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Waller, Warnock and Roe v. Wade: Variations of the Status of the Orphan Embryo

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WALLER, WARNOCK AND *ROE V. WADE*: VARIATIONS ON THE STATUS OF THE ORPHAN EMBRYO

INTRODUCTION

With the birth in Australia of the first child as a result of embryo cryopreservation[1] and transfer in March of 1984,[2] a new wrinkle was added to the debate for determining the rights, both legal and moral, of the various parties involved when *in vitro* fertilization[3] is used to produce pregnancy.[4] This debate has been further fueled with the release of two reports by separate Australian[5] and English[6] committees brought together for the purpose of making recommendations as to the continued use of *in vitro* fertilization. Specifically, the committees addressed the issue of the disposition of cryopreserved embryos which, for various reasons, are unable to be implanted in the mother for whom they were produced.[7] The Australian committee recommended that in the case of "orphaned" embryos,[8] where no agreed

1. "Cryopreservation" refers to the process developed by cryogenetic scientists whereby living organisms are "frozen" in a state of suspended animation and later revived through a "thawing out" process. In embryocryopreservation, the conceptus is first coated with a special liquid solution designed to protect it from damage as freezing occurs. The storage container is slowly cooled and eventually placed in a cannister of liquid nitrogen where storage occurs at −196° C. *See* WALLER COMMITTEE, *infra* note 5, at 14-15. For a discussion of cryonics generally, see G. SMITH, MEDICAL-LEGAL ASPECTS OF CRYONICS: PROSPECTS FOR IMMORTALITY (1983).

2. *See* N.Y. Times, Apr. 11, 1984, at A16, col. 1.

3. *In vitro* fertilization (IVF) is the process whereby sperm and egg are mated in a laboratory dish. *See generally The New Origins of Life,* TIME, Sept. 10, 1984, at 46-56. *See* G. SMITH, GENETICS, ETHICS AND THE LAW 104, 109, 110, 119, 147 (1981); Smith, *Manipulating The Genetic Code: Jurisprudential Conundrums,* 64 GEO. L. J. 697 (1976).

4. For a discussion of various medical, legal, and social issues attendant on these techniques of producing pregnancy, see Andrews, *The Stork Market: The Law of the New Reproduction Technologies,* 70 A.B.A. J. Aug. 1984, 50-56. *See also* Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create A Family,* 17 FAM. L. Q. 199 (1983).

5. THE COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, *Report on the Disposition of Embryos Produced by In Vitro Fertilization* (Aug. 1984) (hereinafter cited as the WALLER COMMITTEE).

6. WARNOCK COMMITTEE, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (July, 1984) (hereinafter cited as the WARNOCK COMMITTEE).

7. WALLER COMMITTEE, *supra* note 5, at 29-34; WARNOCK COMMITTEE, *supra* note 6, at 56.

8. The problem of "orphaned embryos" received widespread attention in Australia and the United States due to the plane-crash deaths of a wealthy California couple, leaving in limbo

provisions have been made at the time of storage, the embryo should be removed from storage as soon as possible.[9] The English committee recommended that, under similar circumstances, the right of disposal should pass to the storage authority.[10]

A question that immediately comes to mind when considering the recommendations of the committees is: What legal rights, if any, does a frozen embryo have with respect to its individuality as *some* type of human entity? The next question is: What rights might or should it have? Part I of this Comment will focus on the two committees' recommendations as possible solutions to the first question. Part II will then survey the second question from a philosophical standpoint, considering first, the vigorous dissent registered in the report of the Australian Committee, and second, U.S. abortion law[11] as a basis for determining by analogy how the question could be resolved under present law. Part III will discuss legislative and judicial attempts, at both the federal and state level, to define life in the unborn. The Comment will conclude with a determination that there is an urgent need for uniform legislation in this country in order to preserve the intrinsic worth and legal rights these human embryos invariably possess.

PART I: THE RECOMMENDATIONS OF THE COMMITTEES

A. The Warnock Committee

The Warnock Committee, established in 1982, considered a broad spectrum of issues spawned by *in vitro* fertilization (IVF) techniques,[12] including

two frozen embryos in the Australian IVF program. *See* N.Y. Times, June 24, 1984, at E7, col. 1; Sellar, *Orphan Embryos*, 309 NATURE 738 (1984). *See also* Wash. Times, Sept. 5, 1984, at A7, col. 2. *See* Smith, *Australia's Frozen Orphan Embryos: A Medical, Legal and Ethical Dilemma*, 24 J. FAM. L. 27 (1985).

9. WALLER COMMITTEE, *supra* note 5, at 29.

10. WARNOCK COMMITTEE, *supra* note 6, at 56.

11. The interesting new addition to the right-to-life debate facilitated by advancements in reproductive technology is that the question of fetal rights must now be considered in the context where the fetus is *outside* the womb. Under U.S. abortion law, this would appear to be a significant twist given the nature of the right to have an abortion, i.e., based upon privacy. Is this right to contemplate termination of pregnancy and, therefore, the fetus, as strong when the fetus is not in the mother's womb? Does this situation somehow give the father of the embryo, regardless of the stage of development, a greater right over the fetus while it is outside the womb than he would if it were implanted? *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (striking down that portion of a statute requiring spousal consent before obtaining an abortion).

12. Some of the issues addressed by both committees, including the propriety of continuing the process and practice of IVF and cryonic preservation of embryos, the use of surrogate mothers, and the possibility of successfully freezing sperm and ova are beyond the scope of this article, which is primarily concerned with determining the rights of embryos given the existence of this technology. For a general discussion of IVF-related issues, see Annas & Elias,

those connected with human embryology.[13] It concluded that IVF techniques had passed the research stage and could be regarded as an established form of treatment for infertility.[14] The Committee was also of the opinion that the technique of freezing, thawing, and transferring embryos was at the stage where the clinical use of these practices should continue to be developed under review by a licensing body.[15]

In terms of issues and recommendations specifically concerning the status or possible status of the human embryo, the Committee considered the rights of the embryo in the context of scientific research.[16] As a starting point, the Committee recognized that the answer to the question of what status ought to be accorded to the human embryo must necessarily be in terms of ethical or moral principles.[17] The majority held, however, that while the *in vitro* embryo enjoys some type of "special" status, close monitoring and necessary research should be allowed to continue in order to facilitate advances in the technique.[18]

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supra note 4; Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings,* 304 NEW ENG. J. MED. 336 (1981); Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation,* 35 SW. L. J. 973 (1982). *See also* Hodgen, *In Vitro Fertilization and Alternatives,* 246 J. A.M.A. 590 (1981); Studdard, *The Morality of In Vitro Fertilization,* 5 HUM. L. REV. 41 (1979). *See generally* Wadlington, *Artificial Conception: The Challenge for Family Law,* 69 VA. L. REV. 465 (1983); Walters, *Human In Vitro Fertilization: A Review of the Ethical Literature,* 9 HASTINGS CENTER REP. 23 (1979).

13. The Committee clarified the term "embryology . . . tak[ing] as our starting point the meeting of egg and sperm at fertilisation. We have regarded the embryonic stage to be the six weeks immediately following fertilisation which usually corresponds with the first eight weeks of gestation counted from the first day of the woman's last menstrual period." WARNOCK COMMITTEE, *supra* note 6, at 5.

14. *Id.* at 34.

15. *Id.* at 53-54. The Committee also recommended that 1) there be a maximum of ten years for storage of embryos after which time the right to use or dispose should pass to the storage authority, 2) legislation should be enacted to insure there is no right of ownership in a human embryo, 3) when one of a couple dies the right to use or dispose of any embryo stored by that couple should pass to the survivor, 4) when both parents die the right of disposal should pass to the storage authority, and 5) when no agreement exists between the couple as to the use of the stored embryo, the right to determine use or disposal should pass to the storage authority as though the ten-year period had expired. *Id.* at 56-57.

16. *See generally id.* at 58-69.

17. *Id.* at 60. The Committee briefly discussed the current position of the *in vivo* embryo under the laws of the United Kingdom, but found them to be inadequate to provide protection for the *in vitro* embryo. *Id.* at 62-63.

18. *Id.* at 63-64. *Cf.* WARNOCK COMMITTEE, *supra* note 6, expression of dissent, at 90-93; EUROPEAN PARLIAMENT, COMMITTEE ON ENERGY, RESEARCH AND TECHNOLOGY, OPINION FOR THE LEGAL AFFAIRS COMMITTEE, ON EXPERIMENTS ON LIVE HUMAN EMBRYOS (1983) ("In this difficult field the European Parliament cannot disregard these principles which, in general and but for well-defined exceptions, prohibit the right to take human life, even that of an embryo, which is at least potentially a human life." *Id.* at 6. "In light of the above arguments, the Committee on Energy and Research considers that the following

The Committee was closely divided, however, on the question of under what conditions research on embryos may take place, given its previous finding that the embryo enjoys some type of "special" status. It first recommended that no live human embryo derived from *in vitro* fertilization, whether frozen or unfrozen, may be kept alive, if not transferred, beyond 14 days after fertilization, nor may it be used as a research subject beyond this period.[19] Second, "spare" embryos may be used as subjects for research during this period with the consent of the couple for whom the embryo was generated;[20] however, a majority recommended that legislation be enacted providing that research may be carried out on *any* embryo resulting from *in vitro* fertilization, regardless of whether the embryo was intentionally or unintentionally produced for that purpose.[21]

B. The Waller Committee

Among the various issues addressed by the Australian Committee[22] was a consideration of "whether the community and the parties (that is, the donors, the *embryo* and the medical and scientific personnel) involved in the process of IVF have any rights and/or obligations and, if so, whether such rights and/or obligations should be enforced, in legislative form or otherwise."[23] More specifically, two situations bearing most directly on the independent rights of embryos were considered: where surplus embryos are either intentionally or unintentionally produced in the laboratory, exceeding the number appropriate for transfer to the uterus of the intended mother;[24] and where postponement of intended embryo transfer leads to circumstances, such as accident, death, or dissolution, making it impossible for sub-

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proposals should be made . . . whilst not prohibiting from the outset all research and experimentation which has been carefully considered to be necessary, guarantee at the same time, in accordance with general ethical principles, the inviolability of the dignity and of the physical and moral integrity of all human beings." *Id.* at 7).

19. WARNOCK COMMITTEE, *supra* note 6, at 66.

20. *Id.* at 66-67.

21. *Id.* at 69. *But see* WARNOCK COMMITTEE, *supra* note 6, expression of dissent, at 94; *cf. infra* notes 31-35.

22. *See supra* note 12.

23. WALLER COMMITTEE, *supra* note 5, at 2 (emphasis added).

24. *Id.* at 11. The distinction between intentional and unintentional creation of excess embryos would appear to be important with respect to their subsequent disposition. While the Committee attempts to harmonize its recommendations on disposition in either instance, the Chairman of the Human Reproduction Biology Unit at the Royal Women's Hospital told the Committee that *any* excess embryos produced at the hospital are allowed to succumb, *id.* at 12, which would appear to give the embryos "rights" only when they are able to be immediately transferred. Thus, an arbitrary selection process at this hospital determines which, if any, embryo will be given the chance to be implanted.

sequent transfer to the intended mother.[25]

In the first instance, the Committee recommended that, after short-term storage,[26] the decision made by the couple whose sperm and ova have been used in the formation of the embryo[27] should be given effect, either by 1) donation of stored embryos to other couples participating in the IVF program, 2) donation of excess embryos for research or experiment, or 3) removal from storage.[28] In the second situation, the Committee opined that the "embryo shall be removed from storage,"[29] similar to the third alternative for couples in the first situation.

Another issue addressed by the Waller Committee relating to the question of rights of the embryo was whether experimentation and research on embryos should be continued in the Victoria IVF program.[30] A majority of the Committee concluded that research on embryos should be allowed in order to facilitate the possibility of enhancing IVF technology,[31] but that experimentation should only be allowed on excess embryos.[32] This view was based

25. *Id.* at 30-31. The Committee takes the position that, should subsequent transfer of an intentionally-produced embryo prove impossible due to prohibitive medical or other conditions of the intended transferee, the parents would exercise a non-absolute right of choice over disposition, a right in some ways analogous to those recognized in parents of a child after its birth, *id.* at 27, opting for either 1) donation to another couple, 2) donation for research or experimentation, or 3) removal from storage. *Id.* at 29.

26. The Committee notes that, in certain instances, such as where the woman whose ova have been used is undergoing prolonged chemotherapy, long-term storage upon consent of the couple, reviewable after five years, may be appropriate. *Id.* at 30.

27. In the future, it is recommended that couples participating in embryo-freezing programs be required to determine *at the time of storage* what disposition shall be undertaken if implantation should later prove impossible, i.e., conditional disposition. *Id.* at 32.

28. *Id.* at 29. *See also* Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer,* a paper prepared for the Ethics Advisory Board, U.S. Department of Health, Education and Welfare, at 13-14, 1978, cited at 44 Fed. Reg. 35,042 (1979).

29. WALLER COMMITTEE, *supra* note 5, at 32. The Committee notes that "removal of the frozen embryo from storage is in some ways similar to the removal of life-support systems from a mortally ill person. Life is allowed to end. This does seem to accord the embryo a measure of that respect which is so often spoken of in relation to it." *Id.* at 29.

30. "The options available in relation to embryo research are complete prohibition, research allowed only on excess or spare embryos, which come into existence as part of IVF programmes for the treatment of infertility, or research on embryos formed specifically for that purpose." *Id.* at 44-45. It is also noted that "without embryo research in the early days of IVF the technique, which today is producing many hundreds of pregnancies per year throughout the world, would never have been successful." *Id.* at 35.

31. "Where the number of embryos produced exceeds the number acceptable for transfer, the couple who produced the embryo shall make a decision about their use . . . . It is possible that some couples will agree to make some available for research purposes . . . ." *Id.* at 46.

32. Two members of the Committee dissented from this view to the extent that they advocated formation of embryos specifically for research or experimentation, arguing that it is ethically acceptable for embryos to be created for those purposes due to the fact that restriction to

upon a moral premise that the embryo in its individual capacity as a human "entity" should be accorded a certain level of respect greater than that of an organism created for purely experimental purposes.[33] The Committee, employing a balancing test of sorts, indicated that such research should be allowed to bolster the success rate of Victoria's IVF program.[34] It was also recommended that the use of any embryo for research be immediate, prohibiting development beyond the stage of implantation, generally 14 days after fertilization is accomplished.[35]

Thus, a majority of both committees' members rejected the idea that the untransferred embryo has any *independent,* legally recognizable or protectable rights,[36] refusing to recommend that legal and moral "personhood" sta-

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excess embryos would make many aspects of potentially beneficial research impossible. *Id.* at 75. Two other members were wholly opposed to any research on embryos which prevents implantation or where there is no intention that the embryo created should be transferred to a recipient uterus. *Id.* at 45, 62-74. *See also* Tieffel, *Human In Vitro Fertilization: A Conservative View,* 247 J. A.M.A. 3235 (1982).

33. "From a moral perspective, it may be said that, regardless of the particular level of respect which different sections of the community would accord an embryo, this individual and genetically unique human entity may not be formed *solely* and from the outset to be used as a means for any other human purpose, however laudable. Where the formation occurs in the course of an IVF procedure for the treatment of infertility, the reasons which lead to the embryo's existence are not 'means to an end' ones." *Id.* at 46.

34. It is hoped that through new research on excess embryos combined with continued experimentation with presently unsuccessful ova freezing techniques, "the morally difficult decisions regarding the use of excess embryos—to allow to succumb in culture, to use for research, to use for embryo donation, or to freeze for subsequent use—would arise less frequently." *Id.* at 45.

35. "It is after this stage that the primitive streak is formed, and differentiation of the embryo is clearly evident. In no circumstances shall any embryo which has been made available for research be frozen for some unspecified future purpose." *Id.* at 47. Karl Rahner notes that during these first few weeks the existence of a "human subject" is seriously doubtful. Rahner, *The Problem of Genetic Manipulation,* 9 THEOLOGICAL INVESTIGATIONS 236 (1972) *Cf.* South Australian Health Commission-Working Party, Recommendation 18: That fertilized gamete(s) of human beings should never be used for scientific or genetic experimentation, *cited in* WALLER COMMITTEE, *supra* note 5, at 43.

36. "But the earlier recommendations also make it clear that the Committee considers that safe storage of the embryo, under the conditions specified in each case, may be protected, where necessary, by legal action." WALLER COMMITTEE, *supra* note 5, at 33.

In the United States, it has long been recognized that unborn fetuses can be heirs at law. *See* Biggs v. McCarty, 86 Ind. 352 (1882); Hall v. Hancock, 32 Mass. 255 (1834); Aubuchon v. Bender, 44 Mo. 560 (1869); Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907); *In re* Holthausen's Will, 175 Misc. 1022, 26 N.Y.S.2d 140 (Sup. Ct. 1941). In order for the child to take under the will or trust, however, the infant must be born alive. *But see* WALLER COMMITTEE, *supra* note 5, at 33 (rejecting the idea that untransferred embryos should be regarded as possessing rights or claims to inheritances). *See also* L.A. Times, June 21, 1984, at 3, col. 4. There is also a line of authority emerging in recent years allowing parents to sue under the wrongful death statutes in actions to recover damages for the death of a viable fetus. *See infra* notes 98-111 and accompanying text.

tus be accorded the embryo. Implicit in this refusal is the idea that the embryo enjoys something *less* than the degree of rights normally vested in persons. It is also not entirely clear what rights the parents have over the stored embryo.[37] Yet the Waller Committee did consider "that the couple whose gametes are used to form the embryo in the context of an IVF programme should be recognized as having rights which are in some ways analogous to those recognized in parents of a child after its birth. The Committee does not consider that those rights are absolute, just as the rights of parents are limited by the rights and interests of the child, and by the larger concerns of the community in which they all live."[38]

Also, in the Australian report a distinction concerning subsequent disposition is drawn upon factual circumstances arguably irrelevant to the independent status and intrinsic worth of the embryo: when the parents are present, choice can be exercised; when the embryo is orphaned, the only option is that the embryo be "allowed" to expire. In essence, by refusing to define positively what the scope of the right is or should be, opting instead for a process-of-elimination approach as to what it is not, the Committee implicitly rejected the fundamental philosophical and scientific premise that life begins at conception, as well as the legal premise that the embryo or early fetus outside the womb should be accorded any recognizable, protectable rights.

PART II: THE POSSIBLE MORAL AND LEGAL STATUS OF THE UNTRANSFERRED EMBRYO

A. The Embryo as a Moral Human "Person"

1. The Waller Committee Report's Dissent

The Waller Committee report produced one lone dissenter, Reverend Dr. Francis Harman, with respect to the entire issue of freezing embryos as a part of Victoria's IVF program.[39] In rejecting the argument held by many that the embryo is simply an "indeterminate mass of cells with the potential to become human and that this potential cannot translate into actuality until

37. "The Committee does not regard the couple whose embryo is stored as having dominion over that embryo. It considers that those concepts should not be imported into and have no place in a consideration of issues which focus on an individual and genetically unique human entity . . . [thus] *the couple may not sell or casually dispose of the embryo." Id.* at 27-28. *See also* WARNOCK COMMITTEE, *supra* note 6, at 56.

38. WALLER COMMITTEE, *supra* note 5, at 27.

39. For the second time in the life of this Committee I find myself 'a lone lorn creetur' like Dickens' Mrs. Gummidge, pleading the human embryo's case for inclusion amongst the libertarian movements of our day." WALLER COMMITTEE, *supra* note 5, at 62.

there is some degree of fetal development,"[40] Reverend Dr. Harman states his position:

> [T]he early embryo is *actually* a human cell with the inherent potential to develop that humanness. This diploid is not just a further progression of haploids (sperm/ovum) but a new entity as distinct ontologically from each haploid as water is distinct from hydrogen and oxygen, and in the earliest (pre-implantation) phase subsistent in itself but already forming a hormonal bond of a specifically human type with its maternal host. To this basic biological data, rational processes lead theists to add the concepts of creation, ensoulment and immortality; reason enlightened by faith leads Christians to add the concepts of redemption; but the common denominator is that 'intuitively we do not equate a fertilized egg with a hamster or a piece of mouse tissue:' (Professor Ian Kennedy in *The Times,* 26 June 1984). Intuitive as that reaction may be, it does not lose any of its force for that reason since in any moral judgment in the area of basic human values there is a certain prethematic and instinctive component which cannot be totally reflected in analytical discourse or legally accountable terms but which is nonetheless real.[41]

Extrapolating from this "intuitive reaction" approach concerning the moral status of the embryo, Reverend Dr. Harman argues that the concept

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40. *Id.* at 63. "This view fragments into a wide spectrum of opinions when it comes to specifying the precise stage of development, with some placing it at implantation, others favouring a time when twinning and recombination are no longer possible, yet others looking to the formation of the cerebral substratum for human thought, and finally others who demand the presence of 'interests' and 'preferences' and require 'a concept of self as a continuing subject of experiences and other mental states' and a belief 'that it itself is such a continuing entity.' This last viewpoint clearly challenges the human biological status not only of the embryo but of anyone who lacks 'morally relevant characteristics' (e.g., rationality, self-consciousness, awareness, autonomy, pleasure and pain), or who suffers a substantial decline in or loss of such characteristics at any time after birth. Thus the way is paved for infanticide and euthanasia." *Id.*

41. *Id.* at 63-64. "In other words, such terms as 'zygote,' 'embryo,' 'fetus' merely indicate successive stages of development in exactly the same way as do the terms 'infancy,' 'childhood,' 'adolescence' . . . . [During the latter stages] no one asserts that a 'different' being is formed." *Id.* at 66. For a philosophical analysis rejecting the idea that the humanity of a being can be determined at any time other than conception, *see* J. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (1970). *Cf.* Warren, *On the Moral and Legal Status of Abortion,* 57 MONIST 43, 53 (1973) (distinguishing "human" in the genetic sense from "human" in the moral sense and arguing that a conceptus is not a human in the moral sense and thus does not enjoy the same rights as those humans who are). Others prefer to straddle the fence, arguing that the fetus from conception has *partial* moral status modified by the competing interests of the mother. *See* D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY (1970); English, *Abortion and the Concept of a Person,* 5 CAN. J. PHIL. 233 (1975). Although this latter position is more relevant during the later stages of pregnancy, the concept is worth noting when discussing the possible existence of independent rights of the conceptus.

of "personhood" can now be introduced to the extent that those essential qualities constituting identity are present.[42] This apparent attempt to blur the distinction some would make between genetic humanness and moral humanness[43] is explained in terms of the embryo possessing "both intra-entity and inter-entity elements which give a high degree of probability, if not certainty, to incipient or rudimentary personhood in the embryo."[44]

Reverend Dr. Harman thus concludes: "Philosophically . . . and with a sound scientific basis, it is *at least highly probable* (emphasis added) that the combination of human biological entity plus sharply defined individual genetic characteristics plus basic relational framework constitutes rudimentary or incipient personhood and justifies putting about the early embryo the question '*Who* is it?' "[45]

2. *The Concept of Moral Certainty and the Human Embryo*

The language of the dissent strongly suggests that the idea of "moral certainty" is somewhat significant to a discussion of the status we should accord the embryo.[46] The argument would be something as follows: Based upon the existing facts that we know to be true or certain about the embryo (i.e., it is human tissue, it has genetic individuality, it at least has a potential to become an "actual" person, whatever that may be, and a high probability exists that this potential will be realized if implantation occurs), a quantum

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42. WALLER COMMITTEE, *supra* note 5, at 64-65.

43. *See* Warren, *supra* note 41.

44. *Id.* at 65. "Intra-entity" elements are those found in the data supplied by molecular genetics, gathered irrevocably in the newly-formed embryo's DNA; "inter-entity," or rational, elements are those derived from the fact that "the early embryo is already involved in fundamental human relationships (paternity, maternity, affiliation) which should develop in due course into a network of familial and social links, rights and responsibilities as a person-in-the-community." *Id.* For a discussion of DNA generally, *see* G. SMITH, GENETICS, ETHICS AND THE LAW 193-215 (1981).

45. WALLER COMMITTEE, *supra* note 5, at 66 (emphasis in original).

46. The Encyclopedia of Bioethics describes this concept as follows: "A certain conscience is a moral judgment made without fear of error based on evidence or motives that are sound. A doubtful conscience exists when the intellect suspends judgment because of insufficient evidence. A certain conscience must always be obeyed and is also a necessary requirement for moral action. A doubtful conscience must become certain in practice before one can act." IV ENCYCLOPEDIA OF BIOETHICS 1527 (1978). Henry Davis also defines it: "Certainty of conscience depends on the certainty with which I draw my conclusion, consciously or implicitly, as to the morality of a given concrete act. Certainty based on evident principles is absolute certainty; if it is based not on evident principles but on what appear to be such good reasons, or on such sufficiently good authority that prudent doubt is excluded, the certainty is said to be perfect moral certainty. Neither absolute nor perfect moral certainty can always be obtained; we must, therefore, be satisfied sometimes with a degree of certainty that is imperfect, where a mistake is quite possible but not likely." 1 MORAL AND PASTORAL THEOLOGY 69 (6th ed. 1949).

of "certainty" that we are dealing with a human person is reached to the extent that treating the embryo as anything but a person would be immoral. Legally, it would follow that the law should thus protect the rights of this being that we have just determined to a degree of moral certainty is actually human in the same way we protect the rights of people generally.

Others would argue that moral certainty of *actual* personhood is not necessary, opting instead for the view that the law ought to recognize the inherent *potential* to become an actual human to the same degree of certainty and attach legal rights to this potential.[47] This hybrid approach to the argument of moral certainty that the embryo is a person introduces the element of probability into the "equation."[48] Since the chances are very good that the embryo will later develop into an actual mature human being,[49] we can be morally certain that there is a probable continuity between *this* embryo and an actual mature human being. The same degree of respect, or rights, should therefore be accorded to the potential human as to the actual human because we are not morally justified in discriminating against a human life merely because of a difference in the realization of its potential.[50]

Still others might argue that neither moral certainty nor a high degree of probability that the embryo is actually or potentially a human life is necessary to mandate protection of the embryo.[51] This argument is premised on the idea that, *because of* the fact of uncertainty as to the status of the embryo, we are morally obligated to give it the benefit of the doubt and treat it as a person until we have moral certainty that the embryo is something other

47. *See* Johnstone, *The Moral Status of the Embryo: Two Viewpoints*, in J. WALTERS & T. SINGER, TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES AND FUTURE POSSIBILITIES 55 (1982). Johnstone prefers the term "respect" rather than "rights." *Id.* at 51.

48. *Id.* at 54. *Cf.* Tauer, *The Tradition of Probabilism and the Moral Status of the Early Embryo*, 45 THEO. STUDIES 3 (1984).

49. Johnstone, *supra* note 47, at 55. Johnstone notes that the chances are sometimes said to be four out of five, but that the precise figures are not important or essential to the argument.

50. Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NATURAL L. F. 85 (1968). This is an interesting concept since potentiality arguments can also be made *after* a child is born. Some would argue that even after birth, a "person" is not "morally" human until certain characteristics are present. *See* P. SINGER, PRACTICAL ETHICS 119-24 (1979). One context where this argument often arises concerns the status of defective or handicapped newborns, which are sometimes allowed to die based upon "quality of life" judgments. Recent Congressional legislation has directly addressed this issue. *See* Child Abuse Amendments of 1984, Pub. L. No. 457, 98th Cong., 2d Sess., 98 Stat. 1749 (to be codified at 42 U.S.C. §§ 5101-106) prohibiting the withholding of medically indicated treatment, including nutrition, hydration, and medication, from handicapped infants' life threatening conditions.

51. *See* Sacred Congregation for the Doctrine of Faith, *Declaration on Abortion* (1975), discussed in Tauer, *supra* note 48, at 31-32; *cf.* Destro, *infra* note 72 and accompanying text.

than an "actual" person.[52]

Another argument can be raised which is generally opposed to the whole notion of "legislating" moral principles into our body of law, a position traditionally held by legal positivists.[53] This position is vulnerable to attack in this context, however, for at least two very important reasons. First, it is difficult to justify the refusal of a legal system in a civilized society to take positive steps to protect what many within that society would maintain is innocent human life. Basic moral foundational principles of this nature are the very mores upon which societies such as ours are built.[54] Indeed, one could argue that this is primarily a *legal,* not a philosophical, idea inherent in the concept of an ordered democratic society, and any moral implications are at best coincidental. Others would argue that in these foundational areas of legal principles, morality and the law are inextricably linked, creating a basis upon which future laws may rest.[55]

Second, our society already recognizes the idea of moral certainty, or something very much like it, as a bona fide concept already embedded into areas of our legal system. One example is the death penalty. Our society allows itself, through the judgments made by the triers of fact, to sentence criminals to death in narrowly defined situations, based upon the nature of the crime, the burden of proof, evidentiary considerations, and mitigating circumstances. This area of the law holds that at a time when it is able to legally establish guilt beyond a reasonable doubt, and because of the overriding concerns of society coupled with this legal finding, society can be morally certain that the death penalty is appropriate at *this* time for *this* criminal who committed *this* specific offense. The due process clauses of the fifth and fourteenth amendments of our Constitution would appear to support this line of reasoning to a fairly substantial degree.

B. Abortion Law in the United States[56]

A virtual avalanche of literature has descended upon us from both propo-

52. *See generally* sources cited *supra* note 51.

53. For a classic explanation of the theory of legal positivism, *see* Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958).

54. *See* WARNOCK COMMITTEE, *supra* note 6, at 2-3.

55. *See* Dworkin, *The Model of Rules,* 35 U. CHI. L. REV. 14 (1967).

56. This section is not intended to be an exhaustive analysis of abortion law. Rather, it is an attempt to extract the relevant principles announced in *Roe, infra,* and juxtapose them in the context of the unimplanted embryo. Given the strength of the pro-life position, depending on the success of proposed Congressional legislation, *see infra* notes 82-85 and accompanying text, and the future make-up of the U.S. Supreme Court, *see* Thomas, *Court at the Crossroads,* TIME, Oct. 8, 1984, at 28, legal trends in one area of the law might have a profound influence upon the other. Also, the approaches taken by the committees and the U.S. Supreme Court

nents and opponents of abortion, arguing in favor of everything from a constitutional amendment protecting the life of the fetus from the moment of conception[57] to the absolute right of the mother to terminate her pregnancy at any stage.[58] The concern here, however, is with the status of the unimplanted embryo, or more specifically, what that status *might* be, given the nature of the abortion right as it exists in the United States today.[59]

In 1973, the United States Supreme Court announced that a woman had a fundamental constitutional right to choose to have an abortion.[60] The Court derived this right from cases creating a substantive due process right of privacy in familial and sexual matters.[61] Though the nature of the right has evolved somewhat,[62] the fundamental elements of the test employed today are virtually the same.[63]

In *Roe v. Wade*,[64] the Court articulated a balancing test in order to deter-

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are very similar in that each "disposes" of the issue by *implicitly* defining away the positive rights there *might* be by *explicitly* defining the rights, at least to a much more significant degree, of the other parties involved, i.e., the mother, the parents of the embryo, and the State. For a discussion criticizing the U.S. Supreme Court approach in *Roe*, *see* Destro, *Some Fresh Perspectives on the Abortion Controversy*, 4 HUM. LIFE REV. 22 (1978). For a discussion of the constitutional issues pertaining to IVF and embryo transfer generally, see Report of the Ethics Board, 44 Fed. Reg. 35,048 (1979).

57. *See, e.g.*, Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975).

58. *See, e.g.*, Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 U. VA. L. REV. 405 (1983); Note, *Due Process, Privacy and the Path of Progress*, U. ILL. L. F. 469, 471 (1979) (stressing the importance of the substantive due process right of privacy). *See also* Smith & Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263 (1984).

59. Some of the more important abortion decisions include Doe v. Bolton, 410 U.S. 179 (1973) (companion case to *Roe v. Wade*, holding that states may not make abortions unreasonably difficult to obtain by instituting elaborate procedural barriers); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (invalidating those portions of a statute requiring spousal and parental consent); Bellotti v. Baird (II), 443 U.S. 622 (1979) (holding that a state must provide an alternative procedure to procure authorization in cases where parental consent is denied for a minor seeking an abortion or if the minor does not want to seek parental consent); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, (1983) (reaffirming *Roe* to the extent that government cannot interfere with the fundamental right of a woman to have an abortion).

60. In Roe v. Wade, 410 U.S. 113 (1973), the Court struck down a Texas statute proscribing abortion except when necessary to save the life of the mother.

61. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of habitual criminals); Meyer v. Nebraska, 262 U.S. 390 (1923) (child-rearing and education).

62. *See* Comment, *Abortion: From Roe to Akron, Changing Standards of Analysis*, 33 CATH. U. L. REV. 393 (1984).

63. *But see* Justice O'Connor's dissenting opinion in *Akron*, 462 U.S. 416, 452 (1983), generally criticizing the Court's adherence to *stare decisis* in reaffirming *Roe*, and denouncing the trimester approach as unworkable and inconsistent with current medical technology.

64. 410 U.S. 113 (1973).

mine the prevailing rights and interests of the parties involved in the abortion decision. Specifically, the woman's privacy right to make procreative decisions to the extent that she could choose to terminate her pregnancy was balanced against the State's "compelling interest" to protect, at one point, maternal health[65] and, at a subsequent point, "potential life" in the unborn fetus.[66] Only when the fetus reaches the "compelling" point of viability, or that time when the fetus "presumably has the capability of meaningful life outside of the mother's womb,"[67] does the State's interest in protecting fetal life reach a degree sufficient that it may go so far as to proscribe abortion during the period after viability, except when it is necessary to preserve the life or health of the mother.[68]

The Court attempted to avoid the question of when life begins by specifically claiming that it was *not* addressing that very question. The Court noted, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[69] The effect, however, of stamping the point of viability with the "compelling state interest" in terms of when the fetus can be legally protected was to deny the proposition that an unborn fetus is a "person" within the meaning of the fourteenth amendment.[70] The Court also denied the fact that a *viable* fetus was *actually* a person in favor of the term "potential life," to be protected by the State only when it chooses to exercise its right to do so.[71]

From the language of the opinion itself, it would appear that some type of presumption exists as to defining the rights of the fetus: since one cannot positively identify a pre-viable fetus as any type of legally protectable life, i.e., human being, the assumption will be made that any rights the fetus may have are automatically subordinate to those of the mother until the doubt as to its status is resolved. But until that time, and upon the basis of this doubt,

65. *Id.* at 163.

66. *Id.*

67. *Id.*

68. *Id.* at 163-64.

69. *Id.* at 159.

70. *Id.* at 158. *See also* Destro, *supra* note 57, at 1252-53.

71. *Roe*, 410 U.S. at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* [emphasis in original] life is involved, the State *may* [emphasis added] assert interests beyond the protection of the pregnant woman alone."); *id.* at 163-64 ("If the State is interested in protecting fetal life after viability it may go so far as to proscribe abortion during that period").

the privacy right of the mother supersedes what could later turn out to be a right to life of the fetus.

The Court in *Roe,* then, effectively succeeded in defining the nature and scope of the abortion right without considering in any meaningful way the independent interests, whatever they may be, of a very important third party—the unborn child.[72] This approach would be unrealistic when fetal rights are considered in the context of an externally produced and (temporarily) sustained embryo.[73] First, the nature of the abortion right is such that the privacy interest of the mother prevails over all others except the State's, and only then when its interests become compelling. This nebulous privacy right appears to be tied, somehow, to the bodily connection between the woman and her unborn child. There is no such connection, however, when an embryo is produced *in vitro* and has not yet been implanted. Unless the embryo is to be treated as the chattel of the mother,[74] the mother *herself* would not be able to make the determination that the embryo should die. Therefore, the nature of the decision in this context would be fundamentally different from that allowed in the abortion context,[75] yet rights of the same parties are at stake in both situations.

In response to this, one might argue that the privacy right of the mother is not relevant when the embryo is outside the womb, and that the determination as to its disposition should be left to the parents and doctors. If a court were to decide such a case on these grounds, however, it might be argued that an illogical distinction would be drawn with respect to the procreative right of privacy discussed in *Roe* when termination of pregnancy is contemplated. In the abortion context, the embryo has absolutely no right to be brought to term, and the decision of the mother in most instances is final. When the embryo is unimplanted, however, it is possible that its ultimate disposition could be in dispute as between the couple who produced it:[76] one party might demand implantation, while the other opts for removal from storage.[77] If the embryo were to be subsequently implanted, the mother

72. Destro notes that "the Court was able to compromise the interests of the unborn by defining away their rights . . . . The Court completely omitted any discussion of why the unborn should or should not have any rights of their own. The rationale behind this marshalling of interests and necessity for this approach to the issues were left unexplained." Destro, *supra* note 57, at 1254.

73. *See supra* note 11.

74. *See* WARNOCK COMMITTEE, *supra* note 6, at 56.

75. Indeed, the Warnock Committee particularly stressed the need for new laws to cope with previously uncontemplated situations made possible by new techniques for alleviating infertility, including embryology. *Id.* at 7.

76. *Id.* at 56-57.

77. *See* Henahan, *Fertilization, Embryo Transfer Procedures Raise Many Questions,* 252 J. A.M.A. 877 (1984).

would presumably still have the right to abort it. But the legitimate dispute as to its disposition would have already been raised, something which is not even possible if the embryo were conceived and sustained totally *in vivo.*[78]

Second, the situation might arise where the intended mother of a cryopreserved embryo dies, and the father wishes the embryo to be implanted. Assuming a willing surrogate mother can be found, what rights does the genetic father have if the surrogate later contemplates an abortion?[79] If a court would *disallow* the abortion, another distinction would be drawn, making the relevant factor either *in whom* the embryo is implanted, (i.e., the genetic mother v. the surrogate) or giving the genetic father the right of determination the genetic mother would normally have exercised.[80] In this latter instance, a further dilemma would arise if the father later decides that *he* wants the fetus aborted. Would such a situation in any way affect the independent rights of the embryo or fetus? Conversely, if the court were to *allow* the abortion, the rights of a couple, the wife of which is unable to carry a child to term, would be subordinated to the surrogate, who is not the natural mother of the child. This determination of rights could only be accomplished by expanding in a very significant way the right of abortion recognized in *Roe.*

Thus, while it is unclear as to how the status of the embryo's rights themselves would be affected in situations similar to those discussed above, it appears that the nature of the fundamental right expounded in *Roe* would be substantially altered if such law were somehow thought to apply. Even if the standards in *Roe* were held to be irrelevant in this particular context, a new procreative right in the family *in this context* would one way or another be determined, and it is unlikely that the prospective rights of the embryo would be totally ignored, as they were in *Roe.* Given the state of present medical technology, such a result in and of itself would warrant, or even demand, that a serious re-thinking of the principles expounded in *Roe* be undertaken.[81]

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78. Thus, the status of an embryo would appear to depend upon whether it is implanted or unimplanted. *Cf. infra* notes 88-97 and accompanying text. Although its *independent* status might not be affected by such a distinction, the rights of the parties involved in the termination decision are substantially affected. This possibility goes far to point out the underlying problem with *Roe:* complete disregard of medical and biological reality with respect to the independent status of the fetus.

79. *See* Andrews, *supra* note 4, at 53-56.

80. *Cf.* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (striking down, *inter alia,* that portion of a statute requiring a married woman to obtain her husband's consent for an abortion during the first trimester).

81. *See generally* Brief for the United States as *amicus curiae* in Support of Appellants in Thornburgh v. American College of Obstetricians and Gynecologists, *appeal docketed,* No. 84-495 (U.S., July 15, 1985).

PART III: LEGISLATIVE AND JUDICIAL EFFORTS TO DEFINE LIFE IN THE UNBORN

This section is primarily concerned with attempts by the Congress, state legislatures, and the courts to accord the unborn child the legal status of "personhood."

A. Federal Law

Since 1973, constitutional amendments have repeatedly been introduced in Congress in an attempt to overturn the Supreme Court decision in *Roe v. Wade,* [82] including most recently a first-ever Senate floor debate on Senate Joint Resolution 3.[83] Similarly, bills attempting to prohibit abortion by statute and declaring that life begins at conception have been proposed during recent sessions of Congress.[84]

With respect to the status of the unimplanted embryo, it appears that legislation defining life to begin at conception and providing constitutional pro-

82. These amendments basically take two forms: a) one would return to the states the power to set the standards for when abortions are appropriate, including the ability to prohibit them entirely, and b) another would define a new "right to life" in the unborn, which the Court in *Roe* said did not exist under the fifth and fourteenth amendments. According to the language of the various proposals, the right would attach at "conception," "moment of fertilization" or "at any stage of biological development." *See generally* Byrn, *A Human Life Amendment: What Would It Mean?,* 1 HUM. LIFE REV. 50 (1975). *Cf.* Callahan, *Raw Data v. Wisdom,* 19 SOCIETY 70 (1982).

83. S.J. Res. 3 as debated on the Senate floor would have overturned *Roe* to the extent that the decision nationalized the regulation of abortion. The States would generally have had the power to legislate on any matters concerning abortion. The measure was defeated by a roll call vote of 50-49, with one senator voting "present." Because the proposal was an amendment to the Constitution, two-thirds of both houses of Congress needed to approve it before submitting it to the states. For a review of the debate on S.J. Res. 3, *see* 129 CONG. REC. S. 9265 (daily ed. June 28, 1983).

84. *See* proposals, in the 98th Congress, including H.R. 618, introduced by Rep. Henry Hyde, providing, *inter alia,* for expedited Supreme Court review of lower court decisions which overturn state laws restricting abortion and infanticide; S. 26 and S. 210, introduced by Senator Jesse Helms, declaring that life begins at conception and that the State has a compelling interest to protect human life, as well as removing inferior federal court jurisdiction. The authority for this type of federal action is contained in section 5 of the fourteenth amendment, which empowers Congress to enforce the due process and equal protection rights of the amendment. *See* Hyde, *The Human Life Bill: Some Issues and Answers,* 8 HUM. LIFE REV. (1982). Unlike constitutional amendments, which require approval by two-thirds of both houses of Congress and three-quarters of the States, statutes need only pass by a simple majority of each house of Congress. The courts could later declare these federal statutes unconstitutional, however, a highly probable result given the present state of the abortion right as a constitutional guarantee. Yet some of the statutory proposals would have explicitly withdrawn jurisdiction of the lower federal courts to review state abortion laws. *See, e.g.,* S. 1741, 97th Cong., 1st Sess., § 4 (1981); H.R. 3225, 97th Cong., 1st Sess., § 4 (1981); S. 158, 97th Cong. 1st Sess., § 2 (1981); H.R. 900, 97th Cong., 1st Sess., § 2 (1981).

tection for the unborn under the fifth and fourteenth amendments would prohibit a doctor and consenting parents from independently determining that a frozen embryo "shall be removed from storage" and "allowed to succumb." In the case of the orphaned embryo, it is unclear what effect this legislation would have on the ability of the State to remove the embryo from storage or to donate it to another couple participating in an IVF program.[85]

It is apparent, however, that such a life-protective amendment would create a serious constitutional dilemma if the right to an abortion is not explicitly prohibited. The due process right of life which would be recognized in the fetus would have to be weighed against the procreative right of privacy recognized in the mother. Similarly, a due process right of life would be recognized in the unimplanted embryo, and the extent to which a state's decision as to disposition would insure that right is not clear.

Federal statutes or constitutional amendments returning to the states the power to legislate on these matters would allow them broad leeway in defining the rights of unborn children. These laws would, however, need to be consistent in defining life in both the abortion and the IVF embryo context. In other words, if a State passed a law prohibiting abortion at any time on the ground that life begins at conception or that a State's "compelling interest" in potential life outweighs whatever privacy right the mother might have in procreative matters, principles of consistency would dictate that the unimplanted embryo be accorded the same "right to life," though perhaps not a right to be implanted. Also, some of these federal proposals would allow direct appeal to the United States Supreme Court if the highest state court invalidated a life-protective state statute.

A second area of federal legislative attempts relevant to the concept of embryo or fetal rights is embodied in regulations dealing with experimentation on fetuses and IVF research.[86] While these regulations are limited to research which is in whole or in part funded by the federal government,[87] the research guidelines draw an important distinction with respect to the possible rights of the unimplanted embryo.[88]

This distinction is borne out by the definition of "fetus" for the purposes of the federal regulations: " 'Fetus' means the product of conception *from the time of implantation* (as evidenced by any of the presumptive signs of

85. In the case of the orphaned embryo, it appears that the State could possibly become the ward of the embryo and presumably would have the final word as to its ultimate disposition, unless a court would be willing to appoint a "relative" or even itself as guardian *ad litem*.

86. Protection of Human Subjects, 45 C.F.R. §§ 46.101-.211 (1983).

87. 45 C.F.R. § 46.101(a) (1983).

88. *See* Blumberg, *Legal Issues in Nonsurgical Human Ovum Transfer*, 251 J. A.M.A. 1178 (1984).

pregnancy, such as missed menses, or a medically acceptable pregnancy test) . . . ."[89] As a result of this definition, research on fetuses *in utero* and *ex utero* is prohibited unless the purpose of the activity is to meet the health needs of the particular fetus, or the risk to the fetus by such research is minimal and the purpose of the activity is to develop important biomedical knowledge which cannot be obtained by other means.[90] Research on non-viable fetuses *ex utero* is prohibited unless 1) vital functions will not be artificially maintained, 2) experimental activities which would terminate vital functions are not used, and 3) the purpose of the research is to develop otherwise unobtainable important biomedical knowledge.[91]

In vitro fertilization is defined as "any fertilization of human ova which occurs outside of the body of a female, either through admixture of donor human sperm and ova or by any other means."[92] The guidelines go on to state that the issues raised by IVF are to be left to one or more established ethical advisory boards, which are to review applications and recommend proposals for federally funded research involving human IVF.[93] The regulations are silent as to the rationale for allowing a distinction as to the propriety of research in the two situations,[94] but as a few examples will show, advances in medical technology mandate that a rationale, if one exists, now be proposed.

First, by defining a fetus in terms of implantation,[95] it would appear that an unimplanted embryo which is able to develop successfully in an "artificial womb"[96] would not be accorded the same status under the regulations as a fetus which develops *in utero* because it would never have been "implanted." One might argue that "implantation" would encompass the artificial womb situation. The definition of implantation within the context of the regula-

89. 45 C.F.R. § 46.203(c) (1983) (emphasis added).

90. 45 C.F.R. §§ 46.208(a), -209(a)(1)-(2) (1983).

91. 45 C.F.R. §§ 46.209(b)(1)-(3) (1983).

92. 45 C.F.R. § 46.203(g)(1983).

93. 45 C.F.R. § 46.204(d) (1983).

94. *But see* 40 Fed. Reg. 33,526 (1975), where in the preamble to the amendments to 45 C.F.R. Part 46, the Secretary of Health, Education and Welfare (now Health and Human Services) concludes that:

> Because biomedical research is not yet near the point of being able to maintain for a substantial period the non-implanted product of *in vitro* fertilization, these regulations do not address this point. Given the state of the research, we believe that regulations would be premature. However, the Department anticipates that such regulations will be prepared when the state of biomedical science so warrants.

95. By implantation it is assumed that period of time after which the embryo would normally implant on the wall of the uterus, usually about 14 days after conception, is meant, as the language and context seem to indicate, rather than the time of transfer of an externally produced embryo to the intended mother.

96. *See* WARNOCK COMMITTEE, *supra* note 6, at 71-72; *Roe*, 410 U.S. at 161.

tions does not support such a construction, however, since IVF issues are expressly distinguished from *in utero* implantation with regard to the status of the embryo for research purposes.

Second, a situation might arise where a woman has an embryo, whether naturally or artificially conceived, removed from her uterus in order to undergo some type of treatment which would otherwise harm the embryo. She and her husband decide on cryopreservation until she can again receive the embryo, but she later learns that she will not be able to carry the child to term. Does the fact that the embryo was previously "implanted" give it some type of rights under the regulations?[97] (i.e., does the embryo subsequently become a "fetus *ex utero*" for the purposes of the regulations?) Or is the embryo's *present* status as "unimplanted" determinative of its status with respect to research or experimentation?

While these two examples might appear to be somewhat farfetched, they are nonetheless possible and quite relevant to a discussion of fetal or embryonic rights under these particular regulations. Given the fact that many other types of situations might arise which could further complicate such matters, it would appear that the need for new comprehensive federal legislation in this area cannot be overstated. Medical technology has reached the point where we can no longer disregard the status of the embryo in these situations, especially in light of the fact that it is now possible for the embryo to be right there before our eyes in a cryopreserved state, and that present law is inadequate to cover the illogical distinctions raised by these new possibilities.

B. State Law

1. The Ability of the Fetus to Sue

A very significant line of authority has developed in the state courts which accords the unborn fetus certain rights of action for prenatal injuries sustained if subsequently born alive.[98] While the earlier cases proposed a viabil-

97. According to the Secretary, it should be noted that "the Department has extended the meaning of the term 'fetus' to include the fetus *ex utero* until such time as such fetus is determined to be viable. The effect of this change is to delete the term 'abortus' which appeared in the proposed rulemaking, and refer instead to a fetus *ex utero*." 40 Fed. Reg. 33,526 (1975). As medical technology pushes back the time from birth when the fetus is "viable," the distinction drawn between the implanted-subsequently *ex utero* fetus and unimplanted-developing embryo with respect to the regulations becomes less justifiable.

98. The most important early case was Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), a malpractice action for injuries sustained to the fetus during childbirth. Relevant to the notion of rights of the fetus, the court reasoned that "while dependent for its continued development or sustenance derived from its mother, (the viable fetus) is not a 'part' of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is

ity requirement as the definitive point where separability occurred, enabling the child to sue for his injuries,[99] the modern trend is to allow a cause of action on behalf of the fetus for any post-conception injuries.[100] The early case of *Kelley v. Gregory*[101] established the non-viability standard subsequently followed by other courts. In a decision which contained prophetic language as to the nature of the effect of advancing medical technology in this area of the law, the *Kelley* court stated:[102]

> While the point at which the fetus becomes viable has been of usefulness in drawing some legal distinctions, the underlying problem that has usually troubled the judges who have written on the subject of recovery for pre-natal injuries, has been in fixing the point of legal separability from the mother . . . . We know something more of the actual process of conception and fetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.

Another recent line of authority has created a cause of action under the wrongful death statutes of the various states on behalf of the estate of a stillborn fetus.[103] The majority view here is that recovery will be permitted only in the case of injury and stillbirth of a viable fetus, though at least two courts would allow a wrongful death recovery for previable injury to a stillborn fetus.[104] The first state to allow such recovery was Minnesota, in the case of *Verkennes v. Corniea,*[105] in which the court held "where *independent existence is possible* and the life is destroyed through a wrongful act a cause of action arises."[106]

A more recent case which prospectively allowed recovery for the death of

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replete with cases of living children being taken from dead mothers." *Id.* at 140. This rationale was based upon the legal premise that a viable fetus was an independent legal person and was owed a separate duty of care from that of its mother.

99. *See id.*; Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962).

100. *See* Wolfe v. Isabell, 291 Ala. 327, 280 So. 2d 758 (1973); Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (1977); Renglow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Kwaterski v. State Farm Mutual Auto Insurance Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967). These decisions require that the child be born alive in order to successfully recover on his behalf.

101. 282 A.D.2d 542, 125 N.Y.S.2d 696 (1953).

102. *Id.* at 543, 125 N.Y.2d at 697. *See also* Justice O'Connor's dissenting opinion in *Akron,* 426 U.S. at 452.

103. *See generally* Annot., 84 A.L.R. 3d 411, 422-25 (1978).

104. *See* Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976) (dictum); Porter v. Lassiter, 91 Ga.App. 712, 87 S.E.2d 100 (1955).

105. 229 Minn. 365, 38 N.W.2d 838 (1949).

106. *Id.* at 370, 38 N.W.2d at 841 (emphasis added).

a viable fetus for motor vehicle homicide is *Commonwealth v. Cass.*[107] The court noted that in enacting the statute, it was reasonable to assume the legislature contemplated that the term "person" would be construed to include viable fetuses,[108] and even if it did not so contemplate, it was nonetheless proper for the court to "define the term person by reference to *established and developing* common law."[109]

Another basis for the decision was that medical science is now able to provide competent proof as to whether the fetus was alive at the time of the defendant's conduct and whether the conduct was the cause of death.[110] In light of this knowledge, and "because we have long since concluded that fear of speculation is not a sufficient ground for denying a civil right of action for prenatal injuries . . . [w]e do not consider it a significant reason for refusing to consider the killing of a fetus a homicide."[111]

These cases represent instances in which the courts have said that the fetus is a "person" or has certain rights for the purposes of the statute being construed. The next inquiry, then, is to determine *at what point* the fetus becomes a person under that particular statute. After this question is raised and, one hopes, answered, it must then be asked on what basis do we justify the distinctions which inevitably are drawn.

Thus, while the courts have taken a hodgepodge approach to answering or attempting to answer some of these questions, advancing medical technology has at least been partially responsible for the questions being raised in the first place. It is reasonable to assume that the status of the early embryo, either implanted or unimplanted, will soon be brought into the discussion as the courts continue to take cognizance of what medical knowledge has forced upon them.

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107. 392 Mass. 799, 467 N.E.2d 1324 (1984). The court ruled that the decision would not be applied to defendant Cass, whose car struck a woman who was 8 months pregnant. The fetus died in the womb as a result of the injuries. The court noted lack of foreseeability of its decision as the reason why prospectivity was applied.

108. *Id.* at 802, 467 N.E.2d at 1326.

109. *Id.* (emphasis added).

110. *Id.* at 805, 467 N.E.2d at 1328.

111. *Id.* at 806, 467 N.E.2d at 1328-29. In a footnote, the court recognized the constitutional limits imposed by such cases as Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 81-84 (1976); Roe v. Wade, 410 U.S. 113, 165-66 (1973). This raises an interesting question addressed earlier, i.e., when the rights of the fetus are weighed against the mother's right to privacy. The due process dilemma inherent in this context is particularly perplexing because a value judgment must inevitably be made with respect to whose rights should prevail.

Three justices dissented on the ground that "the question whether the killing of a viable fetus by reason of the negligent operation of a motor vehicle should be a separate crime is for the Legislature as a matter of wise social policy, and a strong case can be made for appropriate legislation to that effect." *Id.* at 1330.

2. *Relevant IVF and Fetal Experimentation Law*

Although federal law exists in the area of fetal research and IVF, the regulations were not intended to be preemptive of state law in these areas.[112] Thus, a number of states have subsequently enacted legislation designed to restrict fetal research,[113] but only Illinois has explicitly regulated *in vitro* fertilization or embryo transfer.[114] As opposed to the federal regulations,[115] many of the state laws do not exempt unimplanted embryos from fetal research regulation, either because they intend to protect all life from the moment of conception or because they are imprecise in their definitions of "fetus."[116]

The most significant of these laws for the purposes of protecting the unimplanted embryo is the Illinois statute regulating IVF. The statute provides that anyone causing the production of an embryo *ex utero* will be regarded as having the care and custody of a child.[117] The constitutionality of this statute was unsuccessfully challenged by a married couple and their physician, who claimed the law was unconstitutionally vague and prevented them from using the IVF technique, thereby violating their constitutional right of privacy.[118] The State's argument was that the statute merely placed the embryo in the custody and care of the physician during the pre-implantation phase and only required that he refrain from willfully endangering or injuring the conceptus.[119] The court dismissed the case on the ground that no case or controversy was raised since the statute did not prevent the couple from participating in the IVF procedure.[120] The court explicitly recognized that a factual setting where excess embryos not suitable for transfer existed may have prompted the court to address the more precise issue of the possi-

112. 45 C.F.R. § 46.201(b) (1983).

113. *See* Andrews, *supra* note 4, at 54-55.

114. ILL. ANN. STAT. ch. 38, § 81-26(7) (Smith-Hurd 1982).

115. 45 C.F.R. § 46.204(d) (1983).

116. *See* Blumberg, *supra* note 88, at 1178.

117. The Illinois statute, *supra* note 114, provides:

> Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended, (ILL. REV. STAT. ch. 23, § 2354 (1981)) except that nothing in that Section shall be construed to attach any penalty to participation in the performance of a lawful pregnancy termination.

The last clause of this statute is one way in which the clashing constitutional due process and privacy rights discussed earlier might be addressed or even avoided.

118. Smith v. Hartigan, 556 F. Supp. 157 (N.D. Ill. 1983).

119. *Id.* at 161.

120. *Id.* at 162.

ble constitutional rights of the unimplanted embryo.[121]

Another important regulation is the Minnesota statute[122] which provides protection for a living human conceptus, conceived either *in* or *ex utero,* from any type of scientific, laboratory research or experimentation except to protect the life or health of the conceptus. While the narrow issue under this statute would be whether transfer is appropriate insofar as the act of transferring itself may be a type of prohibited experimentation, the broader question of the legal status of the unimplanted embryo is clearly contemplated to some extent, as evidenced by the plain language of the regulation.

While these two statutes recognize some type of rights possessed by the unimplanted embryo, it is nonetheless difficult to discern precisely what they are. Thus, the same problem exists here as in the federal regulations, and it is apparent that uniform regulation, explicitly avoided in the federal statutes, is perhaps the best solution to the highly sensitive area of fetal research and experimentation.

CONCLUSION

As medical technology pushes back the point at which a fetus is viable, and as the effort continues for federal life-protective legislation for the unborn at the moment of conception, the distinctions which have been created both legislatively and judicially concerning fetal and embryo rights become, legally and philosophically, more and more illogical. When one is dealing with a question so basic as "what is life," it seems rather absurd that our legal system tolerates inferior legislative bodies and courts arbitrarily setting the point at different stages for different purposes. From a moral *or* legal standpoint, one does not become a "person" simply because he crosses a state line and happens to be injured and die there; nor does an embryo become a "child" only when he is unimplanted and in the care and custody of a physician; nor should a legal system be allowed to construe or embrace policies which facially, as well as upon deep and careful analysis, appear to be so ill-advised. The status of the early embryo as "orphaned," "unimplanted," or "implanted" is simply not relevant to the important issue of its intrinsic worth as a human entity, and this issue certainly is or should be the central focus of inquiry.

Thus the need for comprehensive federal legislation in this area is clear. Though some might argue that this type of legislation would seriously erode the federal system our Founders so carefully erected, it is important to remember that this particular area of the law is the most fundamental and

121. *Id.* at 163, 164.

122. MINN. STAT. ANN. § 145.421 (West Supp. 1982).

basic to our democratic society, going directly to the heart of liberty itself. Our Constitution protects the due process right to life, liberty, and property, and the time has come to recognize this right in all human life, particularly the innocent unborn who cannot be heard themselves.

Bart Van de Weghe