St. John's Law Review

Volume 72
Number 2 *Volume 72, Spring 1998, Number 2*

Article 4

March 2012

Constitutional Implications of In Vitro Fertilization Procedures

Nicole L. Cucci

NOTES

CONSTITUTIONAL IMPLICATIONS OF IN VITRO FERTILIZATION PROCEDURES

> I knew that instant that we had reached our goal: the early stages of human life were all there in our culture fluids, just as we wanted . . . and even as I gazed down at those embryos, wondering what to do with them, there was no doubt in my mind that the whole field was now wide open.
>
> *–Robert Edwards, British physiologist, upon witnessing his first in vitro fertilization.*

Having children is considered by many to be the greatest achievement in a person's life. Unfortunately, statistics show that in the United States one in eight married couples suffer from infertility.[1] Traditionally, these couples were afforded two options: either choose to remain childless, or to adopt.[2] On July

---

[1] *See* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 911 (1996) [hereinafter Robertson, *Reproductive Technology*] (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 3 (1988)). A person is diagnosed as infertile if, after one year of unprotected sex, he or she is still unable to conceive. *See id.*; *see also* Dan Fabricant, Note, *International Law Revisited:* Davis v. Davis *and the Need for Coherent Policy on the Status of the Embryo*, 6 CONN. J. INT'L L. 173, 174 (1990) (noting that an estimated 2.5 million couples are involuntarily unable to conceive children).

[2] *See* Robertson, *Reproductive Technology*, *supra* note 1, at 911; Duane R. Valz, Book Review, 10 HIGH TECH. L.J. 201, 202 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES) (describing adoption as "an expensive, time consuming, and legally arduous process"); *see also* ATHENA LIU, ARTIFICIAL REPRODUCTION AND REPRODUCTIVE RIGHTS 1 (1991) (noting that "the number of babies available for adoption has been declining since the 1970s"). Liu cited four reasons for this decline: "(1) the widespread use of contraceptives devices, (2) the increase in the number of abortions, (3) changing at-

25, 1978, the birth of Louise Brown in England added one more option and gave new hope to infertile couples worldwide.[3]

Louise was "conceived" in a sterile laboratory with neither her mother nor her father present. This was the first child conceived through the process of in vitro fertilization ("IVF"), with her life beginning in a petri dish rather than in her mother's body.[4] With the advent of IVF, infertile couples were now afforded the ability to conceive, gestate and give birth to biologically related offspring.[5] Louise's birth marked a turning point in the "technological reproductive revolution,"[6] which began over a decade earlier when the development of the birth control pill made sexual intercourse without procreation possible.[7] IVF, along with other assisted reproductive procedures, has paralleled this continuum by effectively making procreation without sexual intercourse possible.[8] As a result of this breakthrough, "the decision to have or not have children is . . . no longer a matter of God or nature, but has been made subject to human will and

---

titudes to, and state support for, single parents, and (4) the freer availability of sterilization." *Id.* (citation omitted).

[3] *See* Sam Thatcher & Alan DeCherney, *Pregnancy-Inducing Technologies: Biological and Medical Implications*, *in* WOMEN AND NEW REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL AND ETHICAL DILEMMAS 27 (Judith Rodin & Aila Collins eds., 1991) (noting that this date "marked the birth of a new reproductive technology that has revolutionized the therapy of the infertile couple"). *See generally*, L. BROWN & J. BROWN, OUR MIRACLE CHILD CALLED LOUISE, A PARENT'S STORY (1979).

[4] *See* PETER SINGER & DEANE WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION at viii (1985) (discussing the basic IVF process "as seen through the eyes of a couple taking part in it" and examining the ethical debate surrounding the technique); *see also* Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992) (discussing the process of IVF); *infra* notes 16-28 and accompanying text (same).

[5] *See* Robertson, *Reproductive Technology*, *supra* note 1, at 911 ("The first American birth resulting from in vitro fertilization occurred in 1981. By 1988, 15,000 stimulated IVF cycles occurred in more than 100 clinics. In 1994, more than 300 clinics performed more than 35,000 cycles, resulting in more than 6,000 births.") (citations omitted).

[6] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE].

[7] *See* ROBERT H. BLANK, REGULATING REPRODUCTION 24 (1990) (noting how the pill and other contraceptives caused the separation of reproduction from sexual intercourse in the 1960's).

[8] *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 6, at 5 (stating that the majority of human reproduction will continue to occur in the traditional manner but that the development of IVF and other reproductive options are truly revolutionary).

technical expertise."[9]

Recent advances in reproductive technologies have created ways to achieve parenthood for a variety of people whose efforts heretofore had been unsuccessful. Such advances have also created a great deal of controversy concerning the moral, ethical, and legal implications which surround the use of these procedures.[10] As reliance on IVF becomes more widespread and acceptable, debates focus on its practical uses and the many scientific advances which IVF makes possible. Two such procedures, embryo cryopreservation and embryo surrogacy, have become the subject of much controversy.[11] There are two divergent views regarding these medical advances: those anxious for expansions on the range of procreative opportunities available to the infertile applaued the procedures[12] and those who condemn them for perverting the sanctity of nature, human life, and the procreative process.[13] At the heart of this controversy lies the issue of whether the established right to procreate coitally should extend to encompass a fundamental right to noncoital procreation. This issue, although mentioned tangentially in cases regarding IVF procedures,[14] has not been explicitly dealt with by any court.

As the combination of IVF and cryopreservation allow for

---

[9] *Id.*

[10] *See* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 285 (1988) [hereinafter Robertson, *Decisional Authority*]. *See generally* SINGER & WELLS, *supra* note 4, at 23-89 (discussing the ethical debate surrounding IVF).

[11] *See* discussion *infra* Parts III, IV (examining the controversy surrounding embryo cryopreservation and embryo surrogacy).

[12] *See* Robertson, *Decisional Authority*, *supra* note 10, at 285, 289-93 (arguing that infertile couples should have a fundamental right to procreate noncoitally and that restrictions on noncoital reproduction by an infertile couple should only be permitted if a compelling state interest standard is met).

[13] *See* LIU, *supra* note 2, at 48-50; *see also* M. Donaldson, *The Control of Reproductive Research*, *in* REPRODUCTIVE MEDICINE AND THE LAW 153, 157 (A. Allan Templeton & Douglas J. Cusine eds., 1990) (questioning "whether it is every woman's inalienable right to have a child regardless of the means used to produce it and whether the future welfare of any baby is not paramount to this wish"). Donaldson states that infertility treatment should only be offered to married couples, or those in a long term relationship analogous to marriage. *See id.* Donaldson argues that a different situation arises with respect to single women who "deliberately produc[e] the single parent syndrome when the public acceptance is still of the two-parent family as a unit." *Id.*

[14] *See infra* note 63 and accompanying text (discussing *Smith v. Hartigan*, an Illinois District Court case that came close to deciding whether a fundamental right to IVF exists).

the embryo to exist outside of the womb, lower courts have had to address issues concerning the rights of the various parties involved in the IVF process. These courts have considered which parties' rights prevail in the context of parental disagreement over the disposition of the embryos, whether there exists any individual rights of the embryo, and the legality of enforcing surrogacy contracts.[15]

This Note examines the traditional constitutional basis for procreative freedom and discusses various arguments for the extension of this right to noncoital reproduction. Part I briefly introduces the medical process for IVF. Part II overviews the historical basis for the rights of privacy and procreation, and argues that these rights should be extended to noncoital reproduction. Part III of this Note examines the legal status accorded to the embryo arising from the utilization of cryopreservation, and the conflicts arising among the various parties involved in IVF procedures. Part IV discusses gestational surrogacy, a process in which a third party gestates the embryo, and summarizes the debates that surround this type of procedure. Part V provides a brief look at future implications concerning IVF procedures.

I. MEDICAL PROCEDURE FOR IN VITRO FERTILIZATION

"Literally meaning 'fertilization in a glass,' "[16] IVF was originally developed to bypass damaged fallopian tubes, where fertilization naturally occurs.[17] The IVF process takes place over a two-week period in four stages: ovulation induction, egg retrieval, fertilization, and embryo transfer.[18] During the first stage, ovulation induction, the woman is given a combination of

---

[15] *See infra* notes 138-52, and accompanying text (discussing court decisions addressing the rights of the embryos, the disposition of embryos, and the rights of parties in surrogacy contracts).

[16] Elizabeth Ann Pitrolo, Comment, *The Birds, The Bees, and the Deep Freeze: Is There International Consensus In the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 152 (1996) (citing ARTHUR L. WISOT & DAVID R. MELDRUM, NEW OPTIONS FOR FERTILITY 3 (1990)).

[17] *See* LIU, *supra* note 2, at 12; Thatcher & DeCherney, *supra* note 3, at 27; *see also* THE JOHNS HOPKINS HANDBOOK OF IN VITRO FERTILIZATION AND ASSISTED REPRODUCTIVE TECHNOLOGIES 153 (Marian D. Damewood, M.D. ed., 1990) [hereinafter JOHNS HOPKINS HANDBOOK].

[18] *See* JOHNS HOPKINS HANDBOOK, *supra* note 17, at 153. *See generally* Thatcher & DeCherney, *supra* note 3, at 28-33 (labeling the four stages as: "augmentation of folliculogenesis," "capture of oocytes," "culture techniques," and "transfer of the conceptus").

hormones to stimulate her ovaries and facilitate the production of multiple eggs.[19] The eggs are then surgically removed by either a laparoscopy or ultrasound-directed needle aspiration.[20] If the doctor determines that the procedure has produced usable ova, the eggs are placed in a petri dish, where treated sperm are introduced.[21] Insemination occurs upon this placement of the sperm and eggs together; fertilization, the actual joinder of the sperm and egg, occurs four to eight hours later.[22] The first fertilized egg divides into two cells approximately eighteen hours later and shortly thereafter subdivides again into a preimplantation embryo, or simply, a preembryo.[23] At this four or eight-cell stage one to three preembryos are transferred into the woman's uterus through insertion of a catheter via the cervix.[24] In successful IVF, at least one of the preembryos implants into the uterine wall, and subsequently develops into a fetus.[25]

IVF differs from artificial insemination, which is the traditional procedure whereby an egg is fertilized and implanted into the intended rearing mother. IVF makes the separation of gestational and genetic motherhood possible, through egg and em-

---

[19] The procedure whereby a woman's ovaries are stimulated to produce multiple eggs is characterized as superovulation. *See* Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 134 (1993).

[20] *See* Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 547 (1991). Laparoscopy is performed under a mild general anesthetic and requires two or three short incisions to be made in the abdomen. The newer technique, aspiration, only requires a local anesthetic. Aspiration involves the insertion of a suctioning needle through the abdomen and bladder, or through the vagina. *See* ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 148-49 (1989).

[21] *See* Jennifer Marigliano Dehmel, Note & Comment, *To Have or Not to Have: Whose Procreative Rights Prevail In Disputes Over Dispositions of Frozen Embryos*, 27 CONN. L. REV. 1377, 1381 (1995).

[22] *See* Davis v. Davis, No. E-14496, 1989 WL 140495, at *23 (Tenn. Cir. Ct. Sept. 21, 1989) (discussing testimony of Dr. Charles Alex Shivers).

[23] *See* BONNICKSEN, *supra* note 20, at 150.

[24] *See id.* at 161. The embryos are implanted prior to differentiating and developing nervous and organ systems. *See id.* There is a one in ten chance that any single transferred embryo will implant in the woman's uterus. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 970 n.100 (1986). If menstruation has not occurred after two weeks, doctors perform a blood test to determine if the chemical changes signaling pregnancy have commenced. *See* BONNICKSEN, *supra* note 20, at 151.

[25] *See* Dehmel, *supra* note 21, at 1381.

bryo donation and gestational surrogacy.[26] Women who have functioning ovaries, but who have either no uterus or cannot safely carry a child to term, may seek to have an embryo, which was created with her egg, carried or "gestated" by another woman.[27] Unlike the situations in which the surrogate mother is both the genetic and gestational mother, the gestational surrogate bears no biological tie to the child.[28]

Gestational surrogacy in the IVF context is made possible by recent advancements in the process of cryopreservation. Cryopreservation allows for the remaining preembryos, which had not been immediately transferred to the uterus, to be preserved and stored for later implantation.[29] Cryopreservation is achieved by cooling and dehydrating an embryo in preparation for its long-term preservation in a frozen state.[30] When the IVF patient is ready for implantation, the embryo is thawed through rehydration before being transferred to the uterus.[31] The survival rate of the cryopreserved embryos after the thawing process is approximately fifty percent.[32]

The benefits of cryopreservation include: (1) cost reduction;[33]

---

[26] *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 6, at 9.

[27] *See id.*

[28] *See id.*; *see also* MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY 42 (1985) (discussing various surrogacy procedures).

[29] Cryopreservation is the process of preserving preembryos by freezing them in liquid nitrogen at sub-zero temperatures. *See* Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1083 (1986).

[30] *See* JOHNS HOPKINS HANDBOOK, *supra* note 17, at 142; Thatcher & DeCherney, *supra* note 3, at 34 (summarizing briefly the process of cryopreservation); *see also* Davidoff, *supra* note 19, at 134-35. The embryo is suspended in an aqueous medium and chemically treated with a cryoprotectant. *See* JOHNS HOPKINS HANDBOOK, *supra* note 17, at 142-43; *see also* SINGER & WELLS, *supra* note 4, at 81 (noting that the embryos are frozen in liquid nitrogen at -321 degrees Fahrenheit). The cryoprotectant replaces the water in the cells when they are dehydrated and prevents the formation of ice crystals which can cause tissue damage. *See* JOHNS HOPKINS HANDBOOK, *supra* note 17, at 143. The embryo is cooled in stages to -80 degrees Celsius, and subsequently transferred to liquid nitrogen whereupon it is rapidly cooled to -196 decrees Celsius for long-term storage. *See* SINGER & WELLS, *supra* note 4, at 81 (noting that this temperature allows the embryos to "remain frozen, without deteriorating, virtually indefinitely—six hundred years, according to one estimate").

[31] *See* Davidoff, *supra* note 19, at 134.

[32] *See id.*

[33] *See* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to An Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Tech-*

(2) lessened physical suffering; (3) egg storage for women who fear future damage to their ovaries or eggs; (4) reduction in the risk of a multiple pregnancies; (5) time to decide proper disposition of the surplus embryos;[34] and, most importantly, (6) an increase in chance of pregnancy.[35] As discussed in Part III, however, cryopreservation has been the subject of much debate.

II. TRADITIONAL RIGHTS OF PRIVACY AND PROCREATION

A. *The Right to Privacy*

Although the Constitution does not explicitly guarantee a blanket right to privacy, the judiciary has recognized that every individual possesses such a right to privacy, which encompasses a variety of "fundamental personal rights."[36] As early as 1891, the Supreme Court stated "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ."[37] This early notion of a protection against interference with one's person was termed by Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*,[38] as "the right to be left alone."[39]

The Court afforded this common law notion constitutional stature in its landmark 1965 decision *Griswold v. Connecticut*,[40] wherein it struck down a Connecticut statute which banned the use of contraceptive devices.[41] The *Griswold* Court held that in addition to the specific rights protected in the Constitution, the

---

nology, 43 DEPAUL L. REV. 523, 529 (1994). Cryopreservation allows for unused fertilized eggs to be preserved for later implantation. Since "the IVF process is costly [approximately $3,000-$5,000 for each egg retrieval] . . . the fewer egg retrievals a woman undergoes, the better." *Id.*

[34] The issue often then becomes whether to destroy or donate the surplus embryos. *See id.* at 529-30.

[35] Cryopreservation allows for the implantation of the embryo during the woman's normal menstrual cycle when her body is free from the drugs, anesthesia, and hormonal hyperstimulation, which were administered during the egg retrieval process. *See id.* at 530.

[36] Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

[37] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[38] 277 U.S. 438 (1928).

[39] *Id.* at 478 (Brandeis, J., dissenting) (deeming such to be "the most comprehensive of rights and the right most valued by civilized men").

[40] 381 U.S. 479 (1965).

[41] *Id.* at 485-86.

First, Third, Fourth, Fifth and Ninth Amendments created a penumbral "zone of privacy," which provided the freedom to make various personal decisions without substantial government interference.[42] Intimate decisions made within the husband-wife relationship fall within this zone, and a statute prohibiting the use of contraceptives "seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[43] The Court found the statute to be overly broad because it intruded on fundamental and protected freedoms.[44]

The Supreme Court expanded this holding in *Eisenstadt v. Baird*,[45] in which it invalidated a Massachusetts statute limiting the sale of contraceptives to married couples.[46] While refusing to rule on whether a right of access to contraceptives existed,[47] the *Eisenstadt* Court held that the privacy regarding birth control decisions afforded married couples in *Griswold* extended also to unmarried individuals.[48] The Court added, "[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."[49] Similarly, the Supreme Court in *Carey v. Population Services International*,[50] struck down a New York law which prohibited the distribution of contraceptives to individuals under the age of sixteen.[51] In invalidating the statute, the Court stated that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."[52]

---

[42] *See id.* at 484.

[43] *Id.* at 485.

[44] *Id.* For such a statute to be valid, the state must show "a subordinating interest which is compelling." *Id.* at 497 (Goldberg, J., concurring). In the absence of such a compelling interest, the statute cannot be upheld. *See id.*

[45] 405 U.S. 438 (1972).

[46] *Id.* at 454-55.

[47] The Court held the statute unconstitutional without the need to address this issue. *See id.* at 453.

[48] *Id.* at 453-54 (finding the classification to violate the Equal Protection Clause).

[49] *Id.* at 453.

[50] 431 U.S. 678 (1977).

[51] *Id.* at 681-82.

[52] *Id.* at 687.

In the 1970's, the Supreme Court further expanded the right to privacy to include the decision to terminate a pregnancy. The landmark case of *Roe v. Wade*[53] held that a woman's right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[54] The Court rejected the notion that this right was absolute, and reserved to the states the power to intervene when the state's interest in the protection of the health and safety of the mother and the unborn child outweighed the mother's privacy interest.[55]

Mirroring the right to avoid pregnancy, both before and after the point of conception, is an individual's right to procreate.[56] The judiciary appears to recognize the right to procreate as emanating from the Due Process Clause of the Fourteenth Amendment.[57] In *Meyer v. Nebraska*,[58] the Supreme Court recognized the "liberty" aspect of the Fourteenth Amendment to intend, "not merely freedom from bodily restraint but also the right of the individual... to marry, establish a home and bring up children... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[59] Subsequently, the Court in *Skinner v. Oklahoma*[60] stated that marriage and procreation were "one of the basic civil rights of man... fundamental to the very existence

---

[53] 410 U.S. 113 (1973).

[54] *Id.* at 153.

[55] *See id.* at 154-55 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' ") (citations omitted). While the holding of *Roe* has been modified in more recent Court decisions, the essential holding relating to a woman's right to choose, prior to viability, remains good law. *See* Casey v. Planned Parenthood of S.E. Pa., 505 U.S. 833 (1992).

[56] John Lawrence Hill, *What Does It Mean To Be A "Parent"? The Claims of Biology As the Basis For Parental Rights*, 66 N.Y.U. L. REV. 353, 366 n.56 (1991) (stating that "the right to procreation... [has] all the indicia of a privacy right").

[57] "No state shall... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[58] 262 U.S. 390 (1923). The *Meyer* Court dealt with a Nebraska statute which prohibited the teaching of a foreign language in a public or private school to a child who had not yet passed the eighth grade. *Id.* at 396-97. The liberty being impacted was that of the teacher's right to teach, and the right of the students' parents to hire him to teach their children. *See id.* at 400. While the Court did not expressly apply a strict scrutiny test, it struck down the law as "arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403.

[59] *Id.* at 399 (citations omitted).

[60] 316 U.S. 535 (1942).

and survival of the race."[61] Although the case was ultimately decided on equal protection grounds, it is often cited as evidence of a judicially-recognized right to procreate.[62]

B. *Extending the Reach of the Right to Procreate*

While there is apparent legal support for a fundamental right to coital procreation, the Supreme Court has never ruled on whether non-coital procreation conducted by assisted reproductive technologies also merits such protection.[63] Personal rights that may be deemed as "fundamental" are those liberties that are "deeply rooted in this Nation's history and tradition."[64] While the breadth of the right to privacy since its initial recognition in *Griswold* has been expanded, the Supreme Court in recent years has demonstrated a reluctance to further expand this right:

> [We are not] inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without

---

[61] *Id.* at 541.

[62] *Skinner* involved an Oklahoma statute which imposed forced sterilization on "habitual criminals" convicted of two or more felonies involving "moral turpitude." *Id.* at 536. However, the statute exempted individuals convicted of various white collar crimes, including embezzlement and bribery. *See id.* at 538-39. The Court held that since the law discriminated between various types of felony convicts, it was a violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 541-42. Nonetheless, the Court's emphasis on the importance of the right to procreate has been incorporated into substantive due process analysis as part of the right to privacy established in *Griswold*. *See* Hill, *supra* note 56, at 366. In addition, "*Skinner* remains the only Supreme Court decision explicitly addressing the right of procreation." *Id.* at 367.

[63] The U.S. District Court for the Northern District of Illinois came closest in directly deciding whether a fundamental right to IVF exists in the 1983 case of *Smith v. Hartigan*, 556 F. Supp. 157 (N.D. Ill. 1983). The issue in *Hartigan* was whether a statute which appeared to prohibit IVF was a violation of the plaintiff's fundamental right to privacy. *Id.* at 159. However, upon the defendant's contention that the statute in question did not in fact prohibit the act of causing in vitro fertilization, the case was dismissed due to a lack of a case or controversy. *See id.* at 164.

[64] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

express constitutional authority.[65]

There is presently no statutory law in the United States which directly prohibits IVF, in fact, as most states have declined to address the issue at all.[66] Yet until the Supreme Court expressly holds that non-coital procreation falls within an individual's right to privacy, the possibility exists for states to place restrictions on the processes of IVF so as to effectively prohibit many infertile individuals from utilizing assisted reproduction technologies.[67]

There is evidence that lower courts are willing to recognize a right to non-coital procreation. In striking down a law that placed restrictions on the treatment of embryos, the District Court for the Northern District of Illinois noted in *Lifchez v. Hartigan*,[68] "[i]t takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[69] The District Court for the Southern District of Ohio was even more explicit in *Cameron v. Board of Education*,[70] stating that Supreme Court precedent in the field of privacy rights guarantees a woman the right to control her own reproductive functions and thus control her desire to become pregnant by artificial insemination.[71]

Surely the *Meyer*, *Skinner* and *Griswold* Courts did not contemplate the development of a procreative alternative to sexual intercourse. This should not preclude the extension of the protections guaranteed by those cases to non-coital procreation. Failure to extend this protection of the right to privacy to assisted reproductive technologies would be to disregard the underlying principle of procreative freedom, namely the right of a per-

---

[65] Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

[66] *See infra* notes 121-37 and accompanying text (discussing state statutes dealing with IVF).

[67] *See infra* notes 121-37 and accompanying text.

[68] 735 F. Supp. 1361 (N.D. Ill. 1990).

[69] *Id.* at 1377. The *Lifchez* court dealt with a statute which prohibited the sale of or experimentation with a fetus, unless such experimentation was "therapeutic." *See id.* at 1363. While the court struck down the law on several grounds, it held that the law violated a woman's fundamental privacy right—the "right to make reproductive choices free of governmental interference with those choices." *Id.* at 1376.

[70] 795 F. Supp. 228 (S.D. Ohio 1991).

[71] *Id.* at 237.

son to have children.[72] Thus, the right to procreative assistance should be deemed fundamental.

Fundamental rights, however, are not absolute and may be intruded upon if a compelling state interest exists.[73] The state should be required to assert a compelling justification when it attempts to restrict access to IVF for select groups, such as unmarried individuals. The state may assert an interest in preserving traditional notions of family to justify limiting access to IVF by unmarried individuals.[74] Arguably, married couples present a more compelling justification for extending fundamental status to procreation with assisted technology than do unmarried individuals, due to the traditional correlation of marriage with "family."[75] Indeed, in *Michael H. v. Gerald D.*,[76] the Court restricted the interpretation of family to "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary

---

[72] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (stating that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

[73] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (stating that states cannot constitutionally interfere directly and substantially with the right to marry without a compelling state interest). The means used to enforce the state interest must be narrowly tailored to only that interest when it interferes with a fundamental right. *See id.* at 388; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (stating that in the instances of fundamental rights, a state regulation is not presumptively valid and that states carry a "heavy burden of justification") (citations omitted).

[74] *See* Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 958-59 (1996) (stating that "[a]t the most obvious level, assisted reproductive technologies enable the formation of families by gay men, lesbians, single people, and post-menopausal women, visibly assaulting the traditional image of the two-parent, heterosexual, biologically-connected family"). Interestingly, however, Professor Rao suggests that even when employed by married individuals, "assisted reproductive technologies insidiously undermine the traditional paradigm from within." *Id.* at 959.

[75] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race"); *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (noting that the statute banning contraceptives "is repulsive to the notions of privacy surrounding the marriage relationship"). Although the *Griswold* Court explicitly extended the privacy right to unmarried individuals in the context of contraceptives, it did so only on equal protection grounds and, "[left] open the possibility that the state may discover more rational reasons why unmarried persons should not reproduce, by either coitus or assisted reproductive technologies." Roger J. Chin, M.D., *Assisted Reproductive Technologies: Legal Issues in Procreation*, 8 LOY. CONSUMER L. REP. 190, 205 (1996).

[76] 491 U.S. 110 (1989).

family."[77] Based on this statement of the Court, one can argue that the traditional understanding of procreation only encompassed married procreation, and therefore, any extension of a right to the utilization of assisted reproductive techniques should only be given to married couples.

Notwithstanding traditional notions of family, an infertile individual's[78] interest in having a child does not appear any less compelling than a fertile person's.[79] The antiquated rationale relied upon in *Michael H.* is not applicable in today's societal make-up. The 1990 Census of Population reported that there were over three million "unmarried partner households" of the opposite sex in the United States.[80] In *In re Adoption of Camilla*, the court allowed the petitioner eligible to adopt a child who was a product of IVF; the petitioner was the biological mother's lesbian partner.[81] The court stated:

> To suggest that adoption petitions may not be filed by unmarried partners of the same or opposite sex because the legislature has only expressed a desire for these adoptions to occur in the *traditional nuclear family* constellation of the 1930's ignores the

---

[77] *Id.* at 123. Justice Scalia's opinion relied on the sanctity given the "family" throughout history, rather than some biological formula that might include "biological fatherhood plus an established parental relationship." *Id.* Note, however, that some state courts disagree with the Supreme Court's definition of "family," and find a broader definition on either statutory or state common law grounds. *See, e.g.*, G.F.C. v. S.G., 686 So. 2d 1382, 1385-86 (Fla. App. Dist. Ct. 1997) (declining to follow *Michael H.* on state law grounds); State *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554, 562 (W. Va. 1996) (declining to follow *Michael H.*); Michael M. v. Giovanna F., 7 Cal. Rptr. 2d 460, 466 (Cal. Ct. App. 1992) (same); Jones v. Trojak, 586 A.2d 397, 399 (Pa. Super. Ct. 1990) (holding *Michael H.* superseded by state statute), *aff'd*, 634 A.2d 201 (Pa. 1993).

[78] The term "individual," rather than "couple," is used throughout the remainder of this Note because of this author's belief that the right to procreation through assisted reproductive technology should extend to married and unmarried individuals alike. The Supreme Court's invalidation of legal presumptions favoring married persons in contraception and child-rearing cases, is evidence that they would likely subject distinctions relating to procreation to heightened scrutiny.

[79] *See* Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 679 (1985) (stating that "[t]he reasons for having a child—to love and be loved by that child, to educate and convey personal ideals and values, to contribute a part of oneself to future generations—do not turn on marital status").

[80] *In re* Adoption of Camilla, 620 N.Y.S.2d 897, 901 (Fam. Ct. 1994) (citing U.S. Bureau of the Census, 1990 Census of Population, CP-2, Social and Economic Characteristics (1993)).

[81] *See id.* at 899.

reality of what is happening in the population.[82]

Additionally, the Supreme Court in *Carey v. Population Services Int'l*, stated "protect[ing] individual decisions in matters of childbearing from unjustified intrusion by the State," emphasizes that there is no inferior procreative right for unmarried persons.[83] Therefore, any right to technically assisted procreation should be granted to unmarried individuals as well as married couples.

Another Equal Protection issue regarding the right to non-coital procreation may arise in the context of wealth classifications. Case law exists establishing that the fundamental right to avoid undue interference with one's ability to prevent or terminate a pregnancy does not impose an affirmative obligation on the part of the state to provide the poor with the means necessary to achieve this end.[84] It would appear that, in the same

---

[82] *Id.* at 901-02 (emphasis added). The court also noted that the adoption in this case served the state's purpose, "to provide for a child's financial and emotional security." *Id.* at 902 (footnote omitted). Moreover, the court recognized that the social stigma attached to illegitimacy has been nearly eliminated. *See id.* at 901.

[83] Carey v. Population Svcs. Int'l, 431 U.S. 678, 687 (1977). The use of IVF has been restricted by individual clinics to exclude many unmarried and homosexuals. As noted previously, the extension of *Griswold* in the holdings of *Eisenstadt* and *Carey* laid the foundation for extending the right to non-coital procreation to unmarried individuals. *See supra* note 45 and accompanying text. At times, courts have been pressured to extend this right to homosexuals. Due to the Supreme Court's determination that homosexuals are neither an immutable class nor politically powerless, subsequent courts have employed rational basis review in evaluating discriminatory classifications. *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (stating that while classifications of race, national origin, or alienage have been subject to strict scrutiny, homosexuality has never enjoyed such a privilege); *see also* Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993) (using rational basis review to strike down regulation barring homosexuals from naval service, but reserving question of whether homosexuals would qualify as a quasi-suspect class), *aff'd sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994). *But see* Baehr v. Miike, CIV No. 91-1394, 1996 WL 694235 at *17 (Hawaii Cir. Ct. Dec. 3, 1996) (determining that denial of same-sex marriages was violative of the equal protection clause and noting that "[g]ay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children .... [They] can provide children with a nurturing ... environment which is conducive to the development of happy, healthy and well-adjusted children, ... [and] can be as fit and loving parents, as non-gay men and women ...."), *order aff'd* 950 P.2d 1234 (Haw. 1997).

[84] *See* Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that the constitutional right to an abortion does not impose an affirmative obligation upon the government to provide the financial resources necessary to exercise the right by subsidizing abortions because, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own

fashion, recognizing a fundamental right to noncoital procreation would create no duty on the part of the state to provide funding for the utilization of these services.

III. CRYOPRESERVATION AND THE RIGHTS OF PREEMBRYOS

In addition to the rights of IVF participants, the techniques of assisted reproduction give rise to a new class of entities, human preembryos, with legal rights yet to be determined. The controversy surrounding noncoital reproduction has increased due to advances in reproductive technology, especially the development of cryopreservation.[85] IVF has created the possibility that viable human embryos might be created and never given the opportunity to realize their potential as living human beings. Because the cryopreservation process "allow[s] the embryo to survive outside the womb [for extended lengths of time], situations such as death, divorce, or disagreement between couples [prior to implantation] raise . . . questions regarding the eventual disposition of the . . . embryo."[86]

A. International Response to Cryopreservation of Embryos

Unlike the United States, other countries have actively addressed the moral and legal issues surrounding cryopreservation. The United Kingdom and Australia have been the forerunners in establishing committees to consider the social, ethical, and legal implications of assisted reproduction technologies.[87] Australia established the Waller Committee[88] in response to the

---

creation"); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (holding that the constitutional right to an abortion is only a negative "right protect[ing] the woman from . . . interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds").

[85] *See supra* notes 29-35 and accompanying text (discussing the process of cryopreservation).

[86] Davidoff, *supra* note 19, at 132. Davidoff states that a large part of the problem is that patients, clinics, and doctors rarely agree on the best way to dispose of unused embryos. *Id.*

[87] The United Kingdom established the Department of Health and Social Security Committee of Inquiry into Human Fertilisation and Embryology (the "Warnock Committee") in 1982. *See* WARNOCK, *supra* note 28, at vi. In Australia, the State of Victoria established the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (the "Waller Committee") which issued a report in 2984. *See* Pitrolo, *supra* note 16 at 177.

[88] *See* Pitrolo, *supra* note 16, at 177. Named after Professor Louis Waller, the

issues raised by the Rios dilemma, a situation which developed in part due to lack of legislation concerning cryopreservation.[89] In 1981, Mario and Elsa Rios traveled from the United States to Australia in order to undergo IVF treatment.[90] Three eggs were fertilized, one of which was transferred to Mrs. Rios while the other two were stored cryogenically in the Australian clinic.[91] Tragically, Mr. and Mrs. Rios were killed in a plane crash in 1984.[92] The Rioses' two remaining frozen embryos became the subject of controversy because they neither executed a will nor signed an embryo disposition agreement.[93] The issue of the disposition of the embryos arose as to whether they could be, "discarded, transferred to another couple, considered heirs and eligible to inherit part of the Rioses' estate through intestacy law, or considered part of the Rioses' estate itself."[94] Resolution of this issue clearly turned on what legal status the embryos were to be accorded. In 1984, the Waller Committee, in its Report on the Disposition of Embryos Produced by In Vitro Fertilization,[95] recommended that although the embryo should not be afforded the status of " 'personhood,' . . . it merits more respect than an entity created solely for research purposes."[96]

The Waller Committee report laid the foundation for the State of Victoria's Infertility (Medical Procedures) Act—the first ever attempt in the world to regulate IVF.[97] The Act, in one of its few deviations from the recommendations of the Waller Committee, required that, upon the consent of the egg and sperm donors, the unused embryos be made available for transfer to another couple.[98]

---

chairman, the committee was comprised of experts from the fields of law, religion, and science. *See* Davidoff, *supra* note 19, at 156 n.215.

[89] *See* NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS 5 (Linda M. Whiteford & Marilyn L. Poland eds., 1989); Davidoff, *supra* note 19, at 156; Pitrolo, *supra* note 16, at 178.

[90] *See* Davidoff, *supra* note 19, at 156.

[91] *See id.*

[92] *See* Pitrolo, *supra* note 16, at 178.

[93] *See id.* The Rioses left behind an adult child and a sizable estate. *See id.* at 177. The implanted embryo had not resulted in a live birth. *See* Davidoff, *supra* note 19, at 156; Fabricant, *supra* note 1, at 183.

[94] Davidoff, *supra* note 19, at 156.

[95] *See id.* at 156 n.218 and accompanying text.

[96] Fabricant, *supra* note 1, at 181; *see also* Pitrolo, *supra* note 16, at 178.

[97] *See* Pitrolo, *supra* note 16, at 178-79.

[98] *See id.* at 179. The Committee originally recommended that the unused embryos be discarded. *See id.*

Unlike the Waller Committee, which was established in large part in response to the Rios dilemma, the United Kingdom established the Department of Health and Social Security Committee of Inquiry into Human Fertilisation and Embryology (the "Warnock Committee") to examine the general ethical implications of new developments in the field of reproductive techniques.[99] Two years after its formation, the Warnock Committee found that, "the human embryo . . . is not, under the present law in the UK accorded the same status as a living child or an adult, nor do we necessarily wish it to be accorded that same status."[100] Nevertheless, the Warnock Committee recommended that the embryo be accorded a "special status"[101] and made sixty-four recommendations to Parliament regarding the application of policies and safeguards to new developments in human fertilization.[102] In 1990, Parliament relied on the suggestions of the Warnock Committee to pass the Human Fertilisation and Embryology Act.[103] This Act limited research on embryos to the first fourteen days after fertilization as suggested by the Warnock Committee and mandated the destruction of human embryos after they are stored for five years.[104]

B. *Domestic Response to Cryopreservation of Embryos*

In contrast to these comprehensive directives, the United

---

[99] *See* Davidoff, *supra* note 19, at 157. Led by Dame Mary Warnock, the Committee was made up of members from medical and health-care professions, and religious and ethical groups from Scotland, Wales, Ireland, and Great Britain. *See* Pitrolo, *supra* note 16, at 173.

[100] WARNOCK, *supra* note 28, § 11.17 at 63; *see also* Christine D. Ahnen, Comment, *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?—An Analysis of* Davis v. Davis, York v. Jones, *and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1314 (1991) (noting that "[i]n 1979, the Ethics Advisory Board of the Department of Health and Human Services determined that 'the human embryo is entitled to profound respect, but this respect does not necessarily encompass the full legal and moral rights attributed to persons' ") (footnote omitted).

[101] *See* WARNOCK, *supra* note 28, § 11.17 at 63.

[102] *See id.* at 63, 80-86. Among the recommendations was that a licensing authority be created to regulate research and artificial reproductive technologies, and legal limits on the use of human embryos in research. *See id.* at 80. The Committee concluded that, absent unacceptable risks, IVF and cryogenic preservation should be viewed as acceptable techniques for treatment of infertility. *See id.* § 7.4 at 40; *see also id.* § 10.3 at 53-54.

[103] *See* Pitrolo, *supra* note 16, at 175. The Warnock Report's recommendations were also used as the basis of the Surrogacy Arrangements Act of 1985. *See id.*

[104] *See id.* at 176.

States has been slow to legislate in the field of IVF or cryopreservation. Recently, the Fertility Clinic Success Rate and Certification Act of 1992[105] legislated that clinics engaging in IVF procedures report the exact numbers of procedures performed and the resulting number of live births occurring.[106] This was designed to combat fraud or misrepresentation due to false, inflated success claims by individual clinics.[107] Unfortunately, the legislature still has not given effective guidelines as to the status of the embryo, the enforceability of embryo contracts, and how to resolve disputes over embryo dispositions.

1. Legal Status of the Embryo

There are currently three views on the legal status of the embryo: the right-to-life view, the property view, and special respect status. The legal status of the embryo is important in settling disputes over its disposition. In the absence of specific legislation regarding IVF procedures, the judiciary has been unable to provide comprehensive, fair, and efficient resolutions to disputes concerning frozen embryos.[108]

Advocates of the right-to-life view consider an embryo a human entitled to all the rights of personhood.[109] Proponents of this view find there is a duty to protect in vitro embryos from harm by immediately transferring the embryo to a uterus; they condemn the use of cryopreservation because it is potentially detrimental to the embryo.[110] They argue that embryos produced through IVF are done so purposefully, not through a reproductive accident, and, therefore there should be no right to discard them.[111] Advocates of this view also argue that these embryos should be protected because of their potential for birth.[112] Moreover, they distinguish *Roe v. Wade* on the basis that the embryos' existence outside of the womb nullifies the abortion-

---

[105] 42 U.S.C. §§ 263a-1 to -7 (1994).

[106] *See id.* § 263a-1.

[107] *See* S. REP. NO. 102-452 at 2, *reprinted in* U.S.C.C.A.N. 2565.

[108] *See infra* notes 138-86 and accompanying text (discussing cases dealing with embryo dispositions).

[109] *See* Ahnen, *supra* note 100, at 1308-09.

[110] *See id.*

[111] *See id.* at 1308. Right-to-life advocates assert that "in vitro embryos must be transferred to a uterus and condemn[ ] any intervention before transfer that might harm the embryo or is not therapeutic, such as freezing and embryo research." *Id.* at 1309.

[112] *See id.* at 1308-09.

related conflict between the woman's right to privacy and bodily integrity.[113]

The American Fertility Society focused on the parties who have an interest in the embryo rather than on the embryo itself when it discussed the embryo-as-property view.[114] In its purest form, this view treats embryos much like any other form of personal property or tissue matter.[115] This view has not found favor with many commentators.[116]

In 1984, the Ethics Committee of the American Fertility Society ("ECAFS") considered the competing views regarding the legal and moral status of embryos and arrived at a compromise between the right-to-life view and the embryo-as-property

---

[113] *See id.*; Davidoff, *supra* note 19, at 137-38. IVF advocates contend that the state interest is not compelling enough to deny the extension of the fundamental right of procreation to noncoital procedures. *See id.* As noted earlier, the cryogenically stored embryo is stored prior to the point at which the embryo develops a nervous and organ system—therefore, the embryo is not conscious and cannot feel pain. *See id.* "[A]t this stage of development only ten percent of all embryos, whether in vivo or in vitro, will implant, and thirty to forty percent of those that implant will spontaneously abort." Ahnen, *supra* note 100, at 1309. In addition, all children who had been cryogenically preserved in their embryonic stage have been born without any physical defect resulting from their embryonic preservation. *See id.* at 1310. Medical experts believe that the natural selection process is responsible for many of the in vitro embryos which do not survive the IVF process, just as many in vivo embryos do not result in live births. *See id.* at 1309. They believe that these embryos possess genetic or other abnormalities which cause them not to develop after fertilization or to spontaneously abort after embryo transfer. *See id.* at 1310.

[114] *See* York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (finding that the cryopreservation agreement between the clinic and the couple created a bailor-bailee relationship, particularly since language in the agreement referred to the prezygotes as property).

[115] *See, e.g.*, American Fertility Society, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY (No. 1) 12 (1984) (stating that "[i]t is understood that the gametes and concepti are the property of the donors [thus, t]he donors [ ]have the right to decide at their sole discretion the disposition of these items . . . .").

[116] Some feel even the "toned-down" view taken by the Warnock Committee, which recommended that legislation provide for no "right of ownership," still treated embryos too much like property in that it contemplated the licensed sale of embryos. *See, e.g.*, I. KENNEDY & A. GRUBB, MEDICAL LAW: TEXT AND MATERIALS 682 (1989) (arguing that, what is ownership, "if it is not the right to control, including to dispose of by sale, or otherwise?" and that effectively, the embryo is being treated as a chattel).

Other commentators, however, treat this view more as an acknowledgment of the status quo. *See, e.g.*, John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455 (1990) ("Although the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.").

view.[117] The Committee adopted the positions set forth by the Waller and Warnock committees, namely that:

> [T]he preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than any other human tissue becuase [sic] of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.[118]

In 1979, the Ethics Advisory Board of the Department of Health, Education and Welfare, had issued a similar statement, arguing that "the human embryo is entitled to profound respect; but this respect does not necessarily encompass the full legal and moral rights attributed to persons."[119] The ECAFS did find, however, that the embryo's "potential to become a person . . . limits the "circumstances in which a preembryo may be discarded or used in research."[120]

2. State Legislation

Currently, three states—Illinois, Louisiana, and Pennsylvania—regulate IVF.[121] The Illinois statute faced its first constitutional challenge by a married couple seeking IVF treatment in *Smith v. Hartigan*.[122] The defendants contended that the in vitro provision "both permits in vitro fertilization and preserves the constitutional rights of women who have become pregnant either naturally or through in vitro fertilization to terminate their pregnancies,"[123] while " 'protect[ing] the State's interest in hu-

---

[117] *See* Ethics Committee of the American Fertility Society, *Ethical Consideration of the New Reproductive Technologies*, 46 FERTILITY & STERILITY (No. 3) 30S (Supp. 1, 1986) [hereinafter *Ethical Consideration*].

[118] *Id.* at 29S-30S.

[119] Support of Human In Vitro Fertilization and Embryo Transfer, 44 Fed. Reg. 35,033, 35,056 (Dep't H.E.W. 1979) (report and conclusions). As the issue of IVF became politically entangled with the abortion controversies, the recommendations of the Board were never acted upon and the Board itself was disbanded. *See* Pitrolo, *supra* note 16, at 172.

[120] *Ethical Consideration*, *supra* note 117, at 77S.

[121] *See* ILL. REV. STAT., ch. 38 ¶ 81-26, § 6(7) (1989); LA. REV. STAT. ANN. §§ 9:121-9:133 (West 1997); PA. CONS. STAT. ANN. § 3213(e) (Purdon 1989).

[122] 556 F. Supp. 157 (N.D. Ill. 1983).

[123] *Id.* at 161. The defendants argued that "pregnancy termination" should be defined as "non-reimplantation of an embryo conceived in vitro with the intention of continuing the pregnancy in the womb, until delivery." *Id.*

man life by prohibiting wilful exposure of embryos to harm, [such] as by destructive laboratory experimentation.' "[124] Based on their interpretation of the statute, the defendants concluded that, " 'to determine that [a] five-to-seven day old, nonviable conceptus should not be reimplanted for any medical reason whatsoever is simply to participate in a lawful pregnancy termination.' "[125] Dismissing the case for lack of subject matter jurisdiction, the court found that the statute, as interpreted by the Attorney General, did not prohibit the IVF procedure in which the couple sought to participate.[126]

Smith did not address the constitutionality of experimental research to improve IVF procedures, such as cryopreservation. Seven years after *Smith*, that issue was touched upon in *Lifchez v. Hartigan*,[127] wherein the same statute at issue in *Smith* was found unconstitutional.[128] The court stated that the failure of the Illinois abortion law to define the terms "experimentation" and "therapeutic" violated due process by rendering the statue so vague that persons would not know if they were in violation of the statute.[129] In part the court based its holding on the statute's infringement of a woman's right of privacy and reproductive freedom.[130]

In contrast to the controversial Illinois statute, Pennsylvania's statute simply requires "persons conducting, or experimenting in, in vitro fertilization" to regularly file reports on information regarding the personnel employed and the number of IVF procedures performed.[131]

The Louisiana statute, the most encompassing and stringent

---

[124] *Id.* (alteration in original) (citation omitted).

[125] *Id.* (alteration in original) (citation omitted).

[126] *See id.* at 164.

[127] 735 F. Supp. 1361 (N.D. Ill.). Physicians specializing in reproductive endocrinology and fertility counseling challenged the constitutionality of a provision of the Illinois abortion law. Section 6(7) of the Illinois Abortion Law provided:

> (7) No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

Lifchez, 735 F. Supp. at 1363 (citing ILL. REV. STAT., ch. 38 ¶ 81-26, § 6(7) (1989)).

[128] *Id.* at 1376.

[129] *See id.* at 1364.

[130] *See id.* at 1376-77.

[131] 18 PA. CONS. STAT. ANN. § 3213(e) (Purdon 1989). Failure to submit the reports results in a fine. *See id.*

set of laws regarding IVF,[132] has expressly recognized human embryos as having legal rights.[133] The statute mandates that all embryos be transferred to a uterus—either the IVF participants themselves or donated to an "adoptive" uterus—thereby protecting the embryo from being destroyed.[134] The statute states that an embryo is, "a juridical person which shall not be intentionally destroyed,"[135] and affords the embryo, even at the one-cell stage, the right to sue or be sued.[136] The statute provides that a curator may be appointed to protect the embryo's interests.[137] This statute will likely face a constitutional challenge in the near future since it leaves open the possibility of stringent directives regarding IVF procedures or even a complete ban on IVF if the state feels that the protection of the embryo at this stage in life is sufficiently compelling.

3. Judicial Discretion

Due to the overall lack of comprehensive legislation in the IVF field, courts have been given much discretion in resolving disputes concerning embryo dispositions. Indicative of the resulting judicial inconsistency are the three contrasting decisions of the district, appellate, and supreme courts of Tennessee in *Davis v. Davis*.[138] Each case confronted the issue of what should be done with cryogenically preserved embryos when the gamete providers disagree as to their disposition. Despite the fact that each case involved custody and disposition of cryogenically pre-

---

[132] *See* Leanne E. Murray, Note, Davis v. Davis*: The Embryonic Stages of Procreational Privacy*, 14 PACE L. REV. 567, 578-79 (1994) (comparing the Louisiana statute to the Uniform Parentage Act).

[133] *See* LA. REV. STAT. ANN. §§ 9:121-9:133 (West 1997). Section 9:126 deems an IVF human ovum as "a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum." *Id.* § 9:126.

[134] *See id.* § 9:129-30. Section 9:130 provides that "[i]f the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation . . . ." *Id.* § 9:130. Note, however, that section 9:129 provides, "[a]n in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person." *Id.* § 9:129.

[135] *See id.* § 9:129.

[136] *See id.* § 9:124.

[137] *See id.* § 9:126.

[138] No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd* No. 180, 1990 WL 10807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd* 842 S.W.2d 588 (Tenn. 1992).

served embryos following the parents' divorce,[139] each court adopted a different theory as to the rights of the embryos, which impacted greatly on their decisions as to the disposition of the embryos.[140] The trial court espoused a right-to-life view and granted joint custody over the embryos to both Mr. and Mrs. Davis with equal power to determine their disposition.[141] The appellate court reversed the trial court's holding, and determined that the dispute should be resolved by bailment law, thus adopting an embryo-as-property view.[142]

---

[139] While married, Mr. and Mrs. Davis attempted to conceive a child via IVF due to Mrs. Davis' infertility. *See Davis*, 842 S.W.2d at 591. Mrs. Davis suffered five tubal pregnancies during her attempts at natural conception. *See id.* The first pregnancy resulted in the removal of her right fallopian tube and the last, a near fatal experience, resulted in her left fallopian tube rupturing. *See id.* Under the advice of her physician, Mary Sue had her left fallopian tube ligated which rendered her unable to ever conceive naturally. *See id.* The couple attempted to adopt a child, but when the adoption proceedings fell through they consulted with Dr. Ray King of the Fertility Center of East Tennessee. *See Davis*, 1989 WL 140495, at *2. After six unsuccessful attempts over a course of three years, and at the expense of $35,000, they decided to enter the new cryopreservation program at the clinic. *See Davis*, 842 S.W.2d at 591-92. Nine eggs removed from Mrs. Davis were fertilized with Mr. Davis' sperm, producing nine embryos ready to be implanted. *See id.* at 592. Two embryos were immediately transferred into Mrs. Davis' womb, and the remaining seven were cryogenically stored for later implantation. *See id.* After the first implantation failed, and prior to any attempts to utilize the remaining embryos, Mr. Davis filed for divorce. At issue was the subsequent "custody" battle over the remaining cryogenically stored embryos. *See id.* Mrs. Davis had initially wanted the embryos so that she could have them implanted in herself at a later date. At the time of the appeal, both Mr. Davis and Mrs. Davis had remarried, and Mrs. Davis had changed her mind about implanting the embryos into herself. She now sought the authority to donate them to a childless couple. *See id.* at 590. Mr. Davis opposed any future implantation of the embryos due to his profound interest in avoiding procreation outside of the sanctity of marriage.

[140] *See Davis*, 1989 WL 140495, at *9 (basing decision on the right-to-life theory); *Davis*, 1990 WL 130807, at *2 (applying property law to determine the status of embryos); *Davis*, 842 S.W.2d at 590 (adopting a new theory by granting embryos special respect status).

[141] Adopting a right-to-life view, the trial court found that "human life begins at the moment of conception . . . [and] that Mr. and Mrs. Davis have accomplished their original intent to produce a human being to be known as their child." Davis, 1989 WL 140495, at *9. The court discussed the Supreme Court's holding in *Roe v. Wade* and *Webster* but found that they did not apply to the case at bar because the right to privacy afforded by those cases only extended to abortions. *See id.* at 10 .Therefore, in applying the doctrine of parens patriae, the court granted custody of the embryos to Mrs. Davis so that "they be made available for implantation to assure their opportunity for live birth." *Id.* at *11.

[142] The Appellate Court rejected the right-to-life view. *See Davis*, 1990 WL 130807. The court instead relied upon the decision in *York v. Jones*, 717 F. Supp. at 425, which determined that property law prevailed because a bailment situation

The Tennessee Supreme Court recognized "the obvious importance of the case in terms of the development of law regarding the new reproductive technologies,"[143] and applied yet another theory in determining the rights of the embryo.[144] The court adopted the view of the Ethics Advisory Committee,[145] the special-respect status of the embryos, due to their "potential for human life."[146] The court stated that the parties' constitutional right to procreation must be balanced against the right to avoid procreation.[147] The court analyzed the individual burdens that would be imposed on both Mr. and Mrs. Davis, and concluded that Mr. Davis's interest in avoiding procreation was more compelling than Mrs. Davis's interest in having the embryos donated to another couple.[148]

The New York Court of Appeals confronted the issue of preembryo disposition in *Kass v. Kass*.[149] The court found no

existed between the gamete providers. *See Davis*, 842 S.W.2d at 595-96.

[143] *Davis*, 842 S.W.2d at 590.

[144] The Tennessee Supreme Court found the intermediate court's reliance on *York* troubling since it implied that the rights of the would-be parents are in the nature of a property interest. *See id.* at 596. The court equated the embryos with fetuses, and noted that the Tennessee abortion statutes demonstrated that viable fetuses in vivo are not afforded the same protection as persons. *See id.* at 595. In particular, the court pointed to section 39-15-201 of the Tennessee Code, incorporating the trimester approach to abortions. *See id.*

[145] *See supra* note 117-20 and accompanying text (discussing the view of the Ethics Advisory Committee).

[146] *Id.* at 597 (noting that Mr. and Mrs. Davis have decision-making interests in the disposition of the embryos, but not property interests).

[147] In relying on the Tennessee abortion statute, the court concluded that the state's interest in potential life was not sufficient "to justify an infringement on the gamete-providers' procreational autonomy." *Id.* at 602.

[148] *See id.* at 604. The court, therefore, awarded "custody" of the embryos to Mr. Davis. In dicta, the court suggested that the result may have been different had Mrs. Davis intended to use the embryos herself, but only if she had no other reasonable opportunity to achieve parenthood. *See id.* at 604. Additionally, the court opined as to the treatment and validity of pre-IVF contracts between progenitors. *See id.* In order to provide guidance to future IVF parties, the court stated that a contract between progenitors concerning the disposition of unused embryos should be valid and enforced. *See id.* at 597. The court reasoned that this is consistent with its conclusion that progenitors maintain a decision-making interest in the disposition of the embryos. *See id.* In determining that Mr. Davis' procreational rights outweighed those of Mrs. Davis the court stated that "[a]ny disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences" *Id.* at 603. The court noted that "[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited." *Id.* at 604.

[149] No. 53, 1998 WL 225157 (N.Y. May 7, 1998).

need to adopt an analysis weighing the interests of the parties, as in *Davis*, on the facts of *Kass*.[150] Instead, the court relied on the *Davis* court's approach that "[a]greements between progenitors ... regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.[151] As a result the court enforced two agreements that Mr. and Mrs. Kass had executed as they "unequivocally stated their [the Kasses'] intent" as to the desired disposition of their cryopreserved embryos.[152]

---

[150] *See id.* at *6 (noting that "for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to 'special respect' "). The court found that constitutional considerations of privacy and bodily integrity were not implicated in determining the disposition of pre-zygotes. *See id.* In *Davis*, the court considered the man and woman engaged in the IVF process to be "entirely equivalent gamete-providers." *Davis*, 842 S.W.2d at 601.

[151] *Kass*, 1998 WL 225157, at *6.

[152] *See id.* at *7. *Kass* involved a dispute over the disposition of cryogenically preserved embryos following the divorce of the couple. *See id.* at *3. Mrs. Kass sought custody of the frozen embryos in order to try to achieve pregnancy through IVF implantation in her own uterus. *See id.* Mr. Kass, on the other hand, wished to have the embryos donated for use in embryo research. *See id.* In consent forms provided by the hospital, Mr. and Mrs. Kass had indicated their mutual desire to donate them to the IVF Program for research. *See id.* at *1. The informed consent document provided that their frozen pre-zygotes may "be disposed of by the IVF Program for approved research investigation" in the event they were "unable to make a decision regarding the disposition" of their pre-zygotes. *Id.* at *2. In their divorce document, they agreed that the pre-zygotes should be disposed of according to the terms of the consent document. *See id.* at *3. Subsequently, Mrs. Kass changed her mind and was opposed to the destruction or release of the five pre-zygotes. *See id.* Mr. Kass sought specific performance of that agreement. *See id.* Despite the execution of an agreement, the trial court awarded custody of the embryos to Mrs. Kass. *See* Kass v. Kass, 1995 WL 110368, at *4 (N.Y. Sup. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (App. Div. 1997), *aff'd* No. 53, 1998 WL 225157 (N.Y. May 7, 1998). Relying on *Roe v. Wade*, 410 U.S. 114 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the trial court held that since in vivo and in vitro fertilization are one in the same, the rights and wishes of Mrs. Kass must prevail. *See Kass*, 1995 WL 110368, at *4. The appeals court reversed the decision of the trial court and stated that the trial court "committed a fundamental error ... in equating a prospective mother's decision whether to undergo [in vitro procedures] with a pregnant woman's right to exercise exclusive control over the fate of her non-viable fetus." Kass v. Kass, 663 N.Y.S.2d 581, 585 (App. Div. 1997), *aff'd* No. 53, 1998 WL 225157 (N.Y. May 7, 1998). The Appellate Division stated that the trial court's reliance on *Roe v. Wade* and *Danforth* was erroneous because those cases involved a woman's "personal autonomy and bodily integrity." *Id.* (citing Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992)) (holding that the state may not impose an undue burden on a woman's right to obtain an abortion). Relying on *Davis*, the Appellate Division reasoned that a woman's "right to exercise virtually exclusive control over her own body [and non-viable fetus] is not implicated in the IVF scenario" because, prior to implantation, a woman's bodily integrity is not at issue. *Id.* at 586.

4. A Need for Legislative Guidance

Judge Miller, dissenting from the Appellate Division's decsion in *Kass*, urged the legislature to implement guidelines to facilitate resolution of these conflicts in subsequent cases.[153] The absence of clear legislation regarding the rights and duties of the parties involved in the IVF process makes the enforceability of IVF contracts questionable, thereby making uncertain the participant's ability to control their reproductive options through these contracts.[154] In balancing the interests between the woman who wishes to exercise her right to procreate against the man's desire to avoid procreation, one party's constitutional rights will take precedence.[155] With the increasing reliance by infertile couples on IVF, and the lack of required embryo disposition agreements, litigation over future disposition of embryos will increase. In an effort to reduce litigation, legislation must be implemented to provide a foundation upon which parties entering into these agreements can rely.

Initially, the legislature must decide the status of embryos. Overwhelmingly, the literature advocates the "special-respect" status of the embryo.[156] Due to the embryo's potential for per-

---

[153] *See Kass*, 663 N.Y.S.2d at 594 (Miller, J., dissenting) ("The legal, emotional, and ethical nightmare resulting [from frozen embryo custody battles] demonstrates the clear need for legislation mandating that in vitro fertilization clinics require the execution of a standardized, binding agreement setting forth the parties' specific intentions in the event of foreseeable changes in circumstances . . . .")

[154] *See* Robertson, *supra* note 116, at 465 (arguing that preconception disposition agreements should not be enforced because parties may not be fully informed, understand the legal implications of their choices, or have any real choice); Lee Kuo, Comment, *Lessons Learned from Great Britain's Human Fertilization and Embryology Act: Should the United States Regulate the Fate of Unused Frozen Embryos?*, 19 LOY. L.A. INT'L & COMP. L.J. 1027, 1033-34 (1997) (questioning the enforceability of preconception agreements because the participants may not contemplate the full consequences of such agreements and the agreements may be entered into under unconscionable circumstances); *cf. Kass*, 1998 WL 225157, at *9 (enforcing a preconception agreement which called for donation of cryopreserved pre-zygotes in the event the parties were unable to decide on disposition).

[155] *See Davis*, 842 S.W.2d at 601 (stating that the right to procreate is of equal significance to the right to avoid procreation subject to certain limits and protections).

[156] *See* Ruth Colker, *Pregnant Men Revisited or Sperm is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1077 (1996) (disagreeing with the result in *Davis* because the court should have valued the potential for life itself in the embryo); Robertson, *supra* note 119, at 447 (contending that the early embryo should be accorded special respect because it is genetically unique and has the potential for life); Dehmel, *supra* note 21, at 1384 (noting that the "special-respect" view of frozen embryos has wide support); Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles*

sonhood, this is the proper status for the embryo.[157] The legislature must next determine whether to afford in vitro embryos rights greater than those given to in vivo embryos. In light of the fact that the courts recognize a woman's fundamental right to terminate an in vivo pregnancy as an expression of her reproductive freedom,[158] it should also allow for the termination of an in vitro embryo under those same freedoms.[159] Arguably, a law such as Louisiana's, which mandates implantation of the spare embryos,[160] does not impose gestational or child-rearing duties because the embryo may be donated, but the burdens of psychological parenthood must be taken into consideration.[161] The *Roe* Court held that the fundamental right of privacy includes freedom in procreative choices, and allowed a woman to avoid the physical, psychological, financial, and child-rearing burdens of parenthood.[162]

Next, the legislature must address disputes that may arise between the gamete providers. These disputes may be resolved in different ways. First, the legislature may consider the Sweat Equity Theory.[163] This theory favors awarding the embryos to the woman because she undergoes the bulk of the physical burdens of the IVF procedure.[164] Because of the imbalance in the

---

Over Frozen Embryos, 41 CASE W. RES. L. REV. 543, 561 (1991) (observing that the *Davis* court seemed to adopt the view of most American and international scholars—that pre-embryos have a special status). *But see* Carow, *supra* note 33, at 570 (fearing that special respect status for pre-embryos might cause courts to consider the rights of the pre-embryos over those of gamete providers).

[157] *See* Robertson, *supra* note 116, at 447.

[158] *See* Planned Parenthood v. Casey, 505 U.S. 833, 870-71 (1992) (recognizing a woman's fundamental right to abort her non-viable fetus, free from any undue interference from the state); Roe v. Wade, 410 U.S. 113, 154 (1973) (noting that a woman's right to privacy includes the right to an abortion).

[159] *But see Kass*, 1998 WL 225157, at *6 (holding that the bodily integrity and personal autonomy rule from *Roe v. Wade* is not implicated in IVF before implantation takes place).

[160] *See supra* notes 132-37 and accompanying text (stating that implantation must be into the IVF participant or into an adoptive uterus).

[161] *See, e.g., Davis*, 842 S.W.2d at 603-04 (concluding that the burden of psychological consequences resulting from unwanted parenthood outweighed a desire to donate pre-zygotes so an infertile couple may achieve pregnancy).

[162] *See Roe*, 410 U.S. at 153.

[163] *See* Dehmel, *supra* note 21, at 1399; Tanya Feliciano, Note, Davis v. Davis: *What about Future Disputes?*, 26 CONN. L. REV. 305, 347 (1993); Mary A. Totz, Comment, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 171-72 (1994).

[164] *See* Dehmel, *supra* note 21, at 1399; Feliciano, *supra* note 163, at 347. It is the woman who submits to medically risky and inconvenient procedures to remove

amount of time and effort expended by gamete providers, this theory recognizes that the woman has more invested and, thus, should have the final say in the disposition of the embryo.[165] This theory appears to have gained favor, as it is similar to the "bodily integrity" argument set forth in *Danforth*.[166]

Another possible resolution to these disputes is to recognize the legality and enforceability of embryo disposition agreements. In the absence of such agreements, an implied contract may be enforced recognizing that the gamete providers entered into this procedure for reproductive purposes.[167] Therefore, the party seeking to enforce the agreement by providing for a means of implantation should decide the fate of the embryo.

IV. GESTATIONAL SURROGACY

The introduction of a surrogate further complicates the IVF controversy because it implicates another fundamental right.[168] Reproductive technology is at the stage where it is possible for a child to have five parents: the egg and sperm donors (genetic parents), the gestational surrogate, the intended mother, and the intended father.[169] Surrogacy continues the disassociation which began with the development of the birth control pill: sexual intercourse from conception, procreation from human involvement, and, now, gestation from motherhood.[170]

---

the eggs, after which she is relegated to bedrest for a few days, whereby the man merely provides the sperm. *See* Totz, *supra* note 163, at 170 n.143.

[165] *See* Dehmel, *supra* note 21, at 1399; Feliciano, *supra* note 167, at 347.

[166] *See* Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976) (stating that a woman has a greater interest in deciding whether to abort a fetus as she bears the physical burden). *But see* Dehmel, *supra* note 21, at 1399 (noting that this argument is flawed due to the happening of unforeseen circumstances affecting the parties' agreement and that it ignores the intent of the parties); Feliciano, *supra* note 163, at 347 (noting that scholars have rejected this argument because no bodily integrity is involved if there was no implantation of the embryos).

[167] *See* Dehmel, *supra* note 21, at 1398 (noting that the ultimate goal is implantation); Feliciano, *supra* note 163, at 346 (noting that an implied contract signifies that the participants intend to be parents).

[168] This Note does not address the constitutionality of surrogacy agreements. This issue is beyond the scope of the paper. This section, in determining the need for legislation regarding disputes between the intended parents and the third-party surrogate, proceeds on the assumption that the legislature will not ban surrogacy agreements outright.

[169] *See, e.g.*, Jaycee B. v. Superior Ct., 49 Cal. Rptr. 2d 694, 696 (Ct. App. 1996) (involving a child support order served on the intended father by the intended mother in a gestational surrogacy case involving anonymous gamete donors).

[170] *See* Sandra Anderson Garcia, *Sociocultural and Legal Implications of Creat-*

The first test of gestational surrogacy arose in *Johnson v. Calvert*,[171] where the court had to decide whether Mrs. Calvert, as a genetic mother, or Anna Johnson, a gestational surrogate, was the "natural" mother of a child produced in an IVF procedure.[172] The trial court found that the Calverts "were the child's 'genetic, biological and natural' father and mother," that Johnson "had no 'parental' rights to the child, and [that] the [surrogacy] contract was legal and enforceable."[173] Johnson's role as gestational host for the Calvert's child may be compared to that of a foster parent—she provided care and protection for the child during the period which its natural mother was unable to do so. The court relied heavily on the fact that the genetic parents were also the intended parents.[174]

In upholding the trial court's decision, the California Supreme Court examined the express intent of the parties involved. The court relied on the parties' surrogacy agreement as indicative of their intent,[175] and determined that California law favored the Calvert's claim.[176] The court concluded that both Mrs. Calvert and Anna Johnson had "presented acceptable proof of maternity" under the applicable statute.[177]

---

ing and Sustaining Life through Biomedical Technology, 17 J. LEGAL MED. 469, 497 (1996) (outlining various disassociations taking place with the development of technology).

[171] 851 P.2d 776 (Cal. 1993).

[172] *See id.* at 778 (outlining the agreement that Johnson was to be paid $10,000 plus life insurance benefits for her role as a surrogate). The Calverts and Anna Johnson entered into a surrogacy agreement whereby Ms. Johnson agreed to carry their fertilized embryo to term and to relinquish all rights to the child at birth. *See id.* The embryo, formed by fertilizing Mrs. Calvert's egg with Mr. Calvert's egg, was implanted into Ms. Johnson's uterus. *See id.* During the course of the pregnancy, Ms. Johnson and the Calverts disagreed about Johnson's life insurance provision and nondisclosure of previous miscarriages and stillbirths. *See id.* The relationship deteriorated to a point where Ms. Johnson threatened to keep the child after it was born. *See id.* The Calverts sought a declaration declaring them the legal parents of the unborn child, and Johnson filed a counter-petition seeking to be declared the legal mother of the child. *See id.*

[173] Anna J. v. Mark C., 286 Cal. Rptr. 369, 373 (Ct. App. 1992).

[174] *See id.* at 376-77.

[175] *See Calvert*, 851 P.2d at 782 (expressing the inability to decide the case without inquiring as to the intent of the parties).

[176] *See id.* (holding "Crispina [Ms. Calvert] is the child's natural mother").

[177] *Id.* at 782. The Uniform Parentage Act (the Act) was adopted in California as was part of a package of legislation introduced in 1975 as Senate Bill No. 347. *See id.* at 778. "[T]he legislation's purpose was to eliminate the legal distinction between legitimate and illegitimate children." *Id.* at 778-79. (explaining that the adoption of the act was in response to United States Supreme Court decisions holding that le-

In *McDonald v. McDonald*,[178] a New York court relied on the *Calvert* decision and held that the gestational mother of two children, born during the marriage, was to be deemed the "natural" mother of the children.[179] The court focused on the intent of the parties when it determined that a mother who utilized donated eggs in order to have a child is the legal mother with all accompanying rights.[180]

An Ohio court in *Belsito v. Clark*,[181] disagreed with the intent-of-the-parties analysis established in *Calvert* and *McDonald*, and determined that a genetic connection was stronger than a gestational one.[182] The court held that the gestational mother could be considered the natural parent only if she obtained the

---

gitimate and illegitimate children deserve equal treatment). The California Civil Code § 7003 provided that a parent and child relationship "*may* be established by proof of [the mother] having given birth to the child, or under [the Act]." CAL. CIVIL CODE § 7003 (Deering 1986), *quoted in Calvert*, 851 P.2d 780. The *Calvert* court explained the breadth of the Act then in force, and explained that under § 7015 of the Act "insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship." *Calvert*, 851 P.2d at 780. The *Calvert* court applied the sections relevant to a father and child relationship to determine the mother and child relationship. *See id.* Section 7004(a) of the code refers to section 621 of the Evidence Code then in effect, now embodied in a parallel section of the Family Code, which stated that "if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests . . . are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly." CAL. EVID. CODE § 621(b) (Deering 1986), *quoted in Calvert*, 851 P.2d at 780 n.6. The *Calvert* court explained that as both women established a mother-child relationship, one a gestational relationship and the other a genetic one, a purely legal determination remained to determine which woman was the natural mother. *See id.* at 781. The court, therefore, needed to consider evidence beyond the statutory language in determining natural motherhood. "When more than one woman share the biological indicators of motherhood—genetic relationship and gestation—the woman who intended to bring the child into being and raise it as her own child is the natural mother under California law." Teresa Abell, Note, *Gestational Surrogacy: Intent-Based Parenthood in* Johnson v. Calvert, 45 MERCER L. REV. 1429, 1430 (1994); *see Calvert*, 851 P.2d at 782-84 (explaining that the child's existence is due to the intentions upon which the Calvert's acted on). The court used a modified "but-for" analysis—"[b]ut-for" the Calvert's acts in bringing about the pregnancy, "the child would not have existed." *Id.*

[178] 608 N.Y.S.2d 477 (App. Div. 1994)

[179] *See id.* at 480 (distinguishing this case from *Calvert* by noting that this case involved a true "egg-donation" scenario).

[180] *See id.* (calling the *Calvert* court's rationale "persuasive").

[181] 644 N.E.2d 760 (Ohio Ct. C.P. Summit County 1994).

[182] *See id.* at 766 (rejecting the *Calvert* test due to its failure to protect individual rights).

"consent of the genetic provider."[183]

As evidenced by these cases, the legislature must define and clarify artificially created parental relationships.[184] In weighing the individual rights of the various parties, it becomes apparent that intent-based determinations of parenthood are most likely to achieve the goal of personal autonomy. As a surrogate freely enters into a contract knowing that she ultimately would surrender her parental rights, these rights are not abrogated by the enforcement of these agreements.[185] It has been stated:

> [L]egal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations . . . they should be honored.[186]

This is logical since the use of reproductive technology is an unambiguous indicator of intent. The intended parents should prevail in disputes over the surrogates because they originated the idea of having the child. The process of childbearing begins with the decision to employ the steps necessary to procreate.

V. FUTURE IMPLICATIONS

As technology develops, IVF procedures advance rapidly. As the procedures drift farther from traditionally accepted notions of procreation, questions arise as to what degree couples should be allowed to manipulate their reproductive potential.[187] Propo-

---

[183] *Id.*

[184] *See* Jean M. Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 693 (proposing regulatory action in areas of reproductive technologies on a graduated scale, beginning with areas with a high state interest to low interest in individual rights); *see also* Jamie Levitt, *Biology, Technology and Geneology: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451, 454 (1992) (proposing uniform surrogacy legislation in the wake of *Johnson v. Calvert*).

[185] *See, e.g.*, *Johnson*, 851 P.2d at 784 ("The payments to Anna under the [surrogacy] contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child.").

[186] Majorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302-03 (1990).

[187] One future procedure currently gaining much attention and debate is cloning or, more specifically, "blastomere separation." Mona S. Amer, Comment, *Breaking the Mold: Human Embryo Cloning and its Implications for a Right to Individuality*, 43 UCLA L. REV. 1659, 1660 (1996). Scientists developed blastomere separation to "help to provide a larger number of embryos than eggs, while necessitating the few-

nents of IVF argue that the right to procreation extends to all available procedures which help facilitate reproduction.[188] The legal implications of cloning have not yet been addressed and present questions as to who has the right to the cloned embryo—the parents or the child who shares the identical genetic makeup of the clone.[189] This procedure is most likely only to be employed through private clinics and other organizations.[190] The utilization of embryo cloning may raise concern of cloned children being created against the will of the first child. The legislature must clearly resolve questions relating to embryo dispositions, not only in present situations, as in the disposition of cryopreserved embryos in the event of divorce or death, but in future disputes, as may be evidenced by the cloning scenario.

CONCLUSION

The growing demand for assistance in reproduction is not likely to abate in the near future. The constitutional right to procreation should extend to noncoital procreation because "coital infertility does not render a couple inadequate as childrearers."[191] Perhaps the fact that people are willing to endure a painful, expensive and time-consuming process in order to facilitate their goal of raising a family is evidence that their interest in procreation is as great or greater than one who can reproduce coitally.[192] Therefore, the interests of the infertile in "bearing, begetting or parenting offspring is as worthy of respect as that of

---

est number of invasive procedures." *Id.* at 1664.

[188] *See, e.g., id.* at 1688 (concluding that because embryo splitting (cloning) increases the success rates of in vitro fertilization, it should not be completely banned).

[189] *See id.* at 1661 (raising the question of "whether the children created from [IVF] have any property rights over the other cloned embryos by virtue of their shared genetic identity").

[190] *See id.* at 1686 (stating that "[c]loning will be privately funded and performed, making it harder to ensure that each child born from this procedure is protected from cloning and leaving future generations only the court system to uphold their right to individuality").

[191] Robertson, *supra* note 10, at 290.

[192] *See, e.g.*, Davis v. Davis, No. E-14496, 1989 WL 140495, at *25 (Tenn. Cir. Sept. 21, 1989) (noting testimony given by Mrs. Davis as to the "many injections she received or administered to herself to prepare her body reproductive system for the removal of her eggs in preparation for the IVF procedures; and . . . the painful, physically trying, emotionally and mentally taxing ordeals she endured"), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

the coitally fertile."[193] "Only serious harm to the interests of others, not avoidable by less restrictive means, should justify interference with such a fundamental choice."[194]

Legislation is needed in the field of IVF to define the rights of individual parties involved in the fertilization process. This will ensure that the clinics do not discriminate on the basis of marital status or sexual preference. Affirmative guidelines regarding the rights of the individuals in the surrogacy context will provide people with notice of their rights upon entering these programs. Hopefully, infertile individuals will be better prepared to utilize these procreative options.

Nicole L. Cucci

[193] Robertson, *supra* note 10, at 290.
[194] *Id.*