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Kathryn Venturatos Lorio

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IN VITRO FERTILIZATION AND EMBRYO TRANSFER: FERTILE AREAS FOR LITIGATION

by

Kathryn Venturatos Lorio*

Is the family primarily a biologic unit composed of a fertile male, a fertile female and children who are genetically theirs, or is the family an essentially consensual unit wherein a man and a woman who are married to each other agree to have and raise children, to regard themselves and the children as a family, and to give each other the comforts of material and emotional support, regardless of any genetic nexus?¹

THE birth of Louise Brown on July 25, 1978, prompted many to question the definition of "family" in a world of biological technology that could produce a human life conceived outside of the mother's body, or "in vitro." Although there were previous undocumented reports of the birth of in vitro babies,² and a number of ongoing studies and experiments with the process,³ the general public did not become acutely aware of the reality of a process that could unite a human egg and sperm in a laboratory until the birth of Louise Brown.⁴

* J.D., Loyola University. Associate Professor, Loyola University School of Law, New Orleans, Louisiana. The author wishes to acknowledge gratefully the invaluable research assistance of Mary Ann Darr and the Alfred J. Bonomo, Sr. Family for the bequest of scholarship funds for such research.

1. Grad, *Legislative Responses to the New Biology: Limits and Possibilities*, 15 U.C.L.A. L. REV. 480, 502 (1968).

2. Reilly, *In Vitro Fertilization—A Legal Perspective*, in GENETICS AND THE LAW 359, 360 (A. Milunsky & G. Annas eds. 1976). See also Smith, *Manipulating the Genetic Code: Jurisprudential Conundrums*, 64 GEO. L.J. 697, 708 (1976) (report of Dr. Douglas Bevis of Leeds Univ. of three successful implants of human embryos that had been fertilized in vitro, resulting in births of three children).

3. See Biggers, *In Vitro Fertilization, Embryo Culture and Embryo Transfer in the Human*, in ETHICS ADVISORY BOARD, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPENDIX: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER § 8, at 2 (1979) [hereinafter cited as EAB APPENDIX]. Biggers cites studies by Jacobsen, Sites, and Arias-Bernal in 1970; Mastroianni and Noriega in 1970; Brackett, Seitz, and Mastroianni in 1971; and Soupart and Strange in 1974, all conducted in the United States. He also mentions Edwards and Steptoe in England; Lopata and Associates in Australia in 1978; Petrov-Maslakov and Associates in Leningrad in 1973; and Castenen and Associates in Hamburg in 1977. *Id.*

4. See *Public Opinion Survey by the Gallup Poll, August 1978*, in 1961 GALLUP OPINION INDEX 1-5 (Dec. 1978), reprinted in EAB APPENDIX, *supra* note 3, § 21, at 1-5. In a Gallup Poll conducted Aug. 4-7, 1978, 93% of the persons surveyed indicated that they had either read or heard about the birth of Louise Brown and her conception outside of her mother's body. *Id.* at 1. The first American baby conceived in vitro was Samantha Steel, who was

Many approved of the in vitro procedure,⁵ viewing it as a possible option to couples wanting a child. Others voiced disapproval, citing the unnatural aspects of the procedure, its immoral implications, and the possible risks involved.⁶ Even among those who generally approved of the procedure, many thought it should not be readily available as a standard medical practice until further research on the safety of the procedure could be conducted.⁷

Thus, from her crib in Oldham, England, the Brown baby was raising the consciousness of people all over the world as the propriety of this new technology became a subject of universal concern. With the discussions came the debate as to the legal ramifications of in vitro fertilization and a realization that our legal system was not prepared to deal with this revolutionary means of creating life.⁸ To create a legal mechanism for dealing with in vitro fertilization tomorrow, an understanding of the process and the laws that affect it today is in order. Although various combinations of in vitro fertilization and embryo transfer are possible,⁹ this Article focuses

born in England on Oct. 2, 1981. See *U.S. Test-Tube Baby's Birth is Revealed*, Dallas Times Herald, Dec. 15, 1981, § A, at 18, col. 1.

5. *Public Opinion Survey*, *supra* note 4, at 4. 60% of those surveyed by Gallup indicated that they favored the in vitro procedure when the following question was posed to them:

Actually what the doctor did was to remove an egg from one of the woman's ovaries and fertilize it in the laboratory with sperm from her husband. The embryo was then implanted in her uterus. The embryo grew inside the woman and was born like other babies. Some people oppose this kind of operation because they feel it is "not natural". Other people favor it because it would allow a husband and wife to have a child when otherwise it would be impossible. Which point of view comes closer to your own?

Only 27% indicated opposition to the operation and 13% had no opinion. *Id.* Perhaps the phrasing of the question in terms of providing hope for a childless married couple and in focusing on the question of the naturalness of the procedure may have served to promote a positive response. See also Harris & Associates, *A Study of the Attitudes of American Women Toward the "Test-Tube" Procedure and Related Matters: Summary Section*, EAB APPENDIX, *supra* note 3, § 22, at 1-9. In a survey of 1501 American women conducted by Louis Harris and Associates for *Parents Magazine* shortly after the birth of Louise Brown, 52% of those interviewed indicated that they approved of the procedure, while 24% disapproved, and 24% were unsure. However, of 1501, 85% felt that "the procedure should be available to married couples who are otherwise unable to have children." *Id.* at 2. See Yarrow, *Test-Tube Babies: For Or Against?*, PARENTS, Nov. 1978, at 81.

6. Harris & Associates, *supra* note 5, at 7.

7. *Id.* at 2. 63% of all those surveyed would prohibit the use of the procedure until further testing to determine its impact upon birth defects. Only 24% desired to see the procedure immediately available.

8. See Note, *The "Brave New Baby" and the Law: Fashioning Remedies for the Victims of In Vitro Fertilization*, 4 AM. J.L. & MED. 319, 323-24 (1978). The author notes that no direct legal regulation of in vitro fertilization exists. *Id.* at 324.

9. The Ethics Advisory Board lists the following possible combinations of in vitro fertilization and/or embryo transfer:

- i. *In vitro* fertilization without embryo transfer
- ii. *In vitro* fertilization and subsequent embryo transfer
 - a. Transfer to the uterus of the donor
 - b. Transfer to the uterus of one or more other females
- iii. *In vivo* fertilization and subsequent embryo transfer
 - a. Fertilization by means of mating
 - b. Fertilization by means of artificial insemination

on the in vitro fertilization and subsequent embryo transfer either to the ovum donor or to another female.

I. THE PROCESS

In vitro fertilization is the process by which an oöcyte (or egg) is removed from the female, placed in a culture medium, and subsequently fertilized by sperm.¹⁰ After several days, when the fertilized egg reaches the blastocyst stage that coincides with the normal time of implantation, it is transplanted into the female's body,¹¹ resulting in embryo transfer. To retrieve the ripe oöcyte from the female donor, the donor is placed under general anesthesia and a laparoscopy is performed. The process involves making a small incision in the patient's abdomen and inserting into the incision a laparoscope, an instrument allowing the doctor to view the reproductive organs. Follicular fluid containing the mature follicle or egg is then aspirated from the ovary by use of a needle.¹² The fluid is mixed with pre-washed semen and diluted to simulate conditions found in the Fallopian tubes.¹³ A few hours after the mixture, fertilization may occur, and about twelve hours later, the embryo is transferred to a solution supportive of embryo development. Approximately two days later, the fertilized egg develops into an eight-celled embryo or blastocyst, and is transferred by means of a fine tube or cannula into the uterus of the carrier female for implantation in the uterine wall.¹⁴

Seven per cent of all couples in the United States are estimated to be infertile, one third of these because of the wife's sterility.¹⁵ Forty per cent, 560,000, of these women are sterile because of diseased oviducts or Fallopian tubes.¹⁶ Others are sterile because of their inability to produce eggs,¹⁷ and still others may be able to conceive, but are unable to carry a child to term.¹⁸ Various combinations of in vitro fertilization and embryo transfer could allow a number of these women to become mothers. For the woman with blocked or damaged Fallopian tubes, in vitro fertilization provides a

c. Ova of the mated or inseminated female

d. Donor ova introduced into the female prior to fertilization.

ETHICS ADVISORY BOARD, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER 3-4 (1979) [hereinafter cited as EAB CONCLUSIONS].

10. See generally Biggers, *supra* note 3, for a discussion of the biology and technique of in vitro fertilization.

11. See Note, *supra* note 8, at 319.

12. See Lopata, Johnston, Hoult & Speirs, *Pregnancy Following Intrauterine Implantation of an Embryo Obtained by In Vitro Fertilization of a Preovulatory Egg*, 33 FERTILITY & STERILITY 117 (1980), for a detailed description of the actual technique used for the in vitro fertilization and embryo transfer resulting in the birth of Candice Elizabeth Reed in Australia on June 23, 1980.

13. Comment, *Lawmaking and Science: A Practical Look at In Vitro Fertilization and Embryo Transfer*, 1979 DET. C.L. REV. 429, 432.

14. *Id.*

15. Biggers, *supra* note 3, at 35.

16. *Id.*

17. Comment, *supra* note 13, at 433.

18. *Id.*

means of by-passing the tubes completely in the process of uniting sperm and egg.¹⁹ This is the technique that produced Louise Brown, as well as the other documented cases of in vitro fertilized children.²⁰

In cases in which a couple desires a child, but the female is not ovulating, the process of embryo transfer could allow for the birth of a child by means of what may be referred to as the feminine counterpart to artificial insemination by donor.²¹ As with artificial insemination by donor, embryo transfer results in the birth of a child that is genetically the product of one member of the infertile couple and a third-party donor. The difference is that the donor contributes the egg, rather than the sperm, in the newer technique. The egg may be fertilized artificially by the sperm of the infertile woman's husband, either by direct insemination of the ovum donor or in vitro. The resulting blastocyst can subsequently be transferred to the uterus of the infertile wife, allowing her the experience of carrying the child and giving birth.²²

In addition to allowing the infertile woman to give birth, this procedure has the advantage of being much less demanding on the donor than surrogate motherhood. For, at best, the donor would merely have to undergo the artificial insemination, and a subsequent flushing out of her uterus with a catheter, neither of which involves surgery, or a great investment of time.²³ Furthermore, a woman who can produce eggs, but is unable to carry a child to term, could have a child that was genetically hers and her husband's by having her own egg fertilized by her husband's sperm. The egg then can be transferred to the uterus of a carrier²⁴ through a similar flushing and implanting procedure.

II. HISTORY OF THE IN VITRO FERTILIZATION PROCESS

Although in vitro fertilization in humans is a relatively recent phenomenon, reports of such conceptions in rabbits and guinea pigs are approximately one hundred years old.²⁵ Likewise, the report of the transfer of an

19. Biggers, *supra* note 3, at 36.

20. See West, Associated Press Release (International), July 22, 1979, London. See also Roundtree, *Second Pregnancy at Nation's First Test-Tube Baby Clinic*, United Press International Release (Domestic), Aug. 3, 1981, Norfolk, Va. (report of 13 successful in vitro births, 11 of which were in Australia).

21. Artificial insemination by donor accounts for the birth of approximately 20,000 children per year, and has been recognized by legislation in many states. Fleming, *New Frontiers in Conception: Medical Breakthrough and Moral Dilemmas*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 14.

22. *Id.* at 24. This process, sometimes referred to as prenatal adoption, would allow the infertile woman to share a special bond with the child, even though she has contributed no genetic material.

23. *Id.* at 42. Two brothers, Drs. Randolph Seed, M.D. and Richard W. Seed, Ph.D. report trying to perform this "artificial embryonation" at their Reproduction and Fertility Clinic in Chicago. *Id.*

24. This process has been compared to that of wet nursing, as the carrier would provide the nourishment for a child that was not genetically hers.

25. Gould, *Fertilization In Vitro of Nonhuman Primate Ova: Present Status and Rationale for Further Development of the Technique*, in EAB APPENDIX, *supra* note 3, § 14, at 1. Onanoff reported in vitro fertilization in rabbits and guinea pigs in 1893. *Id.*

animal embryo dates to about the same period.²⁶ Since then, in vitro fertilization²⁷ and embryo transfer²⁸ have been accomplished with many different types of animals. Although relatively little such experimentation has taken place with nonhuman primates,²⁹ a great deal of recent research involving mammalian embryos has been reported.³⁰

The first mention of the possibility of in vitro fertilization for humans has been credited to Dr. Landrum Shettles of Columbia³¹ in the 1950s. A number of studies of in vitro fertilization began in the 1970s in the United States, as well as throughout the world.³² These prompted debate as to the possible implications of the procedure.³³ The question of in vitro fertilization became an issue for the Department of Health, Education, and Welfare (HEW), now the Department of Health and Human Resources, when Dr. Pierre Soupart of Vanderbilt University sent an application to the National Institutes of Health (NIH) requesting a \$375,000 grant for the purpose of studying in vitro fertilization. Soupart planned to remove, fertilize, and perform a microbiopsy on about 450 eggs from women undergoing surgery, with no intention of having these embryos mature for the purpose of live birth.³⁴ At the time of his request, federal regulations affecting projects funded by HEW did not apply to products of conception prior to implantation.³⁵ Soupart was informed in 1975 that he would be funded by NIH, contingent on a review by the Ethics Advisory Board of HEW.³⁶

26. Biggers, *supra* note 3, at 18. In 1890 Walter Heape reported successfully transferring two fertilized eggs from an Angora rabbit into the oviduct of a Belgian hare rabbit. The Belgian rabbit had mated a few hours before. Ultimately six offspring were born, two of which were Angoras. *Id.*

27. T. CARNEY, INSTANT EVOLUTION: WE'D BETTER GET GOOD AT IT 103 (1980). The eggs of hamsters, rabbits, mice, guinea pigs, rats, cats, gerbils, pigs, and cows have been successfully fertilized in vitro. *Id.*; see Foote, *In Vitro Fertilization in Perspective, Relative to the Science and Art of Domestic Animal Reproduction*, in EAB APPENDIX, *supra* note 3, § 16, at 1-28.

28. T. CARNEY, *supra* note 27, at 104. Successful embryo transfers have been reported in mice, rats, rabbits, pigs, sheep, and horses. *Id.*

29. Gould, *supra* note 25, at 6-7. In vitro fertilization has been observed in the rhesus monkey, olive baboon, and squirrel monkey, only the latter of which appears to be a promising model for further research. *Id.* at 7. *But see* Sackett, *A Nonhuman Primate Research Model of Development Risk Following In Vitro Fertilization and Embryo Transfer*, in EAB APPENDIX, *supra* note 3, § 15, at 1. He proposes the pigtail monkey (*Macaca nemestrina*) as a potential subject for further research with in vitro fertilization and embryo transfer. *Id.*

30. See Biggers, *supra* note 3, at 22, table 3.

31. T. CARNEY, *supra* note 27, at 104; Biggers, *supra* note 3, at 1.

32. See note 3 *supra*.

33. See 44 Fed. Reg. 35,033, 35,036 (1979). Biologist James Watson initiated the ethical debate in 1971 in an article published in *Atlantic Monthly*. See note 46 *infra*. That same month an article defending in vitro fertilization was published. Edwards & Sharpe, *Social Values and Research in Human Embryology*, 231 NATURE 87 (1971).

34. Fleming, *supra* note 21, at 48.

35. 45 C.F.R. §§ 46.203(b)-(c) (1980); see Flannery, Weisman, Braverman & Lipsett, *Legal Issues Concerning In Vitro Fertilization*, in EAB APPENDIX, *supra* note 3, § 18, at 3. These authors suggest that in vitro fertilization research was not sufficiently sophisticated at the time, so the need for preimplantation regulations was not apparent. *Id.* at F-3 n.14. See also Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295 (1979).

36. Fleming, *supra* note 21, at 48.

This board, composed of thirteen lawyers, doctors, and ethicists,³⁷ recommended in May 1979 that Soupart's application be accepted, thus allowing for the study of human embryos provided the embryos not be sustained "beyond the stage normally associated with the completion of implantation," or two weeks after fertilization.³⁸ The report of the Board was submitted to Patricia Harris, then Secretary of HEW, where it remained pending her approval.³⁹ That approval was never granted by Harris or her successor, and no further action has been taken on the issue of federal funding of in vitro fertilization projects.⁴⁰

In contrast to Dr. Soupart's research, which was dependent on federal funding and not designed to produce live births, a privately funded clinic with the professed goal of helping infertile couples have a baby through the use of in vitro fertilization sought approval from the State of Virginia to begin operation under the sponsorship of the Eastern Virginia Medical School. After five months of hearings and studies by state and local health agencies in Virginia, the Virginia State Health Commission issued the necessary "certificate of need" on January 8, 1980, authorizing the establishment of the clinic, after concluding the laboratory would violate no state or federal law.⁴¹ The clinic, which was met with considerable opposition,⁴² announced the birth of the first test-tube baby in the United States on December 28, 1981.⁴³ Drs. Berel Held and Martin Quigley of the University of Texas Medical School announced in July 1981 that a similar clinic was in operation in Houston.⁴⁴

III. ETHICAL AND MORAL CONSIDERATIONS

The analysis of the legal ramifications of in vitro fertilization cannot be done without considering the serious moral and ethical implications of the

37. The members of the Ethics Advisory Board are Sissela Bok, Ph.D.; Jack T. Conway; Henry W. Foster, M.D.; James C. Gaither, J.D.; David A. Hamburg, M.D.; Donald A. Henderson, M.D.; Maurice Lazarus; Richard A. McCormick, S.T.D.; Robert F. Murray, M.D.; Mitchell W. Spellman, M.D.; Daniel C. Tosteson, M.D.; Agnes N. Williams, LL.B.; and Eugene M. Zweiback, M.D. EAB CONCLUSIONS, *supra* note 9.

38. *Id.* at 107.

39. Fleming, *supra* note 21, at 48.

40. Telephone interview with Dennis Doyle, Assistant Regulations Officer, Office for Protection from Research Risks, National Institutes of Health (Sept. 8, 1981). Dr. Soupart died on June 10, 1981; the effect of his death on the request for funding is not clear at this time.

41. See *Test-Tube Baby Lab OK—Pleases Prospective Mothers*, Associated Press Release (Domestic), Jan. 9, 1980, Norfolk, Va.

42. The most fervent opposition came from the Tidewater Chapter of the Virginia Society for Human Life, which unsuccessfully sought an injunction against the clinic. See *Today's Topic: Exciting New Hope or B.N.W.?*, Associated Press Release (Domestic), Apr. 2, 1980, Norfolk, Va.

43. *America's First Test-Tube Baby Normal, Healthy*, Dallas Times Herald, Dec. 29, 1981, § A, at 2, col. 1.

44. Nichols, United Press International Release (Regional), July 9, 1981, Houston, Tex. In a telephone interview, Dr. Martin Quigley stated that the Houston clinic removes only two eggs from the mother. If these were successfully fertilized, both would be implanted. This procedure is in accord with an agreement between the clinic and the Committee for the Protection of Human Subjects, Houston, Tex. (Sept. 23, 1981).

propriety and possible regulation of technological methods of creating life. Although some of these considerations may not be within the scope of governmental intervention, any statutes enacted in this area should reflect the society for which they are drafted. Moral and ethical considerations will color the determination of whether in vitro fertilization should be encouraged, monitored, or perhaps prohibited by legislation.

Biologist James Watson is credited with initiating the debates concerning the propriety of in vitro fertilization.⁴⁵ In an article appearing in *Atlantic Monthly* in May 1971 he first expressed concern as to the future implications of the procedure.⁴⁶ Philosopher Leon Kass⁴⁷ and theologian Paul Ramsey⁴⁸ later expressed their apprehensions. The debates continued with contributions from a number of sources, including biologist R.G. Edwards of the famous British team of Edwards and Steptoe.⁴⁹ The discussions continue today as the success of the procedure is a reality.

One of the threshold issues relates to the "naturalness" of in vitro fertilization as a means of human reproduction. One view is that human conception and reproduction should not be the subject of artificial intervention. Referring to the conception of babies in a laboratory as a "degradation of parenthood," Leon Kass expressed the view that a technological means of reproduction negates the humanity of the process.⁵⁰ This view is shared by many theologians including Protestant theologian Paul Ramsey.⁵¹ Although Pope John Paul II has made no official statement on in vitro fertilization,⁵² Vatican spokesman Rev. Pierfrance Pastore has stated that Roman Catholic doctrine is clear: fertilization "must be carried out according to nature."⁵³ Similarly, Rev. William Smith, spokesman for the Roman Catholic Archdiocese in New York, has referred to in vitro fertilization as "morally objectionable"⁵⁴ because it involves "switching the marital bed into a chemistry set."⁵⁵ A related view has been espoused

45. See note 33 *supra*.

46. Watson, *Moving Toward the Clonal Man*, 227 ATLANTIC MONTHLY, May 1971, at 50.

47. Kass, *Making Babies—The New Biology and the Old Morality*, 26 PUB. INTEREST, Winter 1972, at 32.

48. Ramsey, *Shall We "Reproduce"? I. The Medical Ethics of In Vitro Fertilization*, 220 J.A.M.A. 1346 (1972).

49. Edwards, *Fertilization of Human Eggs In Vitro: Morals, Ethics and the Law*, 49 Q. REV. BIOLOGY 3 (1974).

50. Kass, *supra* note 47, at 49, quoted in Walters, *Ethical Issues in Human In Vitro Fertilization and Research Involving Early Human Embryos*, in EAB APPENDIX, *supra* note 3, § 1, at 8.

51. See P. RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 104-60 (1970); P. RAMSEY, *THE ETHICS OF FETAL RESEARCH* (1975).

52. Telephone interview with Richard Doeflinger, Legislative Assistant, Committee for Pro-Life Activities, National Conference of Catholic Bishops (May 19, 1981).

53. West, *supra* note 20.

54. *Id.*

55. TIME, July 31, 1978, at 69; see Curran, *In Vitro Fertilization and Embryo Transfer: From a Perspective of Moral Theology*, in EAB APPENDIX, *supra* note 3, § 4, at 7. This view is consistent with the teachings of Pope Pius XII who, in his first address on artificial insemination condemned all unnatural means of obtaining semen. *Id.* Curran also refers to Pope Pius XII, *Allocution to the Fourth International Congress of Catholic Doctors*, in THE HUMAN

by Ehtishamul Haque Thanva, a leading Islamic scholar, who terms the procedure "a defiance of the laws of nature."⁵⁶

A moderate view accepts in vitro fertilization as an alternative for married persons who are unable to procreate in the natural way. Roman Catholic theologian Charles E. Curran, observing that "*in vitro* fertilization and embryo transfer are proposed only for that limited number of situations in which the normal process cannot take place,"⁵⁷ concludes that the processes may be acceptable under certain conditions. In vitro fertilization and embryo transfer for childless married persons who desire a child also have been sanctioned by Jewish theologians, including Rabbi Israeli Klavon of the Rabbinical Council of America⁵⁸ and Rabbi Seymour Siegel, professor of ethics at Manhattan's Jewish Theological Seminary.⁵⁹ Another view, propounded by bioethicist Joseph Fletcher, not only deems in vitro fertilization and embryo transfer acceptable, but indeed, preferable modes of procreation, reasoning that these technological processes are much more controlled and deliberative than traditional coitus.⁶⁰

Assuming the hurdle of naturalness is overcome, a question remains as to the rights of the product of conception, and when those rights begin. One position is that the fetus is a human being from the moment of conception⁶¹ and is thus due all human rights at that time. A middle view, propounded by Kass,⁶² is that although a blastocyst may not be a person, it is indeed human in origin and is a potential human being. It is therefore due the rights given to all subjects of fetal research,⁶³ although these may not be as extensive as those due "persons." The next step along the continuum would grant the rights of human status to the blastocyst only after implantation,⁶⁴ and the most restrictive position asserts birth as the time that rights accrue to the products of conception.⁶⁵

BODY: PAPAL TEACHINGS 114 (Monks of Solesmes trans. & eds. 1960). Curran, *supra*, at 3, 29 n.7.

56. West, *supra* note 20.

57. Curran, *supra* note 55, at 19.

58. West, *supra* note 20.

59. TIME, July 31, 1978, at 69. In commenting on the birth of Louise Brown, Rabbi Siegel stated: "The Browns were trying to obey the commandment to have children. When nature does not permit conception, it is desirable to try to outwit nature. The Talmud teaches that God desires man's cooperation." *Id.*

60. Fletcher, *New Beginnings in Life: A Theologian's Response*, in THE NEW GENETICS AND THE FUTURE OF MAN 78, 87 (M. Hamilton ed. 1972).

61. Curran, *supra* note 55, at 14. This is the view of the papal and hierarchical magisterium of the Roman Catholic Church. *Id.*

62. Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer*, in EAB APPENDIX, *supra* note 3, § 2, at 6.

63. *Id.* at 8. Thus, federal regulations that protect subjects from the time of implantation would presumably apply.

64. T. CARNEY, *supra* note 27, at 20. Carney bases his conclusion on the premise that a high percentage of naturally fertilized eggs are also naturally aborted during the preimplantation period. *Id.* See also Curran, *supra* note 55, at 15-16, who places the beginning of truly human life at "two to three weeks after conception," reasoning that true individuality begins at that stage.

65. See, e.g., Edwards, *supra* note 49, at 13-14.

The question of the time that rights begin to accrue is central to the issue of possible destruction of fertilized eggs. One of the major objections to in vitro fertilization is that a number of fertilized eggs may be discarded in the process of selecting the "best" egg for implantation. Indeed, the technique used by the Indian doctors (resulting in the alleged second live birth from in vitro fertilization) involved the administering of hormones inducing superovulation, or the production of more than one egg per cycle in the mother, with the subsequent fertilization of a number of eggs.⁶⁶ Kass points out the number of different fates for the numerous fertilized eggs, including subsequent implantation, death, experimentation, or perpetuation in vitro.⁶⁷ The most acceptable alternative is subsequent implantation; however, this raises a difficulty in that only a certain number of embryos could be carried safely by any one woman at any one time. Transferring eggs to other carriers presents potential problems of higher mortality risks, as well as lineage questions. The second alternative, death to excess embryos, would be unacceptable to those who view life as beginning at conception. Even if one accepts death as a respectful alternative, analogizing the loss to the natural loss of unimplanted fertilized eggs,⁶⁸ the distinction may still be made that superovulation and multiple fertilization result in the intentional creation of multiple potential lives, with the understanding that most will necessarily be destroyed. Experimentation or perpetuation in vitro with these fertilized eggs could indeed be argued as a "fate worse than death."⁶⁹

The problem of multiple fertilizations may have been solved by the practicalities of the in vitro fertilization process itself. The use of hormones to induce superovulation was originally calculated to allow for the possible recovery of a number of eggs, increasing the chances of a successful fertilization and subsequent embryo transfer.⁷⁰ However, the hormones given to stimulate ovulations may have affected the environment in the uterus adversely, thus making subsequent implantation impossible.⁷¹ As a result, many doctors now are using natural cycles, resulting in the retrieval of one egg at a time.⁷²

Assuming that only one egg is fertilized at a time, the risk to this embryo still may be sizable. Many observers are concerned that little is known

66. West, *supra* note 20.

67. Kass, *supra* note 62, at 9.

68. *Id.* at 9-10. Kass points out that 50% of all eggs fertilized as the result of unprotected sexual relations fail to implant, do not remain implanted, or are shed before a pregnancy is diagnosed. *Id.*

69. Arguably, this would be the case if the experimentation resulted in excruciating pain to the embryo.

70. Biggers, *supra* note 3, at 26-27.

71. *Id.* at 28.

72. Taymor, *Current Status of in Vitro Fertilization and Reimplantation*, in GENETICS AND THE LAW II 345, 347 (A. Milunsky & G. Annas eds. 1980). Writing after the birth of Louise Brown, Taymor indicated that during the three years preceding the writing of his article, doctors had not used gonadotropic therapy to stimulate or time ovulation. They had instead relied on measuring the mid-cycle surge of luteinizing hormone in the oocyte donor to time the laparoscopy in order to retrieve one mature egg in a normal cycle. *Id.*

about the danger of in vitro fertilization to the embryo.⁷³ As few primate studies involving in vitro fertilization have been conducted,⁷⁴ many advocate more animal studies prior to using the technique on humans.⁷⁵ Risks to the offspring include abnormalities because of chromosomal aberrations, fertilization by multiple sperm because of the high concentration of sperm directly surrounding the egg in vitro, and the possibility that manipulation induces mutations.⁷⁶ Proponents of the technique argue first, that embryos conceived naturally, or in vivo, face many of the same possibilities,⁷⁷ and secondly, that existing studies indicate no greater risk with in vitro fertilization than with ordinary fertilization.⁷⁸ Additionally, nature has an efficient mechanism for eliminating abnormal embryos, by spontaneously aborting them, often prior to the mother's even knowing of her pregnancy.⁷⁹ In fact, 99.3-99.5% of chromosomal abnormalities in vivo are estimated to be eliminated either through spontaneous abortion or fetal death.⁸⁰ Thus, some argue that even if in vitro fertilization results in more abnormal embryos, they will be eliminated naturally. Such reasoning, however, does not take into account the possibility that the medical treatment used to implant the embryo and to sustain the pregnancy may in fact counteract nature's mechanisms for eliminating the abnormal embryo.⁸¹

In addition to potential risks for the child are risks to the oocyte donor, such as (1) the development of ovarian cysts resulting from pretreatment with the hormones inducing superovulation, (2) dangers associated with the general anesthesia accompanying the laparoscopy, (3) the greater risk of spontaneous abortion, and (4) the dangers of amniocentesis associated with the monitoring of the fetus.⁸² Although the donor would be an adult and thus capable of consent, some contend that if the donor is infertile and desirous of a child, her capacity to consent may be diminished.⁸³ Thus, performing in vitro fertilization may indeed exploit the infertile couple, the very individuals who are requesting the procedure.⁸⁴ Presented with some hope of becoming parents, they may be incapable of assessing the low probability of success⁸⁵ and the likelihood that they will not benefit di-

73. 44 Fed. Reg. 35,033, 35,044 (1979); Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?*, 285 NEW ENG. J. MED. 1174, 1175 (1971).

74. Reilly, *supra* note 2, at 363.

75. EAB CONCLUSIONS *supra* note 9, at 104-06. See also Kass, *supra* note 62, at 27; Mastroianni, *In Vitro Fertilization and Embryo Transfer*, EAB APPENDIX, *supra* note 3, § 13, at 7.

76. See 44 Fed. Reg. 35,033, 35,036 (1979).

77. Schlesselman, *How Does One Assess the Risk of Abnormalities from Human In Vitro Fertilization?*, in EAB APPENDIX, *supra* note 3, § 17, at 27-31.

78. See 44 Fed. Reg. 35,043 (1979).

79. Schlesselman, *supra* note 77, at 28-29.

80. *Id.* at 29.

81. *Id.* at 30.

82. 44 Fed. Reg. 35,033, 35,044 (1979); Walters, *supra* note 50, at 18.

83. 44 Fed. Reg. 35,03, 35,045 (1979); Walters, *supra* note 50, at 19.

84. Kass, *supra* note 73, at 1178.

85. Katz, *Legal Implications and Regulation of In Vitro Fertilization*, in GENETICS AND THE LAW II, *supra* note 72, at 351, 368. The success rate is estimated to be 1 in 400. *Id.* For a more optimistic assessment of the success rate, see note 155 *infra*.

rectly from the procedure, but merely be contributing to research to enable some future couple to become parents.

Even if in vitro fertilization would result in the birth of a child, the procedure arguably is not medically justified, in that it is not therapeutic even to the potential parents. Although it may allow an infertile couple to have a child, it has not cured the infertility.⁸⁶ Yet, alternatively, if our society sanctions therapeutic abortion why not therapeutic conception?⁸⁷ Such is the explanation offered by Dr. Edwards who analogizes this treatment to the prescribing of insulin for diabetics or glasses for the visually impaired; although "the clinical condition itself remains, the treatment modifies its expression."⁸⁸

Another reason to question the use of in vitro fertilization and embryo transfer is that these procedures usher in Huxley's *Brave New World*. Although the use of these techniques by a married couple incapable of procreation without these means appears in and of itself a positive substitute,⁸⁹ the argument is made that this would be only the beginning of an ethical ride down a "slippery slope."⁹⁰ Eventually, the process might be used for extramarital purposes. The use of third-party donor oocytes and embryo carriers would do much damage to the family as an institution, presenting lineage problems⁹¹ and also contributing to the demeaning of women,⁹² as they would be mere incubators. In addition, is the argument that paying for oocytes or for the services of a carrier could ultimately result in a commodities market of "futures" with the child being the pawn of the process.⁹³

Some persons also fear that the process will be used experimentally and result in genetic engineering by which we ultimately may "design our descendants."⁹⁴ Other fears are that such manipulation could result in the production of children in the laboratory⁹⁵ or even the use of other mammals as temporary hosts for humans.⁹⁶ These extensions of the process would thus defy the principle of medical ethics that one should "do no harm."⁹⁷ Of course, the counterargument is that not all the ramifications are negative. Some would argue that in vitro fertilization will lead to posi-

86. Kass, *supra* note 73, at 1177.

87. Leiman, *Human In Vitro Fertilization: A Jewish Perspective*, in EAB APPENDIX, *supra* note 3, § 6, at 12.

88. Edwards, *supra* note 49, at 11.

89. Limitation of the process to married couples is acceptable to many theologians. See EAB CONCLUSIONS, *supra* note 9, at 107; Curran, *supra* note 55, at 23.

90. Ramsey, *Manufacturing Our Offspring: Weighing the Risks*, 8 HASTINGS CENTER REP., Oct. 1978, at 7.

91. Kass, *supra* note 62, at 15.

92. Ramsey, *Testimony on In Vitro Fertilization*, in EAB APPENDIX, *supra* note 3, § 7, at 3.

93. Schroeder, *New Life: Person or Property*, 131:5 AM. J. PSYCH. 541, 542 (1974).

94. Ramsey, *supra* note 92, at 21.

95. T. CARNEY, *supra* note 27, at 108, reports that there is currently work on an artificial womb for humans.

96. Kass, *supra* note 62, at 18.

97. Ramsey, *supra* note 92, at 13.

tive developments, including the ability to repair genetic defects prior to implantation.⁹⁸ If we accept that man is capable of exercising judgment on these matters, then arguably the opponents of the procedure should bear the burden of blocking its use.⁹⁹ Otherwise, some valuable benefits might be lost because of the fear of potential consequences that might never materialize.

IV. EXISTING REGULATION OF ANALOGOUS PROCEDURES

Before analyzing what laws on *in vitro* fertilization and embryo transfer should be promulgated, a review of the currently existing laws on the subject is in order. To date, no federal or state statutes deal directly with the subject of *in vitro* fertilization. Some federal administrative regulations, however, do provide guidelines for federally funded fetal research.

A. Federal Funding of *In Vitro* Research

On October 9, 1973, the Secretary of the Department of Health, Education, and Welfare issued a notice that a special study committee had been appointed by the Department through the National Institutes of Health for the purpose of formulating rules for the protection of human subjects in research.¹⁰⁰ On July 12, 1974, the National Research Service Award Act created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.¹⁰¹ The Commission also was formed to study research involving human fetuses and make recommendations to the Secretary whether the Department should fund such research, and if so, under what conditions.¹⁰² In 1975, after reviewing proposed drafts of the HEW appointed study committee,¹⁰³ the related public comments, and the recommendations of the National Commission, the Secretary amended federal regulations concerning the "Protection of Human Subjects."¹⁰⁴ Those regulations now provide for the establishment of two Ethical Advisory Boards, one for the Public Health Service and one representing the remainder of the Department.¹⁰⁵ They stipulate further that: "No application or proposal involving human *in vitro* fertilization may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical

98. See Walters, *supra* note 50, at 23-24, who lists potential consequences of IVF research.

99. Gorovitz, *In Vitro Fertilization: Sense and Nonsense and a Reply to Leon Kass*, in EAB APPENDIX, *supra* note 3, § 3, at 22-24.

100. 38 Fed. Reg. 27,882 (1973).

101. National Research Service Award Act of 1974, Pub. L. No. 93-348, §§ 201-215, 88 Stat. 342, 348-54, as amended by Emergency Medical Services Amendments of 1976, Pub. L. No. 94-573, § 18(a), 90 Stat. 2709, 2719.

102. 88 Stat. at 350 (§ 202(b)).

103. See 39 Fed. Reg. 30,648 (1974); 38 Fed. Reg. 31,748 (1973).

104. 45 C.F.R. § 46 (1980).

105. *Id.* §§ 46.204(a)-(b).

standpoint."¹⁰⁶

Other than a section stating that no activities governed by the regulations are to be undertaken until "appropriate studies on animals and non-pregnant individuals" have been conducted,¹⁰⁷ no specific guidelines in the regulations pertain to in vitro fertilization procedures prior to implantation. The Secretary explained in 1975 that the regulations do not deal with this matter "[b]ecause biomedical research is not yet near the point of being able to maintain for a substantial period the non-implanted product of *in vitro* fertilization."¹⁰⁸ The regulations are specific in protecting only the products of conception post-implantation.¹⁰⁹

Dr. Soupart's request for funding in 1977 prompted a one-and-a-half year study by the Ethics Advisory Board.¹¹⁰ On May 4, 1979, the Ethics Advisory Board issued its report to then Secretary Patricia Harris, approving Department funding of research involving in vitro fertilization and embryo transfer if certain specific conditions were met. These conditions included sustaining in vitro for no longer than fourteen days after fertilization embryos that were not to be transferred,¹¹¹ and attempting embryo transfer only with gametes obtained from lawfully married couples.¹¹² Secretary Harris left office without approving the report.¹¹³

B. State Regulation of Fetal Experimentation and Artificial Insemination

In addition to not providing specific guidelines for in vitro fertilization and embryo transfer, the HEW regulations only apply to federally funded experiments and do not preempt any state laws.¹¹⁴ As previously mentioned, no state laws deal directly with in vitro fertilization and embryo transfer. State statutes, however, do pertain to the related subjects of fetal experimentation and artificial insemination.

Following the Supreme Court decision of *Roe v. Wade*,¹¹⁵ which in essence rendered many state laws on feticide unconstitutional, many states

106. *Id.* § 46.204(d).

107. *Id.* § 46.206(a)(1).

108. 40 Fed. Reg. 33,526, 33,527 (1975).

109. See Horan, *Fetal Experimentation and Federal Regulation*, 22 VILL. L. REV. 325, 327-29 (1976-1977). The regulations define pregnancy as "the period of time from confirmation of implantation . . . until expulsion or extraction of the fetus." 45 C.F.R. § 46.203(b) (1980). Fetus is defined as "the product of conception from the time of implantation . . . until a determination is made, following expulsion or extraction of the fetus, that it is viable." *Id.* § 46.203(c).

110. See notes 34-40 *supra* and accompanying text.

111. EAB CONCLUSIONS, *supra* note 9, at 107.

112. *Id.*

113. Secretary Harris did request public comment on the report. 44 Fed. Reg. 35,033 (1979).

114. 45 C.F.R. § 46.201(b) (1980) includes the following statement: "Nothing in this subpart shall be construed as indicating that compliance with the procedures set forth herein will in any way render inapplicable pertinent State or local laws bearing upon activities covered by this subpart."

115. 410 U.S. 113 (1973).

passed statutes designed to control research on aborted fetuses.¹¹⁶ A number of purposes were contemplated by the legislation. Some statutes particularly prohibit experimentation that is nontherapeutic to the subject of the research.¹¹⁷ Some of the statutes clearly are meant to prevent a market in fetuses for experimentation;¹¹⁸ however, it is unclear in most cases whether these statutes are meant to protect ex utero blastocysts.¹¹⁹ Even in the statutes that acknowledge the possibility of in vitro fertilization, language in other parts of the statutes appears not to cover the product of in vitro fertilization until it reaches a stage beyond that of the eight-cell blastocyst.¹²⁰

Because questions involving the more established process of artificial insemination are somewhat analogous to those of in vitro fertilization and embryo transfer, an analysis of the governmental reaction to artificial insemination may be illuminating. The process itself dates back to the fourteenth century when Arabs artificially inseminated horses to produce superior specimens.¹²¹ The first documented artificial insemination in humans is credited to English surgeon John Hunter in 1790,¹²² and the first in the United States, to Marion Simms in 1866.¹²³ Today, artificial insemination is widespread, resulting in an estimated 20,000 births per year.¹²⁴

Two different types of artificial insemination may result in a child for a married couple: (1) artificial insemination by husband (or A.I.H.) and (2) artificial insemination by donor (or A.I.D.).¹²⁵ The first is genetically analogous to the process that produced Louise Brown. In both the Louise Brown case and in artificial insemination by the husband, the gametes of

116. Flannery, Weisman, Braverman & Lipsett, *supra* note 35, at 5-6; see Note, *supra* note 8, at 326.

117. CAL. HEALTH & SAFETY CODE § 25956(a) (West Supp. 1981); ILL. ANN. STAT. ch. 38, § 81-26(3) (Smith-Hurd Supp. 1981-1982); LA. REV. STAT. ANN. § 40:1299.35.13 (West Supp. 1981); MASS. ANN. LAWS ch. 112, § 12J(a)I (Michie/Law. Co-op Supp. 1981); MICH. COMP. LAWS ANN. § 333.2685 (1980); MINN. STAT. ANN. § 145.422(1) (West Supp. 1981); MO. ANN. STAT. § 188.037 (Vernon Supp. 1981); NEB. REV. STAT. § 28-346 (1979); N.M. STAT. ANN. § 24-9A-3 (1979); OKLA. STAT. ANN. tit. 63, § 1-735 (West Supp. 1981-1982); PA. STAT. ANN. tit. 35, § 6605(b) (Purdon 1977); UTAH CODE ANN. § 76-7-310 (1978).

118. ILL. ANN. STAT. ch. 38, § 81-26(3) (Smith-Hurd Supp. 1981-1982); KY. REV. STAT. § 436.026 (1975); LA. REV. STAT. ANN. § 40:1299.35.13 (West Supp. 1981); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); MASS. ANN. LAWS ch. 112, § 12J(a)IV (Michie/Law. Co-op Supp. 1981); N.M. STAT. ANN. § 24-9A-5-(B) (1979); N.D. CENT. CODE § 14-02.2-(3) (Supp. 1977); OHIO REV. CODE ANN. § 2919.14 (Page 1975); OKLA. STAT. ANN. tit. 63, § 1-735(a) (West Supp. 1981-1982); TENN. CODE ANN. § 39-308(b) (Supp. 1981); WYO. STAT. § 35-6-115 (1977).

119. See Flannery, Weisman, Braverman & Lipsett, *supra* note 35, at 6.

120. ILL. ANN. STAT. ch. 38, § 81-26(7) (Smith-Hurd Supp. 1981); MINN. STAT. ANN. §§ 145.421(2)-(3), .422 (West Supp. 1981).

121. Lombard, *Artificial Insemination—Civil Law and Ecclesiastical Views*, 2 SUFF. U.L. REV. 137 (1968); Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331 (1980).

122. Shaman, *supra* note 121, at 331 (noting W. FINEGOLD, ARTIFICIAL INSEMINATION 6 (1964)).

123. Shaman, *supra* note 121, at 331 (noting S. KLING, SEXUAL BEHAVIOR AND THE LAW 59-60 (1965)).

124. See note 21 *supra*.

125. Artificial insemination of a single woman by a donor also is possible. One case, C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Jur. & Dom. Rel. Ct. 1977), has recognized the donor as entitled to visitation rights as a father.

conception were contributed by a married couple, thus raising few legal questions of legitimacy or genealogy. If, in the in vitro fertilization process, the egg donor is also the carrier of the resulting fetus, the comparison to A.I.H. is thus quite strong. One potential problem area in A.I.H. involves the use of frozen sperm. In cases in which sperm are used well after the termination of a marriage, legal questions of legitimacy could arise in in vitro fertilization as they may in A.I.H. because many states have statutes presuming the legitimacy of any child born within 300 days after the dissolution of a marriage.¹²⁶

Another potential legal problem area in A.I.H. that could apply equally to in vitro fertilization relates to the question of whether the process is deemed a consummation of a marriage for purposes of determining whether to grant an annulment. A 1949 English case *L v. L*¹²⁷ granted a wife an annulment from her husband although she had conceived a child by A.I.H. In vitro fertilization arguably offers even less contact between spouses and, thus, also would not suffice to consummate a marriage.

Artificial insemination by donor raises more legal problems when the sperm contributor is not the husband of the mother, but usually an anonymous donor. Early cases questioned the legitimacy of children conceived in this manner. For example, in finding a woman who had been artificially inseminated without her husband's consent guilty of adultery, a Canadian court in 1921 emphasized that the "possibility of introducing into the family of the husband a false strain of blood" was what rendered the act adulterous.¹²⁸ An even stricter decision was rendered by an Illinois court in 1954 which held A.I.D. adulterous even when the husband had consented.¹²⁹ Recent cases, however, have determined that it is the sexual act itself that is adulterous, not the placing of the male seed in the female body.¹³⁰

Related to the question of adultery is the question of the legitimacy of the child. In a custody proceeding, *Strnad v. Strnad*,¹³¹ in which the husband of the mother was requesting visitation rights with the child born of artificial insemination consented to by the husband, a New York court in 1948 granted the husband's request.¹³² The court stated that the child was

126. See, e.g., LA. CIV. CODE ANN. art. 185 (West Supp. 1981): "A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage." See also Katz, *Legal Implications of In Vitro Fertilization and Its Regulation*, in EAB APPENDIX, *supra* note 3, § 19, at 11, for examples of statutes from other states.

127. [1949] 1 All E.R. 141, 146. The annulment was based on the ground of incapacity. *Id.*

128. *Orford v. Orford*, 58 D.L.R. 251 (1921).

129. *Doornbos v. Doornbos*, 23 U.S.L.W. 2308 (Cook County, Ill., Super Ct. Dec. 13, 1954), *appeal dismissed on procedural grounds*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

130. *MacLennan v. MacLennan*, [1958] Sess. Cas. 105. See also *People v. Sorensen*, 68 Cal. 2d 280, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968), which rejects as "patently absurd" any notion of adultery, either with the doctor, or with the sperm donor who may be thousands of miles away at the time of the insemination.

131. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

132. 78 N.Y.S.2d at 391.

not illegitimate, but rather should be viewed as "semi-adopted."¹³³ The New York court again recognized the husband's parental rights in relation to an A.I.D. child in *People ex rel. Abajian v. Dennett*,¹³⁴ in which a husband brought a habeas corpus proceeding to recognize visitation rights granted to him under a separation agreement. When the wife sought to defeat the action, claiming the child had been conceived by A.I.D., the court deemed the mother estopped.¹³⁵ The *Strnad* reasoning of "semi-adoption" was criticized in the later case of *Gursky v. Gursky*,¹³⁶ which pronounced another A.I.D. child illegitimate, noting that A.I.D. children were not adopted pursuant to state law and no state statute legitimized A.I.D. children.¹³⁷ Therefore, the child whose father was not the husband of the mother was illegitimate, but because of the husband's consent to the insemination process, he was estopped from denying liability to support the child. *Gursky* was flatly rejected in the case of *In re Adoption of Anonymous*,¹³⁸ a proceeding in which the former husband of the wife refused to grant consent to the adoption of the A.I.D. child of the wife. The argument of legislative inaction was regarded as "an unsound basis for any inferences favorable or unfavorable,"¹³⁹ as bills are sometimes not reported because the legislature may consider that the courts could reach proper solutions without the need for specific legislation.¹⁴⁰ The court in *Anonymous* stated that a child born of consensual A.I.D. during a marriage is the legitimate child of that marriage.¹⁴¹ Much of the support for this decision comes from the leading California case of *People v. Sorensen*,¹⁴² which interpreted "father" in the California support statute to include "a husband, who unable to accomplish his objective of creating a child by using his own semen, purchases semen from a donor and uses it to inseminate his wife to achieve his purpose."¹⁴³

Today a total of twenty states have statutes dealing with A.I.D.¹⁴⁴ All of

133. *Id.*

134. 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).

135. 184 N.Y.S.2d at 183.

136. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

137. 242 N.Y.S.2d at 409-11.

138. 74 Misc. 2d 99, 345 N.Y.S.2d 430, 434 (Sur. Ct. 1973).

139. 345 N.Y.S.2d at 435.

140. *Id.*

141. *Id.* at 435-36.

142. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

143. 437 P.2d at 500, 66 Cal. Rptr. at 12.

144. ALASKA STAT. § 20.20.010 (1975); CAL. CIV. CODE § 7005 (West Supp. 1981); CAL. PENAL CODE § 270 (West Supp. 1981); CONN. GEN. STAT. §§ 45-69f to -69n (1981); FLA. STAT. ANN. § 742.11 (West Supp. 1981); GA. CODE ANN. §§ 74-101.1, -9904 (1981); KAN. STAT. ANN. §§ 23-128 to -130 (1974 & Supp. 1980); LA. CIV. CODE ANN. art. 188 (West Supp. 1981); MD. EST. & TRUSTS CODE ANN. § 1-206 (1974); MD. ANN. CODE art. 43, § 556E (1980); MICH. COMP. LAWS ANN. § 333.2824 (1980); MONT. REV. CODE ANN. § 40-6-106 (1979); NEV. REV. STAT. § 126.061 (1979); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1981-1982); OR. REV. STAT. §§ 109.239, 243, 677.355, 360, 365, 370, 450, 990 (1979); TENN. CODE ANN. § 53.446 (Supp. 1981); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (West Supp. 1981); WIS. STAT. ANN. § 767.47 (West 1981), § 891.40 (West Supp. 1981-1982). Note that all of these statutes

these provide that the husband of the artificially inseminated woman shall be deemed the father of a child conceived by the insemination. Some specify that the written consent of the husband be recorded and kept confidential and that such record be opened only by court order rendered for good cause.¹⁴⁵ A number of these statutes also state specifically that the sperm donor is relieved of all obligations and rights to the child.¹⁴⁶ These statutes, nonetheless, are peculiarly devoid of any particular regulation as to the process itself or the liability for a defective child. Although ten states require artificial insemination to be administered by a licensed physician,¹⁴⁷ only Oregon specifies that the sperm donor is to be selected by the doctor and that one may not be a donor if afflicted with a genetic defect or disease or knows or has reason to know that he has a venereal disease.¹⁴⁸ Georgia peripherally deals with the question of liability by relieving the doctor of all civil liability to the husband, wife, or child, except for negligent administration or performance of the actual insemination.¹⁴⁹

Not only is there little state regulation of the A.I.D. process, and specifically, the selection of donors, but evidence exists that little actual screening of donors by the doctors performing the insemination occurs. In a study conducted in 1978 of 471 doctors listed by the American Fertility Society as performing A.I.D., most doctors surveyed answered that they generally pick the sperm donors.¹⁵⁰ Yet, they admitted to very little screening of donors other than the fact that donors generally were medical students or hospital residents, university or graduate students, or combinations thereof,¹⁵¹ thus resulting in donors of above-average intelligence and health. Although 96% of the doctors stated that they inquired into the history of donors, the inquiry usually consisted of merely asking the donor if he had any genetic diseases or presenting him with a short check-list of familial diseases. Thus, most physicians relied on the donor to reveal any possible defects. Illustrative of this fact is the finding that 94.7% of the

require written consent by the husband, except for the Maryland statute, where consent is presumed.

145. CAL. CIV. CODE § 7005 (West Supp. 1981); CONN. GEN. STAT. § 45-69h (1981); KAN. STAT. ANN. § 23-130 (Supp. 1980); MONT. REV. CODE ANN. § 40-6-106 (1979); NEV. REV. STAT. § 126.061 (1979); OKLA. STAT. ANN. tit. 10, § 553 (West Supp. 1981-1982); OR. REV. STAT. § 677.365 (1979); WASH. REV. CODE ANN. § 26.26.050 (West Supp. 1981); WIS. STAT. ANN. § 891.40 (West Supp. 1981-1982).

146. CAL. CIV. CODE § 7005 (West Supp. 1981); CONN. GEN. STAT. § 45-69j (1981); MONT. REV. CODE ANN. § 40-6-106 (1979); OR. REV. STAT. § 109.239 (1979); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); WASH. REV. CODE ANN. § 26.26.050 (West Supp. 1981); WIS. STAT. ANN. § 891.40 (West Supp. 1981-1982).

147. ALASKA STAT. § 20.20.010 (1975); CAL. CIV. CODE § 7005 (West Supp. 1981); CONN. GEN. STAT. § 45-69g (1981); GA. CODE ANN. §§ 74-101.1, -9904 (1981); MONT. REV. CODE ANN. § 40-6-106 (1979); NEV. REV. STAT. § 126.061 (1979); OKLA. STAT. ANN. tit. 10, §§ 551, 553 (West Supp. 1981-1982); OR. REV. STAT. § 677.360 (1979); VA. CODE § 64.1-7.1 (1980); WIS. STAT. ANN. § 891.40 (West Supp. 1981-1982).

148. OR. REV. STAT. §§ 677.360, .370 (1979).

149. GA. CODE ANN. § 74-101.1(c) (1981).

150. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 586 (1979).

151. *Id.*

surveyed doctors indicated they would reject a carrier of Tay-Sachs disease, but less than 1% of the doctors indicated they tested donors for carrier status.¹⁵² In fact, only 28.8% of the doctors questioned performed any biochemical tests other than blood groupings, and this procedure was mainly to detect communicable diseases.¹⁵³

Even while artificial insemination, a relatively common occurrence, has yet to be handled adequately by legislation, the questions of in vitro fertilization and embryo transfer move into sight. Because the latter are somewhat analogous to insemination, similar regulation of each may be in order. Just as the legal problems of genealogy become more complicated when a third party male agrees to become a sperm donor to an infertile couple, so too do complications arise when a third party female is introduced to the in vitro fertilization and embryo transfer processes.

In many ways, ovum donation by a third party with the sperm donor's wife carrying the child is the female counterpart of artificial insemination by donor. This could be accomplished in one of two ways. Either the donor's ovum could be removed and mixed with the husband's sperm in vitro and then transferred to the wife to carry, or the egg donor could be artificially inseminated with the husband's sperm, and then if a pregnancy resulted, the blastocyst could be transplanted to the sperm donor's wife's uterus for implantation. Each process involves advantages and disadvantages. In the first, the scientific chances of success would be far less, because it would require the surgical removal of the ovum from the donor, the precariously delicate procedure of fertilization outside of her body, and the subsequent attempt to implant a resulting blastocyst in the wife. If the fertilization were not successful, another surgical procedure would be necessary the following month to try to retrieve another egg from the same donor. Then, even if that were achieved and fertilization occurred, the delicate transfer still would be necessary. A possible advantage to this procedure is that the ovum donor would never actually carry a fertilized egg. Her contribution would merely be that of a gamete, analogous to a sperm donor's contribution in A.I.D. Thus, presumably once the gamete is removed from her body, her rights to the child would be no greater than that of a sperm donor. A woman's right to privacy in matters relating to her own body, which was recognized in *Roe v. Wade*,¹⁵⁴ would not apply to the fertilized egg since it never really existed within her. It appears that statutes such as the A.I.D. statutes relieving the donor of both liability and rights to the resulting fetus would be proper.

The second procedure involving insemination of the ovum donor would alleviate some of the technological risks in achieving the actual pregnancy. This is because the chances of a fertile woman conceiving after being inseminated by a fertile man's sperm are much greater than the chances of a

152. *Id.* at 588.

153. *Id.*

154. 410 U.S. 113 (1973).

successful in vitro fertilization.¹⁵⁵ Additionally, if the insemination did not impregnate, the process could be repeated the following month. If a pregnancy resulted, the fertilized egg could be merely flushed from the uterus, rather than having to be surgically removed as in the case of the unfertilized egg being prepared for in vitro fertilization.

Although the second process may be easier physically, it presents a problem in that the ovum donor, if the process is successful, actually would be carrying a fertilized ovum in her body. Her right to control her own body might be viewed as superior to any contractual rights claimed by the infertile couple. Thus, if the donor wished to abort the child, or to carry it to term and keep it, she may be entitled to do so legally, raising many of the same issues raised today by surrogate motherhood where the surrogate contributes both her gamete and her womb.

Whichever method is selected for fertilizing and transplanting the egg, questions similar to A.I.D. arise. Because the donation of the ovum raises the "possibility of introducing into the family" of the wife "a false strain of blood,"¹⁵⁶ allegations of adultery and illegitimacy may arise.¹⁵⁷ No greater example of consent, however, may be imagined than the wife's assenting to the transplant of the conceptus and actually carrying the fetus to delivery. Thus, just as statutes recognize as "father" a man who consents to the artificial insemination by donor of his wife, statutes also should recognize as "mother" the wife who consents to receiving the fertilized ovum into her own body.

The selection of a proper donor is obviously as important in ovum donation as in sperm donation, and regulation of the screening process is equally necessary in both. In some ways, ovum donations present fewer problems. Because the availability of donated ovums would presumably be much less than for sperm donations,¹⁵⁸ the chances of incestuous marriages of children conceived in this way would be less.¹⁵⁹ The smaller number of donors available for ovum donation, however, could result in a commercial market for eggs for a much higher price than sperm donations.¹⁶⁰ Additionally, the fact that ovum donors would be scarcer than sperm donors would mean that the ovum donor pool would be far less select than the sperm donor pool, which tends to consist of men more intelligent and healthy than the general population. In addition to considering

155. Drs. Berel Held and Martin Quigley of the University of Texas Medical School report that the chances of pregnancy by in vitro fertilization and embryo transfer are about 5% according to data from successful procedures in England and Australia. *10 Women Given Test Tube Chance*, *The Times-Picayune—The States Item*, July 10, 1981, § 1, at 8, col. 1.

156. *Orford v. Orford*, 58 D.L.R. 251, 258 (1921).

157. See notes 128-43 *supra* and accompanying text.

158. This presumably would be the case, as a woman generally produces only one mature egg per month, whereas the male produces millions of sperm in a single ejaculation. Additionally the retrieval of the egg is a much more complicated process.

159. See the Glass and Hajnal study of artificial insemination referred to in Curie-Cohen, Luttrell & Shapiro, *supra* note 150, at 588-89. This study concludes that even in A.I.D. "inadvertent inbreeding" is an inconsequential problem as compared to inbreeding in the general population. *Id.*

160. Reilly, *supra* note 2, at 369.

if the donor carried any genetic disease, the selector will have to consider maternal age.¹⁶¹ Thus, questions of breach of warranty against ovum banks that release defective eggs¹⁶² and malpractice suits against physicians for improper screening of donors¹⁶³ could arise.

The issue of anonymity of ovum donors also should be addressed because a revelation of the donations could deter potential donors. As with A.I.D., the child's right to know the identity of his genetic parents may be balanced against the desire of the donors for confidentiality. Just as children are seeking access to sealed adoption records to learn the identity of their natural parents,¹⁶⁴ children resulting from embryo transfer may seek the right to know the identity of their genetic mothers. By statute, all legal rights and liabilities between donor and child, such as mutual rights of inheritance, may be severed, but psychological and medical reasons for revelation still might arise.¹⁶⁵

A third party might also be involved in the embryo transfer process by being the carrier for a conceptus composed of the gametes of the husband and wife desiring a child. Traditionally, a mother is both the gamete donor and the carrier of a child.¹⁶⁶ The severance of the elements of the maternal role would raise questions of establishing maternity that are far more mind-boggling than previous paternity issues. Because there would be no direct physical contact between the husband and the carrier and no "false strain" in the wife's blood line, questions of adultery should not arise vis-à-vis the husband and wife seeking a child. Nonetheless, a carrier's husband might argue that his wife, by carrying another man's child, was guilty of adultery, especially if the carrier's husband had not consented.

161. Schlesselman, *supra* note 77, at 8-9. The author notes that chromosomal abnormalities appear to increase with maternal age. *Id.*

162. See Smith, *Artificial Insemination Redivivus: Permutations Within a Penumbra*, 2 J.L. MED. 113, 122 (1981), in which Smith suggests a possible recovery in strict liability for the selling of defective sperm. See *Belle Bonfils Memorial Blood Bank v. Hansen*, 195 Colo. 529, 579 P.2d 1158, 1159 (1978) (supplying of blood by a hospital blood bank was sale of product, and patient who contracted hepatitis following blood transfusion could maintain cause of action against the bank in strict liability and for breach of implied warranties).

163. See Smith, *supra* note 162, at 123, who notes that a claim against a doctor for improper screening of a sperm donor has recently been raised in a Nevada case to be decided by the state supreme court, *Fitzgerald v. Rueckl*, No. 11433 (Washoe County, Nev., 2d Judicial Ct., filed Oct. 20, 23, 1978), *appeal docketed*, Dec. 22, 1978. The lower court granted summary judgment in favor of the defendant.

164. See, e.g., *In re Adoption of Rand*, 347 So. 2d 450, 452 (Fla. App. 1977) (access denied for failure to show good cause); *In re Gilbert*, 563 S.W.2d 768, 771 (Mo. 1978) (remanded to determine whether good cause existed); *In re Maples*, 563 S.W.2d 760, 768 (Mo. 1978) (remanded to determine whether good cause existed); *In re Linda F.M.*, 95 Misc. 2d 581, 409 N.Y.S.2d 638, 647 (Sur. Ct. 1978) (access denied), *aff'd*, 52 N.Y.2d 236, 437 N.Y.S.2d 283 (1981); *In re Anonymous*, 92 Misc. 2d 224, 399 N.Y.S.2d 857, 859 (Sur. Ct. 1977) (good cause found); *In re Sage*, 586 P.2d 1201, 1207 (Wash. App. 1978) (access denied).

165. See *In re Adoption of Female Infant*, 5 FAM. L. REP. (BNA) 2311, 2313-14 (D.C. Super. Ct. 1979); *In re Adoption of Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

166. Revillard, *Legal Aspects of Artificial Insemination and Embryo Transfer in French Law*, 23 INT'L & COMP. L.Q. 383, 392-96 (1974).

In some ways, a third-party carrier of a couple's conceptus is comparable to the current practice of surrogate motherhood,¹⁶⁷ although the analogy to wet-nursing is perhaps more appropriate because the carrier has no genetic link to the child.¹⁶⁸ The real issue involved here is "Who is the mother?" The A.I.D. cases offer no guidelines because the male never carries the child. In this embryo transfer situation, the husband and wife are the genetic parents. Yet, without the carrier, the child would not be born. Could the child have two mothers? If so, how are the rights of each to the child established?

If the carrier is established as the child's mother, or has some maternal rights, her ability to agree prior to the child's birth to allow the childless couple to keep the child is questionable. In essence, the carrier would be relinquishing her parental rights to the child and agreeing to an adoption. A number of legal problems arise from such an arrangement. First, some states have laws prohibiting private adoptions except in cases where a parent places the child with a stepparent or close relative.¹⁶⁹ Secondly, to have a binding agreement between the couple and the surrogate, some consideration is necessary.¹⁷⁰ If part of that fee is for agreeing to the adoption, legal problems will result. In some states, paying a parent to induce that person to allow an adoption is a crime.¹⁷¹ The Michigan statute prohibiting such payment recently was challenged on constitutional

167. In Louisville, Kentucky, Surrogate Parenting Association, Inc. has been established to bring together couples desiring a child with surrogates. The surrogate agrees to be artificially inseminated with the husband's sperm, hoping to become pregnant and carry a child that the surrogate later would relinquish to the couple.

168. See note 24 *supra* and accompanying text.

169. CONN. GEN. STAT. §§ 45-63, -63a (1981); DEL. CODE ANN. tit. 13, § 904 (1975); GA. CODE ANN. § 74-403 (1981); MASS. ANN. LAWS ch. 210, § 2A (Michie/Law. Co-op 1981); MICH. COMP. LAWS ANN. § 710.51 (Supp. 1981); MINN. STAT. ANN. § 259.22 (West. Supp. 1981).

170. In surrogate mother cases in which the surrogate provides both the ovum and the womb, combined legal, medical, and surrogate fees range between \$13,000 and \$20,000. Ward, *Pregnancy for Pay*, *The Times-Picayune—The States Item*, Feb. 5, 1981, § 6 (Lifestyle), at 1. One surrogate mother was paid \$10,000 for her services. *L.A. Daily J.*, Apr. 18, 1980, at 2, col. 3.

171. CAL. PENAL CODE § 273 (West 1980) states:

- (a) It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his child. This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption.
- (b) It is a misdemeanor for any parent to obtain the financial benefits set forth in subdivision (a) with the intent to receive such financial benefits without completing the adoption or without consenting to the adoption.

MICH. COMP. LAWS ANN. § 710.54 (Supp. 1981-1982) reads in part:

- (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:

grounds of privacy in the case of *Doe v. Kelley*,¹⁷² which involved an arrangement to pay a surrogate \$5000 plus medical expenses in return for her surrendering and agreeing to the adoption of a child she conceived by artificial insemination. The court, in upholding the statute, recognized that the constitutional right to privacy was not absolute and should be weighed against the compelling state interest in preventing "baby bartering."¹⁷³

Even in states without laws specifically rendering such payment criminal, courts have deemed payments to induce an adoption to be against public policy.¹⁷⁴ These cases, however, may be distinguished from those in which the payment covers more than the motivation to consent to the adoption and is in the best interests of the child.¹⁷⁵ Thus the payment to a surrogate arguably is not just for her consent to the adoption, but also for the mother's services of being impregnated, carrying a child, and ultimately going through the delivery.¹⁷⁶ In the instance of embryo transfer, where the gametes are contributed by the adopting couple, the best interests of the child may involve being with both his genetic parents rather than with his womb mother.

Another obstruction to surrogate mother contracts is that the agreement to surrender the child is reached prior to the child's birth, indeed even prior to conception. Courts have not been particularly receptive to prenatal releases to adopt.¹⁷⁷ Recently, Kentucky's attorney general rendered an advisory opinion declaring surrogate mother contracts illegal and unen-

- (a) The placing of a child for adoption.
- (b) The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
- (c) A release
- (d) A consent
- (e) A petition.

172. 6 FAM. L. REP. (BNA) 3011 (Wayne Co., Mich., Cir. Ct. 1980).

173. *Id.* at 3013.

174. See *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E.2d 34, 35 (1956), in which the court denied recovery on a note given to a natural father as consideration for his consent to an adoption by the mother and her second husband, and *Downs v. Wortman*, 228 Ga. 315, 185 S.E.2d 387, 388 (1971), in which the Georgia Supreme Court held a mother's consent to adoption void when the mother was offered her plane fare to her parents' home provided that she consented.

175. *In re Estate of Shirk*, 186 Kan. 311, 350 P.2d 1 (1960). In this case the Kansas Supreme Court upheld an oral contract that provided that a mother would consent to having her daughter adopted by the child's grandmother in exchange for having the grandmother leave part of her estate to both the mother and child. 350 P.2d at 13.

The court in *Reimche v. First Nat'l Bank*, 512 F.2d 187, 189 (9th Cir. 1975), upheld an agreement whereby the mother of an illegitimate child consented to having the father adopt the child in exchange for his providing for the mother in his will. The court found that the "adoption was in the best interest of the child and the pecuniary gain was not the motivating factor on the mother's part." *Id.* at 189.

176. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147, 157.

177. See *Krueger v. Bunker*, 104 Ariz. 26, 448 P.2d 82, 86 (1969) (stating that prenatal consent was voidable); *Anonymous v. Anonymous*, 7 FAM. L. REP. (BNA) 2549, 2550 (N.Y. Sup. Ct. 1981) (voiding mother's written consent to adoption of her child prior to child's birth); cf. *Johnson v. Cupp*, 274 N.E.2d 411, 414 (Ind. Ct. App. 1971) (upholding father's consent to adoption of his child rendered before the child's birth).

forceable.¹⁷⁸ In declaring that "the strongest legal prohibition against surrogate parenting in Kentucky is founded in the strong public policy against the buying and selling of children,"¹⁷⁹ the attorney general cited Kentucky statutes that prohibited a mother from consenting to an adoption before the fifth day after the child's birth¹⁸⁰ and that prohibited a parent from petitioning for voluntary termination of parental rights until the fifth day after the child's birth.¹⁸¹

The surrogate contract, even if upheld on the issue of consideration, raises many other legal problems. Presumably, the surrogate is agreeing to impregnation, pregnancy, delivery of the child, and then relinquishment of all parental rights; however, her standard of care during the pregnancy also should be articulated clearly. The adoptive couple has an interest in the surrogate's drinking, smoking, and drug consumption during the pregnancy. If the surrogate did not take proper care of herself, threatening the health of the fetus, what rights would the adoptive couple have? Could they obtain an injunction or restraining order to control the surrogate's behavior? How would it be enforced?

In a surrogate contract, the adoptive parents would be agreeing to pay at least the expenses relating to the pregnancy and to take the child when born. Usually, the agreement is that the adoptive parents could be bound to take a child even if defective. If the defect was caused by the surrogate's breaching the terms of the contract by not taking proper care of herself, would the adoptive parents be free to refuse to take the resulting child? Could the resulting child, as a third party beneficiary to the surrogate contract, sue the womb mother for injuries?¹⁸² Or perhaps, if the defect were detected in the early months of pregnancy, would either party have the right to terminate the pregnancy?¹⁸³

Even if the child had no physical or mental problems, one of the parties to the contract might change his or her mind. Prior to impregnation the problems would be minor; however, a breach after impregnation would be much more complicated. If the surrogate decided to abort during her first trimester of pregnancy, she might be liable in damages for the parents' pecuniary loss under the contract.¹⁸⁴ She might be sued in tort for the infliction of mental distress,¹⁸⁵ but she could not be forced to carry the child to term. Under the holding in *Roe v. Wade*, she would have the right

178. *Surrogate Motherhood Contracts Declared Illegal by Kentucky A.G.*, 7 FAM. L. REP. (BNA) 2246, 2247 (1981) (advisory opinion by attorney general of Kentucky).

179. *Id.*

180. KY. REV. STAT. § 199.500 (Supp. 1980).

181. *Id.* § 199.601.

182. Tuchler, *Man-Made Man and the Law*, 22 ST. LOUIS U.L.J. 310, 317 (1978).

183. Under the holding of *Roe v. Wade*, the carrier should have the right to make such a decision unless the contract is deemed as a waiver of the constitutionally protected right to privacy.

184. Keane, *supra* note 176, at 167.

185. *See id.* at 167 nn.139 & 140, pointing out that emotional losses generally are not recoverable in contract (*see* RESTATEMENT OF CONTRACTS § 341 (1932)), but that relief in tort for infliction of mental distress might be available (*see* RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

to control her own body. Under contract law, the adoptive couple would not be able to demand specific performance of her personal services.¹⁸⁶

If the surrogate who has contributed ovum and womb decided to breach her agreement and keep the child after delivery, the struggle would be one between natural parents.¹⁸⁷ In the embryo transfer situation, however, in which the surrogate is merely a carrier, her right to the child presumably would be much weaker because she as womb mother would be opposing both genetic parents. Conversely, if the adoptive couple breached the contract by refusing to accept the child after delivery, they should be obligated to support the child they sought to create. The tragic result of all these scenarios is that an innocent child may become the victim. For, even if support is guaranteed, the child may be deprived of a loving family environment.

V. TORT CLAIMS

In vitro fertilization and embryo transfer also raise interesting issues of tort law. A resulting child might sustain an action for injuries suffered or for his wrongful life. Similarly, claims could arise on behalf of parents for the wrongful destruction of life, the wrongful creation of life, or the birth of a deformed child.

The first suit dealing specifically with in vitro fertilization was brought in a New York federal court by Dr. and Mrs. John Del Zio, who claimed \$1.5 million in damages from Manhattan's Columbia Presbyterian Medical Center and Dr. Raymond Vande Wiele¹⁸⁸ for the wrongful termination of an in vitro fertilization procedure. Mrs. Del Zio, who was infertile because of diseased oviducts, agreed in 1972 to allow Dr. Landrum Shettles to proceed with the in vitro fertilization procedure using her husband's sperm. After fertilization but prior to implantation, the specimen was destroyed by Dr. Wiele, the Chief of Obstetrics and Gynecology. Wiele claimed that Dr. Shettles lacked the skills to perform the procedure properly, and that the hospital's committee on experimentation had not approved.¹⁸⁹ Referring to the procedure as "slipshod," doctors at the hospital claimed that if the egg had been implanted successfully, Mrs. Del Zio would have contracted peritonitis and might have died.¹⁹⁰ Mrs. Del Zio claimed that the destruction of the fertilized egg without her consent denied her the chance of having a child, causing her physical damage and

186. 5A A. CORBIN, CORBIN ON CONTRACTS § 1204 (1964).

187. Such a struggle is brewing in a Los Angeles superior court where a couple is suing for custody of a child conceived by artificial insemination of a surrogate. The mother's attorney moved for dismissal on the grounds that California law does not treat semen donors as natural fathers. Although no allegation of breach of contract was advanced, the court said it could not ignore the issue. *News Notes*, 7 FAM. L. REP. (BNA) 2351, 2351-52 (1981).

188. *Del Zio v. Manhattan's Columbia Presbyterian Medical Center*, No. 74-3588 (S.D.N.Y., filed Apr. 12, 1978).

189. *The First Test-Tube Baby*, TIME, July 31, 1978, at 58, 61.

190. *Test Tube Bereavement*, NEWSWEEK, July 31, 1978, at 70.

emotional distress. A jury of four women and two men¹⁹¹ awarded Mrs. Del Zio damages of \$50,000 for emotional distress, with nominal damages being assessed to her husband.¹⁹²

The relief afforded Mrs. Del Zio was not specifically for the wrongful death of the fetus, but rather was a recognition of a severe loss, somewhat analogous to a property loss.¹⁹³ Although New York has a wrongful death statute, as do all the other states and the District of Columbia,¹⁹⁴ New York is among the states that only recognize the action for a live born child.¹⁹⁵ Thus, it is not surprising that a state that does not allow recovery

191. *Id.*

192. *See* 44 Fed. Reg. 35,033, 35,050 (1979).

193. Katz, *supra* note 126, § 19, at 27.

194. ALA. CODE § 6-5-410 (1977); ALASKA STAT. §§ 09.15.010, .55.580 (1973 & Supp. 1981); ARIZ. REV. STAT. ANN. §§ 12-611 to -612 (1982); ARK. STAT. ANN. §§ 27-906 to -907 (1979 & Supp. 1981); CAL. CIV. PROC. CODE § 377 (West Supp. 1981); COLO. REV. STAT. §§ 13-21-201, -203 (1974); CONN. GEN. STAT. § 52-555 (1981); DEL. CODE ANN. tit. 10, § 3704 (1975); D.C. CODE ENCYCL. § 16-2701 (Supp. 1978-1979); FLA. STAT. ANN. §§ 768.16 -27 (West Supp. 1981); GA. CODE ANN. §§ 105-1301, -1307 to -1310 (1968 & Supp. 1981); HAWAII REV. STAT. § 663-3 (1976); IDAHO CODE § 5-310 (1979); ILL. ANN. STAT. ch. 70, § 2.2 (Smith-Hurd Supp. 1981-1982); IND. CODE ANN. § 34-1-1-2 (Burns 1973); IOWA CODE ANN. § 633.336 (West Supp. 1981-1982); KAN. STAT. ANN. §§ 60-1901 to -1905 (1976); KY. CONST. § 241; KY. REV. STAT. § 411.130 (Supp. 1980); LA. CIV. CODE ANN. art. 2315 (West 1979); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-901 to -904 (1980); MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op Supp. 1981); MICH. COMP. LAWS ANN. § 600.2922 (Supp. 1981-1982); MINN. STAT. ANN. § 573.02 (West Supp. 1981); MISS. CODE ANN. § 11-7-13 (Supp. 1981); MO. ANN. STAT. §§ 537.080 -085 (Vernon Supp. 1981); MONT. CODE ANN. §§ 27-1-512 to -513 (1979); NEB. REV. STAT. §§ 30-809 to -810 (1979); NEV. REV. STAT. §§ 41.085, .100 (1979); N.H. REV. STAT. ANN. §§ 556.12-.14 (1974); N.J. STAT. ANN. §§ 2A:31-1 to -6 (West 1952 & Supp. 1981-1982); N.M. STAT. ANN. §§ 41-2-1 to -3 (1978); N.Y. CONST. art. 1, § 16; N.Y. EST., POWERS & TRUSTS LAW §§ 5-4.1 to .6 (McKinney 1981), §§ 11.3.2 to .4 (McKinney 1967 & Supp. 1980-1982); N.C. GEN. STAT. § 1-53 (Pam. Supp. 1981), § 28A-18-2 (1976); N.D. CENT. CODE §§ 32-21-01 to -06 (1976 & Supp. 1979); OHIO REV. CODE ANN. §§ 2125.01 -.03 (Page 1976 & Supp. 1981); OKLA. CONST. art. XXIII, § 7; OKLA. STAT. ANN. tit. 12, §§ 1053-1054 (West 1961 & Supp. 1981-1982); OR. REV. STAT. §§ 30.101- .100 (1979); PA. CONST. art. 3, § 18; 42 PA. CONS. STAT. ANN. §§ 5524, 8301-8302 (Purdon Pam. 1981); PA. R. CIV. P. 2201-2207, 2224-2225; R.I. GEN. LAWS §§ 10-7-1 to -13 (1970 & Supp. 1981); S.C. CODE §§ 15-51-10 to -60 (1977); S.D. CODIFIED LAWS ANN. §§ 21-5-1 to -4 (Supp. 1981); TENN. CODE ANN. §§ 20-5-106 to -108, -111 to -116 (1981); TEX. CONST. art. XVI, § 26; TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952 & Supp. 1980-1981); UTAH CONST. art. XVI, § 5; UTAH CODE ANN. §§ 78-11-6 to -7 (1977); VT. STAT. ANN. tit. 14, §§ 1491-1492 (1974 & Supp. 1981-1982); VA. CODE §§ 8.01-50 to -56 (1977 & Supp. 1981); WASH. REV. CODE ANN. §§ 4.20.005- .020, .046-.060 (1962 & Supp. 1981); W. VA. CODE §§ 55-7-5 to -8 (1981); WIS. STAT. ANN. §§ 895.03 -.031, .04 (West 1966 & Supp. 1981-1982); WYO. STAT. §§ 1-4-101 to -102 (1977), §§ 2-14-201 to -202 (1980).

195. Some states do not recognize a cause of action for the wrongful death of a stillborn fetus. *See* Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stern v. Miller, 348 So. 2d 303 (Fla. 1977); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); State *ex rel.* Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graft v. Taggart, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

for the wrongful death of a viable fetus likewise would not recognize the action for a preimplanted conceptus. A wrongful death action for such a conceptus probably would not survive in any state, because in most of the cases that have recognized a cause of action for the wrongful death of a fetus, the fetus was viable,¹⁹⁶ or at least "quick."¹⁹⁷

Other possible actions on behalf of parents for destruction of a conceptus would include one for intentional destruction with uninformed parental consent¹⁹⁸ and one for negligent destruction by the doctor or hospital.¹⁹⁹ The first action would not lie, however, if the parents had in fact been properly advised of the attendant risks.²⁰⁰ Thus, an inquiry would be necessary to determine if the parents had voluntarily consented to the termination after being meaningfully informed of the risks to the mother and the fetus should the procedure continue.²⁰¹ The action for negligent destruction would face the difficulties of establishing the degree of care demanded of the physician in a relatively untried procedure, as well as the problems associated with proving causation by negligence, as opposed to termination by natural causes in this precariously delicate procedure.²⁰²

196. See, e.g., *Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.D.C. 1971); *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D.W. Va. 1969); *Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1962); *Eich v. Town Gulf Shores*, 300 So. 2d 354 (Ala. 1974); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Gorke v. Le Clerk*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Worgan v. Greggo & Ferarra, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. App. 1970); *Orange v. State Farm Mut. Auto. Ins. Co.*, 443 S.W.2d 650 (Ky. App. 1969); *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. 1951); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967); cf. *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981) (recognizing the parents' cause of action for the wrongful death of their child who was born dead due to a prenatal injury sustained as a six-month fetus). The court in *Danos* did not discuss the necessity for quickness or viability. Tennessee courts previously have denied a cause of action for death of a viable fetus. See, e.g., *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977); *Durrett v. Owens*, 212 Tenn. 614, 371 S.W.2d 433 (1963); *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958). The Tennessee wrongful death act was amended in 1976 to include the death of a viable fetus within the coverage of that act. See TENN. CODE ANN. § 20-5-106(b) (1981).

197. Georgia recognized a cause of action for the wrongful death of a quick fetus in *Shirley v. Bacon*, 154 Ga. App. 203, 267 S.E.2d 809 (1980); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

198. Katz, *supra* note 126, at 26.

199. *Id.* at 27.

200. *Id.* at 26.

201. *Id.*

202. *Id.* at 27.

The estate of the conceptus also could have a cause of action against the doctor for wrongful destruction. The problem with such a suit is that the child never would be born alive, thus never becoming a person²⁰³ having standing. An additional difficulty would arise if the conceptus's estate attempted to sue the parents who had consented to a termination. Even if the definition of person in the fourteenth amendment could be distinguished from the definition of person for standing, thus allowing for the unborn to bring such an action, the mother's right to privacy, as recognized in *Roe v. Wade*, theoretically would deny relief to the estate of the conceptus. Until a preimplanted conceptus can mature outside of the woman's body,²⁰⁴ the woman's right to prevent implantation presumably would prevail over any rights of the conceptus.

A. Child's Action When Born Alive

A child produced by in vitro fertilization who actually is born alive but suffers from some abnormality or defect may have a cause of action against the doctor or hospital for negligence involved with the in vitro fertilization. The duty could be owed directly to the child, as in the negligent performance of the actual fertilization or implantation, or derivatively, as a breach of duty in not informing the parents of potential problems that arise independent of the physician's control.²⁰⁵ The two basic causes of action that an abnormal child might bring are an action for damages caused by prenatal injury and a wrongful life action, claiming it would prefer not having been born at all to suffering a life of deformity.

1. *Prenatal Injury*. The recognition of a cause of action by a child for prenatal injuries is a relatively new development, generally traced to the 1946 case of *Bonbrest v. Katz*.²⁰⁶ In that case a child prevailed in an action against the physician for injuries negligently sustained at delivery.²⁰⁷ The *Bonbrest* case is credited with turning the tide away from the previously controlling rule enunciated in the 1884 case of *Dietrich v. Inhabitants of Northampton*,²⁰⁸ denying a child the right to maintain an action for injuries received prior to its birth.²⁰⁹ Today every jurisdiction allows for recovery by the child for prenatal injuries.²¹⁰ Although some jurisdictions still adhere to the theory that the child must have been viable at the time of the injury to sustain a cause of action,²¹¹ the modern trend is to allow

203. Although recovery has been permitted for children suffering prenatal injuries, the distinction is that these children were born alive and thus had acquired personhood. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).

204. See T. CARNEY, *supra* note 27, at 108 (research on artificial womb for human beings is in progress).

205. Comment, "Wrongful Life": *The Right Not to Be Born*, 54 TUL. L. REV. 480, 490 (1980).

206. 65 F. Supp. 138 (D.D.C. 1946).

207. *Id.* at 139.

208. 138 Mass. 14 (1884); see *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222, 223 (1966), which recognizes *Bonbrest* as the case that started the departure from the *Dietrich* rule.

209. 138 Mass. at 17.

210. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 55 (4th ed. 1971).

211. Viability at the time of injury was stressed in *Bonbrest* as a necessary prerequisite to sustaining a cause of action for injuries. 65 F. Supp. at 140.

recovery to the child for injuries sustained before viability.²¹²

Claims of in vitro children may involve injuries suffered prior to viability, as the injuries might occur prior to implantation and indeed sometimes before conception. The courts, by recently recognizing the right of a child to bring a cause of action for injuries sustained because of negligence occurring prior to conception, have made recovery by an in vitro child much more probable. In *Jorgensen v. Meade Johnson Laboratories, Inc.*²¹³ the Tenth Circuit, interpreting Oklahoma law, allowed a cause of action on behalf of Mongoloid twins against a pharmaceutical company that had manufactured birth control pills.²¹⁴ The pills, which the mother had taken prior to the children's conception, allegedly altered the mother's chromosomal structure. The court specifically noted the recognition of such a cause of action need not await approval by the Oklahoma legislature.²¹⁵ Similarly, in *Renslow v. Mennonite Hospital*²¹⁶ the Supreme Court of Illinois held that a child had a cause of action against the hospital and the doctor for injuries sustained as a result of a negligently performed transfusion on the mother prior to the plaintiff's conception.²¹⁷ A year later, citing both *Renslow* and *Jorgensen*, the Eighth Circuit in *Bergstreser v. Mitchell*²¹⁸ allowed an infant to recover from the doctors and hospital for brain damage resulting from physicians' negligent performance of a caesarean section on the mother prior to the conception of the plaintiff.²¹⁹ Although Missouri had no specific legislation on preconception torts, the Eighth Circuit agreed with the district court in looking "for guidance" to Missouri law, which recognized a cause of action for prenatal injuries.²²⁰

Thus, courts have recognized a duty of care owed by the doctor to the child, which runs through the mother even prior to the child's conception.²²¹ For the in vitro child claiming injury sustained in the process of

212. See *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222, 223 (1966), which stated that "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion."

213. 483 F.2d 237 (10th Cir. 1973).

214. *Id.* at 238.

215. *Id.* at 240.

216. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). In this case when the mother was thirteen years old, defendants had negligently transfused her with Rh-positive blood that was incompatible with her Rh-negative blood. 367 N.E.2d at 1251.

217. 367 N.E.2d at 1255-56.

218. 577 F.2d 22, 25 (8th Cir. 1978).

219. *Id.* at 26.

220. *Id.* at 25.

221. *Jorgensen* states that Oklahoma would treat the problem as one of causation and proximate cause. 483 F.2d at 240. This reasoning is repudiated in *Renslow*, the Illinois Supreme Court favoring the duty theory:

The extension of duty in such a case is further supported by sound policy considerations. Medical science has developed various techniques which can mitigate or, in some cases, totally alleviate a child's prenatal harm. In light of these substantial medical advances it seems to us that sound social policy requires the extension of duty in this case.

367 N.E.2d at 1255; see Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH L. REV. 97, 104-06 (1978), which analyzes preconception torts in terms of Leon Green's duty theory. For a further explanation of the duty theory, see L.

fertilization or implantation, the link between the tortfeasor and the plaintiff is even less derivative than in the preconception tort cases cited. This is because the in vitro child's injury would be related directly to the gametes, the raw material of the plaintiff himself.

2. *Wrongful Life*. Another possible action available to the in vitro child is for wrongful life. A wrongful life action is one brought by a child, not for defects resulting from the defendant's negligence, but for the actual birth itself.²²² The claim is made that absent the defendant's negligence, the child would not have been born.²²³ In essence, the claim is made that nonexistence is superior to a handicapped life.²²⁴ This situation could arise in the in vitro fertilization context where some complication arose and the doctor either failed to test to discover the potential problem or, knowing of the problem, failed to inform the parents so that they could make an informed decision whether to continue the process to birth. Although the wrongful life action has received a cool reception by the courts,²²⁵ the trend may be changing as evidenced by two recent cases.²²⁶

The early precursors of wrongful life actions, perhaps more appropriately deemed "dissatisfied life" cases,²²⁷ involved children claiming a wrongful life of illegitimacy, rather than deformity. In *Zepeda v. Zepeda*²²⁸ the plaintiff sued his father for causing him to be born as an adulterine bastard. The claim was that the father, who was married to someone other than the plaintiff's mother, seduced the mother by promising to marry her. Damages were sought for the deprivation of the right to be a legitimate child, to have a normal home, to have a legal father, to inherit from the father and the paternal ancestors, and for the stigma of being a bastard.²²⁹ In recognizing that the case appeared to be a "natural result" of pre-viability injury cases, the court observed that "it makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them."²³⁰ The court, however, rejected the action, noting that recognition of the plaintiff's claim would create a new tort of wrongful life, encouraging "all others born into the

GREEN, THE LITIGATION PROCESS IN TORT LAW: NO PLACE TO STOP IN THE DEVELOPMENT OF TORT LAW 216 (2d ed. 1977). See also *Anonymous v. Physician*, 6 FAM. L. REP. (BNA) 2565, 2566 (Conn. Super. Ct. June 2, 1980). But see *Albala v. City of New York*, 7 FAM. L. REP. (BNA) 2182, 2183 (N.Y. App. Div. Jan. 8, 1981).

222. See Comment, *supra* note 205, at 485.

223. *Id.*

224. *Id.* at 494-95.

225. See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), modified, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

226. *Scales v. United States*, No. A-79-CA-70 (W.D. Tex., filed June 9, 1981, amended June 12, 1981), appeal docketed, No. 81-1367 (5th Cir. Aug. 12, 1981). *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (Ct. App. 1980).

227. Comment, *supra* note 205, at 486.

228. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964).

229. 190 N.E.2d at 851.

230. *Id.* at 853.

world under conditions they might regard as adverse" to bring suit, and stating that the lawmaking function of the judicial process "should not be indulged in where the result could be as sweeping as here."²³¹

A similar case, *Williams v. State*,²³² arose in New York a few years later. In *Williams* an infant born out of wedlock to a mentally deficient mother sued the state mental institution in which the mother was confined for negligently failing to protect the mother from a sexual assault that resulted in the plaintiff's conception. The claim of the child was similar to that advanced in *Zepeda*: deprivation "of property rights, . . . of a normal childhood and home life . . . of proper parental care, support and rearing," and causing the child "to bear the stigma of illegitimacy."²³³ In rejecting the cause of action, the court echoed *Zepeda's* reasoning, rationalizing that "[b]eing born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court."²³⁴

The possible action by an in vitro child would be more analogous to the recent wrongful life actions brought by a deformed child against a physician for improperly testing for problems, perhaps even prior to conception, or for not informing the parents if a difficulty were discovered.²³⁵ If the parents were properly informed prior to conception, arguably they could decide to avoid conception. If the problem was discovered after conception, the process could be terminated. In either case, a defective child would not be born. The argument of the child is that nonexistence would have been the more desirable alternative.

To prove liability, the plaintiff in such cases would have to establish the traditional elements of negligence: duty, breach of duty, damages and causation.²³⁶ Defining the duty owed by the physician to the child involves a reasoning somewhat analogous to the duty found owed to the child through the mother in prenatal or preconception tort cases. Presumably, the physician owes a duty to the parents (his patients) to test for abnormalities and inform them of potential problems. The standard of care should be that of a reputable physician in the specialized field of in vitro fertilization. Although the unborn or unconceived cannot act on the information given by the doctor, a duty exists to the child derivatively, as the child would suffer most directly the consequences of a breach.²³⁷

The child also must establish the link of causation between his or her

231. *Id.* at 858, 859. In fact, in citing the possibility of creating life in a test tube, the court noted: "If such awesome experiments are successfully pursued and their ultimate goal, the abiogenesis of human life achieved, would a being so created have a cause of action for wrongful life against those whose knowledge and skill were so employed?" *Id.* at 859.

232. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

233. 223 N.E.2d at 343, 276 N.Y.S.2d at 886.

234. *Id.* at 344, 276 N.Y.S.2d at 887.

235. See notes 240-54 *supra* and accompanying text.

236. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15 (1980).

237. See Comment, *supra* note 205, at 491, in which the author used this reasoning to establish a duty in wrongful life cases.

birth and the physician's action or inaction. In essence, the child must prove that had the parents been properly informed of the potential damages to the child, they would have consented to preventing the child's birth. In analyzing this question, a determination must be made as to the standard to be applied. Should the causation be analyzed in terms of an objective standard (what a reasonable person would consent to), or to a subjective standard (what these particular parents would have chosen)?²³⁸

Finally, perhaps the most difficult problem is establishing damages. Although precedent exists for the proposition that life is not always better than nonexistence,²³⁹ measuring the difference between a life of deformity and no life at all is difficult. Such a problem faced the Supreme Court of New Jersey when it denied recovery in *Gleitman v. Cosgrove*.²⁴⁰ The infant in *Gleitman* claimed that the defendant doctors negligently failed to inform his mother during her pregnancy of the effects that her contraction of German measles might have on the unborn child. The child, born with sight, hearing, and speech defects, claimed that his mother might have decided to abort him had she been properly informed by the doctors. In rejecting the claim, the court noted: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself."²⁴¹ A similar case, *Stewart v. Long Island College Hospital*,²⁴² arose in New York. Citing *Gleitman*, the court refused recovery to an infant born with birth defects who claimed that the defendant hospital advised the child's mother during her pregnancy that a therapeutic abortion was not necessary, even though the mother had had German measles in her first trimester of pregnancy.²⁴³

Recovery was also denied by the Court of Appeals of New York in the consolidated cases of *Becker v. Schwartz* and *Park v. Chessin*.²⁴⁴ The brain-damaged Becker child claimed that the physician treating his mother during her pregnancy failed to advise her of the higher incidence of Down's Syndrome children born to women over thirty-five, or of the availability of an amniocentesis to determine whether the child would be born with Down's Syndrome. The Park child's claim was that his parents had not been properly informed that the polycystic kidney disease from which he suffered was an inherited condition and of the high risk that the plaintiff, who had a sibling with the disease, would also be afflicted. Thus, the Becker child was claiming he should have been aborted, and the Park

238. *Id.* at 491-92.

239. See *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 427 (1977), in which the Massachusetts Supreme Judicial Court held that a person does have the "general right . . . to refuse medical treatment in appropriate circumstances."

240. 49 N.J. 22, 227 A.2d 689 (1967).

241. 227 A.2d at 692.

242. 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

243. 35 A.D.2d at 531, 313 N.Y.S.2d at 503-04.

244. *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

child was claiming he never should have been conceived. The court rejected both pleas on two grounds: first, that the infants suffered no "legally cognizable injury," reasoning that no one has a "fundamental right" to be born perfect,²⁴⁵ and secondly, that the court could not and, indeed, would not attempt to create a "hypothetical formula for the measurement" of the infants' damages.²⁴⁶ The New Jersey Supreme Court in *Berman v. Allan*²⁴⁷ again rejected an infant's wrongful life claim. The *Gleitman* reasoning that it was difficult to measure damages, was not adopted; rather, the court believed that the Mongoloid child whose mother had not been informed of the risk or of the possibility of amniocentesis had suffered no damage cognizable by law, because "[o]ne of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life."²⁴⁸

The first case to recognize a cause of action for wrongful life, *Curlender v. Bio-Science Laboratories*,²⁴⁹ arose in California. The injured child claimed damages against a medical testing laboratory for negligently conducting genetic tests which, if performed correctly, would have disclosed the probability that the child would be born with Tay-Sachs disease. The court found a clear duty owed to the parents.²⁵⁰ Rejecting the notion that the wrongful life action involved a right not to be born, the court indicated the child's damages were for the pain and suffering to be endured during the child's life span and any special pecuniary loss resulting from the condition.²⁵¹ Costs of care would also be appropriate if the parents did not have a suit pending for such relief. If such a suit was pending, the court favored consolidation.²⁵²

On June 9, 1981, a federal district court in Texas awarded in *Scales v. United States*,²⁵³ a judgment of \$624,000 to a three-year old child born with damage to almost every major organ. The defendants were physicians who failed to test the plaintiff's mother for pregnancy when she had German measles. Four hundred thousand dollars was awarded for the care and treatment of the child to the age of eighteen, \$24,000 for the child's pain, suffering and mental anguish after the age of eighteen, and \$200,000 for his lack of potential employability.²⁵⁴

245. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

246. *Id.* at 14, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

247. 80 N.J. 421, 404 A.2d 8 (1979).

248. 404 A.2d at 12.

249. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

250. *Id.* at 828, 165 Cal. Rptr. at 488.

251. *Id.* at 831, 165 Cal. Rptr. at 489-90.

252. *Id.*, 165 Cal. Rptr. at 490.

253. No. A-79-CA-70 (W.D. Tex., filed June 9, 1981, amended June 12, 1981), *appeal docketed*, No. 81-1367 (5th Cir. Aug. 12, 1981).

254. *Id.* No evidence exists that the benefits of life were balanced against the cost of a life of deformity, even though a balancing test might be more appropriate. A normal life would be assigned a positive value, nonexistence would rate a neutral value, and life with defects would be negatively valued. To calculate appropriate damages, the severity of the handicap would have to be taken into account. In some instances the benefits of life might outweigh the negative qualities of the handicap, thus resulting in no recovery. See Comment, *supra* note 205, at 497-98.

B. Parents' Actions

Analogous to the child's claim of wrongful life is the parents' claim of wrongful birth. The wrongful birth action involves a claim by the parents that they would have either avoided conception or terminated pregnancy if they had been properly advised of the risks of having a deformed child.²⁵⁵ Similar to the wrongful life claim of the child, the parents in a wrongful birth action are not claiming that the defendant hospital or physician caused the deformity, but only that the defendant was negligent in not properly informing the parents of the risk.²⁵⁶ Damages include those for the pain and suffering and emotional distress of the parents in having a defective child, as well as for the medical expenses and costs of raising the child.²⁵⁷

Some of the cases such as *Gleitman*²⁵⁸ and *Stewart*,²⁵⁹ rejecting a wrongful life cause of action for the child, denied that the parents had stated a cause of action for wrongful birth, based on the strong public policy of preserving human life and the lack of cognizable damages. The public policy argument, however, was severely weakened with the rendering of the *Roe v. Wade* decision, which sanctioned abortion during the early part of pregnancy.²⁶⁰ Even prior cases dealing with negligent sterilization resulting in the birth of healthy, but unwanted, children offered precedent for actions allowing the trier of fact to attempt to measure the expenses incurred for raising an unwanted child.²⁶¹ Thus, the later wrongful life-wrongful birth cases, including the *Becker* and *Park* cases²⁶² and *Berman*,²⁶³ not surprisingly recognized the parents' cause of action, although denying the child's. Interestingly, in the *Becker* and *Park* cases, the court sustained the causes of action for pecuniary damages suffered by the parents caused by the birth, but denied relief for the emotional harm suffered by the parents, citing the latter as a "question best left for legisla-

255. See *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

256. See *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

257. Trotzig, *supra* note 236, at 17-18.

258. See notes 240-41 *supra* and accompanying text.

259. See notes 242-43 *supra* and accompanying text.

260. See *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975), in which the majority sustained a mother's cause of action for expenses for the care and treatment of a deformed child. The mother claimed that the doctor failed to diagnose rubella during her first trimester of pregnancy and so did not advise her of the risks involved. Although *Roe v. Wade* had been decided in 1973, the facts of *Jacobs* occurred in 1968 when abortion was illegal under Texas law. *Id.* at 847-48.

261. See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D.W. Va. 1967); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971). For a more recent case that applied the benefit rule of RESTATEMENT (SECOND) OF TORTS § 920 (1965), to assess damages, see *Mason v. Western Pa. Hosp.*, 428 A.2d 1366, 1368 (Pa. Super. Ct. 1981); cf. *Speck v. Finegold*, 268 Pa. Super. 343, 408 A.2d 496 (1979) (allowing recovery to parents following unsuccessful sterilization and subsequent unsuccessful abortion, resulting in the birth of a child with a crippling hereditary disease).

262. See notes 244-46 *supra* and accompanying text.

263. See notes 247-48 *supra* and accompanying text.

tive address."²⁶⁴ In contrast, *Berman* recognized the right of the parents to recover for mental and emotional damage, but denied recovery for the expenses of rearing the defective child because such recovery would be "wholly disproportionate to the culpability involved."²⁶⁵

VI. CONSTITUTIONAL CONCERNS ABOUT REGULATION

The unanswered legal questions relating to in vitro fertilization and embryo transfer may lead to the oft-stated conclusion, "There ought to be a law . . ." Laws on who may participate in the techniques, the standards to be applied, and the rights of the parties involved all may raise constitutional issues as to the right of the government to regulate a very private aspect of human life. Most of the questions would come in the context of state statutes because the issue relates to an area of public health, safety, and welfare. The federal government, however, also might regulate by conditioning the granting of federal funds for clinical projects on the conformance to certain standards of operation.²⁶⁶

To determine whether a state may regulate the procedures of in vitro fertilization and embryo transfer, one must determine whether a fundamental right is being affected. Making this determination requires an examination to see if the right is one explicitly or implicitly guaranteed by the Constitution. If it is, then courts must examine with "strict scrutiny" any attempts to impinge on that right. Only if a "compelling state purpose" exists for interfering with that right may a statute doing so be upheld,²⁶⁷ and even then the regulation must be the least restrictive means of achieving the state purpose.²⁶⁸

The right to avail oneself of the benefits of in vitro fertilization and embryo transfer certainly may be said to be implicitly guaranteed by the Constitution in its protection of privacy in intimate family matters. The United States Supreme Court in *Meyer v. Nebraska*²⁶⁹ included "the right . . . to marry, establish a home and bring up children" among the rights of "liberty" guaranteed in the fourteenth amendment.²⁷⁰ The constitutional right to rear one's children was recognized in *Pierce v. Society of Sisters*²⁷¹ and in *Prince v. Commonwealth of Massachusetts*.²⁷² Similarly, in *Loving v.*

264. 46 N.Y.2d at 416, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

265. 404 A.2d at 14.

266. See Smith, *supra* note 2, at 715.

267. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

268. Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1029-36 (1974).

269. 262 U.S. 390 (1923).

270. *Id.* at 399.

271. 268 U.S. 510 (1925). The Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

272. 321 U.S. 158 (1944). The Court referred to the "parent's claim to authority in her own household and in the rearing of her children" as "sacred private interests." *Id.* at 165. Note, however, that the court balanced this right against the state's interest "to protect the welfare of children." *Id.*

*Virginia*²⁷³ the freedom to marry was deemed fundamental, with the Court protecting interracial marriage from state prohibition. The Court in *Zablocki v. Redhail*²⁷⁴ likewise invalidated a state statute restricting parents with support obligations to minor children from marrying without court approval.

Another family matter, the right to procreate, was recognized as "fundamental to the very existence and survival of the race" in *Skinner v. Oklahoma*.²⁷⁵ The Court subjected to strict scrutiny an attempt by the Oklahoma Legislature to impinge on that right by sterilization of habitual criminals.²⁷⁶ Later cases dealing with regulation of contraception arose in the 1960s and 1970s. The first of these, *Griswold v. Connecticut*,²⁷⁷ protected the right of married persons to use contraceptives. The Court held a Connecticut statute restricting that right unconstitutional, reasoning that the right of marital privacy was protected from governmental intrusion under the penumbra of guarantees in the Bill of Rights.²⁷⁸ A similar protection was afforded to single persons as a matter of equal protection in *Eisenstadt v. Baird*,²⁷⁹ a case in which the Supreme Court held a Massachusetts statute banning the distribution of contraceptives to unmarried persons unconstitutional.²⁸⁰ According to the Court, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁸¹ Later, in *Carey v. Population Services International*,²⁸² the Supreme Court rendered unconstitutional a New York statute that regulated the distribution and advertisement of contraceptives, labeling the "decision whether or not to beget or bear a child . . . at the very heart of [the] cluster of constitutionally protected choices."²⁸³ In 1975, in the case of *Roe v. Wade*,²⁸⁴ the right to privacy was deemed "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁸⁵ In restricting a mother's absolute right to abortion to the first trimester of pregnancy, the Court recognized the state's interest in protecting the mother's health during the second trimester and the interest of the potential human life in the third.²⁸⁶

After reviewing these cases on the protection of privacy in family areas, one may make a convincing argument that state regulation of in vitro fer-

273. 388 U.S. 1, 12 (1967).

274. 434 U.S. 374, 390-91 (1978).

275. 316 U.S. 535, 541 (1942).

276. *Id.*

277. 381 U.S. 479 (1965).

278. *Id.* at 484-86.

279. 405 U.S. 438 (1972).

280. *Id.* at 454-55.

281. *Id.* at 453 (emphasis in original).

282. 431 U.S. 678 (1977).

283. *Id.* at 685.

284. 410 U.S. 113 (1973).

285. *Id.* at 153.

286. *Id.* at 162-65.

tilization and embryo transfer would intrude upon a fundamental right. If the decision to beget a child is a protected area of privacy, presumably the actual method of begetting also would be protected. Thus, any statute affecting this delicate area would have to serve a compelling state interest and must do so by the least restrictive means.

A number of compelling state interests to regulate in vitro fertilization and embryo transfer may be raised. For example, the state has a real interest in the health of its citizens. Because studies on in vitro fertilization and embryo transfer have not been extensively conducted on animals,²⁸⁷ a state may want to prohibit the use of these techniques until more information is available on the attendant risks to both mother and child. The problem with such reasoning is that the health risks are not definite; hence, the uncertainty would weaken the position that a compelling state interest in protecting the health of its citizens is involved.

An analogy may be drawn to sterilization cases; however, even cases upholding a state's right to sterilize the mentally retarded and deprive them forever of the right to procreate have required observance of constitutional due process.²⁸⁸ Additionally, although recent sterilization cases do not seem to require a showing that potential offspring of the patient would be similarly inflicted with deficiencies to approve a sterilization,²⁸⁹ many emphasize that the state is interested in the inability of the parent to care properly for the resulting child.²⁹⁰ Thus, absolutely prohibiting couples from attempting in vitro fertilization and embryo transfer as a means of procreating, without either proof of physical harm to mother or child, or an inability to care later for that child, appears premature and overbroad.

Another concern of the state may be that these new techniques raise a number of legal problems that cannot be solved. Thus, the state may claim a compelling interest in prohibiting their use. Prohibition, however, does not seem to be the least restrictive means for dealing with the legal issues involved in in vitro fertilization. Many of the questions involving legitimacy and liability already have been raised by artificial insemination, and thoughtful legislation could help determine the resolution in both areas. Embryo transfer with surrogate carriers, however, raises some seemingly insurmountable questions of public policy that go beyond those of in vitro fertilization and perhaps could justify more restrictive legislation. A state,

287. See generally Reilly, *supra* note 2.

288. Even the extreme case of *Buck v. Bell*, 274 U.S. 200 (1927), found "scrupulous compliance" with the Virginia statute at issue and "months of observation" of the subject to assure that the state's interest existed. *Id.* at 207. See also *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171, 177 (1968), *appeal dismissed*, 396 U.S. 996 (1970); *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307, 311 (1976).

289. See, e.g., *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968), *appeal dismissed*, 396 U.S. 996 (1970).

290. See *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976); *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976); *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962); *Cook v. Oregon*, 495 P.2d 768, 772 (Or. App. 1972).

in the interest of promoting the traditional family, may wish to prohibit single persons from availing themselves of the procedures. In light of the *Eisenstadt* decision, such an outright prohibition would be highly suspect on equal protection grounds.

Although a governing unit may be limited in its direct prohibition or regulation of in vitro fertilization and embryo transfer, it can exert significant influence by refusing to fund such projects or conditioning its funding on the meeting of certain standards. Presumably, any federal control over these procedures would assume this avenue of approach. Precedent for such influence is afforded by recent cases recognizing a state's right to encourage childbirth rather than abortion by upholding statutes that provided state funding for hospital services associated with childbirth, but not for nontherapeutic abortions. The issue first arose in the context of reviewing state medical plans. Title XIX of the Social Security Act²⁹¹ established the Medical Assistance (Medicaid) Program to provide federal funding to states that chose to reimburse needy patients for medical expenses. Participating states were required to establish "reasonable standards" for administering the plan, all of which were to be "consistent with the objectives of Title XIX."²⁹² The Supreme Court recognized the right of participating states to exclude nontherapeutic abortions from the funding,²⁹³ and distinguished "direct state interference with a protected activity," as in *Roe v. Wade*, from "state encouragement of an alternative activity consonant with legislative policy."²⁹⁴

A similar right of cities to refuse funding for hospital services for nontherapeutic abortions, but to provide it for childbirth, was recognized in *Poelker v. Doe*.²⁹⁵ A related question arose after the passage of the Hyde Amendment, which severely limited the use of federal funds for abortions. In *Harris v. McRae*²⁹⁶ the Supreme Court held that New York, as a participant in the Medicaid Program, was under no obligation to fund abortions for which federal reimbursement was unavailable under the Hyde Amendment.²⁹⁷ Additionally, the Court held that the amendment neither

291. 42 U.S.C. §§ 1396-1396k (1976 & Supp. III 1979).

292. *Id.* § 1396a(a)(17).

293. *Beal v. Doe*, 432 U.S. 438 (1977). This case involved the State of Pennsylvania.

294. *See Maher v. Roe*, 432 U.S. 464, 475 (1977).

295. 432 U.S. 519 (1977).

296. 448 U.S. 297, 315 (1980).

297. *Id.* at 326; *see* Departments of Labor, and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434, which applied to fiscal year 1977 and provided: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Act of Oct. 13, 1977, Pub. L. No. 95-130, § 106, 91 Stat. 1153, 1154, and Act of Nov. 9, 1977, Pub. L. No. 95-165, § 106, 91 Stat. 1323, 1324, extended those provisions through January and February of 1978. Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460, and Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586, were applicable for the rest of 1978 and 1979. Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926, applicable for fiscal year 1980, provided:

Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to per-

deprived indigent women of their "liberty" guaranteed in the due process clause of the fifth amendment,²⁹⁸ nor contravened the establishment clause of the first amendment, merely because it corresponded to tenets of the Roman Catholic Church.²⁹⁹

Thus, these cases would support governmental refusal to fund in vitro research or clinical application unless certain standards were met. This would perhaps allow the funding unit to restrict the recipients of a resulting child to married persons or only to infertile couples who had little other hope for producing offspring.

VII. CONCLUSION

The legal questions raised by in vitro fertilization and embryo transfer are extensive. Not only is the fate of a child involved in every decision, but collectively the resulting births could affect the institution of the family, and ultimately, all of society. Because of the delicate moral and ethical issues raised, the temptation to refrain from any legislation whatsoever is strong. Yet, the absence of any consensus as to the propriety of the procedures indicates the need for some general guidelines. Otherwise, the procedures will be controlled only by the individual consciences of participants with no guaranteed protection for the resulting child and for society.

As the questions involve public health and safety, the regulation basically would lie in the domain of individual states. Uniformity might be advanced through the adoption of a model act, as suggested by the Ethics Advisory Board.³⁰⁰ Because the issues span so many disciplines, drafters should be recruited from a variety of sectors, including legal, religious, medical, and social.

One fundamental area needing uniformity is the status and rights of children born as a result of in vitro fertilization and embryo transfer. Statutes could provide that legitimacy be presumed by considering the wife of the sperm donor to be the mother of the child, regardless of whether she carries the child or supplies the ovum. Analogies may be drawn to the more sophisticated statutes regulating artificial insemination. The donor or surrogate who is not within the nuclear family that would rear the child may be relieved by statute of all legal rights and obligations to the child. Thus the custody, support, and physical responsibility for the child could be established clearly. To balance the confidentiality of participants with

form abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service;

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

298. 448 U.S. at 317-18.

299. *Id.* See also *Williams v. Zbaraz*, 448 U.S. 358 (1980).

300. EAB CONCLUSIONS, *supra* note 9, at 113.

the potential medical needs of the child, recordkeeping standards could be delineated with provisions for access for specified causes.

Much of the regulation of the actual process of in vitro fertilization and embryo transfer might be better left to the medical profession; however, some minimal standards of procedure are in order. Statutes could specify the degree of expertise and skill required of any physician undertaking the procedure. Additionally, uniform standards for donor selection could be promulgated. Requirements of testing donors for diseases, restricting the number of donors to prevent incest, and prohibiting donations from donors over a certain age would contribute to promoting the health of the resulting child.

Although contracts involving carriers might defy precise legislation for each case, some policy decisions as to enforceability might be enunciated by the states. If a dispute were to arise, would the state enforce the contract? If the contract were silent on an ambiguous issue, would guidelines for resolution be available? States also might consider modes of dealing with court claims that could arise. Decisions as to which causes of action could be entertained and the method of determining the type and amount of relief should be made.

Finally, in cases where federal funds are requested for the in vitro fertilization and embryo transplant research, the government could be much more active in its regulation. The procedure itself could be more closely monitored to minimize the destruction of fertilized eggs. Participants could be limited to infertile married couples only. The government could condition its aid to a state on the adoption of uniform laws defining the status of any resulting children.

Just as the in vitro procedure itself is a sensitive matter of the creation of life, so too should its regulation be viewed. As the physician is acutely aware of the delicate chemical balance necessary for conception in a petri dish, so too should society be cognizant of the need for a thoughtful balance of values in the regulation of the process.

