7.1 Introduction

The concept of reproductive autonomy covers a wide range of reproductive issues: from contraception to abortion; from cloning to sex selection of the embryo for implantation. Generally, the state should accept as lawful any activity unless it causes harm to others, even if it is regarded as immoral. In other words state does not intervene unless it could be shown that the reproductive choice would harm someone else. For example, making reproductive cloning illegal could be supported if it harmed people, but not on the basis that it was ‘unnatural’ or ‘immoral’.\(^1\) With time moral rules also undergo a change. If a moral rule helps community in its survival, the rule will last but if it does not, it will wither away. Such is the case with the moral rules against birth control and abortion. These practices help humanity survive and reproduce successfully and many humans use them. Moral rules forbidding them will not stand.\(^2\)

Reproductive freedom includes control over the decision relating to procreation. But there are certain actions and interventions which are considered morally permissible to prevent the harms, such as abstaining from excessive alcohol use or substance abuse during pregnancy, which many people now consider morally required in order to prevent harm to the foetus and the child it will become. Further coercive parental interventions to protect a foetus, such as forced caesarean sections, forced drug rehabilitation for pregnant women, and forced in utero surgery, as well as even involuntary sterilization of mentally retarded individuals to prevent them from conceiving, have received some public and professional attention and support, although all remain highly controversial. Reproductive freedom is again being challenged by new genetic knowledge and technologies. But if we are to respond properly to each of these issues, we need a systematic analysis of

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\(^1\) Jonathan Herring, *Medical Law and Ethics* 346 (Oxford University Press, New York, 2010).

the scope, limits, and content of reproductive freedom, as well as a clear view of the moral values that ground its importance. In broader terms, the researcher has characterized the concern of this chapter as the conflict between reproductive freedom and the ethical interests or values that ground its importance and support its protection which has been discussed under the following rubrics.³

7.2 Patient-Physician Relationship

The physician patient relationship is the cornerstone of medical practice and, therefore, of medical ethics. Ethical principles such as respect for persons, informed consent and confidentiality are basis to the physician-patient relationship. Since many patients are either unable or unwilling to make decisions about their medical care, therefore, patient autonomy is often very problematic. Equally problematic are other aspects of the relationship, such as physician's obligation to maintain patient confidentiality in an era of computerized medical records and managed care and the duty to preserve life in the face of requests to hasten death.⁴

7.2.1 Autonomy

The first moral basis for the importance and perhaps in support of reproductive freedom is autonomy. Autonomy literally means ‘the ability to act and make decisions without being controlled by anyone else’. It is our moral duty to respect the autonomy of others especially the autonomy of all potentially affected persons. In health care, patient's autonomy requires that the patients consent to the treatment be adequately taken without undue pressure or inducement and they are well informed before giving them the treatment. This principle is applicable to support the patient’s rights to determine the size of their families, to access to medically assisted conception and reproduction when it is required.⁵

Respect for autonomy also requires that the patients' are not deceived

⁴Purosottam Behera, Medical Law and Ethics 5-19 (Mittal Publication, New Delhi, 2007).
in regard to their diagnosed illness. If they are deceived that will be moral infringement of the right of autonomy. So it is important for the health care workers to communicate well with their patients as listening as well as telling is usually necessary for giving patients adequate information and for good communication.\(^6\)

Confidentiality is another element of respecting people's autonomy. Autonomy relates to confidentiality in that personal information about an individual belongs to him or her and should not be made known to others without his or her consent. Confidentiality is also important because human beings deserve respect. One important way of showing them respect is by preserve their privacy. Generally, we are not obliged to keep other people's secret, but in medical arena; the medical practitioners are explicitly or implicitly obliged to keep their patient’s information confidential as it is their duty not to disclose the patient’s information to others. Hence the promise of confidentiality will help the patients in their treatment as they will disclose all the private and sensitive information that is needed for their optimal care and protection. Even the Hippocratic Oath states: “What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.” The Oath, and some more recent versions, allows no exception to this duty of confidentiality.\(^7\)

### 7.2.2 Beneficence and Non-Maleficence

Beneficence poses an ethical challenge when what one person deems as beneficial for herself may have adverse implication for others. The quest for improved medical therapies and effective preventive health care accords with this principle. The ethical duty under beneficence is to do good and maximize good in much of medical treatment and health care. Non-Maleficence incorporates the foundational medical ethics ‘Do No Harm’. The principle requires an extended understanding of the senses in which medical treatment

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\(^6\) See *Supra* note 4 at 60-61.  
\(^7\) *Ibid* at 31-61.
and health care can cause harm. So the aim of the principles of beneficence and non-maleficence, when taken together, is to produce net benefit over harm. Interestingly, in providing net benefit over harm, the patient's autonomy is to be respected for what constitutes benefit for one patient may be harmful for another. For example, a mastectomy may constitute a prospective net benefit for one woman with breast cancer, while for another the destruction of an aspect of her feminine identity may be so harmful that it cannot be outweighed even by the prospect of an extended life expectancy.

The obligation to provide net benefit to patients also require to be clear about risk and probabilities when the assessment of harm and benefit is to be made. Clearly, a low probability of great harm such as death or severe disability is of less moral importance in the context of non-maleficence than is a high probability of such harm, and a high probability of great benefit such as cure of a life threatening disease is of more moral importance in the context of beneficence than is a low probability of such benefit. Therefore, there is a need to have empirical information about the probabilities of the various harms and benefits that may result from proposed health care interventions and this information has to come from effective medical research, which is also, therefore, a prima facie moral obligation.

Obstetricians may face difficulties when caring a pregnant woman because a thing which is beneficial to the pregnant woman may inadvertently harm her foetus. Medical care appropriate and beneficial for a woman who is not pregnant, for instance, may have unknown effects or known teratogenic effects for a later conceived child in utero. An ethical dilemma concerning treatment of pregnant women may arise in case of maternal-foetal conflict, although women usually want care that is appropriate for both themselves and the children that they will deliver. So the research should not be undertaken on women who might be or become pregnant, lest foetal harm may be caused. However, the women's health advocates require research that will develop beneficial treatments for women, except when experimental drugs or other

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8 Supra note 5 at 70-71.
9 Supra note 4 at 62.
10 Ibid.
treatments have scientifically been proven harmful to foetus in utero.\textsuperscript{11}

7.3 **Beginning of Human Life Issues**

7.3.1 **Contraception**

Most of the people believe that the wide range of effective contraception will be helpful for women emancipation. But ethically, contraceptives which cause the destruction of fertilized egg are rejected as immoral by those who see fertilization as the beginning of human life. Many religions have opposed the contraceptives for birth control. But the most rigorous opposition to it comes from the Catholic Church; Pope Pius XII in October 1951, to the Congress of the Italian Catholic Union of Midwives explained that:

> Every human being, even the infant in the maternal womb, has the right to life immediately from God, not from the parents or any human society or authority. Therefore there is no man, no human authority, no science, no medical, eugenic, social, economic or moral 'indication', which can show or give a valid juridical title for direct deliberate disposition concerning an innocent human life.\textsuperscript{12}

From this premise follows the absolute contamination of sterilization. The deliberate use of sterile periods by the married couple for the prevention of conception is permissible, provided it is not made a condition of marriage, and provided there are serious motives, of an ethical, eugenic, economic or social character that justify the observation of non-fertile periods for a long time. But from an ethical point of view, the deliberate use of the calendar can hardly be judged differently from the use of mechanical contraceptives.\textsuperscript{13}

Since the pronouncements of Pope Pius XII, the growing use of contraceptives devices, among Catholic as well as non-Catholics, the increasing acceptance of family planning and, above all, the growing awareness of the immense political and social dangers of the accelerating

\textsuperscript{11} *Supra* note 5 at 71.
\textsuperscript{12} Pope Pius XII (1951) at 7.
world population explosion, led to the appointment by Pope Paul VI of a highly representative committee of ecclesiastics, which recommend in favour of the reconstruction of Church doctrine on this matter. But, in August 1968, Pope Paul VI issued the encyclical, *Humanae Vitae*, which unconditionally reaffirmed the earlier teaching of the Church. It added little to the above-stated theological arguments of his predecessors, except that it emphasized the dangers of population control being abused by government. It reaffirmed the legitimacy of the use of the rhythm period, as a responsible method of determining the future of the family, but unconditionally condemned the use of artificial contraceptives as an irresponsible incentive to lust and promiscuity, and a perversion of the God-ordained function of marriage.\textsuperscript{14}

Therefore, the Roman Catholic Church does permit the use of natural birth control methods such as *coitus interruptus* and other natural methods of birth control but unconditionally condemned sterilization under any circumstances. But the artificial distinction between 'natural and 'unnatural' method of contraception was highly criticized especially in the developing countries where the condom use needs to be encouraged in order to prevent the spread of HIV infection and to control population growth.\textsuperscript{15}

The Islamic view of birth control is hotly debated. At the strict end there is ban on all use of contraceptives, while at the more liberal end there is less opposition. However, most Muslim traditions do emphasize that procreation within marriage is a religious duty and, therefore, sterilization is nearly always objected to by Muslims. Jewish approaches to contraception are also divided. The orthodox position is that male contraception (e.g. the condom) is not permitted but female contraception may be permitted for health reasons (e.g. danger to the health of the mother or potential child). Conservative and reformist views tend to have no opposition to the use of contraceptives between married couples. Further, from the feminists perspective, contraception has done much to give women freedom over their lives. The ability to control whether and when to have children is treasured by many women. So feminist support for contraception has been heralded as

\textsuperscript{14} *Ibid* at 260-261.
\textsuperscript{15} *Supra* note 1 at 286.
a major contribution to women's liberation.\textsuperscript{16}

A vital and indispensable part of our reproductive success has been our ability to control our childbearing by various means, including by use of birth control methods and abortion. Humans know what is best for them when they reproduce and all of humanity has benefited when individuals have control of their reproduction. Therefore, humans haven't needed any social engineering from government or reformers to make them reproduce better. Hence, it can be concluded that it is ethical to use contraceptives as birth control could benefit society, as well as individuals, and that society could be made healthier, safer, and more prosperous if birth control were made more widely available to its citizens.\textsuperscript{17}

\textbf{7.3.2 Abortion}

Through history, women have practiced different forms of birth control and abortions. These practices have generated intense moral, ethical, political and legal debates, since abortion is not merely a techno-medical issue but “the fulcrum of a much broader ideological struggle in which the very meaning of the family, the state, motherhood and women’s sexuality are contested.”\textsuperscript{18} Women have overtly or covertly resorted to abortions, but their access to services has been countered by the imposition of social and legal restrictions, many of which have origin in morality and religion. The norms governing the ethics of abortion have been constantly remoulded to suit the times and the social contexts in which these are set.\textsuperscript{19} According to the most vehement opponents of abortion, it is the mass murder of the most vulnerable members of our societies (unborn children) and according to the supporters abortion is a fundamental human right which is an essential aspect of the move towards greater equality between men and women. To force a woman to go through with a pregnancy against her wishes would be the most profound violation of

\textsuperscript{16} \textit{Ibid} at 284-286.
\textsuperscript{17} \textit{Supra} note 2 at 64, 69.
\textsuperscript{19} R. Kumar and Meenal Kumar, \textit{Childbirth and Postnatal Care} 85 (Deep and Deep Publication Pvt. Ltd., New Delhi, 2009).
her body and autonomy.\textsuperscript{20}

Religion and law for a very long time have been on the side of those who are for the ban on abortion. Christianity, particularly the Roman Catholic Church, and Islam prescribe very stringent injunctions against abortions. Ancient Indian (Hindu) culture and traditions were absolutely opposed to it. The Catholic Church’s opposition to abortion can be gauged by the statement made by Pope Pius XI in 1930 that abortion is forbidden, even to save a woman’s life, because the foetus is “equally sacred”. This goes even beyond the legal ban in most countries where abortion is permissible to save the mother’s life.\textsuperscript{21} It is a shame that the ‘believers’ have thoughts that justify the killing of human beings in the garb of religious values. Religion of today flourishes by using science and technology like the electronic media, medical sciences and schools. The tragic reality is that people the world over are killed in the name of God, Allah, and Bhagwan and still there are people who feel that religious rights should have the ‘respectful’ place. People should now know how those religious leaders often use their sentiments and emotions for their own purposes and have nothing new to offer except claiming miracles from God. Despite the fact that they need hospital and medical science to carry on the campaign for their ‘God’.\textsuperscript{22}

\textbf{7.3.2.1 Moral Arguments regarding Abortion}

People are generally divided into three categories i.e. pro-abortionist, anti-abortionist and the people who used to support abortion in some circumstances only. According to pro-abortionist, abortion is a matter of a woman’s right to exercise control over her own body. They fail to recognize foetal rights or to acknowledge the foetus to be a person. Even if, they think, foetus is a person, its rights are very limited and do not weigh significantly against the interest of people who have already been born, such as parents or existing children of the family. Moralists who judge actions by their consequences along could argue that abortion is equivalent to a deliberate failure to conceive a child and since contraception is widely available,

\begin{thebibliography}{9}
\bibitem{20} Supra note 1 at 286.
\bibitem{21} Ahmad Siddique, \textit{Criminology Problems & Perspectives} 465 (Eastern Book Co., Lucknow, 2007).
\bibitem{22} Vidya Bhushan Rawat, “‘Pro-Life’ also means a Mothers’ Right to Life” 50 \textit{Mainstream} 12 (Dec. 2010).
\end{thebibliography}
abortion should be too. According to anti-abortionist embryo is a human being from the moment of conception with full moral status, so they consider abortion as killing in the same sense as the murder of any other person. Such view may be based on religious or moral convictions that each human life has unassailable intrinsic value, which is not diminished by any impairment or suffering that may be involved for the individual living that life. They also argue that abortion treats humans merely as a means to an end in that abortion can be seen as a discarding of a foetus in which the pregnant woman no longer has any interest. According to the third view, abortion may be justified in a greater number of circumstances but it would be undesirable to allow abortion on demand. These types of arguments are based on the premise that the embryo starts off without rights, although having a special status from conception in view of its potential for development, and it acquires rights and status throughout its development. The notion of developing foetal rights and practical factors, such as the possible distress to the pregnant woman, nurses, doctors or other children in the family, gives rise to the view that early abortion is more acceptable than late abortion. Some people support this position on pragmatic grounds, believing that abortion will always be sought by women who are desperate and that it is better for society to provide abortion services which are safe and which can be monitored and regulated, rather than to allow “back-street” practices.23

7.3.2.2 Abortion and Ethics

According to anti-abortionist foetus is a person from the moment of conception and abortion is wrong in any circumstances because it fails to recognize the rights of the foetus. Those who disagree with the argument that personhood begins at conception argue that “it is striking that the usual fate of the fertilized eggs is to die.”24. It has been estimated that fewer than 15 per cent of fertilized eggs will result in a birth. They argue that setting personhood at conception means that the vast majority of people die within a few days of getting life. Some see this as a strong argument against

24 The words of Professor Brown reported in Smeaton [2002] 2 FCR 193, at para129.
conception being the start of personhood.\footnote{Supra note 1 at 310.} Moreover, if some argue that personhood starts at conception then many forms of contraception would become immoral, namely all those which operate after conception, including the contraceptive pill.\footnote{This Operate either to Present Fertilization or Implementation.} It would also mean that all forms of embryo research and IVF practices which involved discarding embryos would probably be immoral. Such consequences lead some to argue that we cannot accept this view of conception. A different kind of argument in favour of treating the foetus as a person from the moment of conception is that even accepting that at conception a foetus is not a person it has the potential to become a person. Therefore, the foetus must be respected not for what it is, but for what it has the potential to become. But this argument has its critics as we do not normally treat someone who has the potential to be something as if it has acquired it. For instance, if one has the potential to qualify as a doctor that does not mean that we shall treat him/her as a qualified doctor. There is a distinction, of course, in that a foetus (barring something unexpected) will certainly develop naturally into a person.\footnote{Supra note 1 at 311.}

To some commentators the foetus acquires personhood not at the moment of conception but at viability (i.e. the moment at which the foetus becomes capable of existing independently of the mother with appropriate medical support). The notion of viability is seen as important by some because it marks the transition from being a human entity dependent on another for survival, to being someone capable of independent life. The foetus has at that point sufficient independence to be regarded as clearly separate from the mother. But according to critics the time period of viability varies from country to country and is dependent on the availability of medical facilities. For instance, 26 week-old foetus may be viable in Britain\footnote{Ibid at 313-314.} and in America it is 24 weeks. So there is no uniformity in the world in regard to the age of viability. As in developed countries there are advanced medical facilities but in developing and undeveloped countries those medical facilities may not be available. Further to avail health treatment depends upon
financial capacity of a person. For those who can pay can have access to it but for poor who cannot afford those facilities are worthless. Therefore, the proposition of viability is not acceptable.

Abortion opponents often call the embryo or unborn child “innocent” and they call abortion the taking of innocent life. However, no pregnancy, birth, or child is “innocent”. Pregnancy and childbirth each pose grave risks to the mother, and a child needs extensive parental care and investment over a long period of time. A child may be a joy forever, but it is a liability for years. This is why many women defer childbearing until they have finished their education and are economically secure. Alternatively why many poor women accelerate their childbearing since their life expectancy is less and their economic prospects dismal. Hence abortion should be legal because giving parents the ability to control their reproduction helps more of humanity to survive.\textsuperscript{29}

7.3.2.3 Ethics of Personal, Bodily Autonomy

The ethical principle of respect for persons requires that there is consideration and regard for women's autonomous choices. Hence abortion is a matter of woman's right to exercise control over her own body. That is, respect for person requires that we treat women not as instruments of government birth control policies, whether pro-or anti-nationalist, but as their own moral agents. Moreover, the ethical principle of beneficence might well favour the woman taking critical decisions on behalf of her family and dependent children.\textsuperscript{30}

An argument presented by Judith Jarvis Thomson states that even if the foetus has a right to life, abortion is morally permissible because a woman has a right to control her own body. Thomson's variant of this argument draws an analogy between forcing a woman to continue an unwanted pregnancy and forcing a person's body to be used as a dialysis machine for another person suffering from kidney failure. It is argued that just as it would be permissible to "unplug" and thereby cause the death of the person who is using one's kidneys, so it is permissible to abort the foetus (who similarly, it

\textsuperscript{29} See Supra note 2 at 265.
\textsuperscript{30} Supra note 5 at 348.
is said, has no right to use one's body against one's will).

### 7.3.2.4 Is it Ethical to force a Woman to carry a Pregnancy to term or to give Birth to an Unwanted Child?

If lawful abortion is eliminated, then the law will be used to force women to carry pregnancy to term-using their bodies to provide a place where a foetus can develop- into a baby. This is the ideal of anti-choice activists, but would it be ethical? Not permitting women a choice over being pregnant and reproducing is incompatible with justice in a free, democratic state. Even if the foetus is a person and abortion unethical, it shouldn't be prevented through unethical means. Moreover, from the child's perspective, it would not be ethical to force the birth of a child who is unwanted and cannot be cared for because the mother feels unable to properly care for the child. Women who choose to abort when they cannot be good mothers are making the most ethical choice open to them.

Abortion is a difficult issue - no one makes lightly a decision whether to have an abortion? As abortion touches upon a significant number of important, fundamental ethical questions: the nature of parenthood, the nature of rights, human relationships, personal, autonomy, the extent of state authority over personal decisions, and more. This entire means that it is very important that we take abortion seriously as an ethical issue - seriously enough to identify the various components and discuss them with as little prejudice as possible.

### 7.4 Assisted Reproductive Technologies and Ethics

While child bearing process used to lie in the domain of complete privacy, by tradition, now the test tube baby and gestational carrier are the issues of public debate. The rapid development of new medical technologies has raised many ethical and legal issues in this context. New reproductive technologies are changing many cherished ideas about family relationships. Today, a child can be born from a donated egg, with donated sperm, from the

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33 Ibid.
uterus of a woman who is a “gestational carrier”. In this way, a woman with no hereditary link to the offspring may deliver a child, who is also not related genetically to the eventual parents of the child. Therefore, the couples who succeed to attain pregnancy through assisted reproduction and those who assist their new found fertility have to be wary of a most of legal and ethical issues. The main ethical issues related to assisted reproduction are as follows:

7.4.1 Unnaturalness

A significant number of people condemn the practice of artificial insemination even for the couples who cannot otherwise have children because they think it as unnatural and for that reason wrong. They consider ART as against public policy as it includes commercialization of birth, renting wombs (as in case of surrogacy), women's rights, baby-selling etc.

The Catholic Church's objection to assisted reproduction is based on the assumption that the natural consumption of the sexual act is more important in the scale of values of the Church than the procreation of children. There seems to be here a strange confusion between nature in the elementary biological sense and nature as an order of reason in which two human beings, endowed with a sense of purpose and conscious love, seek to seal their union by the procreation of a child through artificial insemination, as they cannot achieve it in the usual way. There is surely in such a decision a nobleness of purpose, which should command respect rather than condemnation. While there may be many other objections to the practice of artificial insemination, it seems inconsistent to condemn it - as between husband and wife - on moral grounds.

Current ethical objections to ART reflect a reasonable prediction that the means we are now using to make the traditional family possible for those who cannot otherwise achieve it carry with them the seeds of destruction of the concept of family as we know it. Of course our views will undoubtedly change as practices change and future generations will see these issues very differently. It is reasonable to expect that such fundamental views as the

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34 Supra note 19 at 124-125.
35 Supra note 13 at 262.
merits of genetic manipulation, our notions concerning family and even what it means to be human will develop and change.\textsuperscript{36} Further if one condemns all tampering with ‘natural’, mothering and family formation, then logically other forms of family formation such as adoption, guardianship, custody, step-families and even contraception must also be condemned. Extending this argument further, all technological advances which affect the natural order, such as organ donation, dialysis and other medical advances which keep people alive, could also be condemned for tampering with ‘nature’.\textsuperscript{37}

Further if one condemns commercial surrogacy (which is a kind of ART) on the ground that it is equivalent to baby selling, are not justified as surrogacy is a contract to bear a child, not to sell a child. Advocates of surrogacy see payment to a surrogate as a fee for gestational services, just like fees paid to lawyers and doctors for their services. Some advocates even argue that the prohibition of commercial surrogacy infringes on a woman’s constitutional right to contract. Advocates also maintain that in a successful; surrogacy arrangement, all parties benefit. The intended parents take home a cherished child, and the surrogate receives a monetary reward and the satisfaction of knowing that she has helped someone realize a special goal.\textsuperscript{38}

Hence, the researcher observes that the naturalness or unnaturalness of a new procedure is not the real issue: the crucial question is whether the procedure is likely to do more good than harm.

7.4.2 Harm to the Embryos

In many types of Assisted Reproductive Techniques (ARTs), multiple embryos are often created but only two or three are often selected and implanted. Through the technique of foetal reduction the number of foetuses in utero of women on IVF programmes are decreased who have become pregnant with multiple embryos. If a woman becomes multiply pregnant, fertility specialists’ advice selective termination of some of these embryos during the first trimester of pregnancy when foetal size is about one and a half

\textsuperscript{36} Ritu Arditti, “Surrogate Mothering Exploits Women” Science for the People 22 (May 1987).
\textsuperscript{38} Helena Ragone, Surrogate Motherhood: Conception in the Heart 133 (Westview Press, Boulder, 1994).
inches long. Guided by ultrasound, the doctor inserts a needle filled with potassium chloride into the foetal chest cavity, causing death by heart failure. The foetus is eventually absorbed by the woman's body.  

This technical procedure is opposed by those who regard an embryos as having a right to life and raises certain ethical questions such as, who decides which foetus is terminated and which survives? The procedure could be used for sex predetermination to save a male foetus at the expense of ‘reducing’ a female? And ironically, Could foetal reduction be used as a “remedy for incompetent practices at fertility clinics”? Of course, it would be possible to meet this concern. Regulations could permit only the creation of single embryos which would then have to be immediately placed in a woman. This would mean that there would be no need to store and then destroy embryos. However, that would greatly reduce the chances of the procedure working. Alternatively, all spare embryos could be made available for donation to other couples. Furthermore, the discarding of certain embryos will provide the parents to have a child with the greater chance of having a healthy life.

7.4.3 Donated Sperm

Though in vitro fertilization (IVF) through husband’s sperm is acceptable in many societies but the problem arises in case of donated sperm which sparks a new debate in medical field. Whilst the need for a mother remains unchallenged, some feel that the removal of the ‘need for a father' provision implied that fathers were redundant or unimportant in child rearing. The ‘need for a father’ question has also been linked to debates about the ‘right’ of a child to know about his or her biological origins. The Roman Catholic Church condemned the trend towards moral relativism, whereby deeply fixed moral concepts about absolute right and wrong are replaced by decisions about what individuals feel as ‘right’ or 'wrong' for them at a particular time. Both Churches agree that politicians, clinicians and scientists who support the changes are promoting a utilitarian approach to human life

39 *Supra* note 37 at 130.
40 *Ibid* at 132.
41 *Supra* note 1 at 349.
42 Human Fertilization and Embryology Authority.
that neglects the 'common sense' view of the family and its broadly accepted moral principles.\footnote{K. Ahuja, “The Need for a Father: Mixed Messages in the UK’s New Legislation on Gamete Donors?” 17\textit{(1)} Reprod Biomed Online 7 (2008).} Similarly in the Islamic world, couples are encouraged to have the children they can support, but the integrity of the family lineage is an important value, and third-party sperm donation is unacceptable.\footnote{G. I. Serour and B. M. Dickens, “Assisted Reproduction Developments in the Islamic World” 74\textit{Int. J. Gynecol. Obstet} 187-193 (2001).}

Some raise moral objections to artificial insemination “to beget, without the possibility of a continuing father-child relationship, would be to withdraw biological potential from personal potential- to reverse the long process of evolution by which biological capacities have been humanized. In a defined sense, therefore, the donor's action, made possible by human science, is anti-human.”\footnote{Gordon Reginald Dunstan, “Moral and Social Issues arising from A.I.D., Law and Ethics of A.I.D. and Embryo Transfer” 17\textit{CIBA Foundation Symposium} 52 (1973).} Similarly some argue that generating a situation in which the child will be raised by a man who is not their biological father is seen as departing too greatly from the traditional setting in which children should be raised. However, many children now-a-days are raised by a man who is not their genetic father (but a step father). There is no evidence that such children suffer greatly from this (as opposed to the separation of their parents).\footnote{Supra note 1 at 350.}

Where sperm donation is acceptable, ethical concerns include medical and social criteria of eligibility to donate, requirements of anonymity to recipients or allowance of designated donors, and subsequent identification of donors to their biological children. Donation should be altruistic rather than for profit, although costs of donation are recoverable including both HIV tests. The number of uses of an individual donation should be limited to reduce the risk of different children of the same donor meeting and unknowingly considering marriage. Donation records should be kept so that resulting children's genetic heritage can be known, but, unless laws provide otherwise, donors and children should become identifiable to each other only with mutual consent. In rare cases, directed donation is acceptable.\footnote{Supra note 5 at 309.} Therefore, the researcher is of the opinion that artificial insemination is
generally acceptable as permissible as there are more regulation of it as compared to alternative reproductive techniques, and the legal rights of the parties are comparatively clear.

7.4.4 Adoption

Opponents of ART argue that it is improper for the couples to go to such unusual lengths to have a child, when so many children are available for valid adoption, which will be beneficial for both i.e. the couple who want to have a child and the abandoned child who needs proper care and attention. But advocates of ART argue that adoption does not adequately meet the needs of infertile couples who wish to have a baby. They point out that there are many times more infertile couples than available infants. Moreover, couples have to undergo a lengthy procedure for adoption with so much tedious formalities. Here, too, social trends have contributed to a greater call for alternative reproductive options. Most important, an increased use of contraceptives and abortion and a greater acceptance of unwed mothers have led to a shortage of adoptable babies.\(^{48}\)

7.4.5 Child Welfare

According to the opponents of ART, children born as a result of ART would experience serious physical or psychological harm when they come to know about the unusual circumstances of conception. Experts, who do not accept techniques involving donation of gametes or embryos, have argued that the secrecy coupled with AID (Artificial Insemination Donor) will, with a great degree of probability, have a harmful effect on the child. The dilemma concerning the child's knowledge of its biological identity cannot be avoided.\(^{49}\) Therefore, it is submitted that there is often some uncertainty as regard the biological identity of a person's parents and, therefore, one should be prepared to uphold a claim to a right to know one's biological origins not only for children born through artificial insemination, but for any child, including those born within valid marriage as a consequence of an adulterous

\(^{48}\) Supra note 38.

relationship and adopted children.\textsuperscript{50}

In our contemporary culture young people have strong moral claims to know their genetic identities. It has been contended by some that now it is time for these moral claims to convert to legal rights. There are some people who argue that it is not in the best interest of child to tell about the gamete donation because there is fear that telling a child how he was conceived would cause severe social and psychological problems. A further reason for not telling the child is that parents should have a right to privacy and if they keep such information confidential that is their prerogative.\textsuperscript{51}

The researcher is of the opinion that there it is not proven fact the children born using ART suffer psychologically or physically. As in case of adoption, there is a probability that child may face emotional trauma when he comes to know that the people who brought him up are not his real parents. But this is not so in case of ART as either both or one of them is his biological parent. So ART in this respect is better than adoption.

7.5 Pre Implantation Genetic Diagnosis (PGD)

Pre implantation genetic diagnosis is a technique where numbers of embryos are created and only two are implanted at a time into the woman. Now the question here is whether it is permissible to select from the embryos created which will be implanted. There is generally no objection to a selection being made on the basis of which embryos are not likely to survive to birth; but more controversially a couple who are at risk of having a child with a genetic disability may wish to select an embryo which does not carry that disability.\textsuperscript{52} Therefore, PGD allows the genetic characteristics of embryos to be studied before being transferred to the uterus to prevent the birth of a child with genetic defects in couples with high genetic risk. This technique is useful in couples who have a high risk of passing on certain genetic diseases or chromosome mutations to their children. It is also indicated in some


\textsuperscript{52} Supra note 1 at 379.
couples coming from an IVF programme PGD permits the screening for chromosomes most commonly involved in prenatal abnormalities and miscarriages during the first trimester. This may be indicated in various situations such as advanced maternal age, altered male meiosis, couples with repeated miscarriage and couples with repeated implantation failures.\(^5^3\)

Therefore, in the opinion of the researcher, the argument that gene selection is unethical as it condones improper parenting style is not sound. But in reality it is improving the lives of coming generation in terms of their medical health by preventing transmission of congenital diseases and thereby providing the healthy life.

Other ethical concern about the widespread use of gene selection is the ethics of selecting the sex of a child and thereby disturbing the sex ratio. As there is increasing acceptance of family balancing so some people are in favour of this practice, moreover it is less problematic than the earlier available methods which lead to infanticide and abortion of unwanted sex. No doubt, there is imbalance in sex ratio in some countries like India, China and Korea that favours male children, but it is less likely in Western Europe and the United States where one gender is not favoured over the other as a general rule. But my contention is that sex selection should be regulated and it is to be permitted only for medical purpose and not for social purpose. For instance, if a family has a disease associated with X chromosome but the specific gene alteration is not known then PGD can be conducted by means of gender selection.\(^5^4\) Therefore, sex selection is permitted only for reducing the risk of passing on sex-linked genetic diseases that reduce the quality of one’s life and not for the preference of blue over pink by the parents. By following such a rule, the abuse of gene selection can be avoided.

Another moral objection to gene selection, which in this case stems from religion, is the argument that by choosing certain embryos to be used for reproduction and selecting against certain genes, physicians are “playing God”. However, this objection is at odds with most functions of modern


\(^{54}\) Ibid.
medicines, "not only in reproductive medicine but also in prolonging life, curing disease, and mitigating pain and suffering." Therefore, the argument against gene selection for the reason that physicians are too greatly empowered in their ability to produce life or affect life cannot be held by anyone that receives and supports medical care in the modern world. Without the ability to choose certain embryos for implantation, a large portion of the function of reproductive medicine (specifically in vitro fertilization) would not be practicable.56

Therefore, after analysing all the ethical aspects of PGD it can be concluded that Pre implantation Genetic Diagnosis is essential for women to have a live infant and providing the infant with the best possible health services for a healthy growth but gene selection should only be confined for medical purpose and not for research and social purpose. So the standards must be set in order to avoid the abuse of Pre implantation genetic diagnosis.

7.6 Sex-Selective Abortions

Another ethical debate in the reproductive freedom arena is whether the woman who is having the right to decide when to have the child and how many children to have also has the right to select the sex of a child? There is divergence of views in this regard. Some pro-choice advocates argue that the ability to select the sex of one's children enhances individual choice and in turn reproductive freedom. The decision to abort a child should be of the woman alone and she should not be compelled to carry on an unwanted pregnancy even if her decision is solely based on the sex of the foetus. Another argument in favour of sex selection is the increasing acceptance of family balancing where the prospective parents strongly desire to have at least one child of each sex. As nature does not give every family their preference. So if there are restrictions imposed on the prenatal sex determination then it would be unethical and unjust. In the United States, research on the sex preference of parents does not reveal partiality towards boys, and the current use of sperm sorting to select the sex of the child before conception actually

shows a slight preference for girls. This circumvents the host of ethical issues raised by the selection of boys but does not make sex selection by abortion ethically unproblematic.\textsuperscript{57}

Another view is that the freedom of choice cannot comprise a freedom of the spouse to decide on their child's sex because that will amount to discrimination on the grounds of sex which cannot be socially tolerated. The long-term social consequences of sex-preselection would probably be detrimental to women and society as a whole. It would lead to the institutionalization of perceptions that males should continue to remain in possession of the structural power, comprising among other things the control of economic, legal and other key of social institutions. It would lead to the confinement of women to subordinated "female" roles.\textsuperscript{58} In the opinion of the researcher, aborting a foetus only because of her sex leads to devaluation of the girl child and social inequality of the sexes which should not be allowed.

Various assisted reproduction technologies, such as in vitro fertilization, can now be manipulated to "ensure" the sex of the fertilized egg either male or female, by selecting for chromosomal characteristics in the sperm. A sperm with an X chromosome will create a female, and a sperm with a Y will create a male. If sperm sorting is not used and embryos are randomly created, then the embryos themselves can be tested to select the sex to be implanted. But since relatively few couples use assisted reproduction technologies, most people must rely on chance to get the sex they want in their children. That is until pre-natal sex diagnosis came along. Earlier, mostly the sampling of genetic material from the embryo or amniotic fluid, can now tell a mother the sex of the embryo or foetus she is carrying. These tests carrying risks of miscarriage, and so new techniques were developed to test the mother's blood rather than the embryo or her amniotic fluid to pick up genetic indicators of the foetus sex. So around the world couples are making use of prenatal ultrasound and other tests to determine the sex of the foetus. If the foetus is of undesired sex, usually female, the parents often abort it. Thus

\textsuperscript{58} Supra note 49 at 271.
the technology which is created to discover abnormalities of the foetus and thereby to provide valuable information about the sex-linked genetic abnormalities in the foetus and to promote reproductive autonomy of women is being used in some countries to determine the gender of a child resulting in abortion, if the resultant foetus is a female, and thus, harming rather than empowering the women.\textsuperscript{59}

The most disturbing aspect of sex selection is a sharp imbalance in the sex ratio especially in India, Korea and China. The majorities of families living in these countries are known for their strong preference for male children. The reason for this practice is that male child will continue their family lineage and will provide social security to his parents in old age. In contrast daughters are considered as burden on their parents as much of the amount is spent as dowry in marrying off a daughter. Even if she does not marry she will remain dependent upon her family. So the nature is not allowed to take its course. Sex-selective abortions and infanticide immediately after birth in Asia have led to a disturbing sex ratio in some areas. China provides the most egregious example of a distorted sex ratio. For the last two decades China has had a one-child policy in an attempt to lower its population growth rate. But it has marked at the expense of girls. The one-child policy, combined with China's cultural preference for males, has led parents to ensure that they have at least one male heir by employing prenatal sex selection abortion that targets female foetuses and to a lesser extent female infanticide. The result of substantially more boys being born and surviving than girls is that over the next decades estimates are that about 30 to 40 million young Chinese males will be unable to find a bride, marry and settle down. Chinese families are pursuing various strategies to get their sons married including early, arranged marriages. The kidnapping of girls for marriage is on the increase. The unmarried males who cannot find a partner usually go to prostitutes, which results in the rapid spread of HIV into the entire population. Hence, the only solution for China is to reduce its sex ratio imbalance and that means reducing discrimination against women before and after birth. At the moment, there are laws prohibiting sex selection, prenatal

\textsuperscript{59} Supra note 2 at 211.
screening and abortion in China and India but the laws are probably unenforceable.\textsuperscript{60}

### 7.7 Foetal Research Issues

Like other technological advancements research involving artificially conceived embryos has proved to be a miracle and contributed to medical advances in genetic disease, infertility, cancer, birth defects, and other areas. It can help save other foetuses and also people already in existence. Brain tissue transplants from aborted foetuses have recently contributed dramatically to the treatment of Parkinson's disease, for example. But ethicists fear that such uses of foetuses could create personal and commercial motives for women to conceive and abort; foetuses would become “organ farms”.\textsuperscript{61} Today, forms of research into human reproductive biology and certain reproductive technologies and, for instance, stem cell research based on manipulation of human embryos, is condemned by some religious institutions. At the secular level, there is very widespread, if not universal, opposition to creating independent, genetic duplicate human beings by cloning cells of existing people or, if scientifically possible, of recently deceased people. Similarly, the Kantian imperative that people not be treated only instrumentally, as means to other's ends, underlies much ethical scrutiny of research proposals. Investigators' need to use human subjects as means to achieve their research ends, such as promotion of scientific knowledge or promotion of commercial enrichments, creates the fear that the subjects may be considered only as means, and that their intrinsic value and dignity as human beings may be discounted.\textsuperscript{62}

Conservatives and feminists base their arguments against the use of foetal tissue on very different grounds. The religious leaders are worried that abortions will increase due to medical research that requires increasingly more foetal tissue and that woman will conceive for the express purpose of aborting foetuses to aid family members or for money. Feminists defend women's right to safe and legal abortion, but many fear that the current

\textsuperscript{60} \textit{Ibid} at 215-216.
\textsuperscript{62} \textit{Supra} note 5 at 83.
medical campaign for foetal tissue research and treatment will put pressure on certain groups of women to have abortions for family members or friends in need. It is also feared that other women, faced with making an abortion decision, might be persuaded directly or indirectly that “donating” foetal tissue redeems the abortion. A woman’s decision to abort is increasingly made dependent on other considerations such as foetal tissue use. Abortion is a hard enough decision for many women to make, without being burdened with yet another decision of whether or not to donate foetal tissue.\textsuperscript{63}

Pro-life advocates argue that since embryonic stem cell research requires the extraction of the inner cell mass of the blastocyst, resulting in destruction of the embryo, it is not, therefore, morally acceptable since they believe that an embryo is a person in its own right with the same moral status as an adult human.\textsuperscript{64} The same ethical implications are there in case of creation of embryos through IVF and taking off stem cells from aborted foetuses. They argue that human life is sacred even after death and performing research on dead foetuses shows disrespect to their life and status. Man has no right to interfere in life’s natural process as it is unjust to harm a life in order to attempt to cure others. It is immoral to value one human life more than another, hence, it is wrong to destroy embryo of any gestational period, says Richard Doer Finger, the Catholic Bishop.\textsuperscript{65}

Many feminists also contend that doctors who are eager to get good tissue samples must put women at additional risk of complications by altering the methods of abortion and by extending the time it takes to perform an abortion. Since there is disagreement over whether older or younger foetuses are more useful for foetal tissue transplants, feminists also point out that some women may be pressurised into having later and riskier abortions in order to ensure intact foetuses with fully developed cells and tissues.\textsuperscript{66}

Modern medicine is capable of freezing a fertilized egg indefinitely,

\textsuperscript{63} Supra note 37 at 180.
\textsuperscript{66} Ibid.
without any known harm to the embryo eventually transferred. It would be difficult to combine this practice with a mandatory transfer policy, since the contingencies that might make donors unavailable or cause them to change their mind about producing offspring are much more likely to occur over a period of years than during the forty-eight to seventy-two hour period usually involved between IVF and transfer. But with or without mandatory transfer, the freezing and storing of fertilized ova raise a multitude of unprecedented legal questions and entanglements and could undoubtedly cause fundamental social changes. The time may come, for example, when there is a commercial market for frozen embryos created from the genes of celebrities. One of the more obvious possibilities that embryo storage creates is transfer of the embryo after the parents have died. The same possibility exists, of course, with the frozen sperm, which can be used after the father has died. In 1984 Carinne Paipalaix, a twenty-two year old secretary from Marseilles, asked a sperm bank to turn over to the sperm deposited by her husband before his death from cancer in 1983. The issue was controversial, but French Court approved her request.

So the key issue here is whether the researchers be allowed to use embryos for experimentation and research. Position varies concerning the legitimacy of embryo research. The Vatican condemns it. Many groups that have considered the issues - including Britain's Warnock Committee, the American Fertility Society's Ethics Advisory Committee, and the authors of the Waller Report in Australia - have decided that it should be permitted but should be subject to prior review and should continue for only fourteen days after conception. The rationale for the fourteen-day line is that it normally takes about that long for a fertilized egg to implant naturally in the uterine wall. Before implantation, there is a reduced likelihood of an egg's survival; in addition, other physiological and neurological facts about this stage of development can justify allowing research before implantation but not

69 Warnock Report at 66.
Moreover, the fourteen day limit has the advantage of allowing a period for research but not too long a period. Some, however, suggest a later cut-off time for research, such as the time when the foetus begins to be sentient and capable of experiencing pain. A utilitarian or consequentiality orientation approves application of techniques such as research on human embryos to advance reproductive knowledge and practice, and approves stem cell research, for instance by the cloning of human embryos, because of its potential to achieve considerable health care benefits. Moreover the ethical principle to do no harm applies in the therapeutic setting, but in research some controlled risk of harm may ethically be justified and perhaps be necessary to prevent greater injury.

7.7.1 Whether the Use of Embryo in Research be permitted?

Law being an instrument of social change and social well-being, it must adopt a balanced approach so that present conflict in individual, social and state interests in the field of embryonic stem cell research can be avoided. To put absolute ban on the research might result in grave injustices which in the name of ethics, we should not allow to happen. So in order to have sound legal regulatory framework, policies and laws securing embryonic stem cell research should include the following points.

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70 See the excellent discussion in Robertson, “Extracorporeal Embryos and the Abortion Debate” at 57-59 (the facts of early development of the pre-implantation embryo). Professor Robertson concludes at 58-59: “To summarize, the extracorporeal embryo is a living entity of a few non difference cells that has the potential, if transferred to a uterus, to attach and eventually produce a live birth. Unlike a foetus, however, the extracorporeal embryo has no organs, no neuromuscular structure or spinal column. Indeed, it will first develop a trophoblastic or placental layer before the embryo proper that could develop into an individual is formed. Not until ten to fourteen days after fertilization will the most rudimentary of all embryo structures emerge- the embryonic disc out of which the embryonic axis and spinal column will eventually, if development continues, emerge. Only later will an organ, neuromuscular and nervous system develop. At some later point the capacity for sentience will also emerge. Wherever we place the point of sentience in the foetus, it is clear that the external, pre implantation embryo (or pre-embryo, to be accurate) has no differentiated organ structure, and has not even developed the rudimentary structure of the embryo itself, which develops after implantation in the uterine wall occurs.”

71 It is unclear exactly when this stage begins; somewhere between six and eighteen weeks is likely. See Peter Singer and Helga Kuhse, “The Ethics of Embryo Research” 14 Law, Medicine and Health Care 133-137 (September 1986) “The minimal characteristic needed to give the embryo a claim to consideration is sentience, or the capacity to feel pain and pleasure. Until the embryo reaches that point, nothing we can do to the embryo can harm it.” For a suggestion that the fourteen- day period is adequate but that it should be flexible to allow for the developing needs of medical research.

72 Supra note 5 at 84.

• Foetal tissue research and transplants cast women as mere environments and containers for the foetuses. The role of women in research is that she provides the raw material. She is the resource for embryos, for eggs, for surrogate wombs and now also for foetal tissue. So central to ethical research is that women should give adequately informed consent to the procedure. And if the woman is not willing to provide foetal tissue then she should not be compelled to provide it because although women have the right to safe, legal abortions, but women should not be foetal tissue provider. Competent persons make decisions for themselves on whether or not to consent to become subjects of research and when potential subjects are not competent to make their informed decisions, informed consent may be given by legal guardians. Even when such consent is given, research cannot be continued when the potential subjects deny consent to or resist procedures to which they are intended to be subjected.

• Secondly, even if the women consented to provide foetal tissue it should be on an aborted foetus. The creation of embryos solely for research purposes should be prohibited. The justification for using foetal tissue from an aborted foetus is that abortions were a waste if the foetal tissue obtained from them were not put to medical use. Therefore if medicine can be advanced by research on the aborted foetus it should be permitted because research seems to be progressive and lifesaving. Hence, it is ethical to use tissue from an aborted foetus for research purpose.

• Any kind of financial help to the woman for donating embryo should be prohibited.

• The persons who violate the norms relating to embryo research should be punished.

7.8 Responsibilities Towards the Offspring

To become a parent is one of the privileges that one has in his or her
lifetime. So becoming a responsible parent involves providing economic, moral, social, psychological support to the child. But sometimes the conduct of the mother during pregnancy can harm a foetus for e.g. if the mother uses alcohol and drugs during the pregnancy, or rejects medical recommendations including lifesaving intervention or engages in a range of other behaviours that have the potential to cause foetal harm. So the key question is whether the responsibility of the mother extends when the child is in the womb of the mother? Another issue is whether it is ethically justifiable to impose legal restrictions or medical interventions on the woman's life style for the sake of the well-being of her foetus.  

7.8.1 Maternal-Foetal Relationship

Pregnancy is a time when most of the women adopt healthy lifestyle and kick off their habits that can harm their babies and try to provide the best they can do for their babies. It is because the mother's every moment whether good or bad, shapes the prenatal environment which provides the base for the developing foetus. There are numerous maternal activities which are potentially harmful to the developing foetus, including drinking alcohol and coffee, taking prescription and non-prescription drugs, smoking cigarettes, failing to eat properly and being obese, playing certain sports, and residing at high altitudes for prolonged periods. Conduct by people other than the pregnant woman can also threaten foetal health. A pregnant woman's exposure to secondary cigarette smoke sexually transmitted and other infectious diseases, environmental hazards such as toxic chemicals, radiations, and lead, and physical abuse can harm the foetus. In the opinion of the researcher, a mother can provides the maximum best possible to her child without any reciprocal favour so woman should regulate her behaviour when she opts to become a mother, hence, anything that can harm the developing foetus should be avoided in order to benefit her child.

Ethical issues that arise in the care of pregnant women are challenging to physicians, politicians, lawyers, and ethicists alike. One of the fundamental


goals of medicine and society is to optimize the outcome of pregnancy. Recently, some apparent attempts to foster this goal have been characterized by legal action and politics aimed at specifically protecting the foetus as an entity separate from the woman. These actions and policies have challenged the rights of pregnant women to make decisions about medical interventions and have criminalized maternal behaviour that is believed to be associated with foetal harm or adverse prenatal outcomes. Recent legislations, criminal prosecutions, and legal cases have raised the question of whether there are circumstances in which a woman who has become pregnant may have her rights to bodily integrity and informed consent overridden to protect her foetus. Across the country, pregnant women have been arrested and prosecuted for being pregnant and using drugs or alcohol. These cases and the publicity they have engendered suggest that it is time to revisit the ethical issues involved.\footnote{ACOG-Maternal Decision Making Ethics and the Law’ available at: www.acog/Resources%20Publications/Committee%20Opinions/Committee%20on%20Ethics/Maternal%20Decision%20Making%20Ethics%20and%20the%20Law.aspx (visited on August 16, 2011).}

7.8.2 Pre Natal Negligence

The issue is whether a cause of action could lie against the mother by or on behalf of a foetus, subsequently born alive for the prenatal injuries due to the negligence of its mother. It was first time in the case of \textit{Grodin v. Grodin}\footnote{(1981), 102 Mich. App. 396, 301 N.W. 2d 869.} that Michigan Court of Appeals held that a child's mother bears the same liability for negligent conduct which results in prenatal injury as would a third person. In \textit{Grodin}, a child brought suit against his mother for prenatal negligence. The plaintiff in \textit{Grodin} had developed brown and discoloured teeth because the defendant mother had taken tetracycline during the time when she was pregnant with the plaintiff. The suit alleged the failure on the part of the mother to request from a doctor a pregnancy test, failure to seek proper prenatal care, and failure to report to doctor that the mother was taking tetracycline.

In \textit{Grodin}, the court treats a pregnant woman as a stranger to her developing foetus for the purpose of tort liability. It means, a woman by becoming pregnant exposes herself to a future law suit by or on behalf of the
foetus which will become her child. It is clear that the recognition of legal right of a foetus would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities. The recognition of such a right by a foetus would necessitate the recognition of a legal duty on the part of the woman who is the mother; a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible. The recognition of such a legal duty would create a new tort: a cause of action assertable by a foetus, subsequently born alive, against its mother for the unintentional infection of prenatal injuries.\footnote{Nancy Ehrenreich (ed.), The Reproductive Rights Reader 365 (New York University Press, New York, 2008).}

But it would be a legal fiction to treat the foetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a pregnant woman and her foetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world.\footnote{Ibid at 366.}

7.8.3 Alcohol and Drug Use during Pregnancy

A pregnant woman is under a moral obligation not to indulge in an activity that can be harmful to the growing foetus. The pregnant woman who consumes alcohol or uses drugs is skipping her maternal responsibility. As by consuming alcohol the level of testosterone is increased which can have serious impact on the growth and development of the future child leading to problems which include mental retardation. So it is important to set limit on alcohol. The United States and Canada advocate total abstinence from drinking during pregnancy, or even when becoming pregnant is a possibility. The United Kingdom and other countries have recently followed suit. And yet, while we know that alcoholic women, particularly those who smoke and experience social stress such as poverty, are at risk for giving birth to babies with Foetal Alcohol Syndrome, the risk to foetuses from light to moderate
maternal drinking as part of a healthy lifestyle is merely theoretical. It is tempting to think that even if light drinking or drug use poses only a small teratogenic risk, women are morally obligated to refrain from it. Many states have tried to prosecute pregnant drug users for separate crimes beyond illicit drug use, such as child abuse, or they are coerced to have abortion or the custody of the babies at birth were seized from the pregnant drug users.\footnote{Supra note 77.}

The most common penalty for a mother's prenatal drug use is the permanent or temporary removal of her baby. Thousands of low-income black mothers have lost custody of their babies on the basis of a solitary drug test. About a dozen States have enacted statutes that require the reporting of positive new born toxicology to child welfare authorities, and many hospitals interpret child abuse reporting laws, passed in all fifty states to require them to report positive results. In some states, a positive drug screening automatically triggers neglect proceedings to obtain custody of the mother. Another penalty is the “protective” incarceration of pregnant drug addicts charged with unrelated crimes. In 1988, a Washington, D.C., Judge sentenced a thirty year old black woman named Brenda Vaughn, who pleaded guilty to forging $700 worth of checks, to jail for the duration of her pregnancy. The prosecutor had agreed to probation, the typical penalty for such a minor offense. Instead Judge Peter H. Wolf stated at sentencing that he wanted to ensure that the baby would be born in jail to protect it from its mother's drug abuse: “I'm going to keep her locked up until the baby is born because she'd tested positive for cocaine when she came before me.... She's apparently an addictive personality, and I'll be darned if I'm going to have a baby born that way.” Vaughn case was picked up by the press as it does not matter to the Judge that the conditions in America's jails are hazardous to foetal health. Women in person often live in filthy and overcrowded spaces, eat poorly, are exposed to contagious diseases and violence, get little or no prenatal care, and have easy access to drugs-hardly a protective environment for a developing foetus.\footnote{Supra note 78 at 372-373.}

Furthermore, in the state of South Carolina large number of women
were prosecuted for maternal drug use. In the case of *Whitner v. State*\(^85\) decision the state Supreme Court concluded that anything a pregnant woman does that might endanger a viable foetus (including, but not limited to, drug use) could result in either charges of child abuse and a jail sentence of up to 10 years or homicide and a 20 year sentence if a stillbirth coincides with a positive drug test.

Most commentators on the ethics of managing pregnant drug abuses have rejected a punitive or coercive approach.\(^86\) The Centre for Reproductive Rights published a brief in 2000 summarizing common arguments against punishing pregnant drug abusers. They point out that punishing the mother does not particularly protect the well-being of children. It is also unlikely to have a deterrent effect, since drug use among addicts is rarely a voluntary choice based on a rational assessment of the risks and potential benefits of drug use. Indeed, most pregnant addicts are not 'choosing' their own pleasure over their children's well-being, as they would generally prefer not to be drug abusers, for their own sake as their child's. Threatening pregnant drug users with punishment may well only deter them from getting prenatal care and especially drug treatment, which thereby further harms their children.\(^87\) Further, if the child is removed by the state from the drug-addicted mother then it will be ethically unjust as the baby is deprived of the more perilous foster care which can be best given by the mother only. Finally, evidence suggests that punitive and coercive policies are not only ethically problematic in and of them, but also unfairly burden the most vulnerable women. In the landmark case of *Ferguson v. City of Charleston*,\(^88\) which involved selective screening and arrest of pregnant women who tested positive for drugs, 29 of 30 women arrested were African American.

Studies suggest that affluent women are less likely to be tested for use of illicit drugs than poor women of colour, perhaps because of stereotyped but demonstrably inaccurate assumptions about drug use. One study found that despite similar rates of

\(^{85}\) 328 S.C. 1, 492 S.E. 2n 777 (1997).


\(^{87}\) *Supra* note 77.

substance abuse across racial and socio-economic status, African-American women were 10 times more likely than white women to be reported to public health authorities for substance abuse during pregnancy. This data suggests that, as implemented, many punitive policies centred on maternal behaviours, including substance use, are deeply unjust as they reinforce social and racial inequality. In the light of all these considerations, the Committee on Ethics strongly oppose the criminal prosecution of pregnant women whose activities may appear to cause harm to their foetuses. Effects to use the legal system specifically to protect the foetus by constraining women's decision making or punishing them for their behaviour erode a woman's basic rights to privacy and bodily integrity and are neither legally nor morally justified.89

7.8.4 Compromise of Pregnant Women’s Autonomy

One fundamental ethical obligation of health care professionals is to respect patient's autonomous decision making and to adhere to the requirement for informed consent for medical intervention. So it is typically a sacrosanct principle in medical ethics that patients have an absolute right to refuse medical interventions, including life-saving interventions, if they make an autonomous, informed, competent choice to do so. However, in the case of pregnant women, this principle has been questioned and sometimes violated by force in the name of protecting the foetus. Examples have included forced caesarean deliveries, mandatory HIV testing, and life-saving blood transfusions performed despite religious objections.90

Pregnancy does not obviate or limit the requirement to obtain informed consent. The crucial difference between pregnant and non-pregnant individuals, though, there a foetus is involved whose health interests could arguably be served by overriding the pregnant woman's wishes. However, in the United States, even in the case of two completely separate individuals, constitutional law and common law have historically recognized the rights of all adults, pregnant or not, to informed consent and bodily integrity, regardless of the impact of that person’s decision on other.91 For instance, in

89 Supra note 79.
90 Supra note 77.
91 Supra note 79.
1978 a man suffering from a plastic anaemia sought a court order to force his cousin, who was the only compatible donor available, to submit to bone marrow harvest. The court declined, explaining in its opinion.

“For our law to compel the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual and to impose a rule which would know no limits... For a society that respects the rights of one individual, to sink its teeth into the jugular vein or neck of its members and suck from its sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissues cause revulsion to the judicial mind. Such would raise the spectre of the Swastika and the Inquisition, reminiscent of the horrors this portends.”\(^2\)

Similarly, pregnant women like any other individual do not lose the constitutional rights to privacy and bodily integrity only because a foetus’ interest is also involved. For instance the case of Angela Carder brought these issues to a head. In 1987, 27-year old woman Angela Carder who was at 25 weeks of gestation became critically ill with cancer and it became clear that Carder was dying. George Washington University Medical Centre, where she was a patient, tried to insist upon an early caesarean section delivery in order to save her foetus. She refused the intervention, which was nearly certain to kill her. Against the wishes of the woman, her family, and her physicians, the hospital obtained a court order for a caesarean delivery, claiming independent rights of the foetus. Both mother and infant died shortly after the caesarean delivery was performed. In 1990, the District of Columbia Court of Appeals posthumously vacated the court order caesarean section, holding that Carder had the right to make health care decision for herself and her foetus, and that only in the most exceptional circumstances should a pregnant woman's right to refuse interventions be called into

So it is the autonomy of the pregnant woman which should be respected as the pregnant woman can herself weigh the risks and benefits involved in her care. Therefore if a competent pregnant woman refuses to consent to medical intervention it cannot be imposed upon her even if, without it, she and the foetus will die. But if the woman is not competent then doctors can carry out the operation having regard to the best interests of the woman. The interests of the foetus are not to be taken into account. There will be little difficulty, therefore, ordering the Caesarean section if that is necessary to save the incompetent women's life. But if the benefit of the Caesarean section is solely for the benefit of the foetus then it may not be performed. As if a child needs a donor kidney, a parent cannot be compelled against their wishes to provide one. Indeed, if the child only needs some blood a parent could not be compelled to donate that. So why should pregnant woman be required to undergo a Caesarean section operation for the foetus.\(^{94}\)

7.9 Reproductive Human Cloning

In reproductive cloning an entire animal or human being is produced from a single cell by asexual reproduction. Human reproductive cloning would involve the creation of human being that would have a genetic makeup identical to that of another individual or embryo.\(^{95}\)

7.9.1 Why Cloning is done?

Cloning may be an attractive means of creating a child to people in a variety of situations. If one or both members of a couple are infertile, cloning presents one viable reproductive option. If one member of the couple has a genetic disorder that the couple does not wish to pass it on to their child, they could clone the unaffected member of the couple. If both husband and wife are carriers of a recessive genetic disease and are unwilling to run the twenty-five per cent risk of bearing a child with the disorder, they may seek to clone one or the other of them. This may be the only way in which the couple will be willing to have a child that will carry on their genetic line. Even people

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\(^{93}\) In re A.C. 573 A. 2d 1235 (D.C. 1990).

\(^{94}\) Supra note 1 at 336-338.

\(^{95}\) Supra note 51 at 67.
who could reproduce coitally may desire to clone for a variety of reasons. People may want to clone themselves, deceased or living loved ones, or individuals with favoured traits. A wealthy childless individual may wish to clone him or herself to have a genetic heir or to pass on control of a family business. Parents who are unable to have another child may want to clone their dying child.  

7.9.2 Potential Dangers of Cloning

Reproductive human cloning is a clear violation of basic tenets of life - individual autonomy, procreative liberty, identity, individuality etc. As things stand now in animal models, cloning technology is not feasible. The main problem with cloning, other than that it does not yet work in humans, is that there is no mixing of two parent’s genes in the conception of the child; rather it is the duplication of the genes of one partner. We may never know if cloning really “works,” even though the process may result in the birth of a live organism. There may be hidden defects and mutations in the cloned child that do not become evident for generations. Cloning does not make an exact copy. This was demonstrated in 2002 when scientists cloned a cat to produce “CC,” a kitten. CC turned out to have different coloured fur than her “mother.” It may also have other different attributes and behaviors as it grows older. Dolly, the first cloned sheep, aged faster than normal and died quiet young. Research on cloned pigs by Dr. Jorge Piedrahita, a professor of molecular biological sciences at North Carolina State University, found that “the DNA is often modified during the cloning process in such a way that it affects the activity of certain genes.” In addition, under the Red Queen theory, by passing on only one person’s genes and by eliminating sexual selection and reproduction, cloning makes it easier for pathogens to survive, grow, and overcome the host. If cloning process is repeated for generations, the cloned line will be less likely to survive. Cloning is a bad idea biologically because it removes the benefits to humanity of sexual selection and sexual reproduction and may, therefore, hurt humanity in its evolutionary

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97 Supra note 51 at 67.
race against pathogens. There is enormous diversity in the human population because of sexual reproduction and this is a good thing and we should not interfere with its inner working.\(^{98}\)

The central contention used to support legislative prohibitions against human cloning is that creating an individual with a genome nearly identical to a living or dead person is an affront to human dignity. For example, Article 11 of UNESCO’s Universal Declaration on the Human Genome and Human Rights states: “Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted.” Arguments used to support this view are that a clone would not have a “genetic individuality” and that his or her individual autonomy would be greatly compromised.\(^{99}\)

The most compelling reason for permitting reproductive cloning is that, the “use of [human] reproductive cloning presents a potential method of obtaining the biological or genetic connection to one’s children that is so crucial to society’s conception of reproduction and family.” Moreover, human reproductive cloning, “like all other forms of assisted reproduction technology, should be presumptively protected as part of a fundamental right to have children, unless some compelling harm requires its prohibition.”\(^{100}\) But opponents of reproductive cloning condemn cloning by stating that cloning is not a method of reproduction as human cloning, unlike all other protected methods of reproduction including sexual reproduction, artificial insemination, IVF and GIFT, does not require “the union of an egg and sperm from two human beings of the opposite sex.”\(^{101}\) Rather, cloning sidesteps the need for gametes, and permits the creation of a new person with the genetic material from any single human cell.\(^{102}\) So-called reproduction without gametes is more similar to asexual reproduction or replication than to any

\(^{98}\) Supra note 2 at 228, 230.


form of reproduction that is currently constitutionally protected.\textsuperscript{103}

The potential danger relating to human reproductive cloning is that it will lead to children being treated as means to parental ends and not as end in themselves, thus, violating the Kantian maxim to treat people as ends and not nearly means.\textsuperscript{104} Human reproductive cloning also creates confusion regarding the family lineage and kinship. Family relationships could also be altered by the fact that a cloned child may seem more like an object than a person, since he or she is “designed and manufactured as a product, rather than welcomed as a gift.”\textsuperscript{105}

So in the case of reproductive human cloning, at present, the risk outweighs the benefit. However, if it becomes feasible it will pose various problems regarding private laws relating to marriage, divorce, maintenance, inheritance etc. and destabilize established social norms and family lineage. So far as the legislative efforts are concerned, in U.K. reproductive human cloning is prohibited under Human Fertilization and Embryology Act, 1990. Similarly, many other countries have banned the reproductive human cloning. However, there are countries that do not currently have legislation relating to cloning, which provides ample opportunities for the misuse of cloning technology. So there requires an international consensus and co-operation for a uniform regulatory mechanism in this regard.\textsuperscript{106}

7.10 Conclusion

So it can be concluded that control over one’s body is an essential part of being an individual with rights and needs but at the same time it is problematic as it involves moral questions about when and under what conditions reproductive decisions should be made or whether it is permissible to use contraceptives to avoid conception. Equally problematic is the issue of abortion. There are certain areas where complete freedom is not possible and it is justified to impose certain restrictions on its exercise. So it is the duty of

\textsuperscript{103} Id.
\textsuperscript{106} Supra note 51 at 79.
society, medical professionals and social workers to evaluate the pros and cons of reproductive freedom and to decide whether and to what extent restrictions should be imposed on the exercise of reproductive freedom. For instance cloning poses a great threat to the society as its risk outweighs the benefit, so it should not be permitted at any cost. Similarly sex selective abortions should not be permitted as their cost to the humanity outweighs their benefits. Otherwise reproductive freedom is beneficial to all, whether men, women or children and ethically justifiable.\textsuperscript{107}

\textsuperscript{107} Supra note 2 at 84.