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## In Virto Fertilization: Hope for Childless Couples Breeds Legal Exposure for Physicians

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# NOTE

## IN VITRO FERTILIZATION: HOPE FOR CHILDLESS COUPLES BREEDS LEGAL EXPOSURE FOR PHYSICIANS\*

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### I. INTRODUCTION

The recent successes with *in vitro* or extracorporeal fertilization

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This article originated as a result of the authors' work with a subcommittee of the Virginia Bar Association's Special Issues Committee of State and National Importance which is examining the topic of *in vitro* fertilization. Dean Lane serves as a regular member of the Special Issues Committee and Ms. Bolton and Ms. Alexander were appointed as John Marshall Fellows to the Committee.

("IVF") in both England<sup>1</sup> and the United States<sup>2</sup> have led to increased interest in this new medical technique. For a large number of women, IVF represents the most promising opportunity for reproduction.<sup>3</sup> This breakthrough makes it possible for infertile couples to experience for the first time the joys of natural parenthood that fertile or "normal" couples take for granted. Pioneers in the field are therefore to be commended for their work. Unfortunately, like other innovative medical services, the IVF procedures also breed legal concerns which will demand resolution in the not-so-distant future. This note will explore these legal concerns and various ethical concerns, set forth the history of the IVF technique, and describe the medical procedure in use today.

## II. THE ARRIVAL OF IN VITRO FERTILIZATION AS A TREATMENT METHOD

### A. *Why IVF?*

After the discovery of the mammalian egg in 1827,<sup>4</sup> great progress was made in dealing with couples' infertility problems.<sup>5</sup> It was not until the last decade, however, when IVF was developed as a treatment modality, that the health sciences were able to overcome the obstacle of infertility where the Fallopian tubes had been surgically removed or were irreparably damaged or diseased.<sup>6</sup> The importance of this development is better understood when it is realized that as many as 560,000 women in the United States alone suffer from pathology of the oviducts (Fallopian tubes) which has led them to be infertile.<sup>7</sup>

1. See, e.g., Steptoe & Edwards, *Birth After the Reimplantation of a Human Embryo*, 2 LANCET 366 (1978); *All About That Baby*, NEWSWEEK, Aug. 7, 1978, at 66; *The First Test-Tube Baby*, TIME, July 31, 1978, at 58; N.Y. Times, July 26, 1978, at 1, col. 5.

2. See Richmond News Leader, Aug. 31, 1982, at 7, col. 2 (reporting the births of the sixth and seventh babies conceived *in vitro* in the United States).

3. Evans & Dixler, *Human In Vitro Fertilization*, 245 J.A.M.A. 2324, 2324 (1981).

4. In 1672, DeGraaf found a follicle (which later became known as the Graafian follicle) on a human ovary and mistook it for an ovum. In 1827, Karl Ernst VonBaer was able to identify an actual human ovum microscopically. Sperm, however, which are much more easily obtained, were identified microscopically as early as 1677. It was twenty years, however, before VonKolliken would correctly describe the development of spermatazoa. Sweeney & Goldsmith, *Test Tube Babies: Medical and Legal Considerations*, 2 J. LEGAL MED. 1, 2 (April, 1980) (citing C.E. VONBAER, *DE OVI MAMALIMUM ET HOMINI GENESI* (1827); A. VONKOLLIKEN, *NEVE DENKSCHR D. ALLQ. SCHWEIZ* (1847)).

5. Sweeney & Goldsmith, *supra* note 4, at 1. For instance, when a male is infertile the process of artificial insemination can be utilized, using that male's sperm or, if necessary, sperm from a donor. *Id.*

6. Trounson & Wood, *Extracorporeal Fertilization and Embryo Transfer*, 8 CLINICS OB. & GYN. 681, 682 (1981).

7. There are 60 million women reproductively active in the USA; 7 percent of married couples are infertile, and a third of these are infertile because of sterility of the wife. Thus, there are 1,400,000 sterile women in the population. Pathology of the oviducts (Fallopian tubes) accounts for 40 percent of these cases so that there are 560,000 women with diseased oviducts.

While there is more than one kind of tubal pathology which can cause infertility, the major cause is adhesions (inflammatory bands connecting opposite surfaces). Currently, the most common cause of tubal adhesions is inflammation of the lining of the uterus to which the tubes connect directly on either side, by way of two structures known as the horns of the uterus. Such inflammation can be caused by intra-uterine devices (IUD's), pelvic inflammatory disease, or gonorrhoea. Once the tubes become blocked, it becomes very difficult to restore tubal function.<sup>8</sup>

Unsuccessful tubal surgery is the most common reason for turning to *in vitro* fertilization and embryo transfer. Often from one to three previous operations have been performed without success.<sup>9</sup> Failure to conceive within two years after surgery, or laparoscopic<sup>10</sup> evidence that both tubes remain blocked, can provide adequate indication that the surgery was not successful. For some patients, any attempts at reparative surgery may be impossible because of the severity and type of the disease.<sup>11</sup>

### B. *History of the Development of the Technique*

To understand *in vitro* fertilization and embryo transfer and its signifi-

ETHICS ADVISORY BOARD, DEP'T OF HEALTH, EDUC. AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER, printed in 44 Fed. Reg. 35,033, 35,042 (1979) [hereinafter cited as EAB REPORT] (quoting Biggers, In Vitro Fertilization, Embryo Culture and Embryo Transfer in the Human 35 (1978) (paper prepared for the Ethics Advisory Board)). See also Hubbard, *Test-Tube Babies: Solution or Problem?*, 82 TECH. REV., Mar./Apr. 1980, at 10, 10 (citing figures from B.E. MENNING, INFERTILITY: A GUIDE FOR THE CHILDLESS COUPLE (1977)). Hubbard defines infertility as failure to conceive or to carry a pregnancy to a live birth after having tried for at least a year. *Id.* Precise data on the extent of this particular type of fertility problem are unavailable. One reason for this is that many infertile couples never undergo medical diagnostic treatment to learn the reason for their infertility.

8. Hubbard, *supra* note 7, at 10.

9. These operations may have been performed by macrosurgery (viewed by the naked eye) or the technologically newer microsurgery (viewed through a microscope). Increasing numbers of microsurgical operations are being performed in efforts to obtain normal tubal function. Trounson & Wood, *supra* note 6, at 681.

10. A laparoscopy is a procedure performed under anesthesia in which two small tubes are inserted into the abdomen through a small incision near the navel. Attached to one tube is a scope. The public frequently refers to laparoscopy as band-aid surgery because the incisions are so small that a band-aid is the only dressing that is required post-operatively. Laparoscopy is also the technique used to obtain the ovum for *in vitro* fertilization. Through the scope, the physician can see the egg in its follicle attached to the ovary. A hollow needle is passed through one tube to aspirate the egg which has been detached from the follicle by forceps which have been passed through the second tube. The procedure is monitored by TV camera. Moore, *Human In Vitro Fertilization: Can We Support It?*, 1981 CHRISTIAN CENTURY 442, 443 (Apr. 22).

11. Reparative surgery may be impossible in some cases of severe tubal disease. Thickening and fibrosis of the tubes or thinning due to tissue breakdown can make passage of ova through the tube extremely unlikely even if the passageway of the tube is open. Trounson & Wood, *supra* note 6, at 682.

cance, one needs to first understand the process of ovulation and fertilization as it occurs naturally. A human female is born with about one million oocytes (immature ova) in each of her ovaries. She never produces any more. Less than 450 of these oocytes are ovulated. Those that are ovulated develop within small ovarian sacs called Graafian follicles in which they are hormonally stimulated to grow each month. Usually, only one of these follicles develops in each menstrual cycle. Under natural hormonal stimulation, the ovum matures, and the Graafian follicle ruptures. The ovum has then been ovulated, and it enters the upper end of the oviduct.<sup>12</sup>

Fertilization normally takes place in the upper third of the oviduct, called the ampulla.<sup>13</sup> After a sperm has penetrated the ovum, the embryo begins mitosis, or cell reproduction. During this time period, the embryo, suspended in the fluids of the Fallopian tube or oviduct, travels toward and finally enters the uterus. This period is called the pre-implantation period of pregnancy. Research has indicated that it takes the embryo three days to get from the ampulla to the uterus. For the next three days, the embryo floats in uterine secretions while it progresses to the blastocyst<sup>14</sup> stage. Six days after conception the blastocyst has adhered to the inner lining of the uterus, the endometrium, and become implanted.<sup>15</sup> This is known as the implantation phase.

*In vitro* fertilization in humans, using sperm and ova from the infertile couple and followed by replacement of the embryo in the uterus of the donor of the ova, was suggested anonymously in 1937 in the *New England Journal of Medicine*.<sup>16</sup> The first well-documented achievement of *in vitro* fertilization of a human ovum, however, was reported in 1970 by the English Doctors Edwards, Steptoe, and Purdy.<sup>17</sup> Transfer of the embryo to a uterus apparently was not attempted in this research experiment. Doctors Edwards and Steptoe subsequently treated Mrs. Lesley Brown — leading to the well-publicized birth of Louise Brown in 1978.<sup>18</sup>

*In vitro* fertilization of human reproductive cells (gametes) is a rela-

12. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 *NEW ENG. J. MED.* 336, 337 (1981).

13. *Id.* at 336.

14. A blastocyst is

a stage in the development of a mammalian embryo which follows the morula which is the stage immediately following the early cleavage of the zygote. It consists of an outer layer or trophoblast to which is attached an inner cell mass. The enclosed cavity is the blastocoele. The whole is called . . . [a] blastocyst.

TABER'S CYCLOPEDIA MEDICAL DICTIONARY B-33 (2d ed. 1973).

15. Biggers, *supra* note 12, at 336-37.

16. Anonymous, *Conception in a Watchglass*, 217 *NEW ENG. J. MED.* 678 (1937).

17. Edwards, Steptoe, & Purdy, *Fertilization and Cleavage In Vitro of Preovular Human Oocytes*, 227 *NATURE* 1307-09 (1970).

18. See sources cited *supra* note 1.

tively recent achievement. Successful laboratory experiments with embryo transfer following *in vivo* (in the womb) fertilization and subsequent flushing of the embryo were reported almost a hundred years ago,<sup>19</sup> but it was not until 1959 that a successful mammalian *in vitro* fertilization and embryo transfer using genetically tagged rabbits was reported.<sup>20</sup>

Only two reports of human embryo transfer following *in vitro* fertilization appeared in the scientific literature before the birth of Louise Brown in 1978. One occurred in Australia in 1973,<sup>21</sup> and the other was reported by Doctors Steptoe and Edwards in 1976.<sup>22</sup> The embryo in the Australian effort was aborted, and the patient of Doctors Steptoe and Edwards experienced a tubal pregnancy which required surgical removal.<sup>23</sup>

Steptoe and Edwards developed what amounts to a three stage procedure: the recovery of an ovum, the fertilization and culturing of that ovum *in vitro*, and the replacement of the resulting embryo into the uterus of the patient from whom the ovum was obtained.<sup>24</sup> This procedure is still followed by Steptoe and Edwards, as well as by others who have repeated their accomplishments.<sup>25</sup>

Recovering the ovum is difficult; one of the difficulties results from its small size. Doctors, therefore, recover the entire unruptured Graafian follicle so that the follicle may rupture in the laboratory dish.<sup>26</sup> Although the first two documented births following *in vitro* fertilization and embryo transfer were the result of procedures carried out in women with natural or spontaneous ovulatory cycles,<sup>27</sup> ovulation-inducing medication may be given to increase the chances of surgical recovery of an unrup-

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19. In 1890, Walter Heape reported in England that he had successfully transferred rabbit embryos from the womb of one rabbit to that of another rabbit. Heape, *Preliminary Note on the Transplantation and Growth of Mammalian Ova with a Uterine Foster Mother*, 48 PROC. ROYAL SOC'Y LONDON 457-58 (1890), cited in Biggers, *supra* note 12, at 337.

20. The many claims by others of earlier *in vitro* fertilization were equivocal. The microscopic technology, for instance, could not at that time have provided adequate visualization to ascertain that a sperm had in fact penetrated the ovum. Biggers, *supra* note 12, at 337 (citing Chang, *Fertilization of Rabbit Ova In Vitro*, 184 NATURE 466-67 (1959)).

21. DeKretzer, Dennis, Hudson, Leeton, Lopata, Outch, Talbot, and Wood, *Transfer of a Human Zygote*, 2 LANCET 728-29 (1973).

22. Steptoe & Edwards, *Reimplantation of a Human Embryo with Subsequent Tubal Pregnancy*, 1 LANCET 880, 882 (1976).

23. *Id.*

24. See Steptoe & Edwards, *supra* note 1, at 366. See also Biggers, *supra* note 12, at 337.

25. Biggers, *supra* note 12, at 338. See also Eastern Virginia Medical School, Dep't of Obstetrics and Gynecology, *The VIP Program* (rev. Apr. 1, 1982) (Protocol for Vital Initiation of Pregnancy Program) [hereinafter cited as VIP Program].

26. Trounson, Leeton, Wood, Webb & Wood, *Pregnancies in Humans by Fertilization In Vitro and Embryo Transfer in the Controlled Ovulatory Cycle*, 212 SCIENCE 681 (1981).

27. *Id.* at 682.

tured follicle and thus the chances of the implantation of an embryo.<sup>28</sup>

The recovery of the follicle must be done surgically, usually by laparoscopy.<sup>29</sup> After one or more eggs are obtained, they must be fertilized in the laboratory *in vitro*.<sup>30</sup> Sperm is obtained from the husband and the fertilization attempt takes place in an incubator in a plastic dish containing a culture medium. Development is allowed to proceed for about forty-eight hours.<sup>31</sup> Just as in the coital situation, sometimes fertilization may not occur when the sperm and ovum meet. Sometimes, also, just as in the normal situation, development will begin and then cease.<sup>32</sup>

The embryo that has developed normally for forty-eight hours must be transferred into the uterus. This is a simple procedure by which a small catheter is used to convey the embryo through the cervical canal into the uterus. Anesthesia is not required.<sup>33</sup> If implantation occurs, and the pregnancy continues, then the attempt is considered to have been a success. Since fertile couples typically require an average of three ovulatory cycles to achieve pregnancy, it cannot be expected that pregnancy will result from *in vitro* fertilization on the first attempt — especially when the inefficiencies of the extracorporeal process are considered.<sup>34</sup> Hormones may be administered to help nurture the pregnancy in its early stages since the natural process of doing so has been interrupted.<sup>35</sup>

### C. *Ethical Concerns*

*In vitro* fertilization and embryo transfer raise several ethical issues which have been debated fervently in both the scientific literature<sup>36</sup> and the mass media.<sup>37</sup> Because of the controversy, the former Department of

28. *Id.* See also VIP Program, *supra* note 25, at 5.

29. Sometimes, because of earlier operations or disease, the ovaries may not be reached by laparoscope. An open operation or laparotomy can be used to alleviate this problem so that subsequent ovum aspiration attempts may be made by laparoscopy. VIP Program, *supra* note 25, at 4-5.

30. *In vitro* means "in glass." Actually, plastic, flat dishes are used. *Id.* at 5.

31. *Id.*

32. *Id.* See also Biggers, *supra* note 12, at 339 (stating that after exposure to spermatazoa, the probability of fertilization of an ovum is 84%).

33. VIP Program, *supra* note 25, at 5.

34. *Id.* at 7. See also Biggers, *supra* note 12, at 338. In women who are reproducing naturally there is only a 20-25% chance of a live birth occurring after an ovum has been exposed to spermatazoa. *Id.*

35. VIP Program, *supra* note 25, at 6. In the normal process of fertilization, the early pregnancy is nurtured by the corpus luteum which is a small gland which develops at the site of the follicle where the egg previously matured. There is concern that the corpus luteum may have its development hindered when the follicle is aspirated. The development of the corpus luteum is monitored, and hormones are given as necessary. *Id.*

36. See, e.g., Evans & Dixler, *supra* note 3, at 2324.

37. See, e.g., Hubbard, *supra* note 7, at 10; Moore, *supra* note 10, at 442; *To Fool (Or Not) with Mother Nature*, TIME, July 31, 1978, at 69 [hereinafter cited as *Mother Nature*].

Health, Education, and Welfare (now the Department of Health and Human Services) in 1975 imposed a moratorium on federal funding of human *in vitro* fertilization research until the issues that had been raised could be examined further. In 1978, hearings were held resulting in the Ethics Advisory Board of the Department of Health, Education, and Welfare announcing that it would support the ethics of allowing federal funding of *in vitro* fertilization research. The support was conditioned on the proviso that reimplantation of the embryo would be made only into the woman from whom the ovum was obtained.<sup>38</sup>

The ethical issues raised by the procedure include: Is the possibility of creating and destroying human lives in the laboratory moral? Will the offspring be genetically normal; and, if not, is it proper to even attempt to use IVF? Will IVF produce changes in the natural patterns of human reproduction? Finally, what are the considerations if IVF leads to genetic engineering?<sup>39</sup>

With regard to the possible creation and destruction of human beings, concern has been voiced over the prospect that ova will be fertilized, creating human life in the minds of some, and that subsequently some or all of these embryos will be destroyed,<sup>40</sup> thus raising the issue of abortion and causing concern to those opposing abortion, in particular the Right to Life Organization.<sup>41</sup> Their concern seems misplaced, however, because current *in vitro* fertilization and embryo transfer techniques provide for all normal embryos to be transferred to the womb of the donor.<sup>42</sup> LeRoy Walters, director of the Center for Bioethics at the Kennedy Institute of Ethics, has stated that a consensus on the status of the early embryo is

38. See text accompanying notes 120-22 *infra* for the specific conditions imposed. See also Evans & Dixler, *supra* note 3, at 2324. See also EAB REPORT, *supra* note 7, at 35,057 (stating that their conclusion "relates to the ethics of conducting research involving *in vitro* fertilization . . .; it does not address the question of Department support of such research").

39. Biggers, *supra* note 12, at 336.

40. See Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295, 1295-96 (1979).

41. See Tucker, *In Vitro Veritas*, NEW REPUBLIC, Oct. 28, 1981, at 14, 15. Tucker illustrates the heated exchange between IVF advocates and opponents:

In response to the opponents of *in vitro* fertilization, infertile couples have formed lobbying groups of their own. Barbara Menning, who in 1973 founded a group called Resolve, to support fertility research, complains that opposition to *in vitro* fertilization is "invariably stated by women and men who have achieved their families, or celibate clergy for whom it is not an issue. Right-to-lifers and others stand up at meetings and give among their credentials the number of children they have borne. In my opinion, and in the opinion of other infertile women, the fact that they have achieved their families *disqualifies* them from any understanding of the pain of childlessness."

*Id.* at 16 (quoting Barbara Menning).

42. VIP Program, *supra* note 25, at 10. "In the event more than 1 egg is fertilized, all fertilized eggs will be transferred into the uterus so that there would be the possibility of developing twins or even triplets under this circumstance." *Id.*



not needed due to the fact that no normal embryos are discarded. He sees the only morally relevant difference between *in vivo* and *in vitro* fertilization as being that in the laboratory the embryos can be examined for abnormalities.<sup>43</sup> A decision not to transfer a grossly abnormal embryo would be similar to a decision not to use heroic means to prolong the life of an infant with serious birth defects.<sup>44</sup>

Concern has been expressed that IVF will cause an increase in the natural incidence of abnormalities through augmentation of chromosomal aberrations — possibly caused in fertilization by abnormal sperm that could not have reached the ovum *in vivo*.<sup>45</sup> The increased rate of fertilization by abnormal sperm could be a result of chemical and physical factors in the laboratory procedure itself<sup>46</sup> and could possibly result from overwhelming the ovum's natural block to polyspermic penetration.<sup>47</sup> Fortunately, nature protects the species by spontaneously aborting most chromosomally anomalous embryos. Cellular development studies of spontaneous human abortuses show in fact that chromosomal abnormalities are a major cause of embryonic and fetal loss.<sup>48</sup> A recent study reached the conclusion that 40 to 50 percent of human embryos that have successfully implanted naturally may have a chromosomal abnormality which causes them to abort.<sup>49</sup> There is no reason to expect that the natural loss of these embryos would not occur following *in vitro* fertilization and embryo transfer, as the evidence indicates that the danger of increased congenital defects is not high.<sup>50</sup>

This evidence, however, is not sufficient for those who argue that infertile women and their unborn children should not be used for experimentation. They argue that the safety of these procedures has not been determined and that it cannot be determined through animal experimenta-

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43. Holden, *Ethicist Approves Test-Tube Baby Research*, 215 SCIENCE 382, 382 (1982).

44. *Id.*

45. Biggers, *supra* note 12, at 340-41.

In October, 1981, William Tucker, writing in *The New Republic*, noted that as of that date only one baby born as a result of the IVF procedure had a birth defect—a congenital heart defect. It was unknown if the defect related in any way to the manner of his conception; his twin sister was apparently normal. Tucker, *supra* note 41, at 15. At the time of Tucker's article, eight IVF children had been born worldwide. *Id.* In December, 1982, it was reported that of the 150 babies born by IVF since Louise Brown, this one defect was apparently still the only one to have occurred. Clark, Witherspoon, Abramson, Shapiro, Gray, & Zabarsky, *Infertility: New Cures, New Hope*, NEWSWEEK, Dec. 6, 1982, at 102, 103, and 108.

46. Biggers, *supra* note 12, at 340-41.

47. *Id.*

48. *Id.* at 340.

49. *Id.* (citing Schlesselman, *How Does One Assess the Risk of Abnormalities from Human In Vitro Fertilization?*, 135 AM. J. OB. & GYN. 135, 148 (1979)).

50. Biggers, *supra* note 12, at 341. Biggers states that the risk seems much lower than that taken by couples with a recessive defect who decide to have a child. *Id.*

tion.<sup>51</sup> An example used to show past scientific misjudgment is the prescribing of the drug thalidomide, once thought to be harmless, which resulted in the birth of thousands of babies with missing limbs.<sup>52</sup> Similarly, and even more analogous to *in vitro* fertilization, was the administration of the hormone diethylstilbestrol (DES) to pregnant women in the belief that it was harmless and could prevent miscarriage.<sup>53</sup> About fifteen years after birth, it became apparent that the daughters of these women had a high risk of developing vaginal cancer.<sup>54</sup> In both instances, the environment in which the embryos were developing was changed. It is felt that manipulation of the environment of conception and early embryonic development could have similar results.<sup>55</sup>

Ethical concerns have additionally been directed toward any changes in the natural patterns of human reproduction in terms of the detrimental effects such may have on marriage and the family.<sup>56</sup> It has been suggested that even if the initial goal of the clinical application of IVF is to assist married couples in bearing children of their own, the technology already provides the potential for ovum, embryo, and womb donation.<sup>57</sup> It is believed by some commentators that the demand for these extramarital uses will be strong and will ultimately compromise family, lineage, and heterosexuality and weaken the taboos against adultery and incest.<sup>58</sup> Stated differently, "We're on a slippery slope. Western society is built around the family; once you divorce sex from procreation, what happens to the family?"<sup>59</sup>

The Roman Catholic Church, which has traditionally opposed artificial advances in procreation and contraception, condemns all interference with nature. Artificial insemination, even with the husband as the donor, was condemned by Pope Pius XII on the ground that it converted the home into a laboratory.<sup>60</sup> *In vitro* fertilization has been compared to switching the marital bed into a chemistry set.<sup>61</sup> Protestant theologian

51. Hubbard, *supra* note 7, at 11.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 11-12.

56. EAB REPORT, *supra* note 7, at 35,045 (citing L. Kass, Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer 15 (1978) (paper prepared for the Ethics Advisory Board)).

57. EAB REPORT, *supra* note 7, at 35,045 (citing Kass, *supra* note 56 parenthetical, at 15).

58. EAB REPORT, *supra* note 7, at 35,045 (citing Kass, *supra* note 56 parenthetical, at 15).

59. *Mother Nature*, *supra* note 37, at 69 (quoting Robert J. Berry, British geneticist and consultant to a board set up by the Church of England to consider issues such as the ones raised by the birth of Louise Brown).

60. *Mother Nature*, *supra* note 37, at 69. See also, Hand, *The Manipulation of Existence*, 45 VITAL SPEECHES DAY 98, 100 (1978).

61. *Mother Nature*, *supra* note 37, at 69 (quoting Rev. William B. Smith, a spokesman for the Archdiocese of New York).

Paul Ramsey, on the other hand, believes that it is the unnatural risk to the child that makes the procedure immoral.<sup>62</sup>

Acceptance of *in vitro* fertilization as recourse from infertility for married couples, for whom it may well provide the only opportunity for a child of their own, represents the more moderate view expressed by Jewish religious leaders.<sup>63</sup> Rabbi Seymour Siegel, professor of ethics at Manhattan's Jewish Theological Seminary, in commenting on the birth of Louise Brown stated: "The Browns were trying to obey the commandment to have children. When nature does not permit conception, it is desirable to try to outwit nature. The Talmud teaches that God desires man's cooperation."<sup>64</sup> It was stated to the Ethics Advisory Board that involuntary infertility has traditionally been seen by Jewish religious leaders to be a very serious matter: "The rabbis put it this way, some fifteen centuries ago. Four are considered as if they were dead: the poor, the diseased, the blind, and the childless."<sup>65</sup>

Concern has been expressed that the genetic manipulation written about in Aldous Huxley's *Brave New World*<sup>66</sup> in 1932 might become commonplace as a result of this new technology.<sup>67</sup> Some of the concerns expressed include:

1. The development of commercial ovum and embryo banks;<sup>68</sup>
2. The genetic selection or manipulation of early embryos;<sup>69</sup>
3. The transfer of nuclei from adult individuals to early embryos, or cloning;<sup>70</sup> and
4. Extracorporeal gestation, or bringing an embryo all the way to viability in the laboratory.<sup>71</sup>

Some commentators have suggested that it would be best to evaluate these potential consequences of *in vitro* fertilization and embryo transfer

62. *Id.* (quoting Paul Ramsey, a theologian). See also Ramsey, *Shall We "Reproduce?"*, *The Medical Ethics of In Vitro Fertilization*, 220 J.A.M.A. 1346 (1972).

63. *Mother Nature*, *supra* note 37, at 69.

64. *Id.*

65. EAB REPORT, *supra* note 7, at 35,045-46 (citing S. Leiman, Statement to the Ethics Advisory Board 131 (Nov. 10, 1978), as printed in Transcript of Meeting V, Nat'l Tech. Info. Serv., PB-288405).

66. A. HUXLEY, *BRAVE NEW WORLD* (1946).

67. EAB REPORT, *supra* note 7, at 35,045.

68. *Id.* (citing Kass, *supra* note 56 parenthetical, at 19).

69. EAB REPORT, *supra* note 7, at 35,045 (citing L. Walters, Ethical Issues in Human In Vitro Fertilization and Research Involving Early Human Embryos n.113 (1978) (paper prepared for the Ethics Advisory Board)).

70. EAB REPORT, *supra* note 7, at 35,045 (citing Walters, *supra* note 69 parenthetical, at n.113).

71. EAB REPORT, *supra* note 7, at 35,045 (citing Walters, *supra* note 69 parenthetical, at n.118).

“from the standpoint of both likelihood and probable impact.”<sup>72</sup> Others believe that some of the fears of the latter group may be potential benefits. One commentator views the surrogate motherhood role as closely analogous to the role of a wet nurse and, therefore, has no ethical objection to extramarital involvement through gestation where intramarital reproduction would be impossible.<sup>73</sup> Sex preselection,<sup>74</sup> pre-transfer screening,<sup>75</sup> retransfer repair of defects,<sup>76</sup> and extracorporeal gestation<sup>77</sup> are all seen by some to be potential benefits.

A final ethical concern with regard to the appropriateness of allocating scarce health care funds to the application of these techniques has been expressed.<sup>78</sup> In addressing this concern, however, it should be pointed out that there are at present no federally supported human *in vitro* fertilization clinics in the United States.<sup>79</sup> The facility at Eastern Virginia Medical School is supported by private funds.<sup>80</sup>

### III. LEGAL ISSUES ARISING FROM IVF

#### A. *The Delzio Case*<sup>81</sup>

*Delzio v. Presbyterian Hospital*<sup>82</sup> suggests the multitude of IVF legal issues that may plague our courts in the future. Mrs. Delzio, a twenty-six year old doctor's wife who was suffering from blocked Fallopian tubes, had previously suffered several miscarriages. Two attempts at tubal repair had failed. When Mrs. Delzio requested a third operation in 1972, Dr. Landrum Shettles at Columbia-Presbyterian Hospital suggested that she consider the possibility of undertaking *in vitro* fertilization and reim-

72. EAB REPORT, *supra* note 7, at 35,045 (citing S. Gorovitz, *In Vitro Fertilization Sense and Nonsense* 14, 15 (1979) (paper prepared for the Ethics Advisory Board)).

73. EAB REPORT, *supra* note 7, at 35,042 (citing Leiman, *supra* note 65 parenthetical, at 126-30).

74. EAB REPORT, *supra* note 7, at 35,042 (citing Walters, *supra* note 69 parenthetical, at n.112).

75. EAB REPORT, *supra* note 7, at 35,042 (citing Walters, *supra* note 69 parenthetical, at n.113).

76. EAB REPORT, *supra* note 7, at 35,042 (citing Walters, *supra* note 69 parenthetical, at n.115).

77. EAB REPORT, *supra* note 7, at 35,042 (citing Walters, *supra* note 69 parenthetical, at n.118).

78. Hubbard, *supra* note 7, at 12. Hubbard feels that this research distorts health priorities—stating that even in the United States many people do not have access to adequate health care. Poor women are “coerced” not to have babies while women who can afford it will pay to “become guinea pigs in the risky technology of *in vitro* fertilization.” *Id.*

79. See Tucker, *supra* note 41, at 14.

80. See VIP Program, *supra* note 25, at 8 (advising IVF patients that it is doubtful that their insurance will cover their costs).

81. *Delzio v. Presbyterian Hosp.*, 74 Civ. 3588 (S.D.N.Y. 1976). For medical information regarding the *Delzio* case, see Sweeney & Goldsmith, *supra* note 4, at 4-9.

82. 74 Civ. 3588.

plantation if the next tubal repair failed.<sup>83</sup>

Since such a procedure had not been carried out by any known workers in the field, there was an agreement that some of Mrs. Delzio's ova would be collected and an attempt made at a "dry run" of the *in vitro* fertilization process.<sup>84</sup> Mrs. Delzio and her husband agreed that another attempt at surgical repair of the Fallopian tubes would be made; and, at the same time, ova would be procured and transported to Columbia-Presbyterian Hospital Medical Center, where Dr. Shettles would attempt to fertilize the ova with Dr. Delzio's sperm.<sup>85</sup>

This attempt at IVF was successful, but unfortunately, the tubal reconstruction failed. The fertilized ova were allowed to run their natural course in the culture media; and then, after they were no longer viable, they were discarded.<sup>86</sup>

Having successfully completed the "dry run," the doctors reinstated the plan to attempt IVF and reimplantation. In preparation, Mrs. Delzio spent nearly a year determining her ovulatory pattern, so that the mature ova could be harvested at the appropriate time.<sup>87</sup> Finally, on September 12, 1973, Mrs. Delzio was taken to the operating room where follicular fluid was aspirated from both ovaries. This fluid, along with some tubal mucosa, was collected in a sterile container, then sealed and transported by Dr. Delzio immediately to Dr. Shettles at Columbia-Presbyterian Hospital Medical Center. Dr. Shettles immediately began the IVF culture of the ovum. The culture medium containing ova, sperm, and tubal mucosa was then placed into an incubator where it was to remain for an anticipated time of three days until it reached the blastula stage.<sup>88</sup>

On the second day of incubation, Dr. Shettles was informed by the Chairman of the Department of Obstetrics and Gynecology that the National Institute of Health banned IVF work, that such work was unethical and immoral, that he [Shettles] was unqualified in the IVF field, and moreover, that Columbia-Presbyterian had never approved such work. As a consequence, the IVF project was terminated; and the blastocyst

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83. See Sweeney & Goldsmith, *supra* note 4, at 4.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 4-5. During this year, Mrs. Delzio suffered further medical complications. She over-responded to a dose of the drug clomothene citrate which had been given in an attempt to make her ovulate and to produce more than one ovum for the IVF attempt, and consequently she developed a large ovarian cyst. *Id.* The most common fertility medication given at this time in the United States is clomiphene citrate (clomid). Telephone interview with Peggy Glessner, Virginia Drug Information Center, Medical College of Virginia Hospitals, Richmond, Virginia (Apr. 15, 1983). See also PHYSICIANS' DESK REFERENCE at 1350, 1886 (J. Angel, Publisher, 37th ed. 1983).

88. Sweeney & Goldsmith, *supra* note 4, at 5.

destroyed.<sup>89</sup>

The following morning, Mrs. Delzio, still in severe postoperative pain, was informed of the project termination, and understandably became emotionally distraught. She succumbed to a profound depression which still persisted in April of 1980.<sup>90</sup>

Litigation was commenced on the theory that there had been unlawful destruction of property with the result that plaintiffs suffered mental anguish for loss of the potential child.<sup>91</sup> The jury awarded Mrs. Delzio \$50,000 compensatory damages for mental suffering, but ruled in favor of the defendants on the conversion claim.<sup>92</sup>

This case graphically illustrates the abundance of legal issues surrounding IVF. What constitutional rights do the respective parties have? Who has the legal right to institute or terminate an IVF procedure? What liabilities attach when sperm, ova, or a fertilized ovum is injured, destroyed, mixed up, or lost during the IVF procedure? Who is liable if the woman who supplied the ova is a carrier for hemophilia, or either donor carries the gene for Tay-Sachs disease? Finally, how are these liabilities changed when a third-party donor ovum, sperm, or womb is employed?<sup>93</sup>

## B. Federal Law

At present, no state or federal statutes address the subject of *in vitro* fertilization. Instead, one must rely for guidance upon the federal regulations promulgated by the Department of Health and Human Services (HHS) to protect human subjects involved in research conducted or funded by that Department.<sup>94</sup> The regulations provide generally that any HHS grant or contract supporting research, development, and related activities involving human *in vitro* fertilization be reviewed by a local Institutional Review Board.<sup>95</sup> It is the responsibility of this Board to consider

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89. *Id.* at 6.

90. *Id.* at 7.

91. *Id.* at 8.

92. *Id.* at 11.

93. The strongest case for a fundamental right to IVF probably exists when the semen and ova are donated by the husband and wife, the blastocyst is implanted in the wife, and procreation would otherwise be impossible for the particular couple by any means other than IVF. Legal, moral, and ethical considerations understandably multiply when the IVF procedure is unnecessary or when a third party's sperm, ovum, or womb is introduced into the procedure.

94. 45 C.F.R. § 46 (1982). In September, 1980, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (hereinafter referred to as the Commission) informed the Secretary of Health and Human Resources that the Department of Health and Human Resources lacked the statutory authority to require institutions to follow the department's regulations and procedures for reviewing research that was not supported by department funds. 47 Fed. Reg. 13,272, 13,275 (1982).

95. 45 C.F.R. § 46.205.

how research subjects are selected, to insure that informed consent is obtained from potential research subjects, and to monitor research activities for the development of any unanticipated risks.<sup>96</sup> The regulations also require that no activity be undertaken until "appropriate studies on animals and nonpregnant individuals have been completed."<sup>97</sup> The only specific requirement relating to human *in vitro* fertilization is that "[n]o application or proposal involving human *in vitro* fertilization may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical standpoint."<sup>98</sup>

The history of federal involvement in this area extends back almost a decade. On November 16, 1973, the Department of Health, Education and Welfare (HEW) published a draft document outlining proposed policies and procedures for the protection of human subjects involved in research.<sup>99</sup> This document represented the work of a special study committee appointed by HEW through the National Institute of Health.<sup>100</sup> The draft policy declared that care had to be taken "not to bring human ova fertilized *in vitro* to viability—whether in the laboratory or implanted in the uterus—until the safety of the technique [had] been demonstrated as far as possible in sub-human primates."<sup>101</sup> It was, therefore, proposed that: (1) all research proposals involving human *in vitro* fertilization be reviewed by an Ethical Review Board;<sup>102</sup> (2) no research involving the implantation of laboratory-fertilized human ova into recipient females be supported until appropriate scientific review boards were convinced that sufficient experiments with animals, including sub-human primates, had been conducted to demonstrate the safety of the technique;<sup>103</sup> and (3) no implantation of *in vitro* fertilized human ova be attempted until guidelines had been developed to govern the responsibilities of the donor and recipient "parents" and of research institutions and personnel.<sup>104</sup>

The following year, in July, 1974, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (the Commission) was established by the National Research Service Award

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96. *Id.* § 46.205(a)(2). For a performance evaluation of Institutional Review Boards generally, see 47 Fed. Reg. 13,272 (1982).

97. 45 C.F.R. § 46.206(a)(1).

98. *Id.* § 46.204(d).

99. 38 Fed. Reg. 31,743 (1973).

100. On October 9, 1973, the Secretary of the Department of Health, Education, and Welfare announced the appointment of this study group. 38 Fed. Reg. at 27,882.

101. 38 Fed. Reg. at 31,738.

102. *Id.*

103. *Id.*

104. *Id.* Requirement 3 does not appear in the subsequent regulations and guidelines.

Act.<sup>105</sup> The Commission's purpose was to study research involving human fetuses, to make recommendations to the Secretary of HEW regarding the funding of such research projects, and, if a positive recommendation for funding was forthcoming, to determine under what conditions such funding should occur.<sup>106</sup>

Coincidental with the creation of the Commission and before any report could be issued by it, HEW published a set of proposed regulations for the protection of human subjects on August 23, 1974.<sup>107</sup> These regulations defined the term "fetus" to include "the product of *in vitro* fertilization which is subsequently implanted in the donor of the ovum."<sup>108</sup> In addition, the regulations provided the Ethics Advisory Board with guidelines for evaluating research proposals submitted to it:

With respect to the fertilization of human ova *in vitro*, it is expected that the Board will consider the extent to which current technology permits the continued development of such ova, as well as the legal and ethical issues surrounding the initiation and disposition of such products of research.

With respect to implantation of fertilized human ova, it is expected that the Board will consider such factors as the safety of the technique (with respect to offspring) as demonstrated in animal studies and clarification of the legal responsibilities of the donor and recipient parent(s) as well as the research personnel.<sup>109</sup>

No effort was made, however, to protect the products of *in vitro* fertilization prior to implantation, the rationale being that biomedical research had not yet neared the point of being able to sustain these products for any substantial period of time.<sup>110</sup>

On August 8, 1975, HEW issued its final regulations for the protection of human subjects following review of both public comment on the proposed regulations and the Commission's report and recommendations pertaining to fetal research.<sup>111</sup> The Commission's report, however, did not directly address *in vitro* fertilization and/or embryo transfer. Accordingly, HEW decided not to impose any substantive regulations upon such research, choosing instead to reiterate the procedural requirement that no

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105. National Research Service Award Act of 1974, Pub. L. No. 93-348, §§ 93-348, 201-215, 88 Stat. 342, 348-54, as amended by Emergency Medical Services Amendments of 1976, Pub. L. No. 94-573, § 18(a), 90 Stat. 2709, 2719 (codified as amended as 42 U.S.C. § 289e-1 (1982)).

106. § 202(b), 88 Stat. at 350.

107. 39 Fed. Reg. 30,648 (1974) (codified at 45 C.F.R. § 46 (1982)).

108. 39 Fed. Reg. 30,648. The proposed definition of fetus included only those circumstances where the *in vitro* fertilized ovum was returned from its donor, thus excluding from the definition those situations where an *in vitro* fertilized ovum was implanted in one other than the donor. For the present definition of fetus, see *infra* note 114.

109. *Id.*

110. *Id.*

111. 45 C.F.R. § 46 (1982).



proposal be funded until it could be reviewed by the Ethics Advisory Board to determine its acceptability from an ethical standpoint.<sup>112</sup> Also, in the proposed regulations, no effort was made to address the issue of nonimplanted fetuses based upon the state of the art in biomedical research at the time.<sup>113</sup> The regulations as they presently exist, therefore, only apply to implanted products of *in vitro* fertilization.<sup>114</sup>

The Ethics Advisory Board established by these 1975 regulations was not actually appointed until 1977 when it became necessary for the Board to consider Dr. Soupart's application for a research grant to study *in vitro* fertilization.<sup>115</sup> Shortly after the Board's receipt of this application, Louise Brown was born;<sup>116</sup> and, as a result, the Secretary of HEW asked the Board to expand its consideration of the application to include the ethical, legal, scientific, and social issues involved in human *in vitro* fertilization and embryo transfer.<sup>117</sup> After more than six months of investigation, the Ethics Advisory Committee issued its report to then Secretary of HEW, Patricia Harris.<sup>118</sup>

As noted previously, the Ethics Advisory Board recommended federal support of research involving human *in vitro* fertilization and embryo transfer,<sup>119</sup> concluding that such support was ethically acceptable under certain conditions.<sup>120</sup> Among these conditions were the following: (1) no embryos would be sustained *in vitro* more than fourteen days after fertilization, the stage normally associated with completion of implantation;<sup>121</sup> and (2) embryo transfers would be attempted only with gametes received from lawfully married couples.<sup>122</sup> In addition, the Ethics Advisory Board adopted the position that further animal research be undertaken, particularly with primates, to assess the risks to mothers and offspring associated with *in vitro* procedures.<sup>123</sup> Although Secretary Harris solicited pub-

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112. *Id.* § 46.204(d).

113. 40 Fed. Reg. 33,527 (1975).

114. Pregnancy is defined as encompassing "the period of time from confirmation of implantation . . . until expulsion or extraction of the fetus." 45 C.F.R. § 46.203(b) (1982). Fetus is defined as "the product of conception from the time of implantation . . . until a determination is made, following expulsion or extraction of the fetus, that is viable." *Id.* § 46.203(c). Note that one commentator has asked: "By excluding from the definition of pregnancy the area between conception and implantation, has not the Commission and HEW legitimated *in vitro* fertilization by defining it as an area involving the non-human?" Horan, *Fetal Experimentation and Federal Regulation*, 22 VILL. L. REV. 325, 328 (1977).

115. EAB REPORT, *supra* note 7, at 35,047.

116. *Id.* at 35,033-34.

117. *Id.* at 35,033.

118. *Id.* at 35,034.

119. *Id.* at 35,057.

120. *Id.* at 35,056.

121. *Id.* at 35,057.

122. *Id.*

123. *Id.* at 35,056.

lic comment on the report,<sup>124</sup> she took no action on it before leaving office.

Since there are no federal statutes in effect to regulate IVF, one must currently rely on HEW regulations, proposals advanced by the Ethics Advisory Board, and analogous state laws when confronted with legal questions involving the *in vitro* procedures.

### C. State Regulation

Although no state has yet enacted legislation dealing specifically with IVF, two existing areas of state law touch on relevant legal considerations;<sup>125</sup> however, both of these types of statutes were developed before the realization of a human IVF birth.<sup>126</sup> Consequently, an interpretation of this legislation broad enough to encompass the IVF legal concerns may not be feasible.

The first variety of pertinent legislation concerns artificial insemination,<sup>127</sup> for which approximately one-third of the states have passed statutes.<sup>128</sup> A number of these statutes require the written consent of the husband to be recorded,<sup>129</sup> and some specifically state that sperm donors<sup>130</sup>

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124. *Id.* at 35,033.

125. *Id.* at 35,047.

126. *Id.*

127. For further information on artificial insemination, see Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 586 (1979).

128. See, e.g., ALASKA STAT. § 20.20.010 (1975); CAL. CIV. CODE § 7005 (West Cum. Supp. 1982); COLO. REV. STAT. § 19-6-106 (1978); CONN. GEN. STAT. ANN. §§ 45-69f to -69n (West 1981); FLA. STAT. ANN. § 742.11 (West Cum. Supp. 1983); GA. CODE ANN. §§ 74-101.1, -9904 (1981); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1983); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. § 333.2824 (1980); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT. § 126.061 (1979); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Cum. Supp. 1982-83); OR. REV. STAT. §§ 109.239, .243, .247, and 677.355, .360, .365, .370, .990 (1981); TENN. CODE ANN. § 53-446 (Cum. Supp. 1982); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE ANN. § 64.1-7.1 (Repl. Vol. 1980); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1982); WIS. STAT. ANN. § 891.40 (West Cum. Supp. 1982-83); WYO. STAT. § 14-2-103 (1977).

129. CAL. CIV. CODE § 7005 (West Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 45-69h (West 1981); KAN. STAT. ANN. § 23-130 (1981); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT. § 126.061 (1979); OKLA. STAT. ANN. tit. 10, § 553 (West Cum. Supp. 1982-83); OR. REV. STAT. § 677.365 (1981); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1982); WIS. STAT. ANN. § 891.40 (West Cum. Supp. 1982-83).

130. Artificial insemination would be necessary if the husband were sterile; however, ethical and moral principles must be considered before utilizing a donor sperm in IVF for reasons other than sterility of the husband. For example, should donor sperm be used if the husband is sick or away at war, or if the couple is divorced or separated? Suppose the potential parents want to produce a child of above average intelligence, or with particular physical characteristics such as red hair, etc. Would society permit use of a sperm bank in such a situation? To date, there are no laws regulating such practices.

are relieved of all obligations and rights to the child.<sup>131</sup> Ten states require that artificial insemination be administered by a licensed physician.<sup>132</sup> The Georgia statute relieves the doctor of all civil liability to the husband, wife, or child unless the insemination procedure was negligently administered.<sup>133</sup> If donor sperm is to be used, Oregon statutes require the physician to select the specimen of an individual who is not afflicted with a genetic defect or venereal disease.<sup>134</sup>

On the question of legitimacy, Virginia Code section 64.1-7.1,<sup>135</sup> like similar statutes in other states,<sup>136</sup> mandates that children conceived by artificial insemination be presumed for all purposes to be legitimate.<sup>137</sup> These statutes become valuable guidelines when questions of inheritance or paternity arise. Since these statutes were not adopted with IVF in mind, however, courts may be reluctant to apply these principles to problems presented by IVF.

A second area of related law is suggested by fetal experimentation statutes.<sup>138</sup> Since these statutes were drafted with abortion in mind, their applicability to IVF experimentation is uncertain.<sup>139</sup>

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131. See CAL. CIV. CODE § 7005 (West Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 45-69j (West 1981); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT. § 126.061 (1979); OR. REV. STAT. § 109.239 (1981); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1982); WIS. STAT. ANN. § 891.40 (West Cum. Supp. 1982-83).

132. ALASKA STAT. § 20.20.010 (1975); CAL. CIV. CODE § 7005 (West Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 45-69g (West 1981); GA. CODE ANN. §§ 74-101.1, -9904 (1981); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT., § 126.061 (1979); OKLA. STAT. ANN. tit. 10, §§ 551, 553 (West Cum. Supp. 1982-83); OR. REV. STAT. § 677.360 (1981); VA. CODE ANN. § 64.1-7.1 (Rep. Vol. 1980); WIS. STAT. ANN. § 891.40 (West Cum. Supp. 1982-83).

133. GA. CODE ANN. § 74-101.1(b) (1981).

134. OR. REV. STAT. §§ 677.360, 370 (1981).

135. VA. CODE ANN. § 64.1-7.1 (Repl. Vol. 1980).

136. See, e.g., CONN. GEN. STAT. ANN. § 45-69i (West 1981); FLA. STAT. ANN. § 742.11 (West Supp. 1983); N.Y. DOM. REL. LAW § 73 (McKinney 1977); WIS. STAT. ANN. § 891.40 (West Supp. 1983).

137. VA. CODE ANN. § 64.1-7.1 (Repl. Vol. 1980).

138. Medical experiments performed on a viable fetus of course constitute unethical practice. The regulations are worded in such a way, however, that the product of *in vitro* fertilization prior to actual implantation and viability does not seem to be within the definition of fetus and, therefore, seems to fall outside the scope of the regulations entirely. See *supra* note 114 for the language giving rise to this implication.

139. See, e.g., ARIZ. REV. STAT. ANN. § 36-2302 (Supp. 1982-83); ILL. ANN. STAT. ch. 38, § 81-26 (Smith-Hurd Cum. Supp. 1982-83); IND. CODE ANN. § 35-1-58.5-6 (Burns Repl. Vol. 1979); KY. REV. STAT. ANN. § 436.026 (Baldwin 1982); LA. REV. STAT. ANN. § 14:87.2 (West 1974); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); MICH. COMP. LAWS ANN. §§ 333.2685 to .2692 (1980); MINN. STAT. ANN. § 145.421-.422 (West Supp. 1979); MO. ANN. STAT. § 188.037 (Vernon Supp. 1983); N.D. CENT. CODE § 14-02.2-01 to -02 (Repl. Vol. 1981); OHIO REV. CODE ANN. § 2919.14 (Baldwin 1981); 35 PA. CONS. STAT. ANN. § 6605 (Purdon 1977); S. D. CODIFIED LAWS ANN. § 34-23A-17 (1977); UTAH CODE ANN. § 76-7-310 (1978).

Whether these restrictions extend to IVF experimentation may depend on whether under state law the terms of the particular statute would be found to encompass *ex utero* blastocysts.

#### D. Constitutional Considerations Concerning IVF Regulation

To determine whether a state may regulate the IVF procedures, one must first determine whether a fundamental right is being affected. Are prospective parents entitled to employ IVF as a constitutional right? Such a privilege is not explicitly guaranteed by the United States Constitution and the Supreme Court has yet to rule on the issue. If IVF privileges are found by the Court to be implicitly guaranteed by the Constitution, courts would have to examine with "strict scrutiny" any attempts to impinge on that right, and the state would be required to demonstrate a "compelling state purpose" and utilize the least restrictive means of achieving that purpose before such regulations would be upheld.<sup>140</sup>

##### 1. Marriage and Family Relationships

The marriage relationship has been regarded by the Supreme Court as involving a "fundamental" interest.<sup>141</sup> Consequently, laws interfering with this relationship must be justified by reason of a compelling state interest.<sup>142</sup>

In *Loving v. Virginia*,<sup>143</sup> the Supreme Court held invalid a state statute forbidding interracial marriage on equal protection grounds, also holding that the interracial couple had been denied liberty without due process of law. The Court, in discussing due process, described marriage as a "basic" right that was "fundamental to our very existence and survival."<sup>144</sup>

The fundamental nature of the family relationship was also recognized in *Boddie v. Connecticut*,<sup>145</sup> in the context of procedural due process, and in *Zablocki v. Redhail*,<sup>146</sup> which invalidated a state statute restricting parents with support obligations to minor children from marrying without court approval.<sup>147</sup> The Court in *Meyer v. Nebraska*<sup>148</sup> found among the rights of "liberty" guaranteed by the fourteenth amendment "the right . . . to marry, establish a home and bring up children."<sup>149</sup> Finally, the constitutional right to rear one's children was recognized in *Pierce v. Society of Sisters*<sup>150</sup> and in *Prince v. Massachusetts*.<sup>151</sup>

140. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 686 (1977); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). See also EAB REPORT, *supra* note 7, at 35,048.

141. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

142. *Id.* See also text accompanying note 140.

143. 388 U.S. 1.

144. *Id.* at 10.

145. 401 U.S. 371 (1970).

146. 434 U.S. 374 (1978).

147. *Id.* at 390-91. The *Zablocki* decision was decided on equal protection grounds. *Id.*

148. 262 U.S. 390 (1923).

149. *Id.* at 399.

150. 268 U.S. 510 (1925). In *Pierce*, the Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

These cases may support a constitutionally protected right to avail oneself of the benefits of the IVF procedure through the implicitly guaranteed right of privacy, particularly with respect to marriage and children. Such an analysis may, however, be questioned in view of dictum in the *Zablocki* opinion which warns that not all regulations affecting marriage need be subjected to strict scrutiny.<sup>152</sup> “[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”<sup>153</sup>

## 2. Procreation, Contraception, and Abortion

In *Skinner v. Oklahoma*,<sup>154</sup> procreation was recognized by the Supreme Court as “fundamental to the very existence and survival of the race.”<sup>155</sup> The *Skinner* Court invalidated an Oklahoma state law which provided for the sterilization of three-time convicted felons, but excepted from its coverage persons who had been convicted of certain types of white collar felonies such as bribery and embezzlement.<sup>156</sup> The Court held that because the interest in procreation was a “basic civil right,”<sup>157</sup> it could not be taken away by the state without the compelling justification required by a strict scrutiny analysis.<sup>158</sup>

Subsequent cases dealing with regulation of contraception arose in the 1960's and 1970's. Embodied in these cases is the concept of a right to privacy. The leading case establishing a constitutional right to privacy is *Griswold v. Connecticut*,<sup>159</sup> in which the Supreme Court held invalid a state law prohibiting the use of contraceptive devices. The scope of the decision was sufficiently broad to apply to “aiders and abettors” who operated a birth control clinic.<sup>160</sup> The Court reasoned that the right of marital privacy was protected from governmental intrusion under the penumbra of guarantees in the Bill of Rights.<sup>161</sup>

In his concurring opinion, Justice Goldberg discussed the ninth amendment<sup>162</sup> which reads: “The enumeration in the Constitution, of certain

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151. 321 U.S. 158 (1944). The Court referred to the “parent’s claim to authority in her own household and in the rearing of her children . . . [as one of several] sacred private interests.” *Id.* at 165. The Court balanced the parents right against the state’s interest in protecting the welfare of children. *Id.*

152. 434 U.S. at 386.

153. *Id.*

154. 316 U.S. 535 (1942).

155. *Id.* at 541.

156. *Id.*

157. *Id.*

158. *Id.*

159. 381 U.S. 479 (1965).

160. *Id.* at 481.

161. *Id.* at 484-86.

162. U.S. Const. amend. IX.

rights, shall not be construed to deny or disparage others retained by the people."<sup>163</sup> Justice Goldberg observed that the ninth amendment was not so much an independent source of constitutional rights as a recognition that the Bill of Rights does not represent an exclusive list of such rights.<sup>164</sup> The right of privacy, the Court said, was one example of a "basic and fundamental right not expressly enumerated."<sup>165</sup> It would be a violation of this right to permit governmental intrusion into the marital bedroom to search for evidence of violation of the Connecticut anti-contraceptive law since the marriage relationship lay within the zone of constitutionally protected privacy.<sup>166</sup>

The rationale of the *Griswold* case was argued to the Supreme Court in *Eisenstadt v. Baird*,<sup>167</sup> a case in which the Court held a Massachusetts statute banning the distribution of contraceptives to unmarried persons unconstitutional.<sup>168</sup> Although *Eisenstadt* was decided on equal protection grounds, the Court, nonetheless, stated that "if 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."<sup>169</sup>

This language in the *Eisenstadt* opinion appears to give strong support to the existence of a fundamental right to utilize IVF. If the Court is willing to support an individual's right to use artificial means to *prevent* a pregnancy, it would logically follow that the same Court would advocate an individual's constitutional privilege to use artificial means to *promote* a pregnancy.

This same line of reasoning is supported by *Carey v. Population Services International*.<sup>170</sup> In striking down as unconstitutional a New York statute that regulated the distribution and advertisement of contraceptives, the *Carey* Court observed:

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, . . . and most prominently vindicated

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163. 381 U.S. at 488-93 (Goldberg, J., concurring).

164. *Id.* at 488-90.

165. *Id.* at 491.

166. *Id.* at 495.

167. 405 U.S. 438 (1972).

168. *Id.* at 454-55. The Court avoided a decision on the claimed right of privacy, holding instead that the state law violated the equal protection clause of the fourteenth amendment by "providing dissimilar treatment for married and unmarried persons." *Id.* *Eisenstadt* illustrates the overlap of the privacy and equal protection guarantees.

169. *Id.* at 453 (citations omitted) (emphasis in original).

170. 431 U.S. 678 (1977).

in recent years in the context of contraception . . . and abortion . . . .<sup>171</sup>

The Court stated that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."<sup>172</sup>

Finally, in *Roe v. Wade*<sup>173</sup> the Supreme Court stated that the right of privacy was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"<sup>174</sup> and that the right was broad enough to encompass a woman's decision whether to terminate her pregnancy.<sup>175</sup>

Whether the Court would deem the right of privacy broad enough to encompass a couple's decision to employ the IVF procedure is uncertain. Recent decisions based on the right of privacy which examine governmental intrusions relating to marriage, procreation, and family relationships by the strict scrutiny standard might well support a ruling that state regulation of IVF and embryo transfer would intrude upon a fundamental right. As a result, any statute affecting this method of begetting children would have to serve a compelling state interest and do so by the least restrictive means.

#### E. *Funding*

Although the finding of a fundamental right to IVF implicitly guaranteed by the Constitution might prohibit a governing unit from prohibiting IVF procedures, significant influence might still be exerted by the government's refusal to fund such projects. Recent cases have recognized a state's right to encourage childbirth rather than abortion by upholding statutes that provided state funding for hospital services associated with childbirth, but not nontherapeutic abortions. In 1977, the Supreme Court held in *Maher v. Roe*,<sup>176</sup> *Poelker v. Doe*,<sup>177</sup> and *Beal v. Doe*<sup>178</sup> that equal

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171. *Id.* at 685.

172. *Id.* at 687. See also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), where the Court recognized that a man has a constitutional right to father and enjoy the association of his offspring. The Court held, however, that a state could not require a husband's consent to an abortion performed during the first trimester of pregnancy, reasoning that a woman's principal role in childbearing justifies her right to act unilaterally during that period. *Id.* at 69-71.

Justices Stewart and Powell, in a concurring opinion, maintained that a man's right to father children is constitutionally protected. *Id.* at 90. They agreed with the majority, however, that a woman's right to decide to terminate her pregnancy outweighs the husband's interest in fatherhood. *Id.*

But see *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (state law requiring mother's but not father's consent to adoption of illegitimate child violates equal protection clause).

173. 410 U.S. 113 (1973).

174. *Id.* at 153.

175. *Id.*

176. 432 U.S. 464 (1977).

177. 432 U.S. 519 (1977).

protection did not require a state to finance elective abortions even though the state did subsidize indigent women for the expenses of childbirth. In *Maher*, Connecticut's Medicaid program limiting state funding for first trimester abortions to those that were "medically necessary"<sup>179</sup> was attacked on equal protection grounds. Finding no suspect class or fundamental right, the Court applied a minimum rationality standard and upheld the funding scheme. Justice Powell noted that the Constitution "imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."<sup>180</sup>

The Court in *Poelker* relied on the approach of *Maher* to reject an attack on the ban on elective abortions in the public hospitals of St. Louis. The St. Louis policy stemmed both from the staffing practices at the public hospital involved, which used doctors and students from the medical school of a Jesuit-operated university, and from directions by the mayor, who was morally opposed to abortion. The majority found no constitutional significance in the mayor's personal hostility to abortions.<sup>181</sup> The Court concluded: "[T]he Constitution does not forbid a state or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . . ."<sup>182</sup>

Justice Powell's majority opinion in *Beal*<sup>183</sup> emphasized that the federal Medicaid law<sup>184</sup> "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act."<sup>185</sup> In *Beal*, the Pennsylvania version of Medicaid limited financial assistance for abortions to those "certified by physicians as medically necessary."<sup>186</sup> Justice Powell found no inconsistency between the Pennsylvania restriction and the objectives of federal law: "Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services."<sup>187</sup>

178. 432 U.S. 438 (1977).

179. *Maher*, 432 U.S. at 466.

180. *Id.* at 469.

181. *Poelker*, 432 U.S. at 521.

182. *Id.*

183. 432 U.S. 438 (1977).

184. Title XIX, Social Security Act, 42 U.S.C. §§ 1396-1396K (1976 and Supp. IV 1980). This statute expressly provides that "[a] State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title] . . . ." 42 U.S.C. § 1396a(a)(17) (1976).

185. *Beal*, 432 U.S. at 444.

186. *Id.* at 441.

187. *Id.* at 444-45 (emphasis in original).



These cases would thus support governmental refusal to fund IVF research and clinical application and would probably allow the governmental unit to restrict recipients of the funds to married couples or to persons incapable of producing offspring by natural means.

#### F. *Substantive Causes of Action Sounding in Tort*

The anticipated growth of private IVF clinics across the country means that an ever-increasing number of otherwise infertile couples will now be able to try the procedure.<sup>188</sup> The result will be greater exposure to liability for doctors and hospitals, thus increasing the likelihood of IVF-related litigation in the future. Numerous causes of action already existing in tort could arise in the IVF context.<sup>189</sup> In an attempt to address some of these issues, this section will focus first on causes of action that could be brought on behalf of an IVF child and then on actions which could be brought to redress injuries to parents.

##### 1. Suits on Behalf of a Child

###### a. Injuries Prior to Birth

A suit could be brought on behalf of a child born alive who is the product of *in vitro* fertilization and who has sustained prenatal or even pre-conception injuries. Today, virtually every jurisdiction which has considered the matter recognizes the right of a child to recover for damages intentionally or negligently inflicted upon it prior to birth.<sup>190</sup> The first case to grant such a cause of action was *Bonbrest v. Kotz*,<sup>191</sup> holding that a child who is born alive has standing to sue for torts inflicted after viability but before birth.<sup>192</sup> To hold otherwise, the court reasoned, would leave a wronged individual without remedy under the law.<sup>193</sup>

While *Bonbrest* represents the traditional rule, the trend has been to recognize a cause of action on behalf of a child for injuries sustained any-

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188. Since 1978, more than 120 babies have been conceived via *in vitro* fertilization procedures. See *Small Miracles of Love and Science*, LIFE MAGAZINE, Nov. 1982, at 44.

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

190. *Id.*

191. 65 F. Supp. 138 (D.D.C. 1946).

192. *Id.* at 142. "Viability" has been defined by the United States Supreme Court as being when a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Roe v. Wade*, 410 U.S. 113, 160 (1973). The concept of viability was important to the *Bonbrest* court as a means of distinguishing Oliver Wendell Holmes' decision in *Dietrich v. Northampton*, 138 Mass. 14 (1884), the first recorded case involving the issue of prenatal negligence. *Dietrich* held that an unborn child was a part of its mother and lacked standing to maintain a suit; therefore, any injury sustained by the infant was only recoverable by the mother. *Id.* Influential in the development of the viability standard was Justice Boggs whose dissenting opinion in *Allaire v. St. Luke's Hospital*, 184 Ill. 359, \_\_\_\_\_, 56 N.E. 638, 640-42 (1900), favored recovery for an infant sustaining prenatal injuries.

193. *Bonbrest*, 65 F. Supp. at 141.

time after conception.<sup>194</sup> In rejecting viability as the test, some courts have recognized the difficulty of applying such a standard,<sup>195</sup> and have noted that it is logically impossible to conclude "that a claim for an injury inflicted prior to viability is any less meritorious than one sustained after."<sup>196</sup> Rather, courts have chosen to rely upon a causation test to determine if the injury sustained is traceable to another's wrongful act.<sup>197</sup>

Although the Virginia courts have not had occasion to consider the permissibility of a cause of action on behalf of an infant for prenatal injuries, the United States District Court for the Western District of Virginia declared its belief in *Bolen v. Bolen*<sup>198</sup> that Virginia courts would entertain such a suit.<sup>199</sup> The court reasoned that if a child must endure life with mental and physical handicaps proximately caused by another's negligence, then fundamental notions of fairness require compensation.<sup>200</sup> The court further stated that the fact that an infant may become a ward of the state or at the very least a substantial financial burden upon his par-

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194. See, e.g., *Wolfe v. Ishell*, 291 Ala. 327, 280 So. 2d 758 (1973); *Simon v. Mullin*, 34 Conn. Supp. 139, 380 A.2d 1353 (1977); *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560 (Fla. Dist. Ct. App. 1976); *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967); *Womack v. Buckhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696 (1953); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959). See generally Note, *Preconception Negligence: Reconciling an Emerging Tort*, 56 Geo. L.J. 1239 (1979) [hereinafter cited as *Preconception Negligence*].

195. As noted by the court in *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, \_\_\_\_\_, 367 N.E.2d 1250, 1252-53 (1977), viability is a relative matter which depends upon such factors as the health of the mother and child, the stage of development, the weight and race of the child, and available life sustaining techniques.

196. *Sylvia v. Gobeille*, 101 R.I. 76, \_\_\_\_\_, 220 A.2d 222, 224 (1966). Indeed, as the court noted in *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, \_\_\_\_\_, 367 N.E.2d 1250, 1253 (1977), there is substantial medical authority to the effect that congenital structural defects caused by conditions in the prenatal environment can only be sustained early in the pre-viable stages of fetal development.

197. See, e.g., *Sinkler v. Kneale*, 401 Pa. 267, \_\_\_\_\_, 164 A.2d 93, 96 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, \_\_\_\_\_, 220 A.2d 222, 224 (1966).

198. 409 F. Supp. 1371 (W.D. Va. 1975).

199. The *Bolen* court distinguished the case of *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969), in which the Virginia Supreme Court refused to recognize a wrongful death action brought by the estate of a stillborn infant because of its unwillingness to find that an unborn child could maintain a common law action for personal injuries. The western district court in *Bolen* observed that although *Lawrence* was supportive of the defendant's position which argued against recovery for prenatal injuries, it was not dispositive since the *Lawrence* court was construing the state's wrongful death statute. *Bolen*, 409 F. Supp. at 1373. Cf. *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981). In *Harman*, the infant plaintiff who sustained prenatal injuries was held not to be a "person" under section 1983 of the Civil Rights Act and therefore was denied recovery. *Id.* at 801.

200. *Bolen*, 409 F. Supp. at 1373.

ents supports such a suit.<sup>201</sup> The facts of the *Bolen* case also suggest that the court recognized a right of recovery for prenatal injuries sustained by non-viable fetuses. In the case, doctors performed a tubal ligation upon the twin plaintiffs' mother without first determining if she was pregnant, thereby allegedly causing the twins' deformities.<sup>202</sup> Had the twins been viable, the mother's pregnancy would have been apparent.

These cases would indicate that a Virginia court faced with a plaintiff conceived through the IVF process might grant recovery for injuries sustained after conception. This conclusion is a logical extension of existing law since the courts have no reason to treat IVF babies any differently than babies conceived normally.

In recent years, a number of courts have also allowed recovery for pre-conception injuries.<sup>203</sup> The first case to consider the issue favorably, *Jorgensen v. Meade Johnson Laboratories, Inc.*,<sup>204</sup> relied upon a causation theory in upholding the infant plaintiff's claim under Oklahoma law that she suffered Down's syndrome because her mother's chromosomal structure was altered when, prior to conception, she took the defendant manufacturer's birth control pills.<sup>205</sup> In *Renslow v. Mennonite Hospital*,<sup>206</sup> the Illinois Supreme Court relied upon a breach of duty theory in holding that a child had a valid cause of action against a hospital and a physician for injuries sustained due to a negligently administered blood transfusion given to its mother several years prior to conception.<sup>207</sup> The *Renslow* court found, in essence, that a contingent prospective duty was owed to the unconceived child who could foreseeably be harmed by the breach of duty to the child's mother.<sup>208</sup> In *Bergstresser v. Mitchell*,<sup>209</sup> the Eighth Circuit upheld a cause of action where the infant plaintiff alleged that his brain-damaged condition occurred because it became necessary for doctors to perform an emergency Caesarean section upon his mother prior to term due to an occult rupture of her uterus caused by an earlier, negligently performed Caesarean section.<sup>210</sup> In reaching this conclusion, the court relied upon *Renslow* and *Jorgensen* as precedent and held that any other decision would lead to a situation where there was a wrong without

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201. *Id.*

202. *Id.* at 1371.

203. See generally *Preconception Negligence*, *supra* note 194. For a recent case denying a cause of action for preconception injuries, see *Albala v. City of New York*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

204. 483 F.2d 237 (10th Cir. 1973).

205. *Id.* at 239-40.

206. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

207. *Id.* at \_\_\_\_\_, 367 N.E.2d at 1255.

208. *Id.*

209. 577 F.2d 22 (8th Cir. 1978).

210. *Id.* at 24.

a remedy.<sup>211</sup>

Both the conception and pre-conception cases could be argued as precedent in a suit brought by an infant plaintiff seeking damages for injuries sustained during *in vitro* fertilization or embryo transfer. The plaintiff, however, would clearly need to establish a duty on the part of the hospital and the physician and would need to demonstrate that the procedures utilized in the *in vitro* fertilization or embryo transfer resulted in the injury alleged. As a practical matter, the problem of proving negligence at the conception or pre-conception stage might be difficult, if not impossible.

#### b. Wrongful Life

Another type of suit which might be brought on behalf of a child born deformed or impaired is a wrongful life suit. In such a case, the child essentially argues that he should not have been born. The theory relied upon is that the physician's negligent failure to inform the child's parents of a possible deformed birth prevents the parents from being able to choose whether to have the child. The child argues that but for the inadequate advice, he would not have been born to experience the pain and suffering attributable to his impaired state.<sup>212</sup> Such a case could be brought by an IVF child where, for example, the physician failed to test for birth defects or serious illness or did so in a negligent manner, failed to inform the parents of potential problems, or directed that a defective blastocyst be implanted.

The courts have not been receptive to causes of action of this nature.<sup>213</sup>

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211. *Id.* at 25.

212. See cases cited *infra* notes 213-34. For a discussion of the wide range of claims asserted in this area, see generally Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Tedeschi, *On Tort Liability for 'Wrongful Life'*, 1 ISRAEL L. REV. 513 (1966), reprinted in 7 J. FAM. L. 465 (1967); Comment, "Wrongful Life": *The Right Not To Be Born*, 54 TUL. L. REV. 480 (1980).

Wrongful life suits such as those cited in this article are to be distinguished from "dissatisfied life" cases where illegitimate children seek damages for being stigmatized as bastards. See, e.g., *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (healthy illegitimate child born following negligently performed abortion denied recovery); *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (healthy illegitimate child denied recovery for wrongful life); *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (illegitimate child denied recovery against state for wrongful life where mother, who was a state mental patient, was sexually assaulted); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (illegitimate child did not state cause of action for damages on theory of wrongful birth where mother was seduced and battered).

213. See, e.g., *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980) (child born with Down's syndrome denied recovery where doctor failed to advise and test mother for disease); *Gildner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978) (under state law, recovery denied child born with Tay-Sachs disease following negligent testing); *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975) (handicapped child denied re-

Recovery has generally been denied on two grounds: (1) the perceived impossibility of measuring damages;<sup>214</sup> and (2) public policy considerations.<sup>215</sup>

The New Jersey decision in *Gleitman v. Cosgrove*<sup>216</sup> is illustrative. In *Gleitman*, the mother of the infant plaintiff contracted rubella during the first trimester of her pregnancy. Although she advised her physician of the illness, she was assured, despite medical knowledge to the contrary, that there would be no harmful consequences.<sup>217</sup> As a result of the rubella, the plaintiff was born mentally retarded and suffered from serious sight, speech, and hearing defects.<sup>218</sup> In addressing the issue of damages, the court declared:

This Court cannot weigh the value of life with impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison re-

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covery where Air Force doctors failed to properly diagnose and treat rubella); *DiNatale v. Lieberman*, 409 So. 2d 512 (Fla. 1982); *Moore v. Lucas*, 405 So. 2d 1022 (Fla. 1981) (child born with Larsen's syndrome following physician's failure to advise that disease was inheritable, denied recovery); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) (mongoloid child denied recovery where physician failed to inform 38-year old mother of prenatal diagnosis by use of amniocentesis); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (child born with birth defects denied recovery after failure of physician to advise mother with rubella of possible consequences); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (recovery denied child born with Down's syndrome where physician failed to advise mother of risks involved in conception after age 35); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (recovery granted child born with fatal kidney disease where physician advised mother who had previously had child with same disease that chance of disease recurring was "practically nil"), *modified sub. nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (recovery denied child); *Stewart v. Long Island College Hospital*, 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (recovery denied impaired child where hospital assured mother who had had rubella during pregnancy that abortion unnecessary); *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979) (recovery denied child born with crippling hereditary disease where parents sought to prevent conception through father's sterilization and had tried to terminate the subsequent pregnancy by a negligently performed abortion); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (deformed child denied recovery where doctor failed to diagnose mother's rubella).

214. *See, e.g.*, *Gilder v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978); *Gleitman v. Cosgrove*, 49 N.J. 22, \_\_\_\_\_, 227 A.2d 689, 692 (1967); *Stewart v. Long Island College Hosp.*, 58 Misc. 2d 432, \_\_\_\_\_, 296 N.Y.S.2d 41, 44 (Sup. Ct. 1968); *Speck v. Finegold*, 268 Pa. Super. 342, \_\_\_\_\_, 408 A.2d 496, 508 (1979).

215. *See, e.g.*, *Phillips v. United States*, 508 F. Supp. 537, 543 (D.S.C. 1980); *Berman v. Allan*, 80 N.J. 421, \_\_\_\_\_, 404 A.2d 8, 12 (1979); *Speck v. Finegold*, 268 Pa. Super. 342, \_\_\_\_\_, 408 A.2d 496, 508 (1979).

216. 49 N.J. 22, 227 A.2d 689 (1967).

217. *Id.* at \_\_\_\_\_, 227 A.2d at 690.

218. *Id.*

quired by compensatory remedies.<sup>219</sup>

The court then proceeded to stress the sanctity of human life.<sup>220</sup>

In denying damages based upon public policy considerations, the courts have also noted that a child does not have a fundamental right to be born a whole, functional human being<sup>221</sup> and that life with or without handicaps is more precious than non-life.<sup>222</sup> In view of this reasoning, it seems unlikely that the courts will modify their stance and allow an IVF child to recover damages on a theory of wrongful life. In *Scales v. United States*,<sup>223</sup> a three-year old child with severely damaged organs was denied recovery against physicians who failed to test his mother for pregnancy when she had German measles.<sup>224</sup> The infant plaintiff had brought suit under the Federal Tort Claims Act based on alleged negligent treatment of his mother during her Air Force basic training.<sup>225</sup> The Fifth Circuit reversed the decision of the lower court which had awarded damages and held the claim barred under federal law,<sup>226</sup> notwithstanding the fact that "the infant had an independent cause of action under state tort law."<sup>227</sup>

Although the majority of decisions in other jurisdictions have uniformly denied the child's right to maintain a wrongful life action, California has dissented from the majority and has granted a limited recovery to an injured child claiming damages for wrongful life.<sup>228</sup> In *Turpin v. Sortine*,<sup>229</sup> the Supreme Court of California examined the question whether a child born with a hereditary affliction may maintain a tort action against a medical care provider who — before the child's conception — negligently failed to advise the child's parents of the hereditary condition, depriving them of the opportunity to choose not to conceive the child.<sup>230</sup> The *Turpin* court concluded that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child — like his or her parents — may recover special damages for extraordinary expenses to treat the hereditary

219. *Id.* at \_\_\_\_\_, 227 A.2d at 692.

220. *Id.* at \_\_\_\_\_, 227 A.2d at 693.

221. See *Becker v. Schwartz*, 46 N.Y.2d 401, 411, 386 N.E.2d 801, 812, 413 N.Y.S.2d 895, 900 (1978); *Speck v. Finegold*, 268 Pa. Super. 342, \_\_\_\_\_, 408 A.2d 496, 508 (1979).

222. *Berman v. Allan*, 80 N.J. 421, \_\_\_\_\_, 404 A.2d 8, 12 (1979).

223. 685 F.2d 970 (5th Cir. 1982).

224. *Id.* at 971.

225. *Id.*

226. The court barred the claim because of the *Feres* doctrine, which states that the United States is "not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 972.

227. *Id.* at 970.

228. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

229. *Id.*

230. *Id.* at 221, 643 P.2d at 956, 182 Cal. Rptr. at 338.

deafness.<sup>231</sup>

The *Turpin* court further noted in dictum that it is incorrect to suggest that impaired life is preferable to nonlife under all circumstances.<sup>232</sup> In support of this view, the court referred to a California statute which granted adults the right to control decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition.<sup>233</sup> The court suggested that in cases more extreme in severity than the one at bar, public policy supports the right of each individual to make his or her own determination as to the relative value of life and death.<sup>234</sup> The *Turpin* court did not, however, indicate those afflictions which would be worse than not being born at all.

## 2. Suits to Recover Damages for Parents

### a. Wrongful Birth

It seems inevitable that the parents of a deformed or impaired child who is produced by *in vitro* fertilization will eventually bring a wrongful birth action claiming that had they been advised of the risks of having such a child, they would have prevented conception or terminated the pregnancy.<sup>235</sup> A number of the earlier cases which considered the issue, such as *Gleitman v. Cosgrove*<sup>236</sup> and *Stewart v. Long Island College Hospital*,<sup>237</sup> refused to recognize that parents in wrongful birth cases had stated a legally cognizable cause of action. Underpinning these decisions were public policy considerations involving the sanctity of human life.<sup>238</sup>

231. *Id.* at 232, 643 P.2d at 966, 182 Cal. Rptr. at 349.

232. *Id.* at 229, 643 P.2d at 963, 182 Cal. Rptr. at 346.

233. *Id.*

234. *Id.*

235. Wrongful birth claims have been asserted not only where a doctor or hospital fails to diagnose or warn parents of a genetic disease but also where abortions or sterilizations have failed or there has been a negligent prescription of drugs which results in a pregnancy. *See, e.g., White v. United States*, 510 F. Supp. 146 (D. Kan. 1981) (parents granted limited recovery for pregnancy and birth-related costs where child born following negligent tubal ligation); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (mother permitted damages where negligently performed abortion resulted in birth); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (parents granted recovery where pharmacist negligently filled prescription for birth control pills with tranquilizers); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (parents entitled to recovery for birth of child following negligent vasectomy); *Sala v. Tomlinson*, 87 A.D.2d 670, 448 N.Y.S.2d 830 (1982) (mother granted recovery for birth of a child following negligent sterilization). *Contra LaPoint v. Shirley*, 409 F. Supp. 118, 120-21 (W.D. Tex. 1976) (recovery by parents denied where abnormal child born following negligent tubal ligation because court found birth of a deformed child not to be a foreseeable consequence of negligent sterilization).

236. 49 N.J. 22, 227 A.2d 689 (1967).

237. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968).

238. *Gleitman*, 49 N.J. at \_\_\_\_\_, 227 A.2d at 693; *Stewart*, 35 A.D.2d at \_\_\_\_\_, 313

But since *Roe v. Wade*<sup>239</sup> recognized a woman's unqualified right during the first trimester to terminate a pregnancy, with a limited right to do so thereafter, the courts have generally not hesitated to recognize wrongful birth claims.<sup>240</sup> As noted by the Federal District Court of South Carolina in *Phillips v. United States*,<sup>241</sup> which involved a physician's negligence in failing to inform or test a Down's syndrome child's mother for the disease, "subsequent cases have suggested that failure to recognize 'wrongful birth' . . . claims could impermissibly burden the constitutional rights involved in conception, procreation, and other familial decisions."<sup>242</sup> The *Phillips* court then went on to say that refusal to recognize such causes of action would immunize individuals in the medical field giving inadequate guidance to those choosing to exercise their constitutional right to abort a fetus which, if born, would suffer genetic defects.<sup>243</sup>

The courts have been divided, however, on the nature of damages to be awarded. Some courts have held that parents should only be allowed to recover pecuniary expenses and have disallowed damages for emotional suffering and mental distress.<sup>244</sup> The grounds asserted for denying the lat-

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N.Y.S.2d at 503. Note, however, that both *Gleitman* and *Stewart* preceded *Roe v. Wade*, 410 U.S. 113 (1973).

239. 410 U.S. 113 (1973).

240. See *Robak v. United States*, 658 F.2d 471, 475-76, 478 (7th Cir. 1981) (cause of action recognized for wrongful birth of rubella syndrome child where there was a failure to diagnose rubella and inform mother of consequences). See also *Gildner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978) (cause of action permitted parents where child born with Tay-Sachs following negligent testing of fetus); *DiNatale v. Lieberman*, 409 So. 2d 512, 513 (Fla. Dist. Ct. App. 1982) (recognized cause of action on behalf of parents for birth of handicapped child due to defendant's prenatal negligence); *Moore v. Lucas*, 405 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1982) (cause of action stated where mother who gave birth to child with Larsen's syndrome advised disease not inheritable); *Berman v. Allan*, 80 N.J. 421, \_\_\_\_\_, 404 A.2d 8, 14 (1979) (cause of action granted parents of mongoloid daughter where doctors failed to inform 38-year old mother of amniocentesis test); *Becker v. Schwartz*, 46 N.Y.2d 401, 413, 386 N.E.2d 807, \_\_\_\_\_, 413 N.Y.S.2d 895, 901 (1978) (recognized cause of action on behalf of parents of child born with Down's syndrome where doctor failed to advise 37-year old mother of risks involved in becoming pregnant after age 35); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (recognized mother's cause of action where defective child born after doctor failed to diagnose rubella); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, \_\_\_\_\_, 233 N.W.2d 372, 377 (1975) (parents granted cause of action where child born with rubella syndrome following doctor's failure to diagnose German measles in pregnant mother).

241. 508 F. Supp. 544 (D.S.C. 1981).

242. *Id.* at 550.

243. *Id.* (citing *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979)).

244. *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (parents can recover for costs of birth and resultant expenses, including costs of raising child); *DiNatale v. Lieberman*, 409 So. 2d 512, 513 (Fla. Dist. Ct. App. 1982) (recovery for extraordinary care of child permissible); *Moore v. Lucas*, 405 So. 2d 1022, 1026-27 (Fla. Dist. Ct. App. 1982) (parents granted past and future medical expenses for extraordinary care necessary to treat child's abnormalities); *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978) (recovery by parents for continued care and treatment of child with Down's



ter include the inability to calculate such damages and the belief that the legislature is the appropriate body to deal with this issue.<sup>245</sup> Some courts which have granted parents the right to recover for damages proximately caused by a doctor's negligence have allowed these damages to be offset by any benefits conferred by the child through application of the benefit rule.<sup>246</sup>

On the other hand, numerous courts have granted recovery for mental and emotional distress but denied recovery for the care, maintenance, and medical expenses of a child.<sup>247</sup> In refusing to allow parents to recover the costs incident to raising a child afflicted with Down's syndrome, the court in *Berman v. Allan*<sup>248</sup> stated:

In essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child—*i.e.*, the love and joy they will experience as parents—while saddling defendants with the enormous expenses attendant upon her rearing. Under the facts and circumstances here alleged, we find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.<sup>249</sup>

In April, 1982, the Virginia Supreme Court, in *Naccash v. Burger*,<sup>250</sup> considered for the first time an action for wrongful birth. As a result of this case, Virginia now allows parents to recover expenses for emotional distress, as well as for the care and treatment of an afflicted child.<sup>251</sup> The suit was instituted by the parents of a child who died from Tay-Sachs disease. The parents had sought testing to determine if they were carriers of the genetic disease. The father was given a blood test and informed that since the results were negative, his wife need not undergo testing. In fact, the father's blood sample was mislabeled and confused with that of another man. Relying upon the assurances they received, the parents continued the pregnancy. After the child was discovered to have Tay-Sachs, further tests were conducted which showed that indeed both parents were

syndrome); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (recovery by parents for costs reasonably related to caring for child's physical defects); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, \_\_\_\_\_, 233 N.W.2d 372, 377 (1975) (recovery allowed parents for past and future medical services if certain facts proved on remand).

245. See *Becker v. Schwartz*, 46 N.Y.2d 401, 416, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902 (1978).

246. See RESTATEMENT (SECOND) OF TORTS § 920 (1977), cited in *Phillips v. United States*, 508 F. Supp. 544, 549-50 (D.S.C. 1981).

247. See *Berman v. Allan*, 80 N.J. 421, \_\_\_\_\_, 404 A.2d 8, 14 (1979) (damages for emotional and mental anguish); *Karlsons v. Guerinot*, 57 A.D.2d 73, 78-79, 394 N.Y.S.2d 933, 936-37 (1977) (damages for pain, suffering and mental anguish).

248. 80 N.J. 421, 404 A.2d 8 (1979).

249. *Id.* at \_\_\_\_\_, 404 A.2d at 14.

250. 223 Va. 406, 290 S.E.2d 825 (1982).

251. *Id.* at 414-16, 290 S.E.2d at 830-31.

carriers of the disease.<sup>252</sup> Had this been determined initially, an amniocentesis test<sup>253</sup> would have been conducted which would have revealed the child's affliction prior to its birth.<sup>254</sup>

The Virginia Supreme Court held that a duty of reasonable care was owed to the parents in the handling of the blood sample and this included the duty to provide the parents with "reasonably accurate information" regarding their unborn child's condition so that they could make an informed decision concerning abortion.<sup>255</sup> The court concluded that this duty had been breached and also found the requisite causal connection between the breach of duty and the injury since the parents decided to have their child based on the negative test report which had resulted from mislabeling.<sup>256</sup> As a result of the injuries sustained by the Burgers, the court ruled that they were entitled to damages which were reasonably and proximately caused by the breach of duty owed them.<sup>257</sup> Citing with approval the case of *Becker v. Schwartz*,<sup>258</sup> the court allowed Mr. and Mrs. Burger to recover expenses incurred in the care and treatment of their deceased infant.<sup>259</sup> In refusing to follow *Berman v. Allan*<sup>260</sup> to the extent that it disallowed damages for the care and treatment of the child, the court noted that the financial burden placed upon the negligent physician in *Naccash* was not the same as that confronting the physician in *Berman*.<sup>261</sup> In *Naccash*, the infant only lived a short time, and her care and treatment were relatively inexpensive. In *Berman*, the child was alive and was expected to have an extended life span.<sup>262</sup> Even so, the court noted that it did not necessarily agree that "if liability is established and the damages claimed are compensable and just, the court should perform a balancing test between competing economic interests in determining whether an injured party is entitled to a particular category of damages."<sup>263</sup>

In addition, the *Naccash* court allowed the parents to recover damages for emotional distress, thus creating another exception to the general rule that such damages are not allowed unless they result directly from tor-

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252. *Id.* at 410, 290 S.E.2d at 827. Tay-Sachs disease is a fatal genetic disease which affects the nervous system. It commonly strikes Jewish infants of Eastern European ancestry.

253. An amniocentesis test analyzes the amniotic fluid extracted from the mother's uterus. This analysis reveals whether the fetus has gross chromosome defects. *Id.* at 410 n.1, 290 S.E.2d at 827 n.1.

254. *Id.* at 411, 290 S.E.2d at 827.

255. *Id.* at 414, 290 S.E.2d at 829.

256. *Id.*

257. 223 Va. at 414, 290 S.E.2d at 830.

258. 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978).

259. 223 Va. at 414, 290 S.E.2d at 830.

260. 80 N.J. 421, 404 A.2d 8 (1979).

261. *Naccash*, 223 Va. at 414, 290 S.E.2d at 830.

262. *Id.*

263. *Id.*

tiously caused physical injury.<sup>264</sup> The court declared that to hold otherwise would be a "‘perversion of fundamental principles of justice.’"<sup>265</sup> It also noted that the parents were not mere witnesses to the consequences of the tortious conduct.<sup>266</sup> Rather, the evidence demonstrated an unbroken causal chain directly linking the erroneous report, the deprivation of the parents' right to continue or abort the pregnancy, and the emotional suffering endured by the parents following their child's birth.<sup>267</sup> An example where *Naccash* might be successfully argued in an IVF case is one in which the sperm samples have been mixed up or, through some other mishap, either in the pre-conception, conception, or fetal state, a defective child is born.

## b. Wrongful Death

Another potential cause of action available to IVF parents might be a wrongful death action, seeking recovery for the death of their child. All states presently allow suits by the personal representative of a child born alive for wrongful death resulting from prenatal injuries.<sup>268</sup> Many states also permit recovery for the death of a viable fetus caused by prenatal injuries.<sup>269</sup> In such cases, the courts have generally concluded that the term "person," as used in the wrongful death statutes, contemplates a

264. *Id.*

265. 223 Va. at 416, 290 S.E.2d at 831 (quoting *Berman v. Allan*, 80 N.J. 421, 433, 404 A.2d 8, 15 (1979)).

266. *Naccash*, 223 Va. at 416, 290 S.E.2d at 831.

267. *Id.*

268. EAB REPORT, *supra* note 7, at 35,050.

269. *See, e.g.*, *Todd v. Sandidge Constr. Co.*, 341 F.2d 75 (4th Cir. 1964); *Gullborg v. Rizzo*, 331 F.2d 557 (3d Cir. 1964); *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969); *Wendt v. Lillo*, 182 F. Supp. 56 (N.D. Iowa 1960); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Gorke v. LeClerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Worgan v. Gregg & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). For cases denying recovery, see *Bayer v. Suttle*, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966); *Carroll v. Skloff*, 415 Pa. 47, 202 A.2d 9 (1964); *Durrett v. Owens*, 212 Tenn. 614, 371 S.W.2d 433 (1963) (but note that wrongful death statute in Tennessee amended in 1976 to include coverage of viable fetuses); *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958).

viable fetus capable of existence independent of its mother.<sup>270</sup> The courts have also noted that it would be illogical to allow a cause of action where an injured child survives birth for even the shortest period of time, but deny such an action where the viable child does not survive delivery.<sup>271</sup> *In vitro* fertilization gives rise to the issue whether the concept of wrongful death would be extended to include the wrongful destruction of an unimplanted blastocyst. In states such as Virginia which do not even recognize a right of recovery for injuries sustained by stillborn viable fetuses prior to birth,<sup>272</sup> the answer would clearly be no at the present time. However, those jurisdictions which do recognize such an action for viable fetuses might well treat the destruction of an implanted blastocyst as a wrongful death.<sup>273</sup>

### c. Wrongful Destruction of Property

The only suit brought thus far involving *in vitro* fertilization is *Delzio v. Presbyterian Hospital*,<sup>274</sup> discussed above,<sup>275</sup> in which the plaintiffs successfully advanced the theory that they were entitled to recover damages for the pain they endured when their property, a culture containing gametes belonging to them, was intentionally destroyed.<sup>276</sup> It is doubtful, however, that the courts would be willing to extend the definition of wrongful death to incorporate the intentional or negligent destruction of a preimplanted embryo.<sup>277</sup>

270. See, e.g., *Panagopoulous v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971).

271. See *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Gorke v. LeClerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971).

272. See *supra* notes 198-202 and accompanying text.

273. See *supra* notes 190-203 and accompanying text.

274. 74 Civ. 3588 (S.D.N.Y. 1976).

275. See *supra* text accompanying notes 81-92. See also *supra* note 87.

276. *Sweeney v. Goldsmith*, *supra* note 4, at 10-11. The *Delzios* also argued wrongful conversion of personal property but damages were awarded by the jury only for mental and physical anguish. *Id.*

277. It is conceivable that the intentional destruction of a preimplanted embryo could constitute a breach of contract where the parents enter into an agreement with the doctors and the hospital to perform *in vitro* fertilization and embryo transfer. Such contemplations, however, are beyond the scope of this article.

#### IV. CONCLUSION

In the future, IVF will certainly become a widely used means of therapy for female infertility when tubal pathological conditions exist. Despite the fact that such a procedure could joyfully enrich the lives of many otherwise childless couples, some segments of our society have and will continue to proffer objections based on moral and ethical considerations. Some of these concerns are valid, and create a vital public interest in establishing legal guidelines to prevent potential abuses. Moreover, children born through the IVF process deserve to have their legal rights protected in such matters as inheritance and paternity. Scientists and physicians involved in IVF, however, also need and deserve the protection of the law in their attempts to help infertile couples have their own children. Yet, certainly the most emotional and arguably the most significant concern is that of the childless couple looking to IVF as a potential solution to their frustration.