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AUSTRALIA'S FROZEN 'ORPHAN' EMBRYOS: A MEDICAL, LEGAL AND ETHICAL DILEMMA

by George P. Smith, II*

I. INTRODUCTION: THE BACKGROUND AND THE ISSUE

The major news story of June 18, 1984, in Australia and around the world, was the discovery that two frozen embryos might well become, if successfully implanted in a surrogate mother, heirs to an estate left by the death of a husband and wife thought to be their biological parents.¹ The facts revealed that in 1981 Mario and Elsa Rios, from Los Angeles, California, participated in the *in vitro* fertilization program of Melbourne's Queen Victoria Medical Center.²

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¹ Hancock & Ford, *Frozen Embryo Orphans Heir to \$8m Estate*, The Australian, June 18, 1984, at 7, col. 7.

In 1983, Canberra, Australia, became the first place in the world where a human pregnancy resulted from a fertilized egg that had been frozen, thawed and implanted in the mother's womb. *Frozen Embryos Trigger Debate by Australians*, Wash. Post, May 17, 1983, at 1, col. 6. The cost of developing and maintaining an *in vitro* or test-tube baby program for seven years in order to produce Australia's first progeny was over one million dollars. Williamson, *Test Tube Births: An Uncertain Way Ahead*, The Nat'l Times, Feb. 7-13, 1982, at 12, col. 5.

² Essentially, the *in vitro* fertilization (IVF) process involves obtaining immature ova (or oocytes) from a woman's reproductive tract, placing them in a culture medium and then fertilizing them with sperm that itself has either been obtained normally from a donor bank or from the candidate's husband. Within several days after the conceptus has reached the blastocyst stage of development, it is transplanted (or transferred as a human embryo) into the genetic mother who produced the egg or, if she is unable to carry the conceptus, to a surrogate mother. See Leeton, Trounson & Wood, *IVF and ET: What It Is and How It Works*, in *TEST-TUBE BABIES 2-10* (W. Walters, P. Singer eds. 1982). See also Note, *The 'Brave New Baby' and the Law: Fashioning Remedies for the Victims of In Vitro Fertilization*, 4 AM. J. L. & MED. 319 (1978); *Hearings on H.R. 142 Before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology*, 98th

Then fifty years old and infertile, Mr. Rios allowed a local, anonymous donor from Melbourne to artificially inseminate three eggs from his thirty-seven year old wife; one was implanted and the other two were frozen for possible use in the future. Mrs. Rios subsequently miscarried and was not emotionally stable enough at that time to undertake further implantations. Before she could return and endeavor to use the other embryos, she and her husband died in a Chilean plane crash. Because no will was executed by the Rios', the California laws of intestate succession³ apply. Thus, Mr. Rios' son by a previous marriage is entitled to his father's share of the estate and Mrs. Rios' sixty-five year old mother takes her daughter's share.⁴

The central issues raised here are whether the two frozen embryos have a legal right to 1) live and be implanted in a surrogate mother, and, when and if they are born, 2) assert inheritance rights in the Rios' estate. Equally important is the question of the extent to which research into the new reproductive technologies should be allowed or restricted.⁵

II. THE COMMON LAW

Early in its development, the common law concept of quickening, especially as it was articulated in the criminal laws, was inextricably related to theology.⁶ While early Christian teaching stressed the sanctity of life from its beginning at fertilization, this particular view was modified subsequently and a distinction was made between an *embryo formatus* and an *embryo informatus*.⁷ Thus, life was regarded as commencing at the unborn infant's first movement in the womb, or when it quickened and was thus infused with a soul.⁸ Consequently, the early common law scholars maintained that only after the foetus quickened could its destruction be classified as murder.⁹

Cong., 2nd Sess. 35-41(1984)(testimony of Howard W. Jones, M.D.)(hereinafter cited as *Hearings*).

³ See CAL. PROB. CODE §§ 6401, 6402 (West 1985).

⁴ Wallis, *Quickening Debate Over Life on Ice*, TIME, July 2, 1984, at 68.

⁵ Lawson, Molloy, Jobson & Walley, *The Frozen Embryo Mystery: The Life and Strange Times of Elsa Rios*, THE BULLETIN, July 3, 1984, at 22 (Austl.).

⁶ Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of The Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20 (1984). See generally Smith, *Quality of Life, Sanctity of Creation: Palliative or Apeotheosis?*, 63 NEB. L. REV. 709 (1984).

⁷ Gavigan, *supra* note 6.

⁸ *Id.* at 21.

⁹ *Id.*

A. *The Australian Posture*

The multi-disciplinary Medical Research Ethics Committee of the National Health and Medical Research Council has reviewed divergent community views concerning both the moral and ethical status of foetuses and concluded that while the traditional legal position may be more definite in some regards,¹⁰ it is quite vague in other respects.¹¹ Nevertheless, it was concluded that prior to birth *and* separation from its mother, a foetus (or an embryo) has but potential or contingent civil legal rights, depending upon the particular stage of gestation, as well as limited protection under the criminal laws of abortion and child destruction.¹² Indeed, in an interesting judicial corollary, Sir Harry Gibbs, Chief Justice of The Australian High Court, ruled in March, 1983, "that a foetus has no right of its own until it is born and has a separate existence from its mother."¹³

B. *Imperfect Civil Rights and Inadequate Criminal Sanctions*

None of these imperfect, potential or contingent civil rights or inadequate criminal sanctions on abortion or child destruction have any application to a frozen embryo before implantation, for the law has refused to recognize the moment of fertilization as the point at

¹⁰ ETHICS IN MEDICAL RESEARCH INVOLVING THE HUMAN FETUS AND HUMAN FETAL TISSUE, ¶¶ 2.9-2.10 (Canberra, 1983).

¹¹ The essential controversy or ambiguity stems from a failure to define with precision who is a person, thus entitled to legal protection, and when an entity is recognized as dead. For example, is a separated viable foetus to be recognized legally as a "person"? Or, is a separated previable foetus to be considered a "person" if that foetus shows momentary signs of life after delivery even though it has no chance whatsoever of living independently due to its prematurity? Because of these uncertainties, the larger question is when does one become civilly or criminally liable for interfering with the life of such an entity. In the three Australian states of Queensland, Western Australia and Tasmania, legislation provides that a child is born "when it has completely proceeded . . . from the body of its mother." Bates, *Legal Criteria for Distinguishing Between Live and Dead Human Foetuses and Newborn Children*, 6 U.N.S.W.L. REV. 143, 145 (1983). Thus, for testing application of the laws of homicide, murder and manslaughter, one cannot be charged with a crime for destruction of an entity unless it is completely extruded from the body. *Id.*; Bates, *Foetal and Neonatal Life, Death and The Law*, 9 LEGAL SERVICES BULL., Feb.-Mar. 1984 at 41-43.

¹² *McKay v. Essex Health Auth.*, 2 W. AUSTR. R. 890 (1982); See Reagan, *Abortion and The Conscience of The Nation*, 9 HUM. LIFE REV. 7 (1983).

¹³ *State v. T.*, 57 AUSTR. L.J. REP. 285 (1983). This is essentially the same posture of the courts of the United States as a consequence of *Roe v. Wade*, 432 U.S. 464 (1977). *But see* M. TOOLEY, *ABORTION AND INFANTICIDE* (1983).

which legal rights are conferred.¹⁴ In two states of Australia, New South Wales and The Australian Capital (A.C.T.), there is authority to suggest that no legal protection is afforded the foetus until it has developed for a period of twenty-eight weeks.¹⁵ Judicial opinions in other states have suggested that the fourth or fifth month of pregnancy is the pivotal point at which full legal protection will be given a foetus.¹⁶

The Deputy Chairman of the New South Wales Law Reform Commission, a widely respected figure in the developing field of the new reproductive biology, has stated that any claims of the Melbourne "orphan" embryos against the Rios' estate are "fanciful."¹⁷ The Attorney General of the State of Victoria, agreeing with that position, stated that the embryos have no legal status of any nature. Furthermore, if they were successfully implanted and subsequently born, they would be the legal offspring of the surrogate "mother" and her husband.¹⁸ Interestingly, in 1979, the Ethics Advisory Board of the former United States Department of Health, Education and Welfare (now Health and Human Services) concluded that the human embryo was entitled to "profound respect." This entitlement, though, did not extend necessarily to a full recognition of the legal and moral rights belonging to human persons.¹⁹

Presently, absent a direction by the decedents before death, the

¹⁴ Lucas, *Abortion in New South Wales—Legal or Illegal*, 52 AUSTRALIAN L.J. 327-39 (1978). For a comparative analysis of the American and British posture, see Annas & Eilas, *In Vitro Fertilization and Embryo Transfer: Medico-Legal Aspects of a New Technique to Create a Family*, 17 FAM. L. Q. 199 (1983); Edwards & Steptoe, *Current Status of IVF and Implantation of Human Embryos*, THE LANCET, Dec. 3, 1983, at 1265.

¹⁵ Bates, *supra* note 11 at 42-43.

¹⁶ *Id.*

¹⁷ Hancock & Ford, *supra* note 1.

¹⁸ *Id.*; see Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639 (1983); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968).

¹⁹ See DEPT. OF HEALTH, EDUCATION & WELFARE, ETHICS ADVISORY BOARD, *Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer* (1979). While clinical work and studies of *in vitro* fertilization processes continue apace in the United States, there has been no federally supported research in this field since 1975 and prospects appear quite dim for such to be granted. Abramowitz, *A Stalemate on Test Tube Baby Research*, HASTINGS CENTER REP., Feb. 1984, at 5.

Rios embryos are the legal responsibility of the hospital where they are kept.²⁰

III. THEORIES OF RECOVERY

There are four possible legal theories under which considerations could be given, hypothetically, to the Rios' embryos. First, they could be viewed as personal property and pass by the intestate laws of succession to the heirs of the Rios' family, thereby allowing the heirs to do with the embryos as they wish. The difficulty here is that for embryos to be considered personal property, they must be recognized in the law as having an *economic* value.²¹ Such a determination is, at this stage, impossible to make.²²

Secondly, the embryos could be treated as though they were fully developed children and subject to the appointment of a guardian *ad litem* by a court in order to determine what would be in the "best interests" of the embryos *vis-a-vis* their implantation or destruction. Thirdly, since it is unlikely that the existing law would elevate the frozen embryos to a legal status of some type of "personhood," one could accept Mr. Chief Justice Gibb's previously stated position and regard the embryos as non-entities.

Finally, the Queen Victoria Hospital could be recognized as the constructive trustee for the deceased Rioses and, accordingly, be allowed to decide their fate. Constructive trusts, also referred to as implied trusts, do not arise because of the expressed intent of the settlor or settlors executing a formal trust. Rather, they are created by a court of equity or a court exercising equitable powers to prevent acts inconsistent with the perceived intention of the parties in question from occurring.²³

For two years, guidelines developed and approved by the National Health and Medical Research Council have existed in Australia to cover the ethical problems associated with *in vitro* fertilization programs. Guideline Seven specifically suggests that an upper time limit

²⁰ Hancock & Ford, *supra* note 1.

²¹ See W. RAUSHENBUSH, *THE LAW OF PERSONAL PROPERTY* §§ 1.5, 1.7 (3d ed. 1975).

²² *Id.*

²³ G.C. BOGERT & G.T. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* 287, 305 (5th ed. 1973).

be placed upon the storage of embryos based upon "the need or competence of the female donor."²⁴ Applied, then, to a *woman's capability* to conceive, it is obvious that at Mrs. Rios' death, her capability to conceive had ended and the two embryos could be destroyed. Interestingly, the Council, supported by the Australian Medical Association, endorsed in 1982 not only the use of *in vitro* fertilization as an acceptable scientific procedure to correct infertility in married couples, but also the use of donor eggs from women and the use of artificial insemination by anonymous male donors.²⁵

IV. THE SCOPE OF REMEDIAL ACTIONS: A COMPARATIVE VIEW

Central to any practical analysis of remedies available in the United States is a determination of the "rights" or "standing" of a conceptus, embryo or foetus. Presently, no standing, and thus no right of action, exists for such an entity within an *in vitro* fertilization procedure.²⁶ Yet, if one were to acknowledge that the foetus becomes a human being at the very instance of conception, then that entity would be entitled to the full protection of the law and able to seek legal redress should it be injured in some way upon actual birth.²⁷

If full personhood and the legal rights associated therewith are not conferred upon a conceptus, but recognition is given to the fact that such an entity is human in origin, and indeed, a potential human, the next step would be to decide the extent to which the rights of informed consent (here, of necessity, proxy consent) and the avoidance of pain, harm or suffering—such rights being due all subjects who participate in experimentations—are guaranteed to these "potential" persons.²⁸ Equally as formidable would be a determination of whether

²⁴ O'Neill & Hutton, *Advice Exists on Rios Embryos, Says Health Council*, The (Austl.) Age, July 4, 1984, at 10, col. 3.

²⁵ Sydney Sunday Telegraph, Nov. 7, 1982, at 6, col. 1. The South Australian government gave its approval in April, 1984, to the freezing of fertilized ova as part of its test-tube baby procedures. It specifically prohibited the use of frozen fertilized ova for scientific or genetic research and the practice of surrogate. Sydney Morning Herald, April 23, 1984, at 9, col. 5.

²⁶ See materials cited *supra*, notes 14-20.

²⁷ See generally Brown, *Legal Implications of the New Reproductive Technology*, in MAKING BABIES: THE TEST TUBE AND CHRISTIAN ETHICS 61-75 (A. Nichols, T. Hogan eds. 1984); *Hearings, supra* note 2, at 167-212 and 219-28 (testimony of Lori B. Andrews and George J. Annas).

²⁸ Carey, *Informed Consent by Participants: Who Participates? Who Consents?*, in TEST TUBE BABIES, *supra* note 2 at 64-70.

the rights and protections of personhood should be granted to the *in vitro* conceptus upon its implantation. Again, iron-clad or boiler-plate conclusions are not available simply because there is no unyielding legal, social, ethical or religious consensus on when life begins.

After recognizing this quandary, consideration must be given to the hapless fate of the excess fertilized eggs, since the normal procedure is to select only one egg for implantation.²⁹ For those respecting the human status of the fertilized egg, "death" through non-use or elimination is not acceptable. Obviously, the better approach would be to stop using hormones to induce super ovulation to recover a quantity of eggs for fertilization. Instead, one egg at a time could be retrieved during the woman's natural cycle to be used in the *in vitro* fertilization procedure.³⁰

Whether viewed as an experimental or therapeutic process, *in vitro* fertilization is, at each stage, fraught with hazardous consequences.³¹ Once fertilization is achieved *in vitro*, transplantation presents the central obstacle for the survival and growth of the conceptus.³² Some authorities maintain that the direct manipulation of the oocytes as well as the conceptus during the *in vitro* fertilization procedure

²⁹ *Hearings, supra* note 2, at 264-93 (testimony of Richard Marrs, M.D.).

³⁰ *Id.*; see also Henley, *IVF and the Human Family and the Likely Consequences*, in *TEST TUBE BABIES, supra* note 2, at 79-87.

³¹ See Edwards & Sharpe, *Social Values and Research in Human Embryology*, 231 *NATURE* 87 (1971).

³² *Id.* For example, the success-failure statistics of the Monash University project, (Melbourne, Australia) led by Professor Carl Wood (recognized as the "father" of IVF) through the Queen Victoria Medical Center and two private hospitals show for the years 1980 and 1981 the following:

	1980	1981
Number	158	251
Eggs fertilized	174	311
Embryos transferred	137	254
Pregnancies	17	28

To be remembered is the fact that not every pregnancy resulted in a live birth; a spontaneous abortion rate of between 25 and 50% was recorded. Taking the two years together, it was found that 11% of the patients treated became pregnant, of whom not less than 25% miscarried. Of the embryos transferred, about 11.5% began to develop *in utero*, again with a failure rate of not less than 25%. Thus, the effective rate, in terms of babies born, is thought to lie between six and eight percent. See Daniel, *The Morality of In Vitro Fertilization*, in *MORAL STUDIES* 47, 57 (T. Kennedy ed. 1984).

could result in a significant risk that defective births would result.³³ Nature can rectify many genetic errors in prospective newborns through spontaneous abortion. *In utero* examination techniques such as amniocentesis, together with the "freedom of choice" abortion on demand can also help to prevent the birth of severely defective children conceived through *in vitro* procedures. Spontaneous abortions, however, do not always occur to abort defective fetuses and amniocentesis is not capable of detecting a large variety of birth defects, while "freedom of choice" abortion is not a practical freedom for some.³⁴

When a physician-experimenter destroys an *in vitro* fertilized conceptus before implantation, either on his own or with the consent or by the direction of the parents, no criminal liability is imposed simply because the conceptus is destroyed *before* it is "viable" and hence no "person" is recognized as being in existence.³⁵ If a conceptus fails to survive because of inherent deficiencies with *in vitro* fertilization technologies, no civil liability is imposed, since presumably a full disclosure of the risks of such an undertaking was made to the participating parents, and their informed consent obtained.³⁶ Yet, it is conceivable that for a willful destruction of a conceptus by a participating experimenter, three causes of action might be pursued by the parents: breach of contract, intentional infliction of emotional distress or wrongful death.³⁷

In reality, owing to the experimental nature of the present *in vitro* fertilization technology, it is highly improbable that any experimenter would contractually guarantee the certain success of the procedure or warrant its total effectiveness. Neither would an action for emotional distress hold much opportunity for success, since it would be nearly impossible for the parents to demonstrate that the very process of *in vitro* fertilization is "outrageous," and that they

³³ Kass, *Making Babies—The New Biology and The "Old" Morality*, 26 PUB. INTEREST 27 (1972). See also Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?*, 285 NEW ENG. J. MED. 1174, 1178 (1971).

³⁴ Kass, *supra* note 33, PUB. INTEREST at 28-29.

³⁵ Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation*, 35 SW. L.J. 973, 996, 999 (1982); Cohen, *The "Brave New Baby" and the Law: Fashioning Remedies for the Victims of In Vitro Fertilization*, 4 AM. J. L. & MED. 319, 328-29 (1978).

³⁶ Cohen, *supra* note 35, at 329.

³⁷ *Id.* at 330.

in fact suffered from great emotional distress as a consequence of the destruction of their conceptus.³⁸ Since wrongful death actions are tied to proof of the death of a "person," and since the destruction of the conceptus would most likely occur *before* implantation, it is improbable that proof could be established regarding the viability of the conceptus in order to establish a cause of action for wrongful death.³⁹

An infant born of an *in vitro* fertilization process, but with a genetic deficiency or other abnormality, would be within his rights to sue the experimenter-physician and the participating hospital for negligence, specifically for damages caused by prenatal injury and for wrongful life. Pain and suffering damages could be awarded by asserting that, as a handicapped infant, he would have preferred no life at all to one of deformity.⁴⁰ The developing case law for the tort of wrongful life, however, is emerging slowly and erratically throughout the jurisdictions in the United States,⁴¹ as it is also with a wrongful birth action maintained by parents who assert conception would have been avoided or terminated if proper counsel had been provided concerning the attendant risks of a handicapped child being born.⁴²

³⁸ *Id.*

³⁹ Lorio, *supra* note 35, at 998. The very first action for wrongful termination of an *in vitro* fertilization procedure was filed in New York against Columbia Presbyterian Medical Center and Dr. Raymond Vandle Wiele by Dr. and Mrs. John Del Zio who claimed \$1.5 million in damages. Mrs. Del Zio was awarded \$50,000 for emotional distress. The relief was not awarded for the wrongful death of the fetus, but was a recognition of a loss of an interest akin to personal property. *Del Zio v. Manhattan's Columbia Presbyterian Med. Center*, No. 74-3588 (S.D.N.Y. Apr. 12, 1978).

⁴⁰ Lorio, *supra* note 35, at 999-1004.

⁴¹ See *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Curlender v. Bio-Science Labs.*, 106 Cal. App. 2d 811, 165 Cal. Rptr. 447 (1980). See also Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713 (1982); *Annas, Righting the Wrong of Wrongful Life*, 11 HASTINGS CENTER REP. 8 (1981); *Peters & Peters, Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 857 (1980).

The strongest argument against recognizing the tort of wrongful life is that a cause of action requires a child to plead that he would be better off had he never been born. Such an argument or position seems to run counter to, if not destroy, the traditional beliefs in the sanctity of all life. See G. SMITH, *GENETICS, ETHICS, AND THE LAW*, Ch. 4 (1981).

⁴² See *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

Finally, if a theory of strict liability were to be imposed for all *in vitro* fertilization procedures, with the experimenter-physician being held liable for any and all birth defects arising from his "abnormally dangerous" work, the maintenance of a suit by or on behalf of a child conceived through such procedures could be brought with relative ease.⁴³ Such a public policy declaration or pronouncement by the courts or legislatures would have a devastating effect on the *in vitro* fertilization process as a means of combating infertility and is not to be preferred as a means of meeting the challenges and problems of *in vitro* fertilization.

Traditional forms of relief in the United States—judicial precedent, legislative design and technological developments—may be used to develop over the course of time a sound strategy for meeting the challenges of this new reproductive biology. Given an absence of clear and unequivocal postures in Australian jurisprudence regarding the scope of liability for negligent medical malpractice and the recognition of the torts of wrongful life and wrongful birth,⁴⁴ Australia will be faced with a need for law reform in this area, hopefully to be achieved through the legislative process instead of by judicial design.

V. THE REFORM MOVEMENT

Since there appears to be no legal authority to prevent the fertilization of human eggs in a laboratory, private or otherwise,⁴⁵ and, given the growing realization that courtrooms are an improper forum for resolving complex philosophical dilemmas based on competing scientific and technological developments,⁴⁶ what remains for the future? Can an accommodation be reached along some humane, equitable or objective lines?

In early 1982, law reform activity in the field of the new reproductive biology began in earnest under the vigorous leadership

⁴³ Cohen, *supra* note 35, at 334.

⁴⁴ See Bates *supra* note 11. See also S. HAYES & R. HAYES, MENTAL RETARDATION: LAW POLICY AND ADMINISTRATION (1981).

⁴⁵ R. SCOTT, THE BODY AS PROPERTY 202 (1982). See also MONASH UNIV., CENTER FOR HUMAN BIOETHICS, PROCEEDINGS OF THE CONFERENCE, *In Vitro Fertilization: Problems and Possibilities* (Mar. 11, 1982, Melbourne, Australia).

⁴⁶ M. Kirby, *Foreword* to MAKING BABIES: THE TEST TUBE AND CHRISTIAN ETHICS at ix (A. Nichols, T. Hogan eds. 1984).

of Russell Scott of the New South Wales Law Reform Commission, who headed an advisory committee studying artificial insemination. A few weeks later, the Victorian government established a committee, subsequently designated the Waller Committee, chaired by Louis Waller, the distinguished Sir Leo Cussen Professor of Law at Monash University. The Committee's mandate was to investigate the problems arising from *in vitro* fertilization and donor gametes (the male sperm and female eggs). The Queensland government and that of Western Australia soon followed with similar research activities.⁴⁷

The Waller Report, *On the Disposition of Embryos, Produced by In Vitro Fertilization*, was released in mid August, 1984, in Melbourne, Australia, by the Attorney General of Victoria. The Waller Committee concluded that the disposition of stored embryos is not to be determined by the hospital where they are in fact stored;⁴⁸ that such embryos are not to be regarded as possessing legal rights or having rights to lay claim to inheritance;⁴⁹ and in cases where "by mischance or for any other reason, an embryo is stored which cannot be transferred as planned, and no agreed provision has been made at the time of storage . . . the embryos shall be removed from storage."⁵⁰ The Committee additionally held that embryos could be frozen⁵¹ and that experimental research "shall be immediate and in an approved and current project in which the embryo shall not be allowed to develop beyond the state of implantation, which is completed fourteen days after fertilizations."⁵² Some of the recommendations of the Committee will be incorporated in the Victorian government's *in vitro* legislative proposals for subsequent parliamentary adoption, while others will be open to further debate and study.⁵³

⁴⁷ Lawson, Molloy, Jobson & Walley, *supra* note 5, at 25.

⁴⁸ COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION (1984), at § 2.16.

⁴⁹ *Id.* at § 2.19.

⁵⁰ *Id.* at § 2.18. See *Orphaned Embryos May be Left to Thaw*, Sydney Morning Herald, Sept. 4, 1984, at 3, col. 1.

⁵¹ COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION (1984), at §§ 3.25-3.28.

⁵² *Id.* at § 3.29.

⁵³ See, *Victoria Will Bar Payments to Surrogate Mothers*, Sydney Morning Herald, Sept. 4, 1984, at 3, col. 2. What could be regarded as the British counterpart

The standing committee of Attorney-Generals of Australia has agreed on the desirability of working toward the development of a uniform code of legislation to cover *in vitro* fertilization and the legal status of children born through the use of donor semen or ova.⁵⁴ One can but guess whether a working consensus will ever be reached among the six state governments, thereby allowing for a uniform code of regulation. Terms such as "when life begins" must be agreed upon before any regulations can be written.

A. *A Reprieve or A New Beginning?*

Disregarding the recommendation of the Waller Committee regarding the Rios' "orphan" embryos, the legislature in the State of Victoria enacted a plan which directs that an attempt be made to have the embryos implanted in a surrogate and, if subsequent birth results, the child be placed for adoption.⁵⁵ Although restricted in application to the two Rios' embryos, the plan would have obvious repercussions for the future development of policy in this field.⁵⁶ Thus, any children resulting from the embryo implants would, under this new Victorian legislation, be taken to be the children only of the adoptive parents.⁵⁷ The extent, if any, to which the law of Victoria would impact upon a legal action in California would be quite speculative.

B. *Legislative Realities*

The New South Wales Parliament passed the Artificial Conception Bill, given Royal Assent on March 5, 1984, which states that

of the Waller Committee, the Warnock Commission, proposed a ban on surrogate mothers, yet concluded that embryo research should be permitted until the fourteenth day after fertilization when the first identifiable features of the embryo develop. TIME, Aug. 6, 1984, at 50. See THE WARNOCK COMMISSION, *Report of the Committee of Inquiry Into Human Fertilization and Embryology* (July 1984). See also Priest, *The Report of the Warnock Committee on Human Fertilization and Embryology*, 48 MOD. L. REV. 73 (1985).

⁵⁴ Lawson, Molloy, Jobson & Walley, *supra* note 5, at 25.

⁵⁵ *Australians Reject Bid to Destroy 2 Embryos*, N.Y. Times, Oct. 24, 1984, at A18, col. 3.

⁵⁶ Interview with Mr. Hayden Storey, the author of the Victorian legislation, on ABC's *Good Morning America* (Oct. 24, 1984) (stressing that his proposal had only specific application to the "special category" which the Rios' embryos enjoyed and that he anticipated no extension to other possible cases).

⁵⁷ Corns, *Legal Regulation of In Vitro Fertilization in Victoria*, 1984 LAW

a child born from *in vitro* fertilization where genetic material is provided by the husband and wife, or where semen is provided by a donor, will be deemed the child of the husband and wife. The same principles are also applied to de facto relationships. Yet, interestingly, the law does not cover children born as a result of an *in vitro* fertilization procedure using donated ova.⁵⁸

A partial legislative response to the confusion of the *in vitro* fertilization procedure has been posited by the Victorian Parliament. Read on March 20, 1984, before the Legislative Council, the Infertility (Medical Procedures) Bill of 1984 would, when enacted, legalize the *in vitro* fertilization procedure for married couples after a waiting period of anywhere from twelve to twenty-four months, during which time the couple is examined in order to determine whether these procedures are the only available means of achieving pregnancy. The couple is also counseled regarding the potential chances for success and failure. Provision is made to allow donor sperm, if the husband is infertile, or donated ova where the wife is incapable of producing eggs. As drafted originally, the proposal carries no declarations or protections for frozen embryos.⁵⁹

C. A Network of Safety

Sir Gustav Nossal has suggested that instead of cumbersome legislative restrictions on the use and development of new reproductive technologies, a "network of safeguards" already in place in some respects, simply needs to be tightened. Continuing public debate on the issue of scientific freedom versus governmental regulation is the focal point of the "network." Additional components include the further development of safety standards, self-regulating industrial guidelines and ethical codes and reliance upon the Common Law mechanism of "reasonable case" to shape and determine the extent to which experimentations and scientific investigations will be allowed. Finally, greater reliance upon national committees within the Ministry

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⁵⁸ Lawson, Molloy, Jobson & Walley, *supra* note 5, at 25.

⁵⁹ Address by J. Asche, *Conference on Ethical Implication in The Use of Donor Sperm, Eggs and Embryos in The Treatment of Human Infertility*, 57 LAW INST. J. OF VICTORIA 716-19 (1983). See Smith & Iraola, *Sexuality, Privacy and The New Biology*, 67 MARQ. L. REV. 263 (1984).

of Science and Technology for overseeing Australian research in this field is urged.⁶⁰

A noted American authority suggests action to be undertaken at three levels: the enactment of model state legislation which defines with clarity the identity of both the legal mother and father of all children, including those born to other than their genetic parents; the development and promulgation by concerned professional organizations of guidelines for sound clinical practice; and the establishment of a national body of various experts in law, medicine, science, ethics and public policy whose mandate would be to monitor on-going developments in the area, and to report to Congress on an annual basis regarding the desirability of specific legislative schemes and regulatory plans.⁶¹

VI. CONCLUSIONS

So long as the family is the focal point of society, legal and medical initiatives and safeguards must be explored in order to assure the very success of the family unit and to discover ways to neutralize if not stabilize the "unexpected." The Rios case is but a precursor or a paradigm of major problems to arise in the future as the challenges, hopes and frustrations of the brave new world visit themselves in full force. The legislative resolution of this particular case was both proper and reasonable. If change must occur, and indeed it must, it should be charted in the legislative assemblies where the conscience and the understanding of each region of the country may be codified as a response mechanism to the various developments in the new reproductive biology as they are tested and subsequently become the facts of life. Infertility as an impediment to family growth must be studied and, when feasible, arrested.⁶² It is only through

⁶⁰ Nossal, *The Impact of Genetic Engineering on Modern Medicine*, 27 QUADRANT 22-27 (Nov. 1983). See also Scott, *Test-Tube Babies, Experimental Medicine and Allied Problems*, 58 AUSTL. L.J. 405 (July 1984). Mr. Scott suggests the formation of a standing advisory committee charged with responding to the whole range of problems and which would be given the added responsibility of developing ethical guidelines in the form of codes of practice. He suggests that the Medical Research Ethics Committee of Australia is a strong beginning to resolving the problems in this field. *Id.* at 416.

⁶¹ Annas, *Redefining Parenthood and Protecting Embryos: Why We Need New Laws*, 14 HASTINGS CENTER REP. 50 (Oct. 1984).

⁶² See *The New Origins of Life: How the Science of Conception Brings Hope to Childless Couples*, TIME Sept. 10, 1984, at 46.

continued, cautious research into the process of *in vitro* fertilization that the family will be assured of its rightful privacy in society and the tragic circumstances of infertility met and resolved.

The Nossal approach is sound, but it can be strengthened by legislative and regulatory programs⁶³ of the design and nature of the present undertaking in Victoria which seeks to validate and control *in vitro* fertilization procedures. If a creative approach to problem resolution can be proffered here by drawing on the best elements of the Nossal approach and the law reform efforts being pursued presently, Australia will be able to boast of a full and active partnership between law and scientific medicine—with the legacy of such an undertaking redounding to the benefit of all mankind.⁶⁴

EDITOR'S NOTE:—*In a letter dated August 29, 1985, from Professor Louis Waller, Chairperson of the Law Reform Commission of Victoria, to Professor Smith, the current status of the Rios' "orphan embryos" was stated as remaining the same: they have not been transferred to a surrogate mother and are still stored at the Queen Victoria Medical Center in Melbourne, Australia. A copy of the letter is on file in the offices of the JOURNAL OF FAMILY LAW.*

⁶³ For an eloquent analysis of legislative, as opposed to judicial strengths in managing the problems of *in vitro* fertilization, see Address by M. Kirby, *IVF—The Scope and Limitation of Law*, presented in London, England, Sept. 1983, at The Conference of Bioethics and The Law of Human Conception—*In Vitro* Fertilization.

⁶⁴ See generally Smith, *Manipulating the Genetic Code: Jurisprudential Conundrums*, 64 GEO. L.J. 697 (1976). See also TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES AND FUTURE POSSIBILITIES (W. Walter & P. Singer eds. 1982).

