

## Eight is Enough! A Constitutional Argument for Regulating Assisted Reproductive Technology

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The recent birth of the octuplets in California has generated considerable media attention and raised several policy questions that implicate the right of procreation. Nadya Suleman recently gave birth to octuplets conceived via in vitro fertilization (IVF). She is unemployed, unmarried, lives with her mother and has 6 other children aged 2-7. She has had all 14 of her children through IVF. The right to procreate is rooted in tradition as a right of privacy and long considered to be a fundamental right protected from governmental interference, however, this case raises constitutional questions. In addition, the particular facts and circumstances in this case implicate issues of funding and broader societal concerns. Further, the use of assisted reproductive technology, not the traditional notions embodied in procreation, raises ethical, moral, and legal questions involving the role of the medical professionals in this procreative zone of privacy. The focus of this article is to address the Constitutional and the societal concerns.

A Constitutional argument has two facets that need to be addressed. First, *Roe v. Wade* informs us that the right to abortion is recognized as a right of personal privacy<sup>1</sup> but that right is not unqualified and must be considered against important state interests.<sup>2</sup> A woman's right to procreate involves the same privacy concerns as her decision to terminate a pregnancy. Therefore, a woman's right to have children is based upon the same right of privacy as the right to have an abortion. The right of the procreative decision embodied in *Roe v. Wade*, however can be limited where compelling state interests arise.<sup>3</sup> The state interests become compelling at the point when the interests of the fetuses achieve significance.<sup>4</sup> An additional Constitutional argument to be considered is that stated in *Skinner v. Oklahoma*, where procreation was held to be a liberty interest and state action was subject to strict scrutiny.<sup>5</sup> Accordingly, a woman's right to procreate is a fundamental right rooted in our traditional notions of privacy and as such is free from governmental interference absent a compelling state interest subject to strict judicial scrutiny. In the context of this case, the state has three compelling interests. First, the state has an interest in protecting the mother from the risks of assisted reproductive technology and a resulting high order multiple pregnancy. Second, the state has an interest in protecting the lives

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, at 152.

<sup>2</sup> *Id* at 154.

<sup>3</sup> *Id* at 155.

<sup>4</sup> *Id* at 159. (The pregnant woman cannot be isolated in her privacy...at some point in time another interest becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly).

<sup>5</sup> *Skinner vs. Oklahoma*, 316 U.S. 535, at 541 (Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching, and devastating effects. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police powers of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which the State makes in a sterilization law is essential...).

of the unborn fetuses from the morbidities that may result from the premature births that are inevitable in pregnancies complicated by high order multiples. Third, the state has an interest in ensuring that the best interest of the children and the burdens of the cost to society that may arise when the parents lack the ability to provide adequately for the children or are otherwise dependent upon state assistance are given appropriate consideration. Where parents lack the ability to provide for the offspring the decisions that affect the access to assisted reproductive treatment are not easily made and medical professionals are not particularly suited for making these policy decisions. Accordingly, some explicit regulatory framework is necessary to ensure that the best interests of the children and society are served while limiting the burden placed upon the parent's procreative rights. Many believe that the well being of the offspring is an overriding ethical concern in determining whether to provide infertility services.<sup>6</sup>

With regard to the health of the mother to be, assisted reproductive technologies are not without risk. The process begins with hormonal manipulation of the mother to be. Specifically, she is given a series of powerful hormonal injections designed to stimulate her ovaries to produce follicles. Her blood levels of estrogen are measured and the developing follicles are monitored by ultrasound. Once she is determined to be ovulatory, she may either receive an injection of another hormone, human chorionic gonadotropin, to induce ovulation (controlled hyperstimulation) and subsequent intrauterine insemination, or have the eggs retrieved for in vitro fertilization (IVF) and subsequent implantation.<sup>7</sup> One consequence of the hormonal cocktail is hyperstimulation syndrome in which there is loss of vascular volume and potential cardiovascular collapse. The occurrence of this complication is related to the number of follicles that have developed and the estrogen levels achieved. The greater the number of follicles and the higher the estrogen levels, the greater the likelihood of occurrence.<sup>8</sup> Another potential complication that may result from a high order multiple pregnancy is related to the physiologic changes that occur during the ensuing pregnancy. The vascular volume expands to accommodate the need for blood flow through the enlarging uterus and placenta. With high order multiple pregnancies, the uterus is markedly enlarged beyond that in a single pregnancy and the placentation that occurs with multiples adds to this. The consequence is that the vascular volume may be so expanded that the mother to be is at risk for heart failure.<sup>9</sup> In addition, all high order multiple pregnancies are delivered by Cesarean section.<sup>10</sup> Surgical delivery in this setting is not innocuous. Because of the extreme uterine distention caused by the multiple fetuses, the uterus may not contract adequately after delivery. This is an important body mechanism to control blood loss after delivery. The result could necessitate blood transfusion and hysterectomy.<sup>11</sup>

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<sup>6</sup> ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *Child-rearing Ability and the Provision of Fertility Services*, Vol. 82 No. 3 FERTILITY AND STERILITY Vol. September 2004, 565 (The Human Fertilisation and Embryology Act setting up a regulatory authority for assisted reproductive technology in the United Kingdom made this consideration explicit...treatment services should not be provided "unless account has been taken of the welfare of any child who may be born as a result of treatment...").

<sup>7</sup> SPEROFF LEON ET AL., CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 934-937 (5<sup>th</sup> ed. 1994).

<sup>8</sup> *Id* at 915-917.

<sup>9</sup> KEITH LOUIS G. ET AL., MULTIPLE PREGNANCY EPIDEMIOLOGY GESTATION AND PERINATAL OUTCOME 540 (1995).

<sup>10</sup> *Id* at 544.

<sup>11</sup> *Id* at 540.

In considering the risks to the fetuses, high order multiple pregnancies are significant causes of prematurity.<sup>12</sup> Infants born prematurely are at risk for mortality and for certain morbidities that will impact their growth, development, and potential for survival. Specifically, premature infants are at risk for developing intracranial bleeding which may lead to cerebral palsy. They are at risk for pulmonary problems such as hyaline membrane disease which may compromise their ability to breathe and lead to chronic pulmonary problems.<sup>13</sup> In addition, premature infants may develop an intestinal necrosis that at times can be fatal. The potential morbidities associated with prematurity necessitates long term intensive acute care that is extremely costly not only in its impact on the health and well being of the neonate but also the financial costs that will burden society. Too little attention is paid to the well being and interests of the children. The media sensationalizes the birth of high order multiples and the ensuing media celebration ignores the risks to the infants as well as the enormous costs that result.

In the context of the California octuplets, additional costs may be borne by society. It is likely that Ms. Suleman will be unable to pay for the cost of the hospital care for these infants much less provide for 14 children as a single mother. Society will bear the cost of care for these children. This raises a policy question as to whether the State may act in the interest of the children and public. The critical question is, does the State have a compelling interest to ensure the health and safety of the children that may be born as a result of assisted reproductive technology, and thus justify regulating access to such technology? To answer this question requires a balancing of the “best interest” of the children against the parental right to procreate. The resolution of this balancing question focuses on three elements, a “best interest” analogy to adoptions, a “timing” distinction between abortion versus IVF, and whether a person is entitled to government funding in order to exercise a fundamental right.

First, an adoption proceeding is a suit affecting a parent-child relationship and as such the standard for resolution is what is in the best interest of the child.<sup>14</sup> Many safeguards and prerequisites are in place to protect the child. For example, in Texas, the Family Code requires a pre-adoption home screening<sup>15</sup>, residence with the adoptive parent for 6 months<sup>16</sup>, and a criminal history report on the adoptive parent(s).<sup>17</sup> These safeguards are not considered to be state actions that unduly burden the adoptive parents, yet no safeguards for the fetuses and children that result from IVF are in place. By analogy in the adoption context, the court readily decides whether potential parents will be competent and whether placement will be in the best interest of the child. Could this same standard be applied in the context of assisted reproduction? Currently, society protects the best interest of the adoptive child but not the IVF child. Secondly, at the time a person seeks to exercise their procreative right in the context of IVF, there is no compelling state interest. The compelling state interests relative to IVF arises much later, when the pregnancy results; the perinatal risks to the fetuses occur *after* the parental exercise of the procreative right. This is unlike the exercise of procreative choice regarding an abortion when the fetus is viable. In that context, the compelling interest of the state exists *at the time* of the

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<sup>12</sup> *Id* at 544.

<sup>13</sup> *Id* at 539.

<sup>14</sup> TEX. FAM. CODE ANN. §153.002 (2005).

<sup>15</sup> TEX. FAM. CODE ANN. §162.003 (2005).

<sup>16</sup> TEX. FAM. CODE ANN. §162.009 (2005).

<sup>17</sup> TEX. FAM. CODE ANN. §162.0085 (2005).

exercise of the procreative right. This “timing” distinction as well as the adoption analogy above may be sufficient justifications for regulating access to assisted reproductive technology. Lastly, a woman exercises the same right of privacy whether she is exercising her right to procreate or exercising her right not to procreate. In *Maher v. Roe*, the US Supreme Court considered the funding issue in the procreative setting. In that case, the State of Connecticut had a regulation that provided funding for childbirth but denied funding for medically unnecessary abortions. In rejecting the argument that the Connecticut law interfered with a fundamental right, the right in *Roe* and its progeny is the right to decide...it implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.<sup>18</sup> In this case, the Court upheld the State’s choice of spending and its attempt to encourage certain types of behavior.<sup>19</sup> In *Harris v. McRae*, Justice Stewart stated, “Although the liberty protected by the Due Process Clause affords protection against unwarranted governmental interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”<sup>20</sup> These cases indicate that even though an individual may have a fundamental right, they are not entitled to government funding to enjoy that right. Accordingly, it is not an infringement upon that right if the state does not provide for payment of assisted reproductive treatments or for children that may result from such treatment. These cases taken collectively would suggest that the state could implement a funding scheme to “encourage” alternative procreative endeavors other than assisted reproductive technology and thus reduce the likelihood of incurring the enormous costs to society that would result from high order multiple pregnancies in families dependent on public assistance. With regard to the State’s interest in the children, the state does have a compelling interest to act in the best interest of the children in the context of assisted reproductive technology.

As a further policy consideration, does the right of privacy in procreation extend beyond the traditional notions of procreation? That is, should the right to be free from government intrusion include procreative activities encompassed by assisted reproductive technology, and if so, should there be any limitation on the exercise of that right? In the current case with Ms. Suleman, she is unmarried and has had all of her children through IVF. Her children were never the product of a coital procreative endeavor, but instead the product of IVF with sperm donation from a friend. It appears that her resort to IVF was to have children independent of any procreative act or relationship and not because of genuine issues of fertility. This not only raises the question of the applicability of assisted reproductive technology to circumstances that are unrelated to infertility and further calls into question Suleman’s motives. She has indicated in interviews that she had a dysfunctional childhood and sought to erase that with the closeness children could bring, that having a huge family could make up for the isolation she felt as a child. Her motivations raise the specter of some psychological issues and her circumstances are devoid of legitimate fertility concerns that warrant assisted reproductive treatments. Non-traditional procreation should be limited to those with legitimate fertility issues.

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<sup>18</sup> *Maher v. Roe*, 432 U.S. 464, at 464.

<sup>19</sup> *Id.* at 475-476 (There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law, the State’s power to encourage actions deemed to be in the public interest is necessarily far broader).

<sup>20</sup> *Harris v. Mcrae*, 448 U.S. 297, at 317.

In conclusion, the right of procreation is a fundamental right that should be free from government interference absent compelling state interests. I have enumerated several compelling interests of the state that could warrant regulation of assisted reproduction in the procreative zone of privacy. Specifically, the risks to the mother from infertility treatments as well as the risk that may result from a high order multiple pregnancy. The state has a compelling interest to act in the best interest of the offspring that result from infertility treatment. The state interest here is twofold. First, the inherent risk to the infants as a result of the prematurity and secondly the ability of the potential parents to provide for the children. An additional compelling interest of the state concerns the burden to society that high order multiples may present, especially in the context of financial limitations of the parents. The state has an interest in limiting that burden to society. Because of these compelling interests, the state should be able to implement some regulatory framework for access to assisted reproductive technology.

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<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>