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# The Use of *In Vitro* Fertilization: Is There a Right to Bear or Beget a Child by any Available Medical Means?

*The prodigious advancements of biomedical science in human reproduction have brought both blessing and cursing in recent years. Many join with childless couples and hail the opportunity to bear a child, while others fearfully contemplate the moral and ethical consequences that accompany the birth of that child. In view of those consequences, laws limiting access to the new methods of reproduction are bound to be drawn and couples are bound to challenge them as unconstitutionally limiting their right to privacy. This comment examines the arguments of both sides in determining whether the right of privacy protects the use of the new methods from government regulation. It presents the constitutional grounds for such arguments and considers the various factual situations that may confront a court deciding the issue. It ends with an evaluation of interests that might justify regulation even if the use of the methods is protected.*

## I. INTRODUCTION

The term *in vitro* fertilization (hereinafter IVF) probably does not mean much to most people, but the common name, test-tube baby, does. To the naive, the latter term conjures up visions of whole babies cultured in laboratories. To the more sophisticated, either term represents a major advance in biological science and presents opportunities to shape men's lives in ways that until now were only possible in science fiction novels. Initially, IVF provides infertile persons with a means of having genetically related children. It also presents opportunities for parents to select desirable characteristics for their children, screen out genetic defects and, should the science of genetics continue to advance, to genetically engineer a child's make-up. Such notions conjure up villainous images in our minds, and raise concern over the use of the IVF process of human fertilization. On one side, those who see the possible consequences of IVF call for laws to stop its use. On the other side are those who desire children but cannot have them, and who claim the inherent right to have children by any feasible method. Stopping IVF takes away that right.

This comment examines the claim that the United States Constitution guarantees as a fundamental right access to IVF as a means of procreation. Consideration will first be given to the IVF process, the need for regulation, and the constitutional bases for recognizing a right to use IVF. Secondly, the factual situations with which a court

may be faced are addressed. Finally, consideration is given to governmental interests that may justify laws restricting access.

## II. THE IVF PROCESS

IVF replaces the events of natural reproduction that take place in the oviduct of a woman.<sup>1</sup> In natural reproduction, once an egg has been formed in the ovary and released into the fallopian tube or oviduct, it travels toward the uterus. If not intercepted and fertilized by sperm travelling up the oviduct, the egg is discarded through menstruation. If it is fertilized, the egg begins to divide and continues to move through the oviduct to the uterus. There it implants in the uterine wall, and the child begins to develop.<sup>2</sup>

In replacing this short process, the IVF procedure requires that physicians extract an egg from a woman's ovary at the time it is most developed. This is done by making a small incision in the abdomen and locating the developing egg in the ovary with a laparoscope. A long, hollow needle is then inserted to gently draw the egg up from the follicle.<sup>3</sup> Once retrieved, the egg is deposited in a petri dish, in a suitable solution, and placed in an incubator. Sperm, maintained in another solution, are then added to the dish and within eighteen hours a new life has begun. The zygote is transferred to a medium for growth where cellular division begins formation of the embryo.<sup>4</sup>

The time for implantation of the developing embryo in a woman's uterus, to achieve the greatest success in pregnancy, is yet undetermined. For some, implantation has been successful at the eight-cell embryo stage, while others have been successful with sixteen-celled embryos. Generally, however, about forty-eight hours after the egg has been removed, the embryo is placed into a woman's uterus via the vagina and cervix.<sup>5</sup> Within this short period of time between fer-

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1. C. GROBSTEIN, FROM CHANCE TO PURPOSE: AN APPRAISAL OF EXTERNAL HUMAN FERTILIZATION 14-15 (1981).

2. *Id.* at 17-20. There are several terms that refer to different stages of the egg's development. Technically, once the egg is fertilized, it is called a zygote. The zygote begins growth by cellular division and is then called an oocyst. When the oocyst grows to the point where it is ready to implant in the woman's uterus, it is called a blastocyst. Once implanted it is called an embryo. The term embryo can also be used generically, referring to the whole development process, which is how it will be used in this comment. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 740 (1976).

3. Hormonal drugs are sometimes used to increase the production of eggs to as many as 17 eggs in one woman. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 46, 48. This "superovulation" adds to the risks of abnormality in the children produced from these eggs, since it increases the incidence of chromosomal abnormality. See *infra* note 8.

4. See generally C. GROBSTEIN, *supra* note 1, at 13-24.

5. Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 205 (1983). It is possible to implant an embryo that has been kept under deep freeze for some time and

tilization and implantation, attending physicians observe the embryo's development to detect possible abnormalities. It is also at this time that the greatest scientific benefit is reaped from the IVF process.<sup>6</sup>

The primary purpose for the development and use of IVF is to provide infertile couples with a method to bear genetically, or at least gestationally, related children, and that it has done.<sup>7</sup> Its use is not without risks to the child, however.<sup>8</sup> Some scientists indicate that the chance for abnormal offspring is three percent greater than the risks in natural reproduction. On the other hand, some say the risk is equal to, or only slightly greater than, natural reproduction, given the human body's ability to discard abnormal embryos before implantation.<sup>9</sup> Nonetheless, even a small risk is critical when dealing with human offspring, and government intervention in the use of the process may be warranted.

Other experimental uses of IVF have arisen because of certain advances in various fields of science.<sup>10</sup> The opportunity to study the re-

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produce a normal child. This has occurred twice; the most recent birth occurred in July, 1984. N.Y. Times, July 7, 1984, § 1, at 44, col. 1. The legal status of a frozen embryo is the subject of a recent Australian case. See *infra* note 88.

6. See *infra* note 10 and accompanying text.

7. Given the difficulty of the procedure, the success in relieving infertility has been fairly good. In the six years since the first IVF birth, approximately 700 children throughout the world have been born using the technique. Another 300 were expected by the end of 1984. Moreover, the number of people deciding to use IVF is likely to rise given the shortage of adoptable babies and the increase of infertility among Americans. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 46.

8. There are four major risks that need to be addressed. First, superovulation, the increase of egg production in a donor woman, increases the incidence of chromosomal abnormality in the embryo leading to defects in the child. Second, the quality of sperm reaching the egg: in natural reproduction the woman's body works to filter out abnormal sperm before they reach the egg. Third, the quantity of sperm reaching the egg: more than one sperm reaching the egg at the same time can cause embryos with more than one set of chromosomes leading to defects in children. Finally, freezing embryos for future use may lead to mutations. Protection of Human Subjects: HEW Support of Human *In Vitro* Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35,033, 35,044 (1979).

9. *Id.*

10. Complete ectogenesis, the external development of a whole living organism whose development is naturally internal, is advanced somewhat by IVF. Also, scientists have manipulated cells comprising the egg in mice and frogs so that they yield offspring genetically identical to the parent-clones. IVF procedures for retrieving human eggs greatly enhances human cloning possibilities. See Comment, *Love's Labor Lost: Legal and Ethical Implications in Artificial Human Procreation*, 58 U. DET. J. URB. L. 459, 480-88 (1981).

Moreover, in the field of molecular biology, the introduction of gene-altering DNA molecules into mouse embryos resulted in a hereditary change in the genetic make-up of the offspring. See generally C. GROBSTEIN, *supra* note 1, at 50-57. Now that scien-

productive process, within the first few days of life outside the womb, will greatly enhance the development of new methods of intervention in human growth. Use of the procedure for this purpose raises serious ethical questions.<sup>11</sup>

#### A. *Who are the Users of IVF?*

IVF is primarily useful to a woman, single or married, who is infertile, either because her oviduct is blocked and damaged, or because her uterus is damaged or removed.<sup>12</sup> IVF in both cases gives her the opportunity to have a child that is genetically related to both her and her husband, if she is married. In the first case, the blocked oviduct prevents conception through intercourse or by artificial insemination. The IVF method is needed if her egg or uterus is to be used in producing a child. In the second case the uterus' inability to receive a fertilized egg prevents the woman from having a child. IVF here allows the woman's egg to produce an embryo that could be implanted in another woman's uterus—a surrogate mother. The child in this case is still genetically related to the infertile woman.

The typical use of IVF has involved a legally married couple that cannot have children because the wife suffers from one of the two aforementioned defects.<sup>13</sup> Here, the procedure is performed using the egg and sperm of the couple to produce the embryo. The embryo is then implanted either in the wife or a surrogate mother, depending on the malady the wife suffers. However, the process is not limited

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tists can alter genetic make-up, efforts are being made to focus that alteration towards treatment of hereditary diseases. Fletcher, *Moral Problems and Ethical Issues in Prospective Human Gene Therapy*, 69 VA. L. REV. 515, 521-22 (1983). Although not presently possible, this technique could be "useful for influencing such genetically complex characteristics as stature, personality, or intelligence." C. GROBSTEIN, *supra* note 1, at 57.

The IVF method also allows parents to influence the characteristics of a child by screening the genes that produce the embryo. Parents could influence the child's physical or mental capabilities by choosing sperm and egg from donors who are intelligent or beautiful or possess other characteristics. At least one sperm bank in California offers sperm donated from Nobel prizewinners. Friedrich, *A Legal, Moral, Social Nightmare*, TIME, Sept. 10, 1984, at 54, 56. One critic of the use of this type of eugenics has spoken rousing against the "Nobel sperm bank." He states that a child produced by "Nobel sperm" has only one reason for being—

he is the experimental [sic] product of a mad scientist and misguided mother. The most he stands to know about his biological sire is that he was a Nobel prize-winner . . . . And this lamentable wunderkind, on whose shoulders rests such a burden, never even agreed to take part in the experiment. He will be born into it.

*New Publications of Note, 1979-81 RPTR. ON H. R. L., II-A-8.*

11. See *infra* notes 81-97 and accompanying text.

12. Leeton, Trounson & Wood, *IVF and ET: What it is and How it Works*, in TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES, AND FUTURE POSSIBILITIES 8 (W. Walters & P. Singer eds. 1982).

13. See C. GROBSTEIN, *supra* note 1, at 32.

to married couples, nor to the use of that couple's sperm and egg,<sup>14</sup> nor simply to overcome infertility.<sup>15</sup>

### B. The Need for Regulation

The issues raised by IVF are many, and their impact will be profoundly felt in society. P. Reilly has observed that "IVF stirs up a . . . deeply traumatic and indeed tragic consciousness. What is at issue is human morality, the self-definition, self-conception of our own humanity."<sup>16</sup> The new relationships between child and parents must be defined and so must the rights attendant to them.<sup>17</sup> There must be measures safeguarding the potential child, in addition to measures

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14. Donor's eggs or sperm can be used instead of the couple's. There is a total of eight possible combinations of egg and sperm, each producing a different child. Four combinations can be put under one category of cases: those cases where a woman's oviduct is blocked so conception cannot take place, but she can bear the child. The other four combinations can be put under a second category of cases in which a wife's uterus is removed or damaged so that she cannot bear a child though she may be able to conceive.

Under the first category falls the most common rationale for using IVF. A husband and wife are both able to produce normal eggs and sperm, but because of some defect or damage in her oviduct the wife is unable to conceive. The child in this case is totally the product of the married couple. Another rationale is provided when the husband is infertile, and the wife is fertile but still unable to conceive. Here sperm from a donor would be used to fertilize the egg. This scenario would also apply to a single woman who was unable to conceive but wanted to bear a child. Still another situation is found when the wife's ovaries do not produce normal eggs capable of fertilization. The husband's sperm can be combined with a donor's egg and the embryo can be implanted in the wife's uterus. Finally, there is the possibility that both the husband and the wife are infertile but the wife wants to bear a child. Here, the procedure would require the egg and sperm of donors. Note that the child in this situation has two sets of parents: parents donating sperm and egg, and parents raising the child. This raises issues in settling the legal relationship between child and parent. See *infra* note 17.

Under the second category of situations the possible combinations of egg and sperm are the same as in the first category. In this category, another woman acts as a surrogate to bear the child for the couple wanting it. Note also that in the final combination of egg and sperm under this category, the child is capable of having five parents: parents donating egg and sperm, parents raising the child and one parent bearing the child. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 46.

15. Even those who are able to have children naturally may choose to use IVF. IVF permits early screening of genetic defects. A couple might want to select an embryo with particular characteristics. They may also want to control the exact timing of a pregnancy for career-related reasons. Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295, 1307 (1979).

16. GENETICS AND THE LAW 397 (A. Milunsky & G. Annas, eds. 1975) (quoting Reilly, in a discussion he had with other professors).

17. When the child is the product of the sperm and egg of a legally married couple, with the wife bearing the child but through conception by IVF, no issue of status or relationship is raised. However, when the egg or sperm of a donor is used, or a

protecting those involved from possible tort liability.<sup>18</sup> The legality of surrogate mother contracts must be determined,<sup>19</sup> and many more issues must be settled.<sup>20</sup>

Sensing the seriousness of the implications arising from this new method of childbirth, some scientists, philosophers,<sup>21</sup> theologians,<sup>22</sup>

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surrogate mother is involved, the relationships of the parties to each other is undetermined.

For discussion of the issues of relationship and status of the child, see *In Vitro Fertilization—Oversight: Hearing Before the Subcomm. on Health and Environment of the Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 105-07 (1978) (statement of W.J. Wadlington) (compares the legal status of an insemination by donor). The issue of the child's status centers on questions of paternity or maternity. See Eisenman, *Fathers, Biological and Anonymous, and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law*, 45 OHIO ST. L.J. 383 (1984); Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 328-29, (1982). One comment discusses the possible claims of motherhood by two women, an egg donor and a surrogate mother: Comment, *Love's Labor Lost: Legal and Ethical Implications of Artificial Human Procreation*, 58 U. DET. J. URB. L. 459, 472-73 (1981).

For discussion of the issue of the legal status of IVF children as it relates to that child's inheritance rights, see Comment, *Protecting Inheritance Rights of Children Born Through In Vitro Fertilization and Embryo Transfer: Suggestions for a Legislative Approach*, 27 ST. LOUIS U.L.J. 901 (1983).

18. Cohen, *The "Brave New Baby" and the Law: Fashioning Remedies for the Victims of In Vitro Fertilization*, 4 AM. J. L. & MED. 319, 328-36 (1978) (He suggests that experimenters should be liable for willfully or negligently destroying an embryo without the consent of the parents but states that present tort actions are insufficient remedies. He suggests a new tort, labelled "wrongful destruction." Cohen also considers liability for the birth of a defective child as a result of the process.).

19. Surrogate mother contracts are a means of having another woman bear a child for a couple. The couple pays the woman for bearing the child under the obligations of the contract. There are two major obstacles to the legality of such contracts: 1) a public policy against "selling children" or profiting from abortion, and 2) state criminal laws prohibiting adultery, which surrogate parenting could be called. Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 808-09 (1982) (discusses public policy, the possible legality of the contracts, remedies for breach and suggests contractual provision and possible legislation). See also Goldfarb, *Two Mothers, One Baby, No Law*, 11 HUM. RTS. 27 (1983) (tries to distinguish baby selling and surrogate motherhood in a call for legislation to permit surrogate contracts).

Carol Crow approaches the problems of surrogate parenting from the child's perspective, considering the child's legitimacy, his custody, and protections for him. Crow, *The Surrogate Child: Legal Issues and Implications for the Future*, 7 J. JUV. L. 80 (1983).

20. See Brahams, *The Legal and Social Problems of In Vitro Fertilization: Why Parliament Must Legislate*, (Pts. 1 & 2), 133 NEW L.J. 859, 881 (1983) (raises issues involving cryostorage or deep freezing of embryos, regulating the medical procedure and doctor's considerations, licensing clinics, limited experimentation on embryos and recording statistical data and follow-up data for research). Other prominent issues that will enter the policymaking process are the ethical problems IVF creates. See *infra* notes 81-97 and accompanying text.

21. Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?*, 285 NEW ENG. J. MED. 1174, 1179 (1971) (After considering the pitfalls of continued use of IVF, Kass calls for broad public deliberation and action concerning IVF and condemns inaction. He suggests the questions raised are too important to leave in the hands of physicians and experimenters.).

22. See Ramsey, *Shall We "Reproduce"? I. The Medical Ethics of In Vitro Fertilization*, 220 J. A.M.A. 1346 (1972) (Ramsey is a Doctor of Theology and Professor of

and lawyers<sup>23</sup> have called for strict government regulation. Others abhor government intrusion into reproductive decisions and free scientific inquiries.<sup>24</sup> Despite the discussion of the need for regulation, few laws have been passed that address these issues.<sup>25</sup>

Nevertheless, the first consideration in forming any law is its constitutionality. Since many of the regulations to be proposed will limit access to IVF, challenges that such laws impinge on the right to procreate and the right of privacy are imminent. One Illinois couple has

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Religion at Princeton University). Dr. Ramsey's statement is strong. IVF "constitutes unethical medical experimentation on possible future human beings, and therefore it is subject to absolute moral prohibition." *Id.* at 1346.

See also Smith, *Intrusions of a Parvenu: Science, Religion, and the New Biology*, 3 PACE L. REV. 63, 74-80 (1982) (though in most cases churches have not taken a stand on IVF, the author considers various religions' probable responses to the new techniques).

23. In *Vitro Fertilization—Oversight: Hearing Before the Subcomm. on Health and Environment of the Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 105-07 (1978)* (statements of W.J. Wadlington, LL.B., James Madison Professor of Law, University of Virginia Law School) (both suggest that the present law in the areas of artificial insemination and IVF is sparse, the need for law is apparent, and legislation should be enacted before the use of IVF increases).

But note that the majority of laypersons, according to Gallup and Harris polls, favor the use of IVF. That majority, however, reflected they would prefer IVF banned until its safety for mother and child was proven. Report of the Ethics Advisory Board, *supra* note 8, at 35,053. Public opinion may have changed since these polls, as increased discussion of the ethical issues raised by IVF has become more widespread.

For further discussion of the issues raised by IVF, see *THE NEW GENETICS AND THE FUTURE OF MAN* (M. Hamilton ed. 1972) (presents points of view from all fields on the issues of new beginnings in life and genetic therapy).

24. Joseph Fletcher, a renowned theologian and philosopher, suggests it is folly to restrict the use of a medical procedure that will ultimately benefit people. And if there are bad uses, they can be prohibited. Fletcher, *New Beginnings in Life: A Theologian's Response*, in *THE NEW GENETICS AND THE FUTURE OF MAN* 78 (M. Hamilton ed. 1972).

R.G. Edwards, the man who helped produce the world's first test-tube baby, defends the use of IVF as therapeutic to infertile people. Edwards, *Fertilization of Human Eggs in Vitro: Morals, Ethics and the Law*, 49 Q. REV. BIOLOGY 3 (1974).

25. Some commentators suggest that the legal problems connected with the artificial insemination procedure must be clarified before IVF regulation can take place. Oakley, *Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAM. L.Q. 385, 390-93 (1974).

Most states have passed laws concerning research on fetuses but few deal with the IVF procedure. See Flannery, *supra* note 15, at 1299-1300; Note, *In Vitro Fertilization: Hope for Childless Couples Breeds Legal Exposure for Physicians*, 17 U. RICH. L. REV. 311, 323-28 (1983) (in addition to discussing the laws relating to IVF, the article emphasizes the effect such laws have in deterring doctors from performing IVF, thus denying couples access to the procedure).

For further discussion of doctors' liability and deterring performance of IVF, see Bernholz & Herman, *Legal Implications of Human In Vitro Fertilization for the Practicing Physician in North Carolina*, 6 CAMPBELL L. REV. 5 (1984).



already tried to challenge a law that placed custodial responsibility for the embryo on the doctor.<sup>26</sup> This law had the effect of discouraging doctors from performing the IVF procedure.<sup>27</sup> The case was dismissed as nonjusticiable.<sup>28</sup> Future courts, however, will have to determine whether one has the right of access to IVF under the rights of privacy. In doing so, a court ultimately determines the level of scrutiny state laws will bear. If the right of privacy does include access to IVF, then state laws limiting it will be strictly scrutinized, and can only be justified by compelling state interests.<sup>29</sup> If not, then states need only have a rational basis for the law. The remainder of this comment explores the considerations future courts must make in determining the right to use IVF.

### III. THE RIGHT OF PRIVACY AS A BASIS FOR THE FUNDAMENTAL RIGHT TO USE IVF IN REPRODUCTION

#### A. *The Procreation Case*

The Supreme Court case of *Skinner v. Oklahoma*<sup>30</sup> was the first to recognize a right to procreate. The case involved a recidivist statute that authorized the sterilization of criminals convicted two or more times for committing a felony of moral turpitude. The Court stated that the right of procreation was one of man's basic civil rights, and because of that, it would view the state law with strict scrutiny. The law was held unconstitutional on the ground that it violated the equal protection clause of the fourteenth amendment.<sup>31</sup> Though the

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

27. ILL. ANN. STAT. ch. 38, § 81-26(7) (Smith-Hurd Supp. 1983) provides:

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

The Act to Prevent Wrongs to Children, ILL. ANN. STAT. ch. 23, § 2354 (Smith-Hurd 1968), provides:

It shall be unlawful for any person having the care or custody of any child, willfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or willfully cause or permit such child to be placed in such a situation that its life or health may be endangered.

ILL. REV. STAT. ch. 38, § 81-22(2)(8) (Smith-Hurd Supp. 1983) defines "human being" as "mean[ing] the individual from fertilization until death."

28. 556 F. Supp. at 162-64 (there was no case or controversy as the prosecutor agreed not to prosecute and the case was for declaratory and injunctive relief. Further, both the defendants and prosecutor interpreted the statute so as not to prohibit access to IVF).

29. See *infra* notes 98-100 and accompanying text.

30. 316 U.S. 535 (1942).

31. *Id.* at 541-42.

Court recognized the right of procreation, it did little to define its scope. Moreover, the Court's later cases reasserting the right to procreate, and bringing it under the auspices of the right of privacy,<sup>32</sup> do not deal with the limits of government restrictions on reproduction.

The basis of the court's recognition of the right to procreate as fundamental lies in the need to perpetuate humankind.<sup>33</sup> If government were allowed to routinely strip people of their reproductive capabilities, it could threaten the existence of a race or of mankind. Those who desire that the use of IVF be protected as part of their right to procreate could argue that this rationale applies to the process. IVF fulfills that which some lack in procreative capabilities.

It is by no means clear, however, that *Skinner* should be read so broadly as to encompass access to a medical procedure as an alternative to intercourse. The logic of *Skinner*, that justified protecting a man from sterilization, does not easily extend to justify protecting an infertile couple's use of a medical procedure at the same level. Further justification is required. One could look to the nature of procreation to find that justification.

Procreation is a complex activity that involves every aspect of reproduction: genetic make-up and conception, gestation and labor, and childrearing.<sup>34</sup> These factors all contribute to one's ability to bring a child into existence. The first two are requirements for procreation; the third is an influential factor in most cases. Until recently, if one were infertile, the possibility of procreating was nil. There was no way an infertile person, man or woman, could contribute to conceiving a child. Likewise, if a couple could conceive, the inability of the woman to bear a child would preclude reproduction. Finally, even though a couple has the physical capacity to have a child, they may lack the mental, financial or social capacity to desire a child. Taken as a whole, the combination of all these factors produces a very per-

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32. In *Roe v. Wade*, 410 U.S. 113, 152 (1973), the Court stated that past decisions clearly indicate "that the right [of privacy] has some extension to activities relating to marriage, . . . [and] procreation . . ."

33. 316 U.S. at 536, 541. Note, however, that recognition of the need to perpetuate humankind may become a less persuasive rationale for protecting procreative rights as overpopulation becomes more of a community concern. The World Food Conference in Rome in 1974, called on all governments and people everywhere "to support . . . rational population policies ensuring to couples the right to determine the number and spacing of births, freely and responsibly, in accordance with national needs within the context of an over-all development strategy." S. ISAACS, *POPULATION LAW AND POLICY* 354 (1981).

34. Robertson, *Procreative Liberty and The Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 408 (1983).

sonal and powerful experience for couples.<sup>35</sup> This is the experience of natural reproduction, and a couple's interest in it is paramount to any but the most compelling government interest.<sup>36</sup> It is what the right of privacy currently protects as to procreation.

IVF, however, makes procreation possible for those who lack one of the necessary factors of reproduction. Thus, in determining whether constitutional protections extend to a couple's use of IVF, one must ask if the absence of any of those factors lessens a person's interest in procreation. If it does, then the justifications for protecting the natural process of procreation will not justify protecting an unnatural process at the same level.

The case for finding that an infertile couple's interest in reproducing is no less than a fertile couple's is persuasive. John Robertson suggests that each aspect of reproduction—conception, gestation, and rearing—has personal value and meaning independently of the others.<sup>37</sup> He maintains that the value of each aspect by itself is enough to extend the right of procreation to cover reproduction by "any means or technique."<sup>38</sup> Thus, a couple or person that had the desire to rear a child, but who could not contribute to conceiving or gestating the child, has a right to procreate. For government to deny the means of doing so infringes on that right.

This argument, though strong, is not totally convincing. Certainly one attaches meaning or value to each aspect of reproduction. However, it is the sum of those values that equals the whole of the natural reproductive experience. To take away one component, and its value, logically lessens the significance of the reproductive experience. The value of the child is the same as any other human being as a result of the combination of all three factors. However, the child's value to a couple contributing only one component is less than the value to a couple contributing all three. Though a couple resorting to IVF may not feel less attached to the resulting child, it is not impossible to imagine a father who loves a son born from the egg of his wife and his sperm more than a son born from the egg of his wife and the

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35. Children . . . provide a deeply gratifying link to the human community and to the future. Decisions about how we will use our reproductive powers are decisions about our future and about our own contribution to the future of the human community, about how one's life is to count, and how far its influence is to extend.

*Id.* at 409 n.12 (quoting Dyck, *Population Policies and Ethical Acceptability* in NATIONAL ACADEMY OF SCIENCES, 2 RAPID POPULATION GROWTH: CONSEQUENCES AND POLICY IMPLICATIONS 618, 625-29 (1971)).

36. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (stating that the marriage relationship clearly deserves the utmost protection of the fundamental constitutional guarantees forming the right of privacy).

37. See Robertson, *supra* note 34, at 408-10.

38. *Id.* at 420.

sperm of another man.<sup>39</sup> Furthermore, though a couple finds fulfillment and meaning in rearing a child not of their own seed and labor, the meaning is less significant than when they join in every aspect of reproduction,<sup>40</sup> and their claim to that child is only made possible through a series of contracts.<sup>41</sup>

It is the fact that a couple joins to reproduce their unique genes, biological traits, and social character in a child that makes procreation so deeply personal that it should receive utmost protection from governmental intrusion. Reproduction by IVF, at least where one of the three components of reproduction is missing, is not as deeply personal and therefore does not require the protections of the fundamental right to procreate. Government restrictions on the use of IVF invade lesser interests and should require lesser justifications.

*B. The Contraception and Abortion Cases Arguably Provide Rationale for Extending Fundamental Protection to the Use of IVF*

Those who claim a right to use IVF in procreating suggest that the

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39. There could be other reasons for which the father would not love the son born of another man's sperm. In natural reproduction, the fact that the boy's birth represents the wife's intimacy with another man may be the cause of his lack of love.

40. This reasoning explains why a foster parent's interest in raising a child is not as great as the natural parents'. Government interference with the former relationship thus requires a lesser government interest to justify the interference.

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of a blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. . . . But there are also important distinctions between the foster family and the natural family. . . . First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family *which has its source in state law and contractual arrangements*.

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844-45 (1977) (emphasis added) (footnotes omitted).

41. A couple using IVF and requiring the egg or sperm of a donor must reach an agreement with him or her for the use of it. Also, if the seed is obtained from a storage bank, the donor may be required to relinquish whatever rights he or she may have to the child produced therefrom. Finally, if a surrogate mother is used, she and the couple must agree as to her services. See *infra* notes 55-56.

Court's decisions concerning contraception, abortion and childrearing protect a measure of autonomy for bringing children into the world. That autonomy, arguably, should include the decision to use IVF.

One of the first cases to recognize the right of privacy was *Griswold v. Connecticut*.<sup>42</sup> The Court there struck down laws forbidding the use of contraceptives by married couples. After stating that the right of privacy was to be found in the "penumbras" of the Bill of Rights,<sup>43</sup> the Court held that the Connecticut laws unnecessarily and broadly encroached upon an area covered by the right.<sup>44</sup> That area seemed to encompass the decisions made in the intimacy of a marriage relationship.<sup>45</sup>

Despite the language in *Griswold*, the Court in *Eisenstadt v. Baird*<sup>46</sup> and *Roe v. Wade*<sup>47</sup> extended the right of privacy to cover decisions to use contraceptives and abortions by unmarried persons. In *Eisenstadt*, the Court recognized that *Griswold* dealt with the marital relationship, but stated that the right of privacy, at least concerning contraception, could not be limited to married couples.

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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 decision to bear or beget a child.<sup>48</sup>

The *Roe* opinion included within the right of privacy abortion decisions in the first trimester of pregnancy. However, that right was not unqualified. The interest an individual has in the right "must be considered against important state interests in regulation."<sup>49</sup> The Court held that, since the rights of privacy are fundamental rights, only "compelling state interests" would justify regulations limiting that right.<sup>50</sup>

In *Carey v. Population Services International*,<sup>51</sup> the Court seems to bring individual autonomy to a peak concerning childbearing decisions.

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42. 381 U.S. 479 (1965).

43. *Id.* at 484.

44. *Id.* at 485.

45. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486. See also Comment, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 672 (1973).

46. 405 U.S. 438 (1972) (the Court found unconstitutional a law forbidding the use of contraceptives by singles).

47. 410 U.S. 113 (1973) (the Court invalidated a law making abortion illegal).

48. 405 U.S. at 453 (emphasis in original).

49. 410 U.S. at 154.

50. *Id.* at 155.

51. 431 U.S. 678 (1977) (the Court invalidated a law making it a crime to distribute contraceptives to minors at all, and allowing adults access to them only from licensed physicians).

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 in recent years in the context of contraception . . . and abortion . . .<sup>52</sup>

[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.<sup>53</sup>

Relying on these cases, proponents of IVF argue that the decision to use IVF is essentially a childbearing decision; whether to bear or beget a child and the means of having the child is irrelevant. However, the language of the Court is limited by the facts of the case before it. At the time of the decision the only means of conception was through intercourse; if other alternatives like artificial insemination did exist, they were not brought to the attention of the Court. Thus, the only decisions concerning whether or not to bear a child involved the act of intercourse. It is plausible that *Eisenstadt* and *Carey* can be read to concern only government interference with the uniquely private act of intercourse between two people. In *Carey*, the Court states that "in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or prevent conception are among the most private and sensitive."<sup>54</sup> Thus, a court could conclude that the protection of autonomy, afforded by the right to privacy in childbearing decisions, only extends to decisions in natural reproduction, not in reproduction by unnatural, medical means.

Furthermore, the IVF procedure diminishes the privacy surrounding the circumstances of conception. It removes the decision of whether or not to conceive from the privacy of a couple's bedroom to the openness of a laboratory. Through whatever contracts are necessary, donors are required to relinquish rights to the child that is of their seed.<sup>55</sup> Furthermore, surrogate mothers may be required to re-

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52. *Id.* at 685 (citations omitted).

53. *Id.* at 687.

54. *Id.* at 685. Indeed, Justice Powell, in his concurring opinion to the plurality decision, would even limit the holding further.

The Court apparently would subject all state regulations affecting adult sexual relations to the strictest standard of judicial review . . . . In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions.

*Id.* at 703 (Powell, J., concurring).

55. It has been recognized that donors of semen have rights to the children they take part in producing. *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977). Also,

linquish their rights to the children they bear.<sup>56</sup> Regardless of the fact that no donor or surrogate may be used, the procedure involves doctors and assistants who must make vital decisions about an IVF birth.<sup>57</sup>

In sum, a court must decide what it wishes to protect against governmental intrusion: the right of an individual to have a child by any available medical means, or the right not to have the state dictate the consequences of intercourse. To answer that an individual has a right to bear a child by any means possible requires a substantial expansion of current constitutional protections. But such an expansion is not inconceivable considering past decisions.<sup>58</sup> To say that the matter is beyond constitutional protection may deny some infertile couples and individuals their only possibility of having children. It could also severely limit the possible benefits of scientific developments should states restrict its use.

#### IV. FACTUAL SITUATIONS AFFECTING THE DECISION OF WHETHER THE RIGHT OF PRIVACY SHOULD ALSO PROTECT ACCESS TO IVF

The range of possible users of IVF is very broad, and since a court's decision is limited by the facts of the case before it, the situation in which the use of IVF arises will shape a court's decision. The marital status of the individual may influence the decision, in addition to the purpose for which the process is used.

##### A. Married Persons

The right of a married couple that is able to conceive and bear children naturally, to procreate, is uncontroverted and fundamental.<sup>59</sup> Within this traditional relationship is found the full extent of a couple's interest in contributing every component of the reproductive experience. It is also from this relationship that the need to perpetuate mankind is met. Furthermore, the decisions made in the marriage relationship, described in *Griswold* as being intimate to the

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parents using donors in the IVF process may wish to contract with the donor requiring him to relinquish those rights.

56. See Note, *supra* note 19, at 820-28.

57. As noted earlier, attending physicians must observe the developing embryo to detect abnormalities. Should any abnormalities be found, the embryo would not be implanted. The doctor must make that decision. See generally L. MASTROIANNI, FERTILIZATION AND EMBRYONIC DEVELOPMENT (1981).

58. Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 70-73, 83-88 (1976). The author concludes that the Supreme Court in its substantive due process analysis has put itself in the forefront of American policy making in certain areas such as the rights of privacy.

59. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

point of being sacred,<sup>60</sup> are those deserving the most privacy and protection.

The IVF situation in which the constitutional issue will most likely arise is closely akin to the situation of natural reproduction in the marriage. Both partners are fertile, providing sperm and egg, but because of some damage or obstruction in the woman's oviduct, conception is impossible naturally. Here, the couple's interests in procreation are identical to the couple conceiving naturally: the genes of this couple are brought together, the wife bears the child and they raise her. Moreover, the decision to have a baby is within the intimacies of the marriage. The only distinction is that the conception and implantation take place in the clinical laboratory involving doctors and assistants. However, the presence of medical personnel does not reduce the couple's privacy rights since doctors are often involved in couples' confidential decisions. Indeed, in *Do v. Bolton*,<sup>61</sup> the Court recognized that the participation of a physician in making an abortion decision is included in a woman's right of privacy. There is, thus, no basis for distinction other than medical aid in conception. A court determining the rights of this couple could simply say that the rights of privacy and procreation are limited to natural reproductive decisions and do not guarantee the use of a medical procedure. However, to deny this couple the use of IVF as a medical aid to conception seems very much like denying the use of medical aids in contraception, which is unconstitutional.<sup>62</sup> Moreover, to deny them IVF when their interest in procreation is equal to a couple procreating naturally would be an arbitrary and irrational rule.<sup>63</sup>

The other situations in which the claim to the use of IVF may arise involve not only some block to conception but also the absence of a

60. See *supra* note 45.

61. 410 U.S. 179 (1973). The Court found that a law requiring committee approval of an abortion decision unconstitutionally limited the "woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it . . ." *Id.* at 197.

62. If the right of a woman to privacy as construed by the Court is broad enough to encompass a woman's decision whether or not to *terminate* her pregnancy by artificial means, the right by analogy is sufficiently broad to encompass a woman's decision to *initiate* pregnancy by artificial means.

Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 28 (1981) (quoting Note, *Artificial Insemination: A Legislative Remedy*, 3 W. ST. U.L. REV. 48, 55-56 (1975) (emphasis in original)).

63. It should be noted that this conclusion applies when the couple uses IVF for relief of infertility. The conclusion that they have a right to use it for other purposes may not apply. See *infra* notes 81-97 and accompanying text.



genetic or gestational factor. Either the husband or the wife lacks the ability to contribute egg or sperm to the reproductive process. It could be that both lack that ability. In addition, the wife may lack the ability to bear a child. Regardless of the situation, some link in the process must be filled by a party outside the marriage.

Here the Court could find, in light of the nature of procreation, that the primary concern surrounding protection of the right to procreate is the production of children. The lack of any factor contributing to the ability to procreate is inconsequential to the right to have children. Thus, denial of IVF would be a denial of the couple's ability to have a child.<sup>64</sup> The Court might also find that the decision to have a baby by IVF concerns only those involved in the process and falls under the Constitution's protection of personal autonomy found in the abortion and contraception cases.

However, for the Court to reach these conclusions would require it to ignore significant distinctions between the IVF situations and the natural reproduction situation. IVF couples cannot contribute in every aspect of reproduction. Their interest in the child is logically less than the natural model, and thus should not receive the same level of protection.

The Court may also decide that the important ethical questions raised by IVF are best answered through the legislative processes.<sup>65</sup>

### B. *Single Persons*<sup>66</sup>

A single woman may want to have a child without a male partner for a number of reasons. She may be homosexual, or she may not have found a desired partner but wants to have a child.<sup>67</sup> The question of whether a single woman has the right to use IVF is similar to her right to use artificial insemination (A.I.).<sup>68</sup> The only difference is

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64. See *supra* note 38 and accompanying text.

65. See *infra* notes 81-97 and accompanying text.

66. Since IVF simply replaces that which takes place in the oviduct of a woman, it is unlikely that a single man who is infertile because of low sperm count would go to the expense of using IVF and a surrogate mother when other alternatives are available, like artificial insemination and sperm concentration. Thus, most single persons who use IVF are women. Men would use the process more for eugenic reasons.

67. Somerville, *Birth Technology, Parenting and "Deviance"*, 5 INT'L J.L. & PSYCHIATRY 123, 130 (1982).

68. Artificial insemination is the introduction of semen into a woman's uterus or oviduct by other than natural means. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 124 (1976).

Married couples use artificial insemination when the husband does not produce enough sperm to fertilize an egg or is sterile, in which case the semen of a donor is used. Single women would use artificial insemination if they wished to be impregnated without resort to intercourse. It should also be kept in mind that a single wo-

that with IVF the woman has no alternative means of conception; with A.I., intercourse is always an alternative.

An infertile single person who claims the right to use IVF faces one more hurdle than does a married couple. She must first establish that one has a right to have children without being married.<sup>69</sup> Then she must establish that the right to have a child protects her use of the medical technique required to conceive it. As to the first hurdle, the argument supporting her constitutional claim emphasizes autonomy in reproductive decisions. While *Skinner v. Oklahoma*<sup>70</sup> implied that the right to procreate was limited to procreation within a marriage,<sup>71</sup> the Supreme Court's later cases state that matters concerning childbirth are individual.<sup>72</sup> To include the right to use a medical technique to conceive, proponents argue that medical aids are used in the woman's decision not to conceive and there should be no difference in using medical aids to conceive when recognizing the right to procreate for single persons.

However, reproduction is not a one person affair and the court's recognition of personal autonomy in reproductive decisions is not completely separate from family concerns. Says June Eichbaum, the Court "vacillates between protection of the institution of the family on the one hand, and the integrity of the individual on the other hand, [this] becomes apparent in a case like [*Planned Parenthood v. Danforth*]<sup>73</sup> where these interests are contradictory."<sup>74</sup>

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man would only use IVF when blockage to her uterus prevents conception by artificial insemination or natural means.

Several articles have been written concerning a single woman's right to artificial insemination. See, e.g., Kern & Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. REP. 251 (1982); Kritchevsky, *supra* note 62, at 26-40.

69. Certainly other than enforcing adultery laws and statutory rape laws for women under eighteen, there is little the state can do to discourage sexual activity between consenting, unmarried adults and to discourage single parent families. Nonetheless, no constitutional provision as yet has been interpreted to protect sexual relations outside marriage and to protect single parenthood. Thus, the state may deny approval of a method that makes single parenthood available and that uses the state's legal mechanisms to bring it about. A challenge to such a denial by a single woman wanting a child by IVF would present the context for the discussion of the right of a single person to have a child.

70. 316 U.S. 535 (1942).

71. *Id.* at 541.

72. See *supra* notes 48-53 and accompanying text.

73. 428 U.S. 52 (1976) (The Court struck down laws requiring spousal or, in the case of an unmarried minor, parental consent to a woman's abortion. The woman's decision was not totally autonomous because the Court balanced her interest against her spouse's or parents'. If it were totally autonomous, no balancing would be used. Thus, family concerns enter into the analysis.).

The Court's vacillating concern with familial interests in the privacy rights may indicate a reluctance to expand those rights to individual lifestyles not within societal norms, like single parent families. The Supreme Court, without opinion, approved the decision in *Doe v. Commonwealth's Attorney for the City of Richmond*,<sup>75</sup> where the lower court stated that the privacy protection was limited to "trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of the family life."<sup>76</sup> Though the Supreme Court in *Carey* would seem to change this rule with the statement that the right to bear or beget belongs to the individual, it explicitly stated it did not deal with the rights of consenting adults to sexual relations.<sup>77</sup> Thus, although a single woman has the right to decide whether or not to have a child without state intrusion, states could still outlaw sexual intercourse outside marriage or other reproductive methods outside of marriage.

However, a New Jersey court's expression of the right of privacy is logically persuasive.

[T]he Court in *Carey* and *Wade* underscored the inherently private nature of a person's decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited.<sup>78</sup>

Should a court find that a single woman has a fundamental right to have a baby, she must still establish that the right protects reproduction by IVF and is not limited to intercourse.<sup>79</sup> This issue is the same as with married couples, and the same justifications apply. Though her interest in the child is less because of her genetic or gestational lack, denial of access to IVF when it is her only means to reproduce may be too restrictive.<sup>80</sup> Also, though her decision is not totally autonomous, the right of privacy may be considered to cover any reproductive decision.

### C. Purposes for Which IVF is Used

As noted earlier, there are a variety of uses for IVF. Its present

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74. Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 375-76 (1979).

75. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (the district court found that Virginia's sodomy statute did not violate homosexual's privacy rights).

76. 403 F. Supp. at 1200.

77. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 n.17 (1977). Though the Court's reasoning is logical, public policy should not be made solely by logical extension of present rules; public morals and a policy of discouraging sexual conduct between minors and others should be considered.

78. *State v. Saunders*, 75 N.J. 200, 214, 381 A.2d 333, 340 (1977) (court invalidated fornication laws).

79. See *supra* note 54 and accompanying text.

80. See *supra* note 64 and accompanying text.

use is restricted to relief of infertility, and it is this purpose that would currently concern a couple's constitutional challenge to state limits on IVF. However, its uses in the not too distant future, and to some extent now, give parents the opportunity to influence a child's characteristics.<sup>81</sup> Since people are often concerned with the quality of their children, it is likely that they would use IVF to effectuate their goals of perfection in a child.<sup>82</sup> A court determining whether a couple has the right to use IVF must determine if that right should be limited to relief of infertility or if it also includes IVF's eugenic uses.

The case against recognizing a right to use IVF for any purpose and placing it beyond the regulatory reach of government except for compelling reasons is strong. The arguments against the use of IVF for eugenic reasons are based largely on ethical and social concerns. The most significant arguments question the idea of granting one person the right to make decisions that could drastically alter another individual's life, or even the lives of a whole generation of people.<sup>83</sup> To allow that person the control over another's life without the consent of the one affected violates human ethics and morals.<sup>84</sup> Of course, an embryo cannot consent to a genetic manipulation, but the parent can. Those who support continued experimentation and limited government regulation suggest that parental consent is recognized for other procedures affecting a child; it would also suffice for IVF.<sup>85</sup> However, genetic alterations do not just affect one child, but also that child's children and their children and so on. It may not be wise to let one person so affect a whole generation. "For a state to leave in

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81. See *supra* note 10.

82. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 429-30 (1983).

83. For a general discussion on duties to future generations, see 2 ENCYCLOPEDIA OF BIOETHICS 507 (1978).

84. Fletcher, *Moral Problems and Ethical Issues in Prospective Human Gene Therapy*, 69 VA. L. REV. 515, 538 (1983).

85. *Id.* at 543. Fletcher, most known for his thoughts on situational ethics, suggests parental consent for the child is sufficient if the end result of the procedure is to make the child better off, ridding him of genetic defects. *But see* Carey, *Informed Consent by Participants: Who Participates? Who Consents?*, in TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES, AND FUTURE POSSIBILITIES 67-68 (W. Walters & W. Singer eds. 1982) (An argument against parental consent is that human will, in consenting to experimentation, cannot be subjected to another. That is the case when a parent is allowed to experiment with a child's life. Another argument is that the experimentation is on the embryo or child-to-be and it is spurious to believe his consent is given if a parent's consent is given. These arguments command prohibition of IVF.).

the hands of private parties the power of radically altering the genetic quality of the population would require an act of political self-restraint of a character unknown in human history."<sup>86</sup>

To suggest that parental consent suffices to authorize genetic alteration also ignores the rights of the developing embryo, if there are any. In *Roe v. Wade*,<sup>87</sup> the Supreme Court decided that as far as abortion was concerned, a mother's right to decide whether or not to continue a pregnancy outweighed any right a developing child has to be born. With IVF, however, the parent has no personal stake in the genetic make-up of his child. The child and his offspring are the ones affected. A court must determine what rights an embryo would have and at what point they apply—at what point does one become a person deserving the protection of the law?<sup>88</sup> The question is not easily answered. It would require an in depth factual inquiry and moral judgment on a court's part.

Those who oppose the use of IVF for eugenic purposes also suggest that allowing its use for relief of infertility will eventually lead to its use otherwise, and we will end up committing the moral violations we desire to avoid.<sup>89</sup> Allowing use of IVF in the one situation that does not require donors will eventually lead to allowing it when donors are required. At that point, genetic screening, a sort of selective breeding, begins. Then, when technology advances to the point that

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86. Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS L.J. 1401, 1413 (1972).

87. 410 U.S. 113 (1973).

88. See C. GROBSTEIN, *supra* note 1, at 75-106; Carey, *supra* note 85, at 68-70; Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982). Answers vary widely. Some say personhood begins at conception, others say not until birth. The factors that these authors consider include medical outlooks of life, social views of personhood and moral attitudes. Finally, some suggest that even if an embryo has rights, those rights do not carry as much weight when balanced against rights of adults. These poignant issues have been raised in the case of the Rios, a Los Angeles couple who died in a plane crash, leaving an estate of one million dollars, no will, and two frozen embryos in Australia. Australian authorities have battled over what to do with the embryos: whether to destroy them or attempt to implant them in an adoptive mother. The latter alternative seems to be the route they have chosen. N.Y. Times, Oct. 24, 1984, § 1, at 18, col. 4. As to the rights the embryos have to inherit the Rios' estate under probate in a Los Angeles court, the issue is in the air. At last report no one had been appointed to represent the embryos' rights. N.Y. Times, June 23, 1984, § 1, at 16, col. 1.

89. See generally C. GROBSTEIN, *supra* note 1, at 68-71 (the idea is that we end up on a slippery slope). The effects of IVF are also likely to be felt in the structure and cohesiveness of the family and society.

[T]he benefits of the new technique justify its introduction for an initial period of trial at least, but that the problems it brings in its wake, and may bring in the future, from the disappointment of married couples who do not achieve parenthood to the possible dispute about such matters as surrogate motherhood, all betray an environment that is morally problematic.

Henley, *IVF and the Human Family: Possible and Likely Consequences*, in TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES, AND FUTURE POSSIBILITIES 85 (W. Walters & W. Singer eds. 1982).

genes can be altered to rid children of genetic defects, it will be used. Finally, such manipulation will be used to alter characteristics of intelligence, appearance, and strength. These uses of IVF are likely to have future consequences that we cannot foresee.<sup>90</sup>

Finally, the finding that the right of privacy not only includes procreation by IVF, but the use of it to alter a child's character, may go beyond the definition of personal rights considered in the right of privacy. On the other hand, there are several persuasive arguments for finding that once one has the right to reproduce by IVF, its use should not be limited to relief of infertility.

There is only one situation in which the use of IVF is purely to relieve infertility. That is with a couple who can contribute sperm and egg, and the wife is able to bear the child but because of some obstruction in her oviduct they cannot conceive. Every other situation requires a donor of egg or sperm. Using IVF in these situations overcomes a couple's infertility but there is also some eugenics involved. A couple can choose between donors of various characteristics to influence the child's traits. Nonetheless, to limit the use of IVF to only the one situation in which the relief of infertility is pure, denies other infertile couples the chance to reproduce. Moreover, selecting between donors is similar to people selecting between prospective mates with an eye to which one would produce the best offspring.<sup>91</sup>

Secondly, parents already make decisions in raising their children that affect the child's mental and physical capacities, and the right to make those decisions is protected from governmental interference by the right of privacy.<sup>92</sup>

In *Ginsberg v. New York*,<sup>93</sup> the Court states:

[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can

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90. C. GROBSTEIN, *supra* note 1, at 67.

91. See Robertson, *supra* note 82, at 430-31.

92. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (recognizing parents' right to choose to send their children to private rather than public school); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating parents have the right to raise children as they wish and that included allowing a child be taught German in contravention of state law). *Roe v. Wade*, 410 U.S. 113, 153 (1973), brings these cases under the right of privacy.

93. 390 U.S. 629 (1968) (the Court found that a law forbidding the sale of "girlie" magazines to children was constitutional and supported parents in their childrearing duties).

neither supply nor hinder.”<sup>94</sup>

To restrict parents on constitutional grounds from using IVF to enhance their children’s characteristics seems anomalous to the present status of parental autonomy in making child rearing decisions. Those laws that conflict with parental freedom in raising children are subject to strict scrutiny, and only the greatest public interests override that freedom.<sup>95</sup>

Finally, the idea that the use of IVF will progressively worsen until we violate the moral structure of our society fails to recognize the power we have as rational persons to prohibit bad uses and promote good uses.<sup>96</sup> Moreover, to prohibit every use of IVF precludes any benefits that might be derived from it. Genetic experimentation at some point, when risks to individuals are low, ought to be used to alleviate the pain suffered by those with genetic disease.<sup>97</sup>

Nonetheless, should a court find that the use of IVF is included in the right of privacy, most likely its use would be limited to relief of infertility. This presupposition is based on the parent’s lack of personal stake in the genetic make-up of the child, and the far reaching consequences of IVF.

## V. BASES FOR STATE REGULATION RESTRICTING USE OF IVF

The matters raised by IVF strike deep in the heart of human conscience and may evoke public resistance to the IVF process. State legislatures may decide that some restrictions on IVF are warranted, or that outright prohibition of its use is necessary. Should those regulations interfere with one’s right to use IVF, they can be constitutionally challenged. This section discusses the levels of constitutional scrutiny that can be applied to state laws and looks at the public interests that justify such laws.

### A. *Judicial Standards of Scrutiny*

The determination of which standard of review to apply in a given case is made most often by the nature of the violated right.<sup>98</sup> Generally, regulations concerning medical procedures receive the lowest level of scrutiny—the “rational basis” standard.<sup>99</sup> However, when

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94. *Id.* at 639 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

95. *Id.*

96. See, e.g., Edwards, *Fertilization of Human Eggs in Vitro: Morals, Ethics and the Law*, 49 Q. REV. BIOLOGY 3, 15-16 (1974) (Edwards, chief developer of IVF in humans, defends its use and even goes so far as to state there are no moral problems posed).

97. See Fletcher, *supra* note 84, at 525.

98. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); see also *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (these cases address other issues besides the right of privacy, but clearly state the rule of determining standards of review).

99. See *Harris v. McRae*, 448 U.S. 297, 321-26 (1980) (upheld congressional limits

the right is a fundamental right, a regulation interfering with it must be narrowly drawn to serve compelling state interests.<sup>100</sup> Thus, a court's inquiry as to the following public interests, should it find that the right to use IVF is within the fundamental rights of privacy, is whether they are compelling.

### B. Government Interests

As discussed earlier, the most controversial concern about IVF is its use for eugenic engineering.<sup>101</sup> Should the use of IVF become widespread, state or federal governments may decide that to leave the decision of genetic make-up in the hands of private parties, or even the government, is undesirable. The use of IVF for eugenic purposes could be prohibited altogether. Such a regulation would clearly be rationally related to the government's concern. But if the right to use IVF is fundamental, determining whether such a regulation is compelling is more difficult. The assessment would have to be largely based on the determination that the harmful results of genetic screening in the composition of a population would be greater than the benefits of treating genetic defects and altering genetic traits.<sup>102</sup>

A second interest that may justify state regulation is the protection of the child. Certainly, where genetic experiments on the embryo carry the risk of mutation in the child,<sup>103</sup> restriction of IVF is justified under either review standard.<sup>104</sup>

Thirdly, a state may declare that the embryo from the point of conception is a person, which provides the state with an interest in

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on use of Medicaid funds for abortions under the rational basis test). *See also* Whalen v. Roe, 429 U.S. 589, 598 (1977) (Court upheld a statute requiring a computerized filing of patients receiving certain drugs as an exercise of the state's police powers under the rational basis test).

100. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *see also* *Roe v. Wade* 410 U.S. 113, 152 (1973).

101. *See supra* notes 81-97 and accompanying text.

102. *See* 1 *ENCYCLOPEDIA OF BIOETHICS* 315 (1978) (suggests a natural balance of personalities is needed for stable society—the influx of intelligent and crafty people would have to be offset by an equal influx of altruistic people to help those the crafty people exploit).

103. *See* Fletcher, *supra* note 84, at 538-39 (fear of genetic mutation is rational under present genetic alteration technology).

104. Government can prevent the killing of a viable fetus in the third trimester of pregnancy because its interest in the life of a child is considered compelling at that point. *Roe v. Wade*, 410 U.S. 113 (1973). Logically, the interest in the life of a child that justifies not killing it would also justify not allowing methods of birth that endanger a child's life.



preventing the embryo's destruction.<sup>105</sup> A state's determination that life begins at conception would likely be upheld since the Supreme Court has disclaimed an ability to reach such a determination, and it may leave it to legislatures to decide.<sup>106</sup> The legislature's determination would be rational. However, should a person's fundamental right to decide whether or not to bear or beget a child be considered to include the use of IVF, it is unlikely that the state's interest will be compelling. In *Roe v. Wade*, the same interest was not deemed compelling until the fetus was viable.<sup>107</sup> Thus, a couple's choice to have a child through IVF would prevail over the interest of protecting blastocysts.

Where IVF involves a single woman desiring a child, the state may have an interest in fostering marriage and maintaining the traditional family setting. This interest articulates two concerns: 1) that it is not in the child's best interests to have only one parent, and 2) that the moral structure of society needs protection.<sup>108</sup>

As to the first concern, the state will attempt to protect the child from the social reproach of being illegitimate by stopping births to single women through IVF.<sup>109</sup> This would support a law forbidding the use of IVF, but it is unlikely that it would be compelling enough to justify the law if IVF's use is fundamental. One Supreme Court decision indicates that, if a single woman has the choice to have an abortion, she is also protected in her right to bear an illegitimate child.<sup>110</sup> As to the second concern, courts have always been supportive of family units. One court suggests that:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks

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105. In the process of implantation, several blastocysts are used to increase the chance of success. Those blastocysts not used for implantation are also used for further experimentation. If the embryo were considered a person, experimentation without intent to bring that person's life to fruition would violate that person's rights. Moreover, production of embryos without intent to implant them would violate those rights. See Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295, 1323-45 (1979); see also Report of the Ethics Advisory Board, *supra* note 8, at 35,045.

106. *Roe v. Wade* 410 U.S. 113, 159 (1973). "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate . . ." *Id.* Whether the Court would give the parents' rights more weight than the embryo's is another thing. See *supra* notes 87-88 and accompanying text.

107. 410 U.S. at 163.

108. See generally Kern & Ridolfi, *supra* note 68.

109. *Id.* at 268.

110. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (discusses the right to marry under the right of privacy).

to foster and preserve marriage.<sup>111</sup>

It is argued, however, that this interest should not become a rationale for reducing the freedom of individuals to form family relationships of their own choosing, or for requiring all citizens to conform to one model of the family.<sup>112</sup> Thus, though this interest would be a rational reason for limiting use of IVF, it may not be compelling.

## VI. CONCLUSION

Among the legal issues that are raised by this revolutionary reproductive process, the most elementary is whether one has a fundamental right of access to the IVF process. The determination of this issue establishes the constitutional standard by which every governmental restriction of its use is measured. That determination in turn will greatly affect the prospects of the procedure's widespread use in relieving infertility and in producing genetically superior children. A finding that the right to use IVF is not fundamental will require only that state laws meet the rational basis test in justifying interference. States may regulate its uses, the users, those who perform the procedure and it may even ban the process altogether. A finding that it is a fundamental right under the rights of privacy would obviate any regulation restricting access except those passed pursuant to compelling state interests.

The determination of this constitutional issue is important to those who desire to use the process as it may be their only means of having a child. It is important to the developers and doctors who desire that the process be used eventually to aid those who suffer from genetic disease. The issue is also important to all of humanity, as its use may, in the near future, drastically affect the character of an entire generation.

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111. DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952); *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972).

112. Kritchevsky, *supra* note 62, at 39.

