

CALIFORNIA RIGHT TO LIFE EDUCATION FUND

P.O. Box 4343, Walnut Creek, CA 94596-4343
(925) 944-5351

E-Mail: callife@calright2life.org

Web Site: www.calright2life.org

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VICTORY!

Pastor Hoye's Constitutional Rights Vindicated at the Ninth Circuit

-Life Legal Defense Foundation

San Francisco, Calif.: On Thursday, July 27, 2011, the Ninth Circuit Court of Appeals issued its opinion in *Hoye v. Oakland*, the case in which Pastor Walter Hoye challenged Oakland's "bubble zone" ordinance as an unconstitutional infringement of free speech. In the 3-0 opinion authored by Circuit Judge Marsha S. Berzon, the court stated, "We agree with Hoye that there are grave constitutional problems with the manner in which the City has understood and enforced its Ordinance."

Oakland's ordinance makes it unlawful, within 100 feet of the entrance of an abortion clinic, to approach without consent within eight feet of a person entering the facility, for the purpose of picketing, leafleting or speaking with the person.

In its opinion, the Ninth Circuit held that the ordinance is facially valid pursuant to the Supreme Court decision in *Hill v. Colorado*, stating, "we do not find any relevant differences between the Ordinance's purpose and text and those of the Colorado statute that the Supreme Court held to be constitutional in *Hill*." The Court noted that the reasoning of the *Hill* decision "has been criticized by scholars of various stripes." However, the court reversed the district court's determination that the ordinance is valid as the city applies it, because the City discriminates in enforcing the ordinance against Hoye but not other speakers. The City only prosecutes persons for "approaching" women within the "bubble zone" if they are trying to persuade the woman not to have the abortion. Clinic "escorts" and others "facilitating" the women entering the clinic can approach and give the women whatever message they want—often urging women to ignore Pastor Hoye. While Pastor Hoye has scrupulously followed the law, he has suffered arrest, prosecution and imprisonment due to the City's determination to shut out his message. On the other hand, clinic escorts routinely break the law as written, yet have never faced

prosecution. Based on these facts, the court concluded, "Oakland's enforcement policy is a constitutionally invalid, content-based regulation of speech."

Pastor Hoye stands on the public sidewalk outside Oakland abortion clinics to offer hope to women. His sign reads, "Jesus loves you and your baby. Let us help." One of the problems Hoye has faced in reaching women stems from the activities of clinic "escorts." These clinic volunteers will surround Hoye, block his sign with blank posters, and drown out his voice, making it impossible for Hoye to reach his intended audience. The Ninth Circuit noted that the Supreme Court in *Hill* had not considered this scenario in upholding the Colorado statute. If, on further hearing, Pastor Hoye can show that the ordinance leaves him without ample alternatives for reaching his audience, this would be grounds for striking down the law, the Court said.

"This part of the decision points to a possible narrowing of the Supreme Court's awful decision in *Hill*," said LLDF Legal Director Katie Short. "In evaluating a constitutional challenge to a bubble law like this, courts will not turn a blind eye to the challenges facing pro-lifers in communicating their message, including when those challenges come from the bad behavior of clinic escorts."

The City consistently argued that the plain language of the ordinance meant that pro-abortion escorts "facilitating access" were never in violation. Ultimately, the Ninth Circuit ruled that, whatever the City thought the ordinance meant, that was not what it really meant. It then remanded the case to the district court, directing that court to enter declaratory relief ordering the City to apply the ordinance evenhandedly, or if necessary, an injunction to that effect. "Life Legal Defense Foundation is grateful for the privilege of serving Pastor Hoye as he brings a message of hope and life to women in Oakland, and rejoices in the court's affirmation of his Constitutional right to speak on this vital topic," commented Dana Cody, President of LLDF. "Congratulations to Attorney Mike Millen and Katie Short, our legal director, on a job well done."

Library Corner

by Cecelia Cody

Human Embryo Adoption: Biotechnology, Marriage, and the Right to Life

Rev. Thomas V. Berg, L.C., and Edward J. Furton, eds.

Foreword, by Robert P. George

[ISBN: 0-935372-50-4] published by the National Catholics Bioethics Center

Estimates put the number of IVF embryos in a cryogenic state at as many as a half a million frozen IVF embryos in fertility clinics across the United States waiting to continue their lives. Some are abandoned or forgotten. What should be done about them? We have mentioned in previous newsletters our opposition to using human embryos for research. Embryos are human persons with value simply because they are human, and to destroy them in research, even if the goal is a proposed good, is morally unacceptable.

Embryo adoption has been proposed as a way to give these babies a chance at completing their lives. Embryo adoption would entail thawing these “surplus” embryos and implanting them into the uterus of a woman willing to gestate them. [Snowflakes](#) is an adoption program by Nightlight Christian Adoptions that is specifically for the adoption of frozen “surplus” IVF embryos. An embryo adoption is also called a *heterologous* embryo transfer (HET) because the gestating mother is not the embryo’s genetic mother. *Homologous* embryo transfer is when an embryo is implanted into the genetic mother’s womb.

Reading this book, I discovered embryo adoption is a very complex issue. More than just a simple discussion over whether or not adopting embryos is ethical, embryo adoption raises questions about the nature of marriage and what it means to be pregnant.

- ❖ If embryo adoption is ethical, should it be limited to married couples?
- ❖ Or could single or religious women participate?
- ❖ Does adopting an embryo imply complacency with the entire immoral process of IVF?
- ❖ If embryo adoption is not ethical, what should be done with the embryos currently frozen?
- ❖ Should embryos be left in cryopreservation or should they be thawed and allowed to expire?

The range of opinion on this issue is staggering; however, all the authors of chapters in this book agree that the current situation is unacceptable. These hundreds of thousands of embryos should never have

been created outside their mother’s womb, outside of the act of love between a husband and wife. These smallest of human lives have been marginalized and treated like commodities. What these great thinkers disagree on is how best to deal with this untenable situation.

There are two camps of Catholic thought on embryo adoptions with variations in each camp. There are those that believe embryo adoption to be immoral and those who believe it to be moral. The dividing line is whether pregnancy is viewed as a part of the procreative process between a husband and wife or whether pregnancy is seen as a biological nurturing that is a necessity after fertilization has occurred.

Among those on the “embryo adoption is immoral” side are [Rev. Tadeusz Pacholczyk](#), [Christopher Oleson](#), [Nicholas Tonti-Filipini](#), [Mary Geach](#), and [Rev. Nicanor Austriaco O.P.](#) The foundation of this argument is the nature of marriage and its role in procreation. Procreation is meant to be the fruit of the conjugal act of a husband and wife. Children are to be begotten out of a specific act of love between a wife and her husband. The above authors quote a specific passage from [Donum Vitae](#):

Respect for the unity of marriage and for conjugal fidelity demands that the child be conceived in marriage; the bond existing between husband and wife accords the spouses, in an objective and inalienable manner, the exclusive right to become father and mother solely through each other. (37) Recourse to the gametes of a third person, in order to have sperm or ovum available, constitutes a violation of the reciprocal commitment of the spouses and a grave lack in regard to the essential property of marriage which is its unity.

They focus specifically on “the exclusive right to become father and mother solely through each other.” They argue that impregnating a woman with the genetic offspring of another violates this right of a husband and wife to become a mother and father only through each other. Embryo adoption specifically excludes the husband because the wife becomes a gestational mother to the embryo while the husband is eliminated entirely from the procreative process.

In the “embryo adoption is moral” camp are [William E. May](#), [E. Christian Brugger](#), [Rev. Thomas D. Williams L.C.](#), [John Berkman](#) and [Rev. Peter F. Ryan S.J.](#) They agree that IVF violates the natural procreation of a husband and wife. They argue that

naturally sexual intercourse, conception and gestation all go together, but IVF interrupts that natural process. Procreation instead takes place in a dish and so gestation is turned into a biological necessity to save the life created with IVF. William E. May writes:

The baby to be transferred to the womb already exists and it is his life that is relevant. Although this human person ought not to have been generated in the way that it was this new person now exists and like babies conceived through the conjugal act, or through IVF and other new “reproductive technologies,” or through fornication, adultery or rape, it has the same immeasurable worth and deserves the same loving care as any other human person.

Taking this facet a bit further: so if embryo adoption is moral then who can and should adopt? May and others hold that married or single women can gestate embryos to save them. May even says that women can gestate, give birth and then give those babies up for adoption. This would be referred to as “embryo rescue” as opposed to “embryo adoption.” Berkman disagrees and thinks embryos should only be adopted by a married couple that is willing to raise the child.

As you can see, there is much disagreement and until the Church comes out with an official stance, there will continue to be debate. So what are Catholics to do if they already have frozen embryos or if they feel called to adopt an embryo? [Rev. Thomas Berg L.C.](#) and [Edward J. Furton](#) have some guidelines.

- ❖ They recommend, first and foremost, getting counsel from a priest or ethicist who is well informed and has a reputation of fidelity to Church teaching.
- ❖ For couples who already have frozen IVF embryos, they recommend implanting them and bringing them to term unless there are grave reasons not to. If there are grave reasons, then the couple can search their conscience and consider giving those embryos up for adoption. If adoption to another couple is not an option, then continuing to keep them frozen may become futile. In this case, it may be ethical to thaw the embryos and allow them to die. For those who feel called to adopt an embryo, they need to examine their conscience to ensure that it is not for any reason other than the best interest of the child. The husband must give “deliberate and express consent” and while the embryos are transferred, great effort must be taken to not cooperate with the IVF industry. A clear statement must be made to condemn the process of

IVF and reiterate that this embryo adoption is an effort to right those wrongs.

Nicholas Tonti-Filippini [writes](#):

By contrast, in *heterologous embryo transfer* [embryo adoption] the husband is isolated from this process by which his wife becomes *with child*. Her body—which she gave to him in love in the sacrament of marriage, a gift which they renew in the conjugal act—for a time, becomes the home of a child that bears no relationship to him, that is from outside their union. It is in this sense that heterologous embryo transfer may be an infidelity to the marriage. The pregnancy is in fact achieved *outside the marital relationship*.

Fr. Pacholczyk goes one step further and argues that even implanting one’s own embryos (*homologous embryo transfer*) is immoral for a couple. He writes:

When a husband and wife decide to do IVF using their own gametes – sometimes referred to as *homologous IVF* – motherhood, I suggest is violated twice. The first violation flows from allowing one’s gametes to be used generatively outside the conjugal act itself, by allowing conception outside the body and apart from a conjugal act. The second transgression occurs at the point of embryo transfer, in the attempt to become a gestational mother without... a prior conjugal act. The woman is essentially becoming a surrogate mother to her own genetically related offspring.

So if adopting embryos violates marriage, what should be done with them? Fr. Pacholczyk and Nicholas Tonti-Filippini disagree. Fr. Pacholczyk argues in his [Making Sense Out of Bioethics](#) series that these embryos be kept frozen until such time as an alternative to embryo adoption becomes available such as an embryo incubator or artificial womb. Nicholas Tonti-Filippini argues that the process of cryopreservation itself is against the dignity of the embryo and embryos should be returned to their natural state and allowed to expire on their own.

John Berkman likens frozen embryos to orphans and argues that Christians have obligation to take care of them. He writes:

If much of society fails to recognize a class of orphans in their midst, as in contemporary society, then it is the special duty of the Christian community to witness this failure... [especially] when the case involves the creation, abandonment, and often killing of the innocent human life in its most vulnerable state. If some think that nothing (morally speaking) can be done to aid these orphaned embryos then their reasons must be truly decisive, or the Christian community's failure to attend to those who are "the least of these" would be a rejection of Christ himself.

Rev. Peter F. Ryan, SJ, asserts that not only is embryo adoption moral, but that the state should "find women who are willing and able to have the embryos transferred into their wombs" and "should run a campaign to have these embryos gestated and adopted."

Upcoming Events

40 Days for Life – Fall 2011

The Fall 40 Days for Life campaign will be September 28-November 6. Visit www.40daysforlife.com.

Remember www.calendarforlife.org

For the latest and most up to date listing of activities and events happening in your area.

WHO IS CALIFORNIA RIGHT TO LIFE?

This is the newsletter of **California Right to Life Education Fund**, a 501-c-3 organization established to educate the public about pro-life issues. Donations to the EDUCATION FUND are **tax-deductible** and can be sent to P.O. Box 4343, Walnut Creek, CA 94596-0343.

California Right to Life **Committee, Inc.** is a 501-c-4 organization providing information on legislative issues affecting the right to life, and pro-life political advocacy. **CRLC, Inc. is not permitted**, under IRS regulations, to offer a tax deduction for donations. \$24.99 annually is requested for a subscription to the CRLC legislative email updates list and can be sent to 1920 Monument Blvd #309, Concord, CA 94520.

Both are affiliates of American Life League, headed by Judie Brown, and share the same "no-exceptions, no excuses" beliefs and the same dedication to promoting the Culture of Life, respecting all innocent human life from the single-cell stage to natural death.