Loyola Consumer Law Review

Volume 8 | Issue 3 Article 12

1996

Assisted Reproductive Technology - Legal Issues in Procreation

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FEATURE ARTICLE

Assisted Reproductive Technologies

Legal Issues in Procreation

by Roger J. Chin, M.D.

Preface

This article examines the legal constraints on the denial of assisted reproductive services. The technical and policy background surrounding the provision of assisted reproductive technologies is surveyed. Unfortunately, individuals saddled with infertility face barriers to access on a number of levels: from heath care providers, third-party payers, and the state. While efforts to regulate natural procreation have been discredited by the failure of the eugenics movement, access to assisted reproductive technologies is often denied based on judgments of parental fitness.

The constitutional protection of procreative rights and statutory guarantees of access to medical care must be weighed against state interests in regulating these technologies. Because of the recent advent of these reproductive possibilities, legal precedents and regulations have failed to contemplate the new conflicts that arise. However, an analysis of the values underlying the legal doctrines and the jurisprudence in analogous situations reveals the scope of the right to procreation. While new social and gestational combinations in parenthood may be beyond the contemplation of due process protections, the utilization of the new reproductive technologies in procreation is as much implicit in the concept of ordered liberty as judicial precedent has recognized traditional coital reproduction to be. The state interest in the fetus or the future family outcome is not sufficiently compelling to justify the denial of these reproductive services.

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Assisted reproductive technologies provide a new ability for many couples to overcome infertility and to separate the reproductive process from sexual intercourse. When the use of such procedures is seen as a couple's private decision to seek medical treatment or to decide to raise a family, statutory and constitutional protections may attach. But state regulation of medical care creates a potential for interference in the use of reproductive treatments, even where the analogous traditional procreative decisions would seem inviolable. Controversial goals of fetal rights and family values are counterpoised against concerns about discrimination and eugenics. In this field, clear legal rules are scant, but a careful examination of statutory and constitutional concerns will help to prevent a haphazard and inequitable transition into a new age of reproduction.

I. Technical background

There are a number of new medical techniques to promote fertility that require medical intervention at various stages of reproduction.[1] Artificial insemination is perhaps technologically the most basic. It involves introduction of fresh or frozen[2] semen into the vaginal cavity, mimicking the coital process. When the semen of the husband is used, it is known as artificial insemination by husband ("AIH")[3]; with a donor, it is called artificial insemination by donor ("AID")[4] This process, everything else equal, offers a comparable success rates to coitus.

Taking the principle further, intrauterine insemination is the placement of concentrated sperm transcervically into the uterus. Drugs may be administered to induce superovulation to improve chances of fertilization. This technique, in treatment of cervical factor infertility,[5] is estimated to result in pregnancy in 48% of patients and has a fecundity rate of 20%.[6]

Certain obstacles exist for sperm along the path to the ovum. For example, when the fallopian tubes are occluded, various techniques may be used to correct the problem. Segmental resection and microsurgical anastomosis can yield a 40% pregnancy rate,[7] and tuboplasty using a catheter has been found to yield a 34% pregnancy rate.[8]

There are also a number of techniques available to more directly effect conception. *In vitro* fertilization with embryo transfer ("IVF")[9] involves collecting ova and sperm to fertilize in the laboratory. If fertilization is successful, the embryo is placed in the uterus for implantation. Successful pregnancies result in 20% to 25% of the cases.[10]

Two other techniques of manual conception are gamete intrafallopian transfer ("GIFT") and zygote intrafallopian transfer ("ZIFT").[11] GIFT involves placing ova and concentrated sperm in the fallopian tube; ZIFT utilizes IVF and places the resulting zygote in the fallopian tube. These techniques are roughly twice as effective as IVF.[12]

IVF, GIFT, ZIFT, and other similar procedures[13] utilize ova artificially collected and, therefore, can be done with donor ova. Donor oocytes[14] may be collected from other women undergoing fertility treatments; from women undergoing other pelvic or abdominal surgeries; or from those specifically solicited to be donors.[15] With respect to genetic parentage, this is the opposite situation to AID.

Surrogate embryo transfer ("SET")[16] involves the removal of an embryo from a surrogate by uterine lavage and implantation in an-

other woman. This is similar to a donated oocyte, except that the egg is first fertilized in the donor's body, typically by artificial insemination.

This unexhausted list of assisted reproductive technologies presents legal and ethical questions on a number of fronts: manipulation of the gametes, zygotes, or embryos; parentage; and the like. Alexander Capron assembled a useful table of different reproductive possibilities:

The focus of the present discussion will focus on legal issues which arise from state regulation of these new reproductive techniques. Questions of custody also arise where more than the gamete donors are involved in the reproductive process. The legal issues of custody battles,

Table 1. *Reproductive possibilities.*[17]

No.	Method	Genetic Source	Fertilization	Gestation	Social Parents
1	Traditional Reproduction	X_M & Y_M	Natural	M	M & M
2	Artificial Insemination, Husband	X_M & Y_M	AI	M	M & M
3	Test Tube Baby	X_M & Y_M	IVF	M	M & M
4	Artificial Insemination, Donor	X_M & Y_D	AI	M	M & M
5A	Donated Egg	X_D & Y_M	IVF	M	M & M
5B	Transferred Egg	X_D & Y_M	AI with embryo flushing	M	M & M
6	Surrogate Motherhood	X_D & Y_M	AI	D	M & M
7A	Test Tube Baby in Rented Womb	X_M & Y_M	IVF	D	M & M
7B	Transfer to Rented Womb	X_M & Y_M	Natural or AI with embryo flushing	D	M & M
8	Postnatal Adoption	X_D & Y_D	Natural, AI, or IVF	D	M & M
9	Substitute Father	X_M & Y_D	IVF	M	M & M
10	Brave New World	X_1 & Y_2	IVF or Natural/AI/with embryo flushing	3	4 & 5

Abbreviations: X = female, Y = male, AI = artificial insemination, IVF = *in vitro* fertilization, D = donor, M = member of married couple.

however, are beyond the scope of this article.[18]

II. Policy background

Restrictions on the use of reproductive technology have originated from legislation, physicians, hospitals, and third-party payers. The legal issues differ depending on the status of the party[19] and the type of restriction.

Table 2. *Limitations on assisted reproductive technologies.*

Action	State action?	Issues
Direct state prohibition	✓	Fundamental right to procreation via technology?
Indirect state prohibition • Fetal experimentation ban[20] • Limitations on embryo handling[21] • Responsibility of use[22]	✓	Burden on fundamental right to procreation? Distinction between therapeutic and experimental?
Selective state prohibition • Age[23] • Medical qualification[24] • Social qualification	✓	Equal protection? Discrimination against disabled?
Refusal of state institution to perform	✓	Affirmative obligation by government?
Refusal of state to fund†	✓	Affirmative obligation by government?
Refusal of third-party payor to fund‡		Interpretation of insurance contract? ERISA?
Refusal of private physician to perform††		Discrimination?

† See *infra* section IV.B. at 215.
‡ See *infra* section II.D. at 197.
†† See *infra* section II.C. at 197.

A. *State legislation*

Perhaps due to the speed by which assisted reproductive technologies is evolving, only four states: Pennsylvania, New Hampshire, Virginia, and Louisiana, have passed legislation directly regulating the use of such techniques. Pennsylvania requires the reporting of IVF statistics. The state collects data on IVF providers, the number of embryos created and destroyed, and the number of female egg recipients.[25]

New Hampshire requires medical evaluation and counseling relating to IVF and restricts such techniques to those patient over 21 years of age.[26] Gamete donors must undergo medical evaluation as well.[27] Finally, a preembryo cannot be maintained *ex utero* for more than 14 days if unfrozen.[28]

Virginia requires HIV testing of gamete donors involved in an assisted reproductive procedure.[29] Moreover, physicians who provide such treatment must disclose success rates at their institution.[30]

Louisiana has the most extensive regulation of assisted reproductive technologies. It

adopts the standards of the American Fertility Society and the American College of Obstetricians and Gynecologists.[31] Furthermore, the statute sets forth standards regarding ownership, responsibilities, and duties of those involved in reproductive technology use.[32]

B. *Fetal experimentation regulation*

In 1994, the Human Embryo Research Panel of the National Institutes of Health issued a report supporting federal funding of human embryo research so long as strict guidelines are observed.[33] The panel endorsed research on

Table 3. *State regulation of fetal experimentation.*

State	Statute	Exemptions† for:			Comments
		Therapeutic‡	Diagnostic	Assist. Repro.	
Illinois	ILL. COMP. STAT. ch. 720, § 510/6 (1995)	C		•	IVF exempted; this law declared unconstitutional by *Lifchez v. Hartigan*
Louisiana	LA. REV. STAT. ANN. §40:1299.35.13(1995)	B			This law declared unconstitutional by *Margaret S. v. Edwards*
Maine	ME. REV. STAT. ANN. tit. 22, § 1593 (1994)				
Massachusetts	MASS. ANN. LAWS ch. 112, § 12J (1995)	A,E	•		Diagnostic test exempted if purpose is to determine life or health of fetus
Michigan	MICH. STAT. ANN. § 14.15(2685) (1993)	D			
Minnesota	MINN. STAT. § 145.422 (1994)	B			Research harmless to conceptus permitted
Missouri	MO. REV. STAT. § 188.037 (1994)	B			
New Mexico	N.M. STAT. ANN. § 24-9A-3 (1995)	C,F	•	•	IVF exempted where every fertilized ovum is implanted in recipient
North Dakota	N.D. CENT. CODE § 14-02.2-01 (1995)	A,E	•		Diagnostic test exempted if purpose is to determine life or health of fetus
Pennsylvania	18 PA. CONS. STAT. § 3216(A) (1995)	B			
Rhode Island	R.I. GEN. LAWS § 11-54-1(a) (1994)	A,E	•		Diagnostic test exempted if purpose is to determine life or health of fetus
Utah	UTAH CODE ANN. § 76-7-310 (1995)		•		Testing for genetic defects permitted; this law declared unconstitutional by *Jane L. v. Bangerter*

† The symbol "•" indicates that the law explicitly exempts either diagnostic research activity or the use of particular types of assisted reproductive technologies.

‡ "A" = Therapeutic use is to preserve the life or health of the fetus or mother. "B" = Therapeutic use is to preserve the life or health of the fetus only. "C"= Therapeutic use is to meet health needs of fetus only. "D" = Only nontherapeutic research prohibited; nontherapeutic use allowed if it will not substantially jeopardize fetus. "E" = Procedures incident to the study of human fetus allowed if they do not substantially jeopardize fetus. "F" = Treatment and diagnostic testing conducted by formal protocols and the necessary for care of mother are exempted.

embryos less than two weeks old, where the number of embryos used is kept to the minimum necessary. While the controversy regarding embryo and fetal experimentation on the federal level concerns only funding, the states have been more aggressive in limiting experimentation.[34]

Although state regulations have exemptions for therapeutic and diagnostic use, some courts have difficulty distinguishing between experimental and therapeutic use of reproductive technologies. Concern has developed because many reproductive technologies are on the cutting edge of technology and, therefore, could be construed as experimental. Thus, diagnostic procedures giving a woman information relevant to the decision whether to abort a genetically defective fetus and therapeutic procedures used to treat infertility, could be prohibited under these laws.

Two federal courts of appeals have found such laws unconstitutionally vague. In *Margaret S. v. Edwards,*[35] the 5th Circuit struck down a Louisiana law prohibiting experimentation on a fetus, except where such experimentation was therapeutic to the fetus. It stated:

> [E]ven medical *treatment* can be reasonably described as both a test and an experiment. . . . The whole distinction between experimentation and testing, or between research and practice, is therefore almost meaningless in the medical context. . . . We therefore think that this statute 'simply has *no* core' that unquestionably applies to certain activities, and we hold that it is unconstitutionally vague.[36]

The 10th Circuit took a parallel approach to a similar Utah statute in *Jane L. v. Bangerter.*[37] The court stated that "[b]ecause there are several competing and equally viable definitions, the term 'experimentation' does not place health care providers on adequate notice of the legality of their conduct."[38]

The case of *Lifchez v. Hartigan*[39] made explicit what *Margaret S.* and *Jane L.* tangentially touch on: prohibiting experimentation treads on constitutionally protected use of therapeutic reproductive technologies. The *Lifchez* court first started with the conclusion that "experimentation" is a vague concept. "Whether or not any particular procedure is experimental or routine is not as important as the fact that many procedures begin as the former and become the latter. It is this *process* that counts, not the classification at any particular point in time."[40] The court went further, however, by declaring a ban on experimentation which would restrict constitutionally protected reproductive technologies. The court cited embryo transfer and chorionic villi sampling as procedures that would be considered as experimental, and stated that the statute would violate constitutional reproductive privacy by interfering with the use of such technologies.

Embryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy. Chorionic villi sampling is similarly protected. The cluster of constitutional choices that includes the right to abort a fetus within the first trimester must also include the right to submit to a procedure designed to give information about that fetus which can then lead to a decision to abort.[41]

In declaring the prohibition on fetal experimentation unconstitutional, the court, therefore, recognized that the use of new (and possibly experimental) reproductive technologies is a protected procreative decision.

C. *Health care providers*

Although the number of statutory controls on reproductive technologies is limited, restrictions imposed by health care providers are plentiful.[42] Fertility treatment specialists commonly shun single and lesbian candidates.[43] Similarly, women aged 40 and older, for whom assisted reproductive technologies may seem particularly useful, will most likely find reluctance in the medical community to provide fertility treatments.[44]

Fertility programs impose obstacles by implementing a number of restrictions. The desire of some to promote a particular type of family may account for restrictions based on marital status, marital stability, sexual orientation, age, etc. Closely related to the ideal image of the family is a concern for the well-being of the future child. Classifications related to approved parenting ability may include: presence of mental or physical handicap; psychiatric history; wealth; drug use; criminal background; or even general good or bad character. Medical contraindications to some reproductive techniques consist of age, medications, smoking, carrier status for genetic defect, etc. The legality of such restrictions depends on a number of factors, including antidiscrimination laws, status of the program, and type of restriction.

D. *Third-party payers*

While the use of reproductive technologies may be legally protected, many people cannot realistically have access to them without agreement by third-party payers to cover such procedures. The obligations of a government welfare body are discussed *infra* sections IV.B. & C. A health insurance program will usually not face the same issues as a state actor,[45] but a number of constraints continue to remain.

Several states mandate that insurance policies must cover particular treatments for infertility. Fertility treatments including *in vitro* fertilization must be a covered expense in Arkansas,[46] Connecticut,[47] Hawaii,[48] Illinois,[49] Maryland,[50] and Texas.[51] California mandates coverage of infertility treatments, including gamete intrafallopian transfer, but excludes *in vitro* fertilization.[52] Massachusetts[53] and Rhode Island[54] require coverage for fertility treatments. Montana,[55] Ohio,[56] and West Virginia[57] classify infertility treatment as a "basic health care service" that health maintenance organizations must provide.

Where there is no state law requirement for coverage, the scope of an insurance plan's coverage is a matter of interpreting the wording of the policy. Generally, insurance policies are construed in a manner most favorable to the beneficiary. "If more than one interpretation of an exclusion is reasonable, the one affording coverage to the insured will be adopted. The insurer has the burden of proving the facts which limit coverage."[58]

The interpretation of insurance policies with respect to infertility coverage has been inconsistent. Some courts have held that "illness" encompasses infertility and that artificial insemination[59] and *in vitro* fertilization[60] are treatments for that illness despite the fact that such therapies do not correct the underlying problem. Other courts, however, have rejected coverage for reproductive technologies where such coverage was not explicitly promised. An Oklahoma ap-

pellate court took the position that *in vitro* fertilization was not "medically necessary" to correct infertility, because the procedure did not fix the underlying medical condition.[61] In another decision from New York, the court refused to find sperm banking by the patient was necessary during cancer treatment, where the chemotherapy would render the patient sterile.[62] The inconsistency in insurance policy interpretation does not appear to be explained by any coherent framework.[63]

This structure of insurance policy interpretation is inapplicable where an employee benefit plan falls under the scope of the Employee Retirement Income Security Act ("ERISA").[64] Simply stated, ERISA preempts certain state laws.[65] Under ERISA, the standard of review regarding the employee benefit package is typically "arbitrary and capricious" as the "benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility benefits or to construe the plan."[66] Under this standard, court decisions have similarly been mixed.[67]

III. Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") is one statute which frames the debate about restrictions on reproductive technologies.[68] The definition of disability under the ADA is broadly understood to be an impairment that substantially limits a major life activity.[69] Under this definition, infertility could be construed to be a disability for the purposes of the ADA. Therefore, if a decision to refuse to treat infertility was construed to be discrimination on the basis of that disability, the ADA would constrain limitations on fertility treatment.[70]

Courts remain split on the question of whether infertility is a disability under the ADA.[71] The court in *Pacourek v. Inland Steel Co.*[72] concluded for the purposes of the ADA that infertility could be a physical impairment and that it did implicate a major life activity.[73] *Zatarain v. WDSU-Television, Inc.*[74] followed in part by stating that infertility was an impairment, but concluded that reproductive dysfunction did not affect a major life activity as anticipated by the ADA.[75] The ADA, however, may apply where the denial of fertility services was premised on other applicable disabilities, such as mental or physical handicap, perhaps in an effort by a health care provider to assure a good family outcome.[76] Furthermore, other antidiscrimination laws may proscribe restrictions on the availability of assisted reproductive technologies. Federal, state, and municipal antidiscrimination laws may be applicable to classifications such as marital status and sexual orientation.

IV. Constitutional considerations

In order to examine the claims of state interests described *infra* section V, it is necessary to evaluate constitutional considerations. Section V. will focus on the discussion of state interests and issues of balancing interests; however, a preliminary discussion of the appropriate level of concern the state must have before limitations are placed and whether they pass Constitutional muster is necessary. Before addressing the state interest in regulating assisted reproductive technologies, the court needs to determine whether there is a substantive due process right to procreation and whether equal protection guarantees require heightened scrutiny of state restrictions. Depending on the outcome of this analysis, the state interest in regulating assisted reproductive technologies may need to be either compelling, substantial, or simply rational.

A. *Right to procreation*

Courts have held in a number of cases that there is a constitutional right to privacy stemming from the Due Process Clause of the Fourteenth Amendment[77] that extends to issues concerning family and procreative matters. This interpretation of the right to privacy was articulated in *Griswold v. Connecticut*,[78] the first in a series of cases dealing with contraceptives, which held that a law prohibiting distribution of contraceptives to married couples would violate the constitutional right to privacy. Penumbras of the First, Third, Fourth, Fifth and Ninth Amendments created a "zone of privacy" that applied to the states through the Fourteenth Amendment.[79] To justify a policy that violates such a right, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[80]

Penumbras of the First, Third, Fourth, Fifth and Ninth Amendments created a "zone of privacy" that applied to the states through the Fourteenth Amendment.

While *Griswold* suggested that the "intimate relation of husband and wife and their physician's role in one aspect of that relation"[81] fell within a sphere of constitutionally protected activity, the case of *Eisenstadt v. Baird* [82] used more expansive language which referred to procreative decisions (although this was *dicta*). Using a rational basis test, the *Eisenstadt* court held that the Equal Protection Clause of the Fourteenth Amendment[83] protects distribution of contraceptives to unmarried persons while married persons do not face similar sanctions. The Court compared *Griswold*'s protection of a married couple's access to contraceptives and stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[84]

Carey v. Population Servs. Int'l [85] decided a New York statute limiting access to contraceptives burdened the right set forth in *Griswold* and *Eisenstadt*, and, therefore, such a law violated the protection of the right to privacy. The regulation in question prohibited distribution of contraceptives to individuals under 16 years of age, and it required that a pharmacist otherwise be the sole distributor of contraceptives. The court explained that "[r]ead in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."[86] Describing categories of issues insulated by the right to privacy, it was "clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage; procreation; contraception; family relationships; and child rearing and education.'"[87]

In referring to procreation as an activity protected by the right to privacy, the *Carey* Court cited[88] *Skinner v. State of Oklahoma ex rel. Williamson.*[89] *Skinner* decided that an Oklahoma law which mandated sterilization of a particular class of criminals was unconstitutional. The *Skinner* Court held the statute punished grand larcenists more severely than it did embezzlers, and therefore, denied equal protection. However, the classification was subject to strict scrutiny because, it burdened the defendant's reproductive choice by mandating sterilization of grand larcenists:[90]

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.[91]

The language of the Court in this line of cases has, in *dicta,* broadly protected the right to procreation. Matters that fall within the constitutionally protected zone of privacy involve decisions "whether to bear or beget a child"[92] and "in matters of childbearing."[93] Laws governing accessibility to and conditions for assisted reproductive technologies certainly touch upon those matters. However, Court holdings in the areas of contraceptives, sterilization, and abortion are not precisely analogous to assisted reproductive technologies and, therefore, one needs to view the sometimes broad language of the Court with care.

1. Due process as a protection of tradition

Substantive due process protection is seen by some as only protective of the rights intertwined in history and tradition of the country. Procreation, when achieved by sexual activity between consenting adults, is protected under the right to privacy. Procreation conducted by assisted reproductive technologies is a relatively new development, however, and the courts have no explicit guidance from long-held "traditions" that are often scrutinized to establish a due process right.

On a number of occasions, the Court has stated its reluctance to broaden the scope of substantive due process:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[94]

The Court is likely to recognize those substantive rights that have a historical basis and are deeply-held. "Appropriate limits on substantive due process comes not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society.'"[95]

In another formulation, the Court declared that "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[96]

In determining whether the prior privacy cases can legitimately be read to protect new assisted reproductive technologies, one needs to determine whether such an application of precedent protects the basic liberties that have been historically recognized. Clearly, the general category of "procreation" has been said to fall inside the zone of privacy. This, however, cannot mean that all types of procreation, those proscribed or unpredictable in 1868, must be constitutionally protected. The factual background and level of generality of the proposed right will determine the outcome of such analysis.

For example, in *Michael H. v. Gerald D.*,[97] the Court refused to overturn a statutory presumption that a child born into a marriage was a child of the marriage, despite proof of paternity by another man. The genetic father, Michael H., lived with the child and the child's mother (Gerald D.'s wife) at various times during the child's first three years of life. Michael H. pursued a filiation action to establish paternity and visitation rights, but Gerald D. was granted summary judgment in denying Michael H.'s action. The Supreme Court, in affirming the lower courts' decisions, recognized a substantive due process right in family ties,[98] but did not extend that protection to the biological father who had lived with the mother and developed family ties with the child shortly after the time of birth. The reason for this limitation on the family aspect of privacy rights was that the concept of family was confined to the traditional, nuclear family. The Court interpreted family privacy precedents as resting upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[99]

One possible analogy can be drawn between *Michael H.* and the case of assisted reproductive technologies: just as the concept of family was not historically understood to encompass the variety of household arrangements seen in modern times, it could be argued that the traditional understanding of procreation only encompassed married sexual procreation and not that involving modern assisted reproductive technologies.

Such a comparison is unwarranted in applying the "pinched conception of 'the family'"[100] to arrive at a similarly limited scope of procreation. Even the most restrictive methodology of substantive due process analysis would not limit procreation to historically understood techniques of procreation. The plurality opinion of *Michael H.*[101] argued that, in analyzing the societal tradition for purposes of due process analysis, the Court should:

> [R]efer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general.[102]

The court did not recognize any family-related substantive due process claim in *Michael H.* because adultery had traditionally been disfavored throughout history in paternity situations. However, in the case of assisted reproductive tech-

nologies, there is arguably no history one way or the other. Therefore, even using this pinched methodology, the narrowest examination of the historical meaning of procreative rights should be at the level of procreation in general.

Other members of the *Michael H.* court are more generous in their analysis of the scope of substantive due process rights. In her concurrence, Justice O'Connor noted that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."[103] This particularly seems to leave open substantive due process analysis for the contemplation of new technologies.

The traditional and historical respect for the right to procreate, recognized in the line of Supreme Court cases previously discussed, can be applied to the case of new assisted reproductive technologies. In determining that people have the right to use artificial means to conceive, there is no new principle of substantive due process, and no long-standing traditions proscribe such activity. It is simply an application of traditional values to new technology. "[L]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of."[104]

The fact that new technology provides a broader scope in exercising rights should not mean that the Constitution cannot expand to accommodate such breakthroughs. "To be sure, the Constitution and the Bill of Rights are not to be read as covering only the technology known in the 18th century."[105] For example, the Fourth Amendment proscription of warrantless searches[106] extended to public telephones because telecommunication technology had come to play a vital role in private communication.[107] The fact the telephone use was unknown in 1791 did not make its use fall outside of the protection of the Constitution. Similarly, new procreative technologies provide opportunities to conduct activities in ways unknown at the time relevant constitutional rights were declared. Yet, the underlying principle of procreative freedom remains unchanged by history and tradition.

2. *Sexual liberty v. procreative liberty*

A second point of distinction is that cases regarding contraception implicitly involve matters of sexuality, whereas assisted reproductive technologies do not. Indeed, one point of the new technologies is that they separate sex from reproduction.[108] The contraception cases do not clearly separate out constitutional respect for "the sacred precincts of marital bedrooms"[109] from concern about the actual physiological process of creating offspring. The Court certainly wishes to protect some of "the most intimate of human activities and relationships,"[110] but such language condenses concern about sexual liberty and procreation into one issue. Traditionally, the two have been intertwined, but with the advent of new technologies, a dissection of these cases should recognize that "[s]exual liberty would not necessarily entail reproduction (merely sex with contraception), and a right to reproduce would not necessarily entail sexual freedom beyond the sexual or other acts required for reproduction."[111]

Clearly, there are elements of both sexual liberty and procreative choice underlying the rationales in the contraceptive rights cases. However, the court needs to determine whether the two elements are needed in combination to justify the recognition of a constitutional privacy

or whether variations in one or the other are independently sufficient.

It is questionable whether sexual liberty, separated from procreation, is adequate to raise a claim of substantive due process. The 1986 decision of *Bowers v. Hardwick*[112] suggests such a position. In *Bowers*, the Court held that a Georgia statute prohibiting homosexual sodomy did not violate due process. After reciting previous cases dealing with family, marriage and procreation concerns, the Court distinguished homosexual sodomy because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[113]

The denial of due process protection for sexual activity in *Bowers* established that the line of contraception cases was not solely dependent on private sexual behavior to establish a privacy right:

> [A]ny claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.[114]

Basically, this seems to be an accurate representation of *Carey*, which, while demanding a compelling state interest to justify the restriction of contraception distribution, made the following caveat:

> [W]e do not hold that state regulation must meet this [compelling interest] standard "whenever it implicates sexual freedom" or "affect(s) adult sexual relations" but only when it "burden(s) an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." As we observe below, "the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults," and we do not purport to answer that question now.[115]

Presumably this indicates that sexual liberty alone was not the sole basis for the demand that a compelling state interest justify the restriction on contraceptive access.

However, sexual liberty seems to be at least an undercurrent in the contraception cases, even though the language does not allocate the derivation of the privacy right between sexuality and biological reproduction. The sacred sphere of private, intimate relations certainly was part of the basis for *Carey*'s protection of "the most intimate of human activities and relationships."[116] *Carey* was an extension of *Griswold*'s respect for the marital bedroom.[117] Furthermore, the contraception cases dealt with the right to make the decision *not* to procreate. Therefore, there was a right to engage in sexual activities without pregnancy. It was assumed by the Court that without sex there would be no procreation (an assumption that is undermined by technical advancements in reproductive technologies.)

The constitutional protection of sexual activity within the institution of marriage seems clear.[118] It did not, however, proscribe all regulations of sexual activity.[119] The Court in *Eisenstadt,* reasoned that the Equal Protection

Clause guaranteed the availability of contraceptives to unmarried couples who engaged in sex. The basis for the decision in *Eisenstadt* centered on the reduced probability of procreation, and not a right to have sex. The Court did not reach the question of whether there was some fundamental right to engage in sex;[120] it only said that under a rational basis requirement for state legislation,[121] "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."[122]

The contraception cases involve situations where the Court found it unconstitutional for the state to refuse access to contraceptives to couples who were engaging in sex. The preceding discussion shows that, while there was concern about regulation of intimate relations between two people, these cases did not solely rest upon sexual liberty, nor did they decide whether consensual nonmarital sexual activity was protected by the constitution.[123] Therefore, the constitutional standard described in the contraception cases is at least partly based on the biological right to procreation. It is not stated, however, whether absent any sort of sexual privacy, there is a right to procreation. Procreation was necessary to the rights in the *Griswold/Carey* line of cases, but in those decisions, the Court was unclear whether it was sufficient.

Other cases clarify the distinction between sexual liberty and procreation. Courts are divided on the question of the constitutionality of restrictions on consensual, heterosexual[124] activity between unmarried individuals. "[A]mong the courts addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private, there is a significant division throughout the country."[125] Where the question has been raised, the analysis of a number of courts makes it clear that the question of sexual liberty is subordinate to the right to procreate: where there is a right to engage in sexual activity it exists because of its role in procreation.

In *Doe v. Duling*,[126] the district court found that Virginia's fornication ban violated the constitutional right to privacy, premising the proscription of sexual behavior on its necessity in vindicating the right to procreate. "Necessarily implicit in the right to make decisions regarding childbearing is the right to engage in [unmarried] sexual intercourse. To hold otherwise would result in the constitutional right to decide whether to bear or beget a child contingent on one's marital status."[127]

In *Zablocki v. Redhail*,[128] the Court held a law prohibiting defaulted payers of child support from marrying to be unconstitutional. The Court seemed to imply that the importance of sexual freedom was primarily incidental to its necessity as a biological function in procreation:

> Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent [privacy right] protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.[129]

A Washington case, *Singer v. Hara*,[130] rejected homosexual marriage on the ground that the state's recognition of marriage was based on its interest in procreation. It appears to follow then homosexual partners, where there is not the possibility of procreation, could be deprived of the right to marry . "The fact remains that marriage exists as a protected legal institution pri-

marily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union."[131]

Doe, Zablocki, and *Singer* demonstrate that when issues of sexuality and marriage are seen to be constitutionally protected, this occurs because procreation is dependent upon sexual activity. This suggests that because biological procreation is sufficient to force recognition of sexual liberty, the basis of the privacy right in matters of intimate relationships is primarily dependent on the ability to reproduce.

3. *Married v. unmarried procreation*

Arguably, the right to procreation recognized in the contraception and sterilization cases extends only to married couples.[132] For example, in *Skinner*, after the Court stated that procreation is "one of the basic civil rights of man," it immediately followed by concluding that "*marriage* and procreation are fundamental to the very existence and survival of the race."[133] Similarly, in introducing an argument for the right to procreate as the basis for striking down a maternity leave provision, the Court stated in *Cleveland Bd. of Educ. v. LaFleur*[134] that "freedom of personal choice in matters of *marriage* and family life is one of the liberties protected by the Due Process Clause."[135] And, of course, in *Griswold*, the court defended the right to privacy because an effort to end contraceptive use was "repulsive to the notions of privacy surrounding the *marriage* relationship."[136]

The *Eisenstadt* Court used broad language in extending the privacy right to unmarried individuals,[137] but ultimately decided the issue on an equal protection basis.[138] Furthermore, the court found the law prohibiting the distribution of contraceptives to be lacking a rational basis, so the Court reasoned that there was no necessity in determining whether the law violated the "fundamental freedoms under *Griswold.*"[139] Therefore, the narrowest construction of *Eisenstadt* is that the Court simply found punishment of fornication by the threat of pregnancy irrational,[140] and therefore, was unable to distinguish the case from *Griswold.* This protects the right to use contraceptives by unmarried persons, but leaves open the possibility that the state may discover more rational reasons why unmarried persons should not reproduce, by either coitus or assisted reproductive technologies.

The language of the contraception cases strongly suggests that the substantive due process right, not simply equal protection, extends to single persons.

The language of the contraception cases strongly suggests that the substantive due process right, not simply equal protection, extends to single persons. The *Eisenstadt* Court explained that "[i]f the right to privacy means anything, it is the right of the individual, married or single. . . ."[141] The Court's references to the right to privacy are uniformly grounded in substantive due process. In the same passage, the *Eisenstadt* Court cited *Skinner,* approving the establishment of such a right. If *Skinner* was originally con-

fined in its scope to married people, this clearly implies that it applies equally to unmarried individuals.

Perhaps the simplest answer to narrow interpretations of *Eisenstadt* is that the *Carey* Court unambiguously explained the scope of the contraception cases confer due process privacy rights upon both married and single persons. *Carey* required that restrictions upon distribution of contraceptives to adults be based on a "compelling state interest."[142] The appellants in the case explicitly tested the theory that *Eisenstadt* was limited as an equal protection guarantee.[143] The Court categorically rejected such construction of *Griswold* and *Eisenstadt*:

> This intrusion into the "sacred precincts of *marital* bedrooms" made that statute particularly "repulsive" [in *Griswold*]. But subsequent decisions have made clear that the constitutional protection of *individual* autonomy in matters of childbearing is not dependent on that element. . . . [*Eisenstadt, Roe v. Wade, and Whalen v. Roe*] put *Griswold* in proper perspective. Griswold may no longer be read as holding only that a State may not prohibit a *married* couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects *individual* decisions in matters of childbearing from unjustified intrusion by the State.[144]

This statement makes clear that there is no inferior procreative right for unmarried persons. Furthermore, the discussion *infra* section IV.A.4. establishes that the basis for the right to procreate covers both achieving and avoiding pregnancy.

4. *Positive v. negative rights*

Another aspect of applying the contraception and abortion cases to the new field of assisted reproductive technologies employs the argument that past cases dealt with the "negative right" to be free from pregnancy,[145] whereas application of this class of privacy rights to new technology asserts a "positive right"[146] to become pregnant.[147] The extension of the right from negative to positive depends upon the construction of the underlying values of procreative rights.[148]

It is still necessary, therefore, to focus on the meaning of procreation and determine whether it is simply based on the interest in bodily integrity in being free from pregnancy (thereby implying only negative procreative rights), or whether there is a broader interest in controlling the outcome of procreative decisions.[149] If procreative rights as recognized by the Court in its contraception and abortion decisions is based in a narrow conception of bodily integrity—the right to be free from the burden of pregnancy—then only the negative right from pregnancy is implicated.[150]

Predicting the course of substantive due process doctrine in this area by the Supreme Court is a difficult task.[151] The Court's reluctance to expand the scope of privacy[152] must be balanced against language in cases such as *Skinner, Eisenstadt*, and *Carey* which could certainly support a "positive" construction of the right to procreation. Furthermore, jurists (post *Bowers)* have not indicated how they would run in the future. Nevertheless, a careful examination of key Supreme Court cases, lower court decisions interpreting them, and policy considerations suggest the principle enunciated in the procreation and family rights cases apply to the "positive" use of assisted reproductive technologies.

The plain language of *Eisenstadt* implies

that the decision whether to create offspring, not the negative burden of pregnancy, is central to the privacy right of procreation:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[153]

Presumably, if the Court was simply decrying the burden of carrying a child as a violation of privacy, it could have used narrower language to emphasize personal bodily integrity instead of the choice of whether to bear or beget a child.[154] There are good reasons to view the choice, positive or negative, to procreate as within the realm of constitutionally protected privacy:

> Procreation may be as central to a single person's identity and life-plan as it is for a married person. Single parent families are increasingly common, and there is no evidence showing that a marriage environment, though perhaps desirable, is essential for healthful childrearing. Moreover, the right of single persons to bear and rear children that they have [already] conceived is firmly established. Recognizing the right of single persons to conceive is thus a marginal, not a major shift.[155]

The desire for a person to produce offspring is not socially regarded as less of a private decision than the choice to use contraceptives in preventing pregnancy or to terminate a pregnancy.

The most limited interpretations of substantive due process stop short of excluding the possibility of a positive right to procreation. Indeed, the dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[156] criticized the broad interpretation of substantive due process and appeared more willing to constrict the scope of negative rights to procreation in the area of abortion than it was with respect to other positive[157] procreative rights.[158] In *Michael H.*, the plurality recognized that "the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint."[159] In describing the scope of recognized procreative rights, the *Bowers* court described such cases as acknowledging the "fundamental individual right to decide *whether or not* to beget or bear a child."[160]

In this debate about the basis of procreative rights, language from *Carey* makes it clear that the actual choice regarding procreation, not simply bodily integrity, underlies the right to procreation:

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy. . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether *to accomplish or to prevent* conception are among the most private and sensitive.[161]

A similar sentiment was declared in *Skinner*, in which the Court used strict scrutiny for its equal protection analysis as a consequence of a sterilization law's burden on the right to procreation. The Court characterized the positive right to remain fertile as:

> [I]nvolv[ing] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.[162]

The abuse of power the *Skinner* Court feared is certainly a possibility if the state decides to place restrictions upon assisted reproductive technologies. For many infertile couples, only the new technology will allow them to reproduce. To allow the state to regulate a field so central to reproductive choices removes the check that individual decision-making places on potentially "evil or reckless hands."[163]

Even before *Carey*, the Court recognized the "positive" aspect of procreative rights in *Cleveland Bd. of Educ. v. LaFleur*.[164] The Court found mandatory, unpaid maternity leave to have unjustifiably impinged on a female teacher's procreative rights. A positive right to procreation is necessarily implied because maternity leave cannot be implemented until the choice of procreation is positively exercised. The Court explained that:

> As we noted in *Eisenstadt v. Baird*, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. . . . [P]ublic school maternity leave rules directly affect "one of the basic civil rights of man."[165]

Lower courts have, in the few cases dealing with assisted reproductive technologies, similarly recognized that the right to procreation encompasses a positive right.[166] An Illinois statute that outlawed fetal experimentation unless it was therapeutic to the fetus itself was struck down on grounds was vague and that it violated the right to procreate. The court in *Lifchez v. Hartigan*,[167] in explaining the reach of *Carey*, stated that:

> It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.[168]

Further, a Federal District Court in Ohio reached a similar interpretation of procreative rights. A teacher who alleged discrimination under Title VII, § 1983, and state law for nonrenewal of her contract because she utilized artificial insemination was denied relief on the facts. Yet, in determining the claim, the court established that procreative rights encompass the positive right to become pregnant. "[T]he Supreme Court's precedent is clear. A woman has a constitutional right to control her reproductive functions. Consequently, a woman possesses the right to become pregnant by artificial insemination."[169]

This interpretation is opposed by those who believe history and tradition serve as the

primary basis for the right not to procreate. For example, Professor Massie argues that:

> The right to contraception or abortion serves autonomy values and also reflects society's traditional interests in preventing the birth of illegitimate children and preserving the marital family unit[170] as a viable entity. . . . If, as the cases indicate, our "history and traditions" are the bases for defining the liberty interest of the Due Process Clause, then one can make a strong argument that unmarried persons have no constitutionally protected positive right to procreate, either by coital or noncoital means. Any legislation denying them access to otherwise legal reproductive arrangements therefore need meet only a rational basis test.[171]

This constrictive view of the Due Process Clause, however, misinterprets past case law. While there has been an "insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society,"[172] the focus is on the *values*, not the actual *practices*, that need to have a solid grounding in tradition and history.[173]

Massie's support for her contention rests upon the Court's decisions in *Michael H.* and *Bowers*.[174] The plurality decision in *Michael H.* may allude to such a stance,[175] but only a minority of the Court views the history and tradition of a particular practice as the sole basis for due process.[176] *Bowers* is also frequency cited for the assertion that substantive due process is exclusively linked to historical practices. Yet, before the Court discussed the historical basis for enforcement of anti-sodomy laws against homosexuals, it was obliged to state that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[177]

However, contrary to Professor Massie's assertion that "intimacy, personal identity, and self-fulfillment alone will not trigger automatic constitutional protection" because decisions like *Bowers* see such claims as threatening to "historical notions of morality,"[178] it was only *after* the court refused to establish a substantive right to sodomy that the *Bowers* Court decided that a state's "moral choices" could serve as a *rational basis* for state legislation.[179] The state's interest in morality per se has never been seen determinative in the recognition of fundamental rights.[180] The holding in *Carey* makes it clear that practices such as the reasonable commercial distribution of contraceptives, though without historical grounding as a traditional practice in 1791 or 1868, still enjoy constitutional protection simply because they are intricately connected with choices of a fundamental nature.[181] It is equally clear that historical disapproval of illegitimacy[182] did not play a role in finding a right to the use of contraceptives.[183] Procreation is recognized as within the zone of privacy because due process encompasses "a right of personal privacy,"[184] not concerns of the state.

5. *Elements of procreation: genetic, social, and gestational*

The discussion of the right to procreation above assumes the use of "standard reproductive technologies," where the genetic parents utilize new technologies to permit the gestation of their own child. In these situations, it seems that the right to procreation protects "decisions in matters of childbearing."[185] However, some types of reproductive technologies permit couples to

break down the concept of "childbearing" into three discrete aspects: genetic, social, and gestational. The *genetic* element is defined by identity of the gamete providers. The *social* element contemplates the intent to raise the child as one's own. The *gestational* element refers to the woman who carries and gives birth to the child. While procreation may be constitutionally protected where all three elements coincide in one couple, is it *necessary* to have all three elements for due process to attach? The presence of which factors are *sufficient* to establish a right? This section will discuss the elements comprising the right to procreation.

Professor John Robertson first suggested this approach to understanding procreational rights, when he argued that there is a liberty interest in each element:

> Claims of procreative freedom logically extend to every aspect of reproduction: conception, gestation and labor, and childrearing. Although these three components combine to create a powerful experience, however, each of them has personal value and meaning independently of the others. . . . A gene contributor may find genetic transfer a vital source of feelings connecting him or her with nature and future generations. . . . Some women find enormous satisfaction and significance in pregnancy and childbirth. . . . Childrearing is a rewarding and fulfilling experience. . . . Each aspect of reproduction can thus be a separate source of fulfillment and significance closely related to what provided by the other aspects. One thinks of oneself as

Table 4. *Elements of various procreative arrangements.*

Method	Genetic		Social	Gestation
	♂	♀	(♂ & ♀)	(♀)
Standard reprod. tech.†	✓	✓	✓	✓
AID	--	✓	✓	✓
Donor oocyte	✓	--	✓	✓
Traditional surrogacy	✓	--	✓	--
Gestational surrogacy	✓	✓	✓	--
DeBoer‡	✓	✓	--	✓
Michael H.	✓	n.a.	+/-††	n.a.

† This includes traditional coital reproduction, artificial insemination by husband, and other techniques such as *in vitro* fertilization where the gametes come from the intended social parents.

‡ See discussion *infra* this section at 214.

†† See discussion *supra* section IV.A.1. at 201 & n.99.

> procreating whether one conceives without gestating or rearing, gestates without rearing or conceiving, or rears without conceiving or gestating. Procreative freedom includes the right to separate the genetic, gestational, or social components of reproduction and to recombine them in collaboration with others.[186]

Courts have acknowledged the analytic reduction of procreation into its three elements in disputes about gestational surrogacy[187] and frozen embryo ownership.[188] Table 4 describes the elements of procreation that are present with various procreative arrangements.

Much of the case law that analyzes the separate elements of procreation arise from conflicts where two parties are seeking custody of one child; the procreative elements are divided between the sides, and rights of the respective parties must be balanced. It is helpful to review the arguments and holdings of these cases to determine the relative and absolute weights of the three elements of procreation.

Davis v. Davis [189] involved a custody dispute over frozen embryos. The ex-wife wanted to have the embryos implanted, but the ex-husband argued, *inter alia,* that doing so would impinge on his protected procreative decisionmaking. The Tennessee court recognized that the right to procreation extended to both positive and negative rights,[190] and implied that implantation of the embryo would violate the husband's right to avoid procreation. The state interest in potential life for unimplanted embryos was described as similarly weak in this case as it was in the early stages of gestation for the purposes of abortion. "[T]he state's interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy."[191]

The court suggested that the genetic element of procreation raised issues of a constitutional dimension:

> Abortion cases have dealt with gestational parenthood. In this case, the court must deal with the question of genetic parenthood. We conclude, moreover, that an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood. The technological fact that someone unknown to these parties could gestate these preembryos does not alter the fact that these parties, the gamete-providers, would become parents in that event, at least in the genetic sense. The profound impact this would have on them supports their right to sole decisional authority as to whether the process of attempting to gestate these embryos should continue.[192]

Despite this recognition, the court stopped far short of the conclusion that genetic inheritance by itself established a *fundamental* constitutional right. First, the court was only comparing the right as against established Tennessee public policy[193] which did not recognize a weighty value in the early stages of gestation; it never even contemplated a countervailing compelling state interest. Second, the court did not adopt an automatic veto by a gamete-provider, notwithstanding the claimed negative procreational right.[194] In fact, the court created a test to balance the interests of the two genetic parents.[195]

Johnson v. Calvert,[196] a California Supreme Court case, supplied additional language

in support of a genetic basis for procreational rights, albeit much of it in dicta. *Johnson* counterpoised the interests of a birth mother against the genetic mother. A married couple, due to the wife's hysterectomy and consequent inability to gestate a child, created a fertilized egg from each others genetic material and had it implanted in a surrogate mother. When the surrogate (gestational) mother had doubts about her prior agreement to give up the child to the genetic parents, the couple succeeded in being declared the natural parents. The court reasoned that both mothers (genetic and gestational) had some claim to motherhood, but the court broke the tie by examining the social intent to raise the child. This decision suggested that genetic parentage, when combined with the social element of intent to raise the child, is a weightier factor in procreation than is gestational motherhood.[197] The decision further implied that gestational parentage by itself, without a genetic tie or intent to socially raise the child, is insufficient to trigger due process protection, but genetic parentage combined with intended social parentage may be protected.

In *Johnson*, the birth mother, Anna, contended that her constitutional parental rights were abridged. *Amicus curiae* further argued that failure to recognize parental rights in a birth mother violated the right to procreate. The court disagreed, finding that by making an agreement to be a surrogate mother (forfeiting the social element of procreation), Anna had failed to make a decision to procreate. Hence, the lack of a social element of procreation, at least where the genetic element is also missing, is fatal to a claim of a constitutional right to procreation:

> A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without, by definition, any expectation that she will raise the child as her own.[198]

The court then more directly addressed the question of due process. It found plausible the argument that genetic and social elements absent a gestational element of procreation might constitute a traditionally protected right:

> Society has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own; such arrangements are of too recent an origin to claim the protection of tradition. To the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise the right to procreate in order to form a family of their own, albeit through novel medical procedures.[199]

The broad language in *Calvert,* possibly implying a constitutional right based only in genetics and social elements, is limited by a number of factors. First, the constitutional discussion only concluded that gestational motherhood without the social or genetic elements was insufficient to trigger procreative rights protection. Any further suggestion that genetic plus social elements were actually sufficient is *dicta.* This limitation was recognized in a later case decided by a California appeals court. "The most that can

be safely extracted from the opinion is that *gestational* surrogacy contracts do not necessarily offend public policy. Indeed, the court did not actually hold that the gestational surrogacy contract at issue in *Johnson v. Calvert* was enforceable as such."[200] In *In re Moschetta*, the court noted the intent to raise the child—the social element—was only relevant as a tie breaker where the genetic and gestational elements were split between two women. Where both genetic motherhood and gestational motherhood are found in one person, social intent is irrelevant.[201] *Moschetta* concludes that a traditional surrogacy arrangement, although vesting the social element in the genetic father's wife, is unenforceable in light of the Uniform Parentage Act and adoption statutes; the genetic/gestational mother is still the natural mother under law.

The New York Supreme Court, in *McDonald v. McDonald,*[202] adopted the reasoning of *Johnson v. Calvert*[203] in recognizing a gestational mother as the natural mother. In this divorce action, a child's father attempted to gain sole custody of his children by arguing that his ex-wife, who had used donor eggs, was not the natural mother. The court disagreed, citing the *Johnson* court's analysis that the tie between gestational and genetic mothers is broken by social intent to raise a child. Because the ex-wife was both a gestational and social mother, she was the natural mother.[204]

The Ohio case of *Belsito v. Clark*[205] rejected the analytic framework used in *Calvert* and *McDonald.* In a gestational surrogacy arrangement where the surrogate changed her mind about giving up the child, the court criticized the *Calvert* court's holding due to its difficulty in application, conflict with public policy, and "failure to recognize and emphasize the genetic provider's right to consent to procreation and to surrender potential parental rights."[206] The court found that a genetic tie was stronger than a gestational connection,[207] and the gestational mother could claim to be the natural parent only with the genetic parents' consent.[208]

These state custody cases, as a whole, tend to favor genetic over gestational motherhood. However, the analyses given by these courts fall short of establishing genetic parenthood as necessary and sufficient for the right to procreation. Indeed, the unsettled question of custody arising from gestational surrogacy arrangements tends to suggest that the basic values underlying procreation are embodied by all three elements and that no single one or pair of elements has a clear claim to the traditions and history underlying substantive due process protections.

The limitations of the analyses in the state cases become apparent by comparing the extent of constitutional parental rights for family arrangements. Parental rights are distinct from procreative rights in that parental rights arise from family structures already in existence, not those desired to exist. Hence, parental rights do not imply procreative rights, since the former may arise from post-procreative family arrangements.[209] However, limits on parental rights may help to establish boundaries on the right to procreate. Consequently, the right to procreate would be meaningless if courts did not recognize the rights of parents to continued parentage.

In *Michael H. v. Gerald D.*,[210] the Court held that no fundamental parental right existed for a child that was genetically fathered by a man not married to the mother. The court reached this conclusion because was because the adulterous arrangement did not reflect the history and tra-

ditions of society and, hence, was not protected as a fundamental right.[211] In essence, lack of a proper social element in the family arrangement undermined the genetic claim. Thus, a genetic tie by itself does not create a relationship which is recognized by the "basic values that underlie our society."[212]

In *DeBoer v. DeBoer*,[213] the Supreme Court refused to stay the Michigan Supreme Court's determination that Jessica Clausen, the DeBoer's adopted daughter, be returned to her genetic parents.[214] The DeBoers adopted the genetic/gestational daughter of Cara Clausen and raised the child for two years. During the course of this time, however, the genetic father, Daniel Schmidt, intervened. He successfully argued that his parental rights were not properly terminated. Therefore, he and Clausen should have custody over the child. The DeBoers did not have a constitutional parental right by virtue of their social tie.

> [T]he DeBoers maintain that there is a protected liberty interest in their relationship with the child. . . . From [parental rights] cases, they extract the principles that it is the relationship between the parent and child that triggers significant constitutional protection and that the mere existence of a biological link is not determinative. We reject these arguments. . . . [A] third party does not obtain such a substantive right by virtue of the child's having resided with the third party. . . . None [of the parental rights cases] involved disputes between a natural parent or parents on one side and nonparents on the other.[215]

Thus, the social element of having raised the child for her entire life was insufficient to establish a parental right.

Given the insufficiency of the genetic or social element, individually, to establish a clear constitutional right, we come to the question of gestational surrogacy. This presents the question of whether genetic and social elements of procreation, without gestation, would be protected by a fundamental right to procreation. *Johnson v. Calvert* considered the question of gestational surrogacy with respect to custody, but no court has directly faced the question of whether the use of gestational surrogacy is protected by a fundamental constitutional right to procreate.

Contrary to the assertion of Professor Robertson,[216] procreation does not fall within the protection of substantive due process without the presence of all three elements of procreation. Technology by itself does not detract from the personal meaning of procreation. Therefore, the Due Process Clause would protect the use of standard reproductive technologies where the same couple provides the genetic, gestational, and social elements of procreation. Each element has been understood by the courts to be a weighty factor in procreation, and the removal of any element undermines the basic values of procreation. The introduction of a third-party surrogate alters the social understanding of procreation and cannot be understood to be an arrangement that is "implicit in the concept of ordered liberty."[217] The contentious debate—judicial, legislative,[218] and academic[219]—surrounding custody in surrogacy, as well as the troubling implications of utilizing a third party in the procreative process,[220] removes surrogacy from the category of values historically and traditionally protected by the 14th Amendment.

B. ***Affirmative right to governmental services***

While it is argued *supra* section IV.A.4. that there is a positive right to procreate protected under the privacy rights cases, it seems fairly well established that there is no obligation of the government to act affirmatively to vindicate that procreative right. Therefore, there is no obligation for the government to provide or fund assisted reproductive services under the Due Process Clause. The government may not prevent a person from exercising constitutional rights; however, where for other reasons those rights are denied, the government need not act to secure them.

> [The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[221]

In the case of assisted reproductive technologies, the reproductive dysfunction of a patient does not originate in state action, so there is no state obligation to correct it.

The lack of an affirmative obligation by the government has been clearly specified in the area of reproductive rights. In *Maher v. Roe*,[222] the Court determined that funding childbirth, while denying funding for nontherapeutic abortions, did not violate the Equal Protection Clause. The Court stressed that there was no abridgment of the right recognized in *Roe v. Wade*[223] because the state did not actively preclude the exercise of that right.

> "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."[224]

This principle was reaffirmed in *Harris v. McRae*,[225] which dealt with the denial of Title XIX funding for medically necessary abortions. "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[226]

In the case of infertility, the lack of an ability to procreate arises from non-governmental sources that the state has no obligation to rectify. Therefore, a state actor, consistent with the Due Process Clause, must neither provide reproductive services nor fund them. This is the case

even if some people will realistically be denied the opportunity to procreate in light of such governmental policies.[227]

C. *Equal protection*

The Equal Protection Clause[228] limits the ability of the government to draw distinctions between groups of people without proper reason. Where an action of the state "operates to the disadvantage of some suspect class"[229] or impinges upon a fundamental right[230] "explicitly or implicitly protected by the constitution,"[231] the classification is subject to strict scrutiny. Otherwise, only a rational basis for the state action is required.

1. *Protected classes*

When a state provides unequal treatment to different classes of society, such action normally "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[232] Classifications based on race, alienage, and national origin, however, are subjected to strict scrutiny and must serve a compelling state interest.[233] The Court has also recognized a quasi-suspect status for a few other groups. Intermediate scrutiny, where the classification must be substantially related to an important governmental objective, applies to classification is based on gender[234] and illegitimacy.[235]

It is unlikely that any restrictions to access or provisions of assisted reproductive services would be subject to intermediate scrutiny for discrimination based on gender. It is true that because only women can become pregnant, women would be more directly subject to some types of restrictions on reproductive technologies.[236] However, pregnancy-related disparities in the treatment of men and women are not impermissible for purposes of gender classification.[237]

Some restrictions on assisted reproductive technologies may be aimed at maintaining the integrity of the marital family unit. Depending on the nature of the arrangement, one can argue that such restrictions may unjustifiably classify based on illegitimacy. However, the child who is potentially discriminated against has not yet been conceived, and the classification does not exist until after birth because "[i]llegitimacy is a legal construct not a natural trait."[238]

Discrimination against other groups is sometimes characterized as invidious and arguably deserving of heightened scrutiny, at a minimum.[239] Thus, the courts would have to use a less deferential standard than the rational basis test. Potential groups within this category have been contemplated in order to screen patients seeking assisted reproductive technologies. Examples include sexual orientation, marital status, age, mental and physical handicap, presence of genetic defect, and wealth.

A commonly suggested restriction is one based on sexual orientation, either directly or under the guise of serving married couples only. Courts have determined that homosexuals are neither an immutable class nor politically powerless.[240] Therefore, a number of circuits have employed rational basis review in evaluating discriminatory classifications involving homosexuals.[241]

Marital status is a classification many programs use to screen potential assisted reproductive candidates. For example, in cases dealing with Social Security, the Court has upheld the use of differentiated benefit levels depending on marital status.[242] However, providing ben-

efits and services dependent on marital status, if it impinges on the right to marry, may raise the question of whether a fundamental interest is burdened, as discussed *infra* section IV.C.2.[243]

Another common classification suggested for parenthood is age. Concern is expressed both for the physiological capability[244] of older women to withstand the physical demands of pregnancy and for children who may have elderly parents. Misconception of the ability of older parents may possibly be based on stereotypes, but the Court will subject age classifications to only rational basis review.[245]

The desire to restrict the access to procreation for those with handicaps has a long history.[246] This may be accomplished in the context of reproductive services by preventing propagation of undesirable genetic characteristics and ensuring that only those with the ability to properly care for offspring have children under certain reproductive programs. The Court faced a classification regarding mental retardation in the context of zoning laws in *City of Cleburne v. Cleburne Living Ctr.*[247] The Court only required that the classification be rationally related to a legitimate state interest but, nevertheless, held the law unconstitutional. In reaching the conclusion[248] that the classification was only subject to minimal scrutiny, the Court acknowledged that the mentally retarded are immutably different.[249] However, the Court but contended that lawmakers were addressing their problems,[250] evidencing that the group was not politically powerless.[251] The Court further indicated that the group was too large and amorphous[252] to be deserving of quasi-suspect classification. It would appear that groups of people with mental or physical handicaps, as well as carriers of defective genes, have a similar profile. Therefore, unequal treatment of these groups would be reviewed only for a rational basis.

Wealth is a *de facto* classification system for the more advanced reproductive technologies that are generally extremely expensive and not funded by public assistance programs. Given that there is no affirmative right to governmental services due to lack of state action,[253] this economic deviding line certainly is not violative of equal protection. Fertility services covered under Medicaid are increasingly faced with political opposition.[254] Allocation of public welfare funds, however, need only be rational.[255]

2. *Equal protection when a fundamental interest is burdened*

Where a classification burdens a fundamental interest, it will be subject to strict scrutiny on equal protection grounds.[256] For example, in *Shapiro v. Thompson*,[257] where denial of welfare depended on a minimal one-year state residency. The Court found that such a classification burdened the fundamental interest to travel. In such a situation, "any classification which serves to penalize the exercise of that right"[258] is subject to strict scrutiny.

For strict scrutiny to be applied under the theory of equal protection, there must be a fundamental interest and the classification must actually penalize the exercise of that interest. While the fundamental interest must be of constitutional significance, it may differ from the fundamental rights explicitly guaranteed by the constitution. For example, there is no explicitly guaranteed federal constitutional right to vote in state elections, but classifications that burden the fundamental interest in electoral representation are subject to strict scrutiny.[259]

a. *Penalizing the use of reproductive services*

Arguably, the various classifications that are proposed may burden a fundamental interest in the right to procreate. A classification that directly penalizes the exercise of procreation[260] through assisted reproductive technologies would be subject to such an analysis. It is doubtful a state would seek to penalize the exercise of procreation via new technologies without outright banning the exercise, which would simply raise the issue of the right to procreate, in *supra* section IV.A. before equal protection analysis would apply.

b. *Selectively denying the use of reproductive services*

Another possible scheme by which the state may express disfavor for the use of reproductive technologies by some groups is to restrict[261] both public and private access to such procedures for selected groups, such as unmarried individuals. This would constitute a burden on the fundamental interest of procreation for groups that cannot use those technologies to procreate. Therefore, the court should apply a strict scrutiny analysis. While "reasonable regulations" that touch on a fundamental right may not be suspect, where a classification "directly and substantially" touches on a fundamental right by denying access to a particular group, the regulation must be supported by a compelling state interest.[262]

An alternative way to analyze such a classification is to say that due process rights of the group denied or restricted access have been violated. This approach would not depend on the classifications themselves, but rather, on the fact that some people have been denied particular rights. Where both equal protection and due process analyses have been applicable in such situations, the Court has internally disagreed as to the proper avenue of constitutional analysis.[263] In the present hypothetical, both substantive due process and equal protection doctrines would have the same result: a demand that the state demonstrate a compelling interest narrowly tailored to the state's interests. However, these approaches may differ somewhat. First, where a classification burdens a fundamental interest under the Equal Protection Clause, that interest need not always rise to the level of one guaranteed by the Due Process Clause.[264] Second, the degree to which the fundamental interest or right must be burdened may differ.[265]

c. *Unequal funding of reproductive services*

Conceivably, a state may decline to fund some reproductive activities, either through its public welfare system or by denying such funding to public hospitals. By funding some groups but not others, a classification is made with respect to the affirmative grant of procreative services. This type of burden probably does not justify heightened scrutiny under an equal protection analysis. The fundamental interest potentially burdened for purposes of an equal protection analysis is not procreation in general, but rather the interest in receiving governmental procreative services. A fundamental interest is probably not involved where the activity that is burdened is not the right to procreate itself (because an individual can always go to his or her private physician[266]), but rather, the right to the funding in order to procreate. Providing procreative services by the state is not a fundamental interest[267] even though the right to procreate is a fundamen-

tal right implicit in the Fourteenth Amendment.

State funding of reproductive services is not a substantive due process right, as seen in *supra* section IV.B., nor is funding a fundamental interest for the purposes of equal protection analysis. The reason is that the right to procreate is based on the right to privacy, which is integrally concerned with the "right to be left alone."[268]

V. State interest in reproductive technology regulation

The state needs to set forth interests that may range from compelling to simply rational depending on the type of restrictions or classifications envisioned. [269] Stricter scrutiny requires a tighter fit between the restriction and the legitimate governmental objectives. Several have been proposed and are relevant to various situations. The following discussion highlights the issues regarding some of the more controversial asserted state interests. The discussion is not meant to exclude other legitimate state interests such as health, safety and consumer protection.[270]

A. *Fetal rights*

A number of assisted reproductive technologies processes manipulate the reproductive process well after fertilization.[271] Since people believe that life begins with fertilization, medical manipulations that disturb a zygote, preembryo or embryo[272] may be subject to limitations in an effort to express the state's concern for the developing being.[273]

Where the intimate decision of a couple before or at the time of conception involves medical technology, concern is also expressed on behalf of the fetus. Of course, at that point, it is only a potential fetus, and, therefore, the state interest would be an extension of the concept of potential life.[274] Both concern for the fetus itself and concern for the unconceived potential fetus are concerns for potential life.[275] For purposes of this discussion, this section will stress post-conception concerns. *Infra* sections V.B. and C. details with concerns about the potential pregnancy, where the critical issue will obviously not deal with the rights of the fetus itself, but rather, with the eventual outcome of the pregnancy and the appropriateness of the potential family arrangement.

1. *Potential existence of the fetus as a state interest*

One area of comparison in reference to the interests of the fetus involves the abortion cases. A state interest in the continued development of the fetus has been recognized in this line of cases, and the state interest has even been held to be compelling in the latter stages of pregnancy. Therefore, after the point of viability,[276] the woman's liberty interest in controlling her pregnancy can be trumped by the "interest of the State in the protection of potential life."[277] Assisted reproductive technologies, however, are not in this age contemplated to involved "fetuses" after the point of viability. Therefore, for a comparison to the abortion cases, the state interests in the early stages of pregnancy must be examined.[278]

Before viability, the Court has recognized the woman's substantive due process right to elect to have an abortion and has indicated that the state may not eliminate that choice altogether.[279] However, the Court has recognized that there is a legitimate state interest in potential life throughout the duration of the pregnancy.[280] In

the final balance, the Court concluded that before viability the state could not unduly burden the abortion decision.

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. A statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[281]

Therefore, during the pre-viability phase of pregnancy, the state interest in potential life is not compelling enough to curtail a woman's right to abortion, but the various regulations do not require strict scrutiny. By implication, however, the interest in the potentiality of life is a rational one.

An Illinois district court applied the analysis used in the abortion cases to an Illinois law that could be construed to impinge upon embryo transfer and chorionic villus sampling. The court applied the lack of a compelling state interest in pre-viability abortion to reproductive technologies performed on a fetus which were not therapeutic for the fetus. "Since there is no compelling state interest sufficient to prevent a woman from terminating her pregnancy during the first trimester, there can be no such interest sufficient to intrude upon these other protected activities during the first trimester."[282]

In comparing the issue of abortion with the right to procreate implicated by reproductive technologies, some differences should be highlighted. First, the individual's interest in having an abortion is possibly greater than the individual's interest in procreating. Because abortion involves both the right to determine whether to procreate as well as the issue of bodily integrity. "The detriment the State would impose upon the pregnant woman by denying this choice"[283] of abortion involves both physical and psychological anguish[284] that is not as directly implicated in the denial of procreative services. To the extent that artificial procreation could be construed to be less of a personal interest than abortion, the state interest may correspondingly be viewed as more compelling, as it relates to artificial procreation.

Second, in the case of abortion, there are no offspring; whereas in artificial procreation, the aim is to create a child. Arguably, there is a stronger interest in potential life when the goal is to bring a life into existence.

The state's interest, with respect to the potentiality of life, is the concern that some reproductive techniques may create a fetus[285] and then place that fetus at risk for failure to implant.[286] Despite the possible differences from the abortion cases, several factors imply that no compelling state interest in the potentiality of life in the early stages of pregnancy exists where assisted reproductive technologies are utilized.

First, it is difficult to see how the potentiality of life could be compelling in comparison with the choice of whether to have a child at all. Because assisted reproductive technologies focus on *positively* reproducing, the state interest in the potentiality of life when the state restricts access to reproductive technologies is actually

an interest in the *non*potentiality of life. If the state does not allow the manipulation of embryos where such techniques are necessary in the treatment of infertility, there will be no fetus at all. Of course, one can argue that the outcome of the potential life may be a concern in some situations, an issue more thoroughly discussed *infra* section V.B. Yet, the nonpotentiality of life apparently must be a substantially weaker state interest than the potentiality of life recognized in the abortion cases.

Second, an issue arises as to whether placing the fetuses at risk can be comparable to the right of a parent's election to have an abortion. Assisted reproductive technologies may involve a higher rate of loss than baseline, but abortion involves a 100% loss.

Third, it is a natural process for the body to occasionally reject the conceptus. For example, only about half of the fertilized eggs resulting from coitus ultimately manage to be born.[287] The body, by spontaneous abortion and miscarriage, effectively screens out the less viable fetuses from becoming children. For the state to assert that this fundamentally natural process is contrary to public policy is a dubious claim. Even in the most optimal circumstances, when artificial means are not employed, the majority of fetuses do not come to term. If the state's concern is that the fetus should not be created if it will be subjected to the possibility of loss, then no pregnancies could overcome this asserted state interest. Surely, this is inconsistent with the proper understanding of the right to procreate.

Restrictions on reproductive technologies that impinge upon the post-conception entity can have only one effect: refusing to allow that entity to be created at all so that it will not face what is seen as unnatural manipulation by man. Some religions take this view[288] for various moral reasons, such as the possibly unpalatable notion that physicians will be playing God. In general, moral choices of the government can legitimately supply a rational basis for legislation.[289] However, a moral preference, without more, is insufficient to serve as a compelling state interest.[290]

Some cases identify a state interest in potential life because of possible injury to the fetus.

2. *Potential injury to the fetus as a state interest*

When concern about the fetus is not that of possible loss (for example, by failure to implant), as described above, but of possible injury to the potential child, the state may have a stronger interest. It should be noted that there is no evidence to support the contention that children conceived through artificial reproductive technologies have any more abnormalities than the baseline found in the general population.[291] Therefore, this cannot be a state interest.

However, reasons exist why a state interest may be important to address. First, advances in this field are rapid, and it is possible that future procedures could put children conceived through particular methods at risk. Second, some prenatal procedures may possibly be correlated with deformities, albeit at very minimal levels.[292] Although such procedures are not directly involved in assisted reproductive technologies, the legal arguments often compare such techniques to the technologies commonly uti-

lized.

Some cases identify a state interest in potential life because of possible injury to the fetus. These cases involve forced cesarean sections, criminal prosecution of mothers who use drugs during pregnancy, state criminal laws protecting the interest of the fetus, and prenatal injuries in tort law.

Court-ordered cesareans have divided the courts. Some courts have refused to balance state interests against the individual at all, apparently deciding there can be no compelling state interest in the fetus sufficient to allow such a gross intrusion upon a woman's bodily integrity.

> [The state] argued that the circuit court should have balanced the rights of the unborn but viable fetus which was nearly at full term and which, if the uncontradicted expert testimony of the physicians had been accurate, would have been born dead or severely retarded. . . . We hold today that Illinois courts should not engage in such a balancing, and that a woman's competent choice in refusing medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus.[293]

Even when a state interest in the fetus is presented, prevailing arguments suggest the interest is not sufficiently compelling.[294]

On the other hand, some courts have forced women to undergo cesarean sections for the benefit of their potential children.[295] However, in such cases, the state interest is that of a post-viability fetus as recognized in the abortion cases.[296]

The cesarean cases are illustrative of the nature of the state interest in preventing fetal injury, but they can be distinguished on several points. First, these cases, by their very nature, all concern post-viability fetuses. *Roe* and its progeny make clear that the state has a compelling interest in the fetus during this stage of pregnancy. Second, the personal right to avoid surgical intervention via cesarean is different than both the choice to have an abortion or to use assisted reproductive technologies. It is likely that a state interest would need to be of greater significance to allow the forced physical intrusion of a cesarean, as opposed to depriving a personal choice regarding future procreation.

The rights of a fetus to be born without defect or injury are contemplated by the criminal law. State laws that establish a duty to care for children include in their scope a duty to care for a "child conceived but not yet born."[297] Similarly, some states consider the killing of a fetus to be equivalent to murder.[298] However, in cases where mothers have been charged with criminally administering cocaine to their babies *in utero*, courts have traditionally held that criminal charges are not validly raised against the mother for injuring her fetus by using drugs.[299] These cases generally have been decided upon statutory and policy grounds, without discussion of constitutional implications.

Civil actions for injury to fetuses are allowed as well. When a fetus is born alive, there is near universal recognition of a cause of action for prenatally inflicted injuries.[300] Additionally, numerous states do not recognize parental immunity,[301] and the application of tort law to a mother's actions during pregnancy is a theoretical possibility. However, civil actions filed by an offspring against its mother for prenatal inju-

ries have been recognized in only a limited number of jurisdictions.[302] When the court rejects such a cause of action, the great discretion a woman must be afforded over the control of her own body is important in distinguishing her from third parties as a tortfeasor. "Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy."[303]

This variety of cases demonstrates the tension between the state interest in protecting the fetus and the intermingled mother/fetal interests. Clearly there is a state interest in the well-being of the fetus, but the cesarean cases show that this interest is not sufficiently compelling in some circumstances when the mother's constitutional interests are involved.

The importance of the state interest in the fetus is necessarily mitigated when it pits the parents' interests against that of the developing fetus. This is illustrated by criminal and civil laws that aim to protect the fetus from harm. The identity of the actor is often critical to the categorization of the action that affects the fetus: killing a fetus is considered murder in some states, yet abortion is exempted; harming another's fetus is criminal, but prosecutions against mothers for drug delivery through the umbilical cord typically fail; third parties can be sued for negligent actions that harm a fetus, but few jurisdictions recognize a cause of action against the mother for the same. Courts have reached these results for a variety of reasons: statutory interpretation and the rule of lenity; public policy; and the right to privacy.

Although the conclusions of criminal and tort law could be altered by a command of the relevant legislature, current law in these areas is suggestive of the level of state interests in the fetus versus the interests of the individual who would bring it into existence. It is certainly important that children brought into the world are as healthy as possible. However, it is unlikely that such an interest can be compelling against the rights of those who create that very possibility. In rejecting an infant's cause of action against its mother for a prenatal tort, the Illinois Supreme Court reasoned that:

> [l]ogic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus. It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. . . . No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world.[304]

Such reasoning is equally applicable to assisted reproductive technologies, if it could be shown that such techniques pose a risk to the developing fetus. In both cases, it is an unrealistic assumption that the interests of the parents are necessarily adverse to the fetus, because, in both cases, the fetus exists only through the efforts of the parents. The idea of fetal rights directly conflicts with the parents' reproductive autonomy. Therefore, it appears that potential injury to the fetus from the use of reproductive technologies is a rational state interest, but is not compelling enough[305] to justify a restriction or

classification where strict scrutiny is required.

B. *Genetic defect (pre-conception injury)*

Another possible reason to regulate assisted reproductive technologies is that some patients, who are otherwise unable to reproduce might be carriers of a genetic defect and, thus, would pass on an "injury" to their offspring. For example, reproductive technologies might be denied to parents who possess certain genetic defects that may be passed on to their offspring. Initially, such a restriction would appear to be subject to strict scrutiny because of its denial of an individual's right to procreate,[306] there by creating a classification that burdens a fundamental right.[307]

The state interest in this situation is to avoid the birth of genetically defective children. One rationale for limiting procreation on this basis is described by Professor Shaw:

> Since parents have control over their reproductive organs and can decide whether to transmit their genes to their children, they should be held accountable to their offspring for causing misery, pain, suffering, and death if it could have been avoided. . . . [I]t should be incumbent upon the law to control the spread of genes causing severe deleterious effects just as disabling pathogenic bacteria and viruses are controlled.[308]

Eugenic measures to optimize the genetic profile of humans have been viewed by many as both morally and constitutionally suspect.[309] Additionally, eugenic measures are impractical and the proscription of procreation by carriers of defective genes[310] has never really been seriously contemplated by the medical community.[311] Regulating the procreative choices of fertile couples would be haphazard and subject to abuse by "evil and reckless hands."[312] On the other hand, infertile couples who seek medical assistance are a discrete group who can be easily regulated through channels whereby the government typically oversees provisions of health care. The question arises, then, as to whether the "handle" that reproductive technologies provide the state in its regulatory capacity can justify laws that would, if applied to the general public, be seen as unconscionable.

One problem with a state interest in the potential child at the early state of pre-conception is that the state interest is too far removed in time and causality to justify intrusive governmental regulation. The availability of a private cause of action for pre-conception torts has a mixed record in state courts.[313] In the context of a Title VII sex discrimination violation by a battery-manufacturing employer, the Supreme Court concluded that such an interest in the fetus was contextually unjustified. "No one can disregard the possibility of injury to future children; the [bona fide occupational qualification], however, is not so broad that it transforms this deep social concern into an essential aspect of batterymaking."[314]

The use of procreative technologies, in situations when its use is considered expressive of the right to procreate appears to have similar characteristics. With respect to constitutional rights, there is nothing less private about conception that occurs in a doctor's office as opposed to conception that occurs in a bedroom.[315] Although the "deep social concern" regarding injury to a potential unconceived life is a rational basis for legislation, this concern is too far

removed from individual choices in bearing or begetting a child to justify state intervention. The constitutional right to privacy does not disappear in a doctor's office.[316]

The fact that infertile couples are politically more susceptible to state regulation is a reflection of the need for constitutional protection. When a constitutional right is at stake, it must not be deprived arbitrarily. Yet, restriction for the reason of genetic defect is a grossly underinclusive restriction. Fertile couples who are carriers of severe genetic defects are not prohibited from procreating, although screening for various genetic indices is routinely proposed for eligibility in assisted reproductive technologies programs.[317]

It is unclear what harm the state would prevent by condoning an infertile couple access to reproductive technologies. Although the possible perpetuation of the genetic defect would be eliminated, the result would be at the risk of the birth of a child. This paradox is the basis of the states' rejection[318] of wrongful life[319] claims in tort law. For example, a Michigan court summarized the problems with a state interest as nonexisting over a handicapped birth due to a negligent action that resulted in life.

> Many courts have echoed the rationale of *Becker*[320] in refusing to recognize a legally cognizable injury in being born impaired rather than not being born at all. Under this view, the tort is often perceived as contradictory to the belief that life is precious and that life, even with a major handicap, is preferable to nonlife. Moreover, this view recognizes the difficulty of determining to what deformities the tort should apply. Many courts also follow the reasoning of *Gleitman*[321] and *Becker* with regard to the impossibility of measuring damages in terms of weighing the value of a defective life against the value of no life at all.[322]

The same problem arises when attempting to recognize a state interest in the nonexistence of genetically defective children.

Classifications which incidentally touch upon procreative rights, require only a rational basis. For exaomple, reduction of medical expenses to care for handicapped children, or even the bare moral judgment that they are better off unborn. However, it is questionable whether such desires could be compelling enough to restrict an individual's right to procreate. The legal system "has no business declaring that among the living are people who never should have been born."[323]

Three states have reached a contrary position in tort law and have allowed damage awards in wrongful life claims. The primary reason of New Jersey,[324] Washington,[325] and California's[326] position is to ensure compensation[327] "notwithstanding [the courts'] apparent agreement that the child has suffered no cognizable injury."[328] However, when a state interest is asserted against an individual's right to procreate, the state is not acting to spread the cost of damages at all. Rather, the state simply declaring that the child should not exist. This position seems to be squarely contrary to the recognized state interest in the sanctity of all life.[329] Thus, it seems unlikely that the interest in avoiding perpetuation of undesirable genes which may cause physical disabilities is compelling enough to withstand strict scrutiny.

C. *Family outcome and rights of the future child*

The proper family environment[330] for a potential child conceived from assisted reproductive techniques is often asserted as a state interest justifying various restrictions and classifications of potential parents. The expression of this state interest would be to prevent the creation of improper family units through the use of artificial means.

One possible area of comparison is the state interest in the best interests of the child who is adopted. The state clearly has *parens patriæ* authority to ensure the best interests of a child in adoptive situations. "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.... The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[331] This state interest is of a sufficiently compelling degree to justify racial considerations as one (although not decisive) factor in adoption decisions.[332] Similarly, in foster care placement, a "child's racial and cultural needs . . . that [are] consistent with the best interest of the child, [are] indisputably a compelling governmental interest for the purposes of the Equal Protection Clause."[333]

Although undisputed in adoption and foster care, the *parens patriæ* role of government does not form a sufficient basis for a state interest in regulating assisted reproductive technologies. In adoption, the specific context of a child's interests can be weighed. It is "the goal to duplicate the relationship that most persons have with their natural parents during their entire lives."[334] On the other hand, when the state's interest in the child is asserted in determining who is capable of procreating, the regulation is more akin to regulating natural families. No child yet exists when fertility treatments are contemplated.

Generally, the state has similar powers to manipulate natural families as its does in the creation of adoptive families. Curiously, the best interests of a child become a compelling state interest only after a possible custody battle arises. When the child does not yet exist, there is no analogous free-standing state interest in the potential circumstances of that child's life. "A couple has no right to adopt a child it is not equipped to rear,"[335] but it does have rights to procreate and raise children.[336] Thus, so long as the care of a child meets minimal standards, a state may not arbitrarily determine that the child's best interests lie in removing her from her present home.

Generally, the state has similar powers to manipulate natural families as its does in the creation of adoptive ones.

Another area where the state has asserted its interest in a particular family arrangement arises in dealing with illegitimate children. In considering the financial obligations to illegitimate children, the Court has acknowledged "the State's interest in protecting 'legitimate family relationships,' and the regulation and protection of the family unit."[337] The state may have an interest in structuring financial obligations to acknowledge its preference for children raised in families with married parents.

This interest enunciated in the illegitimate

children cases fails to apply to children conceived through assisted reproductive technologies. First, this state interest is clearly limited to discouraging the behavior of the parent, not the existence of the child.

> [W]e have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct. . . . "The Court recognized in *Weber* that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.'"[338]

It may appear that regulating reproductive technologies is directed at parents, but such reasoning is faulty. The state does not protect the unitary family by preventing the formation of any family. In this scenario, the state is actually imposing a disability on the child by denying the child life if he or she has the wrong type of parents. This position is not a legitimate state interest in either the illegitimacy cases or in the area of reproductive technologies.

Second, if the state desires to encourage a particular family organization (e.g. marriage before procreation) by denying the right to procreate to those who do not comply, this rationale directly conflicts with *Eisenstadt* and its progeny. Those cases guarantee the right to procreate to both married and single individuals and, by implication, do not permit such distinctions by themselves to be used to defeat the right to procreate.

Third, when classifications touching upon the legitimacy of a child were upheld, these classifications dealt with state social and economic policies which recognized certain types of relationships as being preferable. The classifications did not interfere with the ultimate existence of the child itself. The placement of restrictions on reproductive technologies by the state due to a state concern about the potential family arrangement almost always will fail to be narrowly tailored to the state interest. Less restrictive means are clearly available. For example, the state could provide childcare assistance and education programs for the potential parents. Furthermore, most restrictions are likely to be overinclusive because many individuals with good parenting skills may fail to meet a particular classification. Similarly, restrictions may be underinclusive because individuals with poor parenting skills may still fall within desirable profiles, such as married, noncriminal, psychologically stable, etc. may still be those .

Another set of cases, which establish the right to privacy encompass the right to family relations. These cases suggest that the state's imposition of a particular family arrangement as a state interest is not a legitimate purpose, either on a compelling or rational level. When only a rational basis is required, "it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[339] However, a state interest that itself offends the constitution is not a legitimate one.[340]

Most family rights cases discuss the burden state regulations pose on the freedom to form family arrangements.[341] For example, in a case where a putative father wanted to set aside an adoption of his child, the Court stated that "[i]n recognition of the role of [the institution of marriage], and as part of their overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."[342] The Court decided the federal constitution did not protect the putative father who had never had established a substantial relationship with his child. When the Court finds that a particular family arrangement is not protected by the right to privacy, it is free to weigh the benefits of one type of family over another family arragement in shaping public policy.[343]

However, if the state wishes to express its interests in the family, contravening the use of reproductive technologies, the state converts its interest in the family from a shield (from governmental intrusion) into a sword which justifies abridgment of other rights. Because the promotion of one type of family may undermine the recognition of other family living arrangements, such expressed concern for family should be viewed carefully. Where the government acts to modify the legal entitlements surrounding various family arrangements, it is allowed to do so in cases where the government does not "[seek] to foist orthodoxy on the unwilling."[344] However, "the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. . . . [T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[345]

Therefore, while the traditional understanding of the family may determine what protections the Due Process Clause offers,[346] the state may not impose its conception of the appropraite family unit to undermine other legitimate constitutional rights. The state may have legitimate interests which are intertwined with the function of the family. Yet, without more, a bare interest in particular family arrangements is illegitimate.

> Although the ordinance was supported by state interests other than the State's interest in substituting its conception of family life for the family's own view, the ordinance's relation to those state interests was too "tenuous" to satisfy constitutional standards. By implication, a state interest in standardizing its children and adults, making the "private realm of family life" conform to some state-designated ideal, is not a legitimate state interest at all.[347]
>
> The state's interest in a particular type of family is an illegitimate state goal and, therefore, it cannot serve either a compelling or rational basis for legislation that impinges on procreative rights.

Independent of the state's interest in particular types of families is the underlying concern that certain family situations may actually be detrimental to a child's well-being. The *parens patriæ* role of the state does not apply to potential offspring[348] and is not tailored narrowly enough to serve a compelling state interest against the right to procreate.[349] However, there may be some evidence that certain types of family situations are healthier than others for children.[350] Therefore, while the preference for one type of family over another cannot serve as a rational reason for a regulation, optimization of

the family environment can be an acceptable goal when the desire to protect children is a legitimate one that is not simply "a bare . . . desire to harm a politically unpopular group."[351]

Conclusion

In many social and ethical respects, natural and artificial reproduction are similar because they both fulfill the desire of parenthood and they both have the potential to burden children and society with the prospect of sub-optimal families. The difference between the two types of reproduction is not primarily moral—it is political. The medical procedures necessary to carry out reproductive technologies render such assistance more vulnerable to state intervention as compared to reproduction conducted in the bedroom. While the ease of regulation may explain the vulnerability of assisted reproduction to state control, it does not justify the invasion of the constitutional rights of those who unfortunately are infertile. It seems extreme to question the choice of any two people to have a child. Yet, when a couple arrives at a fertility clinic, their parenting abilities are often scrutinized by doctors, hospital administrators and legislators. State interference with procreation immediately raises questions reaching a constitutional dimension. The use of a doctor, petri dish or other technology in the process of reproduction should not render it any less of a fundamental right.

E N D N O T E S

[1] *See generally* John M. Shane, *Evaluation and Treatment of Infertility*, 45 CLINICAL SYMP. (1993); MERCK MANUAL 1772-73 (16th ed. 1992).

[2] The Centers for Disease Control and the Food and Drug Administration both suggest use of frozen semen to reduce the chance of spreading sexually transmitted diseases. Such a policy is mandated in a number of states. Kamran S. Moghissi & Richard Leach, *Future Directions in Reproductive Medicine*, 116 ARCHIVES OF PATHOLOGY & LABORATORY MED. 436 (1992).

[3] *See* Table 1 (method no. 2) *infra* p. 193.

[4] *See* Table 1 (method no. 4) *infra* p. 193.

[5] Infertility due to infections, inflammation, nonpatency and the like at the cervical os.

[6] Moghissi, *supra* note 2.

[7] *Id.*

[8] *Id.*

[9] *See* Table 1 (method nos. 3, 5A & 9) *infra* p. 193.

[10] Moghissi, *supra* note 2.

[11] *Cf.* Table 1 (method nos. 3, 5A & 9) *infra* p. 193.

[12] Moghissi, *supra* note 2.

[13] Such as pronuclear stage transfer and tubal embryo transfer.

[14] *See* Table 1 (method no. 5A) *infra* p. 193.

[15] Martin M. Quigley, *The New Frontier of Reproductive Age*, 268 JAMA 1320 (1992).

[16] *See* Table 1 (method no. 5B) *infra* p. 193.

[17] Table reproduced from Alexander Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U. CAL. DAVIS L. REV. 679, 682 (1987).

[18] *See generally* Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275 (1992).

[19] The reach of constitutional considerations is limited by the identity of the actor. While it may be constitutionally suspect for the state to restrict individuals from seeking particular medical treatments from their private practitioners, [*see infra* sec-

tion IV.A.; *cf.* Carey v. Populations Servs. Int'l, 431 U.S. 678 (1977) (contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (abortion)] the Fifth and Fourteenth Amendments do not apply to private parties absent state action. San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Thus, even if access is protected for a particular activity, private actors are not obligated to provide particular services.

While private physicians are, therefore, beyond the purview of the constitutional requirements set forth *infra* sections IV.A to C., state hospitals and some employees of state hospitals are state actors for purposes of due process and equal protection analysis. State hospitals are state actors [Foster v. Mobile County Hosp. Bd., 398 F.2d 227, 230 (5th Cir. 1968)] and receipt of federal Hill-Burton funding can, but will not always, transform hospitals into state actors. Holmes v. Silver Cross Hosp. of Joliet, 340 F. Supp. 125, 133 (N.D. Ill. 1972).

Health care providers who merely "utilize the facilities of the [state] hospital, but do not act at the behest of the hospital" are not state actors. *Id.* at 134. However, actions by hospital staff are state action. Suckle v. Madison Gen. Hosp., 362 F. Supp. 1196, 1209 (W.D. Wisc. 1973), *aff'd* 499 F.2d 1364 (7th Cir. 1974). Therefore, private physicians who merely admit patients into a state hospital are not state actors, but in established programs, where standards have been set by the hospital, health care providers' actions are state actions and, therefore, subject to constitutional scrutiny.

In the context of a cause of action under § 1983 for monetary damages, a state program is immune in such situations unless the conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In assisted reproductive technologies, the case law is arguably unclear in many instances. To the extent that the reach of substantive rights in procreation is still undefined by the courts, there is not "a clearly established line of authority proscribing," Jantz v. Muci, 976 F.2d 623, 629 (10th Cir. 1992), restrictions on reproductive technologies. On the other hand, where an equal protection or statutory discrimination claim is brought, many of the issues, such as race and gender discrimination, may have already been long clarified by the courts. *But cf. id.* at 628-30, where a principal did not even assert a rational basis for discrimination based on homosexuality in a high school teaching position. The court held that the law concerning discrimination against homosexuals was in such disarray that the defendant was entitled to qualified immunity.

[20] *See* Table, *infra* section II.B. at 195.

[21] *E.g.*, N.H. REV. STAT. § 168-B:15 (1993).

[22] *E.g.*, LA. REV. STAT. ANN. §§ 9:126, 9:127, 9:130 (West 1994).

[23] *E.g.*, N.H. REV. STAT. § 168-B:13 (1993) (limiting assisted reproductive technologies to women 21 or older).

[24] *E.g.*, *Id.* § 168-B:14.

[25] PA. STAT. ANN. tit. 18, § 3213(e) (1994).

[26] N.H. REV. STAT. § 168-B:13 (1993).

[27] *Id.* § 168-B:14.

[28] *Id.* § 168-B:15.

[29] LA. REV. STAT. ANN. § 9:128 (West 1994). For a discussion of the American Fertility Society and the American College of Obstetricians and Gynecologists standards, *see e.g.*, Jean Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 669-73 (1991).

[30] LA. REV. STAT. ANN. §§ 9:126, 9:127, 9:130 (West 1994).

[31] VA. CODE ANN. § 32.1-45.3 (Michie 1995).

[32] *Id.* § 54.1-2971.1.

[33] *See Federal Panel Urges U.S. to Drop Its Ban on Financing of Human Embryo Research*, N.Y. TIMES, Sept. 28, 1994, at B7; John Schwartz, *Panel Backs Funding of Embryo Research*, WASH. POST., Sept. 28, 1994, at A1.

[34] In addition to limits on fetal experimentation listed in Table 3, a number of states also limit experimentation on fetuses that have been, or are meant to be, aborted. While these laws may also impinge on the use of reproductive technologies, they are less likely to do so, since by definition they only apply to research associated with a decision to terminate a fetus. The following state laws prohibit research on nonviable aborted fetuses unless otherwise noted: ARIZ. REV. STAT. ANN. § 36-3202 (1995) (research permitted to diagnose condition in mother or fetus); IND. CODE ANN. § 16-34-2-6 (West 1995) (pathological examinations allowed); LA. REV. STAT. ANN. § 40:1299.35.13 (West 1995); N.D. CENT. CODE § 14-02.2-01(2) (1995); OHIO REV. CODE ANN. § 2919.14 (Baldwin 1995) (autopsies allowed); OKLA. STAT. tit. 63, § 1-735 (1995); S.D. CODIFIED LAWS ANN. § 34-23A-17 (1995). The following states prohibit research where an abortion is planned: FLA. STAT. ch. 390.001 (1994); MASS. ANN. LAWS ch. 112, § 12J (West 1995); OKLA. STAT. tit. 63, § 1-735 (1995). The following states require consent from the mother for research on nonviable aborted fetuses: ARK. CODE. ANN. § 20-17-802(b)(2) (Michie 1994); MASS. ANN. LAWS ch. 112, § 12J (West 1995); 18 PA. CONS. STAT. § 3216(B)(1) (1996); R.I. GEN. LAWS § 11-54-1(d) (1994); TENN. CODE ANN. § 39-15-208 (1995). Additionally, the following state laws prohibit research specifically on aborted fetuses born alive: ARK. STAT. ANN. § 20-17-802(b)(1) (Michie 1994); CAL. HEALTH & SAFETY CODE § 25956 (repealed 1995) (research on "fetal remains"— "not lifeless product of conception"—allowed, otherwise research on an "aborted product of human conception" prohibited); FLA. STAT. ch. 390.001 (1994); NEB. REV. STAT. § 28-342 (1994) (applies to "any live or viable aborted child"; diagnostic or remedial procedures allowed where the purpose is to preserve the life or health of the aborted child or mother); OKLA. STAT. tit. 63, § 1-735 (1995) (therapeutic research exempted); S.D. CODIFIED LAWS ANN. § 34-23A-17 (1995) ("therapy intended to directly benefit the unborn or newborn child who has been subject to the abortion" is exempted); WYO. STAT. § 35-6-115 (1995) (applies to "any live or viable aborted child"). The laws of the states in Table 3, except Utah, also apply to aborted fetuses born alive. The laws of Illinois, Louisiana, and New Mexico apply to all fetuses.

[35] 794 F.2d 994 (5th Cir. 1986).

[36] *Id.* at 999 (emphasis in original).

[37] 61 F.3d 1493 (10th Cir. 1995).

[38] *Id.* at 1501.

[39] 735 F. Supp. 1361 (N.D. Ill. 1990).

[40] *Id.* at 1366-67 (emphasis in original).

[41] *Id.* at 1377.

[42] For an overview of the general use of reproductive technologies, *see* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES, OTA-BA-358 (1988).

[43] *See, e.g.*, Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (1979) (10% of physicians willing to perform AID on single women); Gerald T. Perkoff, *Artificial Insemination in a Lesbian: A Case Analysis*, 145 ANNALS OF INTERNAL MED. 527 (1985) (professional castigation for physician who treated lesbian couple). However, 10% of the 15,000 to 20,000 yearly AID recipients have been single women. Edward C. Hill, *Obstetrics and Gynecology*, 258 JAMA 2276 (1987).

[44] Mark V. Sauer, Richard J. Paulson & Rogerio A. Lobo, *Reversing the Natural Decline in Human Fertility: An Extended Clinical Trial of Oocyte Donation to Women of Advanced Reproductive Age*, 268 JAMA 1275 (1992) ("Until recently, there has been a general reluctance to apply oocyte and embryo donation to women 40 years of age and above.").

[45] *See supra* section II, note 19.

[46] ARK. CODE ANN. §§ 23-85-137 & 23-86-118 (Michie 1994).

[47] CONN. GEN. STAT. ANN. § 38a-536 (West 1994).

[48] HAW. REV. STAT. §§ 431:10A-116.5 & 432:1-604 (1995) (applicable to insurance plans which provide pregnancy-related benefits).

[49] 215 ILL. COMP. STAT. § 5/356m (1995) (applicable to insurance plans which provide pregnancy-related benefits; also requires coverage for uterine embryo lavage, embryo transfer, artificial insemination, gamete intrafallopian tube transfer, zygote intrafallopian tube transfer, and low tubal ovum transfer).

[50] MD. CODE ANN. INS. §§ 354DD, 470W & 477EE (1994) (applicable to insurance plans which provide pregnancy-related benefits).

[51] TEX. INS. CODE ANN. § 3.51-6(3A) (West 1993) (applicable to insurance plans which provide pregnancy-related benefits).

[52] CAL. HEALTH & SAFETY CODE § 1374.55 (West 1994) (health care service plans); CAL. INS. CODE §§ 10119.6 & 11512.28 (WEST 1994).

[53] MASS. ANN. LAWS chs. 175 § 47H, 176B & 4J (Law. Co-op. 1995) (applicable to insurance plans which provide pregnancy-related benefits).

[54] R.I. GEN. LAWS §§ 27-18-30, 27-19-23 & 27-20-20 (1994) (applicable only to married individuals and insurance plans which provide pregnancy-related benefits).

[55] MONT. CODE ANN. § 33-31-102 (1)(h)(v) (1995) (definitions); *id.* § 33-31-202 (1)(b).

[56] OHIO REV. CODE ANN. § 1742.01(A) (Baldwin 1995) (definitions); *id.* § 1742.03(c)(1)(b).

[57] W. VA. CODE § 33-25A-2(1) (1995) (definitions); *id.* § 33-25A-4(1)(a).

[58] Ralston v. Connecticut Gen. Life Ins. Co., 617 So. 2d 1379, 1381 (Ct. App. La. 1993); *accord* Witcraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785, 787 (Iowa 1988); *see also* Angela R. Holder, *Funding Innovative Treatment*, 57 ALBANY L. REV. 795, 801 (1994).

[59] *Witcraft*, 420 N.W.2d 785.

[60] *Ralston*, 617 So. 2d 1379.

[61] Kinzie v. Physician's Liab. Ins. Co., 750 P.2d 1140 (Ct. App. Okla. 1987).

[62] Zwerin v. Group Health, Inc., 541 N.Y.S.2d 1014 (Civ. Ct. 1989).

[63] *Cf.* Holder, *supra* note 58, at 795 ("An attempt to reconcile [funding of innovative medical treatment] is impossible—the legal questions are as frustrating and confusing as researchers and desperate patients believe them to be. If, as Oscar Wilde wrote, '[c]onsistency is the last refuge of the unimaginative,' insurance companies are being managed by unusually imaginative persons.").

[64] 29 U.S.C. § 1001 *et. seq.*

[65] 29 U.S.C. § 1144(a). This would presumably preempt state laws requiring infertility coverage. *See* 29 U.S.C. § 1144(b)(2)(A) (savings clause) (state insurance regulation applicable except as for deemer clause); 29 U.S.C. § 1144(b)(2)(B) (deemer clause) (employee benefit plans not considered to be insurance for purposes of state regulation).

[66] Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Where discretion is not conferred to the administrator, review is *de novo. Id.*

[67] Holding that IVF was covered: Egbert v. Connecticut Gen. Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990) (Connecticut General's own guidelines describe infertility as an "illness"); Reilly v. Blue Cross & Blue Shield of Wisconsin, 846 F.2d 416 (7th Cir. 1988) (procedure is not experimental). Holding that reproductive technologies were not covered: Thomas v. Truck Drivers & Helpers Local No. 355, 771 F. Supp. 714 (D. Md. 1991) (vasoepididymostomy not covered; plan did not cover infertility treatments). Holding that ERISA preempted state claims: Maciosek v. Blue Cross & Blue Shield of Wisconsin, 930 F.2d 536 (7th Cir. 1991) (IVF not covered; failure to plead ERISA claims); Castro v. New York Life Ins. Co., No. Civ. 89-1054 (D. Ariz. June 4, 1990) (IVF not covered; infertility was pre-existing condition).

[68] 42 U.S.C. § 12111 *et seq.* Discrimination in public accommodations, 42 U.S.C. § 12182(a) (1993), is prohibited in a "professional office of a health care provider, hospital, or other service establishment," *id.* § 12181(7)(F). State hospitals are also covered, *id.* § 12131(1)(b), by a ban on discrimination in services by a public entity, *id.* § 12132. The Rehabilitation Act, 29 U.S.C. § 794 (1993), may also apply to state hospitals that receive federal funding, *id.* § 794(b)(1)(A). The restrictions of the Rehabilitation Act are substantially the same as the ADA. 42 U.S.C. § 12133 (enforcement); *id.* § 12134(b)

(regulations).

[69] 42 U.S.C. § 12102(2); H.R. Rep. No. 485(II), 101st Cong., 2d Sess. at 52 (1990).

[70] It has been argued that the ADA requirements may affirmatively mandate coverage of fertility treatments when any health services are provided by the government. When it was suggested that the Oregon Health Plan drop fertility treatment from its list of services, "[f]ederal attorneys maintain[ed] that not to include some form of treatment would violate the Americans with Disabilities Act. Fertility problems are classified as disabilities under federal law." *Ore. Fertility Funding for Welfare Recipients Called 'Just Insane,'* Seattle Times, April 18, 1994, at B3. *See generally* David Orentlicher, *Rationing and the Americans With Disabilities Act*, 271 JAMA 308 (1994).

[71] Arguable exceptions to coverage under the ADA might include: 1) defining the fertility service as requiring good parenting skills such that the "criteria can be shown to be necessary for the provision of the goods, services, facilities, . . . or accommodations being offered", 42 U.S.C. § 12210(b), or 2) construing the threat to the potential child, *see infra* sections V.A to .B, as a "direct threat to the health or safety of others," 42 U.S.C. § 12182(3).

[72] 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994).

[73] *Cf.* McWright v. Alexander, 982 F.2d 222, 226-27 (7th Cir. 1992) (Rehabilitation Act).

[74] 1995 WL 16777, at *2-3 (E.D. La.).

[75] By comparison, limitations on insurance coverage for HIV+ individuals was determined to violate the ADA, but an exclusion for mental illness has not. Orentlicher, *supra note* 70, at 310. The ADA, of course, does not obligate health care providers to treat all ailments, and past case law regarding the Rehabilitation Act suggests that excluding particular treatments from coverage by a state program is not discrimination if the limitations are applied uniformly. *Id.* at 309 (citing Alexander v. Choate, 469 U.S. 287 (1985)).

[76] *See infra* section V.C.

[77] U.S. Const. amend. XIV, § 1. The Due Process Clause applies to the federal government through the Fifth Amendment, U.S. Const. amend. V.

[78] 381 U.S. 479 (1965).

[79] *Id.* at 484.

[80] *Id.* at 497 (Goldberg, J., concurring) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

[81] *Id.* at 482.

[82] 405 U.S. 438 (1972).

[83] U.S. Const. amend. XIV, § 1.

[84] 405 U.S. at 453 (emphasis in original).

[85] 431 U.S. 678 (1977).

[86] *Id.* at 687.

[87] *Id.* at 684-85 (quoting Roe v. Wade, 410 U.S. 113, 152-53 (1973)) (citations omitted).

[88] *Id.*

[89] 316 U.S. 535 (1942).

[90] *Id.* at 541.

[91] *Id.*

[92] *Eisenstadt*, 405 U.S. at 453.

[93] *Carey*, 431 U.S. at 687.

[94] Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

[95] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

[96] Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[97] 491 U.S. 110 (1989).

[98] *Id.* at 123.

[99] (The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will, thus, cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, the loser stayed with the married woman and the child [as is the situation in the present case] since he happened to be in Los Angeles.).

Id. See also id. at 123 n.3

[100] *Id.* at 145 (Brennan, J., dissenting).

[101] Justice Scalia, in writing the plurality opinion, explains his methodology for examining substantive due process claims in his discussion in footnote 6. *Id.* at 127 n.6. The plurality opinion was joined by four justices, but two (O'Connor and Kennedy) specifically declined to join in footnote 6, *id.* at 132 (O'Connor, J., concurring), leaving the footnote 6 analysis supported only by Rehnquist.

[102] *Id.* at 127 n.6.

[103] *Id.* at 132 (O'Connor, J., concurring).

[104] Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261, 329 (1990) (Brennan, J., dissenting) (quoting *In re* Quinlan, 355 A.2d 647, 655 (N.J. 1976)).

[105] United States v. White, 401 U.S. 745, 756 (1970) (Douglas, J., dissenting).

[106] U.S. Const. amend IV.

[107] Katz v. United States, 389 U.S. 347, 352 (1967).

[108] John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 Va. L. Rev. 405, 406 (1983). As noted by Professor John Robertson, "[f]reedom to have sex without reproduction does not guarantee freedom to have reproduction without sex."

[109] *Griswold*, 381 U.S. at 485.

[110] *Carey*, 431 U.S. at 685.

[111] John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 962 n.70 (1986).

[112] 478 U.S. 186 (1986).

[113] *Id.* at 191.

[114] *Id.* The references to *Carey* are to footnotes 5 and 17, 431 U.S. 678, 688 n.5, 694 n.17 (1977), as further elaborated *infra* in this discussion.

[115] *Carey*, 431 U.S. 678, 688 n.5 (1977) (citations omitted).

[116] *Id.* at 685.

[117] *Griswold*, 381 U.S. at 485.

[118] [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality [altogether,] or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Griswold, 381 U.S. at 499 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)). *Accord* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968).

[119] "Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring).

[120] *Eisenstadt*, 405 U.S. at 447 n.7.

[121] *Id.* at 447.

[122] *Id.* at 448.

(Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease.)

Cf. id. at 451 n.8

[123] *Id.* at 447 n.7; *Carey*, 431 U.S. at 688 n.5.

[124] The question was not decided in *Bowers*. "The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." 478 U.S. at 188 n.2.

[125] Schochet v. State, 580 A.2d 176 (Ct. App. Md. 1990). State v. Poe, 252 S.E.2d 843 (N.C. 1980); *Compare* State v. Pilcher, 242 NW2d 348 (Iowa 1976); People v. Onofre, 415 N.E.2d 936, 940-41 (N.Y. 1980); *with* State v. Santos, 413 A.2d 58, 68 (R.I. 1980); 242 N.W.2d 348, 359 (Iowa 1976); Dixon v. State, 268 N.E.2d 84, 86 (Ind. 1971); Post v. State, 715 P.2d 1105, 1107, 1109 (Okla. Crim. App. 1986);

[126] 603 F. Supp. 960 (E.D. Wash. 1985), *vacated on other grounds*, 782 F.2d 1202 (4th Cir. 1986).

[127] *Id.* at 966-67.

[128] 434 U.S. 374 (1978).

[129] *Id.* at 386.

[130] Singer v. Hara, 522 P.2d 1187 (Ct. App. Wash. 1974) (Petition for rehearing denied July 18, 1974. Review denied by Supreme Court of Washington October 10, 1974.)

[131] *Id.* at 1195.

[132] The right for two married people to procreate is not contested.

[T]he Supreme Court has recognized a married couple's right to procreate in language broad enough to encompass coital, and most noncoital, forms of reproduction. In *Meyer v. Nebraska*, for example, the Court stated that constitutional liberty included the right of an individual 'to marry, establish a home and bring up children.'

Robertson, *Embryos, supra* note 111, at 958. In striking down a mandatory sterilization law for habitual criminals in *Skinner v. Oklahoma*, the Court noted that the law interfered with marriage and procreation, which were among 'the basic civil rights of man.' In *Stanley v. Illinois* the Court observed that '[t]he rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'' The Court has noted [in *LaFleur*] that 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Id.*

[133] *Skinner*, 316 U.S. at 541 (emphasis added).

[134] 414 U.S. 632 (1974).

[135] *Id.* at 640 (emphasis added).

[136] *Griswold*, 381 U.S. at 486 (emphasis added).

[137] *Eisenstadt*, 405 U.S. at 453.

[138] *Id.* at 447.

[139] *Id.* at 447 n.7.

[140] *Id.* at 449.

[141] *Id.* at 453.

[142] *Carey*, 431 U.S. 686.

[143] *Id.* at 686-87.

[144] *Id.* at 687 (emphasis added).

[145] Section IV.A.3., *supra*, deals with the question of whether the marital unit is a necessary basis of substantive due process rights in procreation. As it is generally not contested that a number of cases imply a "positive right" for married persons to procreate, *see* Robertson, *Embryos, supra* 111 note, at 958.

The discussion in the present section concentrates on single parents.

[146] This should not be confused with the affirmative obligation of the government to provide assistance. Rather, the question at hand is simply whether there is a protected privacy interest in becoming pregnant at all.

[147] *See, e.g.*, Ann M. Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487 (1991).

[148] The discussion in sections IV.A.1. & 2. focused primarily on whether the right to natural sexual procreation extends to new reproductive technologies. The present discussion of the "positive" construction of procreative rights concerns whether there is a right to affirmatively procreate at all, by coitus or by any reproductive technology.

[149] John A. Robertson, *Procreative Liberty, supra* note 108, at 416. John A. Robertson described this argument in that "[d]enying a couple the freedom to avoid procreation imposes on the woman the physical burdens of bearing and giving birth, while denying them the freedom to procreate prevents them from having a certain experience." Professor Robertson describes this argument in more detail:

> The argument for a single person's right to procreate sexually must be distinguished from the argument for the right of a single person to have sex with consenting others and the right to avoid procreation. Recognition of the unmarried person's right to avoid procreation through access to birth control and abortion does not necessarily imply either a right to procreate or a right to have sex with consenting others. . . . The single person's right to use contraception and to continue a pregnancy once begun does not necessarily entail a right to conceive in the first place. Preventing conception and pregnancy by requiring contraception and abortion interferes with bodily integrity in a way that preventing conception in the first place—by preventing access to the needed means—does not.
>
> John A. Robertson, *Embryos, supra* note 111, at 962 n.70, 963.

[150] Massie, *supra* note 147, at 502. Professor Ann M. Massie takes this position, arguing that cases such as *Eisenstadt* only "concern protection of the right *not* to procreate, rather than of any rights to conceive, bear, or nurture children."

[151] Robertson, *Procreative Liberty, supra* note 108, at 418-20.

[152] *See, e.g.*, Bowers v. Hardwick, 478 U.S. at 195.

[153] *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

[154] If a narrower ground were available, it would be expected that the Court would reach a decision on that ground. "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Philadelphia Steamship Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885)).

[155] Robertson, *Procreative Liberty, supra* note 108, at 418.

[156] 112 S. Ct. 2791 (1992).

[157] The recognition of "marriage, procreation and contraception" in the dissent, *see infra* note, presumably refers to the list of aspects of due process repeatedly cited in the abortion cases, Harris v. McRae, 448 U.S. 297, 312 n.18 (1980); Roe v. Wade, 410 U.S. 113, 152 (1973), which cite Skinner v. Oklahoma, 316 U.S. 535 (1942), for the proposition that there is a right to procreation. *Skinner* was a case about sterilization and, hence, the positive right to procreation.

[158] "Unlike marriage, procreation and contraception, abortion 'involves the purposeful termination of potential life.'" *Casey*, 112 S. Ct. at 2859 (Rehnquist, J., dissenting).

[159] 491 U.S. at 121.

[160] 478 U.S. at 190 (emphasis added). Notably, the decision cites and uses language from *Carey*, which borrows the "bear or beget" phrase from *Eisenstadt*. In adapting the language from *Eisenstadt*, the phrase in italics replaced the word "whether" with "whether or not", implying a positive right.

[161] *Carey*, 431 U.S. at 685 (emphasis added).

[162] *Skinner*, 316 U.S. at 541.

[163] *Id.*

[164] 414 U.S. 632 (1974).

[165] *Id.* at 640 (citations omitted).

[166] *Compare* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), a case where a divorced couple disagreed as to the disposition of their frozen *in vitro* fertilized embryos. The court decided upon a complex balancing approach in light of the positive and negative aspects of procreative liberty. It stated that "whatever its ultimate [state and federal] constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation." *Id.* at 601.

[167] 735 F. Supp. 1361 (N.D. Ill. 1990).

[168] *Id.* at 1377.

[169] Cameron v. Board of Educ. of the Hillsboro, Ohio, City Sch. Dist., 795 F. Supp. 228, 237 (S.D. Ohio 1991). *Cf.* the case of *In re Baby M.*, where a lower state court upheld a surrogate pregnancy arrangement because it allowed a couple to exercise their right to procreate. 525 A.2d 1128, 1164 (Super. Ct. N.J. 1987). On review, the New Jersey Supreme Court affirmed in part and reversed in part, ultimately holding the surrogacy arrangement null as contrary to public policy. On the point of the right to procreation, the court did acknowledge a positive right to reproduction, in stating that "[t]he right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination." 537 A.2d 1227, 1253 (N.J. 1988). However, that right was not enough to sustain the surrogacy arrangement because introduction of a third party raised questions of custody and the procreative rights of the surrogate mother. *Id.* at 1254.

[170] The interpretation of the marital unit as the ultimate basis of substantive due process rights in procreation is discussed *supra* section IV.A.3.

[171] Massie, *supra* note 147, at 510.

[172] *Michael H.*, 491 U.S. at 122-23 (plurality opinion).

[173] Substantive rights guaranteed by the Due Process Clause are not limited by the literal language of the Constitution nor historical practices. "It is also tempting . . . to suppose that the Due Process Clause protects only those practices defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2805 (1992).

[174] Massie, *supra* note 147, at 510 n.132.

[175] *Michael H.*, 491 U.S. at 127 n.6 (Scalia, J., joined only by Rehnquist, J. in this footnote).

[176] *Id.* at 132 (O'Connor, J., concurring, with whom Kennedy, J. joins) ("I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."); *Id.* at 133 (Stevens, J., concurring in the judgment) ("[E]nduring 'family' relationships may develop in unconventional settings."); *Id.* at 137 (Brennan, J., dissenting, with whom Marshall, J. and Blackmun, J. join) ("[T]he plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decisionmaking."); *Id.* at 162 (White, J., dissenting) ("[W]hatever stigma [of illegitimacy] remains in today's society is far less compelling . . . in this world of divorce and remarriage.").

[177] *Bowers*, 478 U.S. at 191.

[178] Massie, *supra* note 147, at 509 n.127.

[179] *Bowers*, 478 U.S. at 196.

[180] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969).

[181] *Carey*, 431 U.S. at 688-90.

[182] *See* Massie, *supra* note, at 510.

[183] *Cf.* Reed v. Campbell, 476 U.S. 852, 854 (1986) ("[W]e have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct.").

[184] *Carey*, 431 U.S. at 684.

[185] *Id.* at 687.

[186] Robertson, *Procreative Liberty, supra* note 108, at 409-10. *See also* Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, 21 HASTINGS CENTER REP. 5 (1991).

[187] *See* Table 4 *infra* p. 210.

The division of the female reproductive role in gestational surrogacy points up the three discrete aspects of motherhood: genetic, gestational and social. The woman who contributes the egg that becomes the fetus has played the genetic role of motherhood; the gestational aspect is provided by the woman who carries the fetus to term and gives birth to the child; and the woman who ultimately raises the child and assumes the responsibilities of parenthood is the child's social mother.

Johnson v. Calvert, 851 P.2d 776, 791 (Cal. 1993).

[188] The genetic mother, denied unfettered control of frozen embryos, "would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing." Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

[189] *Id.*

[190] As described *supra* section IV.A.4.

[191] 842 S.W.2d at 602.

[192] *Id.* at 603.

[193] Citing lack of fetal protection for wrongful death and homicide and the adoption of the trimester scheme for abortion. *See id.* at 602.

[194] "[T]he rule does not contemplate the creation of an automatic veto." *Id.* at 604.

[195] The preference of both genetic parents are first examined. If they conflict or are unascertainable, prior agreement is used. Absent a prior agreement, relative interests of the parties are examined, with a preference toward the party wishing to avoid procreation, assuming that the other party can reasonably expect to achieve parenthood by other means. *Id.*

[196] 851 P.2d 776 (Cal. 1993).

[197] *Compare* Soos v. Superior Court, 897 P.2d 1356 (Ct. App. Ariz. 1994), holding unconstitutional, on equal protection grounds, a statute that classified the gestational mother as the legal mother. While fathers have an opportunity to prove paternity by genetic testing, this statute prevented genetic mothers from doing so. *But see In re* Moschetta, 30 Cal. Rptr. 2d 893, 896 n.8 (Ct. App. 1994)("[I]n cases directly involving human reproduction, individuals of different sexes may be distinguished on the basis of different reproductive roles.").

[198] 851 P.2d at 787.

[199] *Id.* at 786.

[200] *In re* Moschetta, 30 Cal. Rptr. 2d at 900.

[201] *Id.*

[202] 608 N.Y.S.2d 477 (App. Div. 1994).

[203] 851 P.2d at 782 n.10 ("Thus, under our analysis, in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.").

[204] 608 N.Y.S.2d at 480.

[205] 644 N.E.2d 760 (Ct. C.P. Ohio 1994).

[206] *Id.* at 764.

[207] [T]here is abundant precedent for using the genetics test for identifying a natural parent. For the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent. The genetic parent can guide

the child from experience through the strengths and weaknesses of a common ancestry of genetic traits. Because that test has served so well, it should remain the primary test for determining the natural parent, or parents, in nongenetic-providing surrogacy cases.

Id. at 766.

[208] If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents. By formulating the law in this manner, both tests, genetics and birth, are used in determining parentage. However, they are no longer equal. The birth test becomes subordinate and secondary to genetics.

Id. at 765.

[209] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); *Michael H.*, 491 U.S. at 133 (Stevens, J., concurring) ("[E]nduring 'family' relationships may develop in unconventional settings.").

[210] 491 U.S. 110 (1989).

[211] *Id.* at 123.

[212] *Id.* at 123 (quoting *Griswold*, 381 U.S. at 501).

[213] 114 S. Ct. 1 (1993) (denial of stay).

[214] *Id.* "Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education."

[215] *In re* Baby Girl Clausen, 502 N.W.2d 649, 663-64 (Mich. 1993).

[216] Robertson, *Procreative Liberty, supra* note 108, at 409-10.

[217] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[218] *See, e.g.*, D.C. CODE Ann. § 16-402 (1994) (surrogacy arrangements prohibited and void); N.D. CENT. CODE § 14-18-05 (1995) (surrogacy arrangements unenforceable); VA. CODE ANN. § 20-159 (Michie 1995) (surrogacy arrangement allowed when approved by court); FLA. STAT. ANN. § 742.15 (West 1994) (gestational surrogacy allowed and enforceable).

[219] *See, e.g.*, Marjorie Schultz, *Reproductive Technology and Intention-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WISC. L. REV. 297 (1990); CARMEN SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUDIES 219 (1994); Susan Ferguson, *Surrogacy Contracts in the 1990s: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903 (1995); EXPECTING TROUBLE: SURROGACY, FETAL ABUSE, & NEW REPRODUCTIVE TECHNOLOGIES (Patricia Boling, ed. 1995). *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

[220] [The state] has a legitimate interest in preventing the mercenary trafficking in babies, i.e., rent-a-womb services and the buying and selling of eggs. It also has a legitimate concern to avoid the emotional disruption in the gestational mother likely to result from taking the child from her (*e.g.*, Mary Beth Whitehead), as well as the child's denigration as an object of profit. These constitute compelling reasons in principle why regulation or prohibition in this area may be appropriate.

Soos, 897 P.2d at 1361 (Gerber, J., concurring).

[221] DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989).

[222] 432 U.S. 464 (1977).

[223] 410 U.S. 113 (1973).

[224] *Maher*, 432 U.S. at 475.

[225] 448 U.S. 297 (1980).

[226] *Id.* at 317-18.

[227] *Cf. Maher*, 432 U.S. at 474.

[228] U.S. CONST. amend. XIV, § 1. This applies to the federal government through the Fifth Amendment, U.S. CONST. amend. V. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (The Supreme "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

[229] As discussed in section IV.C.1.

[230] As discussed in section IV.C.2.

[231] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[232] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[233] *Id.*

[234] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[235] Mills v. Habluetzel, 456 U.S. 91 (1982).

[236] There may also be a disparate impact upon women. Reproductive dysfunction appears more common in women, THE MERCK MANUAL 1768 (16th ed. 1992), but male or interactive factors in infertility account for at least 20% of cases, Shane, *supra* note 1, at 21. It also has been argued that restrictions on certain types of arrangements may be discriminatory against men. For example, prohibition of surrogacy arrangements may disproportionately prevent men from exercising their procreative potential. Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 680 n.67 (1985).

[237] Geduldig v. Aiello, 417 U.S. 484 (1974). *But see* Bray v. Alexander Women's Clinic, 113 S. Ct. 753, 789 (1993) (Stevens, J., dissenting) ("*Geduldig*, of course, did not purport to establish that, as a matter of logic, a classification based on pregnancy is gender neutral.... Nor should *Geduldig* be understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause."); Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669, 678 (1983) (pregnancy-based classifications are sex discrimination under Title VII in light of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)); Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (reasoning of *Geduldig* does not allow active deprivation of an employment opportunity); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (criticizing *Geduldig*).

[238] *Michael H.*, 491 U.S. at 131 (plurality opinion).

[239] For the legal system to apply heightened scrutiny to a classification not already recognized by case law, a group must have certain characteristics. The Court explained that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The test for heightened scrutiny was outlined as follows:

> To be a "suspect" or "quasi-suspect" class, [a group] must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.
>
> High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990). The Court has been reluctant to acknowledge the existence of new suspect or quasi-suspect classes in recent decades.
>
> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.

Cleburne, 473 U.S. at 441-42. Therefore, the suggestion that a group heretofore not recognized as quasi-suspect be considered as such should been taken with some caution.

[240] *High Tech Gays*, 895 F.2d at 573-74.

[241] Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1994) (using rational basis review to strike down regulation but reserving question of whether homosexuals would qualify as a quasi-suspect class); Buttino v. Federal Bureau of Investigation, 801 F. Supp. 298 (N.D. Cal. 1992); Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992) (assuming rational basis review for determination of qualified immunity); High Tech Gays, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989). *But see* Watkins v. Army, 847 F.2d 1329 (9th Cir. 1988), *vacated and decided on diff't grounds*, 875 F.2d 699 (9th Cir. 1989); Woodward v. Gallagher, 1992 WL 252279 (Fla. Cir. Ct. 1992) (advocating quasi-suspect classification but deciding on different grounds).

[242] Bowen v. Owens, 476 U.S. 340 (1986); *cf.* Califano v. Jobst, 434 U.S. 47 (1977).

[243] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978). Section IV.C.2. shows that when a classification burdens a fundamental interest, it will be subject to heightened scrutiny under equal protection analysis. Whereas the discussion in section IV.C.2. focuses on procreative liberty as a fundamental interest that is burdened, the analysis follows with equal force when an interest such as marriage is burdened. While the Court in *Zablocki* did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny", *id.* at 387, the state cannot constitutionally "interfere directly and substantially with the right to marry", *id.*, without a compelling state interest.

[244] *But see* Quigley, *supra* note 15 ("The level of success achieved by Sauer and colleagues in the women aged 40 years and above receiving donated oocytes (33.7% anticipated live births per transfer) suggests that the success of the procedure is independent of the age of the recipient."); Sauer, *supra* note 44 ("No age-related decline in fertility was demonstrable when oocyte donation was used, with a mean age of 44.3 ± 3.1 years for those successfully conceiving (range, 40 to 52 years). . . . [W]omen of advanced reproductive age may conceive, carry, and give birth to infants with success rates similar to those of their younger counterparts using assisted reproductive methods.").

[245] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

[246] *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (sterilization of feeble minded in state institutions upheld, but this case is not considered good law in light of *Skinner*).

[247] 473 U.S. 432 (1985).

[248] The court followed the analytic framework described in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), which suggested that more exacting judicial scrutiny be exerted where there is discrimination against discrete and insular minorities, because in such situations the political process cannot be expected to cause the repeal of undesirable legislation.

[249] 473 U.S. at 442.

[250] *Id.* at 443-44.

[251] *Id.* at 445.

[252] *Id.* at 445-46.

[253] *See supra* section IV.B.

[254] *See Ore. Fertility Funding for Welfare Recipients Called 'Just Insane'*, SEATTLE TIMES, Apr. 18, 1994.

[255] Dandridge v. Williams, 397 U.S. 471 (1970).

[256] In *Cleburne*, the Court declared that strict scrutiny under the Equal Protection Clause is required "when state laws impinge on personal rights protected by the Constitution." 473 U.S. at 440. *See also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Police Dep't. of Chicago v. Mosley, 408 U.S. 92 (1972) (right to demonstrate).

[257] 394 U.S. 618 (1969).

[258] *Id.* at 634.

[259] Reynolds v. Simms, 377 U.S. 533 (1964). The level of constitutional significance to which the fundamental interest must rise to obtain strict scrutiny under the Equal Protection Clause is the subject of some controversy on the Court. If a classification deprives a group of fundamental rights under the constitution, it is simply a question of striking down the law as violative of that provision in the constitution or under the Due Process Clause. However, the Equal Protection Clause grants strict or heightened scrutiny analysis to classifications that burden fundamental interests which may not, by themselves, operate to obligate the government to respect such a

right. For example, there is no constitutional right to an education, but when a classification unequally deprives that fundamental interest, it was subject to heightened scrutiny. Plyler v. Doe, 457 U.S. 202 (1982). *But see* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), which argued that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel [that was recognized in *Shapiro*]. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." However, *Rodriguez* has been characterized, in light of *Plyler*, as "a constitutional relic [which is] as doctrine . . . irrelevant." Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 191.

[260] Such a penalty could hypothetically be, for example, the denial of *all* public welfare assistance to an individual who decides to use assisted reproductive technologies. This is the hypothetical example in *Maher*, 432 U.S. at 474, regarding the right to abortion, that the court describes as analogous to *Shapiro* in the imposition of a penalty on a fundamental interest.

[261] Both a prohibition for a particular group, or a "direct and substantial" barrier, *see supra* note 243, at 387, would constitute a restriction for purposes of this discussion.

[262] *Id.*

[263] *See, e.g., id.* at 391-92. Justice Stewart, concurring, disagreed with the majority's approach of invalidating a restriction on marriage because it unequally impinged on a fundamental interest. Instead, he suggested that the substantive due process right to marriage was unconstitutionally impinged. He argued that the Court misunderstood the issue presented:

> [The Court] misconceive[s] the meaning of that constitutional guarantee [of equal protection]. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications. . . . Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. . . . The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom.
>
> *Id.*

[264] *See, e.g., Kramer,* 395 U.S. 621 (1969) (voting); Plyler v. Doe, 457 U.S. 202 (1982) (education).

[265] *Compare Casey*, 112 S. Ct. 2791, 2820 (1992) (substantive due process right to abortion required strict scrutiny for regulations that were "undue burdens") *with Zablocki*, 434 U.S. 374, 387 (1978) (equal protection issue regarding fundamental interest in marriage required strict scrutiny for classifications that were "direct and substantial" interferences).

[266] This, of course, may be a fiction for some individuals who cannot afford private fertility treatment. However, for purposes of constitutional analysis, that does not rise to the level of a burden on a fundamental interest. *Maher*, 432 U.S. at 474.

[267] *Cf. supra* section IV.B.

[268] *Eisenstadt*, 405 U.S. at 453 n.10 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). Unlike the fundamental interests recognized in the areas of voting and education, where the affirmative provision by government requires equal distribution except when contrary to a compelling state interest, voting and education largely serve their purposes by government sponsored participation.

[269] *See supra* section IV.

[270] *See* ROBERT H. BLANK, REGULATING REPRODUCTION 62-65 (1990); GILLIAN DOUGLAS, LAW, FERTILITY & REPRODUCTION 113-16 (1991) (consumer protection concerns).

[271] *See supra* section I.

[272] The terminology for the conceptus varies during development. A zygote is the one-celled entity after fertilization. After cell division, it is referred to as a pre-embryo until about 14 days after fertilization. After that, it is referred to as an embryo An embryo is not a fetus until several weeks later. *See, e.g.,* Davis v. Davis, 842 S.W.2d 588, 592-94 (Tenn. 1992), for a discussion of the different terms and their possible legal relevance. For purposes of the present discussion, however, the asserted fetal rights regard the state's interest in protecting the conceptus from the moment of fertilization.

[273] *Cf.* Sherman Elias, *Social Policy Considerations in Noncoital Reproduction*, 255 JAMA 62 (1986) (Table 1) (comparing the interest in protecting the embryo in a variety of assisted reproductive techniques).

[274] *See Roe*, 410 U.S. 113 (1973); *Casey*, 112 S. Ct. 2791 (1992).

[275] *Cf. Roe,* 410 U.S. at 158 (the unborn are not "person[s]" for purposes of the Fourteenth Amendment).

[276] "[T]he concept of viability, as we noted in *Roe,* is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Casey,* 112 S.Ct. at 2816.

[277] *Id.* at 2817.

[278] When law, ethical commentary, and the reports of official or professional advisory bodies are consulted, there is a wide consensus that the preembryo has a special moral status but not a status equivalent to that of a person. The U.S. Ethics Advisory Board, for example, unanimously agreed in 1979 that 'the human preembryo is entitled to profound respect, but this respect does not necessarily encompass the full legal and moral rights attributed to a person.'

John A. Robertson, *Legal and Ethical Issues Arising with Preimplantation Human Embryos*, 116 ARCHIVES OF PATHOLOGY & LABORATORY MED. 430 (1992).

[279] But some restrictions can be constitutional. "As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right." *Casey,* 112 S. Ct. at 2818.

[280] *Id.* at 2818.

[281] *Id.* at 2820.

[282] Lifchez v. Hartigan, 735 F. Supp. 1361, 1376 (N.D. Ill. 1990).

[283] *Roe*, 410 U.S. at 153.

[284] *Id.*

[285] As noted above, the term "fetus" in this discussion is used loosely to encompass not only fetuses but also zygotes, preembryos and embryos.

[286] Fertility interventions in many instances have a lower rate of pregnancy than coitus. On one end of the spectrum is artificial insemination, which with respect to the likelihood of fertilization or successful implantation, is indistinguishable from coitus. On the other end are technologies such as ZIFT and embryo transfer, which subject the embryo to a high risk of loss. *See supra* section I.

[287] A. Brian Little, *There's Many a Slip 'Twixt Implantation and the Crib*, 319 NEW ENG. J. MED. 241 (1988); Allen J. Wilcox et al., *Incidence of Early Loss of Pregnancy*, 319 NEW ENG. J. MED. 189 (1988).

[288] *See* Hill, *supra* note 43 (Vatican considers artificial insemination and extracorporeal fertilization "morally illicit").

[289] *Bowers*, 478 U.S. at 196 (moral sentiments against homosexuality are a rational basis for anti-sodomy laws).

[290] The government, in U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528 (1973), abandoned its argument of morality as a state interest as a result of the district court's conclusion that "'interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions.' Indeed, citing this Court's decisions in Griswold v. Connecticut, Stanley v. Georgia, and Eisenstadt v. Baird, the district court observed that it was doubtful at best, whether Congress, 'in the name of morality,' could 'infringe the rights to privacy and freedom of association in the home.'" *Id.* at 536 n.7 (citations omitted).

[291] George Huggins & Anne Wentz, *Obstetrics and Gynecology*, 265 JAMA 3139, 3140 (1991) (no evidence of increased chromosomal or congenital abnormalities).

[292] *See, e.g., Report of National Institute of Child Health and Human Development Workshop on Chorionic Villus Sampling and Limb and Other Defects*, 169 AM. J. OBSTETRICS AND GYNECOLOGY 1 (1992).

[293] Doe v. Doe, 668 N.E.2d 1160 (App. Ct. Ill.). *Accord In re* A.C., 573 A.2d 1235 (D.C. Ct. App. 1990).

[294] "Throughout this opinion we have stressed that the patient's wishes, once they are ascertained, must be followed in 'virtually all cases' unless there are 'truly extraordinary or compelling reasons to override them.' Indeed, some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a cesarean section, against that person's will." *In re A.C.*, 573 A.2d at 1252.

[295] Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981).

[296] *Id.* at 460 (Hill, J., concurring); *id.* at 461 (Smith, J., concurring).

[297] *See* CAL. PENAL CODE § 270 (West 1994).

[298] *See* CAL. PENAL CODE § 187 (WEST 1988); 720 ILL. COMP. STAT. Ann. § 5/9.1-9.3 (West 1980); IOWA CODE ANN. § 707.7 (WEST 1979); MISS. CODE ANN. § 97-3-37 (1973); N.H. REV. STAT. ANN. § 585:13 (1986); OKLA. STAT. ANN. tit. 21 § 713 (West 1983); UTAH CODE ANN. § 76-5-201 (1992); WASH. REV. CODE ANN. § 9A.32.060 (WEST 1988); WISC. STAT. ANN. § 940.04 (WEST 1982).

[299] *See, e.g.*, Johnson v. Florida, 602 So.2d 1288 (Fla. 1992) (no drug delivery; rule of lenity); Kentucky v. Welch, 864 S.W.2d 280 (Ky. 1993) (no child abuse; legislative intent); Ohio v. Gray, 584 N.E.2d 710 (Ohio 1991) (no child endangerment; legislative intent); Collins v. Texas, 890 S.W.2d 893 (Ct. App. Tex. 1994) (no reckless injury to child; inadequate notice in law); State v. Luster, 419 S.E.2d 32 (Ct. App. Ga. 1992) (no drug delivery; plain meaning of statute and rule of lenity); Michigan v. Hardy, 469 N.W.2d 50 (Ct. App. Mich. 1991) (no drug delivery; legislative intent). *But see* Whitner v. State of South Carolina, 1996 S.C. LEXIS 120 (S.C. 1996) (Scope of child abuse and endangerment statute includes viable fetuses.)

[300] RESTATEMENT (SECOND) OF TORTS § 869(1) & cmt. a (1989); PROSSER & KEETON, THE LAW OF TORTS § 55 at 368 (5th ed. 1984).

[301] Parental immunity is disapproved in RESTATEMENT (SECOND) OF TORTS § 895G(1) (1989) ("A parent or child is not immune from tort liability to the other solely by reason of that relationship."). A "substantial minority of jurisdictions" follow this rule, and the abrogation of parental immunity is "a clear and accelerating trend." *Id.* cmt. j.

[302] *Compare* Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) (no cause of action against mother for prenatal torts against fetus) *with* Bonte v. Bonte, 616 A.2d 464 (N.H. 1992) (cause of action exists against mother to same extent it does against third parties) *and* Grodin v. Grodin, 301 N.W.2d 869 (Ct. App. Mich. 1980) (same).

[303] *Stallman*, 531 N.E.2d at 360.

[304] *Id.*

[305] The importance of the state interest in the fetus may also vary with other factors, such as the degree of certainty with which injury may occur. For example, if assisted reproductive technologies were to guarantee the birth of physically impaired children, the interest might be considered more compelling.

Small risks of fetal injury that could lead to deformities at birth have been determined not to outweigh the right to procreate. In Lifchez v. Hartman, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990), the "high risk" to the fetus from embryo transfer was not sufficient to outweigh the right to procreate using this means. Of course, the primary nature of the risk with embryo transfer is non-viability of the fetus, *see supra* section IV.A.1., not an injury that will be imposed upon a live birth. However, chorionic villus sampling, which involves "snip[ping] off some of [the fetus' surrounding tissue" and which may be related to limb deformities in a small number of cases, *Report*, *supra* note 292, was also protected by the *Lifchez* court, even if the parents were not determined to abort the fetus.

Similarly, states that only have partially abrogated parental immunity recognize the degree and nature of the risk to which a parent subjects his or her child is determinative of availability of the immunity. RESTATEMENT (SECOND) OF TORTS § 895G & cmt. e (1989) ("The exception is applied equally to conduct that is not intended to cause bodily harm but proceeds in conscious and deliberate disregard of a high degree of risk of it and is called by the courts 'willful,' 'wanton' or 'reckless' misconduct.").

This argument is taken even further by Suzanne Sangre, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309, 404-06 (1993). She asserts there is no state interest at all in preventing the birth of injured children in the context of vertical HIV transmission from mother to child. Comparing restraints on childbirth by HIV+ women to execution of sick children, *id.* at 405, she states that restraints on such "pregnancies cannot be said to fulfill the state interest in protecting fetal life because such statutes promote fetal destruction or prevent the possibility that a fetus will come to life at all," *id.* at 406.

[306] *See supra* section IV.A.

[307] *See supra* section IV.C.2.b.

[308] Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 93-94 (1984).

[309] *See Skinner*, 316 U.S. 535 (1942).

[310] An additional problem would be how to define a "defective gene." With the progression of genetic research and gene mapping, more and more diseases have been associated with a genetic basis. Individuals with breast cancer or heart disease may be able to partly blame genetics, but for the state to intervene in choices regarding whether such individuals should exist illustrates the slippery slope associated with a state interest in eliminating genetic defects.

[311] *But cf.* laws against incest and consanguineous marriages, which have often been justified on grounds of adverse genetic outcome of offspring. Such laws, however, are different than prohibiting a particular genetic carrier from procreating, either naturally or artificially, because they does not place an absolute bar on an individual. And because of their limited scope (in comparison to the size of the group of potential mates) and uniform application, they may not even rise to the level of a burden on a fundamental interest.

[312] *Skinner*, 316 U.S. at 541.

[313] *Compare* Hegyes v. Unjian Enters., 234 Cal. App. 3d 1103, 1122 (1991) ("Only a very small number of courts have permitted recovery for injuries sustained as a result of preconception conduct."); Enright v. Eli Lily & Co., 570 N.E.2d 198 (N.Y. 1991) (no duty); Catherwood v. American Sterilizer, 498 N.Y.S.2d 703 (1986) (no duty to protect the potentiality of life); Albala v. City of New York, 429 N.E.2d 786 (N.Y. 1981) (no duty); McAuley v. Wills, 303 S.E.2d 258 (Ga. 1983) (no duty to unconceived where injuries are too remote); *with* Lough v. Rolla Women's Clinic, 866 S.W.2d 851, 853 (Mo. 1993).

("Most jurisdictions that have addressed the question have permitted preconception tort actions."); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977) (duty arises out of special relationship between doctor and mother); Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (construing Missouri law); Jorgensen v. Meade Johnson Lab., 483 F.2d 237 (10th Cir. 1973) (strict products liability) (construing Oklahoma law); Monusko v. Postle, 437 N.W.2d 367 (Ct. App. Mich. 1989). It is important to note that jurisdictions that have recognized pre-conception torts have not applied them against parents, nor is there liability to third parties for pre-conception torts when there is no live birth. These distinctions distinguish the policy reasons that pre-conception torts may be recognized from the state interest in regulating use of reproductive technologies by the parents themselves, who have not been found liable for pre-conception torts.

[314] International Union v. Johnson Controls, 499 U.S. 187, 204 (1991).

[315] *See supra* section IV.A.2.

[316] *Cf. Roe* 410 U.S. 113 (1973).

[317] *See supra* section II.

[318] "The majority of jurisdictions considering the question have refused to recognize wrongful life claims. *See generally* 83 A.L.R.3d 15." Proffitt v. Bartolo, 412 N.W.2d 232, 235, 240 (Ct. App. Mich. 1987).

[319] This should be distinguished from "wrongful birth" claims, which are nearly uniformly recognized. *Id.* at 236.

The term 'wrongful birth' is a shorthand name given to actions brought by the parents of a child born with severe defects against a physician (or other responsible party) who negligently fails to inform them in a timely fashion of the risk that the mother will give birth to such a child, effectively precluding an informed decision as to whether the pregnancy should be avoided or terminated. A 'wrongful life' claim, on the other hand, is brought on behalf of a child with birth defects who claims that, but for the negligent advice to the parents, the child would not have been born.

Id. at 235.

[320] Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

[321] Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967).

[322] *Proffitt*, 412 N.W.2d at 240.

[323] Smith v. Cote, 513 A.2d 341, 353 (N.H. 1986).

[324] Procanik v. Cillo, 478 A.2d 755 (N.J. 1984).

[325] Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983).

[326] Turpin v. Sortini, 643 P.2d 954 (Cal. 1982). An earlier California decision went so far as to suggest that parents would be liable for deciding to procreate when it was known that a child would be born with a physical impairment. "If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born . . . we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring." Curlender v. Bio-Science Labs, 106 Cal. App. 3d 811, 829 (1980). This cause of action against the parents was later abolished by the California legislature.

CAL. CIVIL CODE § 43.6.

[327] Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988).

[328] *Id.* at 1211.

[329] "Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. . . . Finally, we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life. . . ." Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 280, 282 (1990).

[330] Suggested classifications based on family outcome include marital status, marital stability, wealth, psychiatric history, drug use and the like. These issues may raise traditional equal protection issues, most of which require a rational basis for legislation, *see supra* section IV.C.1., as well as heightened scrutiny under analysis set forth in *supra* sections IV.A. & C.2.

Alexander Capron argues that wealth and social status should be decisive in reproductive technology access. He says that a "goal of public policy in this field should be to protect the social and financial well-being of the children produced. To achieve this, explicit rules may be needed concerning the financial and other obligations of those who use the new techniques." Capron, *supra* note 17, at 693-94.

This position finds general support from Bartha Knoppers and Sonia LeBris: "[A]ssisted conception raises questions of public order and good morals. For these reasons, few countries would guarantee universal accessibility. Most countries impose special restrictions based on civil status, or on certain medical criteria, with the aim of protecting the best interests of the child." Bartha Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 346 (1991) (citing, in part, n.55)

[331] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[332] Compos v. McKeithen, 341 F. Supp 264 (E.D. La. 1972).

[333] McLaughlin v. Pernsley, 693 F. Supp. 318, 324 (E.D. Penn. 1988).

[334] Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1206 (5th Cir. 1977).

[335] *Id.*

[336] *See supra* section IV.A.

[337] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972).

[338] Reed v. Campbell, 476 U.S. 852, 854-55 & n.5 (1986) (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

[339] Bowen v. Flaherty, 483 U.S. 587, 600-01 (1987) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

[340] *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

[341] "That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect are to 'intrude on choices concerning family living arrangements.'" *Bowen*, 483 U.S. at 601-02 (quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977)).

[342] Lehr v. Robertson, 463 U.S. 248, 257 (1983).

[343] Michael H. v. Gerald D., 491 U.S. 110, 129 n.7, 130 (1989).

[344] Califano v. Jobst, 434 U.S. 47, 54 n.11 (1977) (termination of Social Security benefits when child marries is constitutional).

[345] Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (holding a housing ordinance unconstitutional).

[346] *Michael H.*, 491 U.S. at 124.

[347] Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (two-parent notification in abortion for minors, without judicial bypass, is unconstitutional).

[348] *See supra* p. 225.

[349] *See supra* p. 226.

[350] *Compare* Note, *Reproductive Technologies, supra* note 29, at 683, 684 & n.80 ("The second assumption, that children raised by one parent rather than two are disadvantaged emotionally, apparently derives more from social bias than from well-grounded psychological theory.") *with* Massie, *supra* note 147, at 511 ("Nonetheless, our current knowledge of child psychology still suggests that the best environment for a child's optimal development is the stable, heterosexual, two-parent family.").

[351] *Moreno*, 413 U.S. at 534.