When “Bad” Mothers Make Worse Law: A Critique of ART Regulation

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The Suleman Octuplets
Why Are We So Mad About the Octomom?

• Too many children
  – At one time → health risks
  – Total
    • Single
    • Unemployed
  – Burden on the state
• Mentally Unstable
Responses

• Bills for study
• Missouri H.B. 810 → ASRM
• Georgia S.B. 169 → Embryo transfer limits
  – Women < 40 & donor eggs: up to 2
  – Women ≥ 40 up to 3
• Deny Rx for women who already have children
• Mandatory psychological screening
  – California Medical Board
  – Legislation
The Constitutional Backdrop

• Due process → fundamental right to procreate

• Sterilization

• Contraception Cases → *Eisendstadt*
  – Protects decision-making
  – Protects access to means: condoms, IUD etc. = IVF

• Fundamental rights not absolute: Strict scrutiny or undue burden?
Analyzing the Embryo Transfer Limits

• Strict scrutiny
  – Compelling interest in minimizing higher order multiples for health of women and children
• Risks of multiple births:
  – For mother: preterm labor and delivery, gestational diabetes, pre-eclampsia, increased morbidity and mortality, increased depression and anxiety
  – For children: increased morbidity and mortality, cerebral palsy, blindness, chronic respiratory problems, largely from preterm birth
Narrowly tailored? ASRM Guidelines on Embryo Transfer

<table>
<thead>
<tr>
<th>Prognosis</th>
<th>&lt;35 yrs</th>
<th>35–37 yrs</th>
<th>38–40 yrs</th>
<th>41–42 yrs</th>
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<tbody>
<tr>
<td>Cleavage-stage</td>
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<tr>
<td>embryos^a</td>
<td></td>
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<td>Favorable^b</td>
<td>1–2</td>
<td>2</td>
<td>3</td>
<td>5</td>
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<td>All others</td>
<td>2</td>
<td>3</td>
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<td>Blastocysts^a</td>
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<td>Favorable^b</td>
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^a See text for more complete explanations. Justification for transferring one additional embryo more than the recommended limit should be clearly documented in the patient’s medical record.

^b Favorable = first cycle of IVF, good embryo quality, excess embryos available for cryopreservation, or previous successful IVF cycle.

+ adjustment upward for individual circumstances
• Other causes of multiple births
  – Drug therapies: Controlled ovarian hyperstimulation drugs 4x more births than ART
    22.8% of multiple births & greater % of higher order multiples than ART
  – Naturally occurring twins
  – 17% twins & 38% triplets from ART
• Most embryo transfers of ≥ 3 embryos result in singletons
Alternatives for Reducing Multiple Births from ART

• Changing attitudes of physicians and patients through education and informed consent
• Self-regulation and improved technique
• Multifetal reduction
Undue Burden Standard

• Substantial obstacle for some women
• The *Carhart* problem
  – State has significant role in regulating medical profession; protecting ethics & integrity
  – Increased difficulty or expense not sufficient to invalidate
  – Law upheld even though uncertainty about risk to women
  – Abortion doctors treated like others: no “unfettered choice”

• As applied challenge?
• Constitutionality open to question
Are Limits Good Policy?

• In favor of restriction:
  – medical judgment
  – can reduce risk of multiple births
  – counters financial, emotional pressures
• Against restriction ➔ Context
  – Driven by anti-abortion forces
    • Mo. Bill: Rep. Bob Schaaf & Gayle Kingery
    • Ga. Bill: Ethical Treatment of Human Embryos Act
      – No stem cell research
      – Embryo “human being” not property
      – Voids contracts
      – Prohibits intentional destruction of embryos
      – Best interests standard to resolve disputes over embryos
• Intrusive regulation of women’s reproductive medicine
  – Westlaw survey
  – Abortion informed consent regulation: Kentucky H.B. 373
    • Forced ultrasound
    • Forced narration
“Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes . . . Neither the physician . . . nor the pregnant woman shall be subject to any penalty if the pregnant woman refuses to look at the presented ultrasound images.”

Other states: Rhode Island, Oklahoma.

Protection of women = control/coercion of women:

- Carhart
- “Desperate” fertility patients
- Forced C-section/blood transfusion cases
• Undercuts women’s parental authority
  – Fundamental constitutional right

• Disproportionate response
  – Pregnant substance abusers
  – Suleman
Conclusion

• Reducing multiple births -- worthy goal
• Legislative limits on embryo transfer\rightarrow questionable constitutionality and bad policy
• Seek solutions that enhance women’s reproductive and parental power rather than undermine it.