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Frozen Embryos: The Constitution on Ice

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FROZEN EMBRYOS: THE CONSTITUTION ON ICE

I. INTRODUCTION

In this age of advanced technology, the medical field has created newer and better ways of easing life's hardships. One of the most prevalent medical problems affecting millions of American couples today is infertility.[1] Medical research, combined with advanced technology, has helped to bring children to couples who previously had no other choice but adoption.

Today there are at least two generally accepted methods of assisting infertile couples. One such method is through artificial insemination (AI). This procedure involves artificially inseminating a woman with sperm from her husband/partner (Artificial Insemination—Husband or AIH) or from a donor (Artificial Insemination—Donor or AID). Any number of possibilities can ensue if the woman herself is infertile or unable to carry the child.[2]

In addition to AI, another procedure may be utilized—in-vitro fertilization (IVF). IVF involves the mating of egg and sperm in a laboratory dish. Using this method, the sperm of either the husband or donor is combined with the ovum of either the mother or donor and implanted in either the mother or surrogate. To make matters even more complex, a process has been developed whereby the fertilized embryo can be stored in liquid nitrogen. This process freezes the embryo until it is needed for implantation.[3]

This complicated technology seems quite simple, however, when compared to the legal gymnastics that must be performed in order to determine the rights and responsibilities of the parties involved. For example, when Mario and Elsa Rios were unable to bear a child by natural means, they went to the Queen Victoria Medical Center in Melbourne,

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1. It is estimated that seven million American couples have infertility problems. Menning, *The Psychology of Infertility*, in INFERTILITY DIAGNOSIS AND MANAGEMENT, 17 (J. Aiman ed. 1984).

2. See Appendix for list of combinations possible when artificial insemination (AI) or in-vitro fertilization (IVF) are utilized.

3. The term "frozen embryo" is really a misnomer. At the time the mixture of ova and sperm is stored in the liquid nitrogen, it is not yet ascertainable whether the ovum is fertilized and, therefore, it is not yet an "embryo." The definition of an embryo is a "developing organism . . . from about two weeks after fertilization to the end of the seventh or eighth week." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 432 (26th ed. 1981). However, since the phrase "frozen embryo" is used as a term of art, and for the purpose of simplicity, this term will be used throughout this Comment.

Australia for help. The couple produced three test tube embryos, two of which were frozen in liquid nitrogen while the third was implanted in Mrs. Rios' uterus. This implantation failed, but the two frozen embryos remained stored for future use. Unfortunately, the couple was killed in a plane crash before any further attempts at in-vitro fertilization were possible.[4]

The legal issues presented by this unusual incident are vexing. Can the frozen embryos be destroyed or must they be accorded some sort of constitutional protection? If destruction of the frozen embryos is prohibited, must they be implanted in a surrogate mother? If they are born, who are their legal parents? What inheritance rights do they have with respect to their biological parents?

The list of legal issues is too expansive to be covered within the scope of this Comment. Accordingly, this Comment will focus on the right of women who wish to undergo the in-vitro fertilization procedure to control the fate of the frozen embryo.[5] An analysis will be made of their rights as compared to the state's interest in protecting the embryo. Since the most closely related body of law is that which deals with abortion, the analysis in this Comment will be based on the fundamental right of privacy. In addition, this Comment proposes certain guidelines by which lawmakers should draft legislation related to this complicated new world of high-tech conception.

II. THE FROZEN EMBRYO

For the millions of women who are unable to become pregnant naturally, in-vitro fertilization (IVF) has made childbearing a realistic possibility. Assuming that the woman and her partner are fertile, their respective ova and sperm are retrieved, combined in a laboratory dish, and implanted in the woman. If the implantation is successful, the woman will become pregnant and bear a child.

In reality, this scenario is not simplistic or risk free. In order to retrieve an ovum from the ovary, the woman must undergo a laparoscopy.[6] This is a delicate surgical procedure that carries with it risks and

4. N.Y. Times, June 27, 1984, at A12, col. 4. Although a scholarly committee recommended that the embryos be destroyed, Australian lawmakers passed an amendment allowing for the embryos to be implanted in a surrogate mother and put up for adoption. N.Y. Times, Oct. 24, 1984, at A18, col. 4.

5. While this Comment focuses on the woman's rights, it recognizes that a husband or partner has a valid, and arguably equal interest in the fate of the embryo. See *infra* text accompanying notes 70-74 for a discussion of the rights involved in spousal notification.

6. The laparoscopy is performed under general anesthesia. Surgeons insert a laparoscope (⅓ inch in diameter) through a small incision in the abdomen in order to see inside the ovary.

pain, so that it is in the woman's best interests to undergo only as many of these procedures as are necessary for treatment.[7]

Once an ovum has been retrieved the sperm is added to the egg and, if all goes well, the fertilization process begins. When the embryo is at least two to eight cells in size, it is implanted in the woman's uterus. Since the most successful clinics offer only about a twenty percent success rate,[8] and because the odds improve with each successive attempt, a woman may have to undergo several attempts at fertilization before a successful pregnancy is achieved. With the risks and costs inherent in undergoing numerous laparoscopies,[9] embryo freezing seems to be the safest and least expensive solution. A woman whose first implantation was unsuccessful could avoid further unnecessary laparoscopies by storage of the fertilized embryos.

The troubling issue presented by this scientific development is whether a woman who is implanted successfully has a constitutional right to determine the fate of the unused frozen embryos.

If a state may validly assert an interest in the potential life of frozen embryos, it could require a woman to choose between storing the embryos for her own future use or releasing them for someone else's use. While some women could easily choose between these options, others may not want another woman to bear a child with their embryo and would rather dispose of the unused frozen embryos.

At first blush, disposing of the unused embryos would not seem to present a problem because the woman would be disposing of her own six-to-eight cell organism. Yet, if one asserts that life begins at the moment of conception,[10] this destruction is no less abhorrent than abortion.

Testifying before congressional hearings, Reverend Donald McCarthy, of the Pope John XXII Medical-Moral Research and Education Center in St. Louis, argued that every embryo is entitled to a panoply of constitutional rights.[11] These rights include a right not to be frozen, not to be experimented upon, not to be destroyed and even a right not to be

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A long, hollow needle is then inserted through a second incision in the abdomen and the eggs and surrounding fluid are suctioned up. Although some clinics use the less expensive procedure of ultrasound imaging to guide the needle into the ovary, this technique may be less reliable than laparoscopy. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 46, 49.

7. Brahams, *The Legal and Social Problems of In Vitro Fertilization: Why Parliament Must Legislate*, 51 MEDICO-LEGAL J. 236, 237 (1983).

8. Wallis, *supra* note 6, at 50.

9. In the United States each attempt at ovum retrieval costs between $3000 and $5000, not including travel costs and hours missed from work. *Id.*

10. See *infra* note 23 and accompanying text for a discussion of Justice O'Connor's view that life begins at the moment of conception.

11. Friedrich, *"A Legal, Moral, Social Nightmare,"* TIME, Sept. 10, 1984, at 54, 55.

created except out of " 'personal self-giving and conjugal love.' "[12] At this point in the development of this legal-ethical-medical dilemma, it is unclear whether or not any or all of these concepts could become legislative realities.[13]

With the emergence of a strong "pro-life" lobby, and the emotionally sensitive issue of fetal research,[14] It is not unlikely that the following legislation one day could be enacted: "It shall be unlawful to destroy a fetus conceived outside a woman's body."

Yet today, the right to choose an abortion without unduly burdensome state interference is protected by the due process clause of the fourteenth amendment, which encompasses the fundamental right of privacy.[15]

The following discussion analyzes the applicability of the fourteenth amendment right of privacy to the above hypothetical statute. Specifically, one of the privacy interests recognized by the Court in *Roe v. Wade*[16] will be analyzed and applied to the frozen embryo problem. This Comment concludes that the right of privacy promulgated by the Supreme Court in *Roe v. Wade* encompasses a privacy interest both in bodily integrity and in the making of procreative choices and that it could be successfully asserted to challenge the constitutionality of any legislation protecting frozen embryos.

III. *ROE V. WADE*

In 1973, the United States Supreme Court recognized a woman's right to terminate her pregnancy without undue government interference.[17] The Court's decision was based upon a balancing of the woman's fundamental rights with the relevant state interests.[18] In order to determine the effects of *Roe v. Wade* on issues arising from the existence of the

12. *Id.* (quoting Reverend Donald McCarthy).

13. In order to justify such legislation, states would have to bestow rights protected by the fourteenth amendment due process clause on beings not held to be persons in the eyes of the law. *See* Roe v. Wade, 410 U.S. 113, 156-59 (1973).

14. *Id.* at 153; City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419-20 (1983).

15. *See infra* note 88 and accompanying text.

16. 410 U.S. 113 (1973).

17. Roe v. Wade, 410 U.S. 113, 162-63 (1973). In this landmark abortion decision, a pregnant single woman brought a class action challenging the constitutionality of the Texas criminal abortion laws. The Court held that state criminal abortion laws that except from criminal prosecution only a life-saving procedure on the mother's behalf, without regard to the stage of pregnancy and other relevant factors, violated the due process clause of the fourteenth amendment. *Id.* at 147-64.

18. *Id.* at 162-63.

frozen embryo phenomenon, it is necessary to examine the relevant principles promulgated in that decision.

As its basic premise, the *Roe* Court recognized that a right of privacy does exist, although not expressly mentioned in the Constitution.[19] The Court held that this personal privacy guarantee encompasses the right of a woman to terminate her pregnancy.[20]

The Court concluded, however, that the right of privacy is not unqualified: it must be weighed against the important state interests such as protecting potential life.[21] When "fundamental" rights are at stake, however, any state regulation limiting such rights must be justified by a compelling state interest under a strict level of judicial scrutiny.[22]

The *Roe* Court determined that the state's interest in potential life is

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19. The fundamental right of privacy was first defined by the Court in Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the Supreme Court held unconstitutional a state statute that prohibited married couples from using contraceptives. While acknowledging that there is no express right of privacy in the Constitution, Justice Douglas found this right to exist in the penumbras of the Bill of Rights guarantees. *Id.* at 484. Therefore, this newly created right was of sufficient constitutional dimension to be protected from unwarranted state intrusion. *Id.* at 484-86.

The right of privacy in sexual matters has been held to include a woman's right to decide whether or not to bear or conceive children, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), as well as the right to use abortion as a method of implementing this decision. Roe v. Wade, 410 U.S. 113 (1973). *See infra* note 20 and accompanying text.

20. *Roe*, 410 U.S. at 153.

21. *Id.* at 154. The Court recognized that some state regulation in the areas protected by the right of privacy is appropriate when such regulation is based on interests in safeguarding health, in maintaining medical standards and in *protecting potential life*. *Id.* (emphasis added). The Court used the term "potential life," but never defined it. Presumably, the term includes a fetus from the time of conception onward. See *infra* note 23 for further discussion of this issue.

22. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (regulation limiting right to vote subject to strict scrutiny); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (regulation affecting right of interstate movement subject to strict scrutiny); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (regulation abridging right to free exercise of religion subject to strict scrutiny).

The importance of labeling a right "fundamental" is to afford this right the greatest level of constitutional protection. In order for a state to enact legislation which burdens a fundamental right, it must pass a test of strict judicial scrutiny. Under this test, the regulating state must show a compelling state interest which overrides the fundamental right. In addition, the legislation must be narrowly drawn, such that no less burdensome alternative is available. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (regulations imposing a burden on the fundamental right to decide whether to bear or beget a child may be justified only by compelling state interests and must be narrowly drawn to express only those interests); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1963) (State Department regulations denying passports to Communist Party members must be narrowly drawn and provide the least intrusive alternative so as not to invade fifth amendment liberties); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940) (breach of peace statute must be narrowly drawn in order to avoid impairment of the first amendment freedom of religion).

Other examples of "fundamental" rights include the right to vote and participate in the electoral process, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to per-

not always compelling.[23] It established a timetable by which one could discern when the state's interest becomes "compelling" and, thereby overcomes the privacy right of the expectant mother to terminate her pregnancy.[24] This system, based upon trimester units, has become the

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sonal mobility in interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to freedom of association, NAACP v. Alabama, 357 U.S. 449 (1958).

23. *Roe*, 410 U.S. at 162-63. An interesting problem with the Court's analysis is that it seemed to imply that the state's interest in potential life was actually two distinct interests. The Court recognized an interest in potential life that did not become compelling until the third trimester. *See infra* note 24. Arguably, the Court had never before recognized an interest that changed with the passage of time. Interests normally change over time because society's morals change or because societal conditions change. But here, an interest that at one time could not withstand judicial scrutiny, can later pass constitutional muster simply by the passage of two trimesters. Thus, it is reasonable to deduce that the Court created two distinct interests: one in potential life and one in viable life.

In the most recent affirmation of *Roe*, Justice O'Connor's dissent asserted that "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) (emphasis in original). Therefore, the state has a single interest in potential life that exists throughout the pregnancy. *Id.* at 460 (O'Connor, J., dissenting).

24. *Roe*, 410 U.S. at 163-64. The timetable established by the Court is based on a trimester approach. The pregnancy is divided into three time units, each accounting for one-third of the pregnancy. The Court concluded that a state may regulate the abortion procedure only after the end of the first trimester if that regulation relates to maternal health. *Id.* at 163. The Court based its determination on medical evidence that established that the mortality rate from abortions in the first trimester was less than the mortality rate for childbirth. Thus, the end of the first trimester is the point at which the state's interest in protecting maternal health becomes compelling. *Id.*

With respect to regulations relating to the protection of fetal life, the Court concluded that at a point subsequent to fetal viability a state may prohibit abortion except where it is necessary to preserve the life or health of the mother. Fetal viability is the point at which the fetus has the capability of meaningful life outside the mother's womb. The Court's rationale in choosing this time period was based on medical evidence that the moment at which the fetus becomes viable occurs approximately at the end of the second trimester. Thus, fetal viability is the point at which the state's interest in protecting potential life becomes compelling. *Id.* at 163-64.

In *Akron*, Justice O'Connor began her attack on the Court's abortion analysis by challenging the trimester approach. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). She pointed out that the state's interest in maternal health and in potential life changes as medical technology changes. *Id.* at 454 (O'Connor, J., dissenting). On the one hand, as it becomes safer for a woman to undergo an abortion procedure later in her pregnancy, states will presumably be forbidden to implement maternal health regulations until later and later into the pregnancy. On the other hand, medical advances in the field of prenatal medicine demonstrate that fetal viability at earlier stages of pregnancy may be possible in the near future. *Id.* at 457 n.5 (O'Connor, J., dissenting). Accordingly, the "viability" point at which a state is permitted to regulate abortions, thereby promoting its interest in the potentiality of human life, will also occur earlier and earlier in the pregnancy. Thus, Justice O'Connor argued that the *Roe* trimester system is on a collision course with itself, making it an unworkable balancing test for the rights involved. *Id.* at 458 (O'Connor, J., dissenting).

It should be noted that while this Comment assumes the continued validity of the right

core of many Supreme Court abortion decisions since *Roe* was decided.[25]

As the Court made clear in later cases, the essence of *Roe v. Wade* is that any regulation which interferes with the abortion decision during the first trimester will be held constitutionally invalid.[26] Although the "essence" of *Roe* is ascertainable, the Court failed to provide a precise definition of the privacy rights it purported to create. As Professor Ely points out, it is "entirely proper to infer a general right of privacy, so long as some care is taken in defining the sort of right the inference will support."[27] Therefore, it is essential to determine the specific right created in *Roe* so that the right may be applied in cases that differ factually.[28]

IV. THE *ROE* PRIVACY RIGHT

The right of privacy is said to be protected by the Bill of Rights or its penumbras.[29] One significant area in which this personal liberty has been recognized is that of personal, marital, familial and sexual privacy. For example, in *Griswold v. Connecticut*,[30] the Supreme Court ruled that fundamental constitutional guarantees created a "zone of privacy" for

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created in *Roe v. Wade*, the valid criticism of the trimester approach by Justice O'Connor is a genuine threat to the viability of the *Roe* framework.

25. *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (state statute requiring that abortions after twelve weeks be performed in a hospital declared unconstitutional); Simopoulous v. Virginia, 462 U.S. 506 (1983) (state statute requiring that second trimester abortions be performed in licensed clinics was not an unreasonable means of furthering state's compelling interests in protecting maternal health); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (state abortion ordinance requiring all second trimester abortions be performed in a hospital, parental consent, informed consent, a 24 hour waiting period and disposal of fetal remains held unconstitutional); Colautti v. Franklin, 439 U.S. 379 (1979) (state statute requiring a determination of fetal viability before a specific abortion technique is utilized held unconstitutionally vague); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state abortion statute requiring execution of spousal consent form, execution of parental consent form, a physician to preserve the fetus' life and prohibiting the use of the most commonly used abortion procedure during the first 12 weeks of pregnancy held unconstitutional).

26. "*Roe* clearly establish[es] that the State may not restrict the decision of the [woman] . . . regarding abortion during the first stage of pregnancy." *Danforth*, 428 U.S. at 66 (1976).

However, the Court has permitted some state regulation during the first trimester. Although it invalidated most of the provisions of the Missouri abortion statute in *Danforth*, the Court upheld the written consent and recordkeeping provisions of the statute because they did not interfere with the abortion decision or the doctor-patient relationship. *Id.* at 65-67, 79-81.

27. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 929 (1973).

28. The cases cited *supra* at note 25 all involved abortion regulations. For the purposes of this Comment, the facts involve the destruction of an embryo, but do not involve the termination of a pregnancy.

29. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

30. 381 U.S. 479 (1965).

married couples which prevented states from criminally penalizing the use of contraceptives.[31] This "zone of privacy" concept has been expanded to include the right to terminate pregnancy and the right to refuse life-sustaining treatment.[32]

These privacy rights represent two interests: (1) a privacy interest in controlling one's own body and (2) a privacy interest in making personal life choices.

A. The Right to Bodily Integrity

While states retain some control over what a person may do with or to his or her own body,[33] courts have recognized certain qualified privacy rights in this area. These rights have been asserted to prevent a state from forcing unwanted medical treatment upon a person, as well as to prevent a state from withholding treatment.[34]

The right has been recognized to prevent a state from forcing life-sustaining procedures upon a patient.[35] In *In re Quinlan*,[36] the father of a comatose twenty-two year old woman sought appointment as his daughter's guardian and the express authorization to discontinue all extraordinary procedures used to sustain her life.[37] After determining that the father had standing to assert his daughter's constitutional rights,[38] the New Jersey Supreme Court discussed the right of privacy. Basing its conclusion on the Supreme Court's holding in *Griswold v. Connecticut*, the New Jersey court held that the privacy right founded in *Griswold* "encompass[ed] a patient's decision to decline medical treatment under

31. *Id.* at 485-86. The right of privacy was extended to include the right of unmarried persons to use contraceptives in Eisenstadt v. Baird, 405 U.S. 438 (1972).

32. *See* Comment, *Discontinuing Treatment of Comatose Patients Who Have Not Executed Living Wills*, 19 LOY. L.A.L. REV. (1985).

33. For example, states can prohibit one from using controlled substances, *see, e.g.*, CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1985) and from selling one's body in prostitution, *see, e.g.*, CAL. PENAL CODE § 647(b) (West Supp. 1985).

34. Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795, 802 (1980).

35. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). Similar rights have also been recognized. *See* Youngberg v. Romeo, 457 U.S. 307 (1982) (fourteenth amendment encompasses freedom from unreasonable bodily restraint); *In re* Guardianship of Richard Roe, III, 383 Mass. 415, 421 N.E.2d 40 (1981) (liberty interest to refuse psychotropic drugs founded in common law and federal Constitution); Superintendent v. Saikewics, 373 Mass. 728, 370 N.E.2d 417 (1977) (court authorized withholding painful chemotherapy treatment for 67 year old retarded leukemia patient).

36. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

37. *Quinlan*, 70 N.J. at 18, 355 A.2d at 651.

38. *Id.* at 34-35, 355 A.2d at 660.

certain circumstances."[39] The patient's exercise of this right is an exercise of personal choice.[40]

Similarly, the right to obtain contraceptive devices has been recognized to prevent a state from withholding medical treatment. In *Eisenstadt v. Baird*,[41] a lecturer on contraception was arrested for giving an unmarried woman a package of contraceptive foam. He was subsequently convicted under a Massachusetts statute that made it a felony for anyone to give contraceptives to unmarried individuals.[42] Relying on *Griswold*, the Supreme Court held that the right of privacy encompasses a right for both married and unmarried persons to use contraceptives.[43] "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[44]

The right to refuse life-sustaining treatment and the right to use contraceptives both may be analyzed as rights over one's own body. Both involve either the introduction of foreign matter into the body or the prevention thereof.[45] These rights also may be analyzed, however, as rights to make personal life decisions.

B. The Right to Make Personal Life Choices

When one thinks of the right to refuse life-sustaining medical treatment, the freedom from bodily intrusion comes to mind.[46] Yet, more than making a decision not to undergo treatment for a disease or to be free from a respirator, a patient who exercises this right is making a life decision. Often the decision made is not a choice between living with or without a respirator; rather, it is a choice between life and death.

Likewise, when the right to use contraceptives is exercised, freedom from bodily intrusion comes into play.[47] On a more practical level, the

39. *Id.* at 40, 355 A.2d at 663. The court also noted that the *Griswold* privacy right was the same right that encompasses "a woman's decision to terminate pregnancy." *Id.*

40. Clarke, *supra* note 34, at 801.

41. 405 U.S. 438 (1972).

42. MASS. GEN. LAWS ANN. ch. 272 § 21 (West 1970).

43. *Eisenstadt*, 405 U.S. at 453-55.

44. *Id.* at 453 (emphasis in original).

45. Contraception may be viewed as the right to introduce foreign matter, i.e., the pill or diaphragm, while refusing life-sustaining treatment may be viewed as the right to refuse such introduction, i.e., preventing the unwanted use of drugs, respirators, and such to sustain life.

46. *See supra* note 45 and accompanying text.

47. Although the term "intrusion" seems a bit harsh, a woman who has an unwanted pregnancy may in fact view the fetus as an intruder.

choice to use contraceptives is a procreative decision. It is a choice between creating life and not creating life.

The exercise of this right is distinguishable from the exercise of the right to refuse life-sustaining medical treatment because when one uses contraceptives, one does not *destroy* life.[48] The underlying concepts of these rights, however, are the same: a state may not impermissibly inhibit the right of an individual to make these personal life choices.[49]

C. *Abortion: The Right to Bodily Integrity or Procreative Choice?*

Although a single right may involve both an interest in making personal choices and an interest in bodily integrity, the question remains whether the privacy right promulgated in *Roe v. Wade* encompasses one or both of these interests and whether it should be extended to the frozen embryo problem.

1. *Roe* as a bodily integrity right

It can easily be argued that the *Roe v. Wade* privacy right only encompasses a woman's right over her body. First, the factual setting in *Roe* involved a pregnancy.[50] The Court's rationale for imposing first trimester restrictions, whereby a state is prohibited from interfering with the abortion decision,[51] demonstrates that the Court relied heavily on the fact that the fetus was in the woman's uterus. During the first trimester of pregnancy a woman's privacy interest must be balanced with the state's interest in *maternal health*.[52] But the only time a woman's health is at issue is when she is actually pregnant.[53] If the fetus is developing outside her body, abortion poses no risk to the mother's health. Therefore, the right articulated by the *Roe* Court may only involve the control over one's own body.

The Court has also ruled that an expectant father's rights to control the fate of the fetus are not equal to those of the pregnant woman. In *Planned Parenthood v. Danforth*,[54] the Court held unconstitutional Missouri abortion statutes containing spousal and parental consent require-

48. See *infra* text accompanying note 68 for discussion of the intrauterine contraceptive device.

49. *See supra* notes 29-48 and accompanying text.

50. Roe v. Wade, 410 U.S. 113, 120 (1973).

51. *See supra* note 24 and accompanying text.

52. *Roe*, 410 U.S. at 163. *See supra* note 24.

53. But see *supra* text accompanying notes 6-7 for a discussion of the risks involved in IVF.

54. 428 U.S. 52 (1972).

ments.[55] This demonstrates a differentiation between the rights of a pregnant woman and her spouse. Arguably, the parties' rights would be equal if the right was one of procreative choice. This differentiation implies that the right of privacy in *Roe*, on which *Danforth* is based, is unique to the woman.[56] Therefore, it supports reading *Roe* narrowly, as upholding the right of a woman to control her body and not a procreative right.

If one were to conclude that the right to refuse life-sustaining treatment and the right to use contraceptives only constituted rights to bodily integrity, and not rights to make life-determining decisions, it would make sense to read *Roe* similarly. In fact, *Eisenstadt v. Baird, Quinlan* and *Roe* were based on the Court's holding in *Griswold v. Connecticut*. And just as the Court in *Eisenstadt* relied heavily on *Griswold*, the Court in *Roe* relied on *Griswold* and *Eisenstadt* in establishing a right to decide whether or not to abort a fetus. Finally, in *Quinlan*, the New Jersey Supreme Court stated that the right of privacy recognized in *Griswold* "is broad enough to encompass a patient's decision to decline medical treatment . . . in much the same way as it . . . encompass[es] a woman's decision to terminate pregnancy."[57] Assuming these cases constitute a linear progression,[58] *Roe* could be viewed as establishing only a privacy interest preserving bodily integrity.

2. *Roe* as a right of procreative choice

While arguments that *Roe v. Wade* encompasses a privacy interest in bodily integrity are persuasive, it makes more sense to read *Roe* as encompassing a general privacy right to make procreative decisions. First, the language of the cases on which *Roe* is based use terms which point to a decision-making right. For example, in *Eisenstadt v. Baird*,[59] the Court speaks of "the *decision* whether to bear or beget a child."[60] Moreover, the language of *Roe* itself demonstrates a privacy interest in decision-making. The Court speaks of a right "broad enough to encom-

55. For the full text of the Missouri statutes in question, see *id.* at 84-89 (Appendix To Opinion Of The Court).

56. See *infra* notes 70-74 and accompanying text for discussion of rights involved in spousal notification.

57. *In re* Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 663 (citing *Roe*, 410 U.S. 113, 153 (1973)), *cert. denied*, 429 U.S. 922 (1976).

58. *See Developments In The Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1183-85 (1983) [hereinafter cited as *Developments*].

59. 405 U.S. 438 (1972).

60. *Id.* at 453 (emphasis added). *See also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (personal privacy right extends to "freedom of choice to marry").

pass a woman's *decision* whether or not to terminate her pregnancy."[61] In addition, commentators on the subject have referred to the right established in *Roe* as "the right . . . to make unimpeded contraceptive *decisions*,"[62] the "right to make procreative *choices*"[63] and the right to make "the abortion *decision*."[64] The use of these terms supports a general privacy interest in procreative choice.

Second, while abortions and contraception are factually distinguishable,[65] the right to the abortion decision was based, in part, on the recognition of the right to use contraceptives.[66] Since the decision to use contraception involves a privacy interest in making procreative decisions, it follows that the privacy right recognized in *Roe* encompasses, in part, a procreative decision.

On a strictly biological level, the distinction made between abortion and contraception is that the latter prevents the formation of a fetus, while the former destroys a fetus. An interesting twist to this theory is that doctors are not clear about how the intrauterine device (IUD) works.[67] The most prevalent theory, however, is that the IUD agitates the walls of the uterus so that a *fertilized* ovum cannot attach itself and is therefore expelled.[68] If this is true, this form of contraception is actually a form of abortion because the fertilized ovum is already an embryo when it is expelled from the body. Contraception, including the use of IUDs, which prevents pregnancy in a manner similar to that of abortion, has been held to be a right of procreative choice.[69] Therefore, even the abortion decision is one of procreative choice.

Finally, although the Court has invalidated spousal consent requirements,[70] it has yet to rule on spousal notification requirements. In *Scheinberg v. Smith*,[71] the Fifth Circuit held that a Florida statute requir-

61. *Roe*, 410 U.S. at 153 (1973) (emphasis added).

62. *Developments, supra* note 58, at 1184 (emphasis added).

63. *Childbearing and Nurse-Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. REV. 661, 686 (1983).

64. Note, *Spousal Notification Requirement Is Constitutionally Permissible Burden on Woman's Right to Privacy in Abortion Decision*: Scheinberg v. Smith, *659 F.2d 476 (5th Cir. 1981)*, 13 TEX. TECH. L. REV. 1495, 1497 (1982).

65. *See infra* text accompanying notes 67-68.

66. *Roe*, 410 U.S. at 152 (citing *Eisenstadt*, 405 U.S. at 453-54; and *id.* at 460, 463-65 (White, J., concurring in result)).

67. M. HARPER, BIRTH CONTROL TECHNOLOGIES—PROSPECTS BY THE YEAR 2000 46-47 (1983).

68. *Id.*

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

70. Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1972). *See supra* notes 54-55 and accompanying text.

71. 659 F.2d 476 (5th Cir. 1981).

ing a married pregnant woman to notify her husband before terminating her pregnancy was not an unconstitutional burden on her right of privacy.[72] Although a woman may not be substantially burdened in the abortion decision, the court held that the state had a legitimate interest in the institution of marriage.[73] This interest included a "husband's interest in the procreative potential of the marriage" and was based, in part, on *Griswold v. Connecticut*.[74] Both husband and wife have an interest in making procreative decisions. If one accepts the notion that *Griswold* encompasses a right to bodily integrity, and the analysis of the Fifth Circuit giving an expectant father a decision-making right, then the right of privacy, at least according to one federal appellate court, encompasses a bodily integrity right as well as a decision-making right when applied to abortion decisions.

Cases which have analyzed and applied the right of privacy have interpreted that right as encompassing both a privacy interest in making personal life choices and a privacy interest in controlling one's body. This Comment suggests that the abortion right created in *Roe* also encompasses these rights and that courts would have to apply them to any statutes protecting frozen embryos.

V. THE *ROE* RIGHT APPLIED TO FROZEN EMBRYOS

As discussed in part II of this Comment, the in-vitro fertilization (IVF) procedure involves the attempted fertilization of an ovum with a sperm in a laboratory dish.[75] While some fertilized ovum are implanted in the woman's uterus in the hope of a successful pregnancy, the remaining embryos are frozen for future use by placing them in liquid nitrogen.[76] If this first implantation is successful, the now pregnant woman may wish to assert a right to decide the fate of the remaining frozen embryos.[77] The question is whether the privacy right established in *Roe* encompasses a woman's right to decide the fate of her "test tube embryos."

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72. *Id.* at 486. The court remanded in order to determine whether the statute met the constitutional requirement of being narrowly drawn. *Id.* at 187.

73. *Id.* at 483.

74. *Id.*

75. See *supra* introductory paragraph of part II for a discussion of the in-vitro fertilization procedure.

76. *See supra* note 3 and accompanying text. If the first implantation is unsuccessful, another implantation would be attempted with the previously frozen embryos. *See supra* notes 8-9 and accompanying text.

77. While some women would want them kept in storage for future use and others would allow them to be used by other IVF patients, it is likely that at least some women would rather have their frozen embryos destroyed.

If it is concluded that the right of privacy, as promulgated by the *Roe* Court, constitutes only a privacy interest in maintaining one's bodily integrity, a woman who undergoes in-vitro fertilization using the freezing process would not have standing to assert this right. Since the frozen embryo over which she is asserting a privacy interest is located in a laboratory dish, and not in her uterus, a right to control her body is inapplicable.[78] If, however, the right of privacy promulgated in *Roe* primarily constitutes a privacy interest in making procreative decisions, the decision to dispose of excess frozen embryos would be a constitutionally valid exercise of this right.

Just as a procreative choice is made in using contraceptives or in terminating a pregnancy, the same choice is being made with respect to the fate of the frozen embryo.[79] As discussed above,[80] the right of privacy created by the *Griswold v. Connecticut-Roe v. Wade* line of cases encompasses a privacy interest in both bodily integrity *and* procreative choice. Accordingly, whether analyzed as a form of abortion or as a form of contraception, the destruction of unwanted frozen embryos is a right protected by the fourteenth amendment right of privacy. It is a procreative choice which may not be unduly burdened by state regulation. Since the state's interest in potential life does not become compelling until viability, the state could not meet that burden here.[81]

In addition to the assertion of this constitutional right of privacy,[82] any legislation which forbids the destruction of frozen embryos would be bad policy. The only factor differentiating a woman in the very early stages of pregnancy from a woman who has not yet been implanted with an embryo she and her partner created is the location of the embryo. If society permits the destruction of an embryo that is inside a woman's body, but not the destruction of an embryo in a petri dish, absurd results could occur. Conceivably, the woman who is not permitted to destroy the embryo in the petri dish will simply have it implanted in her uterus. If the implantation is unsuccessful, she need not worry further. If, how-

78. *See supra* notes 50-58 and accompanying text.

79. However, simply because a woman asserts a right does not mean she will prevail on the merits. In some cases the state may be able to show the requisite compelling interest. *See supra* note 22.

80. *See supra* text accompanying notes 29-68.

81. *See supra* note 24 and accompanying text.

82. Since women who cannot have children have never been considered a suspect class, an equal protection argument most likely would fail here. Although the state would be treating these women differently than women who could bear children naturally, and therefore obtain abortions, the state need only show a rational basis for this regulation. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3255 (1985) (statute affecting mentally retarded subject to low level scrutiny because mental retardation is not a quasi-suspect classification).

ever, the implantation is successful, she can simply exercise her fourteenth amendment privacy right to terminate her pregnancy by obtaining an abortion. This circumvention of the rule prohibiting the destruction of frozen embryos would pose unnecessary health risks to many women.[83] It would also be cost prohibitive to many, thereby creating a potential equal protection problem.[84]

This illustration of the problem posed by a statute prohibiting the destruction of frozen embryos demonstrates the ineffectiveness of such a rule. A regulation so easily circumvented is not likely to be viable. Accordingly, a more realistic approach must be taken in balancing the competing interests involved.

VI. PROPOSAL

This Comment has presented an analytical approach to one of the many issues that will arise as the freezing of embryos becomes a more routine medical practice. Since the analysis has been presented in terms of hypothetical legislation that would presumably be held unconstitutional under *Roe v. Wade*, it would be helpful to suggest legislation that would be constitutionally valid.

The freezing of human embryos is likely to become as emotionally charged an issue as abortion. Although the Court has recognized a woman's fundamental right to decide whether to have children[85] and has recognized her right to implement that decision through abortion,[86] there is a generally accepted recognition of the human desire to have children. Therefore, medical technology has strived to make procreation a more safe and viable option for those who desire it. While one out of every six American couples is affected by infertility,[87] new conception and childbearing techniques are developed daily.

There is, however, a real concern over fetal experimentation and other questionable uses for these human embryos. Thus, thirty-nine states have already enacted statutes restricting fetal research and/or arti-

83. This rule subjects the woman who does not want to give away her embryos to the health risks inherent in pregnancy and abortion. This certainly runs contrary to the states' interest in maternal health. Roe v. Wade, 410 U.S. 113, 163 (1973).

84. *See supra* note 82. It is also arguable that a woman who cannot afford the procedure is being discriminated against. Since the Court has not held economic status to be a suspect classification, this argument could easily be rebutted by a showing of a rationally based state interest in protecting potential life. *See* Maher v. Roe, 432 U.S. 464, 470-71 (1977) (indigency is not a suspect classification).

85. Eisenstadt v. Baird, 405 U.S. 438 (1972); *see supra* note 41 and accompanying text.

86. Roe v. Wade, 410 U.S. 113 (1973); *see supra* note 17 and accompanying text.

87. Wallis, *supra* note 6, at 46.

ficial insemination.[88]

But before states begin legislating restrictions affecting the freezing of embryos, they must be conscious of the legal framework under which these restrictions will be analyzed. If legislation is drafted with the *Roe* doctrines in mind, the Supreme Court will not have to take steps to "legislate" for the states.[89]

Accordingly, the following proposal is presented as a guideline in drafting legislation that would not offend the constitutional doctrines presented in *Roe* and its progeny:[90]

Embryo freezing will be permitted subject to the following provisions:

1. Stored embryos should be kept for the specific treatment of a particular couple or patient, unless informed consent is given for an alternate use.

2. The maximum time limit for storage of frozen embryos is that period of time which is equivalent to the natural reproductive capabilities of the couple.

3. If techniques for retrieving ova are developed that are reliable, relatively risk-free and not cost prohibitive, a woman should create only one embryo at a time.

Part one of the statute allows a couple to exercise its fourteenth amendment right to decide the fate of the embryo. In addition it prevents fetal experimentation without consent.

Although the purpose of advanced medical technology is to transcend nature, part two of the statute recognizes that if a time limit on storage were not imposed, the legal and societal problems created would be unbearable. Imagine the reaction to the bequeathing of a frozen embryo from generation to generation.

The third part of the statute suggests that a woman create only one embryo for each attempt at impregnation. The state would be given the

88. Those states restricting fetal research include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, N. Carolina, N. Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, S. Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. For a listing of the relevant state statutes see Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. 50, 54-55 (Aug. 1984).

89. One of the major problems many legal commentators have with the *Roe* decision is not that they disagree with the result; rather, they feel that the Supreme Court should not be acting as a legislative body. *See* Ely, *supra* note 27, at 947.

90. Although many more details would need to be included in actual legislation, this proposal should serve as a basic guideline to drafting a statute that could withstand judicial review under the *Roe* analysis.

opportunity to prove that creating one embryo at a time is not a substantial burden on the woman's right to make a procreative choice. If it is not a substantial burden, then the state's interest in potential life can be asserted without unduly burdening the woman's procreative choice.

Based on the analytic framework set forth in *Roe*, the proposal takes into account both the state's interest and the woman's fundamental rights. Since the couple must give its consent before their frozen embryo is used for a purpose other than the woman's implantation, the woman's fundamental right of privacy is advanced. On the other hand, if medical technology advances to the point of creating a risk-free procedure for retrieving ova and the state requires a woman to produce only one embryo at a time, the state's interest in protecting potential life will be protected. Accordingly, this proposal is a viable method of balancing the competing interests involved.

VII. CONCLUSION

The Supreme Court decision in *Roe v. Wade* provides a significant precedent for approaching new issues in the very personal and delicate area of human conception. While the idea of freezing human embryos may seem like a fascinating project of the future, in reality, it is used today to assist couples who cannot have children naturally and who cannot afford the money or health risks involved in undertaking the ovum-retrieval procedure many times. In order to prevent this approach to conception from becoming a science fiction horror, the subject must be approached with the highest moral and ethical scrutiny. The Supreme Court has presented a framework in which to approach the complex issues involved. Unfortunately, these issues are much more complicated than the Court, or anyone else, could ever have anticipated when this framework was established.

Until such time as the Court is presented with these new and complex issues, either Congress or the state legislatures must take steps to anticipate the potential problems, such as the one discussed in this Comment, and provide solutions for them based on the framework in *Roe v. Wade*. Unless the legislatures act soon, millions of infertile couples will have to take their chances and wait for legal nature to take its course.

Tzivia Schwartz

APPENDIX

The following list gives an idea of the numerous combinations that are possible when artificial insemination (AI) or in-vitro fertilization (IVF) are utilized:

For AI—	1.	OM + SD = CM
	2.	OD + SF = CD
	3.	OD + SD = CM
	4.	OD + SF = CM
For IVF—	5.	OM + SF = CM
	6.	OM + SD = CM
	7.	OD + SF = CM
	8.	OD + SD = CM
	9.	OD + SF = CD
	10.	OD + SD = CD
	11.	OM + SF = CD
	12.	OM + SD = CD

OM = Ovum from mother: mother is fertile.
OD = Ovum from donor: mother is infertile.
SF = Sperm from father: father is fertile.
SD = Sperm from donor: father is infertile.
CM = Child born from mother: mother able to carry child to term.
CD = Child born from donor: mother unable to carry child to term; embryo implanted in surrogate mother.