Embryo Transplant, Parental Conflict, and Reproductive Freedom: A Prospective Analysis of Issues and Arguments Created by Forthcoming Technology

Michele N. Coleman

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol15/iss3/6

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
EMBRYO TRANSPLANT, PARENTAL CONFLICT, AND REPRODUCTIVE FREEDOM: A PROSPECTIVE ANALYSIS OF ISSUES AND ARGUMENTS CREATED BY FORTHCOMING TECHNOLOGY

I. INTRODUCTION

Since 1973, women have had a constitutional right to have an abortion, without regard to the preferences of the parents or spouse. Yet, despite the volume of litigation since 1973, two issues remain insufficiently addressed: the effect of newly developing technologies on the rights of the parties involved, and the possible exis-

1. See Roe v. Wade, 410 U.S. 113 (1973). This right, however, is not absolute; the Supreme Court held that a state may assert a compelling interest in potential life and prevent abortion at "viability," held to be between 24 and 28 weeks of pregnancy. Id. at 160, 163. For a further discussion of the concept of viability, see infra notes 74-109 and accompanying text.

2. See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979)(holding that a state may not require consent of a parent as a condition for an unmarried minor to have an abortion during her first 12 weeks of pregnancy without a hearing); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976)(holding that "[T]he State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy.").

3. The two types of technologies that need to be considered are first, reproductive technologies which are utilized by infertile couples, and second, fetal surgery technology.

The various kinds of reproductive technologies include three types of artificial insemination: 1) AID (artificial insemination by donor), 2) AIH (artificial insemination by husband), and 3) AID/H (artificial insemination by donor and husband). C.R. AUSTIN & R.V. SHORT, ARTIFICIAL CONTROL OF REPRODUCTION 90 (1972). Artificial insemination is the introduction of semen into the vagina in ways others than through the act of coitus (intercourse). STEDMEN, STEDMEN'S MEDICAL DICTIONARY 714 (1982). Artificial insemination proves useful when a man's sperm count is low, since the sperm is collected in as large a quantity as is necessary to fertilize the woman. C.R. AUSTIN & R.V. SHORT, ARTIFICIAL CONTROL OF REPRODUCTION 99 (1972).

In surrogate mothering, another reproductive technology, a woman (the "surrogate") is artificially inseminated with the sperm of the husband of an infertile woman. The surrogate agrees that after the child is born, she will give it up for adoption, or relinquish her parental rights. G. Annas, Contracts To Bear A Child: Compassion or Commercialism?, HASTINGS CENTER REPORT, Apr. 1981, at 23.

Another technology, called in-vitro fertilization, is "a union of sperm and egg outside the bodies of the parents without sexual intercourse." GROBSTEIN, FROM CHANCE TO PURPOSE: AN APPRAISAL OF EXTERNAL HUMAN FERTILIZATION 1 (1981). This technique is helpful for women who are unable to conceive, sometimes as the result of a blocked fallopian tube. C.R. AUSTIN & R.V. SHORT, ARTIFICIAL CONTROL OF REPRODUCTION 99 (1972).

Examples of fetal surgery techniques are fetal blood transfusions, in which blood is in-
tence and status of fathers’ rights.\textsuperscript{4}

These issues are becoming more pressing as new reproductive technologies become a common part of today’s society.\textsuperscript{5} For example, surrogate mothering\textsuperscript{6} raises issues as to which of the parties involved in the collaboration are the legal parents of the resulting infant.\textsuperscript{7} Similarly, embryo transplant,\textsuperscript{8} an increasingly successful technology,\textsuperscript{9} presents novel legal issues regarding the rights of mothers and fathers, thereby forcing a reexamination of the relevant case law.

Consider the following hypothetical situation made possible by reproductive technologies just a few years away: a pregnant woman informs her partner that she desires a first trimester abortion.\textsuperscript{10} Her
partner, on the other hand, prefers that the embryo be transferred to a surrogate because he wishes to raise the resulting child. May the father force such a transplant against the mother's wishes? Under the present law, it appears that he may not force her to transplant the embryo, since she has the right to an abortion without regard to her partner's preferences. The situation does, however, raise two novel issues: 1) what effect, if any, does the possibility of embryo transplant have upon the pregnant woman's rights, and 2) are any father's rights created?

This Note traces the history of a woman's right to an abortion, and examines the new rights, issues, and arguments potentially raised by the parties in the embryo transplant situation. The state's interest in the resolution of the situation is also considered. Finally, observations regarding policy implications underlying the use of embryo transplant are addressed.

II. HISTORY OF THE RIGHT TO AN ABORTION

A mother's right to obtain an abortion was formally declared in Roe v. Wade. In Roe, the Supreme Court held that the decision whether to terminate a pregnancy is a fundamental right encom-
passed by the right of privacy. The Court acknowledged the right of privacy by recognizing earlier cases which declared the existence of such a right, as applied mainly to marriage-related activities.

As with all constitutional rights, however, the Court recognized that a woman's right to an abortion is limited by a state's legitimate compelling interest in potential life. This interest in potential life limits the right to have an abortion to the period of time prior to the existence of fetal viability. Viability is the point in pregnancy when the fetus can sustain life outside the womb, albeit with artificial aid. The Roe Court determined that the point of viability is usually between twenty-four and twenty-eight weeks of pregnancy. Thus, during the first two trimesters of pregnancy, a woman may assert her right to an abortion, while the state may intervene upon viability in the last trimester to prevent abortion.

Later cases held that the right to have an abortion was not to be influenced by the preference of a spouse or parent. For example, in Planned Parenthood v. Danforth, the Supreme Court held that the husband could not veto a woman's decision to abort, since the state itself did not possess such power. Furthermore, the Court held that since the woman is more directly and immediately affected by the pregnancy, and since she physically bears the child, her decision may also be construed as recognizing fundamental rights not specifically enumerated in the Constitution, including the right of privacy. Id.

17. Id. at 152.
18. Id. The Roe Court cites Loving v. Virginia, 388 U.S. 1 (1967), and Skinner v. Oklahoma, 316 U.S. 535 (1942), among other cases, which enunciate privacy rights with respect to marriage and procreation, respectively. Roe, 410 U.S. at 152.
19. Id.
20. Id. at 154-55. See also Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (holding compulsory vaccination is an allowable invasion of a person's freedom "to care for his own body" or freedom "from restraint," since it is essential to the state's compelling interest in the "safety, health, [and] peace . . . of the community" (quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890))).
22. Id. at 160.
23. Id. at 160, 163.
24. Id. at 164. The state may still regulate abortion after the first trimester if it is reasonably related to the preservation and protection of maternal health. For example, regulations involving qualifications of those performing the abortion, or the facilities in which it is performed, are valid. Id. at 163.
27. Id. at 69.
must prevail.\textsuperscript{28} The Supreme Court has recognized that a woman's right to an abortion is the product of two interests: rearing burdens and gestational burdens.\textsuperscript{29} For example, \textit{Roe v. Wade}\textsuperscript{30} recognized the physical and psychological harms of pregnancy.\textsuperscript{31} These are the gestational burdens involved in the nine month carrying of the fetus. Similarly, in denying the father any say over the abortion decision, \textit{Danforth} recognized the mother's physical burden of pregnancy.\textsuperscript{32} In granting the abortion right the \textit{Roe} Court also noted that the stigma of unwed motherhood would significantly increase the rearing burdens by making it more difficult to raise the child from birth.\textsuperscript{33}

Given the foundation of the right to have an abortion, namely, interests in avoiding rearing and gestational burdens, it may be inferred that the case law would not support a woman's right to have an abortion in the absence of those burdens. Embryo transplant removes both burdens. The actual transplant removes the embryo, thereby ending the pregnancy, and the resulting child is raised by the father.\textsuperscript{34} Thus, in the case of embryo transplant, a mother does not seem to have any of the articulated interests discussed in \textit{Roe} remaining by which she may assert her fundamental right to an abortion.\textsuperscript{35}

Yet, the present law does not support the father's right to insist upon the embryo transplant, since there is no acknowledgment that a father has any legally protected interest in the abortion decision.\textsuperscript{36} For example, in \textit{Danforth}, the Court did not recognize the father's interest in child rearing or gene propagation.\textsuperscript{37} Although the Court

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 71.
\item \textsuperscript{29} \textit{See} Blasi, \textit{The Rootless Activism of the Burger Court}, in \textit{The Burger Court: The Counter-Revolution That Wasn't}, 198, 212 (Blasi ed. 1983).
\item \textsuperscript{30} 410 U.S. 113 (1973).
\item \textsuperscript{31} \textit{Id.} at 153.
\item \textsuperscript{32} 428 U.S. at 71 ("Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").
\item \textsuperscript{33} 410 U.S. at 153.
\item \textsuperscript{34} \textit{See supra} text accompanying note 12.
\item \textsuperscript{35} The \textit{Roe} opinion has been criticized for not explicitly relating a woman's burdens to other rights, such as bodily integrity or non subordination to others. \textit{See} Blasi, \textit{supra} note 29, at 212. There are other interests, however, which a woman may assert that are worthy of protection. \textit{See infra} notes 40-48 and accompanying text.
\item \textsuperscript{36} \textit{See} Burt, \textit{The Constitution of the Family}, 1979 \textit{Sup. Ct. Rev.} 329, 394 (criticizing the treatment of the father as a stranger to the fetus).
\item \textsuperscript{37} \textit{Danforth}, 428 U.S. at 71; \textit{See also} Robertson, \textit{supra} note 4, at 955 (Gene propagation is the right to procreate, defined as the right to engage in activities that will result in

\end{itemize}
acknowledged the father's interest in his wife's pregnancy and in the fetus, it noted that the unilateral ability to veto the wife's decision would not foster "mutuality and trust in a marriage." The Court sought to preserve the marital unit rather than to accord fathers a legally recognized interest in the abortion decision.

Applying existing law to the prospective embryo transplant situation yields no reliable conclusions. The mother appears to have been stripped of a basis on which to assert her right to an abortion, and the father appears to possess no legally recognized interest through which to assert his demand for embryo transplant. Accordingly, finding a resolution for this problem requires an inquiry into whether the mother possesses any other interests which would enable her to continue asserting the right to terminate her pregnancy. In addition, a further inquiry must be made into the existence and status of the fathers' rights.

III. ASSERTED RIGHTS OF THE PARTIES

A mother may claim she does have interests other than the avoidance of rearing and gestational burdens, thus enabling her to assert her right to an abortion.

First, there is the right of bodily integrity; namely, the individual right to control the utilization of one's own body. Although this right seems to have been addressed by the Roe Court in its recognition of a woman's gestational burden interest, it may nevertheless be argued that a woman's right to bodily integrity includes not only the right to choose pregnancy or nonpregnancy (the gestational burden interest) but also the right to choose the method by which a woman will relieve herself of pregnancy, whether it be by abortion or by embryo transplant. An embryo transplant performed without a woman's consent would be analogous to the situation where a doctor performs a medical procedure without patient consent. This gives biological descendants).

39. Whether the decision would actually preserve the marital unit is another question. The Court only stated that it did not fail "to appreciate the importance of the marital relationship in our society." Id. at 69.
40. See, e.g., Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)(stating that everyone has the right "to possession and control of his own person"). For a general discussion of the bodily integrity right as applied to women, see Johnsen, The Creation Of Fetal Rights: Conflicts With Women's Constitutional Rights To Liberty, Privacy and Equal Protection, 95 Yale L.J. 599, 614-20 (1986).
41. See Roe, 410 U.S. at 153.
42. See, e.g., Berkey v. Anderson, 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67, 76-77
rise to a cause of action against the doctor. If one may sue a doctor who performs such procedures, then presumably one has the right to refuse to undergo such procedures. This decisional autonomy has been expressed in decisions subsequent to Roe. For Example, the Supreme Court reaffirmed that the right of privacy granted in Roe is grounded in the concept of personal liberty, and includes "an individual's freedom of personal choice in matters of marriage and family life." In Thornburgh v. American College of Obstetricians and Gynecologists, the Court held that the decision to end a pregnancy was basic to individual dignity and autonomy, and within the sphere of individual liberty long recognized by the Court. The argument that a women's choice of abortion should allow the transplanting of the embryo since she is relinquishing it anyway, is not valid in light of the Supreme Court's recognition that a woman has the right of personal choice with regard to her bodily integrity, her decision to start a family, and her decision to end a pregnancy. Thus, a woman may choose whether to undergo embryo transplant or abortion.

Second, a mother may assert that she has a psychological interest in avoiding procreation: the unsupervised representation of her genes in the population. The mother may argue that she will be psychologically burdened by the knowledge that her child exists and is unknown. A woman forced to undergo embryo transplant arguably will feel guilt and ambivalence with respect to her role in the child's life.

A father may contend that neither interest asserted by the mother is sufficient to overcome his interest in the birth of his child, and that his interest in procreation should overcome both her interest in bodily integrity and her psychological interest in avoiding pro-

(1969) (stating an action in battery arises and is successful when a treatment is performed on a patient from whom no consent is obtained).

43. Id. See also Mills v. Rogers, 457 U.S. 291, 294 n.4 (1982) (recognizing that the right to refuse medical treatment emerged from tort concepts of trespass and battery).
45. 106 S. Ct. 2169 (1986).
46. Id. at 2184-85.
47. See also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating there is a right "to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear or beget a child.").
48. See Robertson, supra note 4, at 979. This ambivalence may exist because in the embryo transplant situation, the mother knows the identity of the person rearing the child (the father), and thus, may know the whereabouts of the child. This leads to ambivalence with respect to whether she should contact the child, or in some manner establish a relationship. A mother may also want to assert custody and visitation rights with respect to the child later on.
49. See Robertson, supra note 4, at 955.
creation. Thus he should be allowed to insist upon embryo transplant.

A father seeking to assert a right to procreate is in a unique position because it is the prospective availability of embryo transplant which makes his assertion viable. In addition, since he seeks to have this right recognized as paramount to the mother's interests in avoiding procreation and in bodily integrity, the father seeking embryo transplant creates a competition between mother and father which has not been addressed in the context of procreation. Supreme Court opinions imply that there exists a right to procreate for married couples within the context of the family, where marriage, procreation, and rearing are all spoken of in conjunction with each other. In the embryo transplant situation, procreation and rearing are separated, and neither occurs within the context of marriage. Given the Supreme Court's strong support for traditional two parent families, a single father's right to procreate in the embryo trans-

50. Fathers' rights in this country have been declared with respect to children who already exist. See, e.g., Lehr v. Robertson, 463 U.S. 248 (1983) (holding that an unwed father may acquire protection under the Due Process Clause if he participates in the rearing of his child; where he fails to establish such a relationship, the mere existence of a biological link does not merit constitutional protection); Quillioin v. Walcott, 434 U.S. 246 (1978) (holding that a father of an illegitimate child did not have the authority to prevent the adoption of the child by the mother's husband); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding an unwed father had a 14th Amendment right to a hearing to determine his fitness as a parent before his children were taken away from him). Fathers have successfully sought custody of their children, see id., but a father's right to procreate has yet to be recognized.

51. The right is not phrased as the right to reproduce or to pass on genes to biological descendants, but rather, assumes the existence of children and asserts the right to bring them up or raise them. Robertson, Procreative Liberty and The Control of Conception, Pregnancy, and Childbirth, 69 VA. L. Rev. 405, 415 (1983). The court, however, in In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), pointed out that while the right to procreate may be read into decisions that declare a right to raise children, by logically deducing that one must procreate "so as to bring up children[,"] the right to procreate was firmly declared in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), where the Supreme Court held that the right to procreate was among the "basic civil rights of man." 217 N.J. Super. at 385, 525 A.2d at 1164.

52. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (declaring that the right of liberty included the right "to marry, establish a home and bring up children"). The right to procreate has not been declared or even implied, outside the context of marriage and family. Thus, no right yet exists for single people. See Robertson, supra note 51, at 415.

53. Traditional family encouragement is even seen in some of the right of privacy cases. In Roe, for example, the court spoke of the stigma of unwed motherhood in granting the right to terminate a pregnancy. 410 U.S. at 153. Other cases have tried to emphasize an autonomous approach to privacy rights: for example, see Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring the rights of women, married or single, to use contraception). For an analysis of the vacillations of the Supreme Court between autonomous and familial conceptions of the right of privacy, see Eichbaum, Towards An Autonomy—Based Theory of Constitutional
plant situation might not be recognized, since it would undercut this notion.\textsuperscript{54}

The father can make strong arguments, however, for extending the right to procreate to single people. He may argue that the right to have children should be unaffected by marital status because there is no proof that two parents are essential for healthy childbearing or childrearing.\textsuperscript{55} Accordingly, he may argue that single parents can offer as much love, instill as many values, and convey as much morality as married parents because there are no indications to the contrary. Finally, he may argue that his very desire to rear the child will result in a healthy upbringing for the child.\textsuperscript{56}

IV. LEGAL AND SOCIAL BARRIERS TO THE RIGHT TO UTILIZE EMBRYO TRANSPLANT

Since the father's ultimate goal in seeking the court's recognition of his right to procreate is the performance of embryo transplant, courts considering this issue must consider the issues surrounding the use of embryo transplant technology\textsuperscript{57} as well as


\textsuperscript{54} However, the state's assertion of a compelling interest in life may obviate the need to declare a right to procreate. \textit{See infra} notes 69-72 and accompanying text.

\textsuperscript{55} \textit{See generally} Robertson, \textit{supra} note 51, at 418 (stating "[s]ingle parent families are increasingly common, and there is no evidence showing that a marriage environment, though perhaps desirable, is essential for healthful childrearing").

\textsuperscript{56} Few can argue that desire to have a child has no bearing on the quality of the parent's raising of the child.

\textsuperscript{57} The use of reproductive technologies makes it possible for gay singles or couples to have children. This possibility may be disturbing to courts with conservative outlooks, and thus, might cause them to deny the use of new technologies to single people altogether. In Bowers v. Hardwick, 106 S. Ct. 2841 (1986), the Supreme Court evidenced a conservative approach by upholding a Georgia law prohibiting sodomy. The Court ruled on the statute as applied only to consensual homosexual sodomy, although the statute prohibited all forms of sodomy. The Court noted that the right of privacy was limited to rearing and education, family relationships, marriage, contraception, procreation, and abortion, thus excluding homosexual sodomy. \textit{Id.} at 2843-44. The Court held that proscriptions against homosexual conduct has "ancient roots," \textit{Id.} at 2844, which it was reluctant to disturb. \textit{Id.} at 2846.

Of course, a conservative court may feel differently about a married couple's right to utilize reproductive technologies, because of its traditional support for procreation within the marital unit. Thus, the right to utilize reproductive technologies would be a small extension of the right to procreate. \textit{See supra} notes 51-52. However, questions raised by surrogate mothering and embryo transplant such as certainty of parentage, may be a stumbling block even for married couples. Only slightly more than half of the states have solved the parentage issue for artificial insemination. These are: \textsl{Ala. Code} § 26-17-21 (1986); \textsl{Alaska Stat.} § 25.20.045 (1985); \textsl{Ark. Stat. Ann.} § 61-141-(c) (1971); \textsl{Cal. Civ. Code Ann.} § 7005 (West 1983); \textsl{Colo. Rev. Stat.} § 19-6-106 (1986); \textsl{Conn. Gen. Stat. Ann.} § 45-69(i) (West 1981); \textsl{Fla. Stat. Ann.} § 742.11 (West 1986); \textsl{Ga. Code Ann.} § 19-7-21 (1982); \textsl{Idaho Code} § 39-5405
The accomplishment of embryo transplant raises both legal and social issues because it is a collaborative effort involving three parties: the natural mother, the father, and the surrogate who carries the transferred embryo to term. Thus, their rights must be clearly defined.

First, since embryo transplant requires a surrogate, surrogate contracts must initially be considered valid before a father may insist on embryo transplant. The validity of such contracts is debated because procreation itself. The court limited its holding to the traditional family situation, and thus carried on the strong support for traditional two parent families which the Supreme Court has shown. See supra note 3 and accompanying text. For example, the court recognized the right to reproduce non coitally by acknowledging that "[t]he value and interests underlying the creation of family are the same by whatever means obtained." Id. at 386, 525 A.2d at 1164 (emphasis added). Thus, procreation within the family context was acknowledged, but a general right to procreate was not. This is in line with other cases. See supra notes 51-52 and accompanying text. In addition, in upholding surrogate contracts, the rationale used by the court stressed the family context: "[a] woman and her husband have the right to procreate and rear a family." Id. at 386, 525 A.2d at 1165. Thus, while a surrogate contract may be valid for married couples, it is not clear whether it could be validly used by single persons.

58. Courts would not be compelled to recognize the right to utilize embryo transplant, even if the right to procreate was recognized, since procreation can be accomplished through traditional means. It is unlikely, however, that the right to procreate would be considered without a court's holding as to the use of reproductive technologies. This is because the father is the more likely party to bring the issue before the court. While a mother can bear a child traditionally, and would not need the court's permission to do so, the only way a father can procreate as a single parent (without his partner's consent, or without a female partner at all) is through the use of reproductive technologies. A court would, therefore, consider both procreation and reproductive technology issues together. There is, of course, an exception for an infertile woman or a lesbian, who would need to use a technology, such as artificial insemination, in order to procreate.

59. See Bustillo, supra note 8.

60. See In re Baby M, 217 N.J. Super 313, 525 A.2d 1128 (1987), where the court found that a right to procreate and a right to privacy protected surrogate contracts. That surrogate mothering was a non coital method of procreating and did not present barriers to such contracts since "[i]f it is the reproduction that is protected, then the means of reproduction are also to be protected." Id. at 386, 525 A.2d at 1164. The court, however, encouraged state regulation of such contracts. Id.
cause the contract involves the payment of money in connection with the resulting baby. Many object to this payment, maintaining that babies are not commodities which can be bought and sold on the market. Further fears are generated by the possibility that a father will insist on embryo transplant for the sole purpose of illegally selling the resulting baby to a childless couple. Thus, many parties may be financially enriched by the use of the embryo transplant: the doctors who perform it, the surrogate, and possibly even the father of the child.

Second, since embryo transplant involves three parties, a determination of the resulting child’s parents is crucial. Because the surrogate may want to keep the resulting baby, or the natural mother may change her mind and want it, the legal relationships must be clearly defined.

Social criticisms of embryo transplant may discourage courts from recognizing the right to utilize the technology based upon a public policy rationale. In addition to the potential creation of a baby market, many criticize the use of surrogates because it objectifies women. In a procedure involving a surrogate, such as surrogate mothering or embryo transplant, the woman is “objectified” or treated like a container for the developing embryo: a reproductive machine. Her feelings are accorded no consideration in the process. The surrogate may develop an emotional attachment to the developing embryo. This emotional attachment, however, is accorded no recognition in either of these arrangements. The surrogate must relin-
Thus, it is not clear whether courts will be willing to condone the use of reproductive technologies, especially those involving a surrogate, such as embryo transplant.

V. COMPELLING STATE INTERESTS

Since the mother in the embryo transplant situation will assert a right not to procreate, and the father will assert a right to procreate, the potential effect of a state's compelling interest is enormous. Such interest in fetal potential life may tip the scales and resolve the conflict.

Justice O'Connor's dissenting opinion in *Akron v. Akron Center for Reproductive Health* noted that developments in technology could change conceptions of viability. Thus, it is possible for the state to assert that embryo transplant renders the embryo viable, thereby enabling the state to prevent abortion by performing an embryo transplant. The state's argument would be that embryo transplant is a form of artificial aid which enables the embryo to sustain

---

68. See Annas, supra note 3, at 23; N.Y. Times, Apr. 1, 1987, at 1, col. 6. With all of the objections to the use of technologies involving surrogates, a court may feel uncomfortable declaring a general right to utilize technology involving surrogates. The use of embryo transplant, however, to save an embryo that would otherwise be aborted might be declared an exception to the general prohibition of the use of surrogates.


70. *See supra* text accompanying notes 49-50.

71. For a discussion of the state's compelling interests, see *Roe*, 410 U.S. at 163-64.

72. A state's compelling interest in potential life may tip the scales in favor of the father. *See infra* notes 73-75 and accompanying text. The state's interest in regulating for the sake of maternal health, however, may lead the state to prohibit embryo transplant if it is more dangerous than abortion. *See Roe*, 410 U.S. at 163. The mother's health is of paramount importance, and exceeds the state's interest in the fetus. *See infra* note 109 and accompanying text.

73. 462 U.S. 416 (1983). Justice O'Connor criticized the court's invalidation of a section of an Akron ordinance requiring that abortions after the first trimester be performed in hospitals. The court reasoned that since *Roe* was decided, which allowed second trimester health regulations, second trimester abortions have become a lot safer and no longer required a hospital setting. *Id.* at 435-36. Thus, this section of the Akron ordinance did not further the state's interest in health. Justice O'Connor noted that the trimester distinctions created in *Roe* could no longer be used to separate permissible regulations from impermissible regulations, *id.* at 455, since the Akron decision invalidated a second trimester health regulation that *Roe* would have allowed. She went on to note that if, as the Akron decision evidenced, advances in technology could erode the trimester structure, then eventually technology could erode the point of viability chosen by the *Roe* Court in 1973, to a point further back towards conception. *Id.* at 458.

74. *Id.* at 456-58 (O'Connor, J., dissenting).
life outside the womb.\textsuperscript{75}

The state's declaration of a compelling interest in the life of the embryo would obviate the need for courts to establish a father's right to procreate or to utilize reproductive technologies; courts would simply hold that the state's compelling interest in the now viable embryo may legitimately infringe upon the mother's constitutional right to abort, without enunciating or even considering fathers' rights. Therefore, it would be in the father's best interests to allege that the state has a compelling interest in having embryo transplant performed, in addition to asserting his own rights.

The mother in the embryo transplant situation may argue that the state's interest is not validly asserted. She may claim that the availability of embryo transplant does not render the embryo viable because there is no artificial aid provided in the process.\textsuperscript{76} Rather, the embryo is transferred to another womb, which provides the same environment that the embryo had before the transplant process. In addition, the embryo has no inherent survivability or chance of meaningful life outside the womb.\textsuperscript{77} Rather, it is completely dependent upon the transfer to another womb for its survival. One possible response to this argument is that insofar as the embryo is removed from the natural mother, any means by which it develops and comes to term is artificial. Thus, embryo transplant is artificial aid and renders the embryo viable.

Another argument against the state's assertion of a compelling interest is that technology should not define viability. First, it creates windows of time during which a woman could assert her right to an abortion, and other windows of time during which the right to abort could be infringed.\textsuperscript{78} For example, assume that embryo transplant can safely be performed at either the five-day point in pregnancy, or between one and two months in pregnancy.\textsuperscript{79} The result is a viable embryo at five days, at which time a woman would have to succumb to an embryo transplant. Assume that there is no existing technology to safely transplant the embryo between the five-day point and the

\textsuperscript{75} This analysis is in accordance with the definition of viability set forth in \textit{Roe}. See \textit{supra} text accompanying note 22.

\textsuperscript{76} See \textit{supra} text accompanying note 22.

\textsuperscript{77} See \textit{Roe}, 410 U.S. at 163


\textsuperscript{79} Embryo transplant is currently performed at the five day point. See Bustillo, \textit{supra} note 8, at 1172. The one to two month period was postulated by the author earlier as a possible future time that embryo transplant could occur. See \textit{supra} note 11.
one to two month point. During this period, a woman could assert her constitutional right to an abortion. Yet, at the one to two month point in pregnancy, the embryo would again become viable due to embryo transplant technology, and a woman's right to abortion would be denied. From two months to approximately twenty-four weeks (the current point of viability), assume further, that there is again no existing technology to safely transplant the fetus. During this time, a woman could again assert her right to an abortion. From twenty-four weeks to the end of pregnancy, the fetus would again become viable, during which time abortion would be denied. Allowing technology to define viability would create a situation where women conceal pregnancy until it reaches a point where an abortion is legally obtainable. Further, the court in *Colautti v. Franklin*, stressed that the determination of viability is a medical judgment which should be made by the attending physician on the specific facts before him when faced with the question of whether to perform the abortion. The court claimed that this was consistent with *Roe* which “stressed repeatedly the central role of the physician . . . in consulting with a woman about whether or not to have an abortion.” Thus, since viability may differ with each pregnancy, the state could not assert a blanket compelling interest and prohibit abortion in all cases where a father desires embryo transplant.

Second, the concept of viability, as defined in *Roe v. Wade*, was arguably chosen to prohibit a woman from choosing a late gestation abortion, when the chance is great that the fetus could sustain life outside the womb. At the point of viability chosen by the Court, an abortion can result either in the death of the fetus or in a live birth. Viability thus describes a fetus' inherent survivability

81. *Id.* at 388.
82. *Id.* at 387.
83. Although this note limits its discussion to the conflict between a pregnant woman and her partner with regard to the fate of an embryo, to allow technology such as embryo transplant to define viability could lead the state to prohibit all abortions where the embryo has the potential of successful transplant, whether or not there is a conflict between a pregnant woman and her partner.
84. *See supra* text accompanying notes 22-24.
85. *See Rhoden, supra* note 78, at 668-69.
86. *Id.* at 679. The probability of live births from abortions, however, has actually declined, primarily due to earlier abortions. Paltrow, *A Review of Advances in Reproductive and Neonatal Technology as They Relate to Abortion Rights*, 1 *REPRODUCTIVE RIGHTS LAW RPTR.* 1 (1986).
outside the womb. As such, it would not apply to an embryo undergoing transplant, since this procedure merely shifts pregnancy from one woman to another. The embryo has no inherent survivability. The abortion of the embryo would never result in the birth of a live fetus capable of sustaining life outside the womb.

In other legal fields scientific developments have not been allowed to define legal concepts. For example, courts do not accept the minimum acceptable levels of radiation established by the Atomic Energy Commission in determining causation in tort cases. Also, insanity is a legal concept, rather than a medical one; the stability of the law is not shaken by revisions in psychiatrists' manuals.

Another ground for state intervention which could require women to undergo embryo transplant is the existence of statutes which allow states to assume custody of minors whose parents have endangered their welfare. While in some jurisdictions a fetus is not expressly protected by these statutes, Georgia's Supreme Court, in Jefferson v. Griffin Spaulding County Hosp. Auth., allowed the state to assume custody over a fetus whose mother refused to undergo a caesarian section. The caesarian section was deemed essential to the birth of the unborn but viable fetus. The court's rationale for taking custody was that since the fetus was viable, the state had a compelling interest in protecting it from conduct which threatened its potentiality for life. The mother's refusal to undergo the caesarian section was held to be such threatening conduct.

---

87. For this reason, it is argued that viability is actually a socially laden concept created to appease those who believe that the late gestation fetus is so much like a baby that the state should legitimately protect its potential for independent life by prohibiting abortion. See Rhoden, supra note 78, at 671-72.
88. Norvell, Reception of Science by the Legal System, in Scientists In The Legal System 26, 29 (W. A. Thomas ed. 1974). Often, causation is rooted in policy, or is sent for determination by the jury, even though the levels established by the AEC would not support a finding of causation. Id. at 30.
89. See Rhoden, supra note 78, at 692.
90. Id.
94. Jefferson, 247 Ga. at 88, 274 S.E.2d at 459. A caesarian section is a surgical operation for delivering a baby by cutting through the mother's abdominal and uterine walls. Webster's, supra note 10, at 253.
96. Id. at 89, 274 S.E.2d at 460.
97. The caesarian section was not actually necessary to the birth of the fetus, since two
The availability of embryo transplant technology may form the basis for arguing that abortion is conduct threatening the unborn's potentiality for life. Opponents of state intervention, such as the pregnant woman, will argue that the Jefferson rationale does not apply to the embryo transplant situation, since the embryo is not viable, as was the fetus in Jefferson. Again, courts will have to determine the scope of the concept of viability in order to resolve this issue.88

Courts could avoid the issue of defining the scope of viability by intervening on a fetus' behalf regardless of viability. Recently, the district attorney of San Diego formulated such an argument.99 In People v. Stewart,100 the defendant was charged with fetal abuse in violation of Penal Code 270 based upon allegations that she took drugs during her pregnancy, that she engaged in sexual intercourse contrary to her doctor's orders, and that she failed to seek prompt medical attention when she experienced bleeding.101 This case greatly expands the potential grounds upon which a state may argue for intervention, since the charges were not based upon viability of the fetus, but rather upon conduct engaged in by the mother throughout the course of the pregnancy.102 The charges were based upon the mother's conduct during times when the fetus lacked viability, as well as during times when it was viable.103 Thus, states could force women to succumb to an embryo transplant, regardless of the viability or nonviability of the embryo. There are at least two argu-
ments against allowing states to so intervene.

First, the *Roe* Court declared that a fetus is not a person entitled to constitutional protection.\(^\text{104}\) If states intervene regardless of viability, they would be according fetuses an absolute right to life, and would be holding that such a right is paramount to the mother's right. In *Stewart*,\(^\text{105}\) the district attorney attempted to accord the fetus a right to medical attendance, thereby treating the fetus as a person. For a state to intervene absent viability is to ignore holdings that fetuses are not persons entitled to constitutional protection.\(^\text{106}\)

Second, the *Roe* Court's holding that a state has an interest in the life and health of the mother, and may regulate the abortion procedure to protect these interests,\(^\text{107}\) limits the degree to which the state may intervene to force embryo transplant.\(^\text{108}\) Further, it may be argued that the mother's health is to be given more consideration than the fetus' survival.\(^\text{109}\) This notion accords with the holding that a fetus is not a person entitled to constitutional protection.

### VI. POLICY OBSERVATIONS AND ANALYSIS

As sources of infertility relief, reproductive technologies offer valuable childbearing options, because the resulting babies are genetically related to at least one of the partners.\(^\text{110}\) The use of a repro-

---

106. *See, e.g.*, Harman v. Daniels, 525 F. Supp. 798 (W.D. Va. 1981). In *Stewart*, Penal Code Section 270, which is generally used to collect child support, was used as the basis for the charges against Stewart, because the section deemed a child not yet born as an existing person for the purposes of the statute. Moss, *supra* note 103, at 37. At trial, however, legislators revealed that the section was written to prevent fathers from avoiding child support payments for children that their wives were carrying but were not yet born. Address by Lynn M. Paltrow, ACLU attorney for Patricia Stewart (Monson) at Nassau/Suffolk Women's Bar Dinner (Mar. 25, 1987). The law was not written to prosecute women based upon behavior during pregnancy. *Id.* *See also* Moss, *supra* note 103, at 37 (stating that Penal Code Section 270 was not intended to apply to Stewart's situation).
108. *Id.* The state could also prohibit certain in utero procedures for the sake of the mother's health. *Id.*
109. *See, e.g.*, Calautti v. Franklin, 439 U.S. 379 (1979), which held unconstitutional a Pennsylvania statute which required doctors to perform the abortion procedure most likely to result in the birth of a live fetus, so long as a different technique was not necessary to preserve the life of the mother. The Court held that the statute was not clear enough in asserting that the interests of the mother were to be placed above those of the fetus. *Id.* at 400. *See also* United States v. Vuitch, 402 U.S. 62, 70 (1971) (upholding District of Columbia's abortion law which outlawed all abortions not necessary to preserve the life of health of the mother).
110. *See supra* note 3 for a description of the reproductive technologies.
ductive technology outside of the infertility context, however, should not be condoned or compelled by the courts, just because some of the policy implications are intolerable.

The use of reproductive technologies outside the infertility context can result in an objectification of women as reproductive machines. For example, consider the use of embryo transplant discussed herein. In this instance, the natural mother's wishes are accorded no consideration. She would rather abort, but unwillingly relinquishes the embryo to a surrogate. The father, or the state, if it asserts a compelling interest, treats the mother as a womb or a reproductive machine; one womb is traded for another. The objectification results from the accomplishment of the transfer without regard to the feelings of the mother; she is merely one container being discarded for another, surrogate, container.

Insofar as objectification is defined by the unwillingness of one of the parties to accomplish the transaction, that objectification can occur within the infertility context as well. The difference, however, is that such unwillingness can be avoided. It is possible to find a surrogate who will not refuse to relinquish the resulting baby at birth. Some women even feel great satisfaction from being surrogates. These women may be motivated by a desire to be a part of a collaborative effort to aid infertile couples. Therefore, they are not objectified as machines; they participate mentally, as well as physically, in the reproductive technology's effectuation.

Some would argue that there may be a woman willing to relinquish an embryo she was carrying so as to allow her partner to be-

111. The term "infertility context" is used to describe the situation where a reproductive technology is used because a couple is infertile, or because pregnancy would seriously threaten the mother's life.
112. To objectify a woman is to accord her feelings no consideration in the accomplishment of the reproductive technology. See supra notes 67-68 and accompanying text. Thus, she is treated as a reproductive machine or container. Id.
113. See supra text accompanying notes 10-12.
114. See supra note 11 and accompanying text.
115. The Baby M case is on point. There, the couple could not reproduce naturally, for pregnancy would have been risky for the wife, who had a mild case of multiple sclerosis. Subsequently, the surrogate changed her mind and refused to relinquish the resulting baby to the couple. In re Baby M, 217 N.J. Super. 313, 347, 525 A.2d 1128, 1144 (1987).
116. See Behrens, She Just Liked Being Pregnant, NEWSDAY, Jan. 13, 1987, Part II, at 4; Robertson, supra note 4, at 1030-31. Furthermore, unwillingness can be avoided by administering psychological profiles to prospective surrogates. In fact, a profile administered to the surrogate in the Baby M case revealed that she could have trouble relinquishing the baby at birth. Yet, the parties contracted. Barth, 'Baby M' Belongs With Her Mother, NEWSDAY, Jan. 18, 1987, Ideas, at 7.
EMBRYO TRANSPLANT

become a parent. Thus, unwillingness could be avoided outside of the infertility context as well. While this is true, the use of technologies outside the infertility context generally results in a denigration of pregnancy or an infringement of the right to bodily integrity. For instance, consider the use of embryo transplant by a fertile woman who would like to rear a child of her own genetic make-up, but, because of her lifestyle preferences, does not want to carry the child to term. Rather than living through gestation, and thus disrupting her lifestyle, she transfers the embryo she is carrying to a surrogate. In this instance, pregnancy is denigrated because the mother seeks the technology solely for the sake of convenience, in order to avoid the physical commitment that carrying the embryo to term necessitates. When used in the context of infertility, however, pregnancy is not denigrated. Rather, the infertile couple seeks to simulate the biological processes they themselves cannot perform, thereby exhibiting a reverence for pregnancy. Furthermore, the use in the infertility context is necessary to produce genetically related offspring, but is not necessary outside of the infertility context. Therefore, in uses outside of the infertility context, the culturally important mother-child bond is unnecessarily denigrated.

In addition, consider the consequences illustrated by the following situation: an infertile couple seeks in vitro fertilization to have children. During the procedure, many fertilizations are performed, but only one of the resulting embryos is actually implanted into the woman. Suppose a statute prohibited discarding the extra embryos, and directed mandatory donation of these to other women or surrogates. In this instance, the couple would receive more than they bargained for. The technology would be utilized within the infertility context, but the extra embryos would be mandatorily donated, a use outside of the infertility context. The couple would be forced to have anonymous children, and their right to control their own gametes

---

117. Some might also argue that the woman who seeks to avoid gestation would not make a devoted mother.

118. See Robertson, supra note 4, at 1028-29. Pregnancy has always been revered and encouraged in our society. For example, in Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957), the court refused to award damages to a couple whose wife became pregnant after relying on a vasectomy which was unsuccessfully performed by their doctor. The court held that pregnancy was a benefit, not a detriment, because the resulting child would bring pleasure to the couple. Id. at 45-46.

119. Gamete is defined as a reproductive cell which can unite with another to form the cell that develops into a new individual. WEBSTER’S, supra note 10, at 752.
and the uses to which their bodies are put would be infringed.

This situation is different from that of a woman who carries an embryo to term and then puts the resulting child up for adoption, since that woman voluntarily relinquishes contact with her child. Here, the couple would be forced to have the embryos donated. Objectification of the couple, and the infringement of the bodily integrity right results from the mandatory rather than voluntary nature of the situation.

Alternatively, if the couple were allowed to decide whether the embryos would be donated, there could arise a disagreement between them as to the disposition of the embryos. This is a situation which is analogous to the embryo transplant situation. Once again, the question would arise as to who should prevail. Whichever party prevails, the other party’s bodily integrity right has necessarily been infringed. Therefore, mandatory donation infringes both parties’ rights, while the alternative of allowing the couple to make the decision can potentially infringe upon one party’s rights.

Prohibiting the use of these technologies outside of the infertility context, however, avoids both of these results, and no one’s right to bodily integrity is infringed. Furthermore, the prohibition on uses outside of an infertility context avoids objectification of women, and denigration of pregnancy, while leaving the infertile with childbearing options. From a policy perspective, the decision to

120. See Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891); Johnsen, supra note 40, at 615; supra note 40 and accompanying text.

121. Some would argue that the right to procreate would be infringed, since a prohibition on the use outside of the infertility context would prevent single men from procreating. Unlike women, they cannot procreate traditionally, nor are they technically infertile, and thus could not utilize reproductive technologies within an infertility context, as can women. Thus, single men do not have the alternatives that women have. Men may seek to be deemed “infertile” by the courts, so that they may procreate. If not deemed infertile, they may have an equal protection claim that the ban on reproductive technology use outside of the infertility context discriminates against men, thereby denying them their constitutionally protected right to procreate. This would require a court to determine whether procreation by single people is, in fact, protected by the Constitution. See supra notes 50-58 and accompanying text for a discussion of the right to procreate.

122. This resolution would prevent the willing woman from giving up her embryo so that her partner could become a father, since the transplant would be accomplished outside of an infertility context. The argument could be made that this particular use outside the infertility context first, is not an objectification of the woman since she is a willing participant, second, does not denigrate pregnancy since the father exhibits reverence for pregnancy and reproduction by asserting his desire to become a parent, and third, does not infringe the bodily integrity right since the woman chooses the transplant. The consequences of uses outside of the infertility context do not apply here. While these arguments may be viable in this particular instance, they are not so in most other uses outside of the infertility context. A general limit on the use
limit reproductive technology use to situations within the infertility context is the wisest compromise of all of the competing interests.

VII. CONCLUSION

A woman's right to avoid procreation in the embryo transplant situation depends upon the strength of the interests she asserts to maintain her rights. The case law does not speak to interests other than rearing and gestational burdens, which are not relevant in the embryo transplant situation.\(^{123}\) A court's recognition of the bodily integrity interest would allow a woman to choose between abortion and embryo transplant. The bodily integrity interest, coupled with the interest in avoiding the existence of anonymous offspring,\(^{124}\) must be weighed against the father's asserted right to procreate.\(^{125}\) This right has never been affirmatively established for single people, and if recognized, would not bear upon whether there is a right to utilize reproductive technologies.

A court's consideration of the right to utilize reproductive technologies will require a resolution of certain issues: given that embryo transplant requires a surrogate, courts may be concerned with issues of legal parentage and the morality of "paying for babies," and may be unwilling to grant such a right.\(^{126}\)

The direct conflict between the mother who wishes to avoid procreation and the father who wishes to procreate may be resolved by the state's assertion of a compelling interest in potential life.\(^{127}\) Currently, the state's interest exists at viability. The court's changing conception of viability may render the embryo viable in light of embryo transplant technology.\(^{128}\) The state may also assume custody of a fetus if abortion is looked upon as conduct threatening the unborn's potentiality of life. Finally, the court may abandon all references to viability and assert an interest in the embryo regardless of viability. This intervention would give the embryo the status of a person, which is in direct conflict with the Supreme Court's holding that the unborn are not persons entitled to constitutional protec-

---

123. See supra notes 29-35 and accompanying text.
124. See supra notes 40-48 and accompanying text.
125. See supra notes 49-50 and accompanying text.
126. See supra notes 59-65 and accompanying text.
127. See supra notes 69-75 and accompanying text.
128. See supra notes 73-75 and accompanying text.
tion.\textsuperscript{129} It would also place the fetus' interests above the health of the mother, in contravention of Supreme Court holdings that the mother's health is of paramount importance.\textsuperscript{130}

\textit{Michele N. Coleman}

\textsuperscript{129} \textit{See supra} notes 104-06 and accompanying text.
\textsuperscript{130} \textit{See supra} notes 108-09 and accompanying text.