Making Mommies: Law, Pre-implantation Genetic Diagnosis, and the Complications of Pre-Motherhood
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pregnancy and pre-motherhood begin almost from the moment that a woman contemplates becoming pregnant and certainly long before she receives the news of a positive pregnancy test, the time line for mothering responsibilities lengthens. This extension of the duties of mothering prolongs the time line for passing judgment on how an individual woman fulfills her duty to her growing fetus, her future child, and to the larger society.59

**PGD vs. Prenatal Testing: Why Regulate One and Not the Other?**

Before launching a more specific discussion about regulation of PGD, it is useful to consider why a state could place limits on the use of PGD if it has not placed similar limitations on the use of prenatal tests that can lead to abortion or other decisions that are, arguably, to the detriment of a future child.

It is not immediately clear how PGD makes decisions about achieving a pregnancy demonstrably different from those that women have been making during pregnancy for decades. An ultrasound that reveals an anomaly in the twentieth week of pregnancy is not remarkably different from CVS testing that reveals the same anomaly during the twelfth week of a pregnancy. To the extent that the question is solely one of timing, advancing technology and the knowledge that it brings with it have done nothing to shift the moral and legal landscape. At its core, protecting a woman's right to use PGD to make decisions about what genetic traits she would like a potential fetus to have is no different from allowing the same woman to elect amniocentesis or CVS testing once a pregnancy is established to determine whether she will carry that pregnancy to term. Using PGD is a logical progression from other methods of seeking to control birth outcomes from pre-conception counseling,
to consulting psychics, to prayer.\textsuperscript{60} There is a continuum but preconception and prenatal decisions derive from a desire and a constitutional right, according to some scholars, to control what was heretofore uncontrollable.

In spite of the similar uses for PGD and prenatal testing and the similar outcomes they can engender, concrete differences between PGD and prenatal testing explain why the former might be more subject to regulation than the latter. First, requiring any form of prenatal testing necessitates an invasion of a woman’s bodily integrity, which raises the stakes of such testing as a practical matter and as a matter of constitutional analysis. Denying access to such testing both raises issues of the patient’s autonomy and the sanctity of the relationship between healthcare provider and patient, which has far-reaching implications and consequences as well. Standing alone, these difference might explain why legislative bodies have not been eager to require prenatal tests or limit what choices a woman can make about her pregnancy in the wake of receiving the results of such testing. Second, prenatal testing has become an ingrained and routine element of prenatal care and is viewed by many, healthcare providers and pregnant woman included, as a required part of the process of having a baby.\textsuperscript{61} Certainly, the existence of a robust body of case law in which women have
successfully sued physicians for wrongful birth when testing was not offered and a child is born impaired indicates that voluntary prenatal testing plays a vital role in women's experience of pregnancy. In light of these factors, it is not surprising that there are few attempts to actively regulate access to prenatal testing or control the aftermath of such testing.

In contrast to prenatal testing, PGD allows legislative bodies to regulate in the interest of future children without a direct conflict with a woman's body and in a climate where access to such technology is not widely available and therefore is less a routine and expected part of a woman's experience of pregnancy. Further, because of financial issues and physical requirements, only a small segment of the population has access to PGD and, as such, regulation of the practice might engender less uproar because of its perceived limited impact on the general population of pregnant women.

Additionally, and perhaps most importantly, as public debate about other controversies in reproduction and reproductive technology continues to rage, PGD will inevitably be swept up in larger conversations about protecting the integrity of humanity or expanding our human future. Many states have banned human cloning for purposes of
reproduction and many of the arguments against human cloning hinge on moral and religious concerns about the manipulation of embryos and drastic changes to the nature of human reproduction. The federal government has limited access to research funds for experiments involving embryonic stem cells in part because of a respect for embryonic life. Agencies exist to help place frozen embryos leftover from IVF patients in adoptive homes, as though these embryos are no different from the thousands of children in foster care in the United States. Many activists for the disabled and activists living with disabilities loudly decry the devaluation of the lives of disabled people supposedly inherent in decisions about screening out embryos with markers for disease or disability. In this climate, PGD is a logical target because it so clearly implicates concerns for potential life, radical change in the
level of control exercised over reproduction, and legitimate, though arguably misplaced, concerns about eugenics.

Despite the current lack of legislative and regulatory attention being paid to PGD, the more ubiquitous the procedure becomes and the more it is bundled with even more disquieting technology such as human cloning, the more likely it is that regulators will begin to evaluate what role the law can play in controlling who, if anyone, can access the technology and how it can be used.
Part III- Peering into the Crystal Ball: The Regulatory Future

If a legislative body thought it prudent and necessary to leap into the abyss and protect future children from mothering decisions being made prior to pregnancy, those lawmakers would face at least two significant dilemmas. First, what type of regulation is constitutional? Second, and, more fundamentally, what pre-conception embryo screening decisions merit praise and what decisions merit condemnation? This section will focus on the first question and the next part of the article will engage the second inquiry.

At present in the United States, the law plays an extremely passive role in the regulation of reproductive technology generally and PGD specifically and an extraordinary amount of normative uncertainty surrounds the practice.\textsuperscript{203} No state appears to explicitly forbid the use of PGD except where it is defined as embryonic research.\textsuperscript{204} As time passes and the use of PGD proliferates and advances, it will be substantially more difficult to fairly label the technology experimental or to consider all testing of embryos done in the context of providing reproductive services to be research, thus making statutes that focus on the technology as experimental more specious.
According to a 1998 article, understanding the regulation of pre-implantation, post-embryo creating technologies such as PGD requires reviewing legislation that purports to regulate embryo research “fetal research, IVF, tissue or organ transplantation, and payment for embryos.” 205 According to this article, a mere ten states had laws in the late nineties that regulated research or experimentation on human embryos. 206 The study found that four states carefully exempted genetic screening such as PGD from broad bans on embryo research. 207 In five other legislating states, PGD would violate the state ban on embryo research unless the technique could be shown to be “beneficial or risk-free to the embryo.” 208 Finally, in New Hampshire, the law would not allow implantation of an embryo that had been subjected to PGD if the procedure was deemed research. 209 Other than this small minority of states, in every other state in the nation, physicians and patients are essentially without legal restraints when it comes to making decisions about testing and implantation of embryos in the context of providing reproductive health services intended to result in pregnancy and the birth of a child. 210
This discussion assumes that our constitutionally protected right to procreate encompasses a right to use available reproductive technologies, including PGD, though in a future case, the Supreme Court may prove this assumption to be false. However, no such case appears to be on the horizon of the Supreme Court docket. This assumption does not mean, however, that a state could not create constitutionally sound PGD regulations. Even within the context of procreation as a fundamental right, the law has never assumed that the right is unfettered. A state may dictate with whom we can procreate through laws forbidding incest or statutory rape; the government can impact procreative decisions made by low-income individuals by drawing connections between procreation and access to government benefits; with proper procedures in place, a state can authorize sterilization of people incapable of consenting to such a procedure; and federal regulation can impact the expanded use of reproductive technology by placing financial barriers on experimentation involving human embryos. All of these are ways to impede an individual's expanse of procreative choice.

As discussed in the previous section of this article, the regulation of PGD could draw inspiration from multiple paradigms for regulating reproduction or parenting. It is likely, however, that PGD regulation will follow closely in the footsteps of abortion regulation. First, PGD has a close to connection to the abortion debate because it is focused
on future children and potential existence, rather than actual existence. Also, like abortion, it involves relationships among the state, pre-mothers, future children, and healthcare providers, and the courts have already set standards for how to balance these interests. It would be surprising for the courts to ignore these precedents in deciding the legal issues raised by PGD regulation. Finally, it will be impossible to disentangle PGD from the larger societal conversations about the origins of life, moral status of the embryo, parental responsibility, and the future of human reproduction. Though it has not and does not garner the political attention currently lavished on regulation of abortion, PGD is a future frontier in the culture wars because decisions made about regulating this topic will rightly suggest appropriate limits on future regulation of abortion. If an embryo garners sufficient legal respect to warrant protection from manipulation, it is difficult to imagine how such respect cannot also be accorded to a developing fetus in ways that might allow for even closer regulation of a woman’s right to seek an abortion.

With the abortion wars as precedent, the path to future PGD regulation will involve political litmus tests, religious fervor, and moral indignation. As a result, the regulation will vary on a state-by-state basis, it will be politically charged, and, like abortion legislation, much of it will be unabashed in its authors’ attempts to send messages. In the abortion realm, anti-abortion statutes are frequently intended to convey profound respect for nascent life, condemn the choices of those who would end life in its earliest stages, and persuade women to make different choices about ending pregnancies. These same messages resonate in the context of pre-mothering decisions about refusing to implant embryos and leaving them in limbo or allowing for their destruction.

Though it is possible to argue that the parental rights paradigm is an equally or more appropriate template for regulating PGD, that paradigm is significantly more problematic
and less plausibly utilized to justify close regulation of PGD. Most critically, the parenting paradigm presumes the existence of a child. While there are circumstances in which legislative bodies and courts have embraced the view of fetus as child, this is not a consistent interpretation of biological reality and many policymakers and jurists reject the attempt to conflate fetus and child. This debate is even less settled when it involves equating an embryo with a child. To invoke the fetus/embryo versus child debate in a discussion of potential regulation of PGD would not serve the interests of those who wish to place limits upon the practice. Instead, it is more politically expedient to argue that to regulate PGD is to regulate potential in the same way that regulating abortion, particularly in the pre-viability stages, seeks to protect the potential of a developing fetus.\footnote{215}

The abortion analogy, though not perfect, is a helpful one because it allows for the discussion of ways in which states can curtail a practice that cannot or should not be wholly banned. Instead, within the realm of abortion, as discussed in the previous section, various states have found ways to closely regulate the medical procedure so as to exercise significant control over who gets abortions, where those abortions take place, and who gets to perform them.\footnote{216} Through these mechanisms of control, a state can make an abortion decision more complicated and more burdensome for a woman so long as that burden is not undue.\footnote{217} So too, within the realm of PGD regulation, a state could seek to make decisions about using the technology more difficult for women and decrease access through control of who may perform the procedure and under what conditions.\footnote{218}