Unintended Consequences: Technology Challenges to a Woman's Reproductive Right to Choose

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INTRODUCTION

It is not unique to our moment in history to face technologies that we are unprepared to handle. In the 15th century, there was a terrible outcry when the first rifles were made in Spain. The clergy, among others, met the first automobile built in Germany in 1885 with condemnation. In recent history, the practical applications of scientific inventions such as the cotton gin and motor car led to economic and social changes, which required contentious political and legal responses. The advent of the telephone, radio, television, satellite communication and the Internet changed the way we communicate and engage in democracy, for better or for worse.

Today, we are in the midst of trying to adjust to the explosion of medical technologies. Kidney transplants beginning in the 1960s, heart transplants in the 1980s, were greeted with excitement as well as moral soul searching. Then in 1978, when the first "test tube baby" conceived outside of the human body was born, the conversation regarding the morality of alternative reproductive therapies became heated. As the intense debate over existing medical practices that enhance, extend and sometimes extinguish life continues, science marches on and, with it, new challenges to our society and the way we think of ourselves.

Adding to the anxiety over the morality of these technologies is the perceived need to create public policies to regulate them. As we've seen with the abortion controversy, any new policy, whether court-created or legislated, can become obsolete not long after it is implemented. As legislators and judges cogitate over the policy's intent and language, medical research and scientific discovery continue and shift the political and legal landscape. For example, in the abortion debate, the point of fetal viability, currently essential to the question of the constitutional rights, shifts as doctors and scientists discover new ways to support the fetus outside the womb.[1] In 1973, viability was present at the earliest at twenty-four weeks

[1] "Viability" in this context is commonly meant to have a "capacity for meaningful life outside the womb." Lisa Hemphill, *American Abortion Law Applied to New Reproductive Technology,* 32 Jurimetrics Journal 361, 362 (1992). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 US 833,870 (1992) the Supreme Court held that after viability the government may restrict or completely ban abortion in order to protect the potential life of the fetus so long as any such restriction contains an exception for the life or health of the mother. The Court explicitly recognized that future medical developments will change the point of viability and may affect the definition of viability, Later, though, the Supreme Court put into question the importance of the viability question when it justified the upholding of a post-viability abortion ban without a health exception. *Gonzalez v. Carhart*, 127 S. Ct 1610 (2007).

gestation; by 1988, it was at twenty weeks and shortening.[2] Now scientists are hard at work in the field of ectogenesis, where a fetus is gestated outside the uterus in an artificial environment.[3] When looking ahead, "non-destructive" abortion will be available, meaning the removal of an intact embryo from a womb to be implanted in another womb or grown through ectogenesis. What will happen to the constitutional right of abortion if a viability is pushed back to conception and if a woman's bodily autonomy as the "growth medium" for the embryo or fetus is no longer necessary?[4] To add to the confusion, technologies intended to assist with reproduction (ARTs) are being tested and made available to the general population, encouraged by the seemingly endless stream of money willing to be spent by people who wish to have children but can- or wish-not to do so through intercourse.[5] In the past 20 years, all varieties of assisted reproduction, including artificial insemination, in vitro fertilization (IVF), cryopreservation and surrogacy, have become commonplace tools in the cache of adults looking to become parents.[6] Cloning is on the verge

[2] Hemphill at 362.

[3] Partial ectogenesis is currently used to keep alive premature babies. In Tokyo, researchers have managed to extrauterinely incubate goat fetus for as long as three weeks. Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction,* 8 Alb. LJ Sci. & Tech. 1, 57 *n.* 289 (1997).

[4] A reconception of *Roe* in response to new technologies has been envisioned to go in a different direction than that anticipated by this paper by Jack M. Balkin in his article *How New Genetic Technologies will Transform* Roe v. Wade, 56 Emory L.J. 843 (2007).

[5] Assisted reproduction has become big business. Infertility affects about 10% of the reproductive age population, or approximately 6.1 million Americans. Maureen McBrien, *Human Cloning: Beyond the Realm of the Constitutional Right to Procreative Liberty,* 21 Buff. Pub. Interest LJ 107,112 (2003) As of the beginning of the 21st century, more than 177,000 American babies have been born as a result of the use of reproductive technologies *Id.* at 111.

[6] Each of these techniques has many variations. For example artificial insemination (where semen is collected then introduced into the woman's body by noncoital means) can be either "homologous" (AIH) when using the husband's semen, or "by donor" (AID) when using the semen from a male who is not the woman's husband. IVF, consisting of the fertilization of a human egg in a petri dish that is then transferred to a uterus for gestation, can be done either as "zygote intrafallopian transfer" (ZIFT), where the egg is fertilized by the sperm in the petri dish and the zygote is placed inside the woman's fallopian tubes, or as "gamete intrafallopian transfer" (GIFT), where the egg and sperm are combined in the petri dish but the egg is unfertilized when the transfer to the fallopian tubes takes place in hopes that fertilization will occur inside the woman rather than in the dish. Elizabeth Price Foley, *Human Cloning and the Right to Reproduce,* 65 Alb. L. Rev. 625, 631, *n.* 44-46. Variables include who donates the egg and sperm (the hopeful mother and father or donors in the stead of one or both) and to whom the gametes or zygote will be transferred for gestation (the hopeful mother or a surrogate.) In addition, there may be unimplanted gametes or zygotes that can be either cryopreserved or destroyed. Katz, *supra* note 3, at 23-27. Surrogacy is used when the woman seeking to become a mother is not able to or desires not to gestate the fetus in her body and seeks a "surrogate mother" to do so. There are many variations on this theme as well, from the most simple-- where the pre-embryo created by IVF from gametes donated by the hopeful mother and father is implanted in the surrogate and given to the biological parents at birth-·to the multiparty situation where sperm and egg donated by third parties are joined and implanted in the surrogate to be given to the couple who desire to become parents but have no biological relationship to the child once born. There is also surrogate embryo transfer, where an egg donor is artificially inseminated with the husband's sperm, the fertilized embryo is flushed from the surrogate's uterus and implanted into the body of the infertile wife. Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A*

of becoming available as a reproductive option.[7] As the fertilization and gestating process becomes increasingly disconnected from the intended parents' bodies, the rights and responsibilities associated with reproduction face new challenges and permutations.

Regulation of these technologies in the United States will be open to legal challenge under, among other things, the allegation that they violate the US Constitutional right to privacy. The right to privacy protects from governmental intrusion the right to procreate, the right to decision- making about child rearing and child bearing, and the right to bodily autonomy, among other things. The question has and will arise as to whether these rights include IVF, crypreservation, surrogacy, ectogenisis and cloning as a reproductive options and how far these rights extend and to whom. If one uses cloning, for example, as another way to reproduce, how is it legally or constitutionally different from "traditional" reproduction or other technologically-enhanced methods of reproduction? Will there be any limitation on who will have the right to clone and under what circumstances?

If there is no difference in the distinction between the right to reproduce through intercourse and the right to reproduce with ARTs, like IVF and cloning, then the question will become whether use of ARTs is deserving of the same constitutional protection. If so, the right to use them will be constitutionally protected and beyond the reach of lawmakers to ban, save a Constitutional Amendment. Would this protection extend to men and women involved? And, if so, what will that do to the current distinction in law today where women's rights trump men's when the intended mother's body is used for gestation?

This paper will begin the inquiry regarding these constitutional rights by exploring whether the right to use ARTs can be considered a *bodily autonomy* right or a *procreative* right. Reproductive control can have two distinct meanings: the right to control one's body, i.e. bodily autonomy, and the right to control one's reproductive destiny, i.e. procreation. When decisions about contraception, abortion, medical

Legislative Response to the Challenges of Reproductive Technology,29 U. Mich. JL Rev. 671 p996).

[7] Cloning is accomplished by somatic cell nuclear transplantation (SCNT), where the nucleus of the somatic cell of a human is inserted into a human egg whose nucleus has been removed, then is stimulated to divide. The "product" of SCNT can either be destroyed once stem cells are created that can be used for research and therapies (therapeutic cloning) or it can be implanted in a womb, theoretically destined to become an embryo, fetus, then a child (reproductive cloning). There is a distinction between therapeutic and reproductive cloning, but the question is whether this is a distinction with a difference when it comes to the constitutional right to clone. One author has described the difference between therapeutic and reproductive cloning as political, not biological. Alexander M. Capron, *Placing a Moratorium on Research Cloning to Ensure Effective Control Over Reproductive Cloning,* 53 Hastings L.F. 1057, 1061 (2002) After publishing the results of the cloned sheep Dolly's creation in 1997, the journal Nature editorialized that reproductive human cloning will likely be achieved within the next decade. 385 Nature 753 (1997).

treatment, organ donation and the like are being made, these are generally considered exercises in the right to bodily autonomy. In regards to reproduction, once the embryo or fetus or organ leaves the body, there is an argument to be made that the right to control one's body is no longer implicated.

Without this right, only reproductive *destiny* is implicated - only the right to control one's genetic ties or to become a parent. So, when an individual decides to reproduce via an ART and use his/her cells (genetic information) to begin the process of becoming a parent, what exactly is the right he/she is exercising? And, what is the interest that the society, through the courts, should protect from governmental interference:

- the right to procreate, which may mean to create genetic ties to the future, see oneself in one's progeny, and/or experience parenting or
- the right to bodily autonomy, which may mean to make decisions about one's body and/or to determine how its "products" are used?

These two rights, while both arising from the right to privacy, have developed different legal standards. Potentially, they will also have different outcomes when applied to ARTs.

The impact on women's rights may not be the first concern in this context, but should not be ignored. As reproduction through ARTs are increasingly disconnected from a woman's body and, as a result, both men and women are afforded equal rights to use ARTs (and by what argument could this be denied?) then how, consistent with this, may men be excluded from the abortion decision?

THE RIGHT TO BODILY AUTONOMY

Bodily autonomy - having control over decision-making regarding the use and treatment of one's body- is protected from unwarranted governmental intrusion by the United States Constitution under the Due Process clause's implicit right to privacy. The right to reproductive liberty in the context of decision-making regarding whether to beget and bear children is part of this right.[8] In *Roe* v. *Wade,* the Supreme Court found

[8] *Eisenstadt v. Baird,* 405 US at 453 ("...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."); *Roe v. Wade,* 410 US at 153-154 ("the right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 US at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life.").

abortion to be a woman's fundamental right because of the psychological and physical burdens of pregnancy, which is a bodily autonomy issue.[9] However, it also found relevant the burdens of raising an unwanted child, which is a procreational interest that is not exclusive to women. Abortion cases following *Roe* have emphasized the woman's bodily autonomy interest (as opposed to procreational interests) and balanced that against the state's interest in the potential life of the fetus. In *Planned Parenthood v. Casey,* the Court defined the constitutional right of abortion as belonging to the mother inside whose body the fetus grows stating, "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. Her suffering is too intimate and personal for the State to insist, without more, upon its vision of the woman's role."[10] *Casey* set the current standard applied to reproductive decision-making: A woman has the right to abort an embryo or fetus she is carrying up to the point of its viability without the interference of governmental regulations that place an "undue burden" or "substantial obs tacles" in her way.[11]

The right to abortion has been clearly held *not* to extend to the right of the man who is the father of the gestating entity to require or prevent its continued gestation or abortion.[12] This is because the male, while having his "product" - sperm- used to create the embryo, has less of a bodily autonomy interest once that product is outside his body than does the female who physically carries the fetus and is more directly affected by the pregnancy.[13] So, it can be said that under the reproductive rights "bodily autonomy" line of cases, the right is one that is limited to the body's *current* use or well-being, rather than its products.

THE RIGHT TO PROCREATE

When issues like contraception and abortion are addressed under the Constitution, a right to bodily autonomy is considered; the right *refuse* to use one's body in a particular fashion or for a particular purpose. But the positive right to procreate arises from the Constitution in a different line of cases, beginning with the 1923 decision *Meyer v. Nebraska.*[14] In that case, the US Supreme Court invalidated a Nebraska law that outlawed the teaching of any language other than English to children before the eighth grade. The Court found a "liberty" interest in the Due Process Clause of the Fourteenth Amendment that protects the right of the individual to marry and raise children free from governmental interference.

[9] *Roe* at 153.
[10] *Casey* at 852.
[11] I*d*. at 876.
[12] *Planned Parenthood v. Danforth,* 428 US 52 (1976).
[13] *Id.* at 69.
[14] 262 US 390 (1923).

In 1927 in *Buck v. Bell,* the Court refused to extend the *Meyer* precedent to invalidate a Virginia law that permitted involuntary sterilization of institutionalized social misfits, in particular a "feebleminded" woman who was the child of an institutionalized woman and who had once already become a parent herself.[15] But later, in 1942, the Court citing *Meyer* and distinguishing *Buck* invalidated an Oklahoma law that mandated sterilization for a certain class of felons.[16] The Court in *Skinner v. Oklahoma* proclaimed that the right to procreate is "one of the basic civil rights of man."[17]

So, it is clear that while the Constitution protects the affirmative right to procreate, the right is not absolute, protecting anyone, at any time, by any means. Once there is a recognized procreative right at stake, the court will apply "strict scrutiny" meaning that the government must prove that the law furthers a compelling governmental interest and is narrowly tailored to further that interest. If the government cannot prove both of these prongs, the law will be invalidated as unconstitutional. If "assisted" procreation is considered as "fundamental" as coital procreation, then any challenged law restricting or banning it will be afforded strict scrutiny.

ASSISTED REPRODUCTIVE TECHNOLOGIES AND REPRODUCTIVE LIBERTY

The United States Supreme Court has not yet decided any case interpreting the right to privacy as it relates to ARTs.[18] But, a number of state courts and some lower federal courts have. There are a series of cases involving the competing rights of would-be parents to cryopreserved pre-embryos created through IVF.[19]

[15] *Buck v. Bell,* 274 US 200 (1927). This Supreme Court opinion is most often cited today, if at all, as an example of a misguided ruling.

[16] *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[17] *Id.* at 541. Skinner was decided under the Equal Protection clause since it involved the differential treatment between inmates, however the existence of the fundamental right to procreate was essential to the holding since it controlled the standard by which the Court evaluated the Equal Protection claim. Later cases include a 1974 case involving a restrictive maternity leave policy for teachers. The Supreme Court decided that procreational liberty protects the "freedom of personal choice in matters of marriage and family life" and invalidated the policy. *(Cleveland Board of Education v. LaFleur ,* 414 US 632, 639 (1974)).

[18] In *Webster v. Reproductive Health Services, Inc.,* 492 US 490, 523 (1989), Justice Sandra Day O'Connor's concurring opinion raised the prospect that the restrictions on abortion upheld by the decision might threaten the development of IVF programs, however, she stated that this prospect was "too hypothetical" at the time to impact her decision on the case.

[19] The most common IVF procedure involves retrieving oocytes (cells from which eggs or ova develop) from a woman's body and sperm from a male's. Egg cells ready for insemination are combined with sperm and incubate for 12-18 hours. During this time a "prezygote" is created, i.e. eggs have been penetrated by sperm but have not yet joined genetic material. If fertilization is successful, a zygote (a fertilized ovum before it undergoes cell division) is produced. Once the cells divide the entity becomes a pre-embryo (4 to 8 cells). Within approximately 2 weeks it can either be placed in the woman's uterus for implantation or cryopreserved. *JB v.MB.,* 783 A.2d 707, 708-709 (NJ Sup. Ct. 2001). At this time the cells begin to differentiate into what will become the different body parts of the individual and the pre-embryo becomes known as an embryo. *Davis v. Davis,* 842 SW 2d 588, 593

In these cases, the courts have classified the right at stake to be a procreational rather than bodily autonomy right. For example, in *Davis v. Davis,* a couple who had created several frozen pre-embryos using their own genetic material divorced. The wife wished to have the pre-embryos donated to a third party for implantation and upbringing; the husband wanted them destroyed. The Tennessee Supreme Court decided for the husband holding that the right at stake was *not* the wife's right to privacy and bodily autonomy from *Roe* and its progeny.[20]The opinion stated: "None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."[21] The right was a "gamete providers' procreational autonomy" derived from *Skinner.* As such, the rights of the male and female biological "parents" were equal and must be balanced against one another.[22]

Significant to this paper, though not necessary to the *Davis* holding, that opinion stated that if the husband sought to have the pre-embryos implanted in the wife as planned, the wife's right to privacy would prevail to prevent forced implantation. It also recognized that had the wife sought to implant the pre-embryos in her own body in order to raise the resulting child herself the case would have been much closer.[23] The court did not venture to predict whether in this variation of the facts the bodily autonomy or procreational rights of the wife would trump the husband's procreational rights.

In *Kass v. Kass,* New York State's highest court considered a case similar to *Davis,* however, in *Kass* the wife sought to have the prezygotes implanted in herself despite language in the couple's previous agreement that any unused prezygotes would be donated to the IVF program for research or destroyed.[24] Like in *Davis,* the court found no bodily autonomy right for the wife since the preembryos existed outside her body. It did, however, recognize an equal, procreative right of both gamete providers- an equal interest

(TN Sup. Ct. 1992). It is common practice to create more pre-zygotes than will be implanted and save them through cryopreservation in case the initial implantation is unsuccessful or the person wishes to have another child at a later date but may not have access to the egg or sperm for various reasons. Issues arise when the cryopreserved pre-embryos are not used or are sought to be used by one party who either contributed genetic material or arranged for the process against the will of another interested party.

[20] *Davis* at 604.

[21] *Id.* at 601 citing *Danforth* 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.")

[22] *Id.* at 602 - 603. In *Davis,* the court decided that the husband's burden of having his genetic material continue and knowing he is father was greater than the wife's burden of having gone through the process of having her eggs harvested with no resulting child, even though she no longer wished to raise it and so decided that the pre-embryos should not be implanted over the husband's objections.

[23] *Id*. at 604.

[24] 91 N.Y.2d 554 (1998). If the wife had a constitutional right to implant the prezygotes, then the terms of the contract could have been unenforceable as violating public policy. In*Kass,* however, the argument turned on the meaning of the agreement.

in avoiding genetic parenthood and becoming a genetic parent- and upheld the previous agreement to have the prezygotes given to the IVF program.[25] Contrary to these cases, in *Lifchez v. Hartigan,* the federal District Court found a bodily autonomy right associated with reproductive technologies, i.e. that the right that protects a woman from forced pregnancy- the right to abortion-- also protects her right to become pregnant.[26]

Lifchez involved an Illinois law that restricted sale of or experimentation on a fetus not considered therapeutic to the fetus. While the law explicitly permitted IVF, the court found that its failure to permit other reproductive technologies intended to produce healthy children made it unconstitutional.[27] Citing to *Roe* and other abortion rights cases, the court found the use of IVF and other reproductive technologies to be a protected right like abortion. It stated: "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.[28] No distinction between men and women was made.

Contested surrogacy situations bring the difference between bodily autonomy and procreative liberty into sharp focus. In these situations, particularly those in which the surrogate is also the egg donor, the bodily autonomy of the surrogate may be at odds with the procreative liberty of the intended parents, particularly the intended father if he is the sperm donor. The most notable conflicts in this arena arise when the intended parents execute an agreement with a surrogate mother to have her egg fertilized with the intended father's sperm and implanted in her for gestation. The agreement generally provides that once the child is born, it will be turned over to the intended parents and the surrogate/egg donor will surrender all parental rights to the child. The conflict arises when the surrogate changes her mind and refuses to relinquish parental rights in the child or wishes to terminate the pregnancy.[29]

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[25] *Id.* at 563-564. See also *AZ v. BZ,* 431Mass.I 50 (2000)(Contract requiring implantation of pre-embryos if gamete providers dispute disposition is unenforceable; it is against public policy to compel a person to become a parent against his/her will) and JB *v. MB.* 783 A2d. at 716 (Both gamete providers have an equal right to procreate that must be balanced against one another, but "ordinarily, the party wishing to avoid procreation should prevail.)

[26] 735 F.Supp. 1361 (ND Ill. 1990).

[27] For example, diagnostic techniques that may lead to decisions to abort a fetus would not be therapeutic to the fetus and could be restricted.

[28] *Lifchez* at 1377.

[29] For more on surrogate parenting conflicts see Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to\the Challenges of Reproductive Technology, 29* U Mich. JL Ref 671 (1996).

Such was the case in the famous *Matter of Baby M.*[30] In that case, for a fee of $10,000, Mary Beth Whitehead agreed to be artificially inseminated with William Stern's sperm and to carry to term a child. Whitehead would then surrender rights to the child so that it may be adopted by William's wife, Elizabeth Stern, and be raised as the Stern's child. Whitehead later changed her mind and refused to surrender her maternal rights to the child.

The New Jersey Supreme Court decided that the surrogacy contract was unenforceable as violating public policy. Whitehead could not be compelled to relinquish parental rights to the child she bore. While it considered the father's procreative rights important, it held that there was no deprivation of such rights since he did, in fact, procreate. The right to procreate did not include the right to become an acting parent. The court explained it as follows: "The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination....The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation."[31]

But other states have decided surrogacy cases differently and, in some, the bodily autonomy rights of the surrogate did not trump the contractual rights of the intended parents. In these cases, the surrogate woman's right to control her body was reconceived: technology allowed her to use her body as a tool to help others become parents – and make a few bucks for the service—and the law upheld her (and potential parents) right to make enforceable agreements to do the same. *JF v. DB* involved a surrogate who was gave birth to triplets from the IVF of an egg donor and sperm from the intended father. When the surrogate sought parental rights to the born children, the court upheld the surrogacy contract, which denied these rights and required the surrogate to take action to terminate her rights upon birth.[32]

The court explicitly declined to extend its holding to instances in which the surrogate was also the egg donor. But, if that fact would have made a difference, then the distinction between egg and sperm donor would be hard to make. And, if the fetus was still in utero of the surrogate at the time contractual rights sought to control the pregnancy were asserted (for example, to require an abortion or treatment in utero to which the surrogate objected) the results in these cases may have been different. Yet, the precedents they

[30] 537 A.2d 1227 (NJ Sup. Ct. 1988).
[31] *Id.* at 1235. The father of an illegitimate child born to a mother who is married to another man has no fundamental right protected by the constitution. *Michael H. V. Gerald D.,* 491 US 110 (1989). Yet, a majority of states *give* all biological fathers the right to establish parentage against a rebuttable assumption that the mother's husband is the father. *Cihlarv. Crawford,* 29 SW 3d 172 (Tenn. App. 2000).
[32] 116 Ohio St.3d 363, 879 N.E.2d 740 (2007). See also*, Johnson v. Calvert*, 5 Cal.4th 84, 851 P.2d 776, 19 Cal.Rptr.2d 494 (1993) and *McDonald v. McDonald*, 196 A.D.2d 7, 608 N.Y.S.2d 477 (2 Dept. 1994).

establish would make it more challenging for the woman and the reasoning to uphold her rights would be strained.

ARTs AND WOMEN'S REPRODUCTIVE LIBERTY

Women's right to control their own bodies have been the lynchpin of gender equality and a host of other important freedoms for women. Pregnancy and the socially constructed institution of "motherhood" have been used to deprive women of basic rights and equal access to education and employment, among other things. So, constitutional protection for them to control their reproductive lives is distinctly important for them. But, through ARTs, as fertilization and gestation become distinct and distant from (exclusively) mother's bodies, their interests become more akin to men's. Issues related thereto become more "procreational" rather than "bodily autonomy." Once the case law moves in that direction, it will be hard to step back and exclude men from reproductive rights now only afforded to women.

The right to abortion is currently exclusively a woman's right. Neither the woman's husband nor the sperm donor, whether or not one and the same man, has a right to require or prevent the abortion decision. If the right to bodily autonomy, which includes the right to abortion, is extended to ARTs and re-interpreted as the right to control one's "products." then it would give a man a bodily autonomy reproductive right with regard to his cells, which would logically extend to his sperm. The abortion right would then have to involve a balance between a woman's and a man's right to their products (egg and sperm), a significant shift from the current analysis, which discounts the role of the male in the abortion decision and asks only if the woman's choice is burdened unduly by an abortion limitation.

In the IVF cases discussed above, we have already seen a balancing test between men and women applied, though in those cases they clearly call the issue one of procreative liberty. Here one can see abortion politics being played on a new field. Imagine if ectogenisis and/or non-destructive abortion was available and a pregnant woman wishes to have an abortion while the biological father of the embryo or fetus objects.[33] How will her bodily autonomy claim fare? The embryo is viable as it could live outside the mother's body, either through transplantation in another woman's womb or in an artificial womb. So, the post-viability rights analysis would apply: the government could outlaw the abortion unless the mother's life (or possibly health) are at stake, which, in the normal course, it would not be.

[33] For convenience, I will hereinafter refer to the potential life as an embryo, though it is clear that the same issue could arise at any stage of development.

Of course, there would be the need to extract the embryo from her uterus, which would impact her bodily autonomy if she were to object to the transfer.[34] How might this insult be evaluated? The "undue burden" standard in the abortion rights jurisprudence would not apply because the embryo would be viable. But even if it were, or, if the balancing test being used in the procreation line of cases was applied, the woman's right would fall more easily to the interest in potential life[35] plus the interests of the biological father, developed more fully in the IVF cryopreservation procreation line of cases.

Civil libertarians, pro-choice and privacy advocates have in the past, consistently sought to expand the definition of bodily autonomy and protect individual decision making about medical treatment, reproduction and the like from governmental interference. Yet, when faced with ARTs, it looks as though doing so would paradoxically and unintentionally undermine a woman's right to abortion. Technology that disconnects reproduction from the intended parents' bodies arguably and, perhaps, dangerously, disconnects the reproductive right from the woman's body. If using one's cells to clone is a protected right, it would have to be protected for men and women. Following this line would create a conflict with the abortion cases that affirm the reproductive rights for women, and not men, as gestators rather than egg donors.

[34] It is likely that the mother would object if she is seeking an abortion because she doesn't wish to become a mother. It is worth noting that this is the same objection a potential father would raise if he wishes for the pregnant woman to have an abortion against her will. Under current abortion case law, the father would have no legal rights to make his case for his procreative rights to be considered.

[35] An interest that may be recognized from conception under *PPH v. Casey, supra*