Id.* at 160.

When women accepted the definition that a woman's primary role was as wife and mother, control of one's own body meant little. When the biological workings of one's body and one's social status (or intended social status) are congruent, who needs control? In everyday terms, if one's role in life is to be a mother, it is not such a problem that one's biology often seems [single-mindedly] bent on producing children.⁵²

This analysis takes us only so far. First, it ignores the frequency with which mothers choose abortion in trying to provide the best care for their existing children.⁵³ Second, as I read this analysis, it brings us to a laissez-faire (or what I would call pro-choice) conclusion that should allow room for both groups of women to live according to *either* of the two understandings of the place of motherhood. I am sure you have seen the bumper sticker that seems to reflect this laissez-faire approach: "Against abortion? Don't have one." Yet, Luker pushes the analysis one step further, with the following observations:

Pro-choice and pro-life activists live in different worlds, and the scope of their lives, as both adults and children, fortifies them in their belief that their own views on abortion are the more correct, more moral, and more reasonable. When added to this is the fact that should "the other side" win, one group of women will see the *very real devaluation of their lives and life resources*, it is not surprising that the abortion debate has generated so much heat and so little light.⁵⁴

Historian Linda Gordon offers similar conclusions:

Only in seeing the Right to Life movement as saturated with antifeminism does its strength become understandable. Abortion came to represent a multidimensional attack on the "traditional" family and gender system [including sexuality, management of child-raising and employment, and loss of motherhood].⁵⁵

Now we have a framework for understanding the inconsistency in the pro-life agenda that consideration of IVF helps to expose. In the "referendum on the place and the meaning of motherhood," the protection of embryonic and fetal life emerges merely as distracting rhetoric. One might well discern as the real goal of the pro-life agenda the creation of a legal regime that reinforces the primacy of women's role as mothers. From this

52. *Id.* at 118.

53. Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion & the High Price of Motherhood*, 6 U. Pa. J. Const. L. 818 (2004); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* 202 (Oxford U. Press 2000) (defending abortion rights "in the name of responsible motherhood").

54. *Id.* at 215 (emphasis added).

55. Gordon, *supra* n. 8, at 304-05.

perspective, the pro-life activists' condemnation of abortion and condonation of the practice of IVF make enormous sense.⁵⁶

At its extreme, this position on motherhood recalls the famously discriminatory words of Justice Bradley concurring in *Bradwell v. Illinois*, the 1873 case upholding a prohibition on women's practice of law:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.⁵⁷

Surely, a seamless, coherent commitment to progressive values would reject these assertions and the attitudes that they reveal.

2. A Closer Look at Anti-Abortion Laws

Criminal anti-abortion laws necessarily deny equal respect for women by demonstrating distrust for their decisions. The call for such laws stands out as a loose thread in any purportedly seamless progressive agenda. Further, the usual pattern—reflected even in recent enactments such as the ban against so-called "partial birth abortions,"⁵⁸ which punishes the doctor's conduct without implicating the patient in the crime—only makes the paternalism more obvious. After all, but for her request for the procedure and her consent, the physician would not have acted. Portraying the abortion patient as an innocent victim denies her responsibility for the choice and reaffirms women's subordination.⁵⁹

Nor can we justify paternalist state-prescribed informed consent rituals and waiting periods⁶⁰ when we have no similar criminal provisions interfering in the doctor-patient relationship for men's health care. We trust male

56. I do not suggest that I have discovered the "motives" of pro-life activists who seek abortion bans but ignore the practice of IVF. Rather, I am proposing one explanation that fits my observations and coincides with empirical research performed in other contexts. See also Kissling, *supra* n. 2, at 13 ("One is led to believe that, for those opposed to abortion, it is not saving fetuses that matters but preserving a social construct in which women breed.").

57. 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

58. 18 U.S.C.A. § 1531 (West Supp. 2004).

59. Leslie Reagan, *Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s-1970*, 10 Colum. J. Gender & L. 311 (2001) (historical analysis of this issue).

60. See *Casey*, 505 U.S. at 881-87 (joint opinion).

patients to elicit the information they need from their doctors to make meaningful choices about medical care and to sue for malpractice when the information is not given.⁶¹ We must recognize that female abortion patients are equally capable of having an informative dialogue with health care providers, outside the shadow of criminal laws applicable only to this particular type of treatment.

In addition, we must provide public funding for abortions for poor women if we provide such funds for their medical care incident to carrying to term. The stated purpose of such asymmetric subsidies is to “encourage” (coerce) poor women to carry to term⁶²—yet another signal of a readiness to manipulate women in the service of some goal that apparently ranks ahead of respect for their own values and decisions.

III. CONCLUSION: A PRO-CHOICE PATH FOR PRO-LIFE PROGRESSIVES

Many pro-life activists seem obsessed with a single, anti-choice, women-demeaning objective: eliminating the possibility that a woman will be able to obtain the abortion that she has chosen to undergo. Nonetheless, for those who seek to prevent the seamless garment from unraveling, there are many pro-choice and women-respecting initiatives that progressives might pursue to reduce the number of abortions actually chosen. For example, effective sex-education programs⁶³ and access to contraceptives promise to reduce the number of unwanted pregnancies.⁶⁴

Despite the problems I have noted in laws that criminalize an abortion provider’s failure to comply with a state-mandated waiting period and information script,⁶⁵ room remains for more expansive efforts to promote thoughtful medical decision-making. To the extent that access to information—including the opportunity to talk with other patients facing similar choices (both those who have selected a given treatment path and those who have selected alternatives)—enhances sound medical decision-making, the state could facilitate access to such information. Of course, the information must be “neutral” and accurate, and measures designed to facilitate access

61. Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician’s Role in “Private” Reproductive Decisions*, 63 Wash. U. L.Q. 183, 233-34 (1985).

62. See e.g. *Harris v. McRae*, 448 U.S. 297, 325 (1980).

63. Critics have explained why “abstinence-only” programs fail. E.g. Nicholas Kristof, *Bush’s Sex Scandal*, N.Y. Times A21 (Feb. 16, 2005) (op-ed column).

64. See e.g. Kathryn Kolbert, *Two Steps Forward and One Step Back*, 6 U. Pa. J. Const. L. 686, 690-91 (2004); Patrick D. Healy, *Clinton Seeking Shared Ground on Abortion*, N.Y. Times A1 (Jan. 25, 2005); but see Rob Stein, *Pharmacists’ Rights at Front of New Debate; Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, Washington Post A1 (Mar. 25, 2005) (noting difficulty of obtaining contraceptives in some locales because of pharmacists’ refusals to fill prescriptions).

65. See Appleton, *supra* n. 61.

should not single out abortion patients, but should reach all those facing important health care decisions.⁶⁶

Further, respect for women requires vigilance in removing obstacles to carrying a pregnancy to term. Paid family leave,⁶⁷ workplace flexibility (to respond to the dilemma that women professionals face because the best time to have children is often the best time to focus on career advancement),⁶⁸ increased social support for women who choose to have children whom they know will be born with disabilities,⁶⁹ and reconsideration of family caps and welfare work requirements as applied to single parents of young children stand out as just a few examples on my list.⁷⁰ Both pro-life and pro-choice constituencies should support such efforts.

The term "pro-choice" is not just a politically sanitized synonym for "pro-abortion." To the contrary, "pro-choice," as I have always understood it, really does mean, quite literally, "pro-choice."⁷¹ "Anti-choice" initiatives remain, necessarily and unavoidably, incompatible with progressives' asserted commitment to gender equality.

66. Ronald Dworkin would allow the state to see that its citizens take life and death decisions seriously. Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* 151 (Alfred A. Knopf, Inc. 1993). He goes on to caution, however, that "courts must be careful not to allow a state to disguise what is actually a coercive rule as a rule merely encouraging responsibility." *Id.* at 153. This analysis leads him to conclude that the Court should not have upheld the mandatory waiting period in *Casey*. *Id.* at 173-74; see *Casey*, 505 U.S. at 885-87.

67. The Family and Medical Leave Act guarantees only unpaid leaves. 29 U.S.C. § 2612(c) (2000); Steven Greenhouse, *As Demands on Workers Grow, Groups Push for Paid Family and Sick Leave*, N.Y. Times 1.23 (Mar. 6, 2005); see also Mary Ann Glendon, *Abortion and Divorce in Western Law* 22-25 (Harv. U. Press 1987) (noting, in critique of American "right" to abortion, how other countries provide better support for pregnant women and social benefits for mothers).

68. See Barbara Katz Rothman, *Recreating Motherhood* 98 (Rutgers U. Press 2000) (explaining why blaming infertile women for having delayed childbearing ignores the systemic disincentives against earlier childbearing); Joan C. Williams, *Singing the Baby Blues: If Having Children on the Tenure Track Is a Career Killer, Is Having Them in Graduate School Any Better?*, 50 Chron. Higher Educ. C2 (Apr. 23, 2004); Robin Wilson, *How Babies Alter Careers for Academics: Having Children Often Bumps Women Off the Tenure Track, a New Study Shows*, 50 Chron. Higher Educ. A1 (Dec. 5, 2003); see also Elaine Tyler May, *Barren in the Promised Land: Childless Americans and the Pursuit of Happiness* 213 (Basic Books 1997) (describing the "new pronatalism").

69. See e.g. Barbara Katz Rothman, *The Tentative Pregnancy: How Amniocentesis Changes the Experience of Motherhood* 189 (2d ed., W.W. Norton & Co. 1993); Elizabeth R. Schiltz, *Living in the Shadow of Mönchberg: Prenatal Testing and Genetic Abortion*, in *The Cost of Choice: Women Evaluate the Impact of Abortion* 39 (Erika Bachiochi ed., Encounter Books 2004).

70. See e.g. May, *supra* n. 68, at 208 (quoting a "childfree" participant in author's survey, who finds it "difficult 'to listen to platitudes about 'mothers' (in a society that does not pay mothers living wages or high salaries, does not offer much pre-natal care or parental leave, considers war to be 'fun' and sex 'dirty,' and still considers the female responsible for any problems caused by a 'child')").

71. Sydney Buchanan, *The Abortion Issue: An Agonizing Clash of Values*, 38 Hous. L. Rev. 1481, 1482-83 (2002).