Where Does Life Begin? Discerning the Impact of *Dobbs* on Assisted Reproductive Technologies

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Abstract: This article explores the impact of Dobbs on access to assisted reproductive technologies. Clinical aspects of IVF, including embryo discard and cryopreservation, preimplantation genetic testing, and selective reduction of multiple pregnancy are potentially jeopardized by a new legal landscape that protects embryos over the interest of infertility patients.

Introduction

Shockwaves reverberated around the world on June 24, 2022 when the U.S. Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*, overturning a half century of constitutional protection of pre-viability abortion rights.[1] The Court reasoned that abortion is not expressly protected by the language of the U.S. Constitution, nor can it be implied as a component of the 14th Amendment Due Process Clause because it is not "deeply rooted in this Nation's history and tradition."[2] Logically and appropriately, the vast majority of commentary focused on the impact this dramatic pivot would have on those seeking abortions, both in the immediate aftermath of the ruling and in the years to come.[3] By the numbers alone, the impact of *Dobbs* is staggering. Six months after the ruling, 43 states prohibit abortion after a specified point in the pregnancy, with 13 of those states banning the procedure from conception.[4] On average, about 900,000 U.S. women access abortion each year, while only slightly over one-third of abortion-seeking individuals live in states supportive of abortion rights.[5] Without intent or purpose to distract from the frontline implications of a nation without protected abortion rights, some commentators considered the impact of *Dobbs* on other aspects of reproductive health.[6] Without guardrails to regulate state lawmakers' exuberance for controlling women's health choices, what other reproductive medical care could meet its diminishment or decline? This essay considers the future of assisted reproductive technologies (ART) in a post-*Dobbs* legal landscape.

A vital starting point for any discussion about post-*Dobbs* ART is an acknowledgement that at no point does the Court discuss infertility care or any aspect of

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reproductive medicine. In fact, the majority is express in its asserted intent to limit the denial of substantive due process rights to abortion, leaving open possible protection for other types of intimate acts such as access to contraception and same-sex marriage.[7] At the same time, the Court does ground its abortion exceptionalism on the fact that pregnancy termination involves "potential life" and the life of an "unborn human being."[8] It is this lynchpin language that gives verdure to concerns about the legal durability of ART, specifically its most common technique — in vitro fertilization (IVF). In standard of care terms, IVF involves the creation of embryos in a laboratory setting. Thereafter, embryos are often tested for genetic anomalies, one or two are transferred into a woman's uterus to achieve pregnancy, and any remaining viable embryos are frozen for later disposition.[9] The Court's protection of "potential life," while tethered to pregnancy in the context of abortion, could emerge as an independent threshold for assessing a state's interest in regulating reproductive medicine.

Without intent or purpose to distract from the frontline implications of a nation without protected abortion rights, some commentators considered the impact of *Dobbs* on other aspects of reproductive health. Without guardrails to regulate state lawmakers' exuberance for controlling women's health choices, what other reproductive medical care could meet its diminishment or decline? This essay considers the future of assisted reproductive technologies (ART) in a post-*Dobbs* legal landscape.

This essay proceeds in three parts. First, Part I describes the most vulnerable aspects of IVF in the wake of *Dobbs* — embryo discard and cryopreservation, preimplantation genetic testing (PGT), and selective reduction of multiple pregnancy. Each of these technologies is interrogated under a *Dobbs* lens where the protection of potential life preempts health and other considerations of the prospective parent. Next, Part II sets forth three approaches in which to contextualize the new legal landscape as applied to ART. The intent approach, the bodily integrity approach, and the definitional approach will be defined and assessed for their ability to sufficiently distinguish fertility care from abortion under the broad *Dobbs* framework. Finally, Part III comments on the legal future of reproductive technologies in a political and social environment in which nontraditional family formation techniques are increasingly availed by an ever-expanding cohort of politically diverse prospective parents. It is likely this aspect of ART, coupled with the clinical implications of embryo protection laws, will spare IVF from inclusion in legislation aimed at eradicating abortion access in our newly configured reproductive rights landscape.

I. The Vulnerabilities of Clinical IVF Practice

A. Embryo Discard and Cryopreservation

Nearly five decades after its introduction in 1978, IVF remains more art than a science in terms of the ability to determine precisely how many eggs an ovulation induction cycle will yield, how many embryos will form, and how many embryos are needed for transfer to maximize the likelihood of pregnancy.[10] The standard of care in IVF care involves the discard of embryos deemed nonviable or not suitable to achieve a pregnancy, as judged by embryologists in the laboratory.[11] Further, cryopreservation (freezing) of viable embryos for later use is also routine, whether for follow-up to a fresh embryo transfer cycle, or as part of a current move in IVF to "freeze all" embryos before any transfers occur.[12] Embryo discard following cryopreservation occurs at the patient's direction, most commonly when previous cycles have achieved the patient's family formation goals.[13] Thus, embryo discard and cryopreservation are routine in IVF practice, calling into question their susceptibility to regulation or restriction on the ground neither technique serves the best interest of the "potential life" represented by the embryo. Any patient contemplating IVF may now wonder, Will my treatment be altered from the current standard of care because of the *Dobbs* decision?

Currently, the best answer to the question is, probably not. Three factors support this prediction. First, state abortion restrictions focus on embryos in the body, not embryos in the laboratory. An analysis published by the American Society for Reproductive Medicine in the aftermath of the *Dobbs* decision sets

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out each abortion law that became "triggered" after the opinion sent regulation back to the states. In total, ASRM analyzed 24 state laws, including 13 states' "trigger laws" which effectively banned abortion once *Roe* was overturned, and 11 other restrictive state laws that could potentially limit access to IVF.[14] The ASRM analysis found that while many of the laws define "unborn child" to apply from fertilization to live birth, this term is used in the context of defining abortion as the termination of a pregnancy causing the death of an unborn child.[15] In the ASRM analysis, only one state law — Utah — did not expressly tether the existence of an unborn child to a human pregnancy in the context of abortion, defined as "[any] intentional killing…of a live unborn child through a medical procedure carried out by a physician."[16] Most of the provisions in the Utah statute address termination of a woman's pregnancy, but the term "live unborn child" is not defined and thus arguably could be construed as an embryo whose discard amounts to an abortion. With this one potential avenue to inclusion, state abortion laws do not expressly apply to IVF embryos awaiting transfer to the body.

A second factor that counsels in favor of the inapplicability of current abortion regulation to IVF rests in something the Court did not do. The Court did not reach the issue of fetal personhood in *Dobbs,* specifically noting that "[o]ur opinion is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests."[17] In an excellent analysis of this stated omission, Professor Yvonne Lindgren warns that "the possibility of a fetal personhood law being passed at the federal level in a Congress under Republican control casts a long shadow over the decision."[18] These statutes recognize fetuses as "persons" under the law for all intents and purposes from the moment of fertilization, thus converting abortion to homicide.[19] Applied to IVF, embryo discard could be considered homicide while cryopreservation could amount of some type of battery on the frozen embryo. While fetal personhood could provide the nexus from abortion restrictions to limitations on IVF, history is somewhat reassuring. Since 2008,[20] fetal personhood proposals to imbue rights from the moment of conception have found popular support in the context of abortion, but lose significant ground once the possibility of IVF limitations are introduced.[21] In fact, several of the recent abortion laws specifically exempt IVF or any of its ancillary technologies.[22] Moreover, now that the Court has removed any guardrails on abortion restriction – subjecting any regulation to low-level rational basis review – it is unclear what fetal personhood would add to the anti-choice movement beyond emotional symbolism. The risk of moving in that direction is the harnessing together of the pro-choice and pro-ART forces to defeat any personhood codification, scuttling abortion restrictions thought to interfere with access to family formation technologies.

A final factor weighing in favor of sustaining current IVF practice is the sheer untenable nature of the clinical alternative. Today, only a tiny fraction of IVF treatment involves a natural cycle in which the patient's single monthly egg is retrieved without ovarian stimulation.[23] Medication-induced superovulation enables the patient or egg donor to undergo as few surgical retrievals as possible. Ending embryo cryopreservation would require egg retrieval for each attempt at IVF. The risk, expense and inefficiency of this approach are self-evident. Prohibiting embryo discard would require all viable embryos be transferred into the uterus, risking high-order multiple pregnancy. Also, as discussed in Part I(B), disallowing embryo discard would force patients to transfer embryos found to contain genetic anomalies linked to negative health implications for the resulting offspring. Barring embryo discard would also disrupt the millions of embryos currently in frozen storage and subject to preconception disposition agreements entered into by the intended parents.[24] Retroactively eliminating the authority of prospective parents to make decisions regarding their frozen embryos would be highly unpopular not to mention logistically impracticable.[25] Finally, political sensibility in the U.S. has yielded a "hands off" approach to individual choice regarding embryo disposition. While some countries require embryo discard after a certain period in frozen storage, no such laws exist in the U.S.[26] This laissez faire approach has led to an abundance of unused and unclaimed frozen embryos. Any new restrictions on discard or cryopreservation would have to account for the millions of embryos currently in frozen limbo in the U.S. While *Dobbs* has been criticized for forcing women to give birth, it seems an even longer road to forced implantation of languishing unused, abandoned, and diseased embryos.

B. Preimplantation Genetic Testing of IVF Embryos

A second vulnerability in IVF practice in the wake of *Dobbs* is the increasingly routine use of preimplantation genetic testing (PGT). Currently, nearly half of all IVF cycles in the U.S. involve PGT, in which cells are biopsied from a developing embryo to determine the genetic health of any resulting child.[27] The procedure is typically performed on day 5 of the embryo's development and can be used to detect over 650 genetic

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anomalies.[28] Commonly, PGT involves invasion of the early embryo through the trophectoderm — the cells destined to become the placenta — in order to secure cells for testing. More recently, scientists have experimented with leaving the early embryo fully intact and testing cells contained in spent culture medium.[29] This advance may help tamp down the claim that PGT poses unnecessary risk to the embryo itself.

In a post-*Dobbs* era, PGT faces scrutiny because it favors the interests of the prospective parent over the interests of the unborn child. In the main, patients who test their embryos for genetic information do so to learn about genetic anomalies, and upon discovery most will deselect any embryos found to contain health-affecting conditions.[30] This deselection may involve discard, freezing for later disposition, or donation to research, but rarely will the affected embryos be used to initiate a pregnancy. There is no inherent benefit to any embryo to undergo PGT because there are currently no available treatments to repair any genetic health issues detected.[31] Thus, as PGT offers no protection to the "unborn human being" but instead poses a risk of destruction to a "potential life," its vulnerability to post-*Dobbs* restriction is apparent. Perhaps out of concern that PGT restrictions will be the next frontier in the move to protect embryonic life, stakeholders are reporting an uptick in usage since *Dobbs* was decided.[32] Experts surmise patients are seeking to learn about any genetic anomalies in their future children prior to an ongoing pregnancy when options may be far more limited.[33] Choosing PGT while it is still available may be viewed as the only pathway to making an informed choice about one's future parenthood.

Restricting PGT, even in light of *Dobbs,* faces the same structural barriers that have staved off any comprehensive regulation of ART in the U.S. Without a national commitment to funding access to family formation technologies, there is little political appetite for micro-managing IVF treatment. The lack of comprehensive, top-down regulation of ART in the U.S. is regularly and starkly contrasted with regimes in other countries in which licensing of clinical practice is strictly controlled.[34] As a practical matter, U.S. patients are accustomed to unfettered autonomy in their IVF journeys and may threaten to forgo treatment altogether if deprived the opportunity to investigate their offspring's health status. This type of market power is certainly not part of the abortion calculus, one of many distinguishing features between ART and abortion.[35] While abortion has been a subject for hyperactivity in federal and state legislative arenas, ART has stayed somewhat under the radar. This history, coupled with its affiliation with pregnancy-induction, may serve to preserve access to a technology that now meets technical grounds for retrenchment.

C. Selective Reduction of Multiple Pregnancy and Other IVF-Related Treatments

Even when IVF is successful as measured by a viable pregnancy, there are a number of maternal and fetal risks that occur more frequently in ART pregnancies compared to natural reproduction. IVF cycles yield a higher percentage of multiple pregnancies — those yielding two or more fetuses. In 2019, nearly 17% of all ART births were multiples compared to just over 3% of all U.S. births.[36] The morbidity and mortality associated with multiple birth for both mother and babies has been well-documented.[37] For this reason, some patients who face the possibility of losing the entire pregnancy or giving birth to severely health-impacted babies consider selective reduction. Selective reduction is a surgical procedure performed between the late first and early second trimester of pregnancy to "reduce" the number of fetuses in a multiple pregnancy, typically in order to enhance the survival and well-being of the remaining fetuses.[38] Importantly, selective reduction involves surgical techniques that are distinct from abortion but the former "salvific" treatment shares an important feature — a fetus is no longer alive after the procedure is performed. Selective reduction involves the injection of potassium chloride directly into the fetal heart to produce the death of the fetus in utero.[39] The fetus is not removed or expelled from the body but is gradually resorbed as the pregnancy progresses. Done successfully, selective reduction leaves a woman pregnant with a more medically manageable number of fetuses.

Whether selective reduction would be prohibited under a state's abortion law depends on the language of the statute and the role of intent associated with fetal demise. In Kentucky, a state with one of the most restrictive abortion bans in the nation, abortion is defined as "the use of any means…to terminate the pregnancy of a woman…with intent to cause fetal death."[40] Arguably, this language would not include selective reduction because it does not terminate the pregnancy. However, another part of the statute makes it is felony to "use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being."[41] Plain meaning analysis suggests selective reduction would be captured by this language, even if the death of one fetus was based on an intent to save the life of another fetus. No such exemption appears in the law. What might remove selective reduction from penalty is the specific

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exemption of an abortion done "to prevent the death or…serious, permanent impairment of a life-sustaining organ of a pregnant woman."[42] If a woman's life or future fertility is jeopardized by a high-order multiple pregnancy, selective reduction could fall under a "life-saving" exception.

Further medical analysis of the risks a multi-pregnant woman experiences would be necessary to unpack the applicability of the Kentucky law, and others like it, to selective reduction. What we do know is that the law is already causing women in the state to express concerns about proceeding with fertility treatment. In October 2022, three Jewish women from Louisville filed suit to block the state's abortion law arguing it works a violation of their religious rights under the state constitution. Since Jewish law does not define human life as beginning at conception, plaintiffs argue the law imposes a sectarian Christian framework on their reproductive choice, thereby violating their religious free exercise.[43] The women describe their fear of proceeding with much-wanted IVF treatment knowing the potential legal and physical jeopardy such treatment could entail. The risks cited include the forced transfer or forced perpetual storage of surplus embryos, and the inability to remove a nonviable fetus in the event of miscarriage. The incidents of ectopic pregnancy, miscarriage, and preterm labor associated with IVF elevate concerns about the implications of *Dobbs*.[44] Even if IVF patients are able to proceed without restriction to the embryo transfer stage, once pregnant they have to navigate any complications that trigger the elevation of the in-utero embryo over their own health concerns.

At first blush, the application of restrictive abortion laws to IVF appears more theoretical than actual based on the situs of the embryos outside the body. But a closer look at anti-choice advocacy reveals at least some IVF practices could be swept into new prohibitions under the guise of protecting "unborn human beings" and "potential life," now elevated over the interests and rights of patients. While the Court in *Dobbs* emphasizes its opinion pertains exclusively to abortion as a unique act, the crux of that act cannot easily be distinguished from acts necessary to achieve pregnancy via IVF. As Justice Blackmun famously warned in 1989, "a chill wind blows" in dissenting from a decision narrowing but not eliminating abortion rights.[45] The impact of those chill winds remain to be felt.

II. Contexts for Consideration: Framing the Juxtaposition of ART and Abortion

It is too soon to know what impact the decision in *Dobbs* rescinding will have on reproductive technologies. Unlike abortion, medical interventions that assist in conception have never been evaluated for constitutional designation by the Court — meaning they never garnered any express protection subject to judicial dismantling. Prior to *Dobbs*, advocates for folding ART into the reproductive rights cocoon acknowledged the frailty of the argument due to the lack of bodily integrity concerns that arise in abortion.[46] Ironically, the lack of a bodily integrity interest may be precisely what spares IVF from immediate inclusion in restrictive abortion regulation — since laws focus on the in-utero fetus. Aside from situs of the embryo, what else distinguishes IVF from abortion? What follows are three potential constructs in which ART can be distinguished from abortion for purposes of avoiding inclusion in embryo protection legislation.

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A. The Intent Approach

Does it matter post-*Dobbs* that abortion terminates a pregnancy and IVF induces a pregnancy? In the abortion realm, intent matters. Criminal and other penalties apply to those who intentionally terminate a pregnancy, making clear the import of state of mind.[47] As discussed in Part I, abortion restrictions tether the act of killing an unborn child to its existence inside the body. This means the criminal intent associated with

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demise of an unborn human being is situs-specific, thus excluding embryos in the laboratory. But one can imagine a shift toward regulation focused on broader embryo protection. This shift is easily accomplished with new or revised laws that expressly apply to IVF or eliminate the pregnancy requirement. What role would intent play in that new world?

IVF is a fundamentally pronatalist medical technique. The shared intent of the provider and the patient is to produce a baby as a result of the treatment. Arguably, utilization of IVF is accompanied by both a general and specific intent to birth a child. The general intent attaches once a patient makes a decision to turn to IVF and proceed with the treatment protocol. The patient intends for the treatment to yield a new life. Individual decisions along the treatment pathway do not deviate from the general intent (until the patient decides to stop treatment). Specific intent in IVF focuses more granularly on the intent to produce a particular child from each step in the treatment process. A patient's specific intent to produce a healthy child from a single IVF cycle may mean opting to test all embryos for genetic anomalies, directing the discard of embryos with health-affecting conditions, consenting to cryopreservation of supernumerary embryos or discard of frozen embryos in the future. Does the general intent to a produce a new life take priority, even preempt, the specific intent in which embryos are harmed or destroyed?

A pathway to the triumph of general intent to create life over the specific intent to destroy potential life as a byproduct of achieving new life is potentially through the principle of double effect. According to the Stanford Encyclopedia of Philosophy, "[t]he doctrine (or principle) of double effect is often invoked to explain the permissibility of an action that causes a serious harm, such as the death of a human being, as a side effect of promoting some good end… [S]ometimes it is permissible to cause a harm as a side effect (or "double effect") of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end."[48] Catholic scholars have discussed the doctrine of double effect in the context abortion — for example, when a pregnant women with progressive uterine cancer faces certain death unless her uterus (and unborn baby) are removed from her body.[49] The permissibility of a harm-causing action under double effect rests upon four conditions — the act must be morally good, the actor may permit but not intend the bad act, the good effect must flow from the bad effect, and the good effect must be sufficiently desirable.[50]

In an IVF cycle where embryos are discarded or frozen to maximize the chances of producing a healthy offspring, strict application of the four conditions would probably find merit only in the final condition — the proportionality of good achieved by a live birth. For those who equate potential life with existing life, embryo discard or cryo-suspension will not be viewed as morally good; the patient and physician will intend the act; and the birth of a healthy child will not flow directly from the destruction of other embryos in the same batch. But what if the patient made clear she would not undergo IVF without the protections of PGT, embryo discard and cryopreservation? Then the proportionality of the good result may dominate the clinical scenario to find approval for the "bad" treatment decisions made along the way. It remains to be seen if patients would forgo fertility treatment altogether should embryo discard and cryopreservation be removed from IVF protocols. To avoid this difficult choice, the ART community is well-served to elevate their pronatalist goals and intent as the defining feature of modern fertility care.

B. The Bodily Integrity Approach

The majority opinion in *Dobbs* downplays, if not utterly dismisses, concerns about abortion access and its impact on women's bodily integrity. Addressing arguments that forcing women to give birth against their will has negative physical, economic, and social consequences, the Court references adoption and safe haven laws as suitable options to countervail any burdens of carrying a baby to term.[51] If a woman's right to control her own body during pregnancy is lost under *Dobbs*, then surely her right — or anyone's right — to control the fate of ex utero embryos is likewise jeopardized. With the bodily integrity aspect of personal liberty now nullified in the context of pregnancy, are there any constitutional protections in which ART could find refuge? Without protection for IVF as deeply rooted in this Nation's history and tradition, is it possible for the medical technique to withstand restriction in the name of embryo protection?

The concept of bodily integrity is not isolated to the abortion context in Supreme Court jurisprudence. In 1990, the Court decided *Cruzan v. Director, Missouri Dept. of Health*, a case in which the rights of patients to refuse medical treatment was at stake.[52] Citing the Fourteenth Amendment Due Process Clause, the Court held, "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[53] In *Cruzan*, the context of the medical decision was end-of-life care, but nothing

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in the opinion prevents its application to other forms of medical treatment. While it is a stretch to say that patients undergoing IVF experience an impact on their bodily integrity if a law requires their extracorporeal embryos be frozen indefinitely, an invasion would occur if patients were required to transfer all viable embryos in every cycle.

Arguably, *Dobbs* sanctions forced birth. Forced embryo transfer, and perhaps by extension forced perpetual cryopreservation, can be characterized as unwanted medical treatment protected against in *Cruzan*. Further, an argument can be made that depriving patients the right to test, discard or freeze their embryos is likewise an imposition of unwanted medical treatment (as directing the course of the patient's IVF treatment) that should fall under the Court's longstanding protection of patients' rights. Of course, longstanding patient rights held no sway in the context of abortion in 2022. Perhaps repositioning restrictions on embryo discard/cryopreservation as unwanted medical treatment in the context of a competent person's right to refuse medical treatment distinguishes IVF from abortion in which the right to access, not the right to refuse, is at stake.

C. The Definitional Approach

Part I reviews the current landscape surrounding the applicability of abortion laws to IVF clinical practice, concluding the required link to an ongoing pregnancy forestalls application to laboratory-based embryos.[54] A broader look at past and ongoing embryo protection activity may illuminate whether IVF will proceed unscathed in a post-*Dobbs* world. Fetal personhood advocacy continues, aimed at embedding rights in unborn human beings from the moment of conception. As discussed by Professor Henry Greely, since 2008 voters in six states have rejected fetal personhood constitutional amendments, but recent legislative activity may renew the effort to create such rights.[55] For example, a newly enacted law in Oklahoma bans abortion from the time the egg is fertilized. While IVF is not mentioned in the law, discussion surrounding its impact on fertility care prompted the bill's sponsor to opine that IVF is not included because it "would be tough" to prove an abortion had taken place if embryos are discarded.[56] Thus, it appears that definitions embedded in emerging fetal personhood laws may expressly or impliedly steer away from capturing IVF and its treatment of ex vivo embryos.

Those concerned about IVF practice being disrupted, even prohibited, based on fetal personhood codifications might consider three factors that, while not guarantees of exclusion, sway in favor of fertility care proceeding without impact. First, fetal personhood laws are not (yet) widespread — only Georgia currently has such a statute in force.[57] Yet even in Georgia, liability attaches to actions taken upon an embryo "in the womb," prompting medical experts to argue the law does not apply to IVF.[58] A second solace for IVF advocates are the smattering of exemptions written into restrictive abortion laws. A handful of state laws expressly exempt IVF from inclusion, including the Kansas law providing "disposition of the product of in vitro fertilization prior to implantation" is lawful in the state.[59] Still other state law enforcement officials have opined their abortion statutes do not apply to IVF.[60] A third reassurance for continued access to IVF is the sheer ubiquity of assisted conception as a family formation option. Now in its fifth decade of use and responsible for over 8 million babies worldwide, the prospect of curtailing any aspect of this life-giving reproductive technology seems practically and politically unlikely.[61]

III. Political and Practical Hurdles to Restricting Current IVF Practices

The Supreme Court assured the world that longtime persistence of protected rights does not guarantee their continued existence. Thus, it would not be wise to brush off concerns about the future of IVF by referencing its established place in American family life. True, nearly 2 in every 100 births in the U.S. today result from IVF, and the treatment is sought by more Americans each year.[62] While longevity and widespread utilization were also features of abortion in the U.S. (50 years as a constitutional right, with 1 in 4 American women seeking abortion services at some time in their lives), the field changed with the proverbial stroke of a pen.[63] What does distinguish IVF from abortion is its relatively strong support across the political spectrum and, though problematic in other ways, its successful utilization by a demographic of patients and allies with disproportionate power and influence in the American political scene.

Optics alone paint IVF-seekers more sympathetically than those seeking abortion. Infertility patients are often described as "desperately" wanting babies, while those who experience unwanted pregnancies are dubbed irresponsible and selfish.[64] The result of a successful IVF cycle is a healthy baby. The result of a successful abortion is unseen, but the imagery of aborted fetuses dominates anti-choice advocacy. As noted in Part II, some lawmakers devoted to eliminating abortion are careful to express support for IVF and assure its disassociation from laws addressing the "killing of unborn human beings."[65] IVF has won hearts and

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minds from those who have or know of families built on its promise. Even the most ardent abortion foes admit turning to IVF when their quest for parenthood calls for medical assistance. Former Vice President Mike Pence, unabashedly committed to protecting the unborn and the "sanctity of life," recently revealed he and his wife turned to IVF after experiencing infertility.[66] Speaking about his joy from parenting three children, Mr. Pence added, "I fully support fertility treatments and I think they deserve the protection of the law."[67] Of course, it is not publicly known if the Pences' cycles yielded excess embryos, or what the status of those embryos might be. But the Pence journey is emblematic of the IVF exceptionalism that many within the anti-abortion movement have adopted.[68]

As ever, the political scene surrounding the status and regulation of ex vivo embryos is contentious and active. Since the issuance of *Dobbs*, lawmakers on both sides of the aisle have spoken out about the decision's impact on IVF. Some have taken the position that embryo discard should be banned based on the state's interest in protecting potential life; others have advocated for protection of IVF in the wake of the government's newly established authority to shut down its core features.[69] Both categories of bills face opposition. As noted, previous attempts to declare fetal personhood have failed based, in part, on linkage to fertility treatment.[70] In response, the new wave of fetal personhood statutes may embed language exempting IVF from reach, but this position seriously undermines the values and mission motivating the laws in the first place. The location of the embryo, in the body or in the lab, does not alter the fundamental potentiality of the organism to evolve into a fully-formed human being. True, an embryo implanted in a uterus has a much greater likelihood of reaching that status compared to an unimplanted embryo, but both can be regarded as potential life.

Assuming, with cynicism noted, the view taken by VP Pence prevails — ardent advocates for the unborn support IVF because it benefits them or their family. Is it politically wise to stake out this "anti-abortion/pro-IVF" position? Elevating IVF to protected status while criminalizing abortion further stratifies the social and health justice inequities that have long defined utilization of these two medical treatments. The simple fact is the majority of patients who seek IVF are of higher socioeconomic status and white; the majority of patients who seek abortion are of lower socioeconomic status and people of color.[71] Codifying access to family formation by privileging IVF while criminalizing abortion is hardly a pathway to greater equality and justice in the American health care system and should be avoided. Reproductive justice — including the right to have children and to not have children — demands no less than equal treatment for all reproductive choices.[72]

In addition to the political barriers to disrupting IVF, the clinical implications are worth mentioning. What parameters might an embryo protection law contain?[73] The most likely provision would be a restriction on embryo discard. In fresh cycles, this restriction would translate into either dispensing with ovulation induction to avoid harvesting more than one egg or, more likely, fertilizing one or two eggs at a time for transfer and freezing any remaining eggs. As egg freezing and thawing becomes more successful and routine, such a shift is underway and may ultimately resolve dilemmas around embryo discard.[74] A second provision might ban embryo discard from frozen cycles, a far more problematic restriction from a clinical standpoint. Such a law would commit patients to maintaining their embryos in frozen storage in perpetuity. Such a directive is expensive and psychologically burdensome to patients who already express distress over the plight of their frozen embryos.[75] Moreover, adding to the problematic stockpile of unclaimed frozen embryos in the U.S. does little to strengthen the political agenda being advanced with such a law.[76] Finally, laws prohibiting embryo testing (PGT) because of its association with embryo discard invite intense pushback from patients and providers united in their quest to maximize the health of much-wanted offspring. Together, the political and practical behemoths surrounding potential restrictions on IVF portend little change on the horizon.

IV. Conclusion

Stakeholders across the world continue to address the impact *Dobbs* is having on those touched by the legal, medical, and social tsunami it unleashed. The decision's early wake in the ART world seems to be relatively low level, compared to the upheaval still unfolding in the abortion arena. Given IVF's role in U.S. family formation, its identification as a pronatalist technology, and the sheer impracticality of retrenching its core clinical components, drastic changes are unlikely to emerge. Still, the shifting legal landscape provides an opportunity to advance improvements in the IVF sphere. The troubling, stratified demographics of IVF and abortion utilization invite renewed advocacy surrounding access to fertility care, including increased state-mandated insurance coverage.[77] *Dobbs* puts American voters on notice that elections have consequences, some proving highly intrusive in our everyday. Holding lawmakers to reveal and account for their intentions regarding reproductive decision-making, whether it involves bringing or not

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bringing a child into the world, should be an essential component of every election moving forward. There is too much at stake to leave family formation choices to the ambiguities of the campaign trail.

Note

The author has no conflicts of interest to disclose.

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