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[Folder 3]: [Albany Law Journal of Science & Technology - "The Clonal Child: Procreative Liberty & Asexual Reproduction" by Katheryn d. Katz] [2]

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n152. In re Sterilization of Moore, 221 S.E.2d at 312 (suggesting that a state has a right to prevent the birth of children who will become a burden upon the state).

n153. 274 U.S. 200 (1927).

n154. Id. at 207 (explaining that "it is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve ... society can prevent those who are manifestly unfit from continuing their kind). But see Paul A. Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30 (1985) (discussing the mistaken factual basis for the Buck v. Bell decision and collusion on the part of all the professionals in the case, including Buck's attorney, and legislators as part of an elaborate campaign legally to sanction eugenic sterilization).

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Prisoners denied conjugal visits with their wives who have sought to enforce their procreative rights have also had no success in the courts. n155 The prisoners' reasons for wanting to procreate, however, were not the basis for the uniform denials of prison [*33] assistance to facilitate their wishes. Rather, the legitimate penological interests of the institutions in which they are incarcerated were deemed sufficient to support the restrictions.

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n155. See Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (providing that a prison policy prohibiting an inmate from artificially inseminating his spouse was consistent with the prisoner's incarcerated status); Anderson v. Vasquez, 827 F. Supp. 617 (N.D. Cal. 1992) (holding that inmates condemned to death had no right to conjugal visits and that the prison had no obligation to provide artificial insemination services), aff'd in part, rev'd in part, 28 F.3d 104 (9th Cir. 1994); Percy v. N.J. Dep't of Corrections, 651 A.2d 1044 (N.J. App. Div. 1995) (holding that a prisoner serving a life sentence had no constitutional right to procreate by means of artificial insemination, and that restriction on artificial insemination was related to legitimate penological interests). For a general discussion of the issue see Kristin M. Davis, Note, Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right to Procreate, 44 Wash. U. J. Urb. & Contemp. L. 163 (1993); Jacqueline B. DeOliveira, Comment, Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?, 5 Touro L. Rev. 189 (1988).

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Interference with procreational choice, based on "unworthy" reasons, comes not from the state but from the medical profession, inasmuch as physicians have not been allowed to be the gatekeepers deciding who is eligible to utilize the technologies under their control. n156 The history of this control began with the development of artificial insemination in human procreation n157 and the complete deference of the law to the medical profession in response. This deference is grounded in the erroneous belief that artificial insemination is

a highly technological form of medical treatment in response to male infertility. n158 Similarly, this deference has meant medical control in determining which women, whose male partners are unable to procreate, are eligible to become biological mothers and which of their infertile male partners are eligible to acquire children to rear through the use of another male's sperm. n159 One consequence of this unfettered discretion has been the inability of single women to gain access to artificial insemination in a medical setting due to the unwillingness of many physicians to assist women who lack male partners. This reluctance [*34] has led to the practice of self-insemination, using semen from friends or other willing males in non-medical settings. n160

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n156. See Robertson, *supra* note 88, at 233 ("A legal right to use reproductive technologies does not necessarily entitle one to private-sector access. Health professionals are gatekeepers who ultimately determine who will use these technologies. They should use discretion in accepting patients and in acceding in their demands for technological help, yet not exclude persons on the basis of sexual preference, disability, or life-style alone.").

n157. Artificial insemination is a non-coital process by which semen is collected and then introduced into the woman's body by artificial means. If a male, who is not the woman's husband contributes the semen, the process is designated as artificial insemination by donor (AID). The semen donor is usually paid for his contribution. If the husband's semen is used, the process is termed artificial insemination by husband (AIH). See Wadlington, *supra* note 102, at 468-69. See also Office of Technology Assessment, *supra* note 116, at 3 (providing a general overview of AID).

n158. See Daniel Wikler, Policy Issues in Donor Insemination, 6:2 Stan. L. & Pol'y Rev. 47, 48-51 (1995) (discussing the extent to which AID has been dicalized even though it circumvents a medical problem, the male's infertility, rather than treating it). See also Gibson, *supra* note 95, at 2 (noting that "historically [artificial insemination by donor] practice in this country has been shaped by practitioner predictions regarding the adverse social and psychological consequences of AID for the family. Their longstanding theories, however, are only beginning to be critically evaluated by studies of AID participants; no long term studies of AID families have yet been conducted.").

n159. For a more extensive discussion of these issues see Katz, Ghost Mothers, *supra* note 94, at 763-74.

n160. See, e.g., Robertson, *supra* note 93, at 1004-05.

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The same reluctance to allow single women access to reproductive services is present in the realm of in vitro fertilization. n161 Recently, news that a sixty-three years and nine months old woman had given birth to a healthy baby using a donated egg renewed the debate whether the medical community should mandate an age limit above which women should not have access to reproductive technology. n162 What should be given attention, however, is the unfettered

discretion infertility physicians in the United States currently have to determine which women are suitable candidates for assisted conception and their freedom to impose age restrictions. n163

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n161. Robertson, *supra* note 88, at 117 (stating that "many IVF programs will not treat unmarried persons.").

n162. See, e.g., Gina Kolata, *A Record and Big Questions As Woman Gives Birth* at 63, N.Y. Times, April 24, 1997, at A1.

n163. See *id.*

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The extent to which the medical community determines who is worthy of parenthood is also demonstrated vividly in the practices of clinics offering surrogate mother services. n164 These services are the obverse of artificial insemination in that the female partner, who is unable or unwilling to procreate, is the one who seeks to acquire a child to rear, while the male seeks to beget a genetically linked child. A great deal of psychological testing is part of the screening process to determine which patients should be allowed to avail themselves of the services of infertility centers. n165 Because we do not have reliable statistics indicating how many couples or individuals are denied services, let alone indicating the reasons for the denial, it is impossible to state the dimensions of the problem. One assumption that we can make about human cloning is that it will allow those in charge of the technology to exercise almost complete control over who is eligible for asexual reproduction. Clearly, cloning is one reproductive method that does not lend itself to do-it-yourself procedures.

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n164. See generally Noel P. Keane & Dennis L. Breo, *The Surrogate Mother* (1981).

n165. See, e.g., Ralph Slovenko, *Obstetric Science and the Developing Role of the Psychiatrist in Surrogate Motherhood*, 13 J. Psychiatry & L. 487, 500-04 (1985).

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B. Ground Rules: Post-Mortem Reproductive Rights

Cloning has the potential to raise concerns about the security of genetic materials to new levels. What is remarkable about the birth of Dolly is that her creation through cloning did not require the use of two reproductive cells. Rather, the nucleus of a cultured cell from the udder of one sheep was introduced into an enucleated reproductive cell from another. n166 If it is no longer necessary to have two gametes, it would seem that unwitting reproduction of an individual would be much easier than it is now. It is not difficult to imagine a future scenario where obtaining cells for reproduction without the

cooperation of the cloned could become shockingly effortless. In turn, that possibility raises one of the most troubling, although not unique, issues raised by cloning, whether one has postmortem reproductive rights. n167

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n166. See Wilmut, *supra* note 4, at 812.

n167. See generally John A. Robertson, *Posthumous Reproduction*, 69 Ind. L.J. 1027 (1994). Cf. Bonnie Steinbock, *Sperm as Property*, 6:2 Stan. L. & Pol'y Rev. 57 (1995).

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Already courts have struggled with questions regarding the disposition of cryopreserved embryos, the genetic parents of which have died without leaving instructions concerning their disposition; n168 the status of children conceived and born after the death of the father; n169 and whether sperm is property that can be [*36] bequeathed by a testator. n170 Courts have also had to determine whether frozen embryos left behind when both parents have died should be implanted or destroyed. n171 In Italy, the birth of a baby reputed to have been conceived from the fertilized egg of a woman who has been dead more than two years has been the subject of intense controversy. n172 In New Orleans a widowed mother sued to challenge state laws that deny her child, conceived by artificial insemination using the dead father's frozen semen, the status of legitimate child and heir of the father. n173 At New York Hospital-Cornell University Medical Center, infertility doctors are faced with the dilemma of what to do with the stored embryos of a female patient who subsequently died. n174 The patient and her husband had agreed that the embryos should be destroyed if she died, but after her death the husband changed his mind and now wants to use a surrogate gestator. n175

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n168. See Sandra A. Garcia, *Sociocultural and Legal Implications of Creating and Sustaining Life Through Biomedical Technology*, 17 J. Legal Med. 469, 480 n.35 (1996) (citing David T. Ozar, *The Case Against Thawing Unused Embryos*, 15 Hastings Center Rep. 7 (1985)). In 1983, the Rios, an affluent husband and wife from Los Angeles, were killed in a plane crash, leaving behind two cryogenically preserved embryos stored in Australia. In response to the dilemma presented by the orphaned embryos, the government of Victoria passed the Infertility Medical Procedures Act, according to which extra corporeal embryos maybe destroyed or used for experiments only within 22 hours of conception. After passage of the Act, the medical center storing the embryos was directed to find a suitable recipient for the Rios' embryos. *Id.*; Thomas H. Maugh II, *Legacy of Dead L.A. Couple: OK Granted to Implant 2 Disputed Frozen Embryos*, L.A. Times, Dec. 4, 1987, at 3.

n169. See, e.g., Rick Bragg, *Cheating Death, and Testing a Reproductive Law*, N.Y. Times, Dec. 22, 1994, at A16. The Harts had been married for four years when Edward Hart was diagnosed with esophageal cancer and stored a sample of his sperm before undergoing chemotherapy. He told his wife to carry out their plans to have a child if he should die. She was able successfully to inseminate herself three months after his death. The story received widespread publicity

n175. Id.

Currently, there is little guidance for doctors as to whose wishes should prevail since it is not clear whether the right not to procreate survives the death of the genetic parent. A similar dilemma is involved in the widely publicized case of the Garber family who wish to have grandchildren produced from their dead daughter's [*37] frozen embryos. n176 Their daughter chose a sperm donor from a sperm bank to fertilize her eggs before she underwent a bone marrow transplant for leukemia that she knew would leave her sterile. n177 The mother of the deceased woman has been quoted as saying that "she and her daughter [had] talked about raising the child together, but never about the embryos being implanted in a surrogate after her death. 'We never talked about the fact [that] she wouldn't make it... never.'" n178 After appearing on nationally televised talk shows, the grandparents have found a surrogate willing to bear their grandchildren for them. n179

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n176. See id.

n177. See id.

n178. Surrogate Will Carry Dead Woman's Embryos, Times Union (Albany, N.Y.), May 25, 1997, at A14.

n179. Id.

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There is virtually no precedent to guide us in these situations but at least these scenarios involve demonstrated procreative intent, even if it is not at all clear that the genetic parents had posthumous births in mind. Instances in which gametes are harvested immediately after death, without any indication as to the wishes of the deceased are more troubling. n180 It is very easy for a physician to extract sperm from a cadaver. n181 The procedure is accomplished by simply making an incision in the vas deferens, the site where the sperm is stored. n182

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n180. See Gina Kolata, Uncertain Area for Doctors: Saving Sperm of Dead Men, N.Y. Times, May 30, 1997, at A1.

n181. See id. at A1, A19.

n182. Id. at A19.

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A recent survey of 273 infertility centers located within the United States and Canada discovered that between 1980 to 1995 sperm had been removed from dead men at fourteen centers in eleven different states. n183 Moreover, a total of eighty-three requests for the removal of a decedent's sperm had been made at forty of the centers in the United States. n184 For example, there are press reports of a reproductive endocrinologist's postmortem extraction of sperm from the body of an accident victim so that the decedent's young widow could attempt to conceive through artificial insemination. n185 In another incident, a urologist, at the [*38] request of the decedent's widow, extracted sperm from the decedent's vas deferens thirteen hours after he had died. n186 Although no known pregnancies have resulted from these extractions, the sperm has nevertheless been used to fertilize eggs in attempts to achieve successful pregnancies. n187 Since there is no legal guidance for the physicians of whom these requests are made, n188 the decision regarding the collection of the sperm has been based solely on the individual physician's views on the ethics of the situation.

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n183. Id. The study conducted by Dr. Arthur Caplan, Director of the Center for Bioethics at the University of Pennsylvania, was published in June, 1997

in the Journal of Urology. Id.

n184. Id.

n185. See Widow Seeks Use of Spouse's Sperm, Times Union (Albany, N.Y.), June 5, 1994, at A20.

n186. See Beth J. Harpaz, Dead Man's Sperm Removed, Frozen, Just in Case, Times Union (Albany N.Y.), Jan. 20, 1995, at B2. See also Dead Man's Sperm Extracted, Tampa Trib., Jan. 20, 1995, at 8.

n187. Kolata, *supra* note 180, at A1.

n188. Id.

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If sperm is just another body part, no more special than kidneys, corneas, or hearts, then the wishes of the individual having control of the cadaver should control the disposition of any residual sperm just as they control disposition of any other body parts. n189 However, if sperm extracted post-mortem requires categorization separate from other body parts because of its reproductive potential, then arguably the interest in deciding whether one wishes to create progeny survives the death of the rest of the body. Consequently, no procreative use should be made of gametes post-mortem without evidence of a clear intent on the part of the deceased that his or her gametes should serve such a function. Constitutional jurisprudence dictates that the state may not give the husband of a pregnant woman or the father of the fetus a veto of her decision concerning abortion. n190 Furthermore, the state may not require notification of her husband or the fetus's father. n191 Both husbands and wives have the right to undergo surgery to destroy their reproductive capacity without the permission, or knowledge, of their spouse. Additionally, the Tennessee Supreme Court has ruled that a divorced wife may not control the fate of the couple's frozen pre-embryos created during their marriage. n192 The court reasoned that the husband's right not to pro [*39] create would be violated if it granted the wife's request that she be given authority to donate them to a childless couple. n193

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n189. See Unif. Anatomical Gift Act 8-A, 9B U.L.A. 29-62 (1987 & Supp. 1997).

n190. Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976).

n191. Planned Parenthood v. Casey, 505 U.S. 833, 887-98 (1992).

n192. Davis v. Davis, 842 S.W.2d 588 (Tenn. Sup. Ct. 1992).

n193. See *id.* at 603-04. Cf. Kass v. Kass, slip op., 1997 WL 563419 (N.Y. 2d Dep't. 1997) (holding that the presence of an agreement, which requires mutual consent of the parties before implantation of pre-embryos, is binding).

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Posthumous reproductive interests, those desires to reproduce that were partially achieved or at least expressed pre-death, have been protected in the few legal decisions we have determining this issue. n194 It logically follows that a desire not to procreate should also be respected. Moreover, the absence of any indication of the deceased's wishes should militate against assuming that the deceased had such a desire. The right not to procreate, in fact, has been more clearly protected than the right to procreate. Although the United States Supreme Court has struck down one compulsory sterilization law on equal protection grounds and has spoken of procreation as a basic civil right, n195 the Court has never held that the Constitution prohibits all state interference with reproductive choices. In fact, in *Roe v. Wade*, n196 the Court cited *Buck v. Bell* n197 when it stated there is no absolute right to do whatever one pleases with one's body. n198 Moreover, the Court has never recognized a general right to personal autonomy that protects all decision-making where the choice does not produce a demonstrably harmful affect on others. n199

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n194. See, e.g., *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (1996).

n195. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

n196. 410 U.S. 113 (1973).

n197. 274 U.S. 200 (1927) (upholding a state's right to impose sterilization).

n198. *Roe*, 410 U.S. at 154.

n199. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191-96 (1986) (holding that there is no fundamental right of adults to engage in consensual sodomy). See *infra* text and notes at 200-237.

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Of course, it can also be argued that the dead can no longer be harmed by decisions that are contrary to that person's desires, even expressed desires; that reproductive rights necessarily abate with the death of the person. Ergo, there is no reason not to honor the requests of the survivors who in most cases are motivated by love and respect for the person who is no longer living. However, if we have no assurance that our wishes not to procreate and leave partial orphans will survive our deaths, or if we fear that our corpses will be raided in order to harvest our gametes, is not the notion that we have a constitutionally protected choice of whether to bear or beget a child undermined significantly? [*40]

V. Asexual Reproduction and Procreative Liberty

In examining the creation of clonal children in the context of reproductive freedom we must first acknowledge that what is involved is whether there is a right to reproduce asexually. Furthermore, we should bear in mind that the full extent of governmental power to interfere with procreative liberty has never been determined. Nevertheless, supporters of an expansive view of reproductive freedom base their claims on a constitutionally protected right to privacy

that includes individual autonomy. They find support in a series of United States Supreme Court decisions dating back to the 1920s giving broad meaning to the term "liberty," as protected by the Fourteenth Amendment's due process guarantee. n200 The Supreme Court has used substantive due process review to protect judicially defined 'fundamental values' not dependent upon a specific constitutional guarantee, in the areas of privacy, autonomy, and family relations. n201 Although the [*41] nature, n202 scope, and source n203 of these rights is unclear, it is evident that the Court gives these interests extraordinary protection by applying heightened scrutiny to laws which significantly interfere with their enjoyment.

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n200. The right to privacy is not specifically mentioned in the federal Constitution. Rather, it is derived from the concept of liberty found within the Fourteenth Amendment to the United States Constitution, which provides that "no state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, 1. Referring to the Fourteenth Amendment, the United States Supreme Court in *Meyer v. Nebraska* observed:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. 390, 399 (1923).

Additionally, our individual right to privacy has its origins in the Fourth Amendment's protection of the home against unlawful search and seizures. The right of privacy has been defined "as against the [power of] the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

n201. The Court recently noted:

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] to marry, *Loving v. Virginia*, 388 U.S. 1 (citations omitted) (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (citations omitted) (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (citations omitted) (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (citations omitted) (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (citations omitted) (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438 (citations omitted) (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (citations omitted) (1952); and to abortion, [*Planned Parenthood of Southeastern Pa. v. Casey*, ... [505 U.S. 833 (1992)]]]. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right

to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. at 278-279 (citation omitted).

Washington v. Glucksberg, 117 S. Ct. 2258, 2267 (1997).

n202. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a state ban on commercial distribution of and access by youths to non-medical contraceptives is invalid); *Roe v. Wade*, 410 U.S. 113 (1973) (ruling that a woman's decision whether to terminate a pregnancy is encompassed in the right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (ruling that regulations limiting only unmarried individuals access to contraceptives is invalid); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state may not prohibit the use of contraceptives by married couples). This is not to suggest that the constitutional right of privacy, originally defined in Justice Brandeis' dissent in *Olmstead* as "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men," is limited to reproductive autonomy. 277 U.S. at 478. Justice Stevens has identified two distinct individual interests embraced by the term privacy: (1) an interest "in avoiding disclosure of personal matters," and (2) an interest "in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). "The phrase 'right to privacy' appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others." *Griswold*, 381 U.S. at 510 n.1 (Black, J., dissenting) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)). For a criticism of the right to privacy as a constitutional norm, refer to Justice Black's dissent in *Griswold*, 381 U.S. at 507-27, in which he states: "this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy'." *Id.* at 510 n.1.

n203. Numerous efforts have been made to categorize privacy interests. See generally Tom Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233 (1977); Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 Cal. L. Rev. 1447 (1976); Sheldon S. Adler, Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 Yale L.J. 1579 (1978). Professor Tribe has criticized these definitional efforts as too abstract to be useful and too focused on the "inward looking" aspects of privacy such as secrecy, sanctuary, and seclusion to the neglect of its "outward looking" aspects and those that have both inward and outward dimensions, such as childbearing and rearing of children or the choice of one's vocation. Laurence H. Tribe, *American Constitutional Law* 15-1, 1302-04 (2d ed. 1988).

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In *Skinner v. Oklahoma*, n204 the Court's first decision involving reproduction per se, the Court used language reminiscent of sub [*42] stantive due process review in sustaining an equal protection challenge to a state law which provided for compulsory sterilization of certain criminals convicted of crimes of moral turpitude. The Court stated: "We are dealing here

with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." n205 Later decisions concerning state restrictions on the use of and access to contraceptives and the availability of abortion recognized the right of the individual to decide whether to bear or beget a child. n206 However, since Skinner, no decision involving reproductive issues has been the product of a unanimous Court. n207

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n204. 316 U.S. 535 (1942).

n205. Id. at 541.

n206. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (deciding that the right to privacy protects a married couple's use of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that whatever right of access to contraceptives is afforded to married couples must also be provided to unmarried individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (stating that a woman has the right, in conjunction with her physician, to decide to terminate a pregnancy during the first two trimesters). One of the many criticisms of the Court's abortion jurisprudence has been its failure to unify its sex discrimination and reproductive autonomy decisions, despite the profound impact the lack of reproductive control has on a woman's health, opportunities, fortunes and sometimes life itself. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984). See also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992).

n207. Even *Griswold v. Connecticut*, which in 1997 seems to be an unexceptional result, produced two dissenting opinions. See 381 U.S. at 507 (Black, J., dissenting); id. at 527 (Stewart, J., dissenting). Justice Douglas' opinion for the Court, however, was grounded upon the natural rights of a married couple that predate the Bill of Rights. Moreover, *Griswold* was a decision limited to the constitutionality of prohibiting the use of contraceptives by married couples. It was not until the 1972 decision of *Eisenstadt v. Baird* that the Court loosened notions of procreative freedom from their moorings. The Court, however, was unable to agree whether there is a right of access to contraceptives and declined to address the question of whether the state could bar access to contraceptives based on its view of the inherent immorality of preventing procreation. Instead, in an unsatisfactory opinion, the Court held that equal protection mandated that whatever rights of access to contraceptives were enjoyed by married couples, must also be afforded the unmarried; hardly a ringing endorsement of contraceptive freedom. *Eisenstadt*, 405 U.S. at 453. It was not until *Carey v. Population Servs. Int'l*, 431 U.S. 678, that a divided Court squarely held that there is a corollary right of access to contraceptives; a right of access that extends even to minors. The Court's opinion in *Planned Parenthood v. Casey* would have reaffirmed *Roe v. Wade*'s essential holding that a woman has a fundamental right to choose abortion, except that the writers of the joint opinion were joined in judgment by four Justices, who in separate opinions by the Chief Justice Rhenquist and Justice Scalia, overruled *Roe*, leaving the status of *Roe v. Wade* unclear but affirming the exclusion of spousal notification. See *Casey*, 505 U.S. at 900.

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The Court's decisions concerning reproductive autonomy have made clear that the government's power to compel child bearing, begetting, or the destruction of an individual's procreative capacity is limited by the Fourteenth Amendment's liberty guarantee. It is also clear that the state may not seek to discourage nonmarital sex by making an unmarried couple run the risk of pregnancy by denying access to contraceptives. n208 What is not certain is whether unmarried individuals or minors have an affirmative right to procreate. n209 The Court's jurisprudence on morality as a legislative end indicates that a state may seek to prevent non-marital births by prohibiting adultery, fornication, n210 and sex involving minors, even where both participants are underage. n211

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n208. See *Eisenstadt*, 405 U.S. 438 (holding that a state may not prohibit distribution of contraceptives to unmarried persons while allowing distribution to married persons). See also *Carey*, 431 U.S. at 694-96 (ruling that a state may not impose restrictions on access to contraceptives for the purpose of deterring sexual activity by minors).

n209. See generally Patricia A. Kern & Kathleen M. Ridolfi, Note, The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent through Artificial Insemination by Donor, 7 *Women's Rts L. Rep.* 251 (1982); Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 *Harv. L. Rev.* 669 (1985).

n210. See *Eisenstadt*, 405 U.S. at 448 (stating that a state can constitutionally regulate extramarital and premarital sexual relations); *id.* at 449 (noting that the legislature has "a full measure of discretion in fashioning laws to prevent fornication."); *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) (noting that "the State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."); *id.* at 505 (White, J., concurring) (providing that "the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, [is] a permissible and legitimate legislative goal"); *Carey*, 431 U.S. at 707 (Powell, J., concurring) (stating that "the relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests."); *id.* at 713 (Stevens, J., concurring) (noting that "I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."). See also *Bowers v. Hardwick*, 478 U.S. 186, 191, 196 (1986) (ruling that there is no fundamental right to engage in consensual homosexual sodomy, and that morality is a rational and legitimate governmental end). But see *Trimble v. Gordon*, 430 U.S. 762 (1977) (ruling that a state may not seek to promote morality by penalizing non-marital children).

n211. *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (upholding the application of statutory rape laws to all males, regardless of whether or not the male was under the age of majority at the time the crime was committed).

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Reliance on the Court's jurisprudence concerning personal autonomy is also problematic because the continued development of this aspect of liberty is so controversial and unpredictable. For the immediate future, *Bowers v. Hardwick*, n212 a decision rejecting a substantive due process challenge to Georgia's law prohibiting consensual sodomy, illustrates the Court's unwillingness to create new substantive rights of personal decision-making. Furthermore, despite the *Skinner* Court's reliance on the Equal Protection Clause in its seeming recognition of a general right not to be sterilized without consent, the Court has since stated that the clause does not create substantive rights. n213 Even recognized liberty interests are not absolute; they must give way to competing relevant state interests of greater weight. n214 As the Court explained, "we 'have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.'" n215

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n212. 478 U.S. 186 (1986).

n213. See *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997).

n214. See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) (explaining that liberty interests must be balanced against state interests); *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (noting that "liberty secured by the Constitution ... does not import an absolute right in each person to be ... wholly freed from restraint.").

n215. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (quoting *Collins*, 503 U.S. at 125 (citation omitted)).

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Given the lack of a clear textual basis in the Constitution for procreative liberty, the future development of reproductive freedom seems particularly vulnerable to the vicissitudes of personnel changes of the Court. Moreover, there is nothing to prevent the Court from discarding its already cautious approach to claims of personal autonomy and adopting one that is even more unsympathetic. Certain notions involving procreative freedom have taken such a firm hold in the popular imagination that suggesting a complete renunciation of a constitutionally protected right to privacy in some sphere of personal choice would be a politically precarious undertaking. n216 Nevertheless, there is no such political constraint preventing those with lifetime tenure on the Court [*45] from retreating from the cautious position on personal autonomy that the Court has taken.

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n216. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 8-9 (1971) (criticizing the *Griswold* opinion for failing every test of neutrality). This opinion became "the key source of

interrogation when Bork ... was being considered for the Supreme Court in 1987. Bork's criticisms of Griswold antagonized both the Senate Judiciary Committee and, according to the polls, a majority of the American people. His nomination failed." William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 22 n.c (1997).

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Many objections to the prospect of human cloning are based upon beliefs concerning the divine creation of all human life, or the view that "human beings should not probe the fundamental secrets or mysteries of life, which belong to God." n217 Although some argue it is improper to use moral or religious bases to formulate secular laws, the Supreme Court has never endorsed such a principle. In *Harris v. McRae*, n218 which upheld the most far-reaching Congressional restriction on the use of Medicaid funds for abortion, a divided Court rejected challenges under the Equal Protection, Due Process, and both religion clauses of the First Amendment. n219 Justice Stewart, in his opinion for the Court, noted that the fact that a law is consistent with a religious belief does not invalidate the law under the Establishment Clause. n220 Even the dissenters gave cursory attention to the argument that the federal law's abortion restrictions coincided with the tenets of certain religions. n221 In *Webster v. Reproductive Health Services*, n222 a decision upholding a number of regulations of the abortion procedure and restrictions on access to abortion, a number of religious groups joined in an amici curiae brief to argue that restrictions on the right of procreative freedom invade religious liberties protected by the Free Exercise Clause of the First Amendment. n223 They argued that this area should be left to the private sphere since the diversity of religious views on abortion means that state regulation will clash with the strongly held religious convictions of some individuals and groups.

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n217. *Cloning Human Beings*, supra note 7, at 44.

n218. 448 U.S. 297 (1980).

n219. *Id.* at 317-22.

n220. *Id.* at 319.

n221. *Id.* at 329 (Brennan, J. dissenting); *id.* at 329 (Marshall, J. dissenting); *id.* at 349 (Stevens, J. dissenting).

n222. 492 U.S. 490 (1989).

n223. Brief Amici Curiae for American Jewish Congress, et al. at 10-20, *Webster* (No. 88-605).

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The Court has upheld laws based on moral judgments throughout its history. In *Bowers v. Hardwick*, the Court again stated that morality is a legitimate governmental purpose. n224 *Hardwick* and other decisions have also made it clear that the asserted right [*46] will be tested at its narrowest level. For

example, in *Hardwick*, the Court determined whether there was a history and tradition of protecting a right to engage in homosexual conduct, rather than addressing the broader question of whether there is a history of respect for intimate choices. n225 In *Michael H. v. Gerald D.*, the Court treated a non-marital biological father's claim, for recognition as the legal father of a child born as the result of an adulterous affair, as a claim to permit a wife's partner in adultery to intrude upon the marital family. n226

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n224. See 478 U.S. 186, 196 (1986) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

n225. *Bowers*, 478 U.S. 186.

n226. See 491 U.S. 110 (1989).

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The Court's most recent discussion involving the scope of personal liberty is found in their "right to die" decisions. In *Washington v. Glucksberg*, the Court determined that liberty protected by the Due Process Clause does not necessitate invalidation of state laws criminalizing assisted suicide when applied to physicians helping terminally ill individuals hasten death. n227 The Court noted that it "has required a 'careful description' of the asserted fundamental liberty interest" for which protection is sought. n228 Accordingly, it formulated the claim in the narrowest terms - the right to decide to commit suicide with the assistance of another - rather than more broadly as the 'right to die with dignity.' n229

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n227. See 117 S. Ct. 2258 (1997). See also *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

n228. *Id.* at 2260 (citing *Reno v. Flores*, 507 U.S. 292, 302 (citations omitted) (1993)).

n229. See *id.* See also *Glucksberg*, 117 S. Ct. at 2311 (Breyer, J., concurring).

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Moreover, the Court increasingly looks to the past to determine the scope of personal liberty. The Court has often stated "that the Due Process Clause [specifically] protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" n230 For example, the high court has said that its "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." n231 Had the Court relied on history or tradition in deciding the contraception cases, the result would have been an affirmance of the state's

power to restrict both use and access; recognizing or [*47] protecting the right to use or obtain contraceptives is not firmly rooted in history or tradition. In fact, history and tradition is to the contrary. n232 On a more hopeful note, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, n233 the Court reaffirmed its authority to define unenumerated rights through reasoned judgment in interpreting the word liberty in the Due Process Clause of the Fourteenth Amendment. n234 The Court relied upon past decisions dealing with bodily integrity and "a person's most basic decisions about family and parenthood" in retaining *Roe v. Wade*'s essential holding. n235

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n230. *Glucksberg*, 117 S.Ct. at 2268 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). See *id.* at 2262-63 (noting that an examination of our Nation's history, legal traditions and practices demonstrates the Anglo-American common law has punished or disapproved of assisting suicide for over 700 years) .

n231. *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

n232. See generally Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 403-18 (1977) (discussing the struggle of women for reproductive self-determination).

n233. 505 U.S. 833 (1992).

n234. See *id.* at 849.

n235. *Id.*

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Unfortunately, it is also the case that since the *Casey* decision, Justice Blackmun, one of the two justices who would have struck down all of Pennsylvania's restrictions, is no longer on the Court. And, it was Justice Blackmun, one of the staunchest defenders of abortion rights, who included *Buck v. Bell* n236 in his *Roe v. Wade* inventory of Supreme Court decisions establishing the doctrine that an individual does not have an absolute right to do with her body as she wishes. n237 Thus, it is difficult to be sanguine about future developments in the Court's reproductive liberty jurisprudence given how cautious the Court's approach to claims of protected rights to personal decision making, including reproductive liberty, has been. Even if the Court does not retreat from its previous decisions, which protect some aspects of procreative liberty, the Court has never recognized an affirmative right to procreate by anyone, at any time, by any means.

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n236. 274 U.S. 200 (1927).

n237. 410 U.S. 113, 154 (1973).

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Audrey

VI. Procreative Rights Redefined

Constitutional jurisprudence does not clearly define the procreative rights of the unmarried or minors. Even less clear is the notion that there is an affirmative right to procreate through the use of collaborative techniques or assisted reproduction. n238 The Supreme Court has never addressed a question involving reproductive technology or assisted conception. Moreover, there is a [*48] paucity of state decisional law determining constitutional issues related to these techniques. The few opinions from appellate courts to address assisted conception are not supportive of the notion that the Constitution compels a state to adopt a permissive stance. n239 However, there is scholarship to support the notion of a protected status for "reproductive" technologies, even though some of the practices involved are more properly denominated as methods to acquire a child to rear. n240 Since these ideas are the basis of the debate over human cloning, a brief examination of the theory of the right to assisted conception is in order.

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n238. See, e.g., *supra* text and note at 155 (discussing prisoners' reproductive rights).

n239. See *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988) (holding that in New Jersey the surrogate mother's agreement to sell her child is void and the father's procreative rights are not violated since he has reproduced); *Doe v. Kelley*, 307 N.W.2d 438 (Mich. App. 1981) (finding that sections of the Michigan Adoption Law prohibiting the exchange of money for surrogacy is constitutional); *Doe v. Attorney General*, 487 N.W.2d 484, 488-89 (Mich. App. 1992) (explaining that a surrogate parentage contract, which is void and unenforceable under the Surrogate Parenting Act, consists of "(1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) her voluntary relinquishment of her parental rights to the child," but "[a] contract ... that does not contain both elements ... is neither void [nor] unenforceable ... even when entered into for compensation" because a state has compelling interest sufficient to warrant intrusion into protected areas of privacy in matters of procreation).

n240. See generally Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 Seton Hall L. Rev. 347, 386 (1993) (contending that limiting artificial insemination access to married women violates Eisenstadt). Despite the legal commentary positing a constitutionally mandated right to reproductive freedom that includes the use of biotechnology, there is little precedent to support such an expansive view. It should be remembered that almost all scholarly interpretations following *Griswold v. Connecticut* and *Eisenstadt v. Baird* interpreted those decisions as putting all consensual adult sexual activity beyond the reach of government proscription. *Bowers v. Hardwick*, however, brought an end to the expansion of personal rights through the doctrine of substantive due process. Even in *Cruzan v. Director, Missouri Department of Health*, the Court was unwilling to find a protected liberty interest in refusing life-saving medical treatment, assuming for the sake of argument that such a protected interest exists. Moreover, in recent years the Court has limited the reach of *Roe v. Wade* by rejecting

challenges to legislation that would have been invalid under Roe. See e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992).

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Professor John A. Robertson, one of the foremost scholars on reproductive rights, starts from the unexceptional premise that procreative liberty is important because "control over whether one reproduces or not is central to personal identity, to dignity, and to [*49] the meaning of one's life," n241 and concludes that its importance means that it should enjoy "presumptive priority in all conflicts." n242 Accordingly, those who would limit procreative choices, including the use of "novel reproductive techniques," must demonstrate that substantial harm would result in order to justify restriction or interference. n243

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n241. Robertson, supra note 88, at 24. Procreative choice refers to the freedom to decide whether to have offspring, as well as the freedom to make whatever use one desires of one's reproductive capacity. Id. at 16.

n242. Id.

n243. Id. at 40-41 ("If procreative liberty is taken seriously, a strong presumption in favor of using technologies that centrally implicate reproductive interests should be recognized. Although procreative rights are not absolute, those who would limit procreative choice should have the burden of establishing substantial harm. This is the standard used in ethical and legal analysis of restrictions on traditional reproductive decisions. Because the same procreative goals are involved, the same standard of scrutiny should be used for assessing moral or governmental restrictions on novel reproductive techniques.").

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Professor Robertson conflates reproductive technology with procreative liberty since he views all reproductive technology as involving the means to achieve or avoid the reproductive experiences that he identifies as central to human conceptions of meaning and identity. n244 Although in many instances of assisted conception the individual who intends to parent the child has not reproduced in the ordinary sense of the term, he redefines reproduction to mean not just the replication of oneself, but the acquiring of a child for rearing purposes. n245 The use of this definition logically includes those who adopt a child without resorting to any reproductive technology even though there has never been legal recognition of a right to adopt someone else's child.

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n244. Id. at 4 (stating that "to deny procreative choice is to deny or impose a crucial self-defining experience, thus denying persons respect and dignity at the most basic level.").

n245. See id. at 127 (analyzing the legal rights of each party to rear a child conceived through noncoital reproduction).

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Furthermore, Professor Robertson includes those not normally thought of as reproducing within the ambit of protected activity by reference to "partial reproduction." n246 He notes that the infertile have the same desire to "replicate themselves, transmit genes, gestate, and rear children biologically related to them." n247 He states that "their infertility should no more disqualify them from reproductive experiences than physical disability should disqualify persons from walking with mechanical assistance." n248 He also [*50] includes under the rubric of reproduction such practices as surrogacy. n249 These practices are included even though there is no genetic link to the child on the part of the wife who intends to adopt the child produced by the union of her husband's sperm with the surrogate ovum. n250

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n246. Robertson, *supra* note 88, at 34.

n247. *Id.* at 32.

n248. *Id.*

n249. *Id.* at 131-33.

n250. *Id.* at 32-33.

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One could agree that infertile individuals have the same desire as fertile individuals to reproduce and, at the same time, not agree that reproductive technology necessarily fulfills that desire. Instead, the use of technology provides a child who is a reproduction of the genetic parents. Although most reproductive activity involves individuals for whom having children means more than just the act of siring or giving birth, the law treats the conception and birth of children as separate from the rearing of children. An example is found in the notorious custody battle fought all the way to the New Jersey Supreme Court in *In the Matter of Baby M*. n251 Mary Beth Whitehead, a "surrogate" mother, had agreed to be artificially inseminated, to conceive, and to bear a child for Bill Stern, the child's genetic father and his wife. n252 At the child's birth, she was to surrender her rights to the child and give the baby to the Sterns to rear. n253 When she sought to retain custody after Baby M's birth, a bitter custody contest ensued. n254 Whitehead argued, *inter alia*, that as the mother of the child her procreative liberty included a right to have primary custody of Baby M that was superior to the father's claim. n255 She further argued that she should be given custody because surrogate contracts should be contrary to public policy. n256 The Sterns sought enforcement of the agreement and claimed a constitutional right of procreation that included the freedom of consenting adults to deal with matters of reproduction as they see fit. n257 The New Jersey Supreme Court held the agreement was invalid and that while both Mary Beth Whitehead and Bill Stern had procreated, neither one had rearing [*51] rights superior to the other prior to an analysis of the best interests of the child. n258

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n251. 537 A.2d 1227 (1988).

n252. Id. at 1235.

n253. Id.

n254. Id. at 1237-38.

n255. Id. at 1238-39. This decision has had widespread influence. Surrogacy arrangements are statutorily banned in nine jurisdictions and circumscribed in others. See Eskridge & Hunter, *supra* note 216, at 778, nn. k & l.

n256. Baby M., 537 A.2d at 1238.

n257. Id. at 1239.

n258. Id. at 1255-56.

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VII. Cloning and the Law of Assisted Reproduction

A. Lack of Comprehensive Legislation

At first blush cloning would seem to be far beyond the realm of any reproductive technology with which the law has had to deal. An examination of the legal issues raised by other reproductive technologies however, suggests that cloning is a part of a logical progression. n259 This is not to suggest that comprehensive laws or uniform statutes govern the dilemmas inherent in the use of these technologies. n260 In fact, there is no agreement or governing policy at either the national or international level about issues such as the legal and moral status of a pre-embryo, an embryo n261 or a fetus, the legitimacy of surrogate motherhood arrangements, the legality of in vitro fertilization, the rights of gamete contributors, or the duties and appropriate limitations on infertility research or genetic manipulation. n262

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n259. See generally Pitrolo, *supra* note 14 (providing an overview of the various noncoital reproductive technologies, the issues that they have engendered, and the international attempts to resolve any controversies).

n260. Id. at 168-204.

n261. See, e.g., Fla. Stat. Ann. 873.05 (West 1994) (prohibiting the advertising and sale of human embryos).

n262. See Bartha M. Knoppers & Sonia LeBris, Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues, 17 Am. J. L. & Med. 329, 360-361 (1991) (discussing the lack of international legislation and the need for both international and national legislation on medically assisted conception); Pitrolo, *supra* note 14, at 168-204 (providing an overview of the

various domestic and international approaches to reproductive technology regulation). See also World Medical Ass'n, Declaration of Madrid on Professional Autonomy and Self-regulation, reprinted in 39 Int'l Digest of Health Legislation 268 (1988) (pertaining to physicians, not scientists); World Medical Ass'n, Assisted Reproduction: Guidelines for Ethics Committees in the United Kingdom, reprinted in 40 Int'l Digest of Health Legislation 900 (1989).

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On the contrary, legal development has resulted from litigation between interested parties. n263 Among the recent lawsuits resulting from the use of reproductive technologies is a claim by a gay man that he has a right to visitation with the daughter he sired by [*52] donating his sperm to a lesbian couple; n264 a negligence and personal injury suit by a woman who was undergoing in vitro fertilization when her fertilized egg was mistakenly implanted in another woman; n265 and the claim of an Israeli woman who was awarded the frozen embryos she and her divorced husband had fertilized while married. n266

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n263. See generally Robert Blank & Janna C. Merrick, Human Reproduction, Emerging Technologies, and Conflicting Rights (Cong. Q. Press 1995) (demonstrating that the evolution of the policy concerning reproductive technology is taking place in courts rather than in regulatory or legislative bodies).

n264. See Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 357-62 (App. Div. 1994) (explaining that after a blood test established petitioner's paternity by clear and convincing evidence, the court was compelled to enter an order of filiation, and equitable estoppel is not appropriate where the mother initiated and acquiesced in the father's developing relationship with his daughter).

n265. See Creed v. United Hosp., 600 N.Y.S.2d 151, 152-53 (App. Div. 1993) (holding that a complaint seeking to recover for emotional harm unaccompanied by physical trauma does not state a cause of action).

n266. Dianna Cahn, Woman Wins Right to Embryos: Landmark Israeli Decision Defines Pregnancy as Time of Conception, Rocky Mtn. News, Sept. 22, 1996, at 52A. But see Davis v. Davis, 842 S.W.2d 588, 601, 602 (Tenn. Sup. Ct. 1992) (holding that a husband's right not to procreate should prevail over a spouse's desire to implant frozen embryos, particularly where the other spouse has a reasonable possibility of becoming a parent by other means).

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The most troubling case of all involves Jaycee, a two-year old child who has six possible parents but has been ruled to have none. n267 Jaycee was born as the result of an arrangement in which a married couple hired a (married) gestational surrogate to carry to term an embryo created from the egg and sperm of anonymous donors. n268 The commissioning couple divorced before her birth and although Jaycee has lived with her intended mother since birth, the mother had to file a petition for temporary support from the intended father who denies any responsibility for the child. n269 When the appeals court heard the case in

1996, it ruled that Family Court has jurisdiction to make a child support order pendente lite; the ex-husband's signing of the surrogacy agreement showed that he would likely be held to be the child's father. n270 In September of 1997, however, the Superior Court judge ruled that the ex-husband was no longer responsible for child support payments and that his former wife "was not entitled to be declared the legal mother." n271

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n267. See Davan Maharaj, Case may Redefine Fatherhood in State Law, L.A. Times, Sept. 14, 1997, at B1; David E. Rovella, Six Degrees of Parental Separation, Nat'l L.J., Oct. 27, 1997, at 1.

n268. Jaycee B. v. Superior Ct., 49 Cal. Rptr. 2d 694, 696 (4[su'th'] Dist 1996).

n269. Id.

n270. Id.

n271. Maharaj, supra note 267 at B1. The Fourth District Court of Appeals has stayed the judge's decision, stating that the infant's appeal "may have merit." Id.

-End Footnotes-

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This sort of litigation results from a lack of clear legal principles to govern judicial determinations regarding parental rights and responsibilities when assisted reproduction is involved. It makes manifest the human dilemma that follows in the wake of technological advances. Ultimately, such litigation is an unsatisfactory process to resolve the fundamental questions that need to be answered. Anytime legislative inaction forces the courts to resolve major social issues, there are structural defects in the process. These defects include limitations in the scope of the permissible inquiry, the adversarial nature of the proceeding, and the piecemeal results. Ideally, there would be an informed debate in a nonpartisan setting where voices other than those of the individuals who have a personal interest in the outcome would be heard. Until this happens, we must make do with the fragmented and uncertain state of the law.

B. Cloning and the Law of Assisted Reproduction

Cloning appears to offer the opportunity to reproduce oneself in the most literal meaning of the word without having to depend on anyone else to contribute genetic material. The argument that it would be narcissistic to have oneself cloned ignores the narcissism involved in any form of genetic reproduction. There are those who argue that it is selfish to want to reproduce oneself when there are so many children who already need families. For example, in criticizing traditional adoption policies and reproductive technology, Professor Elizabeth Bartholet stated that "we live in a world that has no need for more people. We are rapidly destroying our environment because of our inability to handle the people we already have. It seems crazy to drive those who want to parent away from already existing children who need homes and into the production of new children." n272

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n272. Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 Duke J. Gender L. & Pol'y 5, 9 (1995).

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This criticism is part of an argument against providing legal importance to genetic links between parent and child and instead deciding issues of rights of access to children on the basis of psychological and emotional bonds, rather than biology. n273 A number [*54] of legal commentators have theorized that the law should employ the preconceived understanding of the parties to determine parental rights in cases where reproductive technology involves individuals who have made a genetic or biological contribution to the procreation of a child without intending to be the rearing parents. n274 The most prominent decision to give judicial approval to the notion that intent should determine parenthood is *Johnson v. Calvert*. n275 It involved a dispute between a genetic mother, who had provided the egg for in vitro fertilization, and the gestational surrogate, who had carried the embryo to term and given birth. n276 The California Supreme Court held that since both women had biological claims to motherhood, the genetic mother's 'intent' to be the mother was the determining factor. n277

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n273. At the theoretical level, any discussion of recent developments in the law of parent child relationships must start with a nonlegal concept; the psychological parenting theory developed in 1973 by well-known authorities from the Yale University legal and psychiatric faculties and London's Hampstead Child-Therapy Clinic. Their pioneering work drew on psychoanalytic theory to create a model child placement law emphasizing a child's need for continuity, stability, and permanence of caretaker, and criticized the law's slowness in understanding and acknowledging "the necessity of safeguarding a child's psychological well-being." Joseph Goldstein et al., *Beyond the Best Interests of the Child* 4 (1973). Their work de-emphasized the importance of legal and biological parenthood in determining child custody, stressing instead the importance of the psychological parent to the child. The psychological parent being the "one who on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." Id. at 98. "The psychological parent may be a biological ..., adoptive, foster, or common-law ... parent." Id. A common-law parent is one, other than a biological, adoptive or court-decreed custodian, who has developed a psychological parent or wanted child relationship and "[a] wanted child is one who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her." Id. Moreover, there is no presumption in favor of an adoptive, foster or common-law parent "after the initial assignment of a child at birth to his or her biological parent." Id. See also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1844-52 (1993) (characterizing the legal definition of parenthood as biological ownership to suggest that the law focus on earned parenthood instead).

n274. See, e.g., John Lawrence Hill, What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 414-15 (1991) (stating that genetic relationships, per se, should not be accorded priority in determining parent-child relationships in surrogacy arrangements); Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 396 (noting that "reproductive technology expands and extends the potential for conscious control and purpose in procreation"); Andrea E. Stumpf, Note, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 Yale L.J. 187, 196 (1986) ("The mental concept of the child is a controlling factor [in] its creation, and the originators of that concept merit full credit as conceivers.").

n275. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

n276. Id. at 778.

n277. Id. at 782.

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One troubling aspect of assisted reproduction is the fact that children are created who have only one known or knowable parent. n278 Many of these children are born using anonymous donor artificial insemination and have no way of learning the identity of their biological father. n279 While many people believe that children born of artificial insemination have not been harmed by this gap in their self-knowledge and genetic identity, their voices and their bewilderment at what has been denied them are beginning to be heard. n280 Identity and genetic misinformation problems of the child conceived through artificial insemination can be cured with legislation that requires identification records to be kept and the information contained therein made available sometime in the child's life. n281

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n278. See Peggy Orenstein, Looking for a Donor to Call Dad, N.Y. Times, June 18, 1995, 6 (Magazine), at 1.

n279. See Office of Technology Assessment, supra note 116, at 3 (stating that during 1986 approximately 30,000 babies were conceived using semen from anonymous donors, and that half of the physicians surveyed maintain records of genetic parentage but almost none would release that information to the child).

n280. See generally Annette Baran & Rueben Pannor, Lethal Secrets: The Shocking Consequences and Unresolved Problems of Artificial Insemination 54-73 (1989).

n281. See Gibson, supra note 95, at 34-44.

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Cloning would eliminate some of the troubling and difficult social and legal questions that have resulted from the use of other methods of collaborative or

assisted reproduction. Chief among them is the issue of determining legal parenthood where a number of individuals lay claim to the status of parent when there is a dichotomy between the gamete providers or a gestational mother, and the intended rearing or social parents. For example, it is entirely possible for a couple intending to become rearing parents to enter into an agreement whereby donated sperm and eggs are fertilized in a petri dish and a gestational surrogate carries the resulting embryo to term. n282 All five individuals involved in the transaction could claim status as a parent of the resulting child, either as a matter of contractual intention, genetics, or in the case [*56] of the gestational surrogate, biological ties. Two of the men, the sperm donor and the intended father, could seek recognition as the legal father, n283 while three of the women in the scenario could claim maternity. n284 The egg donor has a genetic link, the gestational surrogate a biological connection, and the intended mother arguably has a contractual claim. n285 Thus, there are a total of five claims for recognition as parent based upon biology, genetic ties, and contractual understandings. To date however, all of the decisions involving parental rights of sperm donors have involved contests between the donor and the child's mother. n286

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n282. This seemingly far-fetched scenario has already taken place at least twice. For example, the Buffalo News reported a story from Southern California that told of the approaching birth of a child for whom five individuals have arguable claims to legal parenthood: the gamete providers, the gestator, and the contracting party who originated the arrangement in order to receive a child to raise. The baby, expected to be a girl, is believed to be the result of the first known five-parent surrogacy arrangement. See Carol Masciola & Susan Peterson, *Baby Girl Will Have 5 Parents*, Buff. News, Aug. 2, 1993, at A7. See also *Jaycee B. v. Superior Ct.*, 49 Cal. Rptr. 4th 694 (4[su'th'] Dist. 1996).

n283. To date, there has been no litigation involving two men seeking paternal status when the child was conceived by artificial insemination.

n284. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (involving a custody dispute between a gestational surrogate and a woman whose egg was used who was also the intended mother).

n285. Id.

n286. See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 531, 537-38 (1[su'st'] Dist. 1986) (upholding visitation rights of known sperm donor since the mother had not obtained semen from a licensed physician as required by California law in order to foreclose the donor from claiming parental rights, and holding that where the parties to AID have "failed to take advantage of the statutory basis for preclusion of paternity, the donor of semen can be determined to be the [natural] father."). The statute provided that "the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if it were not the natural father of a child thereby conceived." Cal. Civ. Code 7005(b) (Deering 1984 & Supp. 1996) (repealed 1994).

On October 4, 1997, the Governor of California enacted temporary legislation to prohibit the cloning of an entire human being in order to evaluate the

litical, ethical, and social implications that cloning a human being raises. See 1997 Cal. Legis. Serv. 688 (Deering).

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If cloning were allowed, some of these conflicting claims could be avoided. If females were able to clone themselves, contests with gestational surrogates would be avoided absent the need to rely on another woman to provide a gestational environment. If a male were cloned, there would be no dispute between sperm donor and intended father. A gestational mother, however, could claim rights as the mother of the clonal child. If the clonal child were cloned from his father's cell, there would be no woman with a material genetic link to the clonal child. In that case, the gestational mother's claim to legal motherhood might deserve recognition. This scenario highlights one of the most troubling aspects of clonal children, the absence of two genetic parents. One church official has stated that "every human being has the right to two [*57] biological parents." n287 However, if one believes that cultural and optional factors are a larger part of the parent-child relationship than genetic or biological links, then one should not be troubled by the prospect of clonal children. After all, a clonal child may have two rearing parents. Nevertheless, the voices of children born from AID or children who have been adopted and who lack knowledge of their genetic origins may well have something to tell us.

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n287. Masood, supra note 3, at 757 (quoting Nicholas Coote, Assistant General Secretary of Roman Catholic Bishops Conference of England and Wales).

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It is possible to provide the missing knowledge of genetic links for adopted and AID children by enacting legislation that mandates record keeping of the identity of gamete donors and guaranteed access to that information. With cloning, there can be no legislation to provide what will always be missing. Unless one views the clonal child's grandparents as the genetic parents, there is no way of knowing what effect this lack will have on the child who is conceived asexually. The question becomes, should those who would use cloning as a method of human reproduction have the burden of showing that it will result in no harm, and if so, how does one accomplish this without controlled studies producing specimens to evaluate? Or, should the burden be on those who would question the wisdom and morality of cloning to demonstrate that harm will come? It is easy to say that cloning fits nicely into our current reproductive technologies. It is more difficult to answer the question of whether it should.

C. Potential Social Effects

Finally, there is one concern about cloning that differs from the questions raised by the already feasible reproductive technologies or genetic interventions. That is the fact that males, as agents of reproduction, could become superfluous, having no role to play in asexual reproduction. n288 This fear, of course, is based on two assumptions: (1) that women will control who will be cloned, thereby controlling the sex of the child, and (2) that women will not want males in the world. It is true that until complete ectogenesis

n289 becomes a reality, or the process is perfected by [*58] which males can gestate the developing embryo, n290 or we have transgenic (transpecie) gestational surrogacy, there is no way to continue the human race without females to gestate the developing child. The fact that women are essential does not mean, however, that men are expendable. An unintended consequence of the practice of artificial insemination has been a break in the nexus between genetic fatherhood and any legal responsibility for the resulting child. To the extent there are laws to address the legal parentage issues created by artificial insemination, these laws terminate any preconceived legal duties of the donor that are usually a part of fatherhood. n291 Furthermore, this weakening of the father-child relationship has had a social effect that even reaches men who have fathered children through sexual intercourse. In particular, in bitter custody battles between genetic fathers and third-parties, the genetic fathers are now sometimes being referred to as "inseminators" n292 or "sperm fathers." n293

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n288. See, e.g., J. Madeline Nash, *The Age of Cloning: A Line has been Crossed, and Reproductive Biology will Never be the Same for People or for Sheep*, Time, Mar. 10, 1997, at 62 (referring to the potential impact of cloning, Washington University biologist, Dr. Ursula Goodenouogh, noted jokingly that "there'd be no need for men.").

n289. Ectogenesis is the process by which a fetus is gestated outside the female body in an artificial environment during the period which it would normally be within the uterus. See generally Singer & Wells, *supra* note 14, at 116-34. Currently, partial ectogenesis is being employed to keep alive small, premature fetuses through the use of extremely sophisticated technology. *Id.* at 116-17. For the most recent developments concerning ectogenesis, see Perri Klass, *The Artificial Womb is Born*, N.Y. Times, Sept 26, 1996, 6 (Magazine), at 117-19 (reporting that in Tokyo researchers have developed a technique of extrauterine fetal incubation using goat fetuses in which the fetuses have been maintained for as long as three weeks).

n290. See Dick Teresi, *How to Get a Man Pregnant*, N.Y. Times (Magazine), Nov. 27, 1994, at 54 (discussing how a male pregnancy in humans could be achieved).

n291. See Unif. Status of Children of Assisted Conception Act, 4, 9B U.L.A. (1987 & Supp. 1997).

n292. See, e.g., Timothy Egan, *Indian Heritage vs. Adoptive Parents*, N.Y. Times, Oct. 12, 1993, at A16 (discussing the custody and adoption of a child whose father was an Oglala Indian and whose mother was a white woman, where the mother had permitted the child to be adopted by a white couple).

n293. See, e.g., Mike Royko, *Otto Gets Putter, Others Get Shaft*, Chi. Trib., June 20, 1995, at 3 (commenting on the case of Baby Richard, *In re Kirchner*, 649 N.E.2d 324 (1995), granting the writ of habeas corpus sought by natural father seeking release of son from husband and wife whose adoption of child had been invalidated).

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Cloning is reproduction in the most literal sense of the word. n294 Accordingly, legislation banning research intended to lead to clonal children arguably interferes with reproductive rights, but it is difficult to identify more than a narrow class of individuals who would have standing to challenge such a ban based on interference with a right of reproductive freedom. The would-be researchers may have a first amendment claim based on a right to pursue [*59] scientific inquiry without government interference. n295 The researchers' reproductive rights, however, are not in issue. Many infertile individuals have a host of other technologies from which to choose. Even if it were possible to grant the requests of the women who are begging physicians to clone their husbands, n296 these women would still not be the ones reproducing. If cloning oneself were an option, the rivalry of a genetic mother could be avoided. To argue that it is a constitutionally protected interest is to go beyond the realm of any precedent involving procreative freedom. Moreover, if the husbands of infertile women wish to reproduce, they have options without resorting to cloning. The only class of persons therefore, who would have standing to challenge a ban on cloning themselves would be those individuals who had no gametes to contribute to reproduction and who wish to replicate themselves.

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n294. See text accompanying note *infra* 272.

n295. See, e.g., Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers Data: A Judge's View*, 59 *Law & Contemp. Probs.* 9, 22 (1996) ("We think it clear that whatever constitutional protection is afforded by the First Amendment [to teach, to carry on research and publish without government interference] extends as readily to the scholar in the laboratory as to the teacher in the classroom" (quoting *Dow Chemical v. Allen*, 672 F.2d 1262, 1275 (7[*su'th'*] Cir. 1982))).

n296. See text *supra*, at note 183-84.

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Finally, assuming *arguendo* that there is a right to reproduce with the use of technology and the gametes of others besides the intended parent, the question concerning cloning is whether there is a right to reproduce asexually. Politically, the question of cloning may well be conflated with the social concern about the large numbers of children living in single parent homes, usually without a father. On the other hand, there is ample precedent for excluding one genetic parent from the status of legal parent. Single persons are permitted to adopt children, but children eligible to be adopted have, by definition, no legal parent since adoption cannot take place without a surrender or termination of parental rights. In fact, courts have allowed termination by either the state or the other parent when there is no adoptive parent, or parents, to take the place of the parents whose rights have been terminated.

The use of artificial insemination by a donor in particular has led to the formation of many untraditional family groupings; that is, they do not have two rearing parents of the opposite sex. Artificial insemination has enabled single women to have children without the involvement of a male parent and surrogacy allows single males to raise children without the involvement of a female

[*60] parent. n297 The legal response to artificial insemination has widely been to deprive children, conceived through its use, any link with the paternal side of their heritage. n298 If the child's mother is married, her husband is usually treated as the child's legal father. If the mother is unmarried, the child may have no legal father because laws governing artificial insemination by donors give the genetic father neither rights nor responsibilities and cut off any claims that a child may have against the donor for support. n299

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n297. See generally Eskridge & Hunter, *supra* note 216, at 827. ("The availability of artificial insemination at prices many middle class people can afford has spawned gestational hetero-surrogacy (another woman carries the fertilized egg of the male-female couple), regular hetero-surrogacy (another woman is inseminated by the sperm of the man in a male-female couple), single parenting by women (the woman is inseminated by an anonymous or known donor with the understanding that she will raise the child), the lesbian baby boom (a woman is inseminated by an anonymous or known donor with the understanding that the woman and her female partner will be the custodial parents), and the 'gay-by boom.' (Marla Hollandsworth's term for gay male couples, who have children through surrogacy arrangements.")). *Id.*

n298. The majority of the states that have addressed the status of a child created through artificial insemination are uniform in declaring that the donor of the sperm, used by a married couple with the husband's consent, is not the legal father of the child. Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 *Amer. U. J. Gender & L.* 183, 208 (1995).

n299. See *id.* at 208-10, 213 (noting that in a majority of the states the sperm donor is not deemed to be the legal father, thus, eliminating any parental rights).

-End Footnotes-

The courts have not been sympathetic to the difficulties faced by a child who has been deprived of one legal parent. A recent California appellate decision, *Alexandria S. v. Pacific Fertility Medical Center, Inc.*, n300 typifies the accepted rationale for not recognizing a child's claim based on an impaired status. In *Alexandria S.*, the court rejected the claim of a child conceived through AID seeking to recover from the physicians and other medical personnel n301 for negligence and breach of contract. The infant alleged that the clinic had deprived her of a legal parent by failing to certify the signature of the mother's husband on the consent form for artificial insemination. n302 A divorce court held that the husband did not have to support the child since the certification on the consent form was lacking, leaving *Alexandria S.* without a legal father. n303 The court of appeals characterized *Alexandria's* claims as: (1) an [*61] impairment of status, and (2) wrongful life by a child born without any impairment, n304 and held that she could not sue. Furthermore, the court held that the clinic's failure to certify the husband's signature was not the proximate cause of her injury. n305 The court reasoned that "the aftermath of recognizing a tort for deprivation of a legal parent has the potential of expanding tort law to permit children to sue physicians, single parents, lesbian and gay parents, or sexual partners of their parent for causing them to have

only one or no legal parent." n306

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n300. See Alexandria S. v. Pacific Fertility Med. Ctr. Inc., 64 Cal. Rptr. 2d 23 (1[su'st'] Dist. 1997).

n301. See id. at 33. The court examined the child's claim under the certification requirement of the California Family Code 7613(a). Id. at 26.

n302. See id. at 26-27.

n303. See id. at 25.

n304. See id. at 30-31 (noting that the claims were essentially for deprivation of a legal father and being born).

n305. Alexandria S. v. Pacific Fertility Med. Ctr., Inc., 64 Cal. Rptr. 2d 23, 31 (1[su'st'] Dist. 1997).

n306. Id. at 30.

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The Alexandria S. court relied on the Illinois decision of Zepeda v. Zepeda, in which the plaintiff, a non-marital child, sued his biological father. n307 In Zepeda, the son claimed that his non-marital birth deprived him of his right to have a normal home and caused him to be stigmatized as a bastard. n308 The defendant's promise to marry the mother, who was unaware that the defendant was already married, induced her to have sexual intercourse with him; the conception and birth of the plaintiff resulted from this sexual encounter. n309 In rejecting his claim, the Illinois court feared the harmful social consequences resulting from the recognition of such a tort stating: "One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation." n310

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n307. Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. 1963).

n308. Zepeda, 190 N.E.2d at 851.

n309. See id.

n310. See id. at 858. See also Williams v. New York, 223 N.E.2d 343, 344 (N.Y. 1966) (holding that a child, claiming to be forced to bear the stigma of illegitimacy and to suffer the deprivations of a normal childhood and familial property rights because he was born as a result of his mother's rape, while a patient at a state hospital, cannot sue for negligence because policy and social reasons prohibit the recognition of such a tort).

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The Alexandria S. court also stated that their refusal to recognize a tort based on one's status as an illegitimate is based upon the fact that such a tort "presumes a child without two legal parents suffers an injury from such an occurrence," noting that:

"illegitimacy is a status which may or may not prove to be a hindrance to one so born, depending on a multitude of other facts; it [*62] cannot be disputed that in present society such a circumstance, both socially and legally, no longer need present an overwhelming obstacle. The same is true for the simply unwanted child [A] cause of action based upon impairment of status - illegitimacy contrasted with legitimacy - should not be recognizable at law because a necessary element for the establishment of any cause of action in tort is missing, injury and damages consequential to that injury." n311

-Footnotes-

n311. Alexandria S., 64 Cal. Rptr. 2d at 30 (1[su'st'] Dist. 1997) (quoting Curlender v. Bio-Science Laboratories, 165 Cal. Rptr. 477, 486 (1980)).

-End Footnotes-

The Alexandria S. court also insisted that her cause of action constituted a wrongful life claim by a healthy child born without physical or mental impairment, a demand for redress that no court has recognized. n312 Again the court premised their refusal on the enormous legal implications and staggering social impact of recognizing a tort when the only damage is in being born. n313 Moreover, courts have refused to allow such actions based on the belief that a child has suffered no legally cognizable injury and that there is no way to rationally ascertain damages. n314 Equally fatal to Alexandria's claim was the fact that she "alleged in her pleading if her mother had known [the husband] would not provide financial support, her mother would not have undergone AID." n315 The court viewed this allegation as "indistinct from a wrongful life claim." n316 Ultimately, Alexandra S.'s claim failed because without her mother's artificial insemination by the donor, Alexandra would not exist.

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n312. See id. at 30-31. Wrongful life claims are actions brought on behalf of children. See, e.g., Turpin v. Sortini, 643 P.2d 954, 957 n.4 (Cal. 1982). Wrongful birth claims refer to actions brought by parents. Id. California courts recognize a wrongful life claim by an impaired child for special damages, but not for general damages, when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. See id. at 965-66.

n313. See Alexanderia S., 64 Cal. Rptr. 2d at 30.

n314. See Turpin, 643 P.2d at 963-64.

n315. See Alexandria S., 64 Cal. Rptr. 2d at 31.

n316. Id.

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The argument that the child would not have been born, but for the particular circumstances of the child's conception, whether by artificial insemination, egg donation, or surrogate motherhood arrangement, is one that is often used to justify reproductive technology. It is an argument that some believe trumps any issues concerning the welfare of the children conceived. Thus, the same argument will probably defeat any claims of clonal children alleging injury as a result of being born without two genetic parents. [*63] Without cloning they would not have been created and thus, have suffered no legally recognizable injury.

VIII. Conclusion

As deliberative bodies consider whether to allow research leading to the implantation of embryos created by cloning, they will be faced with the issue of whether it is acceptable to permit the creation of children with only one genetic parent. If they view the issue through the lens of procreative liberty, then cloning oneself seems to be a logical extension of current practices using other reproductive technologies. As they consider whether it is ethically and morally permissible to allow the creation of children asexually, it is important that they do not base their deliberations and conclusions on fallacies about the humanity of the clonal child. I do not doubt that someday clonal children will be born. In the few months since Dolly's birth, there has been a sea of change in attitudes toward cloning. Scientists have already "become sanguine" about the notion of cloning a human being. n317 Ultimately, the concern surrounding a clonal child's singular origin will give way to the realization that clonal children are simply a replication of other mortal beings.

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n317. Gina Kolata, Human Cloning: Yesterday's News is Today's Why Not?, N.Y. Times, Dec. 2, 1997, at A1.

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SEND TO: TSAI, CHRISTINA
 WHO - GEN. COUNSEL
 RM 308
 OLD EXECUTIVE OFFICE BLDG
 WASHINGTON, DISTRICT OF COLUMBIA 20502