REGULATING REPRODUCTION: A HISTORICAL ANALYSIS OF THE LEGAL APPROACHES TO ADVANCES IN ASSISTED REPRODUCTION TECHNOLOGIES

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In 1973, Dr. Landrum Shettles of Columbia-Presbyterian Hospital in New York City agreed to assist a couple who had struggled for years to conceive a child. John and Doris Del-Zio came to Dr. Shettles, a recognized expert in the emerging field of in vitro fertilization, in order to attempt this final experimental procedure in the hopes of overcoming infertility and having a child. Shettles started working with the Del-Zios and even fertilized Doris Del-Zio's egg in the laboratory, however, the hospital administration learned of Shettles's research and halted the experiment before the fertilized egg could be re-implanted.

By terminating Dr. Shettles's research, the hospital administration impeded scientific progress in aiding infertile couples. Moreover, the discontinuation of the procedure personally devastated the Del-Zios who became emotionally connected with the possibility of experiencing parenthood. As a result, the Del-Zios filed a lawsuit against Columbia Presbyterian Hospital. In their lawsuit, the Del-Zios alleged that the hospital's termination of the procedure provided the basis for legal action under a claim of intentional infliction of emotional distress.

The Del Zio's case illustrates the complex and difficult issues associated with advances in biomedical research and emerging medical technology. The difficulty connected with understanding and addressing the issues and dilemmas presented by the rapid advance of biomedical technology has facilitated the creation of an innovative field of scholarly inquiry - bioethics. One of the most complex issues discussed today in the bioethics field is the regulation of human reproduction and fertility. In many ways, fertility treatment is located just beyond the

"water's edge," beyond the boundaries of legal directive. It is at the frontier of human knowledge, medical science, moral understanding, and the law.

Curiously, historians have largely focused on one piece of the human reproduction equation – preventing or terminating pregnancy through either contraception or abortion. Under a related analytical framework, historians have also explored the issue of eugenics. However, little work has been completed on efforts to facilitate procreation and the arrival of fertility treatment, which has advanced rapidly since the 1970s. This represents a large gap in the historical literature. Moreover, it is essential that scholars research and understand how society has responded to the continuously developing field of assisted reproduction, because it allows for a more accurate representation of rights associated with procreation. Even *Roe v. Wade*, a landmark case supporting a woman's right to choose to terminate her pregnancy, has important implications and connections with facilitating pregnancy. The Supreme Court's rationale has been cited in support of expanding the right of privacy to protecting the right to procreate.

Currently, much of the scholarly debate surrounding advances in biomedical technology has centered on the value of applying legal solutions. However, instead of discussing whether the law should be employed to regulate biomedical advance or fertility treatment, it is more informative to analyze the choice of substantive law. Substantive law creates the legal rules that direct the relationship between individuals in society or between individuals and the state. Substantive law contains a number of varied and diverse bodies of law: including contract, tort, administrative law, criminal law, and constitutional law. Some bodies of law sweep more broadly than others. In other words, choosing particular areas of law to apply to any given issue impacts the reach of the court's decision. The most extreme solution, with the greatest reach and greatest impact, is the application of constitutional law.

Public law is a term often used to describe laws and regulations that control the connection between individuals and the state. Public law includes several different categories of law. These categories include criminal law, administrative law and constitutional law. Cases speaking directly to constitutional principles are sweeping mandates, directing the choice of public law to resolve contentious issues like abortion. Criminal law offers another important area of substantive law. One of the most effective ways to stop, or at least deter, behavior is to make it criminal. Legislatures and Congress assign criminal punishment to acts that bear moral culpability; statutes reflect the moral values of the society that elects the legislative body. Public law represents an important facet of substantive law, but it is only part of the overall landscape.

Alternatively, some bioethics issues have been dealt with through private law. Generally, private law does not involve the state. Two primary examples of private law are the law of contracts and the law of torts. Contract law involves a legally enforceable agreement between two or more parties. Under a contract, the parties have exchanged promises creating a legally enforceable agreement whereby a court may offer a remedy to an aggrieved party if a breach occurs. An individual commits a tort when they commit a wrong that breaches a duty owed to another individual. Courts may rectify these wrongs by awarding damages to the harmed individual. Private law often proceeds on the notion that case decisions reflect the values of a community and allow for incremental change desired by community members. Private law assumes individual autonomy and the need for a case-by-case analysis.

Unsurprisingly, people often look to the judicial system to resolve contentious issues, and this is true of bioethics and biomedical technology. Generally, some of the most recognizable substantive law rules concerning bioethical issues come from Supreme Court decisions applying

constitutional law, such as *Roe v. Wade, Griswold v. Connecticut,* and *Cruzan v. Director*.[1] These cases demonstrate the tension between different parties, organizations, and ideas inherent in the resolution of cases concerning advances in biomedical technology. In addition, the competing interests present in the study of bioethics and biomedical advance illustrate the tension among doctors, lawyers, and academics, but also illuminate the difference between public and private law.

Always hanging over the contentious issues of bioethics is the divisive decision in *Roe v. Wade*.[2] In January 1973, the United States Supreme Court decided this landmark abortion case. Politicization of bioethical issues is likely inevitable. In recognition of the increasing importance of bioethics, Congress created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research in 1974, one year after the *Roe* decision. This body was part of the Department of Health, Education, and Welfare (now Health and Human Services), and remained in existence until 1978. With the exception of two lapses, from 1983-1988 and from 1990-1994, there has been a body in existence that has been responsible for promoting and conducting research, analyzing information, and issuing proposed reports, and sometimes, policy

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[1] In *Griswold v. Connecticut* (1965) the Supreme Court examined the use of contraceptive devices by married couples. The Court concluded that a state may not criminalize the use of contraceptives by married couples. The Constitution affords couples protection under the marital right to privacy found in the penumbra of rights emanating from multiple provisions of the Constitution and the Bill of Rights. *Roe v. Wade* (1973) is a Supreme Court decision concerning a woman's decision to have an abortion. *Roe v. Wade* extends the constitutionally protected right to privacy to include a woman's choice to terminate her pregnancy during the first trimester. During the second trimester, the state may regulate abortion in a manner that is "reasonably related to maternal health." Finally, during the third trimester the state has a legitimate interest in the potential life of the fetus and may regulate and even proscribe abortion. In *Cruzan v. Director* (1990) the Supreme Court examined the issue of removing a patient from life sustaining treatment. The Court found that in order to terminate the life support of an individual in a persistent vegetative state, there must be a showing of clear and convincing evidence demonstrating the wishes of the patient to be removed from life support.

[2] David J. Rothman, *Strangers at the Bedside: A History of How Law and Bioethics Transformed Medical Decision Making* (New York: HarperCollins, 1991); Ben Rich, *Strange Bedfellow: How Medical Jurisprudence Has Influenced Medical Ethics and Medical Practice* (New York: Kluwer Academic/Plenum Publishers, 2001).

advice following the creation of the National Commission in 1974. However these presidential bioethics commissions are notable for the diversity of names, objectives, and at times, political stalemate over divisive issues such as abortion, use of certain groups as study subjects, or stem cell research.

Issues of bioethics live under the shadow of the *Roe* decision, yet scholars tend to treat abortion, surrogacy, and in-vitro fertilization as loosely, if at all, related issues. Instead, scholars must distance themselves from the *Roe* decision, not because it is not important, but rather because focusing so heavily on the decision has made it exceptional. The *Roe* decision was significant, but by no means unique. This decision must be analyzed in context of others during the modern period, specifically other issues relating to bioethics, such as *Buck v. Bell*, *Skinner v. Oklahoma*, and *Cruzan v. Director*. Importantly, the commission offers an opportunity for scholars to examine how political debate has influenced questions of biomedical advance, and more directly, issues stemming from ART.

The present body of scholarship reflects a variety of methodological and disciplinary approaches. Case law opinions reflect unsettled principles concerning many bioethics issues at the common law level. The unsurprising reality at the governmental level is that the bodies created to advise the president have, for the last fourteen years, been shaped, at least in part, by the political ideology of the man occupying the Oval Office. This indicates that studying presidential bioethics commissions will provide a better understanding of the complex relationship between fertility technology and the political process.

The bioethics commissions are evidence of a recognition that public law, the constitutional mandates of the Supreme Court and criminalizing behavior through creating statutes, is not always the best fit. The commissions do not make law, but instead conduct

research into the efficacy of technologies, the value of the technologies to American society, and use this research to report to the President. However, the commissions also point to that in addition to private law, there might also be room for some public law in the bioethics debate through administrative law. In some situations, administrative regulation could potentially be a solution. Ultimately some form of incremental change that is in line with, and receptive to, the values of the society the law governs is the best solution to dealing with issues that individuals desperately want the legal system to "fix."

Today, the field of bioethics is far reaching and encompasses a number of technologies and issues. My dissertation will illustrate the drawbacks of using public law to resolve advances in biomedical technology, including: the inflexibility of the law to address nuanced changes in technology and shifts in public opinion, its susceptibility to political pressure, and its formulation by individuals who have little experience with medical technology.

What kinds of issues do advances in fertility treatment create? Some technologies offer comfort and predictability. For example, genetic counseling helps couples determine if any genetic diseases could be passed to potential offspring. While this reassures couples that their children will not likely suffer from a genetic disease, it produces ethical and moral questions. If applied to traits or phenotypes rather then genetic diseases, the use of genetic counseling can push the boundaries of eugenics. Generally, eugenics advocates the use of practices aimed at improving the genetic composition of the human population.

Eugenics can be either positive or negative. Positive eugenics is aimed at encouraging reproduction among the genetically advantaged, while negative eugenics is aimed at lowering fertility among the genetically disadvantaged. The law has addressed the issue of eugenics in a number of cases. Two classic examples are *Buck v. Bell* and *Skinner v. Oklahoma*.

In the 1927 case of *Buck v. Bell*, the Supreme Court upheld a statute instituting compulsory sterilization of the unfit, including the mentally challenged, claiming an interest "for the protection and health of the state." In this manner, the decision may be seen as an example of negative eugenics. In *Skinner v. Oklahoma*, a 1942 Supreme Court ruling, the Court held that compulsory sterilization could not be imposed as a punishment for a crime. Both cases illustrate how the law has already waded into the murky waters of eugenics and both cases demonstrate how using the law in the area of fertility can lead to undesirable results.

Surrogacy, the practice of having a woman carry a child to term for another couple or parent, has changed and evolved over several decades. In early examples, infertile couples would use the male partner's sperm to fertilize an egg provided by the surrogate mother. As the technology and procedure evolved, surrogate mothers could be implanted with a fertilized egg created by the infertile couple's own gametes. While clear standards in federal law or policy are largely absent from the debate surrounding surrogacy, state legislatures and courts have become involved in regulating the practice. Moreover, similar to the early stages of development for in vitro fertilization, surrogacy regulation varies widely from state-to-state. Some states, California for example, have permissive legislation allowing for the existence of surrogacy. Other states, such as Indiana, declare that all cases of surrogacy agreements are against public policy and therefore unenforceable. Still other states, such as Wisconsin, do not have any explicit legislation handling surrogacy.

While the law governing surrogacy is diverse and varied, one court decision has preoccupied legal scholars and defined the overarching philosophical debate concerning the adjudication of surrogacy cases since it was announced. The Supreme Court of New Jersey, in its 1988 decision *In the Matter of Baby M,* issued a widely regarded opinion considered

fundamental in addressing the issue of surrogacy in the United States. In the case of *In the Matter of Baby M*, we see the intersection of contract and family law, but more importantly the idea that some subject matter is not available for contract. This case provides an excellent example of many of the issues involved in the practice of surrogacy: issues of class, issues of education, issues of public policy, liberty of contract, the emotional strain caused by infertility, and the psychological stress of a surrogate mother relinquishing a child.

After being diagnosed with multiple sclerosis, Elizabeth Stern concluded that a pregnancy would not be in her best interest and might even jeopardize her health and life. In order to create a family, Elizabeth Stern and her husband sought alternatives to starting a family. After rejecting the option to adopt, the Sterns, who were both well educated and financially secure, contacted the Infertility Center of New York. The Center connected the Sterns with Mary Beth Whitehead, who after witnessing her sister struggle with infertility decided to help other infertile couples by becoming a surrogate mother. The Sterns and Whitehead agreed to a surrogacy contract where Whitehead would carry the baby to full term and then turn over custody of the child to the Sterns. The total value of the surrogacy contract was $22,100 - a sum that would greatly help the financially struggling Whiteheads.

Mary Beth Whitehead gave birth to a baby girl in March of 1986. Shortly thereafter, Mary Beth Whitehead, unwilling to give up the child, fled with the baby girl. This story demonstrates how class and financial means factor into fertility treatment. The Sterns would have never have had access to fertility treatment if they had not had the financial means to pursue a very expensive surrogacy contract.

The issue of surrogacy agreements is often complicated further by the relationship of the prospective parents to the gametic material. In *Johnson v. Calvert*, married couple Mark and

Crispina Calvert were unable to have children following Crispina's hysterectomy. Anna Johnson, a coworker of Crispina, offered to act as a surrogate for the Calverts. The Calverts and Anna Johnson subsequently entered into a surrogacy agreement. The Calverts provided an embryo formed from their own gametes. Under this arrangement, Anna Johnson did not provide an egg for fertilization. Johnson was then implanted with the zygote generated from the Calvert's gametes, which resulted in her pregnancy. A child from this pregnancy was born on September 19, 1990. Following the delivery of the child, Anna Johnson refused to relinquish custody. The California courts were now presented with the complicated issue of two different women claiming maternity. Crispina Calvert was the genetic mother of the newly born child. Anna Johnson, however, carried the child to term and delivered the baby - a gestational mother. Under these circumstances, the court determined that the genetic mother was considered the natural mother under California law. The court held:

> [w]e conclude that although the Act[3] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[4]

Under this interpretation, the Court focuses on the intent of parties – utilizing principles of contract law.

Moreover, the majority opinion in *Johnson v. Calvert* opening rejected critics arguments that surrogacy was degrading, dehumanizing women and exploiting differences in economic status inherent in issues of class to take advantage of women of lower economic means. The court stated,

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries

[3] "Act" refers to the California Uniform Parentage Act
[4] *Johnson v. Calvert,* 851 P.2d 776 (Cal. 1993)

> prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes.[5]

With this holding, the Court affirms principles essential to contract law: examining the intent of the parties involved. Moreover, the court employed other principles found in common law decisions, such as contract and tort, in this case. The above-referenced quotation illustrates how the court recognized the agency of the parties. In addition, the majority opinion explicitly addresses the ability of Anna Johnson to enter into contractual arrangements. Her education and intellectual ability present no bars to believing she was able and capable of exercising informed consent when entering into the surrogacy agreement with the Calverts. The Calvert case provides an excellent opportunity to examine issues of class and education and how they speak to the development of policy and the application of law in fertility cases. Issues of class and education are also present in the *Baby M* case. Comparing these two cases will be useful in explaining the consequences of legal solutions in biomedical advance.

Roger Dworkin, a bioethics scholar and law professor emeritus suggests that the law is important and can and should be used as a valuable tool to resolve disagreements in the field of bioethics. However, he also cautions that "blind faith in the law's ability to resolve bioethical problems or unthinking acquiescence in the dominant role of law would be … unsound." Dworkin argues that law is a limiting or reactive factor, rather than a positively acting, forward-looking force, and as a limiting factor, law should only be used when imposing limits.[6]

In summation, private law rather than public law, particularly the areas of contract and tort, is in some instances better equipped to resolve the diverse and complicated issues presented

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[5] *Johnson v. Calvert,* 851 P.2d 776 (Cal. 1993)

[6] Roger B. Dworkin, *Limits: The Role of the Law in Bioethical Decision Making* (Bloomington: Indiana University Press, 1996), 2.

by advances in biomedical technology – principally in the area of fertility treatment. Moreover, the historical record substantiates that solutions applied by legislatures or constitutional interpretation often fail to permit the flexibility required to effectively balance the competing interests inherent in the rapid changes associated with biomedical research. In this way, the law and the legal system should tread gently, walking up to the water's edge, wading into this immense reservoir of moral uncertainty, careful not to allow the water to overpower and engulf us.