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Intimations of Life: Extracorporeality and the Law

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I. INTRODUCTION

A recent survey entitled, “Fecundity and Infertility in the United States: 1965-82,” undertaken by the National Center for Health Statistics, revealed that while infertility has remained fairly constant in recent years among married couples, overall a trend was detected among the young marrieds that found an eleven percent rate of infertility in 1982 for wives between the ages of twenty to twenty-four years; this compared with a previous rate of four percent for the same age group in 1965.\(^1\) The study also predictably found that problems of fecundity increased with age.\(^2\) Thus, for married women between the ages of thirty-five and forty-four who are childless, forty-eight percent were found to have encountered difficulties not only in conceiving but in carrying a fetus to term.\(^3\) Twenty-one percent of couples aged twenty-five to thirty-four encountered difficulties.\(^4\)

In early November, 1985, the National Committee for Adoption reported that even though past government surveys revealed that some two million married couples had expressed a desire to adopt children, largely because of infertility, the United States records only from 142,000 to 160,000 adoptions each year.\(^5\) The Committee also stated that since three-fifths of these adoptions involve either step-parents or other relatives assuming legal responsibility for a child already in a family, only approximately fifty thou-
sand babies remain in the market to satisfy the desires of the two million couples who wish to adopt.  

Economics of the critical baby shortage point dramatically to the need for society to actively pursue means designed to increase the opportunities for married couples to have children. One of these is through in vitro fertilization. If procreation continues to remain at the very center of a marital relationship and, indeed, family the essence of a society that retains its vitality, new and even controversial endeavors are necessary in order to assure this sort of marital fulfillment and societal success and, thus, perpetuation.

This article will study and evaluate the efforts of the state and the federal government to approach the problem of procreational autonomy and to resolve the perimeters of its recognition and application. In order to posit a framework for principled decision making, an analysis of the Australian and British efforts to deal with this problem, respectively, through their Waller and Warnock Commissions, will be undertaken together with a consideration of the famous case of Melbourne’s “orphan” Rios embryos where, for the very first time, the issue of excess fertilized embryos was presented.

The thesis to be postulated here is simple: namely, work with human in vitro fertilization must, under appropriate safeguards, continue. Obviously, a critical analysis—but by no means an exegesis—of the central ethical and constitutional issues involved here must precede this.

6. Id.


II. THE DILEMMAS

With the extracorporeal birth of Louise Brown in July, 1978, engendered outside her mother’s body by the process of \textit{in vitro} fertilization or IVF, an enormous medical achievement was recorded.\(^{11}\) The world’s first test-tube baby had been achieved and validated scientifically.\(^{12}\) In addition to this well known process of artificial conception, artificial insemination, embryo transfer, parthenogenesis, and surrogate motherhood should all be considered properly as within the ambit of the new reproductive technology\(^{13}\) and heirs to many of the concerns expressed over \textit{in vitro} fertilization as a process.\(^{14}\)

It has been calculated that, world wide, as of January, 1984, well over two hundred babies were born as a consequence of \textit{in vitro} fertilization and embryo transfer.\(^{15}\) In the United States alone, the American Fertility Society has reported that at least 125 clinics are operating presently or soon will operate which administer and supervise the \textit{in vitro} process.\(^{16}\)

The Society is currently attempting to develop certification systems for these centers, due to rising concern that unethical clinics as well as doctors and lawyers may take advantage of childless couples.\(^{17}\) Regardless of whether this new reproductive technology is condemned as unnatural and risky,\(^{18}\) violative of the personhood of the embryo,\(^{19}\) or recognized simply as a complex “moral morass,”\(^{20}\) it is rather obvious it will continue to be utilized as a means, albeit exceptional, to combat infertility.\(^{21}\) The question,
then, is what safeguards must be structured in order to allow principled decision-making here? More specifically, what degree of legal protection should be afforded the extracorporeal embryo? Obviously, it need not be considered a person in order to receive legal protections.\(^\text{22}\)

When an \textit{in vitro} fertilization allows for all the fertilized eggs to be replaced (through the process of embryo replacement) in the uterus of the original ovum donor, then the zone of protection question arises only for the actual embryo for a short time, specifically while it is \textit{in vitro}.\(^\text{23}\) The central concern is for the embryo’s safety from foreign organisms that might enter its controlled medical-scientific area due to carelessness on the part of a technician and threaten the normality of its subsequent development. In those cases where the embryos are not replaced, but frozen for future implantation or used for non-therapeutic or basic research efforts, the issue of the extent of legal protection is of considerable importance.\(^\text{24}\) In addition to the previously noted concern for the embryo’s safety, here an extended cryopreservative process presents an additional factor of the embryo’s “consent” to be used for non-therapeutic or genetic research efforts; if, that is, the frozen embryos are regarded as having a type of ethical or moral “rights.” Of further concern is the consent of the sperm and ovum donors to having their gametes used at a later date for a purpose other than implantation. It has been suggested that this latter issue could be resolved by allowing embryos to be frozen only when the informed consent of both gamete donors (e.g., the sperm and the egg donors) had been obtained and only with the specific stipulation they be used in a subsequent fertility cycle if an initial pregnancy is not obtained.\(^\text{25}\)


\(^{23}\) Id. at 51.

\(^{24}\) Id. \textit{See infra} note 87 and the case of Del Zio v. Manhattan’s Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y., April 12, 1978).

\(^{25}\) Id. \textit{See also}, Grobstein, Flower & Mendeloff, \textit{Special Report, Frozen Embryos: Policy Issues}, 312 NEW ENG. J. MED. 1584 (June 13, 1985); Auigley & Andres, \textit{Human In
Similarly, when a contemplated use of the embryo exceeds or deviates from the initial purpose of achieving a pregnancy (i.e., for research or genetic engineering purposes), should the informed consent of the gametes donors be required? In the event only one of them were living, would not he or she retain the decision making authority as to the intended use? Where both gametes donors have died, should the embryo be destroyed? Before studying what state and federal governments are actually undertaking to “regulate” the use of in vitro fertilization procedures and thereby protect the embryos used therein, it is wise to consider at this juncture the major ethical and moral dimensions of this issue.

III. The Ethical and Moral Dimensions

The ethical morality of in vitro fertilization is a deep and complex issue—certainly far beyond the basic purpose of this article. It is important for a complete understanding of the issues of the adoption and use of in vitro fertilization, however, to synthesize the major dimensions of this issue. These in turn shape constitutional posture regarding both the propriety and the regulation of certain new technological methods for creating human life. Obviously, no definitive conclusions can be proffered, particularly since the ongoing debate involves deeply held personal resolutions tied to highly personal beliefs and emotions.

A threshold ethical-moral issue is whether in vitro fertilization is a “natural” means of human reproduction or whether its separation of sex from procreation means it is inherently wrong. Does the conception of babies under laboratory conditions degrade parenthood and in turn negate the process of humanity, or does

26. See generally supra note 25.
27. Id.
28. Id.
31. But see, Fletcher, New Beginnings in Life: A Theologian's Response, in The Genetics and the Future of Man 78, 87 (M. Hamilton ed. 1972) where the author states his position that in vitro fertilization and embryo transfers are not only acceptable but preferable forms
it merely provide a solution to the tragic problem of infertility that afflicts such a growing number of married couples?\textsuperscript{31} Is there an absolute vested right, as a consequence of the marital relationship, to have a child at any and all costs?

A second concern is whether IVF may be morally wrong because it involves the risk of harm to an individual who is yet unborn.\textsuperscript{32} The anticipated harm (although not scientifically documented at this time) could be in the nature of a specific physical injury or abnormality resulting from the IVF procedure, or from the subsequent genetic mother's or birth mother's womb (in the case of a surrogate), or even from a psychological harm that might result to the child born of the total process.\textsuperscript{33}

Another ethical-moral concern is at what point in time should the product of conception gain protectable rights. If the fetus is ethically regarded as a human being at the moment of its conception (when the egg and sperm unite), it is due all human rights and may, accordingly, claim them through a duly appointed guardian.\textsuperscript{34} If, contrariwise, a blastocyst is not recognized as a person and not entitled to a conferral of "human rights" upon it, it has been suggested that it is a potential or "nascent" human being. Therefore, it should be given the right, as are all human subjects of experimentation, to exercise an informed consent (given here, obviously, by a proxy through its parents or a court appointed guardian) before being subjected to fetal research and experimentation.\textsuperscript{35} Query: would the average ordinary reasonable person ever consent to a scientific or medical intervention which might very well bring great pain and ultimate extinction? Using its \textit{parens patriae} pow-

\begin{itemize}
  \item \textsuperscript{31} See supra notes 1-6.
  \item \textsuperscript{32} Tiefel, supra note 29. See also, M. Tooley, Abortion and Infanticide 87-285 (1983).
  \item \textsuperscript{33} Tiefel, supra note 29.
  \item \textsuperscript{35} Kass, Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research and Embryo Transfer, Ethics Advisory Board, Dept. of Health, Education and Welfare, Appendix: H.E.W. Support of Research Involving Human In Vitro Fertilization and Embryo Transfer § 2 at 6 (1979). See also, McCormick, supra note 34.
\end{itemize}
ers, a state might well refuse to allow one of its citizens to participate in such a project. Thus, if the embryo is regarded as a potential person or mini-citizen, it could be argued that it could never be used or participate in such a non-therapeutic undertaking. Still, another contrary view could be that the ethical and human rights of a blastocyst only accrue to it when it is implanted. 36

This accrued rights issue becomes paramount to the matter of the (possible or potential) destruction of fertilized eggs. One of the major ethical-moral objections to the whole process in in vitro fertilization is the “unavoidable” loss through destruction of those eggs determined not to be the “best” one for implantation. If excess or spare embryos may not ethically be viewed as sources for genetic research and experimentation, they are at once discarded. 37

The resolution of this ethical conundrum is relatively simple: namely, instead of inducing superovulation which in turn allows for the recovery of a number of eggs and their subsequent in vitro fertilization, efforts could (and should) be undertaken to follow the natural cycle which results in the retrieval of one egg at a time for the process of fertilization and the subsequent embryo transfer to the genetic mother. 38

A final ethical objection of some to the IVF process is that it may lead to a “slippery slope.” 39 Stated otherwise, in vitro fertilization together with embryo transfer may lead to the unimpeded use of surrogate mothers as substitutes for the genetic mother; the dissolution of the family unit by single, unmarried women (or even lesbians) who no longer see any reason to marry or have sexual relations with a man, or even promote the development of artificial wombs (ectogenesis) whereby women no longer need to have “contact” with their children until after they are, so to speak, born. 40

It has been suggested that:

40. Id. See also, Scott, Legal Implications and Law Making in Bioethics and Experimental Medicine, 1 J. Contemp. Health L. & Pol’y 47, 59-60 (1985).
Even if *in vitro* fertilization would result in the birth of a child, the procedure arguably is not medically justified, in that it is not therapeutic even to the potential parents. Although it may allow an infertile couple to have a child, it has not cured the infertility. Yet, alternatively, if our society sanctions therapeutic abortion why not therapeutic conception.\textsuperscript{41}

IV. THE CONSTITUTIONAL VALIDITY OF REGULATION

The extent to which states may validly endeavor to regulate IVF procedures and embryo transfers depends upon whether these acts are viewed as fundamental rights. Thus, the threshold question is whether they are "rights" guaranteed implicitly by the Constitution as part of the "right to marital privacy."\textsuperscript{42}

Various United States Supreme Court decisions seem to grant "the right . . . to marry, establish a home and bring up children," as among those liberties granted by the fourteenth amendment.\textsuperscript{43} Based upon these cases, it could be argued that any state regulation of *in vitro* fertilization and embryo transfers would be blatant intrusion upon the fundamental right to marital privacy.\textsuperscript{44} Accordingly, "[I]f the decision to beget a child is a protected area of privacy, presumably the actual method of begetting also would be protected. Thus, any statute affecting this delicate area would have to serve a compelling state interest and must do so by the least restrictive means."\textsuperscript{45}

A more conservative analysis of the Supreme Court decisions in this area recognizes, at the threshold, that the right to privacy is not explicitly mentioned in the United States Constitution. No right of sexual freedom is found within the gambit of procreative rights recognized by the Supreme Court nor has the Court fashioned a general right of personal privacy which is sufficiently

\textsuperscript{41} Lorio, In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation, 35 Sw. L.J. 973, 983 (1982).

\textsuperscript{42} J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 740 passim (2d ed. 1983).


\textsuperscript{44} \textit{Supra} note 41 at 1008.

\textsuperscript{45} Id.
broad-based to permit sex outside marriage.\textsuperscript{46}

The Supreme Court first recognized a constitutionally protected zone of privacy in \textit{Griswold v. Connecticut},\textsuperscript{47} and invalidated part of a Connecticut statute forbidding the use of contraceptives by married persons.\textsuperscript{48} The protection of this aspect of procreative autonomy "was largely subsumed within a broad right to marital privacy"\textsuperscript{49} which "stressed the unity and independence of the married couple and forbade undue inquiry into conjugal acts."\textsuperscript{50} From this, however, it cannot be argued that there must exist a co-ordinate fundamental right to reproduce, or to use artificial reproductive technology such as \textit{in vitro} fertilization.\textsuperscript{51} As Mr. Justice Goldberg made clear in his concurring opinion, \textit{Griswold}, "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct," and thus the constitutionality of Connecticut's statutes prohibiting adultery and fornication remained beyond dispute.\textsuperscript{52}

In \textit{Eisenstadt v. Baird},\textsuperscript{53} the High Court was confronted with construing a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. In holding that the statute violated the equal protection clause of the fourteenth amendment, the court observed that "[I]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\textsuperscript{54} Accordingly, the \textit{Eisenstadt} court fleshed


\textsuperscript{47} 381 U.S. 479 (1965).

\textsuperscript{48} The Court observed that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from the guarantees that help give them life and substance." \textit{Id.} at 484 (citation omitted). Thus, it was those "[v]arious guarantees [which] created the zones of privacy." \textit{Id.}


\textsuperscript{53} 405 U.S. 438 (1972).

\textsuperscript{54} \textit{Id.} at 453 (emphasis in original).
out the procreative skeleton of Griswold which initially appeared confined to the so-called "sacred" precincts of the matrimonial bedroom chambers.\(^5\) This decision, however, did no more than refine a qualified right to procreative autonomy blurred by the Griswold Court's emphasis on the marital relation.\(^6\)

In Roe v. Wade,\(^7\) the Court addressed squarely an integral part of the individual's right to procreative autonomy when an unmarried woman in a class action challenged the constitutionality of the Texas criminal abortion laws. The Court articulated a new source of privacy derived from the fourteenth amendment's standard of personal liberty and inherent restrictions upon state action and held this right was sufficiently broad to embrace a woman's decision whether or not to terminate her pregnancy.\(^8\) The Court went further to state, however, that it was not recognizing "an unlimited right to do with one's body as one pleases."\(^9\)

The final pertinent case of interest in this area is Carey v.

55. Id. at 453.

56. "It has been suggested that the Court's opinion was lacking in candor, for it stated in broad dictum a major extension of the 'privacy right' which could have justified its decision, while purporting to rest on a strained conclusion that the statute involved failed even the minimal rationality test." Supra note 50 at 1184 (footnotes omitted).

Under an expansive liberal interpretation, Eisenstadt has been held to extend the right of privacy to all sexual activities of whatever nature. See Wilkinson and White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 589 (1977).

57. 410 U.S. 113 (1973).

58. Id. at 153. This right, however, was not absolute and the degree of involvement allowed would be contingent on the length of the pregnancy. "[P]rior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." Id. at 164. After this stage, the "State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id. Finally, after viability, the state may protect fetal life and "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Id. at 163-64.

59. Id. at 154. In an opinion announced June 11, 1986, in Thornburgh v. American College of Obstetricians and Gynecologists, 54 U.S.L.W. 4618, the United States Supreme Court held that the States—and here, Pennsylvania—were not free to deliberately intimidate women into continuing unwanted pregnancies. In acting to invalidate certain provisions of Pennsylvania 1982 Abortion control Act, the Court rejected the State's argument that its compelling interests in preserving life (of viable fetuses) was superior and—thus—controlling over "constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician is hers to make" (Id. at 4621).
In Carey, the Supreme Court invalidated a New York statute regulating sale and distribution of contraceptives to minors, and stated "at the very heart of [the] cluster of constitutionally protected choices," recognized in the previous privacy cases, was "the decision whether or not to beget or bear a child." Carey is particularly instructive on the question of the unmarried woman's right to artificial insemination or in vitro fertilization procedures as it examines the previous privacy cases and delineates the extent of the individual's right to procreative autonomy.

It has been suggested that since a woman has a right to terminate her pregnancy and to use contraceptives, a posteriori, the conduct required to bring about those procreative choices must also be protected. The Court's opinion in Carey indicates, however, that this is simply not the case.

First, with regard to contraception and abortion, the Carey Court made clear that it is "[the] individual's right to decide to prevent conception or terminate pregnancy" that is protected. Such unequivocal language, however, lends little or no support to the argument that a concomitant right to conceive is also protected. Second, the Court emphasized that its decision did not encompass any constitutional questions raised by state statutes regulating either sexual freedom or adult sexual relations.

60. 431 U.S. 678 (1977) (plurality opinion).
61. In addition to the privacy cases already analyzed in this article, the Court cited Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Loving v. Virginia, 388 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
65. Id. at 688, n.5. See generally, Paris Adult Theatre I v. Slaton, 431 U.S. 49, 68 n.15 (1973) (implication that state fornication statutes do not violate the federal constitution). But see State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) (holding that fornication statute involves by its very nature a personal choice and that it infringes upon the right of privacy).
lesson from the Court’s decisions in *Skinner, Griswold, Eisenstadt, Roe,* and *Carey* is plain: “procreative autonomy includes both the right to remain fertile and the right to avoid conception,” but currently guarantees absolutely nothing more.

### A. State Action

Since the unmarried woman’s decision to be artificially inseminated or participate in an *in vitro* fertilization procedure does not fall within the gambit of any recognized fundamental right, state statutes limiting the procreative technology to married women only “[may] be sustained under the less demanding test of rationality. . . .” Under this test, all that is required is that the distinction drawn be “rationally related” to a “constitutionally permissible” objective. In employing this rather relaxed standard, courts must be sensitive “that the drawing of lines that create distinctions is peculiarly a legislative task and an avoidable one.”

Absent a suspect classification or the infringement of a fundamental right, the Supreme Court has recognized that legislation “protecting legitimate family relationships” as well as both the regulation and protection of the family unit are “venerable state concerns.” Statutes limiting the availability of artificial insemination to married women and statutes that might (indeed, should) be drafted to limit the use of IVF procedures to married women, fall squarely within this classification.

As early as 1888, the Court recognized marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.” Recently, it observed that “a decision to marry and raise the child in a traditional family setting must receive equivalent protection.” Thus, although certain aspects of an individual’s right to procreative autonomy have correctly been divorced from the familial and marriage relationship,

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the Court has also implicitly recognized that, whenever possible, childrearing should take place within the traditional family unit. An unmarried woman's decision to seek artificial insemination or to participate in an IVF procedure goes directly against the tide of these pronouncements.

V. THE STATE AND THE FEDERAL LEGISLATIVE POSITIONS

It is doubtful the legal status of an embryo can ever, with clarity, be legislated nationally because society is not of a singular mind nor is there a consensus of when "life" should be recognized as being legally protectable. Juridical interpretation of this issue has brought about national debate with the decision in Roe v. Wade. Despite the lack of agreement here, for those children born of an IVF procedure where either a donor ova or donor sperm have been used, they should be recognized as children of the family in which they were born. No issue of illegitimacy should be raised nor should the donors be held to any level of financial support of the child or right of inheritance against the donors. Not only are the best interests of the IVF child served in this way, but more importantly, the strength of the family unit is guaranteed and its stability assured.

In the aftermath of Roe v. Wade which, as observed, had the effect of "legalizing" abortion under certain circumstances, some twenty-five states enacted fetal research laws designed primarily

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77. Supra note 74.
to control research on aborted fetuses. Several statutes extend their protective coverage to research on embryos which could have an effect on the initiation of programs utilizing IVF procedures. The procedural safeguards which could be demanded for medical-scientific work for IVF could be viewed as too cumbersome and thus serve as a discouragement for such a program. Some safeguards may affect the procedural uses of preserving excess embryos and be regarded similarly as either bothersome or cumbersome.


80. Examples are the California and Minnesota statutes: . . . (a) It is unlawful for any person to use any aborted product of human conception, other than fetal remains, for any type of scientific or laboratory research or for any other kind of experimentation or study, except to protect or preserve the life and health of the fetus. Fetal remains, as used in this section, means a lifeless product of conception regardless of the duration of pregnancy. A fetus shall not be deemed to be lifeless for the purposes of this section, unless there is an absence of a discernible heartbeat.


The Minnesota statutes states that:

. . . Whoever uses or permits the use of a living human conceptus for any type of scientific, laboratory research or other experimentation except to protect the life or health of the conceptus, or except as herein provided, shall be guilty of a gross misdemeanor.

2. The use of a living human conceptus for research or experimentation which verifiable scientific evidence has shown to be harmless to the conceptus shall be permitted.

3. Whoever buys or sells a living human conceptus or nonrenewable organ of the body is guilty of a gross misdemeanor. Nothing in this subdivision prohibits (1) the buying and selling of a cell culture line or lines taken from a non-living human conceptus; (2) payments for reasonable expenses associated with the removal, storage, and transportation of a human organ, including payments made to or on behalf of a living organ donor for actual expenses such as medical costs, lost income, or travel expenses that are incurred as a direct result of a donation of the nonrenewable organ; or 3. financial assistance payments provided under insurance and medicare reimbursement programs.


81. Michigan statutes, for example, prohibit research on a live embryo if its life or health may be jeopardized. § 333-2685 (1) provides that:

A person shall not use a live human embryo, fetus, or neonate for nontherapeutic
Yet, in a number of these states, the very legality of *in vitro* fertilization as a medical procedure to overcome infertility is in question.82

Only Pennsylvania83 and Illinois84 have statutes regarding *in vitro* fertilization. Pennsylvania's law was enacted to monitor the procedure and provides simply that anyone conducting IVF's is to file quarterly reports with the state Department of Health, describing fully the processes involved with the undertaking.85 The Illinois statute is criminal in nature but, interestingly, does not directly prohibit the IVF procedures, instead making a physician who fertilizes a woman's egg outside her body the custodian of that issue for purposes of an 1977 Child Abuse Act.86 The statute additionally grants custody to the physician, but does not make provisions for the parents to ever regain custody.87 It fails to address the is-

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85. *Supra* note 81.

86. *Supra* note 82.

87. The Illinois statute, cited *supra* at note 84, was challenged in a class action brought by married couples and their physicians who wanted to use the IVF procedure. This case was dismissed for lack of a case or controversy when the court accepted the state's argument that the statute did not prohibit the procedure and that prosecution would not ensue if the physician performed the procedure without willful endangerment or injury to the embryo during the pre-implantation period. Smith v. Hartigan, 556 F. Supp. 157 (N.D. Ill. 1983).
sues of either legitimacy or inheritance rights. Sadly, there are at present no state statutes that propose to clarify the legal status of IVF children. 88

A. The Federal Position

Both as a response to Louise Brown's extracorporeal birth in 1978 and to a grant application for in vitro fertilization research, the then Department of Health, Education and Welfare (now the Department of Health and Human Services) and its Ethics Advisory Board decided to study the complex ethical, legal, social and scientific issues raised by the IVF process. 89 Even though the final report of the Department was ultimately “buried in the bureaucracy,” 90 today, given the sometimes strident pro-life mood of a vocal segment of society, there is pessimism that a strong positive movement will occur at the federal regulatory level. 91 Yet, due largely to the leadership of former Congressman (now Senator) Albert Gore of Tennessee, hearings were conducted in August, 1984, on the very issue of embryo transfers and the legal, ethical and medical responses to such procedures. 92 Although no firm or conclusive steps were taken as a consequence of these hearings, they served to focus attention on the need for continuing dialogue in

The only other decision involving an in vitro fertilization procedure was an unpublished case, Del Zio v. Manhattan's Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y., April 12, 1978), which resulted in an award to the prospective parents of damages for emotional distress caused by the willful destruction of an embryo produced by IVF. The Chief of Obstetrics and Gynecology had removed the embryo from the incubator and destroyed it, stating that the physician who had performed the laparoscopy and subsequent fertilization in 1972 lacked the necessary skills and, moreover, the hospital's committee on experimentation had not yet approved IVF. See Lorio, In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation, 35 Sw. L.J. 973, 996-97 (1982).

88. Supra note 82.
91. This pessimistic, although realistic, view is tied to a perception that it would be far better to hold in abeyance any strong movement at this time for fear of its possible linkage with the right-to-life controversies and would thus give rise to the real possibility that it would never be allowed to be evaluated in a calmer atmosphere. Abramowitz, supra note 15.
this area.

Because of a de facto moratorium set in 1975, no federally funded research has been undertaken on in vitro fertilization.\(^93\) Even though the 1979 Report of the Ethics Advisory Board of HEW concluded that federal support of research on humans in order to establish the safety and the effectiveness of IVF procedures would be ethically permissible as long as certain conditions were met,\(^94\) the Report has never been accepted nor the moratorium ended; there is no real likelihood such action will be taken soon.\(^95\)

It should be noted carefully that the involvement by the federal government and its Department of Health and Human Services is presently structured by general regulations protecting human subjects which apply to any IVF research, development, or other related activities that might in the future be conducted by the Department, or by the federal government outside the Department.\(^96\) As to research projects that involve fetuses and/or pregnant women, the Ethics Advisory Board of the Department will be required to review every such proposal for in vitro fertilization "as to its acceptability from an ethical standpoint."\(^97\)

Subsequent specific protections have been provided fetuses who are the subject of proposed experimentation and IVF research.\(^98\) Although limited to research efforts funded in whole or in part by the federal government,\(^99\) these guidelines make a significant distinction with regard to potential legal rights of unimplanted embryos.\(^100\) The distinction is apparent in the very definition of "fetus: the product of conception from the time of implantation (as evidenced by any of the presumptive signs of pregnancy, such as missed menses, or a medically acceptable preg-

93. Supra note 15.
94. Supra note 89 at 35,057. Among these conditions were that the blastocyst be sustained no longer or beyond the implantation state and that IVF be used only by married couples who had donated their sperm and ova. Abramowitz, supra note 15.
95. Supra note 15, at 6.
98. 45 C.F.R. §§ 46.102-.206 (1985). In Vitro fertilization is defined as "any fertilization of human ova which occurs outside of the body of a female, either through admixture of donor sperm and ova or by other means." Section 46.203(g) (1983).
100. Blumberg, supra note 82.
As a consequence of this structured definition, research undertaken on fetuses in utero and ex utero is prohibited unless the purpose of the activity is to either meet the particular health needs of the at-risk fetus or there is minimal real or potential harm to the fetus by the research and the purpose is to obtain biomedical knowledge not otherwise obtainable. Research undertaken on non-viable fetuses ex utero is prohibited unless either vital functions will not be maintained artificially, experimental activities that would terminate vital functions are not used, or the research purpose is to obtain otherwise unobtainable significant biomedical knowledge. The obvious implication of these restrictions on embryonic and fetal research is that the scientific pursuit of mankind is significantly handicapped. Private research into the mysteries and the opportunities of the new reproductive biology continues. But, without a balanced regulatory scheme and sources for federal research funding, the initiative and the momentum for scientific advancement is curtailed.

VI. The Australian and the British Movement Toward Stability

A. The Australian Initiative

Australian national, ethical guidelines on in vitro fertilization have been in place since 1982; structured by the National Health and Medical Research Council. Guideline Seven suggests an upper time limit (in the order of ten years) be placed upon the storage of embryos which does not go beyond "the time of conventional reproductive need or competence of the female donor." Thus, applied to a woman's capability to conceive, it is obvious at the death of a married woman who has left fertilized ovum in cryopreservation that her reproductive capability has ended and her

101. 45 C.F.R. § 46.203(c) (1985).
102. 45 C.F.R. §§ 46.208(a)-209(a) (1)-(2) (1985).
103. 45 C.F.R. §§ 46.209(b) (1)-(3) (1985).
105. See Ethics in Medical Research Involving the Human Fetus and Human Fetal Tissue (NAT'L. HEALTH & MEDICAL RESEARCH COUNCIL, 1983).
106. Id. Supplementary Note 7 at 36.
embryos could be destroyed. The Council not only endorsed the use of *in vitro* fertilization as an acceptable scientific procedure to correct infertility among married couples, but also the use of donor eggs in women to produce embryos, and the use of artificial insemination by anonymous male donors.

Law reform activity in the field of artificial conception first began in earnest with a study undertaken by the New South Wales Law Reform Commission dealing with artificial insemination in 1982. A few weeks later, the Victorian government established a Committee, subsequently designated the Waller Committee, in honor of its Chairman, Professor Louis Waller. The Committee was mandated to investigate the problems arising from *in vitro* fertilization and donor gametes (or the male sperm and female eggs). Soon to follow in similar research activities were the Queensland Government and that of Western Australia.

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 Committee concluded, among other points, that the disposition of stored embryos is not to be determined by the hospital where they are in fact stored and that such embryos are not to be regarded as possessing legal rights or having rights to lay claim to inheritance. Also, in cases where "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." The Committee additionally held embryos could be frozen and experimental research

107. *Id.* at 35, Guideline 2.
108. *Id.* at 35, 36, Guidelines 3, 4.
113. *Id.* § 2.19.
114. *Id.* § 2.18.
115. *Id.* §§ 3.25-3.28.
"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 14 days after fertilization."\textsuperscript{116}

In cases where surplus embryos are produced in the laboratory intentionally or unintentionally and exceed the number appropriate for transfer to the uterus of the intended mother,\textsuperscript{117} after short term storage,\textsuperscript{118} the Committee recommended that the decision made by the couple whose sperm and ova have been used in the formation of the embryo\textsuperscript{119} should be given effect by a donation of the stored embryos to other couples participating in the IVF program, a donation of the embryos for research or experimentation or their removal from storage.\textsuperscript{120}

Another major issue before the Committee was whether embryos possessed certain "rights" which might prevent them from being the subject of continued research and experimentation in the Victoria IVF program.\textsuperscript{121} A majority of the Committee concluded that while such research and experimentation could continue in order to facilitate the possibility of enhancing IVF technology,\textsuperscript{122} it should only be done on excess embryos,\textsuperscript{123} and not beyond fourteen days after fertilization.\textsuperscript{124} This conclusion was based upon a moral acknowledgment that an embryo in its individual capacity as a human "entity" was entitled to a level of respect higher than that given an organism created for purely experimental purposes.\textsuperscript{125}

Interestingly, in the final analysis, a majority of the Committee refused to countenance the proposition that an unimplanted embryo has any legally protectable rights.\textsuperscript{126} The extent to which parents may exert rights of control or ownership over stored embryos remains equally unclear.\textsuperscript{127} Nonetheless, it was recognized

\textsuperscript{116.} Id. § 3.29.
\textsuperscript{117.} Id. § 1.9.
\textsuperscript{118.} Id. § 2.13.
\textsuperscript{119.} Id.
\textsuperscript{120.} Id. §§ 2.11.1-.11.3.
\textsuperscript{121.} Id. § 3.24.
\textsuperscript{122.} Id. § 3.25.
\textsuperscript{123.} Id. § 3.26. For dissenting views, see pp. 62-74.
\textsuperscript{124.} Id. § 3.29.
\textsuperscript{125.} Id. § 3.27.
\textsuperscript{126.} Id. § 2.19.
\textsuperscript{127.} Id. § 2.8.
that the couple whose gametes are used to form the embryo in the context of an IVF programme should be recognized as having rights which are in some ways analogous to those recognized in parents of a child after its birth. The Committee does not consider that those rights are absolute, just as the rights of parents are limited by the rights and interests of the child, and by the larger concerns of the community in which they live.\footnote{128}

An impassioned dissent was registered by Rev. Francis Harman in response to the Committee's conclusion on the continued use of frozen embryos for research in the Victoria IVF program.\footnote{129} Rejecting the argument that the embryo is but an "indefinite mass of cells with the potential to become human" after some degree of fetal development,\footnote{130} Rev. Harman asserted philosophically and scientifically that a high probability existed that an "incipient personhood" justified protecting the embryo from research and experimentation efforts.\footnote{131}

It is quite evident from its reported deliberations and actual recommendations that the Waller Committee tried very carefully to balance the best interests of the children conceived by IVF with the rights and duties of the community and of those persons involved with the process (donors, medical and scientific personnel) in making its ultimate finding.\footnote{132} In this regard, the Committee is to be applauded for its notable success. Some of the Committee recommendations will be incorporated in the Victoria government's \textit{in vitro} legislative proposals for subsequent Parliamentary considerations, while others will be open to further debate and study.\footnote{133}

While the standing committee of Attorneys-General of Australia has agreed on the desirability to work toward the development of a uniform code of legislation to cover \textit{in vitro} fertilization and the legal status of children born through the use of donor semen or ova,\footnote{134} it is doubtful whether a working consensus can ever be

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\footnote{128. \textit{Id.} § 2.8.} \footnote{129. \textit{Id.} Appendix A.} \footnote{130 \textit{Id.} § A2.1.} \footnote{131. \textit{Id.} § A2.3.4.} \footnote{132. \textit{Id.} § 1.1.} \footnote{133. \textit{See Victoria Will Bar Payments to Surrogate Mothers}, \textit{Sydney Morning Herald}, Sept. 4, 1984, at 3, col. 2.} \footnote{134. \textit{Lawson, Molloy, Jobson \& Walley, The Life and Strange Times of Elsa Rios,}}
\end{flushleft}
reached among the six state governments allowing for a uniform code of regulation. Terms such as when life begins must be agreed upon before effective regulations can be promulgated.

A serious blow to the efforts for responsive unification or progressive development of this area was dealt by Senator Harradine who in the National Parliament on April 23, 1985, introduced "A Bill for An Act to Prohibit Experiments Involving the Use of Human Embryos Created by In Vitro Fertilization," before the embryo has been implanted in the womb of a woman. In August, 1985, while emphasizing the need for a national resolution of the problems of the new reproductive technology, the Family Law Council joined with Senator Harradine by reporting to the federal government that experiments on human embryos and acts of surrogation should be prohibited. In order to meet the plethora of vexatious problems confronting federal, state, and local governments in the field of artificial conception, the Family Law Council urged the establishment of a national council to monitor and advise the respective governments.

To be more specific, on July 24, 1985, The Family Law Council of Australia issued its report, Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia and sought thereby to present a unified approach to tackling the major issues of the new reproductive technology. Recognizing that broad, fundamental questions of both public policy and public interest are inextricably related to the basic medical procedures of this new technology, the Council called for a measured "outreach" to other disciplines, especially to the community-at-large, in approaching resolutions. Toward the achievement of this goal at a national level, the Council called for the establish-

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137. Id. The Deputy Chairman of the Law Reform Commission of New South Wales, Russell Scott, prefers a monitoring approach over a prohibitory one in dealing with the new reproductive biology.


139. Id. at vii.
ment of a National Council on Reproductive Technology. The National Council would, in turn, investigate the "social moral, legal and ethical questions and values which cannot be easily or lightly debated—and which are not all capable of absolute and final answers. Many of these questions will need to be subject to ongoing review and community debate because of their fundamental nature." 140

Rather than await further study and investigation of a number of issues by the proposed National Council, the Family Law Council recommended initially, among other matters, that public policy dictates surrogacy arrangements be viewed as "contrary to the welfare and interests of the child." 141 It recommended, furthermore, all exchanges of money for surrogate mother services (e.g., the advertisements and subsequent contracts) be prohibited by law. 142 Yet, as to the issue of the use of donor gametes (donor sperm, donor ova and donor embryos where both ova and sperm are donated) the Family Council observed that, insofar as the use of donor sperm obtained from artificial insemination had been used for fifteen years in Australia to assist infertile couples in "conceiving" a child, 143 this practice should be allowed to continue. 144

However, more adequate standards and guidelines on a uniform basis of operation were recommended. 145 While the use of "known donors of gametes who are related to the recipient couple" should not be permitted, 146 the use of such gametes whose donors are not related to the IVF candidate couples should be allowed. This assumes that full information and access to special counseling be provided prior to finalizing such arrangements. 147 Concerning the production of human embryos, the Family Council recommended such human embryos not be produced solely for the purposes of research or experimentation. 148 A majority of the Council recommended prohibiting the use of "spare" or excess human em-

140. Id. at 101.
141. Id. at xiii.
142. Id.
143. Id. at 71.
144. Id. at xiii.
145. Id.
146. Id. at xiv.
147. Id.
148. Id. at xiv.
bryos for research experimentative purposes.\textsuperscript{149}

These are "recommendations." Yet, they are studied proposals made by a group of distinguished men and women sensitive to the growing significance of the challenges and the opportunities of the new reproductive technology. Surely, if and when a National Council on Reproductive Technology is established in Australia, the work of the Family Law Council and especially the Waller Committee will be of immense value in resolving the on-going debate and, where possible, providing legislative direction instead of judicial interpretations in this intensely complex area.

B. The Orphan Embryos of Melbourne

A striking paradigm of the medical, social, moral, legal, ethical, and public policy issues of the new reproductive technology was presented dramatically and, indeed, eclipsed the investigative work of the Waller Committee and the Family Law Council as well as the Warnock Committee. On May 20, 1981, a married couple from Los Angeles, California, Mario and Elsa Rios, were allowed to participate in the \textit{in vitro} fertilization program in Melbourne, Australia that operated from the Queen Victoria Medical Center.\textsuperscript{150} These initial actions subsequently set in motion a crisis of concern not only in Australia but around the world and showed, with vivid clarity, the complex realities of an ever-present brave new world.

Because of his infertility, Mr. Rios consented to the participation of an anonymous donor from Melbourne and, thereupon, artificial insemination was successfully achieved for three eggs provided by his wife. One embryo was implanted in Mrs. Rios on June 8, 1981, and the other two were frozen for subsequent use. Owing to trauma associated with a miscarriage of the implanted embryo, another attempt at impregnation was delayed until Mrs. Rios was physically and mentally willing to proceed. But, before this occurred, she and her husband died intestate in a plane crash in Chile.\textsuperscript{151} However, under California laws of intestate succession, Mrs. Rios' son by a previous marriage was allowed a right to his father's share of the estate and the mother of Mrs. Rios was enti-

\textsuperscript{149} Id.
\textsuperscript{150} Lawson, Molloy, Jobson & Walley, \textit{supra} note 110, at 22.
\textsuperscript{151} Id. at 23.
tied to take her daughter's share.\(^{152}\)

In August, 1984, Professor Waller, Chairman of the Victoria Law Reform Commission, determined the embryos had no independent legal "rights" to be unfrozen and implanted in a surrogate mother. He recommended they should be thawed and discarded.\(^{153}\) The state legislature of Victoria instead ordered the remaining Rios' embryos be preserved in their liquid nitrogen container.\(^{154}\) As of August 29, 1985, the embryos remained "on ice" awaiting the appearance of a volunteer surrogate mother or yet another rendezvous with mortality.\(^{155}\)

C. The Warnock Committee

In 1982, four years after the birth of the world's first test-tube baby, the British government structured a Committee of Inquiry into Human Fertilization and Embryology and mandated its members, chaired by Dame Mary Warnock to examine the social, ethical, and legal implications of the new reproductive biology.\(^{156}\) The Committee submitted its Report in July, 1984, and great debate and discussion has followed,\(^{157}\) both in the press\(^{158}\) and in Parliament.\(^{159}\) The Report prompted Mr. Enoch Powell to introduce in


\(^{153}\) Supra note 111, §§ 2.14-2.19. See also, Lawson, Molloy, Jobson & Walley, supra note 110.

\(^{154}\) The Times [London], Oct. 25, 1984, at 7, col. 2. The National Perinatal Statistics Unit of the Fertility Society of Australia in Sydney, issued in 1985 a report entitled, In Vitro Fertilization Pregnancies: Australia and New Zealand 1979-1984. Reporting on nine hundred and nine pregnancies resulting from in vitro fertilization procedures in eleven IVF units in Australia and one in New Zealand, the report showed 54.6% of these pregnancies, or four hundred ninety-six in actual numbers, resulted in live births. One hundred seventy-four or 19.1% of the total pregnancies resulted in preclinical abortions, forty-five or 5.0% ectopic pregnancies, one hundred seventy-two or 18.9% resulted in spontaneous abortions and twenty-two or 2.4% of the pregnancies were stillbirthed. Id. at 2.

\(^{155}\) See Letter from Professor Louis Waller, Chairperson of The Law Reform Commission of Victoria, to Professor Smith dated August 29, 1985, a copy of which is on file in the offices of the Gonzaga Law Review.


\(^{157}\) Id.


\(^{159}\) Brahams, The Legal and Social Problems of In Vitro Fertilization: Why Parlia-
the House of Commons a Private Member's Bill entitled, "The Unborn Children (Protection) Bill." The bill was designed not only to prevent experiments on human embryos but to classify such acts of experimentation as criminal. This bill would, however, provide for the fertilization of a specific human embryo \textit{in vitro} only when attempting to impregnate a specific woman who first received permission for the procedure from the Social Services Secretary.

Essentially, the Warnock Committee approved the cryopreservation of embryos—but only under strict constraints and subject to review by a statutory licensing authority. The Committee recognized that even though embryos enjoyed an ethical or moral (e.g., "special") status, research could continue on them, subject to careful monitoring for a fourteen day period. Further, "spare" embryos are the proper subject for research within this time period if informed consent to such actions is obtained from the couple generating the embryo. The Committee advised that legislation be enacted to allow research on any embryonic life derived from \textit{in vitro} fertilization, regardless of whether it was intentionally or unintentionally developed for that purpose. Ten years would be the maximum allowable time for storage with the right of disposal passing to the storage authority after that time. As to rights of inheritance, the Committee proposed legislation to eliminate the dilemma of Australia's "orphan" embryos by providing that any child born of an IVF process (that used either a frozen or stored embryo) "who was not \textit{in utero} at the death of the father shall be disregarded for the purposes of succession to the inheritance from the latter." On the issue of surrogation, or surrogate mothers, the Committee proposed legislation be drawn that would impose a criminal sanction for the maintenance of surrogate

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163. Priest, \textit{ supra} note 156, at 77.


165. \textit{Id}.

166. \textit{Id.} Proposal 63.
\end{thebibliography}
mother agencies. At the same time, the Committee suggested those individuals entering into private surrogation arrangements in connection with IVF procedures be exempted from criminal prosecution.\textsuperscript{167}

In 1984, the American Fertility Society authorized a statement on \textit{in vitro} fertilization. Among other things, the statement pointed out that ethically acceptable research procedures could be set and followed for donated embryos up to fourteen days after fertilization.\textsuperscript{168} Although it recognizes that embryos are the property of the donors, it nonetheless provides for authorization of cryopreservation for the length of the mother’s reproductive life.\textsuperscript{169} As long as anonymity is retained and donors waive their parental rights, the donation of embryos to another infertile married couple is recognized.\textsuperscript{170}

The Waller and the Warnock Committees’ outstanding work in developing a blueprint for progress in the field of artificial conception is an enormous contribution of unparalleled magnitude. The implementing measures of the work is proceeding in their respective legislative forums. Even in those cases where the committees’ recommendations are encountering opposition, a constructive and open dialogue has been opened and is of considerable importance in resolving efforts to find a framework for principled decision-making. It remains for the United States to assume its rightful position in the vanguard of the “New Reproductive Biology” and not only begin, anew, to conduct vital scientific research into the processes of \textit{in vitro} fertilization and the other variants of artificial conception,\textsuperscript{171} but to structure a national and on-going investigative dialogue to direct, and, where necessary, implement and guide the scientific imperative for research and development. Toward the achievement of this end, a National Commission for Bioethics is needed desperately.

\textsuperscript{167} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} \textit{See Delgado \\& Miller, God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry} in \textbf{1 Ethical, Legal and Social Challenges to a Brave New World} 231 (G. Smith ed. 1982).
A FRAMEWORK FOR PRINCIPLED DECISIONMAKING

Collaborative or artificial reproduction would allow a child to have upward of five parents: "an egg donor, a sperm donor, a surrogate mother who gestates the fetus and the couple who raise the child."\textsuperscript{172} Regrettably, neither the legitimative status of the child nor legal protection afforded the various collaborative partners is clearly affirmed.\textsuperscript{173}

One pre-eminent legal authority has suggested that if the interest of the children is regarded as paramount, the American Commissioners on Uniform State Laws should, in their drafting pursuits, "focus on status issues,"\textsuperscript{174} to the extent practicable, build on existing laws and "stay away from regulating questions"\textsuperscript{175} (e.g., licensing of surrogate mothers). As to sperm and ovum donors, it is suggested self-regulation of the medical profession is preferred to any type of licensure.\textsuperscript{176} And this method would be reinforced by the physicians' "healthy respect for—or fear of—tort and malpractice laws, to ensure their adherence to good practice."\textsuperscript{177}

These are commendable suggestions, but incomplete. Also needed is strong public participation headed by informed organizations seeking to both develop and promulgate guidelines to promote sound clinical practice, as the American Fertility Society recently noted in issuing its new ethical guidelines.\textsuperscript{178} Further, a National Commission for Bioethics of experts in law, science, medicine and ethics should be created. This Commission would report on an on-going basis to Congress and the individual states on the practicability of developing specific regulatory schemes and, where necessary, legislative programs.\textsuperscript{179} In the final analysis, the


\textsuperscript{173} Id.

\textsuperscript{174} Krause, \textit{Artificial Conception: Legal Approaches}, 19 Fam. L.Q. 185, 193 (1985).

\textsuperscript{175} Id.

\textsuperscript{176} Id., at 198.

\textsuperscript{177} Id.

\textsuperscript{178} Otten, \textit{supra} note 16. At present, the Society must simply wait to see if hospitals will even adopt its recommended policies.


The Report on Human \textit{In Vitro} Fertilization of the Ethics Advisory Board of the United States Department of Health, Education and Welfare in 1979 suggested the need for
stability requires development of a legislative strategy that admits both an attack on and resolution of issues of legitimacy and inheritance and also provides a framework for daily or contemporary decision-making.

The laxity and, indeed, total lack of professionalism the medical profession has exhibited "regulating" itself with artificial insemination procedures\textsuperscript{180} militates against the feasibility of total continued "self-discipline" in the area of \textit{in vitro} fertilization, surrogation and the related areas of artificial conception.\textsuperscript{181} If a balance could be struck between legislative strategies and professional control, significant long-term progress could be both charted and assured. Licensure or supervision of \textit{in vitro} fertilization centers and of surrogate mothers by the state would, to some degree, be necessary in order to assure the highest standards of health and prevent commercial exploitation.

\textbf{VIII. Conclusion}

As long as the family is the focal point of society, we must explore legal and medical initiatives and safeguards in order to assure the success of the family unit and design ways to neutralize, if not stabilize, the unexpected. The \textit{Rios} case is but a precursor of major problems to arise in the future as the challenges, hopes and frustrations of the brave new world visit themselves in full force.

\marginpar{a uniform or model law that would clarify the legal status of an IVF child. \textit{Supra} note 89, at 35.058.}

\textit{See also} an address, "IVF—The Scope and Limitation of Law," given by Mr. Justice Michael D. Kirby, President of the Court of Appeal, The Supreme Court, New South Wales, Australia, delivered at the Conference on Bioethics and the Law of Human Conception—\textit{In Vitro} Fertilization at the Grosvenor House, London, England, September 29-30, 1983. There Mr. Justice Kirby advocated that law making here "should be developed in the democratic institution of law making: the representative parliament, aided and encouraged by the interdisciplinary bodies which take pains in consulting a wide range [of] experts but the general community as well." \textit{Id.} at 11.


\textit{See also} P. \textit{Reilly}, \textit{Genetics, Law and Social Policy} 202 passim (1977).

\textsuperscript{181} The Recommendations of the American College of Obstetricians and Gynecologist Concerning Surrogate Mothering issued on May 10, 1983, are an example of professional standards of the kind that could be used as a model for legislative adoption or as a structure for developing an administrative scheme of operation.

upon contemporary society. The legislative response to this particular case was both proper and reasonable. If change must occur, and indeed it must, it should be charted in the legislative assemblies. There, the conscience and the understanding of each region may be codified in response to various developments of "The New Biology" as they are tested and become the new "facts of life." Infertility, as an impediment to family growth, must be studied further and, when feasible, arrested. Only through continued and cautious research into the process of in vitro fertilization will the family be assured of its rightful privacy in society and will the tragic circumstances of infertility be met and resolved.

Thus, if we approach continued experimentation and use of human in vitro fertilization with careful resolve to use it not solely as an end to the deeply felt tragedy of barren marriages and thereby minimize human suffering and maximize the social good of maintaining the essence of societal growth—children—we will approach the future with a steadfast knowing assurance that, as did Daedalus, we will arrive safely and meet these two fundamental goals of our very societal existence. If we are driven by a spirit of recklessness and with no direction, we will surely be corrupted and, as Icarus, fall.\(^\text{182}\) "If mankind is not for itself, who then will be? And if not now, when?"\(^\text{183}\) Surely love must seek to balance knowledge or all is lost.\(^\text{184}\)

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