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Article

TEACHING PRIVACY IN THE AGE OF OCTOMOM: ENHANCING CASE/SOCRATIC METHOD WITH STRUCTURED CLASS DISCUSSION

Constance Anastopoulos and Thomas P. Gressette, Jr. *

Ann Curry: So you're saying you have no income coming in?

Nadya Suleman: At the moment, no.¹

The fact that a woman now has the option to create eight embryos and carry them to term in a single pregnancy is a miracle made possible only by technology.² It is quite another matter that a woman with no job and six children of her own would exercise that option and then rely on government assistance to financially support all fourteen of her children.

I. INTRODUCTION

As technology empowers individuals to impact community resources in ways never contemplated by the law, society will have to address how, or whether, it will protect reproductive freedom when the exercise of that freedom alters the allocation of community resources.³ Questions about the applicability of current definitions of privacy,

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¹ Interview with Nadya Suleman, NBC Television Broadcast (Feb. 10, 2009), available at <http://www.msnbc.msn.com/id/29129311%20/ppage/5/>.

² See *The Science Behind Giving Birth To Octuplets*, CBS2 LOS ANGELES, Jan. 31, 2009, <http://cbs2.com/health/octuplets.multiple.high.2.923397.html>.

³ Steven Edmondson, *Eight is Enough! A Constitutional Argument for Regulating Assisted Reproductive Technology*, UNIVERSITY OF HOUSTON LAW CENTER: HEALTH LAW PERSPECTIVES, Apr. 9, 2009, [http://www.law.uh.edu/healthlaw/perspectives/2009/\(SE\)%20eight.pdf](http://www.law.uh.edu/healthlaw/perspectives/2009/(SE)%20eight.pdf).

individuals' freedom to harness technological advances in reproduction, and scarcity of resources will refine concepts of personal liberty and will force Americans to consider which branch of government should define those liberties.⁴

None of the three branches of American government will be able to promulgate rules or laws fast enough to keep up with the questions posed by advances in areas such as assisted reproduction. Years will pass as legislators coin phrases like "excessive reproduction"⁵ and then finally, after cases have worked through the courts, perhaps judges will write about issues of "state interest in protecting already born children" in case law intended to tell the American public how and when private rights must yield to the rights of others. Americans will need guidance long before the courts, legislatures, or executive agencies resolve these issues, and they will turn to tomorrow's lawyers for answers.

This Article uses the highly publicized story of Nadya Suleman's technologically-assisted conception of octuplets to illustrate the need for new ways to teach privacy to law students. Traditional case/Socratic method provides a foundation for teaching the law of privacy, but casebooks alone are inadequate to prepare law students to answer the privacy questions created by rapidly changing technology.

Part II of this Article provides a history of teaching privacy to law students. Part III considers which teaching methods are best suited to teaching privacy to today's law students and concludes that the optimal method is the case/Socratic method combined with structured class discussion. Part IV considers the characteristics of modern law students, summarizes the relevant facts of Nadya Suleman's conception and delivery of octuplets, and combines a respected casebook's presentation of relevant legal rulings with the Authors' four guideposts for classroom discussion. It demonstrates how incorporating structured class discussion of case law creates the most effective means of teaching law students how to analyze the questions raised by the intersection of technology and individual privacy rights.

⁴ See PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY xi (1995) ("apprehension about invasion of privacy . . . and public concern prompt legislative inquiries and the introduction of legislation").

⁵ See THEODOOR H. VAN DE VELDE, FERTILITY AND STERILITY IN MARRIAGE 65-68 (2006) (discussing excessive reproduction and the need to bring the issue to the attention of legislators).

II. A HISTORY OF TEACHING THE RIGHT OF PRIVACY

The first step toward presenting privacy law was discussion-based classes on the law and issues of gender difference.⁶ These first classes were seminars at the margin of core law classes primarily utilizing articles, essays, literature, and reading lists as the textbooks.⁷ Employing methods strikingly similar to the combination method endorsed by the Authors of this Article, these classes were designed to present law students with questions that require them to think outside traditional legal analysis.⁸

One of the first textbooks on gender and the law was *Sex Discrimination and the Law: Causes and Remedies* by Barbara Allen Babcock, Anne E. Freeman, Eleanor Holmes Norton, and Susan Deller Ross, published in 1975.⁹ This textbook was based on material from a handout generated for one of the first conferences on this subject entitled *Women and the Law* held in 1971.¹⁰ This packet suggested a reading list for these first feminist legal scholars as a way to initiate discussion.¹¹ As this early textbook illustrates, feminist activities focused on legal issues began with the campaign for women's legal rights, including the right to contract, property rights, and women's suffrage in the late 1800s and the early 1900s.¹² As the women's movement for legal rights experienced success, the agenda encompassed broader legal issues and social equality for women. These early scholars on feminism and the law focused on the issues presented by sex discrimination practices, which included attempts to regulate sexual activity by state legislatures and courts.¹³ In fact, it was the attempt to regulate sexual conduct through access to contraception that ushered in the new era of what modern educators teach as the right to privacy.¹⁴

⁶ ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* ix (Rowman & Littlefield 1988).

⁷ See Linda K. Kerber, *Writing Our Own Rare Books*, 14 *YALE J.L. & FEMINISM* 429, 430 (2002) (giving a more thorough analysis of the discussion classes related to the law and issues of gender difference).

⁸ *Id.*

⁹ See *id.* at 430 (citing generally BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR NORTON, & SUSAN DELLER ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975)).

¹⁰ See *id.* at 431 (citing generally BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975)).

¹¹ *Id.* at 430.

¹² See *id.* at 431-33.

¹³ See *id.* at 434-37.

¹⁴ Christine Intromasso, Note, *Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional*

The 1965 United States Supreme Court opinion in *Griswold v. Connecticut*¹⁵ announced the concept of “zones of privacy” and became the foundation for a new line of case law.¹⁶ As later courts began to incorporate the issue of “zones of privacy” and the boundaries between private-public domains were expanded and defined, so too did the study of sexuality, gender, and the law.¹⁷ New cases then filled the pages of casebooks for what is now taught as the law of privacy. However, as cases were decided in these areas, seminar classes transitioned into more traditional law school classes because teachers were able to utilize traditional case law analysis to teach the subject. Naturally, casebooks then became necessary.¹⁸ Next, casebooks covering gender became larger, and sections of those texts discussing reproductive rights and other topics evolved into independent courses.¹⁹

III. TEACHING METHODS AND THEIR APPLICABILITY TO TEACHING THE MODERN INTERSECTION OF PRIVACY AND TECHNOLOGY

Traditionally, privacy law was about insulated, personal rights and when those rights were protected from government interference.²⁰ Reading judicial opinions organized into casebooks is currently the most widely used method to teach law students the specific lines between private and unprotected activities. Technology, however, is changing the way in which people exercise their rights, and once-exact lines delineated in these texts are much less clear today.²¹

Teaching privacy law exclusively from casebooks is simply insufficient to teach law students how to thoroughly analyze issues at the intersection of privacy and technology. Consequently, we must modify the way we teach privacy. To find the best options for teaching

Violation of Planned Parenthood v. Casey's Undue Burden Standard, 24 WOMEN'S RTS. L. REP. 101, 103-04 (2003).

¹⁵ 381 U.S. 479, 484 (1965).

¹⁶ ALLEN, *UNEASY ACCESS*, *supra* note 6, at x.

¹⁷ *See* Kerber, *supra* note 7, at 437-38.

¹⁸ *Id.*

¹⁹ *See id.* at 431-35.

²⁰ *See* Robert M. Bankey, Jr., Comment, *Sound Rights: Legal Protections from Audio Intrusions in Light of Directional Sound Technology*, 17 COMM'LAW CONSPICUOUS 309, 339 (2008).

²¹ *See* Sabu M. George, *Millions of Missing Girls: From Fetal Sexing to High Technology Sex Selection in India*, 26 PRENATAL DIAGNOSIS 604, 605-08 (2006) (discussing how the advances of assisted reproductive technologies and embryology have enabled selective implantation of embryos of a desired sex and its greater implications on Indian society); *see also* Julie Manning Magid et al., *Radio Frequency Identification and Privacy Law: An Integrative Approach*, 46 AM. BUS. L.J., Spring 2009, at 4 (discussing radio frequency identification's impact on modern privacy law).

this rapidly changing subject in the future, we turn to the main teaching methods in use at American law schools.

There are four main teaching methods: case/Socratic, textbook and lecture, problem, and simulation/role play.²² Because each method has unique characteristics, some methods are more naturally suited to certain kinds of subjects.²³ However, while these methods are most often thought of as separate, applying them in tandem is also a valid option.²⁴ That is, in fact, what the Authors suggest in the following section, which presents a primer on the pros and cons of each method in order to demonstrate aspects of the methods properly suited to teaching privacy law.

A. Case/Socratic Method²⁵

The most recognized and utilized teaching method in modern law schools is the case/Socratic method.²⁶ In fact, it is so closely intertwined with the profession that it is nearly synonymous with legal education.²⁷ This discussion begins with the case/Socratic pedagogy because it addresses the core teaching method of most law schools' initial phase of instruction.²⁸

Functionally, the case/Socratic method is the simplest to employ. First, casebooks illustrate the rules of law, allowing students to draw upon those rules to form conclusions based upon hypothetical situations posed by the professor.²⁹ Second, the case/Socratic method may be used in a large class, allowing the teacher control over the class and discussion.³⁰ Finally, the case/Socratic method is relatively easy for the teacher to update through the addition of recent significant cases once the initial materials have been collected.³¹

²² James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods In Legal Education*, 32 GONZ. L. REV. 389, 398 (1996-97).

²³ Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 3-4 (1996).

²⁴ *Id.*

²⁵ See Eagar, *supra* note 22, at 399 ("The original purpose of the case method and accompanying Socratic questioning . . . [is] to teach students how to 'think like a lawyer.'"). Consequently, the case and Socratic methods operate symbiotically. *Id.* For purposes of this discussion, the methods used together will be referred to as the case/Socratic method.

²⁶ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 23 (2007).

²⁷ *Id.*

²⁸ *Id.* at 47.

²⁹ Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 414 (1997).

³⁰ *Id.* at 403.

³¹ Eagar, *supra* note 22, at 403.

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Proponents of the case/Socratic method tout its ability to teach students how to “think like a lawyer,” focusing on the analysis of legal theory.³² The “critical tactic of the method is to seek continual clarification of a proposition or definition by testing it with alternative conflicting possibilities.”³³ While the case/Socratic method has remained entrenched in legal education and dominates law teaching, its limitations are well documented.³⁴

Critics of the case/Socratic method argue that while it does teach some of the skills needed by lawyers, using it exclusively neglects other practical “lawyering” skills.³⁵ When so much of a legal education is based on a single pedagogy, it can create an imbalance by focusing on the content of individual cases rather than the larger legal theory or principle.³⁶ Detractors of this method also claim that since participation of the student is an essential feature of this method, the reality of class size (law school classes are often quite large) and the resulting diminished participation by each student greatly hinders its effectiveness.³⁷ Although the case/Socratic method sometimes is used to demean or degrade students, it appears that the more abusive interrogations have declined; however, it is recognized that this method may hinder female participation in class discussion.³⁸

The case/Socratic method has many strengths, but it also has many weaknesses, particularly when used as an exclusive teaching method. Some professors, like the Authors here, advocate supplementing the method with other forms of active learning.³⁹

Legal scholars who advocate moving away from the case/Socratic method claim that by making legal learning more “realistic, concrete and varied . . . the concepts are often made more understandable by example.”⁴⁰ These advocates claim that utilizing the case/Socratic method is counter to many important strategies of effective teaching because it is premised upon challenging every student response.⁴¹

³² Bateman, *supra* note 29, at 401.

³³ Eagar, *supra* note 22, at 399 (quoting June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1013 (1989)).

³⁴ Friedland, *supra* note 23, at 28.

³⁵ Eagar, *supra* note 22, at 400.

³⁶ SULLIVAN ET. AL., *supra* note 26, at 51.

³⁷ Eagar, *supra* note 22, at 401.

³⁸ Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1554 (1993).

³⁹ Eagar, *supra* note 22, at 403.

⁴⁰ Sarah E. Thiemann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 34 (1998).

⁴¹ *Id.* at 21.

Additionally, casebooks focus on the outcomes of cases, not on solving specific problems.⁴²

Using the case/Socratic method alone seems particularly ineffective in the context of teaching privacy in the modern age, especially when considering how technology has impacted the exercise of those rights. The story of Nadya Suleman presents just one example of how technology has so altered an established practice that it effectively calls personal rights into question in a way not contemplated by established case law. Without more than Socratic questioning, students will not be able to move beyond the rules of their casebooks.

B. Textbook and Lecture

As an alternative to the case/Socratic method, some scholars suggest the textbook and lecture method, particularly during the second and third years of law school.⁴³ The concept of the textbook and lecture method is fairly simple—textbooks are written to “systematize and summarize course content, combined with problems.”⁴⁴ The content of the textbook is then discussed in a classroom setting.⁴⁵

The case/Socratic method utilizes actual edited opinions from cases and is premised on the idea of surprise and thinking on one’s feet.⁴⁶ In contrast, the textbook and lecture method provides and conveys the material in a way that sets forth essential rules and is arguably similar to the information in supplemental materials and commercial outlines often purchased and used by students.⁴⁷

Critics of the textbook and lecture method assert it is often considered a dull method of teaching and is “probably the least effective method in helping students to retain information and develop a practical level of understanding.”⁴⁸ Yet in the context of teaching privacy law, the textbook and lecture methodology presents limitations similar to those of the case/Socratic method. The inert nature of the textbook, which simply summarizes and organizes course content, cannot address the dynamic nature of this evolving area of law.

⁴² See John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the Maccrate Report’s Recommendations for Curricular Reform*, 1 CLINICAL L. REV. 363, 384 (1994).

⁴³ Eagar, *supra* note 22, at 403.

⁴⁴ *Id.* at 409.

⁴⁵ *Id.*

⁴⁶ Myron Moskovitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 250 (1992).

⁴⁷ Eagar, *supra* note 22, at 409.

⁴⁸ *Id.* at 410.

C. *Problem Method*

Another teaching method used in law schools is the problem method. This method has three essential features. The first aspect is the problem, which “involves several issues cutting across several cases and statutes . . . and is meant to resemble a complex situation that a lawyer might face in practice.”⁴⁹ Regardless of whether the problem is framed in the context of litigation, negotiations, drafting, or planning, the first step is to develop a defined set of goals.⁵⁰ Second, the student must approach the problem from a “specified role, such as advocate, judge, advisor, planner or similar role.”⁵¹ Third, “the problem is the focus of the class discussion,” allowing the students to utilize cases, statutes, and other tools to analyze the problem from the assigned perspective.⁵²

Advocates of the problem method point to the benefits of having students apply a full range of abstract principles.⁵³ Proponents claim that the problem method incorporates the advantages of the case/Socratic method in terms of legal reasoning because it includes issue recognition and analysis, decision-making, and identifying the relationship between theory and practice.⁵⁴ More importantly, advocates assert that the problem method surpasses the case/Socratic method by teaching students to ask relevant questions that lead to problem-solving and actionable decisions.⁵⁵ In other words, the problem method is effective because it demonstrates to students that by asking the right questions and applying pertinent data to new situations, they learn how to find their own answers to legal problems, rather than by simply reading how others found answers.⁵⁶ Professors contend that the problem method develops a greater student comfort level with both statutory interpretation and case analysis.⁵⁷ Consequently, the problem method has been found to be particularly well-suited for code-oriented courses.

When considering how to apply the problem method to teaching a rapidly changing subject like privacy and technology, it is clear that the presentation of a problem is created by the modern factual situation at

⁴⁹ Moskowitz, *supra* note 46, at 250.

⁵⁰ Michael P. Allen, *Making Legal Education Relevant to Our Students One Step at a Time: Using the Group Project to Teach Personal Jurisdiction in Civil Procedure*, 27 *HAMLIN L. REV.* 133, 136 (2004).

⁵¹ Moskowitz, *supra* note 46, at 250.

⁵² *Id.*

⁵³ Allen, *Making Legal Education*, *supra* note 50, at 139.

⁵⁴ Eagar, *supra* note 22, at 404.

⁵⁵ SULLIVAN ET. AL., *supra* note 26, at 199.

⁵⁶ See Moskowitz, *supra* note 46, at 245.

⁵⁷ Allen, *Making Legal Education*, *supra* note 50, at 145.

issue. However, because constitutional rules of law cannot be stated succinctly in a manner that allows immediate application to a limited fact pattern, issues are not easily crafted into a neatly resolved problem. That being said, the discussion element of the method can be an invaluable tool if integrated into a lesson with case method.

D. Role Play/Simulation

A similar method used in law school classrooms is role play/simulation.⁵⁸ This method is used more extensively in clinical legal education, but can be used effectively in the classroom.⁵⁹ “The use of simulation is based on the maxim that students learn best not [from] what they hear or see, but [by] what they do.”⁶⁰ Proponents of this method claim it encourages creative thinking and active participation while minimizing anxiety.⁶¹ Advocates claim that case simulations integrate theory, doctrine, and practice—students use all of these skills when they participate fully in the simulation, thereby gaining practical training in creative problem solving, legal research, negotiation skills, and litigation skills.⁶² In other words, this method is designed to train professionals and is more similar to education paradigms utilized in other professional schools such as medicine and business.⁶³

Concerns about role play/simulation as a method arise in course coverage and the ability of the class to cover the necessary content to effectively teach the subject matter.⁶⁴ For teaching privacy law, role play/simulation is ineffective because the subject matter is complex and students need basic knowledge of applicable law. Without the integration of the casebook method, particularly the study of seminal cases establishing the right to privacy, students cannot understand the evolution of the right from Justice Harlan’s dissent in *Poe v. Ullman*⁶⁵ to our modern conception.

E. An Alternative

Elements of the case/Socratic method combined with aspects of the problem method and structured class discussion provide the best combination of elements for teaching privacy in the context of rapidly

⁵⁸ Thiemann, *supra* note 40, at 35.

⁵⁹ Eagar, *supra* note 22, at 407.

⁶⁰ *Id.*

⁶¹ Thiemann, *supra* note 40, at 35–37.

⁶² Eagar, *supra* note 22, at 408–09.

⁶³ Moskovitz, *supra* note 46, at 241.

⁶⁴ Eagar, *supra* note 22, at 408.

⁶⁵ *See generally* *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

advancing technology. Additionally, certain considerations about modern law students require this creative combination of teaching methods.⁶⁶ The guideposts set forth in Part IV demonstrate how the application of these methods prepares law students to address modern privacy issues, including how technology is redefining our personal rights and changing the allocation of collective resources.

IV. TEACHING PRIVACY IN THE AGE OF OCTOMOM— A LESSON PLAN FOR
COMBINING ELEMENTS OF CASE / SOCRATIC METHOD WITH STRUCTURED
CLASS DISCUSSION

A. *Return to the Roundtable*

Early textbooks in the field of legal gender studies (and therefore ultimately privacy) included not only cases, but also historical and sociological materials and even magazine articles.⁶⁷ Discussion and integration using the problem solving method were necessary in the early studies because this allowed scholars to theorize about issues of equality and autonomy.⁶⁸ Questions were numerous, and cases answering them were few; students had no alternative to working together to find solutions to problems. As cases worked their way through the courts and the law developed, the teaching style in this subject area changed as well.⁶⁹ With more court opinions addressing specific fact patterns and issues, the focus shifted away from discussion of the large-scale issues to analysis of the decisions and dicta in the cases, particularly as these lawsuits broke new ground and laid the foundation for privacy rights.⁷⁰ Feminist legal scholars began to scrutinize the language of the cases in an attempt to discern the direction of trends in the law.⁷¹ As these academics concentrated on the activities of the women's movement and the results of their litigation campaigns, teaching moved away from theory and discussion to one of analyzing social equality as legal demands.⁷²

Just as it once was with women's issues and the law, many complicated issues of technology and privacy simply have not yet been decided. At the beginning of this process, we lack answers and find it

⁶⁶ See *infra* Part IV.B.

⁶⁷ Kerber, *supra* note 7, at 434.

⁶⁸ Cynthia Grant Bowman et al., *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 44-45 (2006).

⁶⁹ *Id.* at 45.

⁷⁰ *Id.* at 45-50.

⁷¹ *Id.* at 51.

⁷² Cynthia Grant Bowman, Dorothy Roberts & Leonard S. Rubinowitz, *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 45 (2006).

necessary to return to the roundtable, asking law students to think creatively and to think ahead of the cases we know will soon populate the pages of casebooks.

Understanding privacy as a legal concept is not a simple undertaking. Some scholars have proposed teaching the law of personal liberties as a separate Advanced Constitutional Law class, premised on the idea that a student must first have some understanding of constitutional law before undertaking study of privacy.⁷³ To understand privacy, students must understand due process, fundamental rights and equal protection, and free expression.⁷⁴ Learning at the roundtable affords students the opportunity to more fully understand advanced concepts and to move beyond the basics to apply the concepts to new situations created by new technologies.

In contemplating the Nadya Suleman story, including the role technology played in creating these issues, a return to the use of discussion and thoughtful questioning as a tool of analysis provides a dynamic and fluid device to consider this rapidly changing area. Additionally, this method allows incorporation of other areas of privacy rights.

B. Consider the Age and Experience of Modern Law Students

To effectively teach law students, professors must understand the assumptions they bring to the analysis. Those assumptions condition their willingness and ability to consider new theory. Some assumptions may be false or inapplicable; some may require reexamination in light of present circumstances. Modern American law students increasingly subscribe to the widespread assumption that their bodies are their own and therefore protected, whether as a "right to bodily integrity," or a "right to privacy," or a "right to autonomy."⁷⁵ Of course, just because modern law students "know" these truths does not mean they were always so clear.

Roe v. Wade, "the watershed for both U.S. abortion rights and the right to privacy,"⁷⁶ is perhaps the most debated privacy case in America, so understanding how modern law students understand *Roe* is essential to effectively teaching privacy. The following discussion examines

⁷³ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* xix (2d ed. 2004).

⁷⁴ *Id.*

⁷⁵ See Jonathan Herring & P.-L. Chau, *My Body, Your Body, Our Bodies*, 15 *MED. L. REV.* 34, 34 (2007).

⁷⁶ CATHARINE A. MACKINNON, *SEX EQUALITY* 1218 (2001).

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implications of modern law students' exposure to privacy issues, particularly *Roe*.

1. Consider the Students' Age

More than half of law students today were born after 1985—twelve or thirteen years after *Roe* was decided in 1973.⁷⁷ They have never experienced a world without the right of choice pronounced in *Roe*. Stated another way, more than half of tomorrow's lawyers have always experienced the issue of abortion in terms of a choice, an opportunity (whether morally right or wrong) guaranteed by a United States Supreme Court that recognizes a right of privacy. Whether pro-choice or pro-life, these future lawyers have never known a world in which Americans did not have a certain zone of privacy that cannot, absent certain circumstances, be disturbed by the state.⁷⁸ Finally, and most importantly, the limits on governmental interference with abortion (and therefore citizens' privacy) have been specifically defined by case law that reinforces these students' underlying assumption that certain choices and activities are, at least at some points in time, free from governmental interference.⁷⁹

2. Consider How the Students Have Debated Privacy Because that Debate Shapes How They Approach and Perceive the Issue

The rhetoric law students heard as they matured shapes how they approach privacy issues, so some attention to politicized debate is necessary to properly teach modern law students about the intersection of law and technology.

The world that modern law students "know" and their exposure to abortion issues focuses primarily on rhetoric aimed to reframe *Roe* and to make political and religious discussions out of the right to privacy.⁸⁰ On one side of the debate, pro-life advocates adhere to a principle of moral

⁷⁷ Phil Handwerk, *Analysis of Law School Applicants by Age Group*, Law School Admissions Council, Sept. 2007, <http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=%2fPrivate%2fMainPage2.aspx>.

⁷⁸ M.N.S. Sellers, *An Introduction to the Value of Autonomy in Law*, 1 IUS GENTIUM 1, 8 (2007).

⁷⁹ *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁰ Paige Nelson, Note, *Let the People Speak: Terrorism, the Abortion Debate, and Reduction of the Jury Award in Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 92 IOWA L. REV. 677, 682–83 (2007); Karen F.B. Gray, Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399, 399–400 (1990).

opposition to abortion at any stage in gestation.⁸¹ They argue that all human lives have unique value, regardless of the stage of development or physical health.⁸² The claims are often based on religion and encompass such arguments as the “Sanctity of Life Principle.”⁸³ In addition, pro-life advocates put forth several other arguments for moral and religious opposition to abortion. These arguments include, but are not limited to, “deprivation,” which argues that abortion deprives the fetus of a valuable future.⁸⁴ Others argue against “discrimination” – that by allowing abortions, we unjustly discriminate against the unborn by denying that fetuses have the same right to life as all, and thereby only valuing some lives over others, but not all lives equally. They argue this “valuation” is arbitrary, selective, and discriminatory.⁸⁵ Additionally, advocates of the pro-life position oppose abortion on the basis of “personhood,” claiming that abortion is morally wrong because the fetus is an innocent human being.⁸⁶

Proponents claim these arguments provide a moral filter through which abortion must be viewed, but they are essentially arguments that the rights of the fetus should be afforded more consideration, requiring reduction of the woman’s right to choose an abortion. Right to Life

⁸¹ John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES L. & MED. 3, 17 (2006) (citing JAMES C. MOHR, ABORTION IN AMERICA 34–35 (1978)). Professor Keown is a professor of Christian Ethics at Georgetown University and Visiting Professor of Law, Jurisprudence, and Bioethics at the John Paul II Institute for Marriage and Family, Melbourne, Australia. He is a noted author and scholar who has written extensively on euthanasia and “quality of life” issues. His writings have been cited in many United States Supreme Court decisions on cases involving the issues related to abortion.

⁸² William Robert Johnston, *Evaluation of the BGCT Christian Life Commission’s Abortion and the Christian Life* (2002), <http://www.johnstonsarchive.net/baptist/rptbgctc.html>.

⁸³ See John Coggon, *Problems with Claims that Sanctity Leads to ‘Pro-Life’ Law, and Reasons for Doubting it to be a Convincing Middle Way*, 27 MED. & L. 203, 204–05 (March 2008); see also John Keown, *Restoring Moral and Intellectual Shape to the Law after Bland*, 113 L.Q. REP. 481, 482–503 (1997) (presenting a brief explanation of the principle in ethics and law).

⁸⁴ See, e.g., Don Marquis, *Why Abortion is Immoral*, 76 J. PHIL. 183, 189–93 (1989) (arguing that individuals, including fetuses, who have “a future like ours,” have a right not to be killed).

⁸⁵ See, e.g., Ronald Reagan, *Abortion and the Conscience of the Nation*, HUMAN LIFE REV., Spring 1983, at 7, 10, available at <http://www.humanlifereview.com/reagan> (“[S]ocial acceptance of abortion . . . embrace[s] a social ethic where some human lives are valued and others are not. As a nation, we must choose between the sanctity of life ethic and the ‘quality of life’ ethic.”).

⁸⁶ See, e.g., Caroline Morris, *Technology and the Legal Discourse of Fetal Autonomy*, 8 UCLA WOMEN’S L.J. 47, 65–66 (1997) (anti-abortionists supported their claims of fetal personhood by the fetus’s possession of a soul, and on its human characteristics).

activists argue for firm moral opposition to the taking of life, defending the value of human life as an absolute.⁸⁷

These ideals and ideas about family and the origins of human life are couched in terms of concern for the unborn in arguments and legislation often aimed at overturning *Roe*.⁸⁸ As this movement has gained traction, its impact on students must be considered, for it has influenced state legislatures to adopt numerous measures to make it more difficult for women to obtain abortions, including rules against minors obtaining abortions without consent of their parents, waiting periods arguably designed to discourage patients from carrying out their choice, refusal to finance abortions with state funds, and limits on public hospitals' ability to provide abortion services.⁸⁹ This balancing of privacy and an individual's zone of control are the exact arguments that will inform debate over the issues in the Nadya Suleman story.

Pro-choice advocates argue that while all of these arguments are premised on the idea that life is supreme, they ignore the reality that resources are limited, including the resources to feed and care for each additional life. Pro-choice advocates contend that the pro-life argument incorrectly assumes that a woman's "decision" to carry an unwanted child to term has a limited impact on society and that unlimited resources are available to care for that child.⁹⁰ They contend that each additional child impacts not only the immediate woman/family, but also society as a whole, consuming scarce resources.⁹¹

⁸⁷ See, e.g., Coggon, *supra* note 83, at 204-05 (the doctrine of vitalism holds that life should be preserved no matter what cost and how much suffering it may cause).

⁸⁸ See Reagan, *supra* note 85.

⁸⁹ See, e.g., Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 835, 837-39 (1992) (upholding law requiring mandatory waiting periods, parental consent requirements, and state-scripted counseling requirements); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal regulations prohibiting family planning clinics from receiving Title X funds for counseling or giving referrals to women regarding abortion); Ohio v. Akron Ctr. for Health, 497 U.S. 502 (1990) (upholding an Ohio statute requiring minors to notify one parent or obtain a judicial waiver); Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989) (ruling the state need not commit any resources to facilitating abortions, and upheld a law restricting the use of public employees and facilities for abortions); Poelker v. Doe, 432 U.S. 519, 521 (1977) (holding that an indigent woman had no right to obtain a non-therapeutic abortion at a publicly funded hospital).

⁹⁰ See generally Carrie S. Klima, *Unintended Pregnancy: Consequences and Solutions for a Worldwide Problem*, 43 J. OF NURSE-MIDWIFERY, Nov.-Dec. 1998, at 483 (stating the need for abortions and that unintended pregnancies and their substantial human and dollar costs should be a priority for all countries).

⁹¹ *Id.* at 489 (discussing unintended pregnancy as a worldwide problem that affects women, their families, and society).

By understanding the rhetoric surrounding the most widely discussed privacy case, we begin to understand how law students approach the right to privacy.

C. *Use a Reliable Casebook to Teach the Current State of the Law*

Before students can be asked to apply principles of privacy law to novel situations created by technological advances, they must understand the current state of privacy law as well as its historical development. Casebooks are the best tools for presenting these facts, but most casebooks teach privacy as a series of rules for when the government can interfere with an individual's right to make certain choices. They address only the first step of analysis necessary to comprehend the issues at play in complicated fact patterns like those of the Nadya Suleman story. Therefore, we suggest utilizing a reliable casebook to teach students the current state of the law of privacy and how it evolved to ensure a proper foundation for the discussion suggested in Part IV.D.

Catharine MacKinnon's casebook *Sex Equality* is highly regarded. Its analysis is an example of how a casebook that thoroughly covers a subject area lays a foundation for examining the intersection of privacy and technology.⁹² What we refer to as the right to privacy was, of course, ultimately defined in the context of abortion in *Roe v. Wade*.⁹³

Discussing the development of the constitutional status of the right to privacy, Professor MacKinnon explains that "the first judicial step" in developing the right's foundation in substantive due process was Justice Harlan's dissent in *Poe v. Ullman*.⁹⁴ In *Ullman*, the Court found a challenge to a state's criminal law proscribing obtaining and using contraceptives was unripe because it had not been enforced against the plaintiffs.⁹⁵ MacKinnon explains:

Justice Harlan dissented in terms that became formative, concluding that 'a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.' Building on a previous Fourteenth

⁹² MACKINNON, *supra* note 76.

⁹³ 410 U.S. 113 (1973).

⁹⁴ MACKINNON, *supra* note 76, at 1086 (quoting *Poe v. Ullman*, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting)).

⁹⁵ *Ullman*, 367 U.S. at 523 (Harlan, J., dissenting) (cited in MACKINNON, *supra* note 76, at 1086).

Amendment case forbidding involuntary sterilization of prisoners convicted of some crimes but not others, he envisioned in the 'larger context' of the Fourteenth Amendment's Due Process Clause a guarantee of 'liberty' that extended well beyond the procedural.⁹⁶

Justice Harlan's dissent is important because it frames the question in terms of "consensual behavior having little or no direct impact on others."⁹⁷ This succinct statement is what we come to understand about privacy as ultimately described in *Roe*⁹⁸—effectively it is the foundation of how we now understand, and therefore teach, the modern right to privacy.

Our current understanding of privacy is further illustrated by rules we glean from the repeal of anti-contraception laws and the Supreme Court's opinion in *Griswold v. Connecticut*.⁹⁹ Specifically, in *Griswold* the "Supreme Court discovered that 'zones of privacy' emanate[d] from several guarantees in the Bill of Rights."¹⁰⁰ In quoting *Griswold*, Professor MacKinnon suggests we accentuate the following:

This law...operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation...[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. [Cases under the First, Fourth, fifth, and Ninth Amendments] bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goal by means having a maximum destructive impact upon that relationship.¹⁰¹

⁹⁶ MACKINNON, *supra* note 76, at 1086 (citations omitted).

⁹⁷ *Id.* at 1087 (quoting *Ullman*, 367 U.S. at 546 (Harlan, J., dissenting)).

⁹⁸ 410 U.S. 113 (1973).

⁹⁹ 381 U.S. 479 (1965).

¹⁰⁰ MACKINNON, *supra* note 76, at 1217.

¹⁰¹ *Id.* at 1217 (quoting *Griswold*, 381 U.S. at 482-86).

The next step in defining the new right of privacy “discovered” in *Griswold* came in the Court’s decisions in *Stanley v. Georgia*¹⁰² and *Eisenstadt v. Baird*.¹⁰³ As Professor MacKinnon points out:

Then [the Court] ruled in *Stanley v. Georgia* that a state’s power to regulate obscenity “simply does not extend to mere possession by the individual [of obscene materials] in the privacy of his home,” and invalidated under the Equal Protection Clause a state law that gave differential access to contraception to married and unmarried people otherwise similarly situated. The zenith of this line of authority was reached in *Roe v. Wade*’s invalidation of a state criminal abortion law. In *Roe*, the right to personal privacy, settled in the “liberty” component of the Due Process Clause, was held “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁰⁴

Professors teach law students that these post-*Griswold* cases striking down state contraceptive laws essentially blazed a path to abortion “choice” by setting up arguments based on the reasoning that if a woman has the right to use contraceptives, but these contraceptives were not available, or they were not effective to prevent pregnancy before the fact, then abortion ought to be available after the fact.¹⁰⁵

Professor MacKinnon again reinforces the lesson that privacy rights are born in *Roe* and succinctly sums up the ultimate source for how we understand and teach modern privacy when she states:

[T]he watershed for both U.S. abortion rights and the right to privacy is the Supreme Court ruling in *Roe v. Wade*, in which the Court held the right to choose abortion is a “liberty” protected in its “privacy” from unwarranted governmental intrusion by the substantive due process component of the Fourteenth Amendment. Striking down Texas’s criminal abortion law, *Roe* also held that the state had no compelling interest in

¹⁰² 394 U.S. 557 (1969).

¹⁰³ 405 U.S. 438 (1972).

¹⁰⁴ MACKINNON, *supra* note 76, at 1088 (citations omitted).

¹⁰⁵ On the pro-choice movement, see generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984); ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES* (2001); SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* (1991).

legislating to preserve fetal life until after viability, and that the fetus is not a “person” within the meaning of the Fourteenth Amendment.¹⁰⁶

Roe stands for the rule that while it is necessary to consider the impact on others when we exercise our liberties (the right to abortion in this case), those “others” must be parties within the state’s protection.¹⁰⁷ Until a fetus is viable, it is deemed not within the state’s protection, and the state cannot interfere with the mother’s rights.¹⁰⁸ Generally, we may exercise our rights without hurting others; because the fetus is not a “someone else,” women can exercise their rights without the state’s interference.¹⁰⁹

Professors teach the simple rule that when dealing with government interference in decisions concerning our private bodies, the rights of the individual trump the government’s interest.¹¹⁰ The idea that a woman is the ultimate master of her own body and personal space is underscored in cases involving the rights of the father of a fetus who claims he has a right to notice, a right to an opinion regarding the choice of abortion, or an option to raise the child himself.¹¹¹ For example, Professor MacKinnon instructs that in *Planned Parenthood of Central Missouri v. Danforth*¹¹² “the U.S. Supreme Court held that the state cannot constitutionally give husbands a veto power over their wives’ first trimester abortion decision because the state does not itself have this power.”¹¹³

Professor MacKinnon’s analysis of the import of *Roe*, and the lesson’s pertinence to discussions of the Suleman facts, is not unique. In fact, most texts teach modern law students the cases in a similar manner. The casebook authored by William Eskridge, Jr. and Nan Hunter, entitled

¹⁰⁶ MACKINNON, *supra* note 76, at 1218 (citations omitted).

¹⁰⁷ See Melissa Neiman, *Motorcycle Helmet Laws: The Facts, What Can Be Done to Jump-Start Helmet Use, and Ways to Cap Damages*, 11 J. HEALTH CARE L. & POL’Y 215, 239 (2008) (stating that the liberal philosophy of helmet regulation is that riding without a helmet does not affect others and thus belongs in the “private, unregulated sphere”); James Griffin, *The Human Right to Privacy*, 44 SAN DIEGO L. REV. 697, 706 (2007) (“For instance, it is the form of John Stuart Mill’s principle of liberty: freedom of action unless harm to others.”).

¹⁰⁸ *Roe v. Wade*, 410 U.S. 113, 163 (1973).

¹⁰⁹ ROBERT H. BLANK, *MOTHER AND FETUS: CHANGING NOTIONS OF MATERNAL RESPONSIBILITY* 99–100 (1992).

¹¹⁰ See Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 189 (2009).

¹¹¹ See Christopher Bruno, *A Right to Decide Not to be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141, 142–44 (2008).

¹¹² 428 U.S. 52 (1976).

¹¹³ MACKINNON, *supra* note 76, at 1225 (quoting *Danforth*, 428 U.S. at 70).

Sexuality, Gender, and the Law, presents *Roe* similarly, noting that it recognized a “fundamental right” of a woman to choose what and how her body is used.¹¹⁴ Citing the argument of *Roe*’s attorney Sarah Weddington that “because pregnancy to a woman is one of the most determinative aspects of her life, it is of fundamental importance that she have the freedom to terminate it.”¹¹⁵ Similarly, in Mary Jo Frug’s *Women and the Law*, editors Judith Greenberg, Martha Minow, and Dorothy Roberts present *Roe* in the context that an individual’s body, for both men and women, is the foundation of one’s personhood, an important source of self-knowledge, and as an important boundary between themselves and others.¹¹⁶ Additionally, the editors discuss cases that present legal reform efforts post-*Roe*, premised on the claim that women should have more control of their own bodies.¹¹⁷ In *Gender and Law and Introduction to Feminist Legal Theory*, Katharine Bartlett, with Deborah Rhode and Martha Chamallas, respectively, follows MacKinnon’s approach by teaching privacy law as a personal right to be protected from government intrusion.¹¹⁸

These excellent casebook presentations of the current lines of privacy law cannot alone answer the questions raised by the Suleman facts because these facts could not have been anticipated. However, that means only that the texts must be supplemented in order to address the impact of technology on privacy.

To be clear, we do not suggest that a casebook author should be expected to anticipate all such future questions, and it is not practical to suggest casebooks be repeatedly revised to attempt to specifically ask the questions necessary to teach students to think beyond the current law. We do suggest, however, that legal education can present the rules of case law in a way that welcomes unanswered questions.

The remainder of this Article presents four guideposts to frame a discussion of any modern issue of the intersection of technology and privacy. The Nadya Suleman example is used to demonstrate the application of the guideposts for enhancing traditional case/Socratic teaching of the rules of law set forth in the preceding discussion.

¹¹⁴ See ESKRIDGE & HUNTER, *supra* note 73, at 30-31.

¹¹⁵ *Id.* at 30.

¹¹⁶ JUDITH G. GREENBERG ET AL., *WOMEN AND THE LAW* 649 (3d ed. 2004).

¹¹⁷ *Id.* at 649-51.

¹¹⁸ KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 852-54 (4th ed. 2006); MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 45-53 (2d ed. 2003).

D. *Four Guideposts for Classroom Discussion*

With history as our best example, we see that when questions of personal liberties are emerging faster than case law can answer them, the discussion roundtable provides the framework necessary to study those issues.¹¹⁹ We offer four guideposts for discussion as a framework for teaching law students how to examine the intersection of privacy and technology. Although not intended to be exhaustive, these guideposts can build on an understanding of the law achieved through case/Socratic method and should produce thoughtful discussion that will prepare law students to solve tomorrow's privacy dilemmas.

1. Identify the Facts and the Role Technology Played in Creating the Situation

Students should begin with a summary of the relevant facts. By way of example, a summary of the Nadya Suleman facts follows.

After in vitro fertilization, thirty-three-year-old divorced and single mother Nadya Suleman gave birth to eight children on January 26, 2009 in Bellflower, California.¹²⁰ She already had six children, ranging in age from two to seven. All fourteen of her children were conceived through in vitro fertilization, the last eight using remaining embryos from the previous in vitro procedure.¹²¹ A team of 46 doctors, nurses and surgical assistants, stationed in four delivery rooms at the Bellflower Medical Center in California, delivered the infants.¹²² She gave birth to two girls and six boys, who joined her six other children.¹²³ Medical experts estimated the cost of delivering the infants and caring for them until they are healthy enough to leave the hospital at \$1.5 million to \$3 million.¹²⁴

¹¹⁹ See *supra* Part II (discussing the structure and content of seminars on law, privacy, and gender before a body of case law had developed).

¹²⁰ Associated Press, *California: And Babies Make 14*, N.Y. TIMES, Jan. 31, 2009, at A14.

¹²¹ Randal C. Archibold et al., *Octuplets, 6 Siblings, and Many Questions*, N.Y. TIMES, Feb. 4, 2009, at A14.

¹²² Dan Childs et al., *Octuplets' Mom: Can She Afford to Raise 14 Kids?*, ABC News, Feb. 2, 2009, <http://abcnews.go.com/Health/WomensHealth/story?id=6774471&page=1>.

¹²³ Archibold et al., *supra* note 121.

¹²⁴ MSNBC.com staff, *Octuplets' mom on food stamps, publicist says*, NBC Today Show, Feb. 2, 2009, <http://today.msnbc.msn.com/id/29110391/from/ET/>.

This is not the first time that Ms. Suleman received in vitro fertilization. Ms. Suleman had spent at least \$24,000 on her first in vitro fertilization procedure, which resulted in the birth of her first four children.¹²⁵ After receiving an inheritance from her aunt, Ms. Suleman used an undisclosed amount to conceive twins through in vitro fertilization.¹²⁶ Frozen eggs left over from the second pregnancy were used to conceive the octuplets.¹²⁷ In all, West Coast IVF in Beverly Hills, California performed six in vitro fertilization procedures on Ms. Suleman.¹²⁸

In the last in vitro fertilization procedure, Ms. Suleman's doctor believed that only one or two embryos would implant and grow. Instead, all six proved viable and two of them split into twins, resulting in octuplets.¹²⁹ When Ms. Suleman learned she was expecting multiple babies, doctors gave her the option of selectively reducing the number of embryos, but she declined.¹³⁰ In a delivery by cesarean section that lasted less than five minutes, doctors, who anticipated seven children, were surprised to discover an eighth child.¹³¹

No law dictates how many embryos can be placed in a mother's womb.¹³² Even so, fertility doctors generally follow guidelines that recommend doctors take account of the mother's physical and mental condition and home life.¹³³

As of the date of this writing, Ms. Suleman is unemployed and is collecting \$490 in food stamps per

¹²⁵ Associated Press, *Suleman Worked Hard for Those Babies*, NBC Miami News, Apr. 10, 2009, http://www.nbcmiami.com/news/us_world/Suleman-Worked-Hard-for-those-Babies.html.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Sharon Otterman, *Mother of Octuplets Names Fertility Clinic*, N.Y. TIMES NEWS BLOG, Feb. 9, 2009, <http://thelede.blogs.nytimes.com/2009/02/09/octo-mom-names-fertility-clinic/?emc=eta1>.

¹²⁹ Mike Celizic, *First look: Octuplet mom shows off babies*, NBC Today Show, Feb. 9, 2009, <http://today.msnbc.msn.com/id/29086126/from/ET/>.

¹³⁰ Jessica Garrison et al., *Mother of octuplets already has twins, four other children*, L.A. TIMES, Jan. 30, 2009, <http://www.latimes.com/news/la-me-octuplets30-2009jan30,0,6314319.story>.

¹³¹ *Id.*

¹³² Associated Press, *California Medical Board probes octuplet birth*, NBC Today Show, Feb. 6, 2009, <http://today.msnbc.msn.com/id/29057426/from/ET/>.

¹³³ *Id.*

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week.¹³⁴ Following an on-the-job injury in 1999, she has collected more than \$165,000 in state disability payments.¹³⁵ Although she is weighing book, television, newspaper, and movie requests,¹³⁶ she has also been lambasted by talk-show hosts, fertility experts, and even her own mother, whose hands are full caring for Ms. Suleman's other children.¹³⁷

The first of the four guideposts for analysis is perhaps the most literal. Students should be asked to list exhaustively the specific ways in which technology has contributed to the fact pattern at issue.

Analyzing the Suleman fact pattern, technological advances create and/or affect the following:

- The process of in-vitro fertilization;
- Implantation of multiple frozen embryos;
- Multiple embryos successfully implanting;
- Mother's decision not to terminate any of the eight embryos after successful implantation;
- Prenatal advances that allow term pregnancy of octuplets;
- Delivery of octuplets; and
- Healthcare advances in the care of multiples.

After identifying the specific roles technology played in creating the facts of the situation, students should be encouraged to identify related issues or questions.

2. Consider Who Should Resolve the Issues Created by the Particular Intersection of Technology and Privacy

Law professors usually direct students to case law to find answers to legal issues. In the arena of privacy law, however, it is appropriate to question whether the judicial branch is the branch best placed to answer the questions posed. Students will consider *who should resolve* the issues they identified after reviewing the facts.

Some authors have suggested that American courts "lack the institutional capacity to easily grasp the privacy implications of new technologies they encounter."¹³⁸ Some assert that judges are not

¹³⁴ *Supra* note 124.

¹³⁵ *Id.*

¹³⁶ Archibold et al., *supra* note 121.

¹³⁷ Associated Press, *Octuplets mom getting outrage rather than gifts*, NBC Today Show, Feb. 3, 2009, <http://today.msnbc.msn.com/id/29002731/>.

¹³⁸ See generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 858 (2004).

properly suited to define privacy when new technology is involved because “[j]udicially created rules also lack necessary flexibility; they cannot change quickly and cannot test various regulatory approaches.”¹³⁹ Beyond these arguments, serious constitutional implications are involved in determining who should decide these issues.

In their book *Judicial Dictatorship*, William J. Quirk and R. Randall Bridwell remind us that law professors should be asking not only how the Supreme Court might rule on a given fact pattern, but also whether the Supreme Court should be answering the question at all.¹⁴⁰ Professors Quirk and Bridwell suggest:

The traditional view was that the separation of powers made the legislature and executive responsible for change and the Court the guardian of continuity and stability. The Court, however, over the past thirty years, has made itself the major agent for change—one that operates without democratic check to accomplish ends that could not be achieved by democratic process.¹⁴¹

Students should thoughtfully consider which branch of government should determine the limits of privacy or, in the Suleman case, whether any protection guarantees a woman’s right to conceive multiple children with the assistance of medical technology. Questions to be considered are: Is a profession or professional entity involved? Is that entity or profession regulated by a state agency? Should that agency or the legislature be defining the rights and roles?

If the courts should not answer the questions raised by the intersection of privacy and technology, then who should?

Some argue that executive agencies are more appropriate to resolve certain issues because they are more accountable to the people than are federal judges.¹⁴² Applying this logic, students may wish to discuss whether the health and health policy aspects of the Suleman example suggest that executive agencies ought to regulate prospective mothers’

¹³⁹ *Id.* at 859.

¹⁴⁰ See generally WILLIAM J. QUIRK & R. RANDALL BRIDWELL, *JUDICIAL DICTATORSHIP* (1995).

¹⁴¹ *Id.* at xv.

¹⁴² Glen Staszewski, *Reason Giving and Accountability*, 93 MINN. L. REV. 1253, 1261 (2009) (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is. . . .”); see also REGAN, *supra* note 4.

fertility choices if those choices involve giving birth to multiple children. If welfare funds and health services are involved, perhaps executive agencies are best suited to regulate these matters.

Students should consider whether the legislative branch is the most appropriate for resolving the rights to use technology to mother multiple children. The legislative solution has often been rejected for privacy issues because "it is difficult to conceptualize privacy, especially for purposes of formulating policy."¹⁴³ Still others assert that the focus on judicial protection of privacy ignores Congress's success in defining and protecting privacy.¹⁴⁴ Considering all these views, students should be asked how they might draft a law defining privacy relative to technologically-assisted fertility and to identify the difficulties of legislating in this area.

In resolving this debate, law professors should ask students to consider additional factors, such as whether the mother's need for governmental assistance to raise children should make a difference in access to medical technology by which the children are conceived, born, and assisted in survival? Does this factor affect which body, if any, should be defining permissible actions?

Although the debate likely will be resolved, like so many before, in the courts, law students should examine which branch of government or what body is best suited constitutionally to resolve the issues created by a particular intersection of technology and privacy.¹⁴⁵

3. Assuming the Courts Will Resolve the Issues, Examine Cases That Provide Insight and Explore Theories of Constitutional Interpretation

Even realizing that case law does not provide the only source for resolution of these issues and that other branches are arguably

¹⁴³ REGAN, *supra* note 4, at 3 ("As a value, privacy is important, but as a goal for public policy, privacy remains ambiguous.").

¹⁴⁴ Kerr, *supra* note 138, at 856.

¹⁴⁵ See *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (stating the constitutional protection afforded to personal decisions relating to marriage and procreation); see also *Poe v. Menghini*, 339 F. Supp. 986, 992 (D. Kan. 1972). The court stated:

Even though not specifically mentioned in the Constitution, an individual has long been recognized to have retained his right to individual autonomy and privacy and that this right carries over into the marital relationship. Consequently, the Supreme Court has recognized the existence of a right to care for one's own health, to personal autonomy, to marry, to have offspring, to use contraceptives, to direct the upbringing and education of one's children, as well as the right to travel.

Id. (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

empowered to decide the issues, students must understand that case law continues to guide the resolution of such issues.¹⁴⁶ Unless there is a major shift, American courts will continue to resolve these issues of privacy.¹⁴⁷ Therefore, students need to identify specific cases or lines of cases that provide insight to analysis of the issue and to understand why the cases were decided as they were. This demonstrates the necessity of using the traditional casebook teaching method in conjunction with the roundtable discussion.

Professors have traditionally taught law students that:

[*Roe v. Wade*] held the right to choose abortion is a “liberty” protected in its “privacy” from unwarranted governmental intrusion by the substantive due process component of the Fourteenth Amendment. Striking down Texas’s criminal abortion law, *Roe* also held that the state had no compelling interest in legislating to preserve fetal life until after viability.¹⁴⁸

If this constitutional analysis is applied to situations like the Suleman scenario, law students will have to answer whether the substantive due process component of the Fourteenth Amendment also protects a woman’s right to conceive multiple children with the assistance of technology. If the state has no compelling interest in legislating to preserve fetal life, can it legislate to prevent conception of life or lives through medical assistance? Does it make any difference if the mother intends to conceive a single or multiple babies?

In deciding *Roe* and other cases like *Danforth*, the Court was not considering the facts students will be examining in this current exercise. Arguably, the Court could not have imagined the opinion in *Roe* being used to dissect a fact pattern involving the conception and birth of eight babies. Considering the technological advances at play here, one might ask whether the Court could have dreamed of the current process of in vitro fertilization, prenatal care that permits term pregnancy of octuplets, and neonatal care sufficient to allow multiple tiny babies to survive. It is not a new or simple question how to apply case precedent to decide later issues involving facts not remotely within the consideration of the original Court.

¹⁴⁶ ALICE FLEETWOOD BARTEE, *PRIVACY RIGHTS: CASES LOST AND CAUSES WON BEFORE THE SUPREME COURT* 195 (2006).

¹⁴⁷ *Id.*

¹⁴⁸ MACKINNON, *supra* note 76, at 1218 (citation omitted).

Two major theories—Originalism and the Living Constitution—seek to resolve this dispute over how to factor change into constitutional interpretation. Students should be exposed to both theories.

Originalism asserts that:

[w]hen the original Constitution was ratified, and when amendments were added to it over the course of years, a particular meaning was enacted, and judges are not given the authority to change that meaning. The role of a judge is to say what the Constitution does mean, not what it ought to mean; if change is needed, Article V sets out the procedure by which it can be amended. Allowing judges to have free rein to change the meaning of the Constitution to suit the perceived needs of the day takes sovereignty away from the American people and places it in the hands of an unelected judiciary. Adherence to original understanding, by contrast, prevents judges from imposing their own values. Originalists thus argue that constitutional cases should be decided according to our best guess as to how the ratifiers would have decided them. Judges should protect a right to abortion only if the ratifiers would have agreed that it existed. . . . Anything else, originalists say, is illegitimate (or even “activist”).

The standard argument for the living Constitution focuses on the fact that conditions and attitudes have changed greatly since the framers’ times. Living constitutionalists argue that the Constitution must be able to adapt to respond to current needs and problems rather than remaining frozen in time. Because the amendment process is so difficult and cumbersome, requiring a two-thirds majority in both the House and the Senate and then ratification by the legislatures of three-quarters of the states, living constitutionalists seem to view judicial modification of the Constitution with equanimity—a necessary evil, at the worst. Without judicial changes, they say, states would still be allowed to segregate schools, ban interracial marriage, and

exclude women from the practice of law, to give just a few prominent examples.¹⁴⁹

In his article *Abortion and Original Meaning*, Jack M. Balkin writes that when contemplating the constitutional basis for the decision in *Roe*, the “choice between original meaning and living constitutionalism is a false choice,” and he suggests an alternative approach.¹⁵⁰ Balkin first considers the critics of *Roe* who deride the decision under the theory of Originalism, claiming that the “right of privacy” is not specifically mentioned in the Constitution.¹⁵¹ These critics claim there is no constitutional basis as contemplated by the Framers and adopters of the Constitution for protection of a privacy right for a woman’s choice to have an abortion.¹⁵² In comparison, Balkin notes that the Living Constitution theory is rooted in the incorrect premise that interpretation based on original meaning will leave our Constitution inflexible and unable to meet the challenges brought on by a changing society as well as technology.¹⁵³

Balkin urges that both of these criticisms are wrong and offers a third option—that *Roe* is based on the “constitutional text of the Fourteenth Amendment and the principles that underlie it.”¹⁵⁴ He distinguishes between an analysis of the decision based on the *original meaning* of the constitutional text versus one based on *original expected application*.¹⁵⁵ Under Balkin’s interpretation of original expected meaning, he argues that even though the Framers did not expect or intend the Fourteenth Amendment to apply to abortion, they nonetheless intended that principles of equal protection and prohibition against class legislation that underlie the Fourteenth Amendment would support “anti-subordination” of one person’s rights over another’s and therefore a right to privacy.¹⁵⁶

Balkin rejects the assumption that faithfulness to the text means faithfulness to the original expected application.¹⁵⁷ Rather, he argues, “constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text.”¹⁵⁸ In other

¹⁴⁹ Kermit Roosevelt, *Originalism and the Living Constitution: Reconciliation*, ACS Issue Brief, July 8, 2007, <http://www.acslaw.org/node/5111>.

¹⁵⁰ Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007).

¹⁵¹ *Id.* at 291.

¹⁵² *Id.*

¹⁵³ *Id.* at 293.

¹⁵⁴ *Id.* at 292.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 293.

¹⁵⁸ *Id.*

words, Balkin claims that interpretation should look to original meaning and underlying principles and decide how best to apply them in current circumstances.¹⁵⁹ He calls this approach “text and principle.”¹⁶⁰

Whether we conclude Professor Balkin is correct, or not, this problem of changing circumstances, created by technological advances, is what makes the contemplation of different theories of constitutional interpretation so important. Asking students to consider how they view the Constitution and how that view affects the application to changing fact patterns furnishes them additional tools to deal with the changing way we exercise privacy rights.

Additionally, applying Balkin’s “text and principle” theory becomes particularly challenging when applying the theory to the Suleman facts. Balkin’s argument—that the right of privacy is founded in the Fourteenth Amendment principle of anti-subordination of one person’s choice to another person’s choice—produces new and unique questions when these choices create overlapping zones of privacy. Students should ponder whether Balkin’s emphasis on “plasticity, contestability or fluidity of underlying principles” may result in inconsistent interpretations when circumstances change.¹⁶¹ In situations such as Nadya Suleman’s choice to utilize technology, we encounter the issue of whose choice should prevail when choices conflict? How should a court reconcile these rights? What considerations are relevant?

Discussing these two major schools of interpretation along with ideas like Balkin’s variation will prompt students to think about how they view the Constitution. They should be encouraged to think about how to interpret the document, what that means to the issue at hand, and what their own philosophy of interpretation will be.

4. Address the Implications for Allocation of Resources

In reviewing the Suleman facts, not only will the advances in medical technology that allowed conception and viable birth of these babies be important, but so will the costs to society of allowing the birth of these children; some of those costs are social but most often they will be calculated in terms of economic cost to the state and to others.¹⁶² In addition to new debates over the right to conceive and to give birth,¹⁶³ Suleman’s delivery of octuplets has led many to ask what right, if any,

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 388 (2007).

¹⁶² Edmondson, *supra* note 3.

¹⁶³ Archibold et al, *supra* note 121.

such a mother has to expect the assistance of state funds to assist her in caring for her children.¹⁶⁴ Therefore, in addition to addressing technology's creation of new factual scenarios, students must be encouraged to factor the role of limited resources into the equation.

The allocation of resources – that is, balancing needs and resources – is not a new analysis to law. In fact, Professors Emma Coleman Jordan and Angela P. Harris have compiled an entire textbook to help students examine these important issues. In *Economic Justice*, Professors Jordan and Harris focus on engaging students in understanding both economics and social justice.¹⁶⁵ Professors Jordan and Harris observe that the United States constitutional structure protects some rights – political and civil rights – but not others, namely social and economic rights.¹⁶⁶ In other words, the constitutional law is defined as protecting citizens from abuse of government power, but does not require the government to provide its citizens with anything.¹⁶⁷

Given scarce economic resources and with increasing numbers of Americans dependent on government economic assistance, disputes over an individual's consumption of resources through the exercise of personal rights are inevitable. The consumption of resources is perhaps the most striking example of modern conflict resulting from technology's narrowing of the space between an individual's choice and the impact of that choice on others.

To address the interplay of economics and privacy in the Suleman factual scenario, students should look to instances where the Supreme Court has recognized limitations, particularly in allocation of scarce resources. Examples of this include *Harris v. McRae*, in which the Supreme Court decided that freedom of personal choice does not require federal Medicaid programs to fund medically necessary abortions.¹⁶⁸ Rather, the Court said that “the freedom of a woman to decide whether to terminate her pregnancy” was guaranteed.¹⁶⁹ *Harris* marked the Court's attempt to circumscribe the constitutionally guaranteed freedom and subordinate it to the specific social goals and allocations.¹⁷⁰ In other words, *Harris* recognized a woman's right to *decide* whether to terminate her pregnancy, while also denying any obligation on the state to expend

¹⁶⁴ See Associated Press, *Octuplet Family Financial Burden May Fall on Taxpayers*, FOXNews.com, Feb. 11, 2009, <http://www.foxnews.com/story/0,2933,491204,00.html>.

¹⁶⁵ EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* vi (2005).

¹⁶⁶ *Id.* at 87.

¹⁶⁷ *Id.*

¹⁶⁸ 448 U.S. 297, 311 (1980).

¹⁶⁹ *Id.* at 316.

¹⁷⁰ *Id.* at 326–27.

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limited resources to pay for it—in effect, a barrier to carrying out her choice.¹⁷¹ Do the Suleman facts suggest a different conclusion?

Students may also wish to consider *C.K. v. Shalala*.¹⁷² In this decision, the Third Circuit Court of Appeals upheld a so-called “family cap” provision, which eliminated the standard increase in welfare funding provided for additional children born to an individual currently receiving welfare funding.¹⁷³ Claiming that the “family cap” was not an example of the state’s attempt to influence the behavior of men and women, the court found that the cap merely imposes a ceiling on benefits accorded through welfare funding, permitting any additional children to share in that “capped” family income. The court also held that the cap must be rationally related to a legitimate governmental purpose.¹⁷⁴ Further, the court stated that “it is well-settled that decisions about family composition, conception, and childbirth fall into a constitutionally protected zone of privacy.”¹⁷⁵ A state may not hinder an individual’s exercise of protected choices; however, the state is not obligated to remove obstacles that it did not create, including lack of financial resources.¹⁷⁶

For thirty years now we have understood that a woman’s right to make choices about her body, as recognized in *Roe*, is a constitutionally protected right of privacy within certain limitations.¹⁷⁷ With the advent of reproductive technology unforeseen when *Roe* was decided, we now must debate further questions: Does the right to privacy guarantee a woman the right to employ reproductive technology to bear multiple children, anticipating that the state will bear some of the cost of care for the children? If *Roe* is the best source for defining a woman’s right not to have children, is it the starting point to answer whether a woman has a right to have a child (or many children) supported by welfare funds? Tomorrow’s legal scholars will have to answer the question whether the extraordinary fact that Nadya Suleman conceived multiple fetuses with technological assistance, and/or in anticipation of state support, should play any role in defining those fetuses’ right to exist (as distinct from the single conventionally conceived fetus at issue in *Roe*). Is the ability of these children to contribute back to society a factor when deciding the

¹⁷¹ *Id.* at 316–17.

¹⁷² *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995), *aff’d sub nom.* *C.K. v. New Jersey Dept. of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996).

¹⁷³ *Id.* at 1015.

¹⁷⁴ *Id.* at 1013.

¹⁷⁵ *Id.* at 1014.

¹⁷⁶ *Id.*

¹⁷⁷ Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 280 (1992).

allocation of finite resources? And, again, which branch of government should answer these questions?

Our previous understanding of the delineation between zones of privacy and the allocation of limited resources is premised upon certain known truths, that is to say, that multiple births are rare and occur randomly. However, it is now possible for a welfare mother of six to employ technology in order to conceive an additional eight children and then present them to the state for support.¹⁷⁸ Technology and the allocation of scarce resources have collided; tomorrow's lawyers will have to clean up the debris.

V. CONCLUSION

Every day, individuals like Nadya Suleman make private decisions that will affect indefinable numbers of people both now and in the future. Disputes will be brought to governors, legislators, and judges, with requests for new rules about how and where one is guaranteed freedom to exercise private rights. The concept of privacy from *Griswold*, *Roe*, and their progeny will necessarily evolve, and these cases will frame new debates seeking answers to questions raised by the intersection of privacy and technology. Specifically, who decides and who pays?

Tomorrow's lawyers will be called upon to debate where private rights end, where the state's right to preserve resources begins, and which branch of government should draw the lines between the two. In order to prepare law students to participate in this process, law professors must look for new ways to teach law students how to frame the issues. Having explored the facts of the Nadya Suleman story by way of example and having presented an instruction format of four guideposts for structured class discussion, we call for a return to the seminar roundtable.

¹⁷⁸ Childs et al., *supra* note 122.