

2012

Count Your Chickens Before They Hatch: How Multiple Pregnancies Are Endangering the Right to Abortion

Priyanka Shivakumar

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Priyanka Shivakumar, *Count Your Chickens Before They Hatch: How Multiple Pregnancies Are Endangering the Right to Abortion*, 78 Brook. L. Rev. (2012).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol78/iss1/5>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Count Your Chickens Before They Hatch

HOW MULTIPLE PREGNANCIES ARE ENDANGERING THE RIGHT TO ABORTION

INTRODUCTION

Reconciling the constitutional right to procreate with the constitutional right to abortion produces a paradox. The former protects citizens' interests in having a child, and the latter protects women's interests in terminating a pregnancy. Yet, the right to procreate can also directly implicate a woman's right to terminate her pregnancy. Indeed, sweeping medical advancements in the area of reproductive technology put this incongruity in sharp relief.

"Assisted Reproductive Technology" refers to treatment methods that infertile women use to attain pregnancy.¹ According to the Centers for Disease Control and Prevention, "[Assisted Reproductive Technology] includes all fertility treatments in which eggs and sperm are handled."² In vitro fertilization (IVF) is one of the most popular techniques used in the United States to assist women in achieving pregnancy.³ During an IVF procedure, it is customary to implant more than one embryo in the woman's uterus, with the hope that at least one embryo will result in a pregnancy.⁴ However, one of the common, well-known outcomes of an IVF procedure is for a woman to attain multiple pregnancies after one cycle of implantation.⁵ Since the United

¹ Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1623 (2008).

² Ctrs. for Disease Control & Prevention, *Assisted Reproductive Technology (ART)*, CDC.GOV, <http://www.cdc.gov/art> (last visited Nov. 3, 2011).

³ *Id.*

⁴ Kirsten Riggan, *Regulation (or Lack Thereof) of Assisted Reproductive Technologies in the U.S. and Abroad*, CTR. FOR BIOETHICS & HUMAN DIGNITY (Mar. 5, 2011), <http://cbhd.org/content/regulation-or-lack-thereof-assisted-reproductive-technologies-us-and-abroad>.

⁵ *Fact Sheet: Fertility Drugs and the Risk of Multiple Births*, AM. SOC'Y FOR REPROD. MED., http://www.asrm.org/Fertility_drugs_and_the_risk_of_multiple_births/ (last visited Sept. 21, 2012) [hereinafter *Fact Sheet: Fertility Drugs*].

States supports the notion of “patient autonomy”⁶ and does not limit the number of embryos that can be transferred into a woman’s uterus during a cycle, physicians and patients are free to choose how many embryos are actually implanted in a single cycle.⁷ Although professional medical organizations, such as the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, provide guidelines for embryo transplantation according to a woman’s age, these guidelines represent only nonbinding recommendations.⁸

The unpredictability of the IVF procedure has prompted enormous scrutiny from legal scholars and the general public. For example, in 2009, Nadya Suleman—commonly known as “Octomom”⁹—gave birth to octuplets with the assistance of IVF.¹⁰ Suleman already had six other children who were conceived through IVF.¹¹ Furthermore, it soon came to light that Suleman was an unemployed single mother who was receiving public assistance and had serious psychological problems.¹² Inevitably, questions arose about the ethical and moral implications of the dearth of legislation regulating embryo transfer and the IVF procedure.¹³ Suleman’s story highlights the controversy of “unfit mothers” who gain the ability to bear more children than they are capable of providing for through IVF. On the other hand, IVF’s increasing prevalence has also drawn attention to women on the opposite end of the spectrum: women who undergo IVF, knowing that it will likely result in multiple pregnancies, and then choose to reduce their pregnancy to fewer fetuses.

“Multifetal pregnancy reduction” describes procedures involving multiple fetuses where a woman chooses to terminate one or more fetuses.¹⁴ In the past, doctors have performed reductions for women carrying multiple fetuses because a multifetal pregnancy is significantly more dangerous than a

⁶ Garrison, *supra* note 1, at 1633.

⁷ See Riggan, *supra* note 4.

⁸ *Id.*

⁹ See Alan Duke, *Nadya Suleman’s Doctor Loses California Medical License*, CNN (June 1, 2011), http://articles.cnn.com/2011-06-01/us/california.octuplets.doctor.revoked_1_kamrava-fertility-doctor-embryos?_s=PM:US; Riggan, *supra* note 4.

¹⁰ Randal C. Archibold, *Octuplets, 6 Siblings, and Many Questions*, N.Y. TIMES, Feb. 4, 2009, at A14.

¹¹ Duke, *supra* note 9.

¹² Deborah L. Forman, *When “Bad” Mothers Make Worse Law: A Critique of Legislative Limits on Embryo Transfer*, 14 U. PA. J.L. & SOC. CHANGE 273, 277 (2011).

¹³ See Archibold, *supra* note 10.

¹⁴ Ruth Padawer, *The Two-Minus-One Pregnancy: Unnatural Selection*, N.Y. TIMES, Aug. 10, 2011, (Magazine), at 24, available at <http://www.nytimes.com/2011/08/14/magazine/the-two-minus-one-pregnancy.html>.

twin or single pregnancy¹⁵—although generally doctors will not reduce any further than a twin pregnancy, barring health risks.¹⁶ Reducing a twin pregnancy, also known as “twin reduction,” is increasingly controversial. In fact, a growing number of women undergoing IVF treatments are opting for a twin reduction, even when there are no health risks to the mother or the fetuses.¹⁷ Many physicians have refused to perform the procedure altogether, claiming that twin reductions are more unethical than multifetal pregnancy reductions¹⁸ because a twin reduction is often chosen for “social” reasons rather than for medical reasons.¹⁹ This aspect of twin reductions enables the public to equate it with abortions.

A woman’s right to an abortion is a fundamental right protected by the U.S. Constitution. The Supreme Court decided *Roe v. Wade* on January 22, 1973²⁰ and determined that the right to privacy under the Fourteenth Amendment encompasses a woman’s decision to terminate her pregnancy.²¹ The Court later reaffirmed its central holding from *Roe* in *Planned Parenthood v. Casey*.²² Although the Court unexpectedly changed course in its analysis, introducing the concept of personal autonomy rather than the right to privacy to justify its holding, it concluded that a woman’s right to an abortion is a fundamental right.²³ The Supreme Court has rarely visited the abortion issue since *Casey* in 1992. However, given the advancement of assisted reproductive technology in general, and IVF in particular, coupled with a lack of legislation regarding the procedure, new questions are emerging as to what decisions are encompassed within the meaning of personal autonomy.

This note explores the implications IVF may have on the notion of personal autonomy as enunciated in *Casey*. The note will present two protected fundamental rights—the right to procreate and the right to an abortion—and analyze the

¹⁵ *Id.*

¹⁶ *Id.* at 25.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Mark I. Evans & David W. Britt, *Multifetal Pregnancy Reduction: Evolution of the Ethical Arguments*, 28 SEMINARS IN REPROD. MED. 299-300 (2010), available at <http://www.compregen.com/pdf/ethicalarguments.pdf>; Gretchen Sisson, *Having One-Minus-One Choices*, ABORTION GANG (Aug. 15, 2011), <http://www.abortiongang.org/2011/08/having-one-minus-one-choices/>.

²⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

²¹ *Id.*

²² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992).

²³ *Id.* at 869.

inherent conflict between them. In particular, this note will discuss how twin reductions lead the public to question the right to abortion, rather than the countervailing right to procreate and the unregulated IVF procedure. Finally, the note will demonstrate that the current state of abortion rights already endangers a woman's right to privacy and therefore should not be targeted to solve problems associated with twin reductions. Rather, to effectively preserve both the right to abortion and the right to reproductive freedom, the legislature should enact regulations to more strictly govern the use of the IVF procedure.

Part I of this note briefly summarizes the IVF procedure and its place within the legal landscape. This section also further describes the twin reduction procedure. Part II provides background and analysis of the Supreme Court precedents governing the legal doctrines that twin reductions implicate. Part III presents moral and ethical considerations that arise from twin reductions and why the practice is often associated with regular abortions. Part IV explains why abortion rights are currently susceptible to deterioration. Finally, Part V will propose possible solutions to the issue of twin reductions and other problems resulting from an unregulated IVF process.

I. IN VITRO FERTILIZATION

A. *The Procedure*

IVF is the artificial process of fertilizing a female egg with sperm in a laboratory.²⁴ A typical IVF "cycle"²⁵ begins with the woman undergoing about two weeks of hormone therapy to increase the number of eggs her ovaries produce.²⁶ The eggs are then retrieved and harvested through different outpatient procedures.²⁷ Finally, the eggs are placed in a petri dish and

²⁴ CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 91 (2d ed. 2011).

²⁵ An IVF procedure is referred to as a cycle because "the procedure consists of several steps that take place over a period of about two weeks and is not a single medical procedure at one point in time." *Id.* at 94.

²⁶ *Id.* at 93.

²⁷ There are various outpatient procedures used for the retrieval of the eggs

during which the eggs are aspirated from the ovary by either placing a needle, guided by ultrasound through the vaginal wall, by laparoscopic surgery or by Trans-Abdominal Oocyte Retrieval. Typically only one local

fertilized.²⁸ As cell division begins and “the zygote is between 2 and 16 cells,”²⁹ the embryos are either transplanted into the woman’s uterus or cryopreserved.³⁰

Each cycle of IVF is financially burdensome.³¹ Rates vary among fertility clinics, but the cost for each cycle is typically between \$10,000 and \$20,000,³² averaging around \$12,400.³³ Most states do not require insurance companies to cover IVF, and if they do, coverage is limited.³⁴ Because each cycle does not guarantee a pregnancy, many women go through several cycles without any success.³⁵ Very few people can afford to pay for IVF cycles themselves,³⁶ and as a result, it is common practice for physicians to transfer multiple embryos into a woman’s uterus during one cycle, leading to the high and distinct possibility of multiple pregnancies.³⁷

B. *Legal Landscape Governing the Number of Implanted Embryos*

The United States has no actual legislation regulating the IVF procedure itself. This *laissez-faire* approach gives

anesthe[ti]c is required for this process, but general anesthesia in the form of conscious sedation may be used.

Id. (citing Tracey S. Pachman, *Disputes over Frozen Preembryos and the “Right Not to Be a Parent,”* 12 COLUM. J. GENDER & L. 128, 129 (2003) and authorities cited therein).

²⁸ *Id.* at 94.

²⁹ *Id.*

³⁰ *Id.* at 91. Each instance of egg implantation does not guarantee a pregnancy. Therefore, multiple eggs are fertilized at once, “so that the process can be repeated if necessary.” *Id.* at 94. Cryopreserved embryos are the fertilized eggs, which are not implanted in an IVF cycle and are persevered for possible future implantation. If a patient decides against future implantation, the fertility clinics are usually left with the conundrum about what to do with these “surplus” embryos. *See id.* at 121. A large controversy exists regarding the disposition of cryopreserved embryos; however, that issue is beyond the scope of this note.

³¹ *Id.* at 95.

³² *Id.*; see also *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx> (last updated Mar. 2012).

³³ *Frequently Asked Questions About Infertility*, AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/awards/index.aspx?id=3012> (last visited Jan. 16, 2012).

³⁴ See *State Laws Related to Insurance Coverage*, *supra* note 32. “Since the 1980s, 15 states . . . have passed laws that require insurers to either cover or offer coverage for infertility diagnosis and treatment.” *Id.* However, this coverage does not necessarily extend to IVF procedures. “While most states with laws requiring insurance companies to offer or provide coverage for infertility treatment include coverage for in vitro fertilization, [several of those states] have laws that specifically exclude coverage for the procedure.” *Id.*

³⁵ KINDREGAN & MCBRIEN, *supra* note 24, at 95.

³⁶ *Id.*

³⁷ See Riggan, *supra* note 4.

doctors and patients³⁸ complete control without any legal restrictions. Instead, the entire field of IVF is solely guided by professional medical organizations such as the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology. These organizations' guidelines encourage physicians to inform patients about the risks³⁹ and costs of IVF,⁴⁰ and they state the recommended number of embryos to transfer based on the woman's age⁴¹ and other factors.⁴² Should the physician or patient decide to transfer more than the recommended number of embryos, the guidelines provide for an exception,⁴³ so long as the physician documents "the justification for exceeding the recommended limits . . . in the patient's permanent medical record."⁴⁴ Even if physicians fail to follow the recommendations, they will not be liable under the law.⁴⁵

Outside of the United States, many countries have enacted legislation that limits the number of embryos that can be transferred during an IVF cycle.⁴⁶ For example, Germany,

³⁸ See, e.g., *Fact Sheet: Fertility Drugs*, *supra* note 5 ("Before the placement of these embryos . . . [the patient and the] doctor will decide how many embryos to place in [the] womb.").

³⁹ Like any medical procedure, IVF comes with certain risks during each cycle. During the initial drug therapy, ovary stimulation can cause rare, but significant physical side effects, such as nausea or vomiting, shortness of breath, weight gain, severe abdominal pain, among others. *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/infertility/ivf.html> (last updated May 2007). Egg retrieval can cause bleeding and infections. *Id.* These side effects are very rare and only occur in one percent or less of cases. *Id.* However, the existence of possible risks provides another incentive for multiple-embryo transfers, increasing the chance of pregnancy so that a patient need not endure another IVF cycle.

⁴⁰ Practice Comm., Soc'y for Assisted Reprod. Tech. & Practice Comm., Am. Soc'y for Reprod. Med., *Guidelines on Number of Embryos Transferred*, 92 FERTILITY & STERILITY 1518, 1518 (2009) [hereinafter *Guidelines on Number of Embryos*], available at www.sart.org/publications/detail.aspx?id=3966.

⁴¹ The guidelines suggest the following recommendations for the number of embryos transferred: For women under the age of thirty-five, one or two embryos; for ages of thirty-five to thirty-seven, two or three embryos; for ages of thirty-eight to forty, three to four embryos; and for over the age of forty, up to five embryos. *Id.*

⁴² Additional factors include embryo quality, opportunity for cryopreservation, patient's previous results with IVF, and accumulation of newer techniques. *Id.*

⁴³ *Id.* at 1519.

⁴⁴ *Id.*

⁴⁵ See Molly Hennessy-Fiske, *Octuplets Doctor Could Still Lose Medical License*, L.A. TIMES (Feb. 10, 2011), <http://articles.latimes.com/2011/feb/10/local/la-me-0210-kamrava-20110210> ("[F]ertility specialists are not required to adhere to strict standards concerning how many embryos they implant."). Although physicians are not legally bound, they may face repercussions for noncompliance from state medical boards. See Duke, *supra* note 9 ("The California Medical Board ruled that Dr. Michael Kamrava committed 'gross negligence' with 'repeated negligent acts, for an excessive number of embryo transfers' into Suleman in 2008.").

⁴⁶ See Riggan, *supra* note 4.

Italy, Spain, and Switzerland have implemented regulations limiting the number of embryos to three per cycle.⁴⁷ The United Kingdom's Human Fertilization and Embryo Authority has restricted the number of embryos to no more than two for women under the age of forty and no more than three for women over forty.⁴⁸ Among other countries, Belgium and Sweden have endorsed the idea of a single embryo transfer, where "a fresh embryo is transferred in the first cycle and single cryopreserved embryos are transferred in subsequent cycles."⁴⁹ European countries have been successful in reducing the number of multiple pregnancies following such regulations.⁵⁰ However, the United States has yet to follow Europe's approach, currently relying on standards and guidelines rather than federally imposed regulations that would limit the number of embryos transferred during each IVF cycle.

C. *Problems Associated with a Lack of Regulation*

As with most areas of medical practice, IVF procedures are largely self-regulated on a voluntary basis.⁵¹ The sole piece of legislation the federal government has enacted relating to the IVF procedure is the Fertility Clinic Success Rate and Certification Act of 1992,⁵² which requires all clinics to submit reports regarding their pregnancy success rates per IVF cycle.⁵³ The report allows patients to compare clinics based on their rates of patient pregnancy. The higher the rate of successful pregnancies, the more attractive a clinic appears to a patient struggling with infertility. Therefore, clinics may transfer a higher number of embryos to increase their success rate,⁵⁴ despite the dangers of a multiple pregnancy.⁵⁵ At the same

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Urška Velikonja, *The Costs of Multiple Gestation Pregnancies in Assisted Reproduction*, 32 HARV. J.L. & GENDER 463, 467 (2009).

⁵¹ *Id.* at 465; see also Garrison, *supra* note 1, at 1631. ("[A]cross all areas of medical practice, the law of medical choice is dominated by the principle of patient autonomy."). Therefore, courts generally do not interfere in this area, and emphasize the notion that a human being should have complete control over decisions that relate to their body. *Id.*

⁵² 42 U.S.C. §§ 263a-1 to -7 (2006).

⁵³ *Id.* § 263a-1.

⁵⁴ Velikonja, *supra* note 50, at 483. Furthermore, clinics are not required to report the actual number of multiple pregnancies or the number of children born with medical problems—thus depriving the patient of important, useful information. *Id.*

⁵⁵ See *infra* Part I.D.

time, patients who desperately want children are incentivized to choose clinics that are willing to transfer a greater number of embryos.⁵⁶ If a clinic refuses to implant the number of embryos that the patient demands, she can simply find a competitor clinic⁵⁷ that is willing to comply with her request.⁵⁸ Therefore, many doctors will agree to the patient's demand for multiple embryo transfer, even if it means noncompliance with the medical standards.⁵⁹

The general discretion given to doctors and their patients has its advantages,⁶⁰ but an abuse of the discretion inevitably leads to moral and ethical concerns among society. Nadya Suleman, widely known as "Octomom," provides a pertinent example of the scrutiny that the lack of embryo transfer legislation invites.⁶¹ After she gave birth to octuplets by utilizing IVF, it was disclosed⁶² that Suleman's physician, Michael Kamrava, implanted twelve embryos into her womb.⁶³ Suleman had six other children, also conceived through IVF,⁶⁴ three of whom had developmental disabilities.⁶⁵ In addition, Suleman was an unemployed single mother receiving public assistance,⁶⁶

⁵⁶ Velikonja, *supra* note 50, at 482.

⁵⁷ The fertility industry has rapidly grown into more than \$1 billion business, providing for strong competition among clinics. Stephanie Saul, *Birth of Octuplets Puts Focus on Fertility Clinics*, N.Y. TIMES (Feb. 11, 2009), <http://www.nytimes.com/2009/02/12/health/12ivf.html>. "The industry has doubled in size At last count, the number of procedures was up to 134,260 and there were more than 483 clinics across the country." *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ An unregulated industry allows doctors and scientists to experiment and procure new medical advancements. Velikonja, *supra* note 50, at 465. Furthermore, fertility patients enjoy the freedom to choose the reproductive methods that best suits their needs and preferences. *Id.*

⁶¹ See Forman, *supra* note 12, at 275; Radhika Rao, *How (Not) to Regulate ARTs: Lessons from Octomom*, 21 ALB. L.J. SCI. & TECH. 313, 313-14 (2011); see also Saul, *supra* note 57.

⁶² Originally, Suleman claimed that Dr. Kamrava had implanted six embryos, and two of them had divided into twins, but Dr. Kamrava admitted that he had in fact implanted twelve embryos. Shari Weiss, *Octomom Nadya Suleman's Doctor, Michael Kamrava, Loses Medical License After Long Investigation*, N.Y. DAILY NEWS (June 2, 2011), http://articles.nydailynews.com/2011-06-02/gossip/29631720_1_michael-kamrava-octomom-nadya-suleman-fetal-reduction; Molly Hennessy-Fiske, *Suleman Doctor Says Implanting a Dozen Embryos Was Wrong*, L.A. TIMES (Oct. 22, 2010), <http://articles.latimes.com/2010/oct/22/local/la-me-1022-octuplets-doctor-20101022>; see also Saul, *supra* note 57.

⁶³ Hennessy-Fiske, *supra* note 62. The ASRM Guidelines provides that only two eggs should be implanted in a woman of Suleman's age; however, Suleman had been implanted with six times the recommended amount of embryos. *Guidelines on Number of Embryos*, *supra* note 40, at 1518; see also Weiss, *supra* note 62.

⁶⁴ Weiss, *supra* note 62.

⁶⁵ Forman, *supra* note 61, at 273.

⁶⁶ Weiss, *supra* note 62.

propelling her further toward public condemnation as an irresponsible and unfit mother.⁶⁷ Dr. Kamrava was also the subject of a prolonged investigation by California's medical board,⁶⁸ resulting in the revocation of his medical license.⁶⁹ Kamrava claimed that Suleman insisted on the dozen-embryo transfer, and that she had agreed to undergo fetal reduction if she became pregnant with more than triplets.⁷⁰ The medical board rejected Kamrava's defense, emphasizing that the initial consideration of an appropriate number of embryos transferred is imperative and that doctors should not rely on the fetal reduction procedure in the event that multiple pregnancies result.⁷¹ Suleman's circumstances transformed the public attitude toward IVF, animating concerns regarding the lack of embryo transfer legislation and prompting state legislatures to act.⁷² Ultimately, none of the proposed legislation passed,⁷³ and multiple pregnancies still occur at significantly high rates⁷⁴—a fact that brings to the forefront another controversial aspect of IVF: multifetal pregnancy reductions.

⁶⁷ Forman, *supra* note 61, at 273; Rao, *supra* note 61, at 313.

⁶⁸ The investigation led by the California medical board was to determine “whether accepted standards of medical practice has been violated.” See Saul, *supra* note 57. Administrative law judge Daniel Juarez “found that Kamrava committed gross and repeated negligence by implanting Suleman with an excessive number of embryos . . . [but that he] was unlikely to repeat his mistakes.” Hennessy-Fiske, *supra* note 45. Judge Juarez recommended that the medical board place Kamrava on five years' probation, instead of revoking his license. *Id.* The board eventually rejected the recommendation and revoked Kamrava's license. Weiss, *supra* note 62. It has been suggested the close review of Kamrava was largely due to the fact that there is a lack of regulation combined with the “international notoriety of the octuplets.” Hennessy-Fiske, *supra* note 45.

⁶⁹ Weiss, *supra* note 62. However, Kamrava can petition for reinstatement of his medical license three years after the date of revocation. *Id.*

⁷⁰ Hennessy-Fiske, *supra* note 62; Saul, *supra* note 57.

⁷¹ Weiss, *supra* note 62.

⁷² Forman, *supra* note 61, at 278; Rao, *supra* note 61, at 313. Georgia and Missouri were among states that proposed bills that would specifically limit the permissible number of embryos to transfer for each IVF cycle. Rao, *supra* note 61, at 314; Forman, *supra* note 61, at 278.

⁷³ Forman, *supra* note 61, at 278; Rao, *supra* note 61, at 314.

⁷⁴ AM. SOC'Y FOR REPROD. MED., MULTIPLE PREGNANCY AND BIRTH: TWINS, TRIPLETS & HIGH-ORDER MULTIPLES—A GUIDE FOR PATIENTS 3 (2012) [hereinafter MULTIPLE PREGNANCY AND BIRTH], available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/multiples.pdf. The 2008 Assisted Reproductive Technology Report produced by the Center for Disease Control and Prevention further advises that the percentage of multiple pregnancies might have been higher than reported, due to pregnancies that end before the number of fetuses is determined. CTRS. FOR DISEASE CONTROL & PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY REPORT 25, available at <http://www.cdc.gov/art/ART2008/index.htm> (last visited Nov. 24, 2012) [hereinafter ART2008].

D. *Multifetal Pregnancy Reductions*⁷⁵

Multiple pregnancies create tremendous health risks to both the mother and fetuses.⁷⁶ Women are at a higher risk of pregnancy complications, such as miscarriage, premature labor, gestational diabetes, anemia, and post-partum hemorrhaging.⁷⁷ Furthermore, the fetuses are at great risk of premature birth, low birth weight, cerebral palsy, and other long-term medical and developmental complications.⁷⁸ As a result, physicians perform multifetal pregnancy reductions to lower the number of fetuses that will be carried to term in order to increase the chance of a healthy and successful pregnancy.⁷⁹

Pregnancy reduction procedures usually take place within the first twelve weeks of the pregnancy.⁸⁰ Potassium chloride is injected into the gestational sac⁸¹ of the fetus or fetuses to terminate the fetal heart motion.⁸² Often, doctors perform ultrasounds to detect if any of the fetuses have abnormalities, because abnormal fetuses are most frequently selected for reduction.⁸³ When considering a pregnancy reduction, patients are strongly urged to discuss the possible outcomes with their doctors and spouses before making a final determination about the future of their pregnancy.⁸⁴

⁷⁵ “Multifetal pregnancy reduction” is the medical term used by medical professional organizations and physicians to describe the procedure that reduces the number of fetuses in the uterus. It is also known as “selective reduction” or “pregnancy reduction.” MULTIPLE PREGNANCY AND BIRTH, *supra* note 74, at 9, 14. I will use the term “pregnancy reduction” to refer to this procedure.

⁷⁶ *Id.*

⁷⁷ *Id.*; *Fact Sheet: Fertility Drugs*, *supra* note 5; *see also* Riggan, *supra* note 4.

⁷⁸ MULTIPLE PREGNANCY AND BIRTH, *supra* note 74, at 8; *Fact Sheet: Fertility Drugs*, *supra* note 5; *see also* Riggan, *supra* note 4.

⁷⁹ *Fact Sheet: Fertility Drugs*, *supra* note 5. One out of three multiple pregnancies also result in a natural pregnancy reduction, where the woman’s body itself reduces the number of fetuses. *Id.*

⁸⁰ *Id.*

⁸¹ At this early stage of pregnancy, “the fetus is enclosed in a fluid-filled pouch, called a gestational sac.” *Id.*

⁸² *Id.*; *see also* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 92 (1995).

⁸³ BLANK & MERRICK, *supra* note 82, at 92.

⁸⁴ *Fact Sheet: Fertility Drugs*, *supra* note 5.

It’s hard for most couples to decide to have multifetal pregnancy reduction, especially if [the patient] has tried hard to get pregnant in the first place. If [a patient is] thinking about having this procedure, [the patient and their] partner should talk to [their] doctor who may recommend a visit with a maternal-fetal medicine specialist or get professional counseling before the procedure. Both partners need to be comfortable with their decision and may need emotional support prior to and immediately following the procedure.

Throughout the 1990s, physicians held opposing views on whether it was even necessary to reduce triplets to twins.⁸⁵ Eventually, as technology progressed and the pregnancy reduction procedure evolved,⁸⁶ physicians agreed that reducing triplets to twins was safer than carrying triplets to term.⁸⁷ On the other hand, a twin pregnancy has been considered safe for both the mother and the fetuses,⁸⁸ resulting in many doctors refusing to reduce a twin pregnancy to a “singleton”⁸⁹ and generating rhetoric that equates twin pregnancy reductions to abortions.⁹⁰

E. Twin Reductions

Twin reductions spark intense public debate in the abortion context, not only among those who are pro-life, but also among those who identify themselves as pro-choice.⁹¹ Because multiple pregnancies are a well-known result of IVF, women undertake the procedure informed that a twin pregnancy is a very likely possibility.⁹² Furthermore, recent reports released by the Center for Disease Control and Prevention have confirmed

Fact Sheet: Complications and Problems Associated with Multiple Births, AM. SOC'Y FOR REPROD. MED., http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/complications_multiplebirths.pdf (last visited Jan. 16, 2012).

⁸⁵ Padawer, *supra* note 14, at 25.

⁸⁶ Pregnancy reductions came with a high risk of miscarriages. However, with better ultrasound equipment and higher physician “technical expertise,” the number of miscarriages effectively decreased. *Id.*

⁸⁷ *Id.*

⁸⁸ See A.J. Antsaklis, *Reduction of Multifetal Pregnancies to Twins Does Not Increase Obstetric or Prenatal Risks*, 14 OXFORD J. HUMAN REPROD. 1338, 1338 (1998). The study compared twin pregnancies resulting from assisted reproduction with standard twin pregnancies, and observed “no significant difference in miscarriage rate, mean gestational age at delivery, mean neonatal weight at birth or perinatal mortality rate.” *Id.*; see also *Twin Pregnancies from Assisted Conception Are No More Risky than Those Resulting from Spontaneous Conception*, STORKNET (Feb. 24, 2004), <http://www.storknet.com/cubbies/infertility/news-twins.htm> (noting that researchers at four academic medical centers monitored twin pregnancies and found that assisted reproduction conception did not contribute to an increased risk to the pregnancy).

⁸⁹ Singleton is a term used to describe a pregnancy carrying a single fetus. See e.g., MULTIPLE PREGNANCY AND BIRTH, *supra* note 74, at 14.

⁹⁰ Padawer, *supra* note 14, at 25.

⁹¹ See generally Jennifer Fulwiler, *What Pro-Choice Intellectual Honesty Looks Like*, NAT'L CATH. REG. (Aug. 12, 2011, 7:12 AM), <http://www.ncregister.com/blog/jennifer-fulwiler/what-pro-choice-intellectual-honesty-looks-like>; Anna North, *The Complicated Ethics of Twin Reductions*, JEZEBEL (Aug. 12, 2011, 1:00 PM), <http://jezebel.com/5830054/the-complicated-ethics-of-twin-reduction>.

⁹² See ART2008, *supra* note 74 (reporting that twin pregnancies accounted for 29% of all overall births resulting from IVF pregnancies); see generally MULTIPLE PREGNANCY AND BIRTH, *supra* note 74; *Fact Sheet: Fertility Drugs*, *supra* note 5.

that twin births in the United States are escalating,⁹³ and the rise in twins is largely attributed to the growing popularity of IVF treatments.⁹⁴

As a result, patients who undergo fertility treatment and affirmatively choose to reduce their twin fetuses to a singleton without the attendant health risks are viewed in a somewhat different light than those with multifetal pregnancy reductions. Unlike multifetal pregnancy reductions, twin reductions convert the existing controversy surrounding the lack of embryo transfer regulation into a misplaced debate regarding abortion rights.⁹⁵ The attitude equating twin reductions to abortions is largely due to the fact that twin pregnancies are considered to be safe. Accordingly, reducing down to a singleton pregnancy is viewed as an “elective” procedure,⁹⁶ and therefore the procedure has engendered attacks on constitutional abortion rights.

Even though twin reductions are seen as an unpleasant result of IVF, the public outcry to eliminate twin reductions often resorts to restricting abortion rights rather than targeting the source of the problem: an unregulated embryo transfer system. Why does twin reduction add fuel to the abortion controversy?

⁹³ Ctrs. for Disease Control & Prevention, *Multiple Births*, CDC.GOV, <http://www.cdc.gov/nchs/fastats/multiple.htm> (last updated Nov. 30, 2011). In 2009, one in every thirty babies born in the United States was a twin, a significant increase over the one in fifty-three rate in 1980. *Id.* Nationally, 3.3 percent of all births were twins in 2009, up from 2 percent in 1980. *Id.*

⁹⁴ Joyce Martin, an epidemiologist who co-authored the CDC Birth report, expressed that an increase in twins were expected as more women are delaying pregnancy until they are over thirty. For some unknown reason, women over thirty years of age are more likely to conceive twins naturally than younger women. About a third of the twin birth rate increase can be attributed to that. However, the remaining portion of the rise of twin births is due to fertility drugs and treatments. *Attack of the Twins! Older Moms, IVF Spurring More Double Births*, N.Y. DAILY NEWS (Jan. 5, 2012), http://articles.nydailynews.com/2012-01-05/news/30595170_1_twins-older-moms-fertility-drugs; Janice D’Arcy, *Twins are Multiplying, Raising New Questions for the Nature vs. Nurture Debate*, WASH. POST (Jan. 5, 2012), http://www.washingtonpost.com/blogs/on-parenting/post/twins-are-multiplying-raising-new-questions-for-the-nature-vs-nurture-debate/2012/01/05/gIQALYOAdP_blog.html; Robin Wulffson, *New CDC Report: Twin Birth Rate Soaring in U.S.*, EMAXHEALTH (Jan. 5, 2012, 2:05 PM), <http://www.emaxhealth.com/11306/new-cdc-report-twin-birth-rate-soaring-us>. Furthermore, the greatest increase in twin rates was reported for women 40 and older, who are more likely to require fertility treatments and more likely to implant a higher number of embryos in a single IVF cycle. D’Arcy, *supra*; Wulffson, *supra*. Another interesting aspect reported is that over the last three decades, the twin rate increase was not uniform for Caucasian and African American women. Without fertility treatment, African Americans have a higher rate of twin pregnancies. Wulffson, *supra*; *Attack of the Twins!*, *supra*. The increase in Caucasian twins conveys the disparity that exists with the availability of IVF treatments among different races and socioeconomic classes.

⁹⁵ See *infra* Part III.

⁹⁶ Robin Marty, *The “Elective” Selective Reduction*, RH REALITY CHECK (Aug. 10, 2011, 4:47 PM), <http://www.rhrealitycheck.org/blog/2011/08/10/elective-selective-reduction>.

The answer has to do with the initial desire of desperately wanting children and the subsequent termination, which requires the selection of one of the fetuses. It can be difficult to reconcile the fact that a woman who struggles with infertility and crosses significant emotional, physical, and financial leaps to become pregnant would subsequently choose to terminate a pregnancy for non-medical reasons. Anti-abortion activists argue that it is immoral for the woman to initiate a pregnancy knowing it could result in a termination that is not justified on health risk grounds.⁹⁷ Some even say that a woman loses her personal autonomy when she initially chooses IVF and therefore has a greater responsibility to carry the pregnancies to term.⁹⁸ Heated debates ensue about the nature of the selection: the patient is essentially *choosing* or *selecting* one fetus over the other.⁹⁹ Typically, if one fetus has a genetic disorder or other complications, it is not surprising that the healthier fetus is chosen to survive.¹⁰⁰ However, if a patient has two equally healthy fetuses, her selection of one over the other becomes a contentious issue.¹⁰¹

The inquiries presented above summarize the controversial nature of twin reductions. Personal autonomy and reproductive freedom are staples of American values, reflected in the Constitution. Twin reductions are an example of the conundrum that inevitably develops when reproductive choices increase. The ethical and moral considerations that have emerged from twin reductions are a source of dispute and confusion. In addition, the societal response to these concerns is further complicated by the fact that twin reductions accentuate the apparent conflict between two fundamental rights. It is therefore helpful to examine the doctrines implicated by twin reductions, given that legislatures must account for two types of reproductive choices that are guaranteed by the fundamental right of privacy but are not often seen together.

⁹⁷ See, e.g., Thomas Peters, *Coin Toss Abortion? Why Our Protracted National Tolerance for Abortion Must End*, LIVEACTION (Aug. 16, 2011), <http://liveaction.org/blog/coin-toss-abortion-why-our-protracted-national-tolerance-for-abortion-must-end/>.

⁹⁸ See Danielle Friedman, *A New Debate over In Vitro*, DAILY BEAST (July 26, 2010, 8:03 AM), <http://www.thedailybeast.com/articles/2010/07/27/can-ivf-women-have-an-abortion.html>.

⁹⁹ See William E. May, "Reducing" Pregnancies and "Wanting" Children, CHRISTENDOM, <http://www.christendom-awake.org/pages/may/reducing-pregnancies.htm> (last updated Sept. 28, 2011).

¹⁰⁰ See Liza Mundy, *Too Much to Carry?*, WASH. POST (May 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051501730.html>.

¹⁰¹ See Peters, *supra* note 97.

II. THE HISTORY OF CONFLICTING FUNDAMENTAL RIGHTS

Twin reductions invoke constitutional concerns primarily in two situations: (1) IVF, where an affirmative choice to procreate is made, and (2) the reduction procedure, where an affirmative choice to terminate a part of the pregnancy is made. The Supreme Court has ultimately recognized that a right to procreate is fundamental and intermingled with a broad right to privacy. On the other hand, the right to abortion is much narrower because the Court has recognized that states have an interest in intervening and limiting it. An analysis of the constitutional protections will reveal that, in comparison to the right to procreate, abortion is a much narrower right that is already in danger of state intrusion.

A. *Protection of the Right to Procreate*

The Supreme Court has established the right to procreate as a fundamental right, as evidenced by the fact that states cannot compel a person to procreate¹⁰² nor can they obstruct a person's ability to procreate.¹⁰³ The cases dealing with the latter support the idea that access to IVF is a constitutionally protected right.

In *Skinner v. Oklahoma*,¹⁰⁴ the Court struck down an Oklahoma statute that compelled sterilization of habitual criminals.¹⁰⁵ Even though the rights to marriage and procreation are not explicitly listed in the Constitution, the Court declared that those rights were "basic civil rights of man" and "fundamental to the very existence and survival" of individuals.¹⁰⁶ The Court applied a strict scrutiny standard of review to invalidate the statute,¹⁰⁷ declaring the choice of whether to procreate as a paramount right that should be free from unnecessary state intrusion.¹⁰⁸

¹⁰² See *infra* Part III. The Court's abortion precedents prohibit states from imposing an undue burden on a woman's right to terminate her pregnancy. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰³ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹⁰⁴ 316 U.S. 535.

¹⁰⁵ *Id.* at 541.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ("We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential . . .").

¹⁰⁸ *Id.*

Subsequently, in *Griswold v. Connecticut*,¹⁰⁹ the Court struck down a law prohibiting the use of contraception, holding that the law infringed upon a married couple's right to privacy that is enshrined within the "zone of privacy created by several fundamental constitutional guarantees."¹¹⁰ A married couple's right to privacy was extended to individuals in *Eisenstadt v. Baird*.¹¹¹ The Court emphasized, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹¹² The Court clarified that the constitutional right to privacy not only protects an individual's general decision whether to procreate,¹¹³ but also that it protects access to the particular method chosen to achieve or avoid procreation.¹¹⁴ The emphasis on "individual" autonomy applies neutrally to both men and women, regardless of their marital status.¹¹⁵ Through these precedents, therefore, IVF, which enables an individual to bear a child, is protected by an individual's right to procreate.¹¹⁶

B. *The Right to Abortion*

The broad privacy right found in the penumbra of constitutional guarantees that protect an individual's choice to procreate¹¹⁷ did not extend to the right to abortion.¹¹⁸ Instead, the

¹⁰⁹ 381 U.S. 479 (1965).

¹¹⁰ *Id.* at 485. The Court found the zone of privacy within the penumbra of expressed constitutional rights. It reasoned that the First, Third, Fourth, and Fifth Amendments created this zone of privacy protection. *Id.* at 484. The Court further held that a law that destroys the privacy given to married couples is "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 486. ("We deal with a right of privacy older than the Bill of Rights . . .").

¹¹¹ 405 U.S. 438 (1972).

¹¹² *Id.* at 453. The Court relied on the prior precedents from *Griswold* and *Skinner* as a basis for its holding. *Id.*

¹¹³ *Id.* at 453-54.

¹¹⁴ In the present case, the means chosen was contraceptives to avoid procreation, and a state could not ban access to these contraceptives. *Id.* at 453. *See generally* *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (striking down a state statute that limited the distribution of nonprescription contraceptives to licensed pharmacists as unconstitutionally interfering with the rights of individuals to use contraceptives.).

¹¹⁵ *Eisenstadt*, 405 U.S. at 453-54.

¹¹⁶ Lower federal courts have also interpreted these precedents to uphold IVF procedures as constitutional. *See, e.g.,* *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) ("It takes no great leap of logic to see that within the constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.")

¹¹⁷ *See supra* note 111 and accompanying text.

Court placed abortion rights in a narrower privacy doctrine, substantially increasing a state's power to intrude on the right.¹¹⁹ The first landmark abortion case the Supreme Court decided was *Roe v. Wade*, where the Court struck down a Texas law banning abortions.¹²⁰ The Court recognized abortion as a fundamental right protected by the Fourteenth Amendment's Due Process Clause.¹²¹ Therefore, any law attempting to restrict abortions would have to pass the "strict scrutiny test."¹²² The Court did not find the state's interests—protecting women's health and protecting the potentiality of fetal life—to be sufficiently compelling to uphold an outright ban on abortions.¹²³ However, the Court explicitly stated that a woman's right to an abortion is not absolute¹²⁴ by acknowledging that states have sufficient interests to warrant some regulation, even in areas encroaching on a fundamental right.¹²⁵ To balance the interests, the Court created a "trimester approach,"¹²⁶ emphasizing that a state's interest in protecting the life of the mother and the life of the fetus becomes increasingly compelling as the pregnancy term progresses.¹²⁷ The Court held that the state's interests

¹¹⁸ The Court made clear that the right to abortion would not fall in the same realm as the right to procreate:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus The situation therefore is inherently different from marital intimacy . . . or procreation, or education, with which *Eisenstadt* and *Griswold* . . . were . . . concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973) (citation omitted).

¹¹⁹ "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

¹²⁰ *Id.* at 162.

¹²¹ *Id.* at 153 ("This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (emphasis added)).

¹²² *Id.* at 155. Under the strict scrutiny test, a government restriction on a fundamental right must be narrowly tailored to fulfill a legitimate and compelling government interest. Otherwise, the state regulation is ruled unconstitutional in violation of the Due Process Clause.

¹²³ *Id.* at 153.

¹²⁴ *Id.* ("[A]ppellant and some *amici* argue that a woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.").

¹²⁵ *Id.* at 154.

¹²⁶ *Id.* at 163.

¹²⁷ *Id.* at 162-63.

during the first trimester are not sufficiently compelling to restrict first trimester abortions.¹²⁸ Furthermore, during the second trimester, the state may protect its interest in the mother's health, as long as the regulations "reasonably relate" to her health.¹²⁹ However, the Court determined that, because states have a compelling interest in protecting the potential life of the fetus, states may regulate or even ban abortions during the third trimester, reasoning that this was the period when the fetus typically becomes viable.¹³⁰

This trimester approach was overruled in *Planned Parenthood v. Casey*,¹³¹ in part because technological advancements paved the way for a more precise determination of the point of fetal viability,¹³² but also to give recognition to state interests.¹³³ The Court emphasized that the rigid trimester framework presented in *Roe* "misconceives the nature of the pregnant woman's interests and . . . undervalues the State's interest in potential life . . ."¹³⁴ The Court expanded its analysis of abortion and recognized the right as part of the right to privacy encompassed within a broader concept of liberty and personal autonomy protected by the Fourteenth Amendment, which includes the ability to make choices involving the most "intimate and personal" matters and the right to define one's own concept of existence.¹³⁵ The Court reaffirmed that a woman has a right to abortion before viability,¹³⁶ but it also emphasized that a state has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."¹³⁷

In order to highlight that some governmental intrusion may be warranted, the Court established the "undue burden" standard, which replaced the previous strict scrutiny test.¹³⁸ "A

¹²⁸ *Id.* at 163.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

¹³² *Id.* at 860. At the time of *Roe*, viability was thought to occur at twenty-eight weeks, but by 1992, viability was determined to occur as early as twenty-three weeks.

¹³³ "[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Id.* at 871.

¹³⁴ *Id.* at 873 (emphasis added).

¹³⁵ *Id.* at 857.

¹³⁶ *Id.* at 846.

¹³⁷ *Id.*

¹³⁸ *Id.* at 876. ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed

finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking to abort an unviable fetus.”¹³⁹ In *Casey*, the Court emphasized that, notwithstanding a woman’s right to abortion, a state has substantial “interest[s] in the potential life within the woman,”¹⁴⁰ and “[n]ot all governmental intrusion is of necessity unwarranted.”¹⁴¹ Furthermore, the Court explicitly acknowledged that a State has an interest in protecting potential life throughout a woman’s pregnancy¹⁴²:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. The Constitution does not forbid a State or city, pursuant to democratic process, from expressing a preference for normal childbirth.¹⁴³

Thus, after *Casey*, a state may not ban abortions outright before viability,¹⁴⁴ but it may enact regulations to “promote the State’s *profound* interest in potential life,”¹⁴⁵ as long as it does not place an undue burden on a woman’s right to abortion.¹⁴⁶ After viability, “the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁴⁷

unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue.”).

¹³⁹ *Id.* at 877.

¹⁴⁰ *Id.* at 875.

¹⁴¹ *Id.*

¹⁴² *Id.* at 876.

¹⁴³ *Id.* at 872 (internal quotation marks omitted).

¹⁴⁴ *Id.* at 879.

¹⁴⁵ *Id.* at 878. (emphasis added) (“[T]hroughout the pregnancy, the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the women to choose childbirth over abortion.”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 879 (citations omitted).

Casey's departure from *Roe* altered the right to abortion in three significant ways. First, *Roe*'s trimester framework prohibited governmental intrusion in the first trimester, but by adopting the undue burden approach in *Casey*, the Court dismantled the period once set aside for the woman to make her decision free from governmental intrusion and firmly established that the state has an interest in the fetus from the outset of the pregnancy.¹⁴⁸ Second, *Casey*'s undue burden approach still identifies the right to abortion as fundamental, but it does not invalidate a state's imposition on a woman's decision-making process when exercising that right.¹⁴⁹ Therefore, states are free to enact regulations to influence a woman's choice about her abortion, as long as the state does not infringe on the right to abortion outright.¹⁵⁰ Third, the undue burden standard undoubtedly granted significant weight to a state's interest in potential life, broadening the number of permissible abortion regulations.¹⁵¹

Despite these restrictions, IVF and the reduction procedure remain largely unregulated. However, public outcry is growing in recognition of the ethical and moral concerns presented by situations—like twin reductions—that result from unregulated embryo transfers. These ethical and moral concerns have redirected the public's focus onto the termination aspect of twin reductions, even though such concerns fundamentally stem from the IVF procedure itself.

III. WHY TWIN REDUCTIONS BECOME ANALOGOUS TO ABORTIONS

Medically speaking, a reduction procedure is not the same as an abortion.¹⁵² Nevertheless, society uses the term "twin reductions" and abortions interchangeably. Some anti-abortion activists have even gone so far as to claim that a twin reduction is a cowardly "euphemism for murder."¹⁵³ Others have claimed

¹⁴⁸ See Caitlin E. Borgmann, *Abortion, The Undue Burden Standard, and The Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 310 (2010).

¹⁴⁹ *Casey*, 505 U.S. at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

¹⁵⁰ *Id.*

¹⁵¹ See Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 396 (2011).

¹⁵² An abortion terminates the fetus and empties the uterus, whereas, a reduction does not result in an empty uterus. Mundy, *supra* note 100.

¹⁵³ Albert Mohler, *This Isn't Meddling—It's Murder*, CHRISTIAN POST (Aug. 17, 2011, 10:26 AM), <http://www.christianpost.com/news/this-isnt-meddling-its-murder-54062>; Peter Saunders, "Selective Reduction"—A Euphemism for Deliberately Killing One

that abortion is the “safety net” for IVF, referring to twin reductions.¹⁵⁴ Why is there such a concentrated effort to lobby bringing twin reductions under the umbrella of abortions? Perhaps the best explanation is that a twin reduction is often seen as “elective” rather than medically necessary.¹⁵⁵ Therefore, people tend to scrutinize the reasons why a woman might choose twin reductions, and such intense scrutiny ends up underscoring the same ethical and moral dilemmas that are attributed to abortions in the normal course. Those dilemmas are particularly used by anti-abortion activists to explain why they think abortion is “wrong” and should be illegal.

However, twin reductions go one step further and cause additional outrage in light of the initial use of IVF to attain a pregnancy that is later partially terminated. Thus, although the focus on the reason equates twin reductions to abortions, twin reductions also raise issues that result from IVF and the initial choice to procreate.

To illuminate this controversial landscape, imagine the following hypothetical scenarios that highlight the similar ethical and moral considerations associated with twin reductions and abortions. After each hypothetical, an explanation will present the main ethical and moral issues stemming from each situation. These observations will demonstrate that the problems associated with twin reductions are in fact quite different and are a result of engaging in the initial IVF process.

A. *Hypotheticals*¹⁵⁶

In the hypotheticals below: (1) all patients are informed of the high possibility of multiple pregnancies; (2) all patients are implanted with two or more embryos, either as a result of the patient’s choice, the doctor’s choice, or both; (3) none of the patients or fetuses are in danger of any health risks; and (4) all

or *More Babies*, NAT’L RIGHT TO LIFE NEWS TODAY (Jan. 11, 2012), <http://www.nationalrighttolifenews.org/news/2012/01/selective-reduction-a-euphemism-for-deliberately-killing-one-or-more-babies>; Rebecca Taylor, *Pro-Life Review of Top 10 Bioethic Stories from 2011*, LIFE NEWS.COM (Jan. 3, 2012, 7:28 PM), <http://www.lifenews.com/2012/01/03/pro-life-review-of-top-10-bioethics-stories-from-2011>.

¹⁵⁴ Rebecca Taylor, *Abortion: The “Safety Net” for IVF*, MARY MEETS DOLLY (Nov. 23, 2010, 9:10 AM), <http://www.marymeetsdolly.com/blog/index.php?/archives/994-Abortion-the-safety-net-for-IVF.html>.

¹⁵⁵ Marty, *supra* note 96.

¹⁵⁶ All hypotheticals, including names and facts are fictional. I constructed these hypotheticals through the different sources and cases I studied. Some are, of course, exaggerated to emphasize the possible controversies.

of these patients live in State X, a fictitious state in the United States that has no legislation regarding the permissible number of embryos transferred per IVF cycle.

1. Caroline: Post-Menopausal Pregnancies

Caroline is a fifty-year old single woman and a prominent marketing executive. She has never been married and has not found her ideal partner. Due to the amount of stress she experienced and the time commitment required to achieve her career goals, Caroline has never tried to have a child. However, now that she is a successful executive, she decides that she wants a child in her life. Because of her age, it is difficult for her to conceive naturally, so she begins IVF treatments. Caroline is now pregnant with twins but has decided that she does not want to raise two children by herself at her age. Therefore, she asks her doctor to perform a twin reduction.

To begin, a massive debate already exists regarding the age when a woman should no longer be able to procreate. Caroline is fifty years old, so the only way she would realistically be able to have a child is through IVF. Many critics condemn post-menopausal pregnancies as “an unnatural act.”¹⁵⁷ Furthermore, Caroline does not want to raise two children by herself, even though she can afford it financially. Anti-abortionists would conclude that Caroline is fashioning her life as she wants and would label her reasoning as “profoundly selfish.”¹⁵⁸

2. Laura & Will: Consumerism

Laura, a high-school teacher, and Will, a mechanic, have been married for twenty-five years and have two children. They decide that they are ready for another child. However, Laura has trouble conceiving naturally. After five years of IVF treatments, Laura is finally pregnant with twins. The couple decides that they do not have the energy to take care of two newborns in addition to raising their other two children. Furthermore, they do not believe they are financially capable of supporting four children, particularly after the exorbitant IVF treatments. Laura fears that she will not be able to devote

¹⁵⁷ Lylah Alphonse, *Too Old to Be a Parent? Post-Menopausal Pregnancy Triggers Moral Outrage*, ALLVOICES (Dec. 18, 2009, 2:32 PM), <http://www.allvoices.com/contributed-news/4840901-too-old-to-be-a-parent-postmenopausal-pregnancy-triggers-moral-outrage>.

¹⁵⁸ Ryan Sprague, “*This Is Not What I Want for My Life*,” RYANSPRAGUE.COM (Jan. 11, 2012), <http://www.ryansprague.com/2012/01/11/this-is-not-what-i-want-for-my-life>.

enough time and attention to her older children and is terrified that she will become a bad mother. However, she states that she would forego twin reduction had she conceived the twins naturally. Will fully supports her decision.

Laura and Will are a middle-class couple who already have two children, but who choose to have more children. This would be viewed as “willful disregard” of their prior experiences.¹⁵⁹ However, a larger issue highlighted in this scenario is Laura’s statement that she would have kept both children had they been conceived naturally. First, the couple’s rationale that they were not financially secure to afford two children is cast into doubt. Raising a child born through IVF will not cost more than raising a natural born child. A natural child would pose the same problems the couple predicts they will face if they do not reduce the pregnancy.¹⁶⁰ Moreover, this scenario highlights a major criticism of IVF and abortions: consumerism of reproductive health.¹⁶¹ The possibility that an IVF baby is treated differently than a natural baby is a major source of concern.¹⁶² Furthermore, Laura’s statements can be construed as justifying abortion because of the way the pregnancy was conceived. Anti-abortion activists will view this reasoning as “dehumanizing children”¹⁶³ and will claim that abortion allows women to play God and dispose of otherwise healthy and viable children.¹⁶⁴

3. Rob & Jackie: Selection

Rob is a successful real-estate mogul who yearns for a son to carry on his family’s name and businesses. Jackie is unable to conceive children naturally and begins IVF treatments in hopes of giving Rob a son. Jackie is pregnant with twins, one boy and one girl. Because she is a stay-at-home

¹⁵⁹ *Id.*

¹⁶⁰ Lynne Marie Kohm, *A Hitchhiker’s Guide to ART: Implementing Self-Governed Personally Responsible Decision-Making in the Context of Artificial Reproductive Technology*, 39 CAP. U. L. REV 413, 426 (Children born through IVF are “the same as people conceived the old-fashioned way.” (internal quotation marks omitted)).

¹⁶¹ See generally Judie Brown, *Consumerism in the Womb*, AM. LIFE LEAGUE (Aug. 16, 2011), <http://www.all.org/article/index/id/OTE0NQ>; Frances Kelly, *From Octomom to MomMinusOne, Is Sex in America Too “Consumerish”?*, RENEW AM. (Aug. 12, 2011), <http://www.renewamerica.com/columns/kelly/110812>.

¹⁶² See Brown, *supra* note 161; Kelly, *supra* note 161.

¹⁶³ Brown, *supra* note 161.

¹⁶⁴ Ken Connor, *Infertility and Abortion: When Playing God Destroys Lives*, LIFE NEWS (Oct. 13, 2012, 10:17 AM), <http://www.lifenews.com/2012/10/03/infertility-and-abortion-when-playing-god-destroys-lives/>.

mother, Jackie is thrilled with the idea of raising twins. Rob, on the other hand, does not want to raise a girl. He convinces Jackie that daughters are much more difficult to handle. Jackie eventually agrees and decides to reduce her pregnancy, choosing the male fetus over the female.

This scenario presents a chief source of resentment that anti-abortionists have over twin reductions. Because there are originally two fetuses, pro-lifers view the procedure as a selection process, where one fetus is “selected” to survive over the other.¹⁶⁵ Here, Rob only desires a male child and persuades his wife to abort the female fetus. With twin reductions, gender preference is one of the primary ways that the patient decides which fetus to keep.¹⁶⁶ The moral and ethical implications of gender selection practices in general relate to a contentious issue within society.¹⁶⁷ If the gender is the same or the patient has no preference, the doctor usually chooses the fetus that is easier to access,¹⁶⁸ which ignites another source of concern for anti-abortionists.¹⁶⁹ Indeed, numerous conservatives have coined twin reductions as “coin toss” abortions, “where one twin lives and one twin dies simply because one twin is closer to the abortionist’s needle.”¹⁷⁰ Lastly, by referring to this procedure as a “selection,” many conservatives view it as treating children as disposable commodities.¹⁷¹

B. *How Do We Fix This?*

These issues inevitably cause anti-abortionists to add twin reductions to their list of reasons to ban abortions. The issues presented in the hypotheticals illustrate the questionable ethical practices associated with twin reductions. It is thus reasonable to pursue government regulation. However, to suggest, as many have, that abortion rights are too broad and should be reined in is a mistake. Anti-abortion activists who voice their concern about twin reductions rarely call for regulation of the IVF process. The attack solely targets the termination aspect of the pregnancy, even though most twin

¹⁶⁵ May, *supra* note 99.

¹⁶⁶ Mundy, *supra* note 100.

¹⁶⁷ See Meredith Leigh Birdsall, *An Exploration of “The ‘Wild West’ of Reproductive Technology”: Ethical and Feminist Perspectives on Sex-Selection Practices in the United States*, 17 WM. & MARY J. WOMEN & L. 223, 234 (2010).

¹⁶⁸ Mundy, *supra* note 100.

¹⁶⁹ Peters, *supra* note 97.

¹⁷⁰ *Id.*

¹⁷¹ May, *supra* note 99.

reductions occur as a result of IVF and the number of embryos implanted in a single cycle.¹⁷² In light of the fact that abortion rights have been significantly weakened over the past decades and remain in uncertainty today, twin reductions should not perpetuate further attacks on the right to abortion. Therefore, an effective solution to the twin reduction problem should target the IVF practice directly rather than abortion more broadly.

IV. THE CURRENT SUSCEPTIBILITY OF ABORTION RIGHTS

A. *Post-Casey Weakening of the Right to Abortion*

As mentioned in Part II, the Court in *Casey* held that states have a legitimate interest in potential life and are permitted to enact regulations to advance their interest, so long as those regulations do not pose an undue burden on the right to abortion.¹⁷³ Many scholars have lamented that although *Casey* was technically a victory for the right to abortion, in reality the decision enabled the state to further interfere with a woman's right to abortion.¹⁷⁴ For example, in *Gonzales v. Carhart*,¹⁷⁵ the Court upheld the Partial-Birth Abortion Ban Act, which bans a particular method of abortion so long as a safe, alternate abortion method is available.¹⁷⁶ Some argue that the *Gonzales* decision, by affirming the Court's protection of the state interest in potential life, opened the floodgates for government intrusion.¹⁷⁷ They fear that the state interest will become so broad that, when coupled with the Court's lack of scrutiny, it will inevitably allow regulations that chip away at the right to abortion.¹⁷⁸

This fear may already be justified, as evidenced by numerous state legislatures' attempts to restrict abortions¹⁷⁹ by

¹⁷² See Evans & Britt, *supra* note 19, at 299; Trisha Macnair, *Selective Reduction in Pregnancy*, BBC HEALTH BLOG, http://www.bbc.co.uk/health/physical_health/pregnancy/pregnancy_reduction.shtml (last updated June 2008) (stating that "Selective reduction became more common as a result of IVF techniques"); see generally Padawer, *supra* note 14.

¹⁷³ See generally Part II *supra*.

¹⁷⁴ See Borgmann, *supra* note 148, at 291 ("*Casey's* 'undue burden' test has fostered extensive encroachments on women's personal privacy."); Smith, *supra* note 151 at 379 (Through *Casey*, "the ability of a state to regulate abortion in furtherance of its interest in protecting potential life has expanded . . .").

¹⁷⁵ 550 U.S. 124 (2007).

¹⁷⁶ *Id.* at 129.

¹⁷⁷ Smith, *supra* note 151, at 379-80.

¹⁷⁸ *Id.*

¹⁷⁹ See Anna Holmes, *GOP Candidates Revive Issue of Birth Control*, WASH. POST, Jan. 12, 2012, at C1, available at <http://www.washingtonpost.com/lifestyle/style/conversation->

developing new ways to leverage the broad and vaguely defined term “interest in potential life.” Some states have tried to implement “fetal pain”¹⁸⁰ measures, which encourage patients to request anesthesia because the fetus is “capable of feeling pain.”¹⁸¹ These measures publicize a state’s moral opposition to abortion and also convey another aspect of *Casey* that is extremely beneficial for states.

The Court’s decision in *Casey* granted states the ability to persuade a woman, throughout the course of her pregnancy, to opt out of an abortion.¹⁸² This resulted in a proliferation of “informed consent” laws, which require doctors to describe the abortion procedure to their patients¹⁸³ using a graphic script drafted by the state.¹⁸⁴ Another purpose behind informed consent laws is to warn the woman of possible regret if she goes through with her choice to terminate her pregnancy.¹⁸⁵ Furthermore, compulsory ultrasound laws are designed to dissuade women from choosing abortion by forcing them to look and listen to the ultrasound of an unwanted pregnancy.¹⁸⁶ Such measures not only convey the state’s obvious opposition to abortion, but they also essentially harass women during their decision-making process by attempting to torment them with guilt.¹⁸⁷

Moreover, state legislatures have recently attempted to use the democratic process to eradicate abortion rights. One example of this strategy can be gleaned from the recent “Personhood Amendment” proposals.¹⁸⁸ The purpose of these amendments is to declare an embryo as a person, thereby entitling it to full legal rights and consequently equating

over-abortion-continues-39-years-later/2012/01/05/gIQA5j0luP_story_1.html (“By the end of [2011], 135 measures had been enacted [in efforts to threaten abortion rights] . . . a record number of abortion restrictions.”).

¹⁸⁰ Borgmann, *supra* note 148, at 319.

¹⁸¹ Smith, *supra* note 151, at 397.

¹⁸² See Brown, *supra* note 161.

¹⁸³ Borgmann, *supra* note 148, at 319; Smith, *supra* note 151, at 398.

¹⁸⁴ Borgmann, *supra* note 148, at 320.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 319; see generally GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (Oct. 2012), available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf; see also Smith, *supra* note 151, at 397.

¹⁸⁷ See Jonathan Gray, *Compulsory Ultrasound Audiences and Feminism*, ANTENNA (Feb. 27, 2012), <http://blog.commart.wisc.edu/2012/02/27/compulsory-ultrasound-audiences-and-feminism/>; Carolyn Jones, “We Have No Choice”: One Woman’s Ordeal with Texas’ New Sonogram Law, TX. OBSERVER (Mar. 15, 2012, 9:03 AM), <http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/>.

¹⁸⁸ Erik Eckholm, *Push for “Personhood” Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES (Oct. 25, 2011), <http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html>.

abortion to murder.¹⁸⁹ Mississippi, Nevada, and Alabama, among other states, have enacted such initiatives,¹⁹⁰ which are viewed as “the most extreme in a field of extreme anti-abortion measures that have been before the states this year.”¹⁹¹ The personhood initiative goes beyond the abortion restrictions adopted by states—such as the informed consent laws—because its main purpose is to “narrow or hamper access to abortions by, for example, sharply restricting the procedures at as early as 20 weeks, curbing insurance coverage and imposing expensive regulations on clinics.”¹⁹² If the proposals are initially successful but later declared unconstitutional by the Supreme Court, abortion rights activists claim that the amendment could “disrupt vital care and force years of costly court battles.”¹⁹³ The more dangerous prospective result of the personhood amendments is that they would allow states to interpret *Roe* to uphold abortion restrictions by reasoning that an embryo’s right to life outweighs a woman’s privacy rights.¹⁹⁴ Even if voters disapprove the personhood initiatives, it is clear that “personhood groups” will not give up the fight to declare an embryo a person and will continue to push this agenda to attack abortion rights.¹⁹⁵

B. *The Political Landscape of Abortion*

The current composition of the Supreme Court makes many scholars uneasy about the future of *Roe*.¹⁹⁶ The previous years dominated by the Republican Party have seen a shift among the bench toward the conservative end of the spectrum.¹⁹⁷

¹⁸⁹ *Id.*; see also Laura Bassett, *Nevada Judge Rules Fetal Personhood Initiative Misleading to Voters*, HUFFINGTON POST (Dec. 19, 2011, 6:34 PM), http://www.huffingtonpost.com/2011/12/19/nevada-fetal-personhood_n_1159082.html; Robin Marty, *Mississippi Plans to Push “Personhood” Through Legislature After Voters Say No*, CARE2 (Jan. 4, 2012, 11:00 PM), <http://www.care2.com/causes/mississippi-plans-to-push-personhood-through-the-legislature-after-voters-say-no.html>; Mike McClanahan, *Voters May Define Start of Human Life: Alabama Personhood Bill*, CBS42 NEWS (Jan. 3, 2012, 9:08 PM), http://www.cbs42.com/content/localnews/story/Voters-may-define-start-of-human-life-Alabama/3pN4m91MaEa8sOLFF6b_cQ.csp.

¹⁹⁰ See Bassett, *supra* note 189; Marty, *supra* note 189; McClanahan, *supra* note 189.

¹⁹¹ Eckholm, *supra* note 188.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Rita M. Dunaway, *The Personhood Strategy: A State’s Prerogative to Take Back Abortion Law*, 47 WILLAMETTE L. REV. 327, 328 (2011); Tom Venzor, *Protecting the Unborn Child: The Current State of Law Concerning the So-Called Right to Abortion and Intervention by the Holy See*, 89 NEB. L. REV. 1132, 1140 (2011).

¹⁹⁵ See, e.g., Marty, *supra* note 189.

¹⁹⁶ See Borgmann, *supra* note 148, at 311; Smith, *supra* note 151, at 403.

¹⁹⁷ Smith, *supra* note 151, at 403.

Since Justice O'Connor's retirement, Justice Kennedy is now seen as the swing vote on abortion issues.¹⁹⁸ Scholars are not confident that Justice Kennedy will protect abortion rights,¹⁹⁹ claiming that his interpretation of *Casey's* undue burden standard "gives unprecedented weight to the state's interest in the embryo or fetus, thereby permitting all manner of encroachments on the privacy of women seeking abortions."²⁰⁰

Furthermore, presidential elections generally play an important role in the political climate for abortion rights. First, presidents often have the opportunity to appoint a new Supreme Court Justice during their term in office.²⁰¹ If a Supreme Court justice retires at any point during a Republican administration, it is more than likely that a conservative justice will be appointed²⁰² who will uphold the current Republican agenda to abolish abortion rights.²⁰³

Second, a Republican President would almost surely pursue anti-abortion policies and strengthen public opposition to abortion. It is undisputed that "[t]he assault on women's reproductive health is a central part of the Republican agenda."²⁰⁴ For example, the Republican Party tends to support "personhood amendments," which would declare that human life begins at the moment of fertilization, granting legal rights to human embryos and banning all abortions.²⁰⁵ Therefore, it is vital to acknowledge

¹⁹⁸ Borgmann, *supra* note 148, at 311; Smith, *supra* note 151, at 403.

¹⁹⁹ Smith, *supra* note 151, at 403.

²⁰⁰ Borgmann, *supra* note 148, at 311.

²⁰¹ See U.S. CONST. art. II, § 2.

²⁰² See, e.g., Alan Wirzbicki, *Election's Winner May Shape Supreme Court*, BOS. GLOBE, Oct. 1, 2012, at A1, available at <http://www.bostonglobe.com/news/politics/2012/09/30/supreme-court-could-reshaped-next-four-years/0UfIGTSjcQFXZKpbCmrQOH/story.html> ("Republican presidents have made it a greater priority to appoint conservative Supreme Court justices.")

²⁰³ See *2012 Republican Party Platform*, WHITE HOUSE 2012, <http://whitehouse12.com/republican-party-platform/> (last visited Nov. 7, 2012) ("We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.")

²⁰⁴ Editorial, *Republicans Versus Reproductive Rights*, N.Y. TIMES, Jan. 8, 2012, at A18, available at <http://www.nytimes.com/2012/01/09/opinion/republicans-versus-reproductive-rights.html>.

²⁰⁵ *2012 Republican Party Platform*, *supra* note 203 ("[W]e assert the sanctity of human life and affirm that the unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children."); see also Erik Eckholm, *Republican Presidential Candidates Embrace Granting Legal Rights to Human Embryos*, N.Y. TIMES (Dec. 22, 2011, 1:31 PM), <http://thecaucus.blogs.nytimes.com/2011/12/22/republican-presidential-candidates-embrace-granting-legal-rights-to-human-embryos>; Peter Hamby, *GOP Platform Committee Approves Tough Anti-Abortion Stance*, CNN (Aug. 21, 2012, 11:51

that a Republican victory in presidential elections inevitably throws abortion rights into a state of limbo.

V. SOLUTIONS TO TWIN REDUCTIONS

For the reasons presented in Part IV, I again emphasize that the right to abortion is not the key to solving the moral and ethical dilemmas resulting from twin reductions. Rather, the unregulated field of IVF represents the true root of the twin reduction problem. The dearth of regulation regarding embryo transfer increasingly generates ethical problems. Therefore, the most effective solution is to limit the number of embryos transferred in an individual cycle.

Recent studies have shown that, particularly as IVF techniques advance, a single embryo transfer is just as effective in achieving pregnancy as two or three embryos.²⁰⁶ However, doctors have a difficult time convincing patients of this fact.²⁰⁷ The longstanding idea is that the more embryos, the better the chances of a pregnancy; as a result, patients who are desperately seeking pregnancy are hesitant to accept that a single embryo could be equally as effective.²⁰⁸ Therefore, it is imperative that professional medical associations and doctors themselves promote this new idea. Patients need to become comfortable with the effectiveness of a single embryo, and this will only occur if the medical community proactively informs them of this preferred method.

Additionally, another possible solution is enactment of actual legislation. But this poses a few problems of its own. First, IVF implicates the right to procreate, which is broadly protected and would be subject to strict scrutiny by the Court if it were infringed.²⁰⁹ Moreover, the United States is generally very deferential to doctors and patients in the area of medicine.²¹⁰ Patient autonomy plays a big role in the relationship between the government and its regulation of medicine.²¹¹ Therefore, any actual IVF legislation would also clash with this traditional

AM), <http://politicalticker.blogs.cnn.com/2012/08/21/gop-platform-committee-approves-tough-anti-abortion-stance/>.

²⁰⁶ See Kim Carollo, *One Embryo Better than Two in In Vitro Fertilization*, ABC NEWS (Dec. 21, 2010), <http://abcnews.go.com/Health/WomensHealth/single-embryo-transfer-effective-safer-double-embryo-transfer/story?id=12451473>.

²⁰⁷ See *id.*

²⁰⁸ *Id.*

²⁰⁹ See generally *supra* Part II.

²¹⁰ Garrison, *supra* note 1, at 1631-32.

²¹¹ *Id.*

notion. However, legislation may be permissible because IVF is a medical procedure and a state has a recognized interest in maintaining health and safety standards for its citizens.²¹² Since multiple pregnancies pose tremendous health risks,²¹³ a state may be able to enact legislation directed at regulating the occurrence of multiple pregnancies. Moreover, since a single embryo transfer may be just as effective in producing a pregnancy, any infringement on the right to procreate would be minimal at best.

On the other hand, perhaps granting more authority to professional medical associations, such as the American Society of Reproductive Medicine or the Society for Assisted Reproductive Technologies, would curb the abuse of embryo transfers. Currently, these associations have no authority to enforce their guidelines. If the medical associations had more power, this would likely help to minimize the market incentives for physicians to deviate from the guidelines.

Regardless of which solutions society chooses to pursue, the most important objective is that changes be made to impact embryo transfers directly. Any of these proposed changes would only represent an initial step toward preventing future problems associated with multiple pregnancies.

CONCLUSION

The increasing availability of reproductive choices is a double-edged sword. On one hand, IVF has brought happiness and fulfillment to many people who struggle with infertility. On the other hand, with more choices comes the increased pressure of ethical and moral responsibility. Choices should remain and continue to increase, but there is also a need for the individual to wisely consider all aspects and consequences of their choices, given that they will impact the society in which we live. Twin reductions are an excellent example of how individual choices affect society. One person's enjoyment of reproductive freedom, by engaging in IVF, can cause negative repercussions for women's privacy and autonomy. It is easy for the public to engage in a general attack on abortion rights or to view individual instances of twin reductions and make negative judgments. However, the choices we make for ourselves about our bodies, our lifestyles, and our families are private. These

²¹² *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 833, 857 (1992).

²¹³ *See generally supra* Part I.

choices should not require justification. With reproductive freedom, we must never forget that whatever personal choice we make for ourselves can impact the existence of choices for others.

Priyanka Shivakumar[†]

[†] J.D. Candidate, Brooklyn Law School, 2013; B.A., The George Washington University, 2007. I would like to thank the *Brooklyn Law Review* editorial staff for their incredible patience and assistance. I am also grateful to my fantastic family and friends for their unwavering support and encouragement. I am indebted to Nicholas Jackson for being my invaluable sounding board and for continuously believing in me. Finally, I give my deepest gratitude to my mother, Jyothi, and my father, Shivakumar, for their unconditional love and selflessness throughout my life. Dedicated in loving memory of Matthew Phillips, a twin, who inspired me always to write.