

When “Bad” Mothers Make Worse  
Law:

A Critique of ART Regulation

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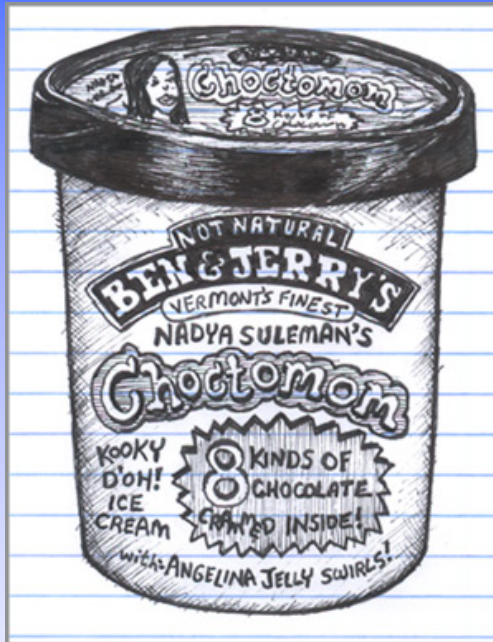
# The Suleman Octuplets



# Why Are We So Mad About the Octomom?

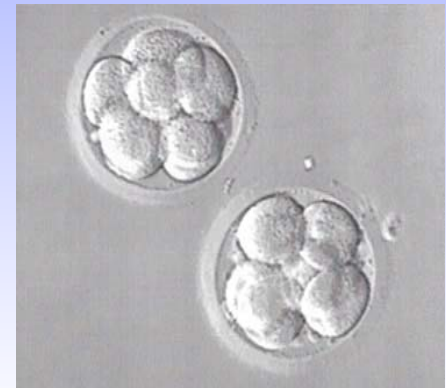
- Too many children
  - At one time → health risks
  - Total
    - Single
    - Unemployed
  - Burden on the state

- 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  $\geq$  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

Recommended limits on the numbers of embryos to transfer:				
Prognosis	Age			
	< 35 yrs	35–37 yrs	38–40 yrs	41–42 yrs
Cleavage-stage embryos <sup>a</sup>				
Favorable <sup>b</sup>	1–2	2	3	5
All others	2	3	4	5
Blastocysts <sup>a</sup>				
Favorable <sup>b</sup>	1	2	2	3
All others	2	2	3	3

<sup>a</sup> 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.

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

*Practice Committee Number of Embryos Transferred. Fertil Steril 2009*

+ 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  $\geq 3$  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 → questionable constitutionality and bad policy
- Seek solutions that enhance women's reproductive and parental power rather than undermine it.