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ALTERNATIVE MEANS OF REPRODUCTION: VIRGIN TERRITORY FOR LEGISLATION

Kathryn Venturatos Lorio*

*Freedom to have sex without reproduction does not guarantee
freedom to have reproduction without sex.¹*

Approximately seventeen percent of all couples of reproductive age have difficulty becoming parents.² For those desiring children but unable to have them in the traditional way, the new methods of reproduction are the miracles they have been awaiting. Yet, in a society consumed with overpopulation and decisions to terminate pregnancies, the rights of those attempting to create life have been relatively ignored. One reason may be that it is difficult for those with children to truly understand the dilemma of the involuntarily childless.³ Another is that medical advances have outpaced the ability of society to accommodate those advances. It is essential that the social, legal and moral ramifications of the new reproductive technologies be closely examined. To cavalierly dismiss the technologies as distasteful or eccentric would be inhumane. Yet, to allow them to develop unchecked could severely damage not only the parties and the resulting children, but also the society to which the latter are born.

Complicating the matter is the fact that adoption is not as viable an option as it once was,⁴ partially due to the accessibility of abortion and to society's increasing acceptance of unwed mothers who choose to keep

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1. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 Va. L. Rev. 405, 406 (1983).

2. Infertility: Couple's Reactions, N.Y. Times, July 26, 1982, § 1, at 13, col. 1. A couple is considered medically infertile if after one year of trying, they are unable to have children. Greater than three million women want children and cannot conceive. Id.

3. Barbara Menning, founder of Resolve, a counseling and referral agency for infertile couples, spoke in defense of *in vitro* fertilization (IVF) at a conference concerning "The Ethical Issues of Human Reproductive Technology" (June 1979, Hampshire College, Amherst, Massachusetts):

At the Ethics Advisory Board hearings it was amazing how many "Right to Lifers" and other witnesses stood up and gave among their credentials the number of children they had borne, as if to add credibility to their testimony. In my opinion, and in the opinion of other infertile women, the fact that they had achieved their families disqualified them from any understanding of the pain of childlessness.

Hubbard, The Case Against In Vitro Fertilization and Implantation, in *The Custom Made Child* 259 (1981).

4. Nationwide, there is a long waiting list for legally available Caucasian infants, and even toddlers and pre-schoolers. "Special needs" children, *i.e.*, those with physical, emotional, and mental handicaps, are more readily available but much less in demand. Telephone interview with Gloria O'Day, Administrator of Adoption Services, Ass'n of Catholic Charities of New Orleans (Feb. 2, 1984).

and raise their children. The waiting period for adopting a child can be five years or more.⁵ Couples who have delayed starting families—whether for educational, financial or career reasons—may not discover their difficulty in conceiving until they are well into their thirties. Then, if they take time to undergo infertility treatment before applying for adoption, they are often met with the disappointment of rejection due to their age.⁶

In the meantime, medical science has been making great strides in providing new alternatives for these couples—choices that could result in a child that is the genetic offspring of at least one member of the couple. However, the law either is silent on the regulation of these new procreative methods, or attempts to deal with them in terms of existing statutes or cases which were written at a time when these new modes of reproduction were not envisioned.⁷

Any regulation of the new reproductive methods must be drafted with a recognition that the right to procreate has been cited by the United States Supreme Court as “fundamental to the very existence and survival of the race.”⁸ As relating to the accessibility and use of contraceptives, that right to privacy has been guaranteed to both the married⁹ and the unmarried.¹⁰ Thus, it is not unreasonable to assume that the right to privacy extends to persons availing themselves of the new means of reproduction.¹¹ Yet, even when fundamental rights are concerned and courts examine state regulation with strict scrutiny, a “*compelling governmental interest*”¹² may exist, allowing regulation by the least restrictive means.¹³ Relying on its interest in the health of its citizens, a state might attempt to regulate the use of new medical techniques—requiring they be

5. Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 *Women's Rts. L. Rep.* 107, 108 n.4 (1982). Ms. Gloria O'Day states that by the time most couples come to the Association of Catholic Charities, they have already been through a long fertility work-up which may have lasted anywhere from two to five years. They are then informed that depending on the rigidity of their expectations, the waiting time may be another three to five years. Telephone interview, *supra* note 4.

6. Ms. O'Day stated that there can be no more than forty-five years between the age of the child and the adopting parents. The Association of Catholic Charities will take formal applications from couples up to 37 years old. However, in the case of “special needs” children, see *supra* note 4, there may be some flexibility to this rule. Telephone interview, *supra* note 4.

7. Robertson, *supra* note 1, at 426.

8. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

9. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

10. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

11. See *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) (declaring that the “decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices”).

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

13. See generally Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 *Vand. L. Rev.* 971, 1029-36 (1974).

performed only by licensed personnel in hospitals or under certain conditions. Similarly, even if the state's interest in preserving the family is not accepted as compelling enough to prohibit the use of these techniques by the unmarried,¹⁴ states would not be obligated to provide the services¹⁵ nor to fund them.¹⁶

ARTIFICIAL INSEMINATION

One of the older¹⁷ and more common¹⁸ forms of alternative procreation is artificial insemination, or the injection by instrument of semen into the women's reproductive tract for the purpose of procreation.¹⁹ For married women, there are basically two types of artificial insemination: artificial insemination husband and artificial insemination donor.²⁰

Artificial insemination husband is used in cases in which a husband is either physically unable to have sexual intercourse, or more commonly,

14. *Eisenstadt*, 405 U.S. 438 (1972).

15. See generally Robertson, *supra* note 1, at 420 n.36:

A finding that single persons have a right to procreate would not, however, guarantee access to noncoital reproductive services. In some instances, there would be no state action involved; in others, there would be no obligation on the state to provide these services, or to provide them equally to married persons and single persons.

16. Cf. *Harris v. McRae*, 448 U.S. 297, 311 (1980) (New York, a participant in the Medicaid program, was under no obligation to fund abortions for which federal reimbursement was unavailable under the Hyde Amendment.); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (The Supreme Court recognized the right of states to exclude non-therapeutic abortions from Medicaid funding.); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (Cities have a right to refuse funding for non-therapeutic abortions while choosing to fund related child birth expenses.).

17. The first documented artificial insemination of humans is credited to English surgeon John Hunter in 1790. Shaman, *Legal Aspects of Artificial Insemination*, 18 J. Fam. L. 331 (1980) (citing W. Finegold, *Artificial Insemination* 6 (1964)).

18. Wadlington, *Artificial Conception: The Challenge For Family Law*, 69 Va. L. Rev. 465, 472 (1983). Compare also note 33. In 1980 it was estimated that about 20,000 children a year were born as a result of the artificial insemination donor (A.I.D.) method. Fleming, *New Frontiers in Conception: Medical Breakthroughs and Moral Dilemmas*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 14.

19. This does not include sexual intercourse with one other than the husband for purposes of conceiving a child. See *In Re Adoption of McFadyen*, 108 Ill. App. 3d 329, 438 N.E.2d 1362, cert. denied, 103 S. Ct. 1259 (1983) (On appeal from the granting of adoption, conceding that her husband was not the biological father of her child, Mrs. McFadyen argued that her sterile husband was the legal father because he had consented to her having intercourse with other men for the purposes of impregnating her. The circuit court noted that as a matter of law, such an arrangement was not the legal equivalent to artificial insemination.).

20. A third possible type of artificial insemination is confused or combined artificial insemination (C.A.I.). This involves the mixing of the husband's sperm with that of a donor. The woman may become impregnated by either husband or donor, thus providing some psychological comfort not present with artificial insemination donor. Wadlington, *supra* note 18 at 469-70.

has a low sperm count.²¹ By collecting semen samples and aggregating them to increase the sperm count or simply by directing the sperm closer to the egg and shortening the distance the sperm must travel to meet the egg, the inseminator enhances the possibility of inducing pregnancy.

Since the child born of artificial insemination husband is the biological product of a married couple, no genealogy problems are involved.

However, other legal questions may arise. For example, in *L. V. L.*²² a woman who had conceived a child through artificial insemination husband sought an annulment. Holding that artificial insemination husband did not constitute consummation of the marriage, the English court granted her request. Also, proof of legitimacy may be a problem in instances where the husband's sperm is frozen and the actual insemination is not performed until well after the husband's death. In such cases, the child may not be able to avail himself of the common legal presumption that the husband is the father of any child born within three hundred days of a marriage.²³

Artificial insemination donor presents many more complications. Early cases deemed the act adulterous, as exemplified by a Canadian court in *Orford v. Orford*²⁴ in which a woman had been inseminated without her husband's consent. In the 1954 Illinois case of *Doornbos v. Doornbos*,²⁵ the stigma of adultery was imposed even though the husband had consented to the process. Likewise, the child born of artificial insemination was pronounced illegitimate as late as 1963 by a New York court in *Gursky v. Gursky*,²⁶ where the court noted that artificial insemination donor children were not adopted pursuant to state law, nor were they legitimized by statute. The modern, enlightened view is that it is the sexual

21. A man is considered oligospermic if his sperm density is less than 20 million per milliliter. Short, Human In Vitro Fertilization and Embryo Transfer § 4, at 310 (1979), in Ethics Advisory Board, U.S. Dep't of Health, Educ. & Welfare, Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer [hereinafter cited as Ethics Advisory Board, Appendix]. See also R. Dickey, S. Taylor & D. Curole, The Fertility Institute of New Orleans In Vitro Fertilization—Patient Information (available from the Fertility Institute of New Orleans, Suite 118, 9830 Lake Forest Blvd., New Orleans, La. 70127) [hereinafter cited as R. Dickey, Patient Information].

22. [1949] 1 All E.R. 141, 146.

23. See, e.g., La. Civ. Code. art. 185 ("A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. . . ."). For a discussion of this presumption, see Kinney, Legal Issues of the New Reproductive Technologies, 52 Calif. St. B.J. 514, 514 (1977).

24. 58 D.L.R. 251 (1921).

25. No. 54 S. 14981 (Super. Ct. Cook County), 23 U.S.L.W. 2308 (1954), appeal dismissed on procedural grounds, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956). Contrast the unreported case of *Hoch v. Hoch*, No. 44-C-8307 (Cir. A Cook County, Ill. 1945), which did not find the artificial insemination donor adulterous, even though the husband had not consented.

26. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

act, not the placing of the male seed in the female body, that is adulterous.²⁷

This more liberal view has been adopted by a number of courts which have pronounced children born of artificial insemination donor legitimate. Rejecting the *Gursky* rationale, a New York court in *In re Adoption of Anonymous*²⁸ opted to protect the child whose parents had consented to artificial insemination donor during their marriage. Likewise, the California Supreme Court in *People v. Sorensen*²⁹ extended the definition of "father" beyond the biological father to a husband who, unable to beget a child, purchased semen from a donor for purposes of inseminating his wife.³⁰

Many of the legal questions associated with artificial insemination could be alleviated by carefully drafted legislation. Two major difficulties presently exist. First, only twenty-one states have any legislation dealing with artificial insemination donor.³¹ Second, even where it exists, the legislation often does not go far enough, leaving many legal queries to baffle future courts.

One area that requires more attention is the husband's consent. What constitutes consent? Must it be written? How long is it effective?³² Only sixteen of the states' statutes mention the need for written consent of the husband, although all suggest that some form of consent is required.³³

27. *People v. Sorensen*, 68 Cal. 2d 280, 289, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968); *MacLennan v. MacLennan*, [1958] Sess. Cas. 105.

28. 74 Misc. 2d 99, 345 N.Y.S. 2d 430, 434 (Sup. Ct. 1973).

29. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

30. See also *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (Analogized the artificial insemination donor (A.I.D.) husband to an adopting foster father).

31. Louisiana Civil Code article 188 states in pertinent part: "The husband also cannot disavow paternity of a child born as the result of artificial insemination of the mother to which he consented." Alaska Stat. § 25.20.045 (Supp. 1983); Ark. Stat. Ann. § 61-141(c) (1971); Cal. Civ. Code § 7005 (West 1983); Cal. Penal Code § 270 (West 1970); Conn. Gen. Stat. §§ 45-69f to - 69n (1981); Fla. Stat. Ann. § 742.11 (West Supp. 1984) (irrebuttable presumption of legitimacy); Ga. Code Ann. § 74-101.1 [19-7-21] & [43-34-42] (1982) (irrebuttable presumption of legitimacy); Kan. Stat. Ann. §§ 23-128 to -130 (1974 & Supp. 1978); Md. Est. & Trusts Code Ann. § 1-206(b) (1974); Md. Health & Gen. Code Ann. § 20-214 (1982); Mich. Comp. Laws Ann. §§ 333.2824(6), 700.111(2) (1980); Mont. Code Ann. § 40-6-106 (1983); Nev. Rev. Stat. § 126.061 (1981); N.Y. Dom. Rel. Law § 73 (Consol. 1977); N.C. Gen. Stat. § 49 A(1) (1976); Okla. Stat. Ann. tit. 10, §§ 551-553 (West Supp. 1983-1984); Or. Rev. Stat. §§ 109.239, 109.243, 109.247, 677.355, 677.360, 677.365, 677.370, 677.990 (1981); Tenn. Code Ann. § 68-3-306 (1983); Tex. Fam. Code Ann. § 12.03 (Vernon 1975); Va. Code § 64.1-7.1 (1980); Wash. Rev. Code Ann. § 26.26.050 (West Supp. 1984-1985); Wis. Stat. Ann. §§ 767.47(9), 891.40 (West Supp. 1983-1984); see also Unif. Parentage Act § 5, 9 U.L.A. 592 (1979).

32. *R.S. v. R.S.*, 670 P.2d 923 (Kan. 1983) (Although the Kansas statute requires the husband's written consent, a husband was equitably estopped from denying paternity when he had orally consented to the artificial insemination of his wife.).

33. Alaska Stat. § 25.20.045 (1983) (consented to in writing); Cal. Civ. Code § 7005

Of those sixteen, only nine require that the consent be recorded.³⁴ In those instances, the records are kept confidential and may only be opened by court order on a showing of good cause.

(Supp. 1983) (stating that husband's consent must be in writing and signed by husband and wife); Cal. Penal Code § 270 (West 1970) ("The husband of a woman who bears a child as the result of artificial insemination shall be considered the father of that child for the purposes of this section, *if he consented in writing . . .*") (emphasis added); Conn. Gen. Stat. § 45-69g (1981) ("A.I.D. shall not be performed unless the physician receives in writing the request and consent of the husband and wife."); Fla. Stat. Ann. § 742.11 (West Supp. 1984) (both the husband and wife have consented in writing); Ga. Code Ann. § 74-101.1 [19-7-21] (1982) (both spouses consented in writing); Kan. Stat. Ann. § 23-128 (1974) (the consent in writing of the husband and wife); Mont. Code Ann. § 40-6-106 (1983) ("The husband's consent must be in writing and signed by him and his wife."); Nev. Rev. Stat. § 126.061 (1981) ("The husband's consent must be in writing and signed by the party and his wife."); N.Y. Dom. Rel. Law § 73 (Consol. 1977) (consent in writing of woman and her husband); N.C. Gen. Stat. § 49-A(1) (1976) (the husband and wife requesting and consenting in writing); Okla. Stat. Ann. tit. 10, §551 (West Supp. 1983-1984) (consent in writing of the husband and wife); Or. Rev. Stat. § 677.365 (1981) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the written request and consent of her husband."); Tex. Fam. Code Ann. § 12.03 (Vernon 1975) (consent must be in writing); Va. Code §64.1-7.1 (1980) (consent in writing of such woman and her husband); Wash. Rev. Code Ann. § 26.26.050 (West Supp. 1984-1985) ("The husband's consent must be in writing and signed by him and his wife."); Wis. Stat. Ann. § 891.40 (West Supp. 1983-1984) ("The husband's consent must be in writing and signed by him and his wife."). Note that the Maryland and Michigan statutes state that the consent of the husband is presumed; however, Michigan states that the presumption is rebuttable by clear and convincing evidence. Md. Est. & Trusts Code Ann. § 1-206(b) (1974) (consent of husband presumed.); Mich. Comp. Laws Ann. § 700.111 (2) (1980) ("Consent of the husband is presumed unless contrary is shown by clear and convincing evidence."); Unif. Parentage Act § 5, 9A U.L.A. 592 (1979) (The husband of a woman who conceives a child through A.I.D. with the husband's consent is treated as the natural father.). See also La. Civ. Code art. 188 (stating that a husband who has consented to artificial insemination of his wife cannot disavow paternity). Although there is no formal requirement for written consent, most physicians performing artificial insemination donor in Louisiana require signed informed consent as a matter of course. Interview with Richard P. Dickey, M.D., Director of the Fertility Institute of New Orleans, in New Orleans, Louisiana (Feb. 7, 1984) [hereinafter cited as Dickey interview]; Interview with Staff of Omega Institute Laser Research Foundation, in New Orleans, (Feb 9, 1984); Interview with Ronald W. Lewis, M.D., Tulane University Medical Center Fertility Clinic, in New Orleans (Feb. 13, 1984) [hereinafter cited as Lewis interview]; Telephone interview with William E. Roniger, M.D., Louisiana State Medical School Fertility Clinic (Feb. 23, 1984) [hereinafter cited as Roniger interview].

34. Cal. Civ. Code § 7005 (West 1983) ("The physician shall certify . . . [the husband's and the wife's] signatures and the date of the insemination, and retain the husband's consent as part of the *medical record* . . . [which shall be] kept confidential, and in a sealed file.") (emphasis added); Conn. Gen. Stat. § 45-69h (1981) ("(a) Whenever a child is born . . . by the use of A.I.D., a copy of the request and consent required . . . , together with a statement of the physician who performed the A.I.D., that to the best of his knowledge the child was conceived through A.I.D., shall be *filed with the judge of probate* . . . (b) The information may be disclosed only to the persons executing the consent. No other person shall have access. . . except upon order of the probate court for cause shown.") (emphasis added); Kan. Stat. Ann. § 23-130 (West 1981) ("[C]onsent . . . shall be executed

The issue of how long consent remains effective has been litigated recently. In *K.S. v. G.S.*,³⁵ a mother's request for child support for her child was answered by the husband with a claim that although he had initially consented to her insemination, his consent was withdrawn prior to the child's conception. The New Jersey court noted that in the absence of authority limiting the continuing effectiveness of consent, it is presumed that consent continues unless the husband overcomes the burden of proof by clear and convincing evidence.

Once consent has been given for artificial insemination, is the husband deemed to be the father of any child conceived during the marriage? The case of *State ex rel. H. v. P.*³⁶ suggests that once a husband consents to insemination, it will be difficult to deny the paternal tie. In that case, a wife challenged her husband's paternity of her child. Although it was conceded that she had been artificially inseminated with her husband's consent on at least ten occasions prior to the conception of her child, she claimed the biological father was a man with whom she had been intimate on a business trip. The court denied her request for blood tests, deeming her estopped from contesting the child's paternity.

In addition to requiring that the husband's consent be in writing and recorded, states might consider providing a time period for the effectiveness

and acknowledged by both the husband and the wife . . . and an original . . . may be filed under the same rules as adoption papers in the district court of the county in which such husband and wife reside.") (emphasis added); Mont. Code Ann. § 40-6-106 (1983) ("The physician shall certify . . . [the husband's and the wife's] signatures and the date of the insemination and file the husband's consent with the department of health and environmental sciences, where it shall be kept confidential and in a sealed file.") (emphasis added); Nev. Rev. Stat. § 126.061 (1983) ("The physician shall certify . . . [the husband's and the wife's] signatures and the date of the insemination, and file the husband's consent with the health division of the department of human resources, where it must be kept confidential and in a sealed file.") (emphasis added); Okla. Stat. Ann. tit 10, § 553 (West Supp. 1983-1984) ("[S]aid consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. [It shall] not be open to the general public, and the information . . . may be released only to persons exacting such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.") (emphasis added); Or. Rev. Stat. § 677.365 (1981) ("[C]onsent . . . shall be filed by the physician who performs the artificial insemination with the State Registrar of Vital Statistics . . . [and] shall be sealed . . . [and] opened only upon an order of a court of competent jurisdiction.") (emphasis added); Wash. Rev. Code Ann. § 26.26.050 (West Supp. 1984-1985) ("The physician shall certify . . . [The husband's and the wife's] signatures and the date of the insemination, and file the husband's consent with the registrar of vital statistics, . . . [to be] kept confidential and in a sealed file.") (emphasis added); Wis. Stat. Ann. §891.40 (West Supp. 1983-1984) ("The physician shall certify . . . [the husband's and wife's] signatures and the date of the insemination, and . . . file the husband's consent with the department of health and social services, . . . [which shall be] kept confidential.") (emphasis added).

35. 182 N.J. Super. 102, 440 A.2d 64 (1981).

36. 90 A.D.2d 434, 457 N.Y.S.2d 488 (1982).

of the consent with another time period for renewal when the initial period has expired. A determination should be made as to whether inaction would result in a presumption of continued or withdrawn consent.

Besides providing a paternal link with the husband of the mother, statutes should clearly relieve the donor of obligations to the child. Presently eight states explicitly do so.³⁷ Others, such as Louisiana, are silent on the subject. Although part of the legislative intent of the amending of Civil Code article 209 on filiation may have been to eliminate dual paternity,³⁸ the Louisiana courts appear receptive to a dual paternity argument.³⁹ Thus, although a child is deemed the legitimate child of the husband of the mother under Civil Code article 188 due to the husband's consent to artificial insemination of his wife, it is still possible that the child might attempt to establish filiation to the sperm donor. Any waiver of paternal rights by the donor would not deprive the child from asserting his rights against the donor. In order to protect both donors and

37. Cal. Civ. Code § 7005(b) (West 1983) ("The donor of semen. . . to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child."); Conn. Gen. Stat. § 45-69(j) (1981) ("A donor of sperm used in A.I.D., or any person claiming by or through him, shall not have any right or interest in any child born as a result of A.I.D."); Mont. Code Ann. § 40-6-106(2) (1983); Nev. Rev. Stat. § 126.061 (1981) (Both the Montana and the Nevada statutes employ the same language used by California in its donor provision which was adopted from the Uniform Parentage Act.); Or. Rev. Stat. § 109.239 (1981) ("If the donor . . . is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of artificial insemination; and (2) A child . . . shall have no right, obligation or interest with respect to such donor."); Tex. Fam. Code Ann. § 12.03(b) (Vernon 1975) ("If a woman is artificially inseminated, the resulting child is not the child of the donor unless he is the husband."); Wash. Rev. Code Ann. § 26.26.050(2) (West Supp. 1984-1985) (Washington's donor provision is similar to the California, Montana, and Nevada donor provisions but goes farther to state that the donor shall not be the natural father "unless the donor and the woman agree in writing that said donor shall be the father." Where such is the case, the same filing requirements are made as if the donor were the husband of the woman consenting to artificial insemination.); Wis. Stat. Ann. § 891.40 (West Supp. 1983-1984) (Wisconsin also tracks the language of the California donor provision, but adds that "the [donor] bears no liability for the support of the child and has no parental rights with regard to the child.").

38. La. Civ. Code art. 209 ("A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article."). See *Fontenot v. Thierry*, 422 So. 2d 586, 588-89 (La. App. 3d Cir. 1982) (citing *Spaht*, *Developments in the Law*, 1980-1981—Persons, 42 La. L. Rev. 403 (1982)).

39. In *Succession of Levy*, 428 So. 2d 904 (La. App. 1st Cir. 1983), the court permitted a child to prove filiation to his biological father, although the husband of the mother had not disavowed the child. The court interpreted article 208 to mean that a child not entitled to legitimate filiation "to the parent to whom he is attempting to prove filiation" may bring an action to filiate. See also *Malek v. Yekani-Fard*, 422 So. 2d 1151 (La. 1982) (stating that the marital status of the mother was irrelevant in a suit brought by a child to establish filiation with one other than the husband of the mother).

children, statutes should clearly deny any legal relationship between donor and child.

Artificial insemination also raises questions as to the liability of the person performing the process. Generally, the procedure is performed by a person with medical training. Twelve states actually require that the procedure either be performed by a licensed physician or under his or her supervision.⁴⁰ This would presumably reduce the chances of infection or negligent performance. There has been some opposition, particularly from single women, to the requirement that the process be performed only by a licensed physician. Objections have been raised by heterosexual women who are unmarried, but whose "biological clock" is ticking away. Not having found a mate, but desiring a child, some seek artificial insemination as the answer. Additionally, the argument has been raised by lesbian women wishing to create a family unit.⁴¹ Since the private physician can decide whether or not to perform a procedure and which pa-

40. Alaska Stat. § 25.20.045 (1982); Cal Civ. Code § 7005 (West 1983); Conn. Gen. Stat. § 45-69(g) (1981) (by persons certified to practice medicine); Nev. Rev. Stat. § 126.061 (1983); N.Y. Dom. Rel. Law § 73 (Consol. 1977) (performed by persons duly authorized to practice medicine); Okla. Stat. Ann. tit. 10, § 553 (West Supp. 1983-1984) (requires a currently licensed physician to perform artificial insemination); Or. Rev. Stat. 677.360 (1981) (allows physicians and persons under their supervision to perform artificial insemination); Va. Code § 64.1-7.1 (1980) (requires a licensed physician to perform the artificial insemination). The Georgia and the Maryland statutes are two of the strongest. Ga. Code Ann. § 74-101.1 [43-34-42] (Supp. 1983) (A 1982 opinion of the Georgia attorney general requires that "performance of Artificial Insemination upon female human beings *may not be delegated* by licensed physician to physician's assistant or other qualified allied health personnel.") Md. Health & Gen. Code Ann. § 20-214(a) (1982) ("A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination" The statute also relieves both physicians and hospitals of any civil liability or disciplinary action for refusal to perform artificial insemination.).

41. D. Hitchens, *Lesbians Choosing Motherhood: Legal Issues in Donor Insemination* (1983) (available from Lesbian Rights Project, 1370 Mission St., San Francisco, California 94103); The Lesbian Mother's Nat'l Defense Fund, *Artificial Insemination Packet* (available from LMNDF, P.O. Box 21567, Seattle, Washington 98111). See also *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977) (semen donor seeking visitation rights with respect to a child born of artificial insemination of a single woman). But see Or. Rev. Stat. § 677.365 (1981) ("Artificial Insemination shall not be performed upon a woman without prior written request and consent and, *if she is married*, the written request and consent of her husband.") (emphasis added); Wash. Rev. Code Ann. § 26.26.050 (West Supp. 1984-1985) ("[D]onor of semen provided . . . for use in [the] artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived unless the donor and the woman agree in writing that said donor shall be the father."). Both the Oregon and Washington statutes indicate that there would be no statutory bar to single women wishing artificial insemination. Note, however, that the Washington statute would require the donor in a single woman insemination to agree in writing to be the father. Also note that it has been said that it is relatively easy for single women to perform self-insemination. Robertson, *supra* note 1, at 418-20 n.36 (1983), citing *Amateur Insemination*, in the *Next Whole Earth Catalogue* 345 (1980). Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in The*

tients he will accept, many physicians might refuse, on moral grounds, to administer artificial insemination donor to single women.⁴² If the physician is employed by a state facility, it may be argued that refusal to perform artificial insemination, based on the patient's marital status, is a denial of equal protection. The argument is based on the presumption that procreation is a fundamental right⁴³ and the constitution guarantees to "the individual, married or single, [the right] to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁴⁴ In answer to the equal protection argument, one might cite *Maher v. Roe*,⁴⁵ the case which recognized the right of a state to exclude nontherapeutic abortions from the federally funded Medicaid programs. In *Maher*, the Supreme Court distinguished the state's refusal to include abortions in the program from "direct state interference with a protected activity."⁴⁶ Thus, even if a state could not show a compelling reason to criminalize the use of artificial insemination donor by the unmarried, it is possible that doctors in a state facility could refuse to administer the process to the unmarried in an attempt to discourage it. Some legislatures may decide to require that only physicians administer artificial insemination. If that is the case, decisions must be made as to what sanctions to impose on those acting without a physician. Criminalizing the performance of artificial insemination donor without medical supervision would be state action, and could elicit the constitutional arguments of denial of equal protection, which the state would have to rebut by establishing a compelling state reason for its action.

Selecting the proper donor for artificial insemination is of paramount

United States, 300 New Eng. J. Med. 585, 585 (1979) ("Despite societal pressure discouraging artificial insemination for single women, at least 9.5 percent of the respondents [physicians] (36 of 379) have done so.").

42. Ronald W. Lewis, M.D., Tulane University Fertility Clinic, stated that on occasion Tulane receives telephone requests from single women for artificial insemination. Tulane's fertility program is limited to married couples, however. Tulane's program requires participating couples to sign an informed consent form which states: "We represent that we were legally married at (place, city and state) _____ on _____ 19_____ and that we have co-habited together as man and wife since that date." Lewis interview, supra note 33 (consent form available from Tulane University Medical Center, 1415 Tulane Ave., New Orleans, Louisiana 70112). The Fertility Institute of New Orleans is also limited to married couples. Dickey interview, supra note 33. LSU's consent form contained no written clause with regard to marriage. Roniger interview, supra note 33.

43. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing the right to procreate as "fundamental to the very existence and survival of the race.").

44. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

45. 432 U.S. 464 (1977). See also Md. Health & Gen. Code Ann. § 20-214 (1982) (stating that neither an individual nor a hospital may be required to perform artificial insemination and that such refusal will not result in either civil liability or disciplinary action).

46. 432 U.S. at 475.

importance, not only to the recipient who may give birth to a defective child, but also to the doctor performing the insemination if he is negligent in the selection of the donor. Generally, as revealed in a study conducted in 1978 which surveyed doctors listed by the American Fertility Society as performing artificial insemination donor,⁴⁷ the selection of a donor is made not by the patient, but by the doctor. Most donors possess above average intelligence and health and are either medical students, hospital residents, or university students.⁴⁸ However, little further screening is conducted. Although almost all the doctors performing artificial insemination donor do take a family history of donors, this is usually in the form of presenting a check-list of familial diseases to the donor.⁴⁹ Since donors are generally paid for their semen,⁵⁰ the incentive to reveal a disqualifying genetic history is not great. Although most doctors would reject a

47. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 586 (471 doctors responded to the study; 91.8 percent of those performing A.I.D. do not allow the recipients to select the donors). See Or. Rev. Stat. § 677.360 (1981) ("Only physicians licensed under this chapter and persons under their supervision may select and perform artificial insemination."). All physicians interviewed were concerned with doing as careful a matching between the couple and the donor as possible, including blood type. Dr. Lewis selects all of his donors personally. Dickey interview, *supra* note 33; Lewis interview, *supra* note 33; Roniger interview, *supra* note 33.

48. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 586 (Sixty-two percent of the responding physicians used medical students or hospital residents; 10.5% used university or grad students; 17.8% used both). Dr. Lewis stated that Tulane's donor pool was comprised of approximately 90% medical and graduate students in related medical fields. The remaining 10% were chosen from the professional community. Lewis interview, *supra* note 33. Dr. Roniger, consistent with the Curie-Cohen, Luttrell & Shapiro study, stated that the LSU donor pool was comprised 100% of students in either graduate, medical, or dental school. Roniger interview, *supra* note 33.

49. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 586. Tulane screens its donors for any infections and does a semen analysis to check the sperm count and screen for syphilis. Tulane's donor information form records such information as: name, address, phone number and date enrolled; height, weight, eye and hair color; blood type and family diseases; sports, art, and music; and a small section at the bottom to enter comments and the name of the interviewer. On the reverse side, the form asks: "Has anyone in your family had any of the following conditions? Please include those family members who may have died. Think of your family as any brothers, sisters, father, mother, maternal and paternal aunts, uncles, and grand parents." The form then lists eight congenital conditions and 28 adult conditions. If there is an affirmative answer to any of the congenital or adult conditions the donor is to state the specific relation, the conditions and the age affected. Tulane University Medical Center Fertility Clinic, Donor Screening Form (on file with Dr. Ronald W. Lewis, M.D. Tulane University Medical Center Fertility Clinic, 1415 Tulane Ave., New Orleans, Louisiana 70112). LSU does similar screening. If all of the information is negative and the physical examination is normal, the donor brings in a semen analysis for an elaborate culture specimen. Ethnic groups with genetic disorders particular to their group are screened for such disorders, *e.g.*, black donors for sickle cell anemia and mediterranean donors for thalassemia. Roniger interview, *supra* note 33.

50. Tulane pays their donors for the first donation and for each subsequent donation until there is a successful pregnancy or the couple drops out. Lewis interview, *supra* note 33.

donor with a negative genetic history, few physicians do any positive screening.⁵¹

Legislators might consider the possibility of requiring certain genetic tests prior to any insemination, or at least informing the recipients of the availability of such testing.⁵² Such screening could range from testing for communicable diseases to, in the case of a married couple, the matching of physical appearance with the recipient husband.⁵³

Although the problem of incest stemming from multiple children produced by the same donor may seem remote,⁵⁴ it becomes more plausible within ethnic groups and within the same community.⁵⁵ Most doctors studied reported no policies concerning the maximum use of a donor,⁵⁶ although those who did, limited the use of a single donor to six or fewer pregnancies.⁵⁷

Noting the frequency of use of the same donor's semen necessitates the keeping of records on donors. Although most doctors keep records on the recipients, few retain them on the resulting children or donor.⁵⁸

51. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 586. For example, although 94.7% of the doctors surveyed in the study indicated they would reject a carrier of Tay-Sachs disease, less than one percent of the doctors indicated they tested donors for carrier status. See Or. Rev. Stat. § 677.370 (1981) ("No semen shall be donated for use in artificial insemination by any person who: (1) has any disease or defect known to be transmissible by genes; or (2) knows or has reason to know he has venereal disease."). One reason that little actual genetic screening is done may be its expense, added to an already costly procedure. Initial screening costs \$150.00 plus a \$75.00 donor fee, and each subsequent insemination costs \$75.00 plus a \$50.00 donor fee. Usually a woman comes in for one to two inseminations per cycle. The pregnancy rate for women without children is approximately 50% in the first six months, 75% after one year, and approximately 80 to 100% pregnancy rate after one and a half years. The failure or drop-out rate ranges from 10 to 20%. In depth genetic screening would add an additional \$500.00 to \$1,000.00 to the cost. Lewis interview, *supra* note 33.

52. Banks That Aid Parenting, *The Times-Picayune/The States Item*, Mar. 14, 1981 § 5, at 1, col. 1 (Dr. Cyris Milani reporting that he conducts genetic screening if recipients wish to pay \$40.00 or more).

53. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 587, reveal that some matching as to physical appearance occurs routinely and some only when requested. Dr. Lewis of Tulane's Fertility Clinic states that his objective is to match the donor such that it is "impossible for society to tell that the child is not genetically of the couple." Lewis interview, *supra* note 33. See also *supra* note 47.

54. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 589.

55. *Id.*

56. *Id.* at 587. Of those who responded to the Curie-Cohen, Luttrell and Shapiro study, 84% had no policies concerning maximum use.

57. *Id.* Dr. Lewis stated that Tulane preferred to limit the use of any particular donor to one to three successful pregnancies because he wanted to avoid any chance of weakening the genetic pool. He noted, however, that this could be difficult at times because often there was little or no follow-up as to the success of the pregnancy when a patient was a referral. Lewis interview, *supra* note 33. Likewise, LSU limits the number of pregnancies per donor. Roniger interview, *supra* note 33.

58. Curie-Cohen, Luttrell & Shapiro, *supra* note 41, at 588. (92.2% of the physicians

Legislation requiring such record keeping would likely be opposed on the grounds of insuring the privacy of the parties and protecting the donor's anonymity.⁵⁹ However, a carefully drafted statute could require that records be kept confidential with accessibility permitted only for cause, and even then, only when medically necessary.⁶⁰

SURROGATE MOTHERHOOD

Surrogate motherhood is another alternative for those who cannot, or choose not, to procreate in the traditional manner. The surrogate agrees to be artificially inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm all rights and obligations to the child. Generally, the sperm is that of a married man whose wife is infertile.⁶¹ This procedure is somewhat analogous to artificial insemination donor in that the resulting child will be the biological offspring of one member of the infertile couple. Indeed, it is this similarity which has been noted by proponents of surrogate motherhood, who claim that prohibiting this procedure while sanctioning artificial insemination is discrimination on the basis of sex.⁶² However, surrogate mothering in-

who responded kept records on the recipients, 36.9% kept records on the children born, and 30.4% kept records on the donor).

59. *Id.* 82.6% of the responding physicians opposed any such legislation, as would Dr. Roniger. Roniger interview, *supra* note 33. Note that although Dr. Lewis did not see as much of a problem of keeping such records on "fresh donors," he did see a need for legislation where frozen sperm banks were concerned. Lewis interview, *supra* note 33.

60. Compare Louisiana's statute requiring a written statement of family history to accompany acts of surrender in adoption.

A. Any person who executes an act of legal surrender . . . shall execute these with a written statement. . . .

B. [Containing] the following nonidentifying information if known:

(1) Ages of the biological parents.

(2) An explicit and extensive medical genetic history of the biological parents and their immediate families.

C. [A] copy of said statement shall be included in the sealed adoption record.

La. R.S. 9:422.13 (Supp. 1984).

61. Not all surrogate contracts involve a married sperm donor. Compare California Assembly Bill No. 3771, which would restrict surrogate contracts to use by infertile couples only. ("Infertile Couple means a husband who is capable of producing viable sperm and his wife who has been determined by a licensed physician to be incapable of conceiving or carrying a child to term without significant risk to her life or who has been unable to conceive for one year prior to the date of the execution of the contract."), Cal. A.B. 3771, 1981-1982 Reg. Sess., and the 1981 Michigan Bill which did not require the father to be a married man ("If a single natural father has entered into a surrogate parenthood agreement with a surrogate, that natural father, together with the surrogate, shall file a petition to terminate the parental rights of the surrogate and to establish the paternity of the natural father."). Mich. H.B. 5184 Reg. Sess (1981).

62. See Rushevsky, *supra* note 5, at 120 n.98 ("Surrogate intermediary Katie Brophy has analogized the payment of fees to sperm donors to the payment of fees to surrogates and concluded that the legal distinctions are 'very sexist.'"). Would the discrimination be against the male who is not permitted to procreate this way, or against the surrogate who

volves an added element not present in artificial insemination donor. For in the latter, the sperm donor merely contributes genetic material, then severs his relationship to any offspring, while a surrogate mother goes on to nurture the fetus within her until birth.⁶³

Although not as common as artificial insemination donor is today, the concept of surrogate motherhood is not new. The Bible records that Sarah, unable to bear a child, directed Abraham to her hand-maiden, Hagar, who later bore Abraham his son Ishmael.⁶⁴ Surrogate motherhood has gained popularity recently.⁶⁵ It is estimated that by the end of 1982, one-hundred children were born of surrogate motherhood in the United States.⁶⁶ As a result of the increasing use of this method of reproduction, a number of state legislatures have considered adopting laws regulating the practice.⁶⁷

is not permitted to provide her services, or against the infertile couple who is denied the chance to have a child so conceived?

63. The more appropriate analogy is between A.I.D. and ovum donation.

64. Now Sarai, Abram's wife, bore him no children. She had an Egyptian maid whose name was Hagar. . . And Sarai said to Abram, 'Behold now, The Lord has prevented me from bearing children; go unto my maid; it may be that I shall obtain children by her'. . . And Hagar bore Abram a son, and Abram called the name of his son Ishmael.

Genesis 16:1-2, 15. But note Krimmel, *The Case Against Surrogate Parenting*, 3 *Hastings Center Rep.* 35, 36 (1983) (stating that Sarah actually had given Hagar to Abram as a second wife and that Hagar did not relinquish Ishmael to Sarah; rather, after Sarah gave birth to Isaac, she banished both Hagar and Ishmael).

65. Bird, *Surrogate Motherhood: hers? yours? ours?*, 2 *Cal. Law.* 20, 22 (Feb. 1982). Note that in Kentucky there is a Surrogate Parenting Association, Inc.; in California, Surrogate Parenting Foundation; and in Michigan, Surrogate Family Services, Inc. Maryland and Arizona also have surrogate mother centers. There is even a newsletter for interested persons. Robertson, *Surrogate Mothers: Not So Novel After All*, 13 *Hastings Center Rep.* 28, 28 (1983); Rushevsky, *supra* note 5, at 109. See also *Pregnancy by Proxy*, *Newsweek*, July 7, 1980, at 72.

66. *Surrogate Moms: State Law Should Be Brought in Line with Times*, *Detroit Free Press*, Feb. 13, 1983, at B2, col. 1; *A Surrogate-Motherhood Nightmare*, *Atlanta Const.*, Jan. 31, 1983, at A10, col. 2. Noel Keane, a Michigan attorney, states that he has arranged 23 surrogate births in the last seven years and 21 more women are currently pregnant in his program. He is also working on surrogate arrangements for 30 other couples. For more information, see N. Keane & D. Breo, *The Surrogate Mother* (1981).

67. Alaska H.B. 498, 1981 Reg. Sess.; Ariz. S.B. 1280, 36th Leg., Reg. Sess. (1983); Cal. A.B. 3771, 1981-82 Reg. Sess.; Cal. A.B. 365, 1981-82 Reg. Sess.; La. S.B. 175, 1983 Reg. Sess.; La. S.B. 224, 1976 Reg. Sess.; Mich. H.B. 4114, H.B. 4178, H.B. 4179, 1983 Reg. Sess. (Three bills in favor of surrogate regulation, introduced by Rep. Fitzpatrick, D-Battle Creek, Mich., were defeated by a vote of approximately 80-85 of the 110 member House); Mich. H.B. 4207, 1983 Reg. Sess.; Mich. H.B. 5184, 1981 Reg. Sess.; Mich. S.B. 4207, 1983 Reg. Sess.; Mich. S.B. 63, 1983 Reg. Sess. (The latter bill, introduced by Senators Binsfield, Arthurhartz, DeGrow, Cruce, Gast, Engler, A. Cropsey & H. Cropsey, The Committee On Health and Social Services, passed the Senate and is currently pending in the House. Telephone interview with Senator Binsfield's staff (Jan 31, 1984).); S. Car. H.B. 3491, 1982 Reg. Sess.; S. Car. H.B. 2098, 1982 Reg. Sess. Maryland and South Dakota are two other states which have also introduced legislation concerning surrogate parenting.

Aside from the obvious moral and psychological considerations deterring the practice, surrogate motherhood is a financially costly⁶⁸ and potentially illegal procedure. Additionally, with so many alternatives such as surgical treatment for the infertile female⁶⁹ or possibly *in vitro* fertilization⁷⁰ if the problem is blocked Fallopian tubes, or even embryo transplant, surrogate motherhood really may be more of a last resort.

To date, not one state has a statute specifically sanctioning surrogate contracts.⁷¹ Other states have disapproved of the practice as evidenced by proposed legislation,⁷² court cases,⁷³ and attorney general opinions.⁷⁴

Avery, Surrogate Mothers: Center of New Storm, U.S. News & World Report, June 6, 1983, at 76.

68. Surrogate arrangements cost more than adoption and as much as six times more than *in vitro* fertilization. The going rate is \$10,000 to \$15,000 for the surrogate mother plus medical and other expenses plus attorney and broker fees. Fenly, "The Baby Broker": California Psychologist Specializes in Arranging "Pregnancy by Proxy," The Times-Picayune/The States Item, Aug. 26, 1982, § 5, at 9, cols. 3-5. See also Avery, *supra* note 67 (The total bill to the couple can run as high as \$45,000.).

69. For explanation of new laser surgery techniques used to enhance the possibility of pregnancy, see J. Bellina, J. Voros, A. Fick & J. Jackson, Management of Endometriosis with the Carbon Dioxide Laser & Danazol (unpublished manuscript) (available from Omega Institute Laser Research Foundation, 3439 Kabel Dr., New Orleans, La. 70114).

70. Dr. Lewis notes that surrogate mothering was a phenomenon which existed before *in vitro* fertilization was a realistic alternative, and that the more readily available and technologically feasible *in vitro* fertilization becomes, the more demand for surrogate motherhood will decline and perhaps become obsolete. Lewis interview, *supra* note 33.

71. See *supra* note 67.

72. Mich. S.B. 63, 1983 Reg. Sess. (This bill passed the Senate and is pending in the House. Telephone interview, *supra* note 67. Cf. Ohio Rev. Code Ann. § 5103.17 (Page 1981) (prohibiting "any person or organization not licensed as a child placing agency from . . . (1) the solicit[ing] of a woman to become artificially inseminated with the sperm of a man who remains anonymous to them for the purposes of the woman bearing children and surrendering possession of the children and all parental rights to such men and their spouses." La. S.B. 175, 1983 Reg. Sess. (proposing to make a third party guilty if he knowingly participates in the act of selling a child). Senator Newman, the author of the bill, explained that "the bill will establish guidelines for parties to actions involving the selling of unborn children, surrogate mothers, or adoptions. Senator Jefferson moved that Senate bill 175 be reported favorable as amended, and without objections it was so reported." Minutes of Meeting, La. Senate Comm. on Judiciary (May 24, 1983).

73. *In re Baby Girl*, 9 Fam. L. Rep. (BNA) 2348 (1983) (Evidence that the mother of a child was married and had contact with her husband created a *conclusive presumption* that mother's husband was the father. Motion by mother and husband to terminate parental rights denied.); *Syrkowski v. Appleyard*, 122 Mich App. 506, 333 N.W.2d 90 (1983) (Court ruled that it had no jurisdiction under the Michigan Paternity Act to establish contracting father's biological link to a child conceived through a surrogate contract.); *Doe v. Kelley*, 106 Mich App. 169, 307 N.W. 2d 438 (1981) (Appellate court properly granted summary judgment where the plaintiffs contemplated entering into an agreement to pay \$5,000 plus medical expenses to a third party to have a child.). But see *Kentucky v. Surrogate Parenting Associates, Inc.*, 10 Fam. L. Rep. (BNA) 1105 (1983) (Court ruled that since the sperm donor in a surrogate arrangement already had a natural and legal relationship with the child, the adoption statutes are not applicable and the proscription against payment for adoption was not violated.).

74. Enforcement of Ohio Rev. Code § 5103.17, 83-0010 Ohio Op. Att'y Gen. (1983)

One difficulty is that the surrogate mother agrees to give up any resulting child for adoption by the natural father and his partner. This has been noted as a difficulty in states which prohibit private adoptions, except to stepparents or relatives.⁷⁵ However, in support of the practice, the argument may be made that the natural father *is* a relative and his wife would be the analogous step-parent.⁷⁶

Yet, even in states allowing private adoptions by non-relatives, the validity of surrogate contracts is in question if these arrangements are deemed against public policy.⁷⁷ Some contend that such contracts are detrimental to the family unit by injecting third parties into the private marital sector of procreation, while others condemn the practice as one which treats children like property and women like incubators subject to economic coercion.⁷⁸ Additionally, the agreement by a mother to surrender custody of her child is considered by some as abandonment⁷⁹ which may

("R.C. 5103.17 absolutely prohibits a person or group from acting to separate a child from the child's parents, without reference to whom the child will be given."); Surrogate gestation contracts, 83-162 Okla. Op. Att'y Gen. (1983); see also Okla. Stat. Ann. tit. 21, §§ 865-869 (West 1983) (prohibiting trafficking of children: "That one of the prospective adoptive parents would also be a biological parent does not alter the fact that a surrogate agreement interjects compensation in an adoption agreement beyond the expenses specified."). The Louisiana Assistant Attorney General in a response to a question posed by Rep. Robert R. Waddell stated that

R.S. 14:286, Sale of a minor child is not violated if the adopting parents pay only actual parental care & living expenses of the surrogate mother and her actual living and medical expenses for thirty days after birth. There may be no payment to a "middleman" or "broker" except for fees charged by licensed non-profit adoption agencies.

Letter from Rene Saloman, Ass't Att'y Gen., on behalf of William J. Guste, Jr., Att'y Gen., to Rep. Robert P. Waddell (Oct. 18, 1983) (Responding to Rep. Waddell's inquiry whether surrogate arrangements would be in violation of La. R.S. 14:286—Sale of a Minor Child). Surrogate motherhood contracts were declared illegal by Kentucky's Attorney General in 7 Fam. L. Rep. (BNA) 2246 (1981) (Att'y Gen. Beshear asserted that surrogate motherhood agreements were contrary to Kentucky's strong public policy against buying and selling children.). But see *Kentucky v. Surrogate Parenting Associates, Inc.*, 10 Fam. L. Rep. (BNA) 1105 (1983).

75. Conn. Gen. Stat. §§ 45-63, 63a (1981); Del. Code Ann. tit. 13, § 904 (1981); Ga. Code Ann. § 19-8-3 (1982); Mass. Ann. Laws ch. 210, § 2(A) (Michie/Law. Co-op. 1981); Mich. Comp. Laws Ann. § 710.51 (West Supp. 1983-1984); Minn. Stat. Ann. § 259.22 (West 1982).

76. The Status of Ohio Law Relative to Surrogate Mother Arrangements: Report to Members of Ohio Gen. Assembly (May 19, 1983).

77. See La. Civ. Code art. 1895 (stipulating that contracts are not permitted if they are *contra bonos mores*). The proposed Project of Titles III and IV of Book III of the Civil Code of Louisiana contains a similar provision. See La. State Law Inst., Revision of Book III, Titles III and IV of the Louisiana Civil Code art. 1968 (1983).

78. See generally Krimmel, *supra* note 64, at 35. See also Fenly, *supra* note 68, § 5, at 9, col. 1 (Opponents at a "surrogates' seminar" held in December of 1981 accused potential surrogates of hiring out their bodies and planning "premeditated abandonment.").

79. Fenly, *supra* note 68, § 5, at 9, col. 1; Speed the Probe on Buying Babies, Toronto

provide the basis for a tort suit on behalf of the surrendered child.⁸⁰

Proponents of surrogate contracts argue that couples have a constitutionally protected right to privately arrange their procreation.⁸¹ Yet some states may prosecute participants for adultery.⁸² Even if that hurdle is overcome, opponents insist that the right to procreate does not extend protection to those who agree to accept payment for the carrying of a child.⁸³ However, even if the agreement involves no compensation to the surrogate, it may still raise legal issues when the contract is breached and a party looks to the state for relief. In that case, the public policy argument could result in no relief to the aggrieved party.⁸⁴

However, even without a breach, surrogate contracts have been condemned as illegal—possibly as prostitution,⁸⁵ but more commonly, as baby buying. In many states, it is criminal to enter into contracts in which money or other consideration is given in exchange for the surrendering of a child.⁸⁶ Exceptions are made for the payment of medical expenses incurred by a natural mother who places her child for adoption.⁸⁷ When

Star, Feb. 18, 1983, at 6, col. 1 ("[W]hen the child is born and the surrogate mother ups and leaves the hospital without it, the hospital authorities may—as they did in Metro's first surrogate case last summer—claim that the baby has been abandoned and call the Children's Aid Society.").

80. Rushevsky, *supra* note 5, at 127 & n.157 (citing Commonwealth ex rel. Teitelbaum v. Teitelbaum, 160 Pa. Super. 286, 290, 50 A.2d 713, 715-16 (1947)).

81. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). See *supra* text accompanying notes 43-46.

82. See *supra* text accompanying notes 24-25.

83. Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

84. In Louisiana, even if the arrangement was purely gratuitous and made with formality, see La. Civ. Code art. 1773, a court might conclude that the *cause* is unlawful if the enforcement of the *cause* were deemed contrary to moral conduct or public order. La. Civ. Code art. 1895.

85. Rushevsky, *supra* note 5, at 112. n.39. The payment of the fee for use of the body is the analogy.

86. Louisiana has such a provision, which provides in pertinent part:

A. Except as provided a by law, it shall be unlawful to sell or surrender a minor child to another person for money or anything of value, or to receive a minor child for such payment of money or anything of value.

La. R.S. 14:286(A) (West Supp. 1984). Cal. Penal Code § 273 (West 1970); Mich. Comp. Laws Ann. § 710.54 (West Supp. 1983-1984); Ohio Rev. Code Ann. § 3107.10 (Page 1980); Okla. Stat. Ann. tit. 21, § 866 (West 1983). See also Rushevsky, *supra* note 5, at 115 n.63, (citing Ariz. Rev. Stat. Ann. § 126 (1979)); Colo. Rev. Stat. § 18-6-402 (1977); D.C. Code Ann. §§ 32-782, 32-785 (1979); Fla. Stat. § 63.212 (1980); Iowa Code Ann. § 600.9 (West 1980); Ky. Rev. Stat. Ann. 3 199.590 (Baldwin 1980).

87. La. R.S. 14:286(B) provides:

B. Nothing in this Section shall be construed to prohibit any person contemplating adopting a minor child, not yet born, from paying necessary, actual prenatal care and living expenses of the mother of the minor child adopted, nor of paying necessary, actual living and medical expenses of such mother or child for a reasonable period of time, not to exceed thirty days, after the child is born.

See also statutes cited note 86 *supra*.

the Michigan statute prohibiting such payment was recently challenged on constitutional grounds, the Michigan court of appeals in *Doe v. Kelley*⁸⁸ upheld the statute, which the court said does not prohibit the having of the child through the surrogate procedure, but which does preclude the couple "from paying consideration in conjunction with their use of the state's adoption procedures."⁸⁹ Similarly, attorney general opinions in Oklahoma,⁹⁰ Louisiana,⁹¹ and Kentucky⁹² indicate that surrogate contracts are violations of the baby buying or trafficking statutes. Despite the attorney general's opinion in the latter state, representatives of the Kentucky corporation of Surrogate Family Services, Inc., contend that such contracts may be upheld if the fee paid by a man to a woman who bears his child is not to induce her to place the child for adoption, but instead to secure her agreement to voluntarily terminate her parental rights to the child.⁹³ Additionally, it is argued by proponents of the surrogate contracts that there is a big distinction between the sale of a black market baby for which a troubled pregnant woman who never planned her pregnancy is manipulated, and the deliberative decision of a surrogate mother who willingly agrees to become impregnated in order to help an infertile couple.⁹⁴

The fact that the surrogate agreement is reached prior to the child's conception may involve another legal obstacle. For in some states, a parent is prohibited from terminating parental rights to the child,⁹⁵ or surrendering the child for adoption⁹⁶ prior to the fifth day after the child's birth.

Another difficulty with surrogate contracts is that they usually involve brokers who profit from the arrangements. For example, a California psychologist who specializes in arranging surrogate contracts estimates the cost to an infertile couple at \$20,000 to \$30,000, depending on whether the natural mother has health insurance. She acknowledges her cut to be \$9000, mostly to pay for psychological testing and legal fees.⁹⁷ The argu-

88. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

89. *Id.* at 441.

90. Surrogate Gestation Contracts, 83-162 Okla. Op. Att'y Gen. (1983).

91. Letter from Rene Soloman, Ass't Att'y Gen., on behalf of William F. Guste, Jr., Att'y Gen., to Rep. Robert R. Waddell (Oct. 18, 1983).

92. Surrogate Motherhood Contracts Declared Illegal by Kentucky A.G., 7 Fam. L. Rep. (BNA) 2246 (1981).

93. Brophy, A Surrogate Mother Contract to Bear a Child, 20 J. Fam. L. 263, 264 (1981-1982).

94. Andrews, Removing the Stigma of Surrogate Motherhood, 4 Fam. Advoc. 21, 44 (Fall 1981).

95. Ky. Rev. Stat. Ann. § 199.500 (Baldwin 1982) (prohibiting an adoption when the mother's consent is given before the fifth day after the child's birth).

96. La. R.S. 9:422.6 (Supp. 1984). See *In re CDT*, 415 So. 2d 315 (La. App. 2d Cir. 1982) (An act of surrender was deemed ineffective since it was executed prior to the child's birth.).

97. Fenly, *supra* note 68, § 5, at 9, col. 1.

ment is raised that the introduction of an intermediary alters the privacy of the arrangement and weakens the parties' position of a constitutionally guaranteed right.⁹⁸ A recent Ohio attorney general's opinion⁹⁹ has deemed intermediaries, unlicensed by the Department of Public Welfare as placement agencies pursuant to state statute,¹⁰⁰ as prohibited by statute¹⁰¹ from arranging surrogate contracts. Although not passed by the Louisiana House of Representatives, a recent senate bill¹⁰² proposed to expand the crime of surrendering minors to include as perpetrators not only those who surrendered the child or paid for the surrendering, but also any person who knowingly participates in the act of selling a child.¹⁰³

Although opinions have been rendered on the illegality of surrogate contracts under current laws, and although bills attempting to regulate these agreements have been considered,¹⁰⁴ no states have sanctioned, outlawed or regulated the arrangements by specific legislation. Should a state overcome public policy arguments which would prohibit these contracts outright and decide to regulate them instead,¹⁰⁵ a number of decisions must be made. For example, who shall be eligible to enter into such contracts? A South Carolina bill requires that the sperm donor be married¹⁰⁶ and that the surrogate have already given birth to at least one child.¹⁰⁷ A California bill requires that the recipients of the child prove their infertility prior to being eligible to contract this arrangement.¹⁰⁸ In

98. See Rushevsky, *supra* note 5, at 112.

99. Enforcement of Ohio Rev. Code § 5103.17, 83-001 Ohio Op. Att'y Gen. (1983).

100. Ohio Rev. Code Ann. § 5103.03 (Page 1981).

101. Ohio Rev. Code Ann. § 5103.17 (Page 1981).

102. La. S.B. 175, 1983 Reg. Sess.

103. Minutes of Meeting, Senate Comm. on Judiciary (May 24, 1983).

104. See *supra* note 67. A proposed Michigan anti-surrogate act, Mich. S.B. 63, 1983 Reg. Sess., is the only bill that is still alive. After having passed in the state senate, it is still pending in the Michigan House of Representatives. All of the other bills introduced in various states have been defeated.

105. For newspaper articles calling for legislation on surrogate motherhood, see Rejected: An Absence of Legal Guidelines Leaves Surrogate Babies Adrift, *Detroit Free Press*, Jan. 25, 1983, at 6A, col. 1; Surrogate Moms: State Law Should Be Brought in Line with the Times, *Detroit Free Press*, Feb. 13, 1983, at 2B, col. 1; Surrogate Bill a Necessity, *Lansing State Journal*, Jan. 25, 1983, at 6A, col. 1, A Surrogate-Motherhood Nightmare, *Atlanta Const.*, Jan. 31, 1983, at 10A, col. 1; Babies for Sale, *Greensboro News*, Feb. 17, 1983, at 1, col. 1; Law Must Protect Baby Doe, *El Paso Times*, Feb. 15, 1983; Speed the Probe on Buying Babies, *Toronto Star*, Feb. 18, 1983.

106. S. Car. H.B. 2098 & H.B. 3409, 1982 Reg. Sess.

107. *Id.* This requirement is designed to minimize the occasions in which a surrogate would want to keep the resulting child. The rationale is that a woman who has already had a child will be more apt to understand the ramifications of, and have less psychological problems with, surrendering the child after birth. It should be noted that the bill does not require the surrogate to have had a live birth or living children. A married woman who has experienced a still birth could conceivably have serious psychological problems in a surrogate arrangement.

108. Cal. A.B. 3771, 1982 Reg. Sess.

Michigan,¹⁰⁹ California,¹¹⁰ and South Carolina,¹¹¹ the bills require a full psychological study of the potential recipients to ensure that the child will ultimately be placed in a good home.¹¹² Although all of these provisions may be rationalized as in the best interest of the child and thus compelling, constitutional arguments might be raised by those prohibited from participating. For example, the cohabiting couple who do not opt for marriage may argue a denial of privacy in procreative matters.¹¹³

Not only must legislation trod entirely new ground in many areas, it also must accommodate conflicts between the surrogate mother concept and already existing law. For example, the legal presumption common in many states is that the husband of the mother is presumed to be the father of any children born during a marriage.¹¹⁴ That presumption must be overcome for the natural father in a surrogate arrangement to be recognized as the legal father. Such was the conflict in two recent cases involving surrogates. In *Syrkowski v. Appleyard*,¹¹⁵ the parties entered into a surrogate mother contract. Prior to the resulting child's birth,

109. The Michigan bill provides that:

A person who has a certificate of registration as a marriage counselor, a licensed psychologist, a licensed physician who is a psychiatrist, or a qualified employee of a licensed child placement agency has counseled the natural father and his spouse on the consequences and responsibilities of surrogate parenthood and believes that the natural father and his spouse both fully understand these consequences and responsibilities, and are prepared, in the professional judgment of the person or agency to assume these responsibilities.

Mich. H.B. 4114, 1983 Reg. Sess.

110. Cal. A.B. 3771, 1982 Reg. Sess. Section 7505 states in pertinent part: "(a) the petition shall include . . . (b) evidence of the ability of the infertile couple to care for the child. . . [including] (c). . . a report recommending approval of the petitions has been submitted by an agency approved by the court to conduct a home study of the infertile couple." Note that the California bill requires review of the criminal record as well. Perhaps such a clause was precipitated by a newspaper account which indicated that one child was born to a woman who was inseminated with sperm from the California Nobel Sperm Bank. The woman had lost custody of children of a previous marriage after her husband was accused of child abuse, and both the woman and her husband had served federal prison terms in connection with a scheme to use identity records of dead children and others to secure credit cards and bank loans. Nobel-Sperm Bank Mother Lost Children Because of Abuse, *The Times-Picayune/The States Item*, July 14, 1982, § 1, at 5, col. 1.

111. Section 20-7-3670 of the South Carolina bill provides: "(A) upon filing of all pleadings for surrogate adoption, the court *must* order an investigation . . . (B) [which] must consider (5) the mental & physical health of the wife and the natural father. . . . [D] the judge must review the report prepared. . . [and if] the report recommends surrogate adoption . . . The judge, within ten days after receipt of the report, must enter an order certifying the stability of the wife and the natural father. . ." S. Car. H.B. 2098, 1982 Reg. Sess.

112. This is analogous to the studies conducted on adoptive parents.

113. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

114. La. Civ. Code art. 184 provides that "the husband of the mother is presumed to be the father of all children born or conceived during the marriage." For a general discussion of the common law presumption of legitimacy, see Note, "Children Born of the Marriage"—Res Judicata Effect on Later Support Proceedings, 45 Mo. L. Rev. 307 (1980).

115. 122 Mich App. 506, 333 N.W. 2d 90 (1983).

Syrkowski filed a complaint requesting an order of filiation pursuant to the Michigan Paternity Act¹¹⁶ and the entry of his name as natural father on the child's birth certificate. Mrs. Appleyard admitted the allegations and also requested an order of filiation. The Attorney General of Michigan intervened, alleging that the circuit court had no jurisdiction over Syrkowski's action under the Paternity Act since a "surrogate mother" arrangement was involved. Instead, the Attorney General argued that Mr. Appleyard was the legal father of the child since he consented to his wife's artificial insemination.¹¹⁷ Syrkowski replied by submitting Mr. Appleyard's revocation of consent to the insemination. Refusing to reach the issue of whether surrogate mother contracts were against public policy, the appellate court concluded that the relief requested by Syrkowski was beyond the scope of the Paternity Act and thus not within the court's jurisdiction.¹¹⁸

A Kentucky circuit court in *In re Baby Girl*¹¹⁹ similarly denied the request of the husband of a surrogate mother who wished to terminate parental rights and transfer custody of the child to the biological father. Although the child had already been surrendered to the biological father who had left the state, the court refused to recognize the biological father as the legal father, rationalizing that a child born in wedlock was presumed to be the legitimate child of the mother and her husband. Since the mother was married and had been in contact with her husband during the possible time of conception, the presumption was deemed conclusive and could not be overcome merely by an affidavit admitting the artificial insemination. Additionally, the court noted that, in violation of statute, no application had been made to the Cabinet of Human Resources of Kentucky for permission to place or receive the child for adoption. In Louisiana, any legislation sanctioning surrogate mother contracts would have to accommodate Civil Code article 188 which prohibits the husband of a mother from disavowing a child born as a result of artificial insemination to which he consented.

116. Mich. Comp. Laws Ann. § 722.714(f) (1968) (Paternity Act); Mich. Comp. Laws Ann. § 722.717(a) (filiation).

117. The Attorney General relied on Mich. Comp. Law Ann. § 333.2824(6) (1980), Mich. Stat. Ann. § 14.15 (2824)(6), Mich. Comp. Law Ann. 700.111(2) (1980), and Mich. Stat. Ann. 27.5111(2). Cf. La. Civ. Code art. 188 (precludes disavowal by the husband of a child born to his wife as a result of artificial insemination to which he has consented).

118. The court noted:

We view the surrogate mother arrangements with caution as we approach an unexplored area in the law which, without a doubt, can have a profound effect on the lives of our people. The courts should not be called upon to enlarge the scope of the Paternity Act to encompass circumstances never contemplated thereby. Studied legislation is needed before surrogate arrangements are recognized as proposed under the facts submitted herein.

122 Mich. App. 506, 515, 333 N.W.2d 90, 94 (1983).

119. 9 Fam. L. Rep. (BNA) 2348 (Ky. Cir. Ct., March 8, 1983).

Once a state permits surrogate contracts, there still remains the task of drafting a detailed contract that anticipates the myriad of possibilities.¹²⁰ Legislation could mandate standards for all such contracts. Basically, the surrogate agrees to be inseminated by the donor's sperm, carry any resulting child, and then surrender the child to the donor in exchange for payment of medical expenses and a fee for the surrogate¹²¹ which generally is between \$5000 and \$10,000. Maximum fees could be set by state regulation.¹²² Proposed legislation may also provide for lost wages to the surrogate,¹²³ and the possible requirement that the sperm donor post a bond in favor of the state securing support to the child should the donor be unable to support the child for any unforeseen reason.¹²⁴ Additionally, a donor might be required to name the child as beneficiary on a life insurance policy as additional security for the child.¹²⁵

A well drafted surrogate contract should anticipate remedies in the event of a breach by one of the parties. For example, what if the surrogate has sexual intercourse with her husband during the potential conception period? Such was the case in the recently publicized case of *Baby*

120. For a suggested surrogate contract, see Brophy, *supra* note 93.

121. For a discussion of the tax ramifications related to the payment of a surrogate fee, see Maule, *Federal Tax Consequences of Surrogate Motherhood*, 60 *Taxes* 656 (1982).

122. Mich. H.B. 5184, 1981 Reg. Sess., section 95: "The department shall establish . . . a maximum fee for compensation of a surrogate. The maximum fee shall be reviewed every two years . . . [and] shall not be less than \$10,000.00." The 1983 Michigan Bills did not contain a maximum fee provision. See also S. Carolina's 1982 proposed legislation:

Prior to the entry of a final decree of surrogate adoption, the natural father and his wife must file with the court a sworn statement describing money or other consideration or thing of value paid to or exchanged by any party in the surrogate adoption proceeding. . . . The court must approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

S. Car. H.B. 2098, 1982 Reg. Sess.

123. Michigan's 1983 bill provided for payment of lost wages. "[A] written surrogate parenthood agreement may contain . . . expenses incurred for . . . the surrogate's loss of work time." Mich. H.B. 4114, 1982 Reg. Sess. This was a change from Rep. Fitzpatrick's 1981 proposed legislation which provided that payment of surrogate expenses "shall not include any expenses for lost wages of the surrogate or other nonrelated incidentals, unless specifically enumerated within the agreement." Mich. H.B. 5184, 1981 Reg. Sess. South Carolina's House Bill 3491 and House Bill 2098, which appear to have been modeled after Michigan's 1981 legislation, also do not provide for lost wages unless specifically enumerated in the agreement. S. Car. H.B. 2098, & H.B. 3491, 1982 Reg. Sess.

124. Mich. H.B. 4114, 1983 Reg. Sess. ("[T]he natural father shall file a surety bond . . . to indemnify this state for any cost up to \$100,000.00 incurred by the state for the care of a child born to a surrogate . . .").

125. Cal. A.B. 3771, 1982 Reg. Sess., § 7506 ("A contract approved . . . shall include, but shall not be limited to . . . (d) The provision of term life and health insurance for the surrogate and infertile couple for such term and in such amounts as shall be determined by the parties to the contract."). See also Brophy, *supra* note 93, at 275 (contract provision § VII); *Pregnancy by Proxy*, *Newsweek*, July 7, 1980.

Doe in Michigan,¹²⁶ in which Mrs. Stifers, the surrogate mother, delivered a microcephalic child. Blood tests confirmed that the child was that of the surrogate and her husband, who had breached their agreement to refrain from sexual intercourse during the period immediately prior to her artificial insemination. The breach resulted in a suit by Malahoff, the man contracting for the services. Malahoff sought \$30,000 in damages for breach of contract. Additionally, the Stifers indicated they were contemplating suit against the doctor performing the insemination,¹²⁷ claiming they followed the latter's instructions. In order to alleviate the possibility of a donor receiving a child who is not genetically his, the surrogate contract should require blood tests and other necessary medical tests to confirm the biological paternity of the child.¹²⁸

Another problem area involves the care exercised by a surrogate during her pregnancy. Contracts should stipulate restrictions as to smoking, drinking, drug consumption, and strenuous activity, since all of these could potentially affect the child. The question still remains as to the remedy if the surrogate breaches the agreement. Should amniocentesis be required to discover any defects?¹²⁹ If the child is defective, the issue of causation arises. If it could be proven that the surrogate contributed to the defect, should the donor still be required to keep the child?¹³⁰

Assuming there is no question of a defect, but that the surrogate mother changes her mind and decides to terminate her pregnancy, what relief is available to the sperm donor? Since the services rendered by the

126. *Baby Doe Goes Home*, N.Y. Times, Feb. 3, 1983, at 16, col. 1.

127. *Id.*

128. See Mich. H.B. 4114, § 8, 1983 Reg. Sess. ("(1) Not later than 24 hours after the birth of a child born to a surrogate, the natural father, the surrogate, the surrogate's husband if the surrogate is married, and the child shall submit to procedures necessary for the performance of blood or tissue typing tests which tend to establish the paternity of the child."). See also Brophy, *supra* note 93, at 274.

129. See Brophy, *supra* note 93. For example, Michigan Rep. Fitzpatrick's proposed 1983 bill requires the surrogate to agree to "reasonable medical instructions regarding her prenatal health and the prenatal health of the fetus." But note that the "agreement shall not be construed to require the surrogate to abort the fetus." Mich. H.B. 4114, 1983 Reg. Sess.

130. See Mich. H.B. 4114, 1983 Reg. Sess. (Section 4: "(1) A natural father and his spouse shall assume, upon birth, all parental rights and responsibilities for a child, *regardless of the condition of the child.*") (emphasis added). But note that the bill does provide that the natural father may contest paternity by blood tests and tissue typing. In the event that the court determines that the natural father is not the father of the child born to the surrogate, "[t]he surrogate's consent to the termination of her parental rights. . . shall be considered void, and the surrogate shall assume parental rights and responsibilities for the child," Mich. H.B. 4114, 1983 Reg. Sess. These provisions were presumably included after the controversy which arose out of the *Baby Doe* case. See *supra* text accompanying notes 126-27. See also Brophy, *supra* note 93, at 282 (section XXI: "The natural father assumes the legal responsibility for any child who may possess congenital abnormalities and he has been previously advised of the risk of such abnormalities.").

surrogate are extremely personal in nature,¹³¹ and since the case of *Roe v. Wade*¹³² would protect the surrogate's right, absent waiver, to abort during the first trimester of pregnancy, specific performance to carry the child to term would not be available.¹³³ However, the donor might be able to obtain relief in the form of damages for infliction of mental distress.¹³⁴

Likewise, if the surrogate carried the child to term, but decided to keep it, no specific performance could be required.¹³⁵ A custody battle would then result between the two natural parents, the surrogate and the sperm donor. Although the father's position may be strengthened by recent cases involving father's rights to illegitimates,¹³⁶ and joint custody statutes,¹³⁷ most courts would be reluctant to take a child of tender years from the mother.¹³⁸

An even bigger problem might arise if the donor and the surrogate refuse to take the child, either because the child is defective or the parties simply change their minds. Although the child might be financially secure if the donor is required to support the child or if the donor has executed a bond¹³⁹ or life insurance policy¹⁴⁰ in favor of the infant, no legislation could alleviate the potential damage to the unwanted child who would not be welcomed by either parent.

Although attempting to accommodate for these potential problems may tempt legislatures to completely outlaw surrogate contracts, two major deterrents to this approach exist. First is the cited constitutional ques-

131. See Restatement (Second) of Contracts § 341 (1981).

132. 410 U.S. 113 (1973).

133. But see Cal. A.B. 3771, 1982 Reg. Sess. (section 7511: "Upon breach of contract that is subject of a petition approved pursuant to this part the court may grant such legal and equitable relief as it deems appropriate, *including specific performance.*") (emphasis added).

134. Restatement (Second) of Torts § 46 (1965).

135. See *supra* notes 131 & 133.

136. *Stanley v. Illinois*, 405 U.S. 645 (1972).

137. La. Civ. Code art. 245, as added by 1983 La. Acts, No. 215, § 1 (effective Sept. 1, 1983):

In a proceeding where custody of an illegitimate child formally acknowledged by both parents is sought by both parents, and in proceedings for change of custody after an original award, custody shall be awarded in accordance with Article 146. For purposes of this article, any reference in Article 146 to children of the marriage shall be deemed to apply to an illegitimate child formally acknowledged by both parents.

138. *Fulco v. Fulco*, 259 La. 1122, 254 So. 2d 603 (1971) (legislatively superseded by La. Civ. Code art. 157); *Suire v. Jagneaux*, 422 So. 2d 572 (La. App. 3rd Cir. 1982); *Deese v. Deese*, 387 So. 2d 671 (La. App. 3d Cir.), cert. denied, 393 So. 2d 740 (La. 1980); *Meyers v. Meyers*, 324 So. 2d 562 (La. App. 1st Cir. 1975), writ. not considered, 329 So. 2d 453 (La. 1976).

139. See provision in Michigan House Bill 4114, *supra* note 124.

140. See *supra* note 125.

tion involving the analogy of the process to artificial insemination donor. Second is the argument that the arrangements will go underground, leaving even less protection for the parties and, most importantly, for the resulting child.

IN VITRO FERTILIZATION

The birth of Louise Brown in England on July 25, 1978 awakened the world to a new human procreative possibility—*in vitro* fertilization, or conception outside of the mother's body.¹⁴¹ Shortly thereafter, *in vitro* clinics were established in Norfolk, Virginia and in Australia,¹⁴² the former of which announced the birth of the first *in vitro* baby in the United States on December 28, 1981.¹⁴³ By the end of 1982, about twenty clinics in the world were capable of *in vitro* fertilization.¹⁴⁴ Although there is only one such clinic currently operating in Louisiana,¹⁴⁵ it is anticipated

141. See P. Soupart, Present and Possible Future Research in the Use of Human Embryos: Abortion and the Status of the Fetus 67 (1983) (July 25, 1978, Oldham, England—first *in vitro* fertilization birth (girl); Oct. 3, 1978, Calcutta, India—second birth (girl), similar procedure with one more technical step (cryopreservation); Jan. 14, 1979, Glasgow, Scotland—third birth (boy) (most significant academic birth because birth of a male rules out possibility of accidental activation of human ovum, possible due to extra-corporeal manipulations); June 23, 1980, Melbourne, Australia—fourth birth (girl)).

142. See Comment, In Vitro Fertilization: New Territory For the Preconception Tort, 5 GMU L. Rev. 169, 169 (1982); R. Dickey, S. Taylor, D. Curole & B. Bordson, The First In Vitro Fertilization Pregnancy in Louisiana (1983) (unpublished manuscript) (available from The Fertility Institute of New Orleans, Suite 118, 9830 Lake Forest Blvd., New Orleans, Louisiana 70127).

143. Annas & Elias, In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family, 17 Fam. L.Q. 199, 202 (1983).

144. These include several clinics in England; two clinics in Melbourne, Australia—Monash University & Royal Women's Hospital; one team in Vienna, Austria; two teams in Paris, France; three in Germany; one in Holland. The U.S. teams include: two in California, two in Texas, one in Connecticut and one in Virginia. Machol, In Vitro Fertilization: The Work Continues, 19 Contemporary OB/GYN 40, 40 (1982). See also Center in Chicago is Midwest's First for Test-tube Babies, The Times-Picayune/The States Item, Dec. 22, 1982 § 1, at 16, col. 1 (Chicago's Mount Sinai Hospital); Double-Header is Reported by test-tube clinic, The Times Picayune/The States Item, Sept. 1, 1982, § 1, at 6, col. 1 (citing among those previously mentioned, Vanderbilt University, University of Oklahoma at Tulsa, and Hillcrest Medical Center clinics). Since 1982 other clinics have opened in the United States, notably including one in Louisiana. See *infra* note 146. For other new *in vitro* clinics, see In New Haven, a New Kind of Baby Boom, N.Y. Times, Feb. 27, 1983, § 23, at 2, col. 1 (Yale, New Haven, Conn.); State's First In Vitro Clinic Opens, N.Y. Times, May 8, 1983, § 6, at 1, col. 1 (Middlesex General-University of Medicine, New Jersey).

145. An application for a certificate of need was made to the Louisiana Division of Health Planning and Development, Department of Health and Human Resources, in December of 1982 to construct facilities for *in vitro* fertilization at Pendleton Memorial Hospital in New Orleans to operate in conjunction with the privately owned Fertility Institute of New Orleans. After approval was received on January 3, 1983, construction of facilities began in April of 1983. R. Dickey, S. Taylor, D. Curole & B. Bordson, *supra* note 142, at 1. See also Woman Is First in State to Carry Test-Tube Baby, The Times-Picayune/The States

that more *in vitro* facilities will be available in New Orleans shortly.¹⁴⁶

The *in vitro* process involves the surgical removal of one or more human eggs or oocytes from the mother's ovary by placing a small needle into the egg follicle.¹⁴⁷ The egg is then placed in a culture medium for nourishing and subsequently fertilized by sperm in a petri dish.¹⁴⁸ For several days, the fertilized egg remains in incubation in an environment simulating the mother's womb and when it reaches the eight cell embryo or blastocyst stage, coinciding with the normal time of implantation, it is transferred into the mother.

One of the major reasons for considering *in vitro* fertilization is to bypass damaged or blocked Fallopian tubes, the latter being the cause of sterility in forty to fifty percent of all infertile women.¹⁴⁹ Without removing the egg and allowing it to be fertilized outside of the mother's body, no pregnancy could occur, since the ripe egg would never be able to pass through the blocked tubes to the uterus where it could unite with sperm for fertilization. Although microsurgical techniques may be used

Item, Sept. 27, 1983, § 1, at 13, col. 1. But note that the first 'test-tube' baby born in Louisiana was conceived through Baylor University's Program in Houston, Texas; State's First Test-Tube Baby Born, The Times-Picayune/The States Item, Mar. 11, 1984, § 1, at 20, col. 3.

146. Dickey interview, *supra* note 33. Both Tulane, under the direction of Ian H. Thorneycroft, Ph.D., M.D., and Louisiana State University Medical School, anticipate opening *in vitro* fertilization clinics in the near future. Lewis interview, *supra* note 33; Roniger interview, *supra* note 33.

147. Patient Information: In Vitro Fertilization & Embryo Transfer Program—Baylor College of Medicine & St. Luke's Episcopal Hospital (available from Baylor IVFET Program, Dep't of Obstetrics & Gynecology, Baylor College of Medicine, 1200 Moursund Ave, Houston, Texas 77030). [hereinafter cited as Baylor Patient Information]. See also R. Dickey, S. Taylor, D. Curole & B. Bordson, *supra* note 142, at 3. Although the process may be done vaginally, Doctor Unveils Another New First in "Test-tube" Fertilization Techniques, The Times-Picayune/The States Item, Sept. 4, 1982, § 2, at 2, col. 1, the surgical removal is more common and is considered safer. Dickey interview, *supra* note 33. The mother is placed under general anesthesia and a laparoscopy is performed. The latter involves an incision in the patient's abdomen and the insertion of a magnifying instrument, or laparoscope, which permits the surgeon to better view the reproductive organs. For more information concerning oocyte harvesting, see Machol, *supra* note 144, at 40-51; see also Lopata, Johnston, Hoult & Speirs, Pregnancy Following Intrauterine Implantation of an Embryo Obtained by In Vitro Fertilization of a Preovulatory Egg, 33 Fertility & Sterility 117 (1980) (providing a detailed description of the actual technique used which resulted in the birth of Candice Elizabeth Reed in Australia, June 23, 1980).

148. Biggers, In Vitro Fertilization, Embryo Culture and Embryo Transfer in the Human, in Ethics Advisory Board, Appendix, *supra* note 21, § 8 at 2; see also, R. Dickey, S. Taylor, D. Curole & B. Bordson, *supra* note 142, at 4. The term "test-tube" baby is a misnomer in that although the egg that is removed is first placed in a test-tube to transport it from operating room to the laboratory, the actual conception takes place in the petri dish where the sperm are introduced into the process.

149. Biggers, *supra* note 148, at 35; Soupart, *supra* note 141, at 68.

to restore Fallopian tubes, that process involves a risk of ectopic pregnancies.¹⁵⁰

Another reason for considering *in vitro* fertilization is that the male partner may have a low sperm count. Generally, a man is considered oligospermic if he has fewer than twenty million sperm per milliliter.¹⁵¹ Since a number of sperm may be lost in the trip from the vagina to the uterus, the placement of sperm in direct contact with the egg in a petri dish enhances the chance of fertilization.

The medical, ethical, and legal ramifications of *in vitro* fertilization were considered carefully by the Ethics Advisory Board, a Board created on recommendation of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.¹⁵² In response to a request for federal funding of a study of *in vitro* fertilization by Dr. Pierre Soupart of Vanderbilt University in 1977,¹⁵³ the Board conducted a year and a half study, culminating in a report to the Secretary of the Department of Health, Education, and Welfare.¹⁵⁴ The report approved of federal funding of the process as long as embryos which were not transferred back into the mother's womb were not sustained any longer than fourteen days after fertilization and that embryo transfer only be attempted with gametes obtained from lawfully married couples.¹⁵⁵

Added to misgivings about the unnatural aspect of *in vitro* fertilization¹⁵⁶ are concerns about the protection of any resulting fertilized eggs and when that protection begins. Related to the complicated question of when life begins, the attitudes concerning regulation of *in vitro* fertilization are extremely diverse. If life begins at conception,¹⁵⁷ then

150. Soupart, *supra* note 141, at 69. Dickey interview, *supra* note 33. J. Bellina, J. Voros, A. Fick & J. Jackson, *supra* note 69 (In cases of mild-to-moderate and severe-to-extreme, post operatively there was a 3% ectopic pregnancy rate.).

151. Short, *supra* note 21; Mishell, *State of the Art—What Can We Offer Patients?*, 20 *Contemporary OB/GYN* 219 (1982).

152. For a discussion of the Ethics Advisory Board's role, see generally Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation*, 35 *Sw. L.J.* 973, 984-85 (1982).

153. *Id.* at 977.

154. *Id.* at 985 (citing Ethics Advisory Board, U.S. Dep't of Health, Educ. & Welfare, *Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization & Embryo Transfer* 107 (1979) [hereinafter cited as *Ethics Advisory Board, Conclusions.*]).

155. *Id.* Secretary Harris left office without approving of the process, and the Ethics Advisory Board has since been disbanded. Robertson, *supra* note 1, at 426 n.58.

156. Kass, *Making Babies—The New Biology and the Old Morality*, 26 *Pub. Interest*, at 32 (Winter 1972).

157. See generally Lorio, *supra* note 152, at 979-80 (discussing how the various religious denominations view the practice of *in vitro* fertilization). See also *Vatican Is Frowning on Test-Tube Babies*, *N.Y. Times*, Sept. 3, 1982, at 3, col. 1. The proposal for the *in vitro* clinic in New Orleans was submitted to the Catholic Archdiocese. Although no written approval was received, Dr. Dickey reports that the Archdiocese deemed the program "compatible with their own feelings" and "permissible." Television interview with Richard P.

no egg should be injured or destroyed once fertilized. This mandates that any egg removed in the *in vitro* process and fertilized be returned to the mother's body after maturing to blastocyst stage. This raises doubt concerning a technique used by some physicians in order to enhance the possibilities of pregnancy. By administering hormones to the mother, superovulation, or the production of more than one mature egg during any menstrual cycle, results. If all the mature eggs are fertilized (multiple fertilization), serious problems arise when there are too many eggs to transplant back into the mother. Since the mother could only successfully carry a certain number of fetuses to term,¹⁵⁸ the remaining fertilized eggs must either be frozen or destroyed. To remove too many eggs in an attempt to enhance the chances of pregnancy is thus arguably callous to the potential *conceptus*.

Even if conception is not regarded as the beginning of life, there is general agreement that a fertilized egg is human in origin and due some protection although not necessarily the same protection provided for persons.¹⁵⁹ One difficulty here is that federal regulations relating to fetal research¹⁶⁰ define the fetus as "the product of conception from the time of implantation."¹⁶¹ Additionally, most state statutes regulating fetal experimentation appear to apply only to fetuses beyond the blastocyst stage.¹⁶² Therefore, there is a void in regulation for the period between fertilization and transferral of the embryo to the carrier's uterus for implantation.

Dickey, M.D., at Pendleton Memorial Methodist Hospital, New Orleans, Louisiana (Feb. 19, 1984) (available from Channel 6, News-Watch/NewsMaker, 520 Royal St., New Orleans, La. 70130).

158. Dr. Dickey only removes three to four eggs and reimplants every egg that is removed. Dickey interview, *supra* note 33. See also P. Dickey, S. Taylor, D. Curole & B. Bordson, *supra* note 142, at 4; Woman First in State to Carry Test-Tube Baby, *The Times-Picayune/The States Item*, Sept. 27, 1983, § 1, at 13, col. 1; Lorio, *supra* note 152, at 978 n.44. Dr. Martin Quigley of the Houston *in vitro* project stated that he removes only two eggs from the mother, and if both are successfully fertilized, both are reimplanted. Telephone interview with Martin Quigley, M.D. (Sept. 23, 1981).

159. Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer*, Ethics Advisory Board Appendix, *supra* note 21, § 2, at 6. *Roe v. Wade*, 410 U.S. 113 (1973) (stating that "person" does not include the unborn).

160. 45 C.F.R. § 46.201-211 (1983).

161. *Id.* Definition of Fetus is found at § 46.203(c).

162. It is unclear in most state statutes regulating federal experimentation whether the statutes are meant to protect *ex utero* blastocysts. Flannery, Weisman, Braverman & Lipsett, *Legal Issues*, in Ethics Advisory Board, Appendix, *supra* note 21, at 6. The following states have statutes dealing with fetal experimentation: Ariz. Rev. Stat. Ann. §§ 36-2301 to 36-2303 (West Supp. 1983-1984); Ark. Stat. Ann. §§ 82-434 to 82-442 (1976 & Supp. 1983); Cal. Health & Safety Code § 25956-25957 (West Supp. 1984); Ill. Ann. Stat. ch. 38, §§ 81-26 (Supp. 1983-1984); Ind. Code Ann. § 35-1-58.5-6 (West 1979); Ky. Rev. Stat. § 436.026 (Bobbs-Merrill 1975); La. R.S. 40:1299.35.13, 40:1299.35.18 (Supp. 1984) La. R.S. 14:87.2 (1974); Me. Rev. Stat. Ann. tit. 22 § 1593 (1981); Mass. Ann. Laws ch. 112, § 12 J (Michie/Law. Co-op. 1984); Mich. Comp. Laws Ann. §§ 333.2685 - 333.2692 (1980); Miss.

Another problem arises if eggs are removed and fertilized with every intention of returning them to the mother, but are unable to be transferred due to the mother's death or some other unforeseen difficulty.¹⁶³ Although these fertilized eggs could be frozen for a period, the question remains as to where they should be implanted. One possibility is embryo transfer to a different woman.¹⁶⁴ However, besides the myriad of ethical ramifications, the problem of finding a willing and suitable carrier exists.

The Illinois Abortion Law of 1975, as amended, does have an *in vitro* provision which states that "[any] person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for purposes of section 4 of the Act to Prevent and Punish Wrongs to Children."¹⁶⁵ The statute defines human being as "the individual from fertilization until death,"¹⁶⁶ and the law is not to be construed to apply to "participation in the performance of a lawful pregnancy termination."¹⁶⁷ The constitutionality of the statute was challenged by an infertile married couple wishing to conceive by *in vitro* fertilization, and by the wife's gynecologist, in the case of *Smith v. Hartigan*.¹⁶⁸ Due to irreversibly damaged Fallopian tubes, Mrs. Smith was unable to conceive naturally. She was advised by Dr. Lifchez that her only alternative was *in vitro* fertilization. Although he stood ready and willing to aid in the process, he refused due to his perception that the Illinois statute prohibited the activity. Lifchez noted that he would not implant a defective conceptus since it would not survive, but most likely spontaneously abort. Plaintiffs' contentions

Code Ann. §§ 41-39-1 to 41-39-3. (1981); Mo. Ann. Stat. § 188.037 (1983); Mont. Code Ann. §§ 50-20-108, 50-20-112 (1983); Neb. Rev. Stat. §§ 28-342, 28-346 (1979); N.M. Stat. Ann. §§ 24-9A-1 to -7 (1981); N.D. Cent. Code §§ 14-02.2-01 to -02 (1981); Ohio Rev. Code Ann. § 2919.14 (Page 1982); Okla. Stat. Ann. tit. 63, § 1-735 (West 1984); Pa. Stat. Ann. tit. 18, § 3216 (Purdon 1983); Pa. Stat. Ann. tit. 18, § 3216 (Purdon 1984); R.I. Gen. Laws §§ 11-54-1 to 11-54-2 (Supp. 1981); S.D. Codified Laws Ann. § 34-23A-17 (1977); Tenn. Code Ann. § 39-4-208 (1982); Utah Code Ann. §§ 76-7-310, 76-7-311 (1978); Vt. Stat. Ann. tit. 18, §§ 5224-5225 (Supp. 1982); Wyo. Stat. § 35-6-115 (1977). But see Ill. Rev. Stat. ch. 38, §§ 81-21 to 81-31 (West Supp. 1983-1984).

163. Dr. Dickey states that not only does he return all eggs back to the woman's womb, but also he does so as soon as possible, when the ovum has grown to a two to sixteen cell size. Dickey interview, *supra* note 33; Woman's First in State to Carry Test-Tube Baby, *The Times-Picayune/The States-Item*, Sept 27, 1983, § 1, at 13, col. 1.

164. Embryo "Donation" Criticized, *N.Y. Times*, Jan. 29, 1982, § 1, at 17, col. 1. To this author's knowledge, no mechanical incubator has been devised which could carry a child to term.

165. Ill. Rev. Stat. ch. 38, § 81-26(f) (West Supp. 1983-1984). See also Pa. Stat. Ann. tit. 18, § 3213(e) (Purdon 1983) (requiring all persons "conducting or experimenting in *in vitro* fertilization" to file quarterly reports with the Department of Health.).

166. Ill. Rev. Stat. ch. 38, § 81-22(8) (West Supp. 1983-1984).

167. Ill. Rev. Stat. ch. 38, § 81-26(7) (West Supp. 1983-1984).

168. 556 F. Supp. 157 (N.D. Ill. 1983).

that they were being deprived of their fundamental right to privacy and that the statute was vague in not specifying whose conduct was prohibited¹⁶⁹ were met by the Attorney General's reply that the statute was not meant to prohibit *in vitro* fertilization. As interpreted by the Attorney General and adopted by the court in its opinion, the provision was designed to prohibit "the wilful exposure of embryos to harm, [such] as by destructive laboratory experimentation."¹⁷⁰ Additionally, the defendants argued that the duty ceased upon reimplantation of the conceptus. The exception for termination of lawful pregnancy was cited as support for the propriety of the doctor's decision not to reimplant a defective embryo.¹⁷¹ Although the court noted that the only potential issue raised related to the technique of superovulation and subsequent multiple fertilizations,¹⁷² the plaintiffs did not indicate that the procedure would be conducted in that manner. Thus, the court denied the plaintiffs' motions for injunctive relief, dismissing the action for lack of subject matter jurisdiction.

Just as surrogate motherhood raises a number of contractual dilemmas, *in vitro* fertilization, being a delicate procedure, raises tort questions. As early as 1978, the issue of wrongful termination of an *in vitro* procedure was litigated in *Del Zio v. Manhattan's Columbia Presbyterian Medical Center*.¹⁷³ After fertilization, but prior to implantation, the resulting specimen was destroyed by the chief of obstetrics and gynecology at Manhattan without the consent of the gamete donors. The destruction was intentional because the doctor claimed that the procedure was not properly conducted and implantation would result in the mother contracting peritonitis, a potentially fatal disease.¹⁷⁴ Treating the case more as a property loss than wrongful death action,¹⁷⁵ a jury awarded Mrs. Del Zio \$50,000 for emotional distress suffered, with nominal damages to the husband for his loss.¹⁷⁶

Actually, most states would probably respond similarly since relief in wrongful death has traditionally been awarded only for viable or quick fetuses.¹⁷⁷ Interestingly, the Louisiana Supreme Court in *Danos v. St.*

169. The plaintiffs noted the "team" nature of the process. *Id.* at 160.

170. *Id.* at 161 (citing Defendant's memorandum at 9).

171. Defendants contended that "to determine that [a] five-to-seven day old, non-viable conceptus should not be reimplanted for any medical reason whatsoever is simply to participate in a lawful pregnancy termination." *Id.* at 161 (citing Defendant's Memorandum at 26).

172. *Id.* at 163.

173. No. 74-3588 (S.D.N.Y., filed Apr. 12, 1978).

174. Test-Tube Bereavement, *Newsweek*, July 31, 1978, at 70.

175. Katz, Legal Implications of In Vitro Fertilization and Its Regulation, in Ethics Advisory Board, Appendix, *supra* note 21, § 9, at 27.

176. 44 Fed. Reg. 35,033, 35,050 (1979).

177. See Lorio, *supra* note 152, at 998 nn.196 & 197. See also *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

*Pierre*¹⁷⁸ did not discuss quickness or viability in its recognition of a cause of action for wrongful death of a six month fetus due to prenatal injury. However, it is questionable whether Louisiana courts would be receptive to wrongful death actions for the loss of an eight-cell blastocyst.

Should there be a live child born defective due to negligence in the performance of the *in vitro* procedure, it is possible that courts might entertain the child's action for relief due to those prenatal injuries.¹⁷⁹ Since recent cases have allowed such relief even in preconception torts,¹⁸⁰ it is not unreasonable to expect relief when the negligence occurred after conception, even if prior to implantation.

The *in vitro* child born defective could also claim he or she is due relief under the concept of wrongful life. The argument is not that the *in vitro* procedure caused the defect, but that the doctor neglected to test for defects or failed to discover a problem soon enough for the parents to make a decision as to whether to continue with the process. After proving the existence of a duty owed, its breach, and the causation of the injury, the plaintiff in a wrongful life action has the difficult task of proving the extent of damages, that is, how much more valuable it would be to have never existed.¹⁸¹ Although states have not been favorably disposed to the theory that an absence of life is preferable to a life of deformity,¹⁸² there recently has been a breakthrough.

The California case of *Curlender v. Bio-Science Laboratories*¹⁸³ entertained a wrongful life action against a medical testing laboratory for improperly performed genetic testing. The court recognized a right by the resulting child born with Tay-Sachs disease to claim damages for pain

178. 402 So. 2d 633 (La. 1981).

179. Every state allows recovery by a child for prenatal injuries. W. Prosser, Handbook of the Law of Torts § 55 (4th ed. 1971).

180. See *Bergstreser v. Mitchell*, 577 F.2d 22, 25 (8th Cir. 1978) (recovery to infant for brain damages resulting from negligently performed caesarian section on mother prior to conception); *Jorgensen v. Meade Johnson Laboratories*, 483 F.2d 237 (10th Cir. 1973) (recognizing a cause of action against pharmaceutical company that manufactured pills taken by the mother prior to conception and allegedly altered chromosomal structure resulting in the birth of mongoloid twins); *Lazevnick v. Monroe County General Hosp.*, 499 F. Supp. 146 (M.D. Pa. 1980) (allowing plaintiffs to maintain their cause of action for damages where daughter was born with brain damage and partial paralysis due to hospital lab technician's negligent blood typing); *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (sustaining cause of action sustained against the hospital and doctor for negligently performed transfusion prior to conception). But see *Albala v. City of New York*, 54 N.Y.2d 269, 270, 429 N.E.2d 786, 787, 445 N.Y.S.2d 108, 109 (1981) (Court affirmed defendant's motion for summary judgment and stated that there was "no such action [as preconception negligence] . . . cognizable under our [New York] law.").

181. For a more through discussion of wrongful life actions, see Lorio, *supra* note 152, at 1001-04.

182. Actions for wrongful life and wrongful conception are specifically prohibited by statute in South Dakota. S.D. Codified Laws Ann. § 21-55-1 (Smith Supp. 1983).

183. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

and suffering to be endured during his lifetime and for pecuniary loss resulting from impaired functioning due to the disease.¹⁸⁴ Similarly, a federal district court in Texas granted relief to a child born defective due to the mother having contracted German measles during her pregnancy.¹⁸⁵ The defendant doctors who had failed to test the mother for the pregnancy when she had the measles were held liable for the child care and treatment, pain and suffering, and lack of potential employability.¹⁸⁶

Parents of a defective *in vitro* child might also seek relief in the form of a wrongful birth action.¹⁸⁷ Again, the claim is not that the physician caused the deformity, but that his negligence in testing or informing parents of the problem deprived the parents of the choice as to whether to embark on the *in vitro* procedure, or if already begun, whether to continue it. With *Roe v. Wade*'s recognition of the right of a mother to terminate her pregnancy in the early stages, the public policy argument against abortion weakened. More courts began recognizing the parents' right to maintain wrongful life actions, even when similar wrongful birth actions on behalf of the child had been rejected.¹⁸⁸

EMBRYO TRANSFER

On February 3, 1984, Dr. John E. Buster of Harbor-U.C.L.A. Medical Center announced the first human birth resulting from embryo transfer.¹⁸⁹ The baby born to a woman in her thirties who had been treated for infertility was genetically that of the woman's husband and an egg donor.

The process of embryo transplant involves the transfer of a fertilized egg into a womb. The initial fertilization could be performed *in vivo*—through either sexual intercourse or artificial insemination—or *in vitro*. If the fertilization occurs *in vivo*, the fertilized egg is removed from the donor's uterus after five days when it consists of approximately eighty to one hundred cells. The removal is by lavage, or "washing out," of the donor's uterus.¹⁹⁰

184. 106 Cal. App. 3d at 831, 165 Cal. Rptr. at 489-90.

185. *Scales v. United States*, No. A-79-CA-70 (W.D. Tex., filed June 9, 1981, amended June 12, 1981), rev'd, 685 F. 2d 970 (5th Cir. 1982).

186. *Id.* The case was reversed by the Fifth Circuit on jurisdictional grounds. The Fifth Circuit found that the child's claim was barred as a matter of law by the *Feres* doctrine which prohibits lawsuits brought by servicemen under the Federal Tort Claims Act when the injuries involved in the law suit arise out of activities incident to military services. 685 F.2d at 971.

187. For a more thorough explanation of wrongful birth actions, see Lorio, *supra* note 152, at 1005-08.

188. See the consolidated cases of *Becker v. Schwartz* and *Park v. Chessin*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

189. Success is Born for Embryo Transplant, *The Times-Picayune/The States Item*, Feb 4, 1984, § 3, at 15, col. 1.

190. Brotman, *Human Embryo Transplants*, N.Y. Times, Jan. 8, 1984, § 6 (Magazine), at 42; Soupart, *supra* note 141, at 75.

A number of various uses for embryo transfer have been contemplated. If a woman is unable to ovulate, or produces eggs which carry chromosomal defects, she could avail herself of embryo transfer and still experience pregnancy and childbirth. She could actually carry her husband's child, although she herself did not contribute the egg. Conversely, a woman who had no difficulty producing healthy eggs, but who either could not carry a child for medical reasons or chose not to do so for personal reasons,¹⁹¹ could have her fertilized egg transferred to a carrier until birth.

It has been suggested that this "prenatal adoption"¹⁹² would provide another option to women who were pregnant with an unwanted child. The woman who did want to carry the child to term would no longer have to abort, but could surrender the embryo to a willing carrier. The problem with this theory is that timing of the two women's cycles is so critical. Yet, with our computer age, available carriers could be kept "ready and waiting," or failing that, embryos could be frozen until a suitable carrier became available. The resulting child would be genetically that of the egg donor.

The legal problems raised by these combinations are analogous to those involving artificial insemination donor, and surrogate mother contracts. The first example of embryo transfer, in which an egg donated by a third party is fertilized, is quite similar to artificial insemination donor, but with a reversal of sex roles. The donation in this instance is that of an ovum, rather than of sperm. Just as with an artificial insemination donor, the genetic combination of a husband's sperm with a third-party donor's egg may be claimed to be adultery. However, using the artificial insemination donor model, this would not be adulterous unless the combination was achieved through sexual intercourse.¹⁹³

The question of parentage differs somewhat from that in artificial insemination donor due to the nature of the donations made by the parties. Whereas the male only contributes a gamete to the reproductive process, the female's contribution is that of both egg and womb. Legislation similar to artificial insemination donor statutes could sever the egg donor's duties and rights to the child after the embryo is removed from her body,¹⁹⁴ and the child could be deemed the carrier's child. Indeed, it is arguable

191. A great deal of controversy has arisen surrounding this motivation. The argument is made that a woman who chooses not to carry a child purely because it is inconvenient should not be permitted to avail herself of the process.

192. See *British Study Embryo Banks*, N.Y. Times, Feb. 11, 1982, § 1 at 26, col. 6.

193. See *supra* text accompanying notes 24 & 25.

194. E.g., Or. Rev. Stat. § 109.239 (1981) ("(1) such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and (2) a child born as the result of the artificial insemination shall have no right, obligation or interest with respect to such donor."). Other states which have similar donor-type provisions include California, Connecticut, Montana, Oregon, Texas, Washington, Wisconsin, and Nevada. For further discussion, see *supra* note 37 and accompanying text.

that the child would be more the carrier's than would be an analogous artificial insemination donor child as to the husband, since the carrier has at least performed part of the maternal role.

What was once known as the strongest presumption of the law,¹⁹⁵ that is, that the husband of the mother is the father of the child, is of limited utility. The ramifications if both the egg donor and the carrier are married should be considered. Statutes should clearly delineate the rights and obligations of the male partners. If a married egg donor changes her mind prior to embryo transfer, should her husband be deemed the father of the child? In Louisiana and other states, if he has agreed to her insemination by the sperm of the other women's husband, he would be deemed the father of the child,¹⁹⁶ absent a contrary provision in the law. Should the biological father wish to assert paternal rights, the question of dual paternity might arise.

Care in selecting ovum donors in embryo transfer is as important as the selection of sperm donors in artificial insemination donor.¹⁹⁷ Testing for diseases and chromosomal defects should be required of ovum donors.¹⁹⁸ Additionally, it might be advisable to set age restrictions for egg donors since maternal age is so closely linked to Down's syndrome and other chromosomal defects.¹⁹⁹ As with an artificial insemination donor, limitations on the number of egg donations might be considered in order to avoid incest problems.²⁰⁰

If a carrier contracts to provide a womb for the fertilized egg of another, problems similar to those involving surrogate mothers arise, such as guidelines for the surrogate's behavior during pregnancy and the establishment of remedies should she change her mind and decide to abort the child.²⁰¹ Unless her contract amounts to a waiver of her constitutionally protected right to privacy,²⁰² a carrier could abort a child that is not even genetically hers. This possibility of aborting a child could also arise if the lavage is unsuccessful in removing the fertilized egg.²⁰³

195. La. Civ. Code art 184. The Louisiana jurisprudence is replete with cases upholding the strength of this presumption. See, e.g., *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (La. 1952); *Mock v. Mock*, 411 So. 2d 1063 (La. 1982).

196. See La. Civ. Code art. 188.

197. See *supra* notes 47-53 and accompanying text.

198. Compare *supra* notes 52-53.

199. Chromosomal problems occur in the following frequency: women who are 20 years old have problems 1/1000; 30 years old, 1/500; 35 years old, 1/200; 40 years old, 1/50; 44 and over, 1/20. Dickey interview, *supra* note 33. See also Dickey, Patient Information, *supra* note 21, for breakdown between overall genetic abnormalities compared to Down's Syndrome.

200. See *supra* notes 54-57 and accompanying text.

201. See *supra* note 199.

202. *Roe v. Wade*, 410 U.S. 113 (1973).

203. The possibility of an unsuccessful lavage is noted to donors and their husbands in the screening process at UCLA. See Brotman, *supra* note 190, at 42.

Many opponents of embryo transplant are concerned about the commercial aspects of ovum or womb donation.²⁰⁴ Originally, it was contemplated that each ovum donor be paid fifty dollars a flush with a 200 dollar bonus if a fertilized egg was retrieved.²⁰⁵ Although the going rate for womb donors has not yet been an issue, the idea of receiving a fee for the use of one's body to incubate a child is manifest with public policy considerations. Many fear that in either donation, women, particularly poor women, will be exploited and demeaned.²⁰⁶

Opponents to the process are particularly concerned about the fact that Fertility and Genetic Research, Inc., in California has applied for a patent for the process. The patent application is for the catheter used in the lavage and for the method of using the instrument.²⁰⁷ Although other medical processes have been patented,²⁰⁸ the fact that the patent application for embryo transfer is backed by a corporation supports those alleging commercialization.²⁰⁹

CONCLUSION

The severance of sexual intercourse from the reproductive process raises innumerable legal questions, most of which are intricately related to social and ethical ramifications. Balancing the interests of participating parties, resulting children, and society is no easy task, since the protection of one group could be at the expense of another. Such an endeavor must, therefore, be approached with open minds and hearts.²¹⁰

Clearly, current legislation is inadequate to handle these new technologies which, if even imagined, were considered science fiction when

204. Schroeder, *New Life: Person or Property*, 131:5 *Am. J. Psych.* 541, 542 (1974). Note that the UCLA clinic put an advertisement in several community and college newspapers to get ovum donors: "Help An Infertile Woman Have a Baby: Fertile women, age 20-35 willing to donate an egg. Similar to artificial insemination. No surgery required. Reasonable compensation." Four hundred women responded, from which only 21 were selected as suitable.

205. Fleming, *New Frontiers in Conception: Medical Breakthrough and Moral Dilemmas*, N.Y. Times, July 20, 1980, § 6 (Magazine).

206. Ramsey, *Testimony on In Vitro Fertilization*, in *Ethics Advisory Board*, Appendix, *supra* note 21, § 7, at 3.

207. Brotman, *supra* note 190, at 42.

208. Lawrence G. Sucsy, Chairman of Fertility and Genetic Research, Inc., notes that eye, brain, and stomach surgical methods have been patented, as has a non-surgical way of reversing female sterilization. *Id.* at 47.

209. Betty Jane Anderson, Associate General Counsel at the American Medical Association, indicates that this is detrimental to the public as it restricts dissemination of medical procedures. *Id.* at 47.

210. In consideration of the ethical questions raised by *in vitro* fertilization, Richard A. McCormick, S.J., member of the Ethics Advisory Board, noted: "Some would say the child ought to be born out of an act of love, but sexual intercourse is not the only act of love in marriage." McCormick, *Ethical Questions: A Look at the Issues*, 20 *Contemporary OB/GYN* 227, 228 (1982).

existing laws were promulgated. Undoubtedly, childless couples will seek out these medical techniques in an effort to become parents. Thus, a blanket prohibition of the methods would probably be as successful as the alcohol experiment of the twenties; indeed, the goal of parenthood is presumably more innate.

The other extreme of *laissez-faire*, however, could ultimately prove equally disastrous. Today, as sperm donors may be selected through catalogues,²¹¹ and frozen embryo banks are being established,²¹² some consideration should be given to legislating boundaries for the procedures and regulating standards for currently existing practices. However, the fear of abuse must be tempered by sensitivity to the delicate personal interests involved.

211. "Specialty sperm banks" now exist with catalogues detailing the specific qualities of each donor. A couple wishing artificial insemination can examine a catalogue and choose a donor with characteristics that the couple would like their offspring to possess. Dickey interview, *supra* note 33. See also High-IQ Sperm Bank Yields Baby, *The Times Picayune/The States Item*, May 25, 1982, § 1 at 2, col. 5. The Repository for Germinal Choice was established in 1979 to make available the sperm of Nobel Prize winners and other creative, intelligent people.

212. Clinic May Produce Test-Tube Babies from Donated Eggs, *The Times-Picayune/The States Item*, July 7, 1983, § 1, at 6, col. 1 (Eggs would be obtained from women undergoing abdominal surgery. The eggs would be donated without payment.); British Study Embryo Banks, *N.Y. Times*, Feb. 11, 1982, § 1, at 26, col. 6 (A plan to set up frozen embryo banks prompted government investigation by Prime Minister Margaret Thatcher.).