

commentaries

Children by choice: reproductive technologies and the boundaries of personal autonomy

R. Alfa Charo, J.D.

University of Wisconsin Law School, and Department of Medical History and Bioethics, University of Wisconsin Medical School, University of Wisconsin, Madison, 5211C Law Building, 975 Bascom Mall, Madison, WI 53706, USA

e-mail: racharo@facstaff.wisc.edu

Unlike other countries that regulate assisted reproduction, the US has largely left this field to the domain of professional self-regulation and market preferences. The reason lies both in the confused jurisprudence of reproductive liberty and the paralysing effect of the abortion debate on US politics. The debate surrounding cloning, however, has galvanized both activists and the government to revisit the question of regulation, and recent cases in the US Supreme Court suggest that if the political will to regulate this field is found, governmental authority to intervene in areas such as pre-implantation diagnosis, gamete donation and surrogacy might well be upheld, even in the face of constitutional challenges.

Assisted reproduction, with its mix-and-match gametes, gestational-mothers-for-hire, preconception sperm sorting, pre-implantation sex selection and genetic diagnosis, custody fights over frozen embryos, and, perhaps in the future, reproductive cloning or embryo engineering, brings the incompleteness of US legal philosophy concerning personal autonomy in reproductive decision-making into sharp focus. Whether the issue is the increasing use of pre-implantation diagnosis to screen embryos or the markets that have formed around human gametes, concerns about the collective effects of these individual actions on society have galvanized some activists in the US to call for a halt to 'the new eugenics'. Furthermore, the Food and Drug Administration and the National Institutes of Health, perhaps partly in response to the outcry concerning the possible use of somatic cell nuclear transfer for human reproduction, are beginning to examine the question of government oversight in assisted reproduction¹.

Although it did enact the Fertility Clinic Success Rate and Certification Act to require reporting of success rates from IVF clinics², the federal government generally remains reluctant to regulate reproductive

technologies. Only a handful of states have enacted reproductive technology legislation and, with the exception of legislation aimed at reproductive cloning (see Table 1)³, most focus solely on record keeping and physician involvement in artificial insemination⁴. Louisiana, for example, is the only state that explicitly

prohibits the sale of human oocytes, whereas Virginia is the only state that explicitly sanctions the sale of human oocytes⁵.

Other countries have experimented more aggressively with legal responses to assisted reproduction. In addition to statements by international professional



"I think we should include listening to Barry White music to our list of assisted reproduction techniques."

Table 1 State Laws on human Cloning (as of June 2002).
Source: National Conference of State Legislatures.

California

Business And Professions §§16004, §§16105, Health & Safety §§24185, §§24187, §§24189

Provides for the revocation of licenses issued to businesses for violations relating to human cloning; prohibits cloning of human beings for the purpose of initiating a pregnancy and the purchase or sale of ovum, zygote, embryo, or foetus for the purpose of cloning human beings; establishes civil penalties.

Iowa

2002 SB 2118

Prohibits human cloning for any purpose; prohibits transfer or receipt of a cloned human embryo for any purpose, or of any oocyte, human embryo, foetus, or human somatic cell, for the purpose of human cloning; establishes civil penalties and grounds for revoking licensure.

Louisiana

40 §§1299.36.1 to 6

Prohibits human cloning for the purpose of initiating a pregnancy; establishes civil penalties.

Michigan

§§333.26401 to 06; §§333.16274, §§16275, §§20197, §§750.430a

Prohibits human cloning for any purpose and prohibits

the use of state funds for human cloning; establishes civil and criminal penalties.

Missouri

§§1.217

Bans use of state funds for human cloning research which seeks to develop embryos into newborn child.

Rhode Island

§§23-16.4-1 to 4-4

Prohibits human cloning for the purpose of initiating a pregnancy; establishes civil penalties for corporations/hospitals and individuals.

Virginia

§§32.1-162.32-2

Prohibits attempt to create a human being by transferring the nucleus from a human cell into an oocyte from which the nucleus has been removed (human being is undefined); also prohibits the implantation or attempted implantation of the product of somatic cell nuclear transfer into an uterine environment so as to initiate a pregnancy; also prohibits possessing, shipping or receiving the product of somatic cell nuclear transfer for the purpose of implanting such product into an uterine environment so as to initiate a pregnancy.

assisted reproduction focus on medical practice, an area traditionally regulated by the states, not by federal government. Although some policy concerning state law questions is made through state cases, such as the applicability of contract law to surrogate motherhood or embryo custody disputes¹⁹, comprehensive legislative policy is difficult. In part, this is because if states do attempt any form of regulation, their efforts may be challenged as unconstitutional intrusions of state authority into a constitutionally protected area of personal liberty.

Recent cases concerning frozen embryos have not yet clarified the situation, as they alternate between viewing reproductive technologies as a matter of private contract or public policy. Many states treat these embryos as a unique type of property over which the gamete donors have ultimate dispositional authority²⁰, but where conflicts arise between the progenitors, courts have yet to clearly determine whether the dispute should be resolved by contract, property law, family law or constitutional law. Although some courts have tended to favour resolution by enforcing private contractual arrangements, others are leaning towards relying on public policy considerations and lately have been giving preference to the party who seeks to avoid procreating²¹. Thus, even in these very particular disputes about frozen embryos, US law does not yet clearly indicate whether individuals may have complete control, through the use of contracts, over obtaining and using gametes and embryos, or if the courts will continue to have authority over reproductive technologies and will continue to rely on their interpretations of public policy to set limits on individual decision-making.

At the jurisprudential heart of the confusion is the question of whether human reproduction, in all its forms and with all its accompanying medical and market activities, should be free of all but the most compellingly necessary governmental intrusion. It is a question of tremendous importance but, at least in the US, one of little judicial precedent. Thus, to understand the

societies⁶, some nations, such as Japan⁷ and Italy⁸, rely wholly or in part on self-regulation through domestic medical society guidelines or on the indirect effects of health service reimbursement policies⁹. Others countries establish commissions to propose new practice policies, such as the United Kingdom's influential 1980s Warnock Commission¹⁰, Australia's state and federal bioethics commissions¹¹, and the French National Consultative Ethics Committee for Health and Life Sciences¹², whose myriad opinions have led to a number of legislative restrictions on assisted reproduction practice and research¹³. A number of countries (for example, Australia, Canada, France, Germany, Israel, New Zealand, South Africa, Sweden and the United Kingdom) have merged these techniques in an effort to create a comprehensive national policy covering everything, from the kinds of assisted reproduction services (and correlative offerings, such as genetic screening)

that will be available to the credentials required to offer the services to limitations on who may receive the services or what kind of research may be done to promote further development and improvement of services¹⁴.

By contrast, despite a number of efforts by professional societies¹⁵ and several national and state bioethics commissions¹⁶, much policy in the US still derives from a combination of indirect regulation and limited state and federal case law. In part, this is a result of constitutional limitations on federal power in the US. Policy can be made indirectly by regulatory conditions on approval for new drugs and biologics (which is how federal policy on both research and reproductive applications of cloning has developed from 1997–2002)¹⁷ or by placing limitations on how federal research funds may be spent (which is how federal policy on embryo research has developed from 1980–2002)¹⁸. But most controversies concerning

Table 2 A selective chronology of U.S. Supreme Court decisions concerning abortion, contraception and sterilization.

Source: National Abortion Rights Action League.

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

Prevented sterilization pursuant to Oklahoma law aimed at felons convicted of crimes of 'moral turpitude.'

Griswold v. Connecticut,**381 U.S. 479 (1965)**

Invalidated a Connecticut statute that prohibited the use of contraceptives, holding that the statute violated the constitutional right to marital privacy.

Eisenstadt v. Baird,**405 U.S. 438 (1972)**

Invalidated a law prohibiting the distribution of contraceptives to unmarried people, holding that the constitutional right to privacy extends to the reproductive decisions of both married and unmarried people.

Roe v. Wade,**410 U.S. 113 (1973)**

Invalidated a Texas law prohibiting abortions not necessary to save the woman's life.

Planned Parenthood of Central Missouri v. Danforth,**428 U.S. 52 (1976)**

Invalidated provisions of a Missouri statute that required a married woman to obtain the consent of her husband before obtaining an abortion.

Maher v. Roe,**432 U.S. 464 (1977)**

Upheld a Connecticut prohibition of the use of public funds for abortions, except those 'medically necessary.'

Carey v. Population Services,**431 U.S. 678 (1977)**

Invalidated a New York law prohibiting the sale or distribution of contraceptives to minors.

Colautti v. Franklin,**439 U.S. 379 (1979)**

Invalidated as unconstitutionally vague a Pennsylvania statute that required a physician, under threat of criminal penalties, to use the method and 'degree of care' most likely to preserve the life and health of the foetus if the physician determined the foetus was viable or had 'sufficient reason to believe that the foetus may be viable.'

Harris v. McRae,**448 U.S. 297 (1980)**

Upheld the Hyde amendment, which prohibits the use of federal funds for abortions not necessary to preserve the woman's life.

Thornburgh v. American College of Obstetricians and Gynecologists,**476 U.S. 747 (1986)**

Invalidated provisions of Pennsylvania statute that required physicians to secure 'informed consent' by providing anti-abortion information, including the availability of State supplied printed materials describing the characteristics of the foetus and listing alternatives to abortion.

Webster v. Reproductive Health Services,**492 U.S. 490 (1989)**

Upheld provisions of a Missouri statute prohibiting the use of public facilities or public personnel to perform privately funded abortions.

Rust v. Sullivan,**500 U.S. 173 (1991)**

Upheld federal regulations prohibiting health care professionals at family planning clinics that receive Title X funds from counseling or referring women regarding abortion, or even informing a pregnant patient that abortion is a legal option.

Planned Parenthood of Southeastern Pennsylvania v. Casey,**505 U.S. 833 (1992)**Upheld provisions of a Pennsylvania statute that required physicians to provide patients with anti-abortion information to discourage women from obtaining abortions, as well as a mandatory 24-hour delay following these lectures. The Court explicitly overruled parts of *Thornburgh* and abandoned the 'strict scrutiny' standard of review applied to fundamental rights for a less protective 'undue burden' standard of review.**Stenberg v. Carhart,****530 U.S. 914 (2000)**

Invalidated a Nebraska law that prohibited so-called 'partial birth' abortion unless the procedure is necessary to save the life of the woman, because it lacks any exception to protect women's health.

reproductive technologies will depend on whether they are viewed as an exercise of especially protected personal liberties. This question is not easy to answer. Even though reproduction, as a whole, has been marked out for special protection from government intrusion, the reasoning behind that protection remains unclear. If it is because human reproduction is associated with intimate marital relations, then technologies using third party gametes or hired surrogates may not be protected, because they represent a departure from the purest form of marital privacy. If it is because the government ought not interfere with the physical bodies and reproductive capabilities of its citizens, then there may be a right to terminate a pregnancy or to refuse sterilization, but there is only a far weaker claim of any right to access medical services that depend on extra-uterine maintenance or diagnosis of embryos. But if it is because human reproduction is notable for the profound way in which it reflects individual choices, aspirations and self-identity, then there may be a far broader range of reproductive decisions that are free from government intrusion. To predict which of these rationales will prevail, and thus to predict the fate of reproductive technology regulation efforts in the US, one begins with the core decisions concerning fertility, contraception and abortion.

Various aspects of reproductive privacy rights have been articulated in a number of landmark cases in the US Supreme Court (see Table 2). The earliest case limited the right of the government to order involuntary sterilization²². In the 1960s and 1970s, the Court issued other landmark rulings²³ that protected access to contraceptives and abortion services²⁴, declaring that the 'decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices'²⁵ and that 'if the right of privacy means anything, it is the right of the individual... to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child'²⁶. The earliest cases, such as those concerning forced

dynamic of assisted reproduction debates and emerging policy in the US it is essential to return to core jurisprudential issues concerning the degree of personal liberty

guaranteed by the federal constitution in reproductive decision-making.

In the US, the right of the government to regulate, or even prohibit, assisted

sterilization, were grounded in a traditional, common-law concern about bodily integrity, but the later cases incorporated concerns about marital privacy and psychological autonomy. For example, a right to contraception for men — for whom conception is a psychological, but not a physical, burden — implicitly endorsed a theory of reproductive liberty that went beyond mere bodily integrity and included a more general right to control one's future. This is a notion of reproductive liberty that might support a claim of constitutional protection for the use of any number of new reproductive technologies.

However, subsequent abortion decisions seemed to back away from this expansive notion of reproductive liberty. Where psychological autonomy was raised, as in Justice Sandra Day O'Connor's statement that 'at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life', it was ravaged by her colleagues, as when Justice Scalia wrote that this 'collection of adjectives... can be applied to many forms of conduct that this Court has held are not entitled to constitutional protection... (for example) homosexual sodomy, polygamy, adult incest and suicide, all of which are equally 'intimate' and 'deeply personal' decisions involving 'personal autonomy and bodily integrity', and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable²⁷.

The comments by Scalia presaged future trends in judicial thinking about the elements of personal liberty, and subsequent abortion cases have backed away from this regard for psychological autonomy and emphasized instead gender equality or bodily autonomy²⁸. This trend to de-emphasize a broad interpretation of liberty interests in psychological autonomy has already been affirmed in cases concerning issues as diverse as homosexuality²⁹ and suicide³⁰, where the Supreme Court has emphasized repeatedly that only historically grounded practices that are 'central to ordered liberty' will be viewed as

Table 3 January–June 2002 State Legislative Activity on Reproductive Technologies (note: only the Washington State bill was passed; all others are either pending or have failed to pass within the legislative time limit).

Source: National Conference of State Legislatures.

Connecticut

HB 5762

Would have clarified legal parentage of a child conceived using genetic material of donor and required health care providers to maintain certain information regarding donors, including genetic testing done as a part of donor screening.

Minnesota

HB 2819 and SB 2625 and SB 3452

Would have required counseling prior to entering into a collaborative reproduction agreement and to enter into a binding agreement prior to creating an embryo.

Missouri

HB 1458

Would have prohibited sex selection on extrauterine IVF.

HB 1790

Would have prohibited genetic engineering of humans (including the addition of nonhuman genetic material to a human embryo, sperm or ovum or the addition or deletion of human genetic material to a human embryo, sperm or ovum used to create a human pre-embryo or embryo) except for prevention or therapy for specific disability or disease.

deserving special protection from government regulation or prohibition.

Assisted reproduction exists uneasily within the confines of such restricted boundaries on personal liberty. When performed with the gametes of the intended rearing parents, and without any effort at pre-implantation diagnosis, it comes closest to replicating the circumstances that have triggered Court protections in the past. But when third party gametes are used by a married couple, it is no longer a form of genetic reproduction for the infertile member of the couple, but rather a means to bypass alternatives, such as adoption, or even conception through adultery. Thus, it loses one important characteristic — sheer biological connection to the next generation — that has animated the decisions of the Court. And when gametes are procured by purchase, it loses another important characteristic — marital privacy — as this

New Jersey

AB 496

Would have mandated preconception advance directives on the disposition of frozen gametes or embryos prior to use of assisted reproduction services.

AB 2011

Would have prohibited IVF for any purpose other than implantation; limit implantation to married women; prohibit destruction of extrauterine embryos; and clarify dispute resolution concerning extrauterine embryos; embryos would have become wards of states when couples longer desire embryos to be implanted or after two years.

Washington

SB 5207

Clarifies kinship of a child conceived by assisted reproduction.

Wisconsin

AB 736

Would have banned human cloning and placed limits on embryo research and the use or sale of embryonic or fetal tissue; would also have mandated a study on how to reduce the number of IVF embryos created by infertility clinics and how to facilitate the prenatal adoption of unused IVF embryos.

action necessarily brings third parties and the world of commerce into the reproductive endeavour. Even if the Court were to find that there is a protected right to use third-party gametes, it might yet conclude that there is no right to have them available for sale³¹. Such prohibitions already exist on the sale of human organs, even when their purchase might save the life of a dying patient. And preconception sex selection or even pre-implantation diagnosis for genetic illness — techniques that have aroused the concern of some feminists and disabled-rights advocates — are vulnerable to governmental regulation if the broad view of psychological autonomy is rejected by the Supreme Court.

The importance of the Supreme Court jurisprudence lies in the effect it has on demands for well-grounded public policy. Where activities are especially protected, governmental restrictions are prohibited,

unless shown to serve a compelling purpose that cannot be addressed by less onerous means. Without special judicial protections, however, almost any public concern can justify governmental restrictions. Thus, even though arguments over the societal effects of gamete sales and surrogate motherhood remain unresolved, with some insisting that they maximize personal opportunity and others insisting that they invite exploitation and demean the spirit, government restrictions need not await positive proof of social harms, if the practice is unprotected by special constitutional doctrine. Given the recent retreat of the Supreme Court from an expansive notion of reproductive liberty, constitutional challenges to state regulation of reproductive technologies might indeed fare poorly, even if reports of harm or exploitation remain anecdotal, rather than widespread.

Of course, prospects for state and federal regulation do not depend solely on an assessment of whether the regulation can withstand constitutional challenge. The political will to attempt regulation also depends upon the political climate and ramifications of attempting regulation. Reproductive technologies have always attracted a spate of state bill introductions after each announcement of a new technique, but rarely have the bills been passed. In part, this is because even the most benign interventions can lead the government into a quagmire. Regulating sperm donation with regard to viral transmission is relatively easy. But regulating sperm donation with regard to genetic traits would quickly embroil government regulators in the controversial task of determining which genetic traits code for conditions so serious that no one with the trait ought to be a donor. In a word, it would require a governmental eugenics policy.

Not only is government action delicate, it is often thwarted by legislatures that are unable to reach a consensus on even the broad outlines of government policy. Reproductive technology policy does not fit easily within the American political landscape of the last few decades, which

has teamed (simplistically speaking) economic libertarians with moral communitarians in the Republican party, and economic communitarians with moral libertarians in the Democratic party. Reproductive technology policy does not fall along these lines, as it tends to team market restrictions with moral and social restrictions. Legislative efforts, therefore, cannot take advantage of traditional political alliances.

Surrogacy, for example, is opposed by some feminists as an invitation to the exploitation of poor women. They are joined in a rather strange alliance with social conservatives, who see it as an affront to traditional families and motherhood. Other feminists, however, are loathe to argue that competent women are incompetent to choose to enter into these arrangements, and are joined in their own strange alliance with economic conservatives who prefer markets and contracts to laws and regulations. Furthermore, genetic diagnosis, whether *in vitro* or *in vivo*, is simultaneously deplored by some patient groups, concerned about promoting intolerance for people with disabilities, and supported by other patient groups, concerned about helping parents to avoid foisting these burdens on their children. Underlying all of these shifting alliances is the looming question of abortion rights, with every legislative initiative tested against whether it is a symbol of increasing or decreasing public tolerance and public control over the right to terminate a pregnancy, thus turning every regulatory initiative into a proxy battle in the ongoing abortion wars that have paralysed American politics since the 1960s.

The net effect of this unusually complex political landscape has been a dearth of effective legislative initiatives, despite the introduction of hundreds of bills over the last two decades. However, the advent of somatic cell nuclear transfer has added a new and dynamic element to this political landscape, and has spurred a small number of states to ban human reproductive cloning. But although congressional opposition to reproductive cloning is universal,

congressional attitudes towards reproductive cloning are more divided. Nonetheless, overlap with abortion politics has paralysed the congress, with research cloning and embryo research serving again as a proxy for the debate over abortion. Abortion opponents, taking advantage of the controversy surrounding cloning, have attached restrictions on embryo research to federal bills to ban reproductive cloning, and in both 1997 and 2002, the extended struggles over the embryo research restrictions have prevented the reproductive cloning bans from being passed³².

Even though federal legislation on cloning has been stalled, it has galvanized interest groups and media, paving the way for future efforts to regulate reproductive technologies (see Table 3). Many of the arguments put forth for banning non-reproductive research uses are premised on a slippery slope theory that conflates cloning with genetic engineering and eugenics. Even if the research uses of cloning remain legal in the US and much of the industrialized world, this debate has already revived efforts to regulate IVF³³ and pre-implantation diagnosis, and to ban the sale of gametes³⁴.

In addition to questions about markets and genetic diagnosis, myriad other legal issues related to assisted reproduction also remain unresolved. Despite a handful of state cases, for example, there is yet to be a uniform national approach to the thorny problem of determining legal kinship in cases of conflict between progenitors, gestational mothers and intended rearing parents³⁵. The cloning debate may have the effect of breaking current deadlocks and forging some new and effective political alliances that could be used to introduce legislation to regulate and regularize the use of reproductive technologies. But at the base of all the legislative debates that will ensue will lie the most central dilemma of all: how much control should the government have over the use of these technologies to create and to shape the family? In the US, alas, neither the public, the politicians nor the court have yet answered that question. □

1. A joint NIH/FDA meeting on the regulation of assisted reproduction is scheduled for September 2002.
2. 42 U.S.C. 263a-1(a) (1995).
3. As of June 2002, legislation on human cloning has been enacted in seven states: California, Iowa, Louisiana, Michigan, Missouri, Rhode Island, and Virginia. See National Conference of State Legislatures, <http://www.ncsl.org/>
4. Blank, R. & Merrick, J.C. *Human Reproduction, Emerging Technologies, and Conflicting Rights*, 96-98 (Congressional Quarterly, 1995).
5. La. Rev. Stat. Ann. 9:122 (West 2000); Va. Code Ann. 32.1-289.1 (Michie 1999).
6. Statement On The Principled Conduct Of Genetics Research (approved by HUGO Council, March 21, 1996), *Eubios Journal of Asian and International Bioethics* 6, 59-60 (1995) (based on Knoppers, B.M., Hirtle, M. & Lormeau, S. Ethical issues in International Collaborative Research on the Human Genome: The HGP and the HGDP. (1995)); Schenker, J.G. FIGO statements and world experience. *Hum. Reprod.* 1998 13: 2047-2049; *Universal Declaration on the Human Genome and Human Rights* (UNESCO, November 1997); *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings* (Strasbourg: Council of Europe 1997); European Parliament and Council Directive on the Legal Protection of Biotechnological Inventions COM(97)446 final.
7. Shirai, Y. Ethical debate over Preimplantation Genetic Diagnosis in Japan. *Eubios Journal of Asian and International Bioethics* 11, 132-136 (2001); Higuchi, N., "Parenthood under Japanese Law," in *Frontiers Of Family Law* (Andrew Bainham & Judge David Pearl eds., 2d ed. 1995).
8. Ferrando, G. "Artificial Insemination in Italy," in *Creating The Child* (Donald Evans & Neil Pickering eds., The Hague, The Netherlands, 1996).
9. Wertz, D.C. International Perspectives on Ethics and Human Genetics. *Suffolk U. L. Rev.* 27 1411, 1443-45 (1993); Lorio, K.V. The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from Our Neighbors - What Translates and What Does Not. *Loy. L. Rev.* 45, 247 (Summer 1999).
10. Report of the Committee of Inquiry into Human Fertilisation and Embryology, HMSO, July 1984 (Cm. 9314).
11. See <http://anatomy.med.unsw.edu.au/cbl/embryo/law/law1.htm> for a list of commissions and resulting Australian state and federal legislation.
12. Viville, S. and Ménézo, Y. Human embryo research in France. *Hum. Reprod.* 17, 261-263 (2002); Opinions of the National Consultative Ethics Committee for Health and Life Sciences, <http://www.ccne-ethique.org/english/start.htm>.
13. For example, U.K. Surrogacy Arrangements Act (1985) and Human Fertilisation and Embryology Act (1990) (Britain), the Infertility (Medical Procedures) Act (1984) (Victoria, Australia), and various French statutes and regulations available at <http://www.ccne-ethique.org/english/start.htm>.
14. Blank, R.H. *Regulating Reproduction* (Columbia University Press, New York, 1990).
15. American Society for Reproductive Medicine (<http://www.asrm.org/Media/Ethics/ethicsmain.html>); American Medical Association (http://www.ama-assn.org/apps/pf_online/pf_online?f_n=browse&doc=policy-files/E-2.00.HTM&&s_t=&st_p=&nth=1&nxt_pol=policy-files/CEJA/E-000.01.HTM&); Association of Reproductive Health Professionals (<http://www.arhp.org/arhpframeadvocacy.html>); American Society of Human Genetics (<http://www.faseb.org/genetics/ashg/policy/pol-00.htm>); American College of Obstetricians and Gynecologists, Code of Ethics (<http://www.acog.com/>).
16. Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy (New York State Task Force on Life and Law, April 1998); Cloning Human Beings (June 1997) and Ethical Issues in Human Stem Cell Research (September 1999) (National Bioethics Advisory Commission, <http://bioethics.georgetown.edu/nbac/>); see also the President's Council on Bioethics (<http://www.bioethics.gov/>).
17. <http://www.fda.gov/cber/genetherapy/clone.htm>
18. Charo, R.A. Embryo Research: An Argument for Federal Funding. *Journal of Women's Health* 4 (6), 603-608 (1995); Charo, R.A. The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women. *Stanford Law and Policy Review* 6 (2), 1-38 (1995); Charo, R.A. Bush's Stem Cell Compromise: A Few Mirrors? *Hastings Center Report* 6 (December 2001) 31 (6); Charo, R.A. "Bush's Stem Cell Decision May Have Unexpected — and Unintended — Consequences," *Chronicle of Higher Education* (September 7, 2001)
19. Litowitz v. Litowitz, Docket No. 70413-9, Supreme Court of the State of Washington, (06/13/2002).
20. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *York v. Jones*, 717 F. Supp. 421, 426-27 (E.D. Va. 1989) (holding that Cryopreservation Agreement entered into between gamete donor/parents and IVF clinic "fully recognized plaintiffs' property rights in the pre-zygote and limited [the defendant clinic's] rights as bailee to exercise dominion and control over the pre-zygote"). Some states, however, have enacted specific statutes that grant pre-embryos specific legal protection as "persons." e.g., LA. REV. STAT. ANN. @ 9121-133 (West 2000).
21. *J.B. v. M.B.*, 170 N.J. 9 (2001) (holding that ordinarily, the party wishing to avoid procreation should prevail); *Kass v. Kass*, 91 N.Y. 2d 554 (1998) (enforcing pre-conception contract requiring donation of embryo for research in absence of agreement otherwise by progenitors); *A.Z. v. B.Z.*, 431 Mass. 150 (2000) (holding pre-conception contract unenforceable when it would result in unwanted parentage by one gamete provider).
22. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
23. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down statute which forbid use of contraceptives on grounds that statute invaded zone of privacy surrounding marriage relationship); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down statute forbidding distribution of contraceptives to unmarried persons on equal protection grounds).
24. *Roe v. Wade*, 410 U.S. 113 (1973) (establishing unrestricted right to an abortion in first trimester); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) (striking down provisions of abortion statute requiring spousal consent and parental consent).
25. *Carey v. Population Services International*, 431 U.S. 678 (1977).
26. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
27. *Pennsylvania v. Casey*, 505 U.S. 833 (1992).
28. While Justice O'Connor's opinion in *Pennsylvania v. Casey* (505 U.S. 833 (1992)) does speak to the notion of psychological liberty, her subsequent statements reflect a concern more for gender equality in society than for unfettered personal choice in all matters touching, no matter how remotely, on human reproduction.
29. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
30. *Washington vs. Glucksberg*, 521 U.S. 702 (1997), allowing a right to suicide only if bodily integrity is threatened by unwanted medical intervention, thus implicating a fundamental right to refuse the bodily invasions of treatment, even at the risk of death. Where continued existence does not entail bodily invasions, then no right to suicide (or to assistance in suicide) exists.
31. Rao, R. Property, Privacy and the Human Body. *Boston University Law Review* 80, 359-460 (2000); Robertson, J.A. *Children Of Choice: Freedom And The New Reproductive Technologies* (Princeton University Press, Princeton, NJ; 1994)
32. Weiss, R. "Clinton Presses Ban on Human Cloning; Statement a Response to Fears of Attempts Unless Congress Acts," *The Washington Post*, January 11, 1998; Kranish, M. & Leonard, M. "Cloning ban foes unite, conquer; Bipartisan effort stalled Bush plan," *The Boston Globe*, June 14, 2002.
33. For example, efforts in the Wisconsin legislature to regulate IVF in order to reduce the number of surplus embryos that will be destroyed or used for research. See also Kiefer, F. "A call for federal oversight of fertility clinics," *The Christian Science Monitor*, August 21, 2001; Hall, C. "The forgotten embryo; Fertility clinics must store or destroy the surplus that is part of the process," *San Francisco Chronicle*, August 20, 2001.
34. Currently, a minority of states have passed legislation addressing in vitro fertilization. Cal. Penal Code §§ 367g (West 1999) (permitting use of preembryos only pursuant to written consent form); Fla. Stat. ch. 742.17 (1997) (establishing joint decision-making authority regarding disposition of preembryos); La. Rev. Stat. Ann. §§ 9:121 to 9:133 (West 1991) (establishing fertilized human ovum as biological human being that cannot be intentionally destroyed); Okla. Stat. Ann. tit. 10, §§ 556 (West 2001) (requiring written consent for embryo transfer); Tex. Family Code Ann. §§ 151.103 (West 1996) (establishing parental rights over child resulting from preembryo). See also "Human Cloning and Other Crimes," *The Age* (Melbourne) June 17, 2002.
35. *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998); *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).