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LEGISLATIVE GUIDELINES TO GOVERN *IN VITRO* FERTILIZATION AND EMBRYO TRANSFER

I. INTRODUCTION

On September 4, 1984, two embryos, whose parents had been killed in a plane crash, remained frozen in storage in Australia as a committee of scientists, philosophers, theologians, and legal experts determined their fate.¹ The parents had been attempting to have a baby through *in vitro* fertilization (IVF).² The embryos were the product of eggs removed from the mother, Elsa Rios, and sperm from an anonymous donor. Because the Rios' did not anticipate predeceasing the embryos, they left no instructions for their disposition in that event. The scholarly committee recommended that the embryos be destroyed. Other groups, particularly those opposed to abortion, demanded that the embryos be thawed and implanted in surrogate mothers.³ Government officials were inclined to follow the committee's recommendation because the embryos would be difficult to donate without the parents' consent. Later, however, the Australian government, responding to strong opposition to destruction of the embryos, determined that they should not be destroyed.⁴ The dilemma confronting the Australian government is a recent example of a scientific development that has advanced beyond existing legally defined rights and responsibilities. The result of this scientific development which is outpacing the law is that courts are faced with such

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1. San Jose Mercury News, Sept. 4, 1984, at 7A.

2. This technique is hereinafter referred to as IVF. See *infra* notes 16-17 and accompanying text.

3. Surrogate motherhood occurs when a woman contracts to bear a child for another in return for money. Surrogate motherhood and the legal status of the embryo are major issues beyond the scope of this comment. This comment cannot avoid these issues because they are so intertwined, but they will be referred to indirectly. Presently, a child can be born with up to five parents if one adds up donors, surrogates, natural, and legal parents. The possibilities are illustrated as follows: 1) ovum from mother + sperm from father = child born of mother, 2) ovum from mother + sperm from donor = child born of mother, 3) ovum from donor + sperm from father = child born of mother, 4) ovum from donor + sperm from donor = child born of mother, 5) ovum from donor + sperm from father = child born of surrogate, 6) ovum from donor + sperm from donor = child born of surrogate, 7) ovum from mother + sperm from father = child born of surrogate, 8) ovum from mother + sperm from donor = child born of surrogate. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 46. See *infra* notes 40, 100-04 and accompanying text.

4. San Jose Mercury News, Oct. 24, 1984, at 12A.

unforeseen legal and moral issues as: the unclear rights and liabilities of parents and donors; the uncertain legal status of the embryo; the possibility of widespread genetic manipulation and its consequences; and the potential of permanent physical and mental injury to mother and child. The problem is compounded by the highly emotional nature of issues which are related to the production or termination of human life.

New reproductive technologies become increasingly available without any regulations to address this multitude of legal issues. California law must address these new reproductive possibilities in order to guide interested parties and physicians through uncertain and potentially litigious areas.

This comment proposes statutory guidelines to eliminate the legal uncertainties concerning IVF and embryo transfer (ET),⁵ specifically when they are employed for procreative⁶ purposes.⁷ In doing so, this comment concludes that existing statutes governing artificial insemination⁸ and fetal research⁹ should be inapplicable to some aspects of IVF and ET.¹⁰ Legislation is necessary in order to advise persons of their legal rights so that they can make increasingly commonplace procreative decisions. The courts should not be left to create ad hoc remedies after problems arise.

Before proposing guidelines for state regulation of IVF and ET, it is necessary to determine whether such action is within a state's power or whether regulating these procedures infringes upon a constitutionally protected fundamental right. The issue is whether the right to decide to resort to IVF and/or to ET for procreative purposes is one that is guaranteed by the United States Constitution. No laws currently exist which specifically cover IVF and ET.¹¹ The only "procreative" issues that have as yet been examined for purposes of constitutional analysis are contraception and abortion. These issues will be discussed by analogy to show that a right of access to IVF and ET is a constitutionally protected "fundamental" right if

5. This technique is hereinafter referred to as ET. See *infra* notes 18-19 and accompanying text.

6. This comment will address only the clinical context, in which the procedures are used for procreative purposes rather than research.

7. The distinction between the research and clinical contexts is important because each context involves very different rights. Freedom of inquiry and the right to do research are clearly separate from the right to procreate.

8. See *infra* notes 37-40 and accompanying text.

9. See *infra* notes 41-43 and accompanying text.

10. See *infra* notes 30-43 and accompanying text.

11. See *infra* notes 30-43 and accompanying text.

one is infertile.¹² Once this fundamental right is recognized, regulations which are found to infringe upon the right are subjected to strict judicial scrutiny. Whether and to what extent IVF and ET may be regulated depends upon whether the state of California can successfully assert a "compelling" interest¹³ which justifies the regulation. Once a compelling state interest has been established as a basis for regulation, the suggested guidelines will define the rights and responsibilities of interested parties. For example, the would-be parents must provide for the disposition of embryos that are not implanted.¹⁴ In addition, there must be a standard of care for physicians which provides protective donor screening.¹⁵ These guidelines are necessary because as long as infertility is a problem, technology will be employed to overcome it. Before the legal problems can be analyzed, however, an understanding of the procedures involved and the legal issues associated with each is necessary.

II. THE PROCEDURES

A. In Vitro Fertilization

In the course of IVF, the woman undergoes a surgical procedure known as a laparoscopy to remove an egg (or eggs) from an ovary. The egg(s) is put in a petri dish containing a medium conducive to its development. Sperm of the husband or donor¹⁶ is then added to the dish, and the egg is fertilized. Once fertilized, the egg is inserted into the woman's uterus through a tube that passes through the vagina. In the uterus, the embryo implants itself and begins to grow as any normally conceived embryo. This is the classic "test-tube" baby. Often, more than one egg is removed from the ovary, fertilized, and implanted, in order to increase the odds of a successful pregnancy. Thus, multiple births are common. If the "extra" eggs

12. See *infra* notes 45-84 and accompanying text.

13. See *infra* notes 45-60 and accompanying text.

14. See *infra* notes 87-95 and accompanying text.

15. Sperm should be tested for gonorrhoea. The donor's blood should be tested for syphilis and hepatitis. Donors with known genetic defects should be ruled out. Family history of mental retardation, congenital defects, or neurological disorders should mandate rejection as a donor. Screening should be done for the traits of Tay-Sachs and sickle cell anemia. Tests should be administered to insure compatible Rh factors between donors and recipients. Alcohol and drug abusers as well as persons who are exposed to radiation on the job should be precluded from being donors. Any other known test that might screen out possible causes of birth defects or disease should be administered. See L. ANDREWS, *NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD* 167-68 (1984).

16. See *supra* note 3.

are not implanted, they can be frozen or donated.¹⁷

B. *Embryo Transfer*

1. *With In Vitro Fertilization*

This process is similar to IVF except that the egg fertilized in the petri dish is that of a donor rather than the mother. Because synchronization is important to the success of this procedure, the egg comes from a donor whose menstrual cycle matches that of the recipient. The donor egg is fertilized by sperm of the recipient's husband or by sperm from a donor.

2. *With In Vivo Fertilization*

ET can also be performed with the donor egg fertilized *in vivo*. This is distinguished from *in vitro* fertilization in that the donor's egg is fertilized in her body through artificial insemination.¹⁸ After five days, a plastic tube is inserted into her uterus. The embryo is withdrawn through this tube and then inserted into the uterus of the recipient.¹⁹ A woman who actively contributes to the conception by the use of her uterus rather than passively donating the egg may have a stronger legal parental claim to the resulting child. Thus, it is imperative with this procedure that parental rights and responsibilities be clearly defined because a third party, the egg donor, is actively contributing to the conception of the child.

C. *Health Risks*

There are inherent health risks with these new medical procedures that cannot be avoided. The risks to the mother are minimal²⁰ although more research is necessary.²¹ Because these are medical procedures, existing standards of due care, to which reasonably prudent physicians are held,²² already apply. However, there are no ex-

17. See *infra* notes 85-92 and accompanying text.

18. There is, of course, the possibility that the donor could be naturally inseminated through intercourse.

19. See L. ANDREWS, *supra* note 15, at 249.

20. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 52 (quoting Dr. Ervin Nichols, director of practice activity for the American College of Obstetrics and Gynecology).

21. *Id.*

22. "[D]octors must use all care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over and above what is normally possessed by persons in the field . . . the doctor must have and use the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing; and a doctor will be liable if harm results because he does not have

isting standards to insure that donated genetic materials are free from known defects or diseases. A large-scale study²³ by two geneticists and an endocrinologist revealed that many doctors do little screening of donors in connection with artificial insemination.²⁴ An inquiry into donor family history is limited to the donor indicating "family health problems" on a short list of common diseases.²⁵ Sometimes doctors use medical students as donors and trust that the students would not lie about the status of their health.²⁶ Although it is possible to test for over twenty-five hundred identifiable genetic disorders for which a donor might not know he is a carrier,²⁷ these tests are often not done. The report concluded that "the screening of donors is inadequate."²⁸ The lack of proper donor screening adds substantially to the health risks to children born through the procedures. Available testing must be done in order to avoid the known health risks inherent in the donation and use of defective genetic materials. These risks can be reduced by implementation of donor screening standards that eliminate those donors affected with genetic disease or defect.

The present lack of a standard for donor screening leaves many legal issues unsettled. Perhaps health care providers could be held liable for wrongful life causes of action for children who are born tragically defective or genetically diseased.²⁹ But people who donate

them. W. PAGE KEETON, PROSSER AND KEETON ON TORTS 185-87 (5th ed. 1984).

23. Curie-Cohen, Lutrell, Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (1979).

24. See L. ANDREWS, *supra* note 15, at 169 (citing Curie-Cohen, Lutrell, Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (1979)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. A wrongful life action was found to exist on behalf of a child caused to be born with genetic defects. Medical personnel performing genetic testing negligently failed to inform parents of the possibility that their child might be born with Tay-Sachs disease. The court found "no difficulty in ascertaining and finding the existence of a duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn." *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 828, 165 Cal. Rptr. 477, 488 (1980). *But see Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). In *Turpin*, the California Supreme Court allowed special but not general damages to a child born with impaired hearing after health care providers failed to advise the child's parents of the possibility of the hereditary condition. General damages were denied because it was impossible to determine whether the child suffered an injury at being born impaired as opposed to not being born at all. Special damages were allowed to cover extraordinary expenses necessary to treat the hereditary ailment. 31 Cal. 3d at 239, 643 P.2d

defective or diseased genetic materials are not liable for the inevitable consequences of such donation. Without a standard of donor screening which creates a duty to avoid known genetic disaster, no one is ultimately liable for the defective, unwanted children who are born as a result.

III. EXISTING FEDERAL AND STATE RESTRICTIONS SHOULD NOT APPLY TO IVF AND ET

A. Federal Regulations

The birth of the first "test-tube" baby in 1978 and an application for a grant to conduct IVF research prompted the Department of Health, Education, and Welfare (HEW) and its Ethics Advisory Board (EAB) to undertake a study of the ethical, scientific, social, and legal issues raised by IVF.³⁰ The Report found that the only existing federal involvement with IVF is an HEW regulation³¹ which conditions funding of any proposal involving human *in vitro* fertilization upon review by the Ethics Advisory Board.³² This regulation would not govern IVF and/or ET in the private, clinical context because there is no eligibility for HEW funding. The EAB Report noted that regulation of these procedures at the state level is not preempted by federal law.³³ Therefore, states are free to regulate in

at 966, 182 Cal. Rptr. at 349 (1982).

30. ETHICS ADVISORY BOARD OF THE DEP'T OF HEALTH, EDUCATION, AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER, *reprinted in* 44 FED. REG. 35,034 (1979) [hereinafter cited as EAB Report].

31. 45 C.F.R. § 46.204(d) (1978).

32. EAB Report, *supra* note 30, at 35,047.

No application or proposal involving human *in vitro* fertilization may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical standpoint. [footnote omitted]

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

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

Id.

33. HEW regulations state that nothing in the subpart pertaining to research involving pregnant women, fetuses, and *in vitro* fertilization, "shall be construed as indicating that com-

this area as long as constitutional limits are observed.³⁴

B. California Law

IVF and ET are new procedures, therefore there is no California statute or case law precisely on point. Statutes governing artificial insemination³⁵ and fetal research³⁶ are the closest existing law that is likely to serve as precedent. However, these statutes are focused upon the discrete practices of artificial insemination and fetal research rather than advanced technologies in conceiving children and should not be construed to apply.

1. Artificial Insemination

California Civil Code section 7005³⁷ provides in pertinent part:

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.³⁸

If the husband's sperm is used, no legal issue arises because the child is the genetic child of the husband and wife. With IVF, artificial insemination is not employed so the statute does not directly apply. However, there is the legal presumption that if a husband gives consent to his wife to employ artificial conception techniques, he is treated as the father. This presumption could apply by analogy to IVF.³⁹

pliance with the procedures set forth . . . will in any way render inapplicable pertinent state or local laws bearing upon activities covered by this subpart." 45 C.F.R. § 46.201(b) (1978).

34. "When Congress exercises a granted power, the federal law may supersede state laws and preempt state authority, because of the operation of the Supremacy Clause of Art. VI The Court's preemption rulings often turn on a determination of congressional intent in the setting of the particular text, history and purposes of the federal legislation involved." G. GUNTHER, *CONSTITUTIONAL LAW* 317-18 (11th ed. 1985). The EAB Report explicitly stated that state law was not preempted, thus clearly expressing the legislative intent.

35. CAL. CIV. CODE § 7005 (West Supp. 1983).

36. CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1983).

37. CAL. CIV. CODE § 7005 (West Supp. 1983).

38. CAL. CIV. CODE § 7005 (West Supp. 1983).

39. The artificial insemination statute is part of the Uniform Parentage Act, CAL. CIV. CODE §§ 7000-18 (West 1973). The Act concerns the establishment of parent and child relationships, questions of paternity, and issues of adoption. The analogy is grounded in the fact

A conflict arises if a child were born through *in vivo* fertilization using artificial insemination because the parental presumption in the statute which treats the woman and her husband as the legal parents would also consider the egg donor and her husband as legal parents. It is necessary to overcome the artificial insemination statute in order to achieve the desired result that only the embryo recipient and her husband be treated as parents.⁴⁰ Any proposed regulation to govern IVF with *in vivo* fertilization (as opposed to *in vitro* fertilization) must stipulate that it overrides the parental presumption of the artificial insemination statute so that only the embryo recipient, and her spouse if she is married, are treated as the legal parents.

2. Fetal Research

Most states, including California, have statutes governing fetal research.⁴¹ Some are more general than others and would preclude IVF as well as ET because the procedures would be included in the definition of the kinds of fetal research which are prohibited.⁴² The California statute, however, covers fetal research only in connection with the by-products of abortion. The statute reads in pertinent part:

It is unlawful for any person to use any aborted product of human conception, other than fetal remains, for any type of sci-

that similar issues of paternity and legitimacy are inherent in both artificial insemination and IVF. CAL. CIV. CODE § 7005 (West Supp. 1983) codifies California case law holding that a child born of artificial insemination is legitimate. *See generally* *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) (holding that artificial insemination is not adultery).

40. The desired result would be different in a surrogate mother contract situation. In that case, the embryo recipient would be a surrogate mother and the individual or couple hiring her would want to be treated as parents. Such contracts would probably not be upheld although the issue has not yet been tested in American courts. The statute governing artificial insemination creates a presumption that the natural, in this case surrogate, mother and her husband are the legal parents. In addition, 24 states have statutes prohibiting paying a mother for giving up her child. *See* CAL. PENAL CODE § 273(a) (West 1970). The issue of surrogate mother contracts is another issue that needs to be resolved in the area of new conception methods. *See generally* Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291 (1982); Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467 (1982); Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385 (1981-82); Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1981-82); Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341 (1980-81).

41. CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1983).

42. Michigan, for example, forbids research on a live human embryo if its health or life may be jeopardized. MICH. COMP. LAWS ANN. §§ 333.2685-2692 (West 1980). Minnesota prohibits experimenting on live human conceptus, including one conceived ex utero, unless the experiment protects the health or life of the conceptus or unless evidence has shown that type of experiment to be harmless. MINN. STAT. ANN. §§ 145.421-422 (West Supp. 1982).

entific 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.⁴³

IVF would not be covered by the statute because IVF does not involve an "aborted product." The egg is fertilized outside the uterus and the resulting embryo is implanted in the woman, not withdrawn. The statute could, however, affect ET with *in vivo* fertilization. The flushing technique used to withdraw the embryo from the woman donor could be considered an abortion, and the California statute may thus prohibit the technique. This would depend on how broadly the phrase "aborted product of human conception" would be construed. No cases, as yet, have interpreted the statute in the context of ET with *in vivo* fertilization. However, it could be argued in support of ET that reimplanting the embryo in the recipient is "protect[ing] or preserv[ing] the life and health of the fetus."⁴⁴ In addition, the statute's actual focus is on "research and experimentation." Thus, if IVF and ET become commonplace, then they are no longer "research and experimentation." Concluding that these statutes should not apply, constitutional issues remain concerning the state's ability to directly restrict the availability of these procedures.

IV. CONSTITUTIONAL ISSUES REGARDING GOVERNMENTAL REGULATION OF IVF AND ET

Governmental regulation of IVF and ET falls within a state's broad power to regulate affairs involving public health and safety.⁴⁵

43. CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1983).

44. *Id.*

45. "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky v. Board of Regents of the University of the State of New York*, 347 U.S. 442, 449 (1953). "According to settled principles the police power of a state must be held to embrace at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 23 (1824) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *R.R. Co. v. Husen*, 95 U.S. 465 (1877), *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877); *Lauton v. Steele*, 152 U.S. 133 (1893)). One commentator has noted, "[T]here is little serious dispute about the proposition that the legislature may, indeed should, act to preserve and foster the health, safety, and socio-economic well-being of the people." Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 724 (1976).

The regulatory power stems from the silence of the Constitution in this area as well as the tenth amendment.⁴⁶ Because the federal government consists of only enumerated powers, the lack of a grant of power to the federal government implies that such power is reserved to the states. State actions are valid unless prohibited explicitly or implicitly by the Constitution.⁴⁷ Thus, a state may constitutionally regulate many areas of health care because such regulation is not prohibited by the Constitution. However, the regulation must still meet the requirements of due process;⁴⁸ there must be a rational basis for the regulation.⁴⁹ The regulation must be "'rationally related' to a 'constitutionally permissible' purpose."⁵⁰ If, however, the regulation infringes upon a constitutionally protected fundamental right, a state must show a "compelling" interest and the regulation must be narrowly tailored to that interest.⁵¹ This distinction cannot be over-emphasized for it determines the level of scrutiny to be given to a regulation. In *San Antonio School District v. Rodriguez*,⁵² the Supreme Court provided the framework for analysis: "We must decide, first, whether [state legislation] . . . impinges upon a fundamental right explicitly or implicitly protected by The Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers

46. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X, § 1.

47. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 225 (1978).

48. See *Whalen v. Roe*, 429 U.S. 589 (1977) (statute requiring state to keep file of patients receiving certain drugs is valid exercise of police power):

At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control It follows that the legislature's enactment of the patient i.d. requirement was a reasonable exercise of New York's broad police powers.

Id. at 598.

49. "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part The New York statute challenged . . . is manifestly the product of an orderly and rational legislative decision." *Id.* at 597.

50. *Maher v. Roe*, 432 U.S. 464, 478 (1977) (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

51. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (state restriction on distribution of contraceptives struck down). "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* at 686.

52. 411 U.S. 1 (1973).

some legitimate, articulated state purpose"⁵³

Therefore, the first question to be addressed in a constitutional due process analysis is whether the right asserted is constitutionally protected. It must be determined whether individuals seeking access to IVF and/or ET, for purposes of procreation,⁵⁴ are exercising a fundamental legal right.

The constitutionally protected legal right to reproduce by means of IVF and/or ET would be found among the penumbras of the right to privacy in connection with marriage,⁵⁵ contraception,⁵⁶ and procreation.⁵⁷ A fundamental right of access to IVF and/or ET can be found by drawing close analogies. Although the cases discussed below which establish the right of privacy in connection with marriage, contraception, and procreation are a logical starting point, these cases did not consider, and do not directly define, analogous rights in the context of IVF and/or ET. If a fundamental right is found to exist, then IVF and ET can still be regulated if the right is not infringed upon,⁵⁸ and if the regulation rationally furthers a legitimate state interest.⁵⁹ If the regulation was found to infringe upon a fundamental right, it would be upheld only upon a showing that it was necessary to further a compelling state interest and that the regulation was closely tailored to that interest.⁶⁰

A. *The Right To Privacy Within Marriage*

The right to privacy within marriage was recognized by the Supreme Court in *Griswold v. Connecticut*.⁶¹ In *Griswold*, the Court struck down a statute that prohibited the use of contraceptives. The majority held that the statute violated the right of marital privacy protected by the Constitution.⁶² The Court stated that marriage is:

a relationship lying within the zone of privacy created by sev-

53. *Id.* at 17.

54. *See supra* note 7.

55. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the constitutionally protected area of privacy within the marital relationship).

56. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (invalidating statute restricting distribution, sale, advertisement, and display of contraceptives).

57. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (recognizing that individuals have a right to be free from unwarranted state interference with procreative capabilities).

58. *See supra* notes 45-53 and accompanying text.

59. *See supra* notes 45-53 and accompanying text.

60. *See supra* notes 45-53 and accompanying text.

61. 381 U.S. 479 (1965).

62. The Court included the right of marital privacy within the penumbra of specific guarantees of the Bill of Rights. *But see infra* note 84.

eral constitutional guarantees. And [the present case] concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship The very idea is repulsive to the *notions of privacy surrounding the marriage relationship*.⁶³

Based upon this language, an infertile couple could assert that to prohibit their access to new conception techniques is to interfere with the right of privacy within marriage. This argument is supported by Justice Goldberg's concurring opinion in *Griswold*. Justice Goldberg noted that the rights being protected were those of "marital privacy and [the right] to marry and raise a family."⁶⁴ Children are a vital, central aspect of marriage and family. Because privacy within marriage and family is protected, the decision to have children should also be protected. The fact that a couple is infertile strengthens the argument that a state regulation barring access to IVF and ET unreasonably interferes with the privacy of the marital relationship. Prohibiting the use of new conception techniques effectively denies an infertile couple the right to procreate. The privacy right recognized by *Griswold* includes the right to choose whether to have a child. This decision is certainly within the borders of "privacy surrounding the marriage relationship."⁶⁵

In order to protect an infertile couple's access to IVF and ET, it is necessary to carry the logic of this argument one step further. If the right to choose to have children is a protected right, then perhaps every available manner of procreation should also be protected. When one cannot have a child naturally, the right protected by *Griswold* should include not only the decision whether to have a child, but also access to safe, new, technical means of conceiving a child.

Opponents of IVF and ET would read *Griswold* more narrowly. This narrow reading would only protect the right of married persons to control the outcome of intercourse. A narrow reading is consistent with the actual language of the holding. By contrast, one must adopt an extremely liberal construction of *Griswold* in order to include the right of access to IVF and ET within its holding. Nevertheless, the language quoted above does indicate that what is being protected is not only the right to control the outcome of intercourse but a zone of privacy surrounding the marital relationship.⁶⁶ If a

63. *Griswold v. Connecticut*, 381 U.S. at 485-86 (emphasis added).

64. *Id.* at 495 (5-4 decision) (Goldberg, J., concurring).

65. *Id.* at 485-86.

66. *Id.*

right of access to IVF and ET were protected by *Griswold*, a state may still regulate the procedures if so doing would further important state interests⁶⁷ and if the regulations were narrowly tailored so as not to infringe upon privacy within marriage. This required tailoring could be accomplished by restricting access to IVF and ET to married, infertile couples. However, a regulation this narrow could not withstand an attack under the right to privacy in connection with contraception and procreation. Therefore, the privacy right protected by *Griswold* is not ultimately necessary as a foundation for the guidelines to be suggested in this comment.

B. The Right to Privacy in the Decision Whether to Bear or Beget a Child (The Right to Contraception)

In *Eisenstadt v. Baird*⁶⁸ and *Carey v. Population Services International*,⁶⁹ the Supreme Court held that statutes which restrict access to contraceptives are unconstitutional. In *Eisenstadt*, the Court stated:

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁷⁰

If an individual or a couple is infertile, the decision to resort to IVF or ET is essentially whether to bear or beget a child. It is not a question of "how" but "whether" to bear a child *if such means afford the only way to conceive a child*.

In *Carey*, the Court recognized that:

Read in the light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State This is so not because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.⁷¹

Although these cases specifically address the decision not to have

67. See *supra* notes 45-53 and accompanying text.

68. 405 U.S. 438 (1972) (holding unconstitutional a statute which effectively prevented distribution of contraceptives to single but not married persons).

69. 431 U.S. 678 (1977). See *supra* notes 51 and 56.

70. 405 U.S. at 453 (emphasis in original).

71. 431 U.S. at 687-89.

a child, the above language supports an individual's right of access to IVF and ET by focusing on the decisionmaking aspect of childbearing. In *Carey*, the statute prohibiting contraceptives was struck down because it imposed a "significant burden on the right of the individuals to use contraceptives if they choose to do so."⁷² The same can be said of restrictions which might be imposed on access to IVF and ET. The decision of an infertile individual or couple to use IVF or ET in order to have a child must be constitutionally protected as related to matters of childbearing.

Opponents of IVF and ET might argue that the right to decide whether to bear or beget a child as protected by *Eisenstadt*⁷³ and *Carey*⁷⁴ does not cover access to procedures necessary to execute the decision. They might read the cases as carving out a right to be free from unwarranted government intrusion into the particularly private act of sexual intercourse and into the question of whether such intercourse should result in pregnancy. However, the above quoted language is not so limited and is clearly intended to protect not only intercourse and a right of access to contraceptives but also "decisions in matters of childbearing."⁷⁵

C. *The Right to Procreate*

In *Skinner v. Oklahoma*,⁷⁶ the Supreme Court recognized a right to be free from unwarranted governmental interference with procreative capabilities. The Court held unconstitutional a statute which permitted Oklahoma's Attorney General to mandate by court order the sterilization of criminals who were three times convicted of certain crimes.⁷⁷ The majority noted, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."⁷⁸ Thus, to deny an infertile person or couple their only means of conception is to deny them their established, fundamental right to procreate. Thus, Supreme Court precedent requires that restriction of these means, absent a compelling state interest, would be an unwarranted government interference.

Opponents of IVF and ET might argue that *Skinner* held that

72. *Id.* at 689.

73. 405 U.S. 438 (1972). *See supra* note 68.

74. 431 U.S. 678 (1977). *See supra* notes 51, 56.

75. 431 U.S. at 688-89.

76. 316 U.S. 535 (1942).

77. *Id.* at 538.

78. *Id.* at 541.

it was unconstitutional for a state to surgically terminate an individual's ability to procreate. That narrow reading might not establish a constitutional right to a medical technique that would enhance one's procreative potential. However, the Court in *Skinner* expressly recognized procreation as "one of the basic civil rights of man."⁷⁹ The Supreme Court broadly recognized "the right to have offspring."⁸⁰ It did not qualify that right as the right not to be sterilized.

D. Summary

It can be concluded that sometimes, for some people, access to new conception techniques for procreative purposes is a fundamental right which requires protection. However, guaranteed access to IVF and ET based on the fundamental right to decide to bear children as expressed in *Eisenstadt*⁸¹ and *Carey*,⁸² and as the right to procreate as established by *Skinner*, is necessarily limited. Only persons who are prevented from conceiving naturally due to their infertility or that of their mate could successfully assert that access to these procedures is a fundamental right. The constitutional basis for finding a fundamental right to these procedures is dependent upon there being no other way for a person to procreate. The decision to beget a child is not impaired by restrictions to IVF and ET if one is able to conceive naturally.

The right to privacy within marriage provides access to IVF and ET only to married persons. However, the rights to procreate (*Skinner*) and to decide to bear a child (*Eisenstadt*, *Carey*) are not so limited.

Access to IVF and ET bears sufficient relationship to the areas of privacy already protected to be logically included in the right to privacy encompassed in the fourteenth amendment's⁸³ concept of personal liberty.⁸⁴ There are, however, state interests involved that

79. *Id.*

80. *Id.* at 536.

81. 405 U.S. 438 (1972).

82. 431 U.S. 678 (1977).

83. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

84. Before *Roe v. Wade*, 410 U.S. 113 (1973), it might have been argued that such a right be included in those personal rights "implicit in the concept of ordered liberty" which are so fundamental that an undefined penumbra provides them with an independent source of constitutional protection. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Court in *Roe v. Wade*, however, found such privacy rights to be within the fourteenth amendment. 410 U.S. at 152-53.

still permit government regulation of these procedures.

V. STATE INTERESTS WARRANTING REGULATION OF IVF AND ET

Once a fundamental right of access to IVF and/or ET is established, the state must demonstrate a compelling interest in order to infringe upon that right, and the regulation must be narrowly tailored to that interest.⁸⁵ If the regulation does not infringe upon the fundamental right, the state need only show a rational basis for state interference.⁸⁶ Many public policy considerations are inherent in the widespread use of IVF and ET. The state has many justifiable interests which narrowly tailored regulations could rationally further. The dignity of early human life, the health of embryos, the possibility of genetic manipulation, and the public policy against surrogate mother contracts are some state interests which will be discussed below.

A. "Extra" Embryos

Invariably, availability of the procedures involves the formation of, and tampering with, early human life. The state has an interest in the protection of embryos and the dignity of early human life as presently is evidenced by the fetal research statute.⁸⁷ This interest, however, is more related to the research context than to the clinical context because research generally does not aim to conceive a healthy child. However, as discussed earlier, often more eggs are fertilized than necessary for IVF to increase the odds of a potential pregnancy.⁸⁸ The state has a reasonable interest in what becomes of these "extra" embryos even though they are the property⁸⁹ of those whose genetic materials produced them.⁹⁰ Most likely, "extra" embryos

85. See *supra* notes 45-53 and accompanying text.

86. See *supra* notes 45-53 and accompanying text.

87. CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1983). See *supra* notes 41-44 and accompanying text.

88. See *supra* text accompanying note 17.

89. An embryo would not be given "person" status under the law. *Roe v. Wade*, 410 U.S. 113 (1973). Further, one case focused on the destruction of the would-be parents "property" in awarding damages for emotional distress following the intentional destruction of fertilized eggs. See *Del Zio v. Presbyterian Hospital*, No. 74-3558, slip op. (S.D.N.Y. April 12, 1978).

90. The state interest involved here would probably not be protecting potential human life. The Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), ruled that a state's interest in protecting potential human life is compelling only when a fetus has reached viability. *Id.* at 163. The Court defined viability as the point at which a fetus could live outside the mother's

would be donated or frozen.⁹¹ Regulations governing embryo donation and freezing must be adopted soon if IVF and ET are to be generally available to infertile people.⁹² The state has a health interest in the possible harmful effects of freezing and storage techniques. Also, health risks are associated with embryo donating which stem from the lack of adequate donor screening and testing. Requiring donor screening in order to avoid known potential genetic defects and the transfer of viruses and bacteria would help insure protection of fetuses and embryos.

Another state concern associated with the "extra" embryos is in precluding individual or institutional genetic manipulation. The social implications of large-scale genetic planning justify state regulation of IVF and ET. The thought of private embryo banks, at which potential parents could choose children with "desirable" genetic traits is disturbing. Widespread availability of these procedures without regulation or restriction could have profound effects on the genetic make-up of the population.⁹³ A few private persons should not have such control over the genetic fabric of society. Without regulation, even fertile individuals would have the option of producing genetically "superior" offspring. Any practice that could have such far-reaching effects on society is more than a merely rational state concern and should be regulated for the general welfare.

State regulation of a couple's or an individual's options concerning their extra embryos would not infringe upon the fundamental right of access to IVF and/or ET. These extra embryos are not needed for either procedure. Therefore, the state need only have a rational basis in regulating extra embryos. A state's concern with general health, safety, and welfare⁹⁴ furnishes a rational basis for regulating what could be done with unused embryos.⁹⁵

womb "albeit with artificial aid," *id.*, or the point at which it could experience a "meaningful life." *Id.* at 163. It is without question that the embryos used in IVF and ET are not viable according to either definition because they are too early in development. Therefore, the state's interest in protecting the embryos for the sake of their potential lives would not be compelling.

91. A myriad of legal questions are inherent in the possibility of frozen embryo banks. Does a frozen embryo have a right to be born? Who dictates its fate? Does a frozen embryo have inheritance rights? Can one make a living as an "embryo dealer?" Such questions will have to be resolved and are inextricably tied to the prospect of IVF and ET becoming widely available.

92. Such regulations would compliment the statutory guidelines to be suggested but are beyond the scope of this comment. *See infra* notes 106-18 and accompanying text.

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

94. *See supra* note 45 and accompanying text.

95. *See supra* note 91.

B. *Discouraging Illegitimacy And Promoting Family*

The Supreme Court has recognized that the state has an interest in discouraging illegitimacy and fostering marriage and family.⁹⁶ An outright prohibition of access to IVF and ET to single individuals would violate the holding of *Eisenstadt v. Baird*⁹⁷ because these cases established the right to make procreative decisions without regard to marital status. In addition, the California Legislature has not limited the availability of artificial insemination to married persons.⁹⁸ The statute does not provide that a woman must be married in order to be artificially inseminated.

Even though a state's interest in discouraging illegitimacy might ultimately rest with concern for the welfare of the child, a prohibition not tailored to that concern must fail. A state could only restrict access to IVF and/or ET to married persons by limiting the public funding of these procedures to married persons. The Supreme Court held in *Maher v. Roe*⁹⁹ that a state need not show a compelling interest in its election to fund only those activities which support its policies. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy [T]he State's power to encourage actions deemed to be in the public interest is necessarily far broader."¹⁰⁰ Thus, the state could constitutionally choose to fund IVF and ET as medical procedures for married persons only. However, a state could not limit IVF and ET only to married persons if the procedure were entirely privately funded.

C. *Public Policy Against Surrogate Mother Contracts*

Another state interest that supports regulation of IVF and ET is the present policy against surrogate motherhood.¹⁰¹ A surrogate mother contracts to bear a child for another in return for money. Our society as a whole has an aversion to this practice, as reflected

96. *Weber v. Aetna Gas & Sur. Co.*, 406 U.S. 164 (1972) (declaring Louisiana worker's compensation statute which denied equal right of recovery to dependent but unacknowledged illegitimate children unconstitutional). The Court affirmed the State's interest "in protecting 'legitimate family relationships,' . . . and in the regulation and protection of the family unit." *Id.* at 173.

97. 405 U.S. 438 (1972).

98. CAL. CIV. CODE § 7005 (West Supp. 1983).

99. 432 U.S. 464 (1977).

100. *Id.* at 475-76.

101. *See supra* note 40.

in case law¹⁰² as well as statutes¹⁰³ which prohibit a mother from selling her child for adoption. Surrogate contracts would probably be held unenforceable.¹⁰⁴ Unless and until surrogate legislation is adopted, regulations governing IVF and ET could exist independent of surrogate mother contract arrangements while protecting the fundamental right of infertile couples or individuals to resort to IVF and ET.

D. Welfare of Potential Children Born From IVF and ET

The state interest in the welfare of the child as well as the child's uncertain legal status can be addressed without infringing upon a right of access to IVF and ET. Written consent and a legal presumption that parties will have parental responsibility for resultant offspring would sufficiently advance the state interest in the welfare of the child.¹⁰⁵ There would be no issues of illegitimacy and paternity which would leave the state to provide for the child's welfare. The regulation would not prevent those who desired children through these procedures from having them. It would merely ensure that the legal status of the child was not in question and that the

102. See generally *Doe v. Kelly*, 307 N.W.2d 438 (1981) (forbidding payment to a surrogate mother in connection with an adoption); *Noyes v. Thrane*, No. CF 7614 (Los Angeles County, California, Superior Court, filed Feb. 20, 1981); *Syrkowski v. Appleyard*, 333 N.W.2d 90 (1983) (holding that the Paternity Act does not include the birth of a child resulting from a financial transaction involving surrogate motherhood).

103. ALA. CODE § 26-10-8 (1975); ARIZ. REV. STAT. ANN. § 8-126(c) (1974); CAL. PENAL CODE § 273 (a) (West 1970); COLO. REV. STAT. § 19-4-115 (1974); DEL. CODE ANN. tit. 13 § 928 (1981); FLA. STAT. ANN. § 63.212(1)(b) (West Supp. 1983); GA. CODE ANN. § 19-8-19 (1982); IDAHO CODE § 18-1511 (1979); ILL. REV. STAT. ch. 40 §§ 1526,1701,1702 (1981); IND. CODE ANN. § 35-46-1-9 (Burns Supp. 1983); IOWA CODE ANN. § 600.9 (West 1981); KY. REV. STAT. § 199.590 (2) (1982); MD. ANN. CODE art. 16 § 83 (1981); MASS. ANN. LAWS ch. 210 § 11A (Michie/Law Coop. 1981); MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1983-84); NEV. REV. STAT. § 127.290 (1983); N.J. STAT. ANN. § 9:3-54 (West Supp. 1983-84); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983); N.C. GEN. STAT. § 48-37 (Supp. 1981); OHIO REV. CODE ANN. § 3107.10(A) (Page 1982); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (Supp. 1983); TENN. CODE ANN. § 36-136 (Supp. 1983); UTAH CODE ANN. § 76-7203 (1978); WIS. STAT. ANN. § 946.716 (1982).

104. See *supra* note 40.

105. The issue of responsibility is much more critical in surrogate situations. There is at least one case in which none of the parties wanted responsibility for a child born microcephalic, usually a sign of retardation. The surrogate, Judy Stiver, turned the child over to Alexander Malahoff who had agreed to pay \$10,000. He later rejected the child and denied paternity. Tests done on live television revealed that he was not the father. The child was made a ward of the court so that adoption could be arranged, but the child ultimately remained with the surrogate mother. See *The N.Y. Times*, Jan. 23, 1983, at 19, col. 1; *Id.* at Feb. 3, 1983, at A16, col. 1; *Id.* at Feb. 7, 1983, at 10, col. 1; R. Rosenblat, *The Baby in the Factory*, *TIME*, Feb. 14, 1983, at 90.

appropriate people were charged with responsibility for children born through these procedures.

VI. A LEGISLATIVE PROPOSAL

Legislation governing these procedures would solve some of the legal problems regarding IVF and ET.¹⁰⁶ First, it should be required that those who resort to IVF and ET do so by reason of infertility. As discussed earlier, a constitutional right to these procedures exists only if a person cannot conceive a child naturally. Second, legislation should provide that if a married woman, with her husband's consent, resorts to IVF and/or ET using her own or donor ovum and the husband's or donor sperm, she and her husband would presumptively be the parents of any resultant offspring. If ET with *in vivo* fertilization were employed, the parental presumption should explicitly override the presumption of the artificial insemination statute which presently treats the sperm recipient and her spouse as the legal parents.¹⁰⁷ These provisions would clarify the legal status of the child. Written agreements, executed by both husband and wife, stipulating to such parental responsibility prior to either procedure should be required. If donor sperm or ova are used, all parties, including donors, should agree in writing that donors are barred from being charged with or asserting parental claims.¹⁰⁸ This would insure that donors and potential parents are aware of, and have consented to, their respective rights and responsibilities.

If a single woman sought access to IVF and/or ET, she alone should be presumed to have parental responsibility unless another person consented in writing to share such obligation. A provision regarding donors should apply to insure knowledge of rights and consent to responsibility.

In addition, would-be parents should be required to provide for the disposition of the embryo(s) should the parents die or divorce before implantation. A similar provision should provide for the disposition of any "extra" embryos. This would alleviate uncertainty as

106. It must be emphasized that the proposal suggested is intended to cover only the clinical context of the procedures. Further, the provision regarding parental responsibility and extinction of donor rights would have to be modified were the surrogate situation to become legally recognized.

107. CAL. CIV. CODE § 7005 (West Supp. 1983).

108. For such a provision to cover surrogate situations, it might be required of all parties to stipulate prior to the procedure who would be charged with parental responsibility and who would be barred from asserting parental rights. Problems might still exist, however, because of the present uncertainty of the enforceability of surrogate contracts. See *supra* note 40.

to whether the embryo(s) should be donated for research, frozen for later use, or implanted in other women.¹⁰⁹ If the embryos are donated for research, such research must conform to the fetal research statute¹¹⁰ as well as any other restrictions adopted in the future to govern research on embryos. If the would-be parents specify that embryos will be frozen or donated, such specifications would have to conform to any future regulations governing embryo freezing and donating.¹¹¹

There should also be a provision establishing a standard of due care for physicians. This standard should require available tests to be administered in order to screen out known causes of birth defects or diseases.¹¹²

Finally, as included in the California artificial insemination statute,¹¹³ there must be a record-keeping requirement that all papers and documents pertaining to the procedures remain in a permanent file similar to adoption files.¹¹⁴ The file must be kept confidential and subject to inspection only upon a court order showing good cause. This file is necessary to insure adherence to the above provisions. Consent forms, agreements, and documented tests performed for donor screening should also be kept.

Any legislation governing IVF and ET would be consistent with state involvement in areas affecting health, safety, and the general welfare.¹¹⁵ Legislation with the above provisions could follow the current California statute governing artificial insemination.¹¹⁶ Such legislation could be amended or added to as necessary. Amendments would be necessary as related legislation is adopted,¹¹⁷ as tech-

109. See *supra* note 91.

110. CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1983).

111. See *supra* note 91.

112. See *supra* note 15.

113. CAL. CIV. CODE § 7005 (West Supp. 1983).

114. CAL. CIV. CODE § 227 (West 1986).

The petition, relinquishment, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition *shall* be filed in the office of the county clerk and shall not be open to inspection by any other than the parties to the action and their attorneys . . . except upon the written authority of the judge of the superior court. A judge of the superior court shall not authorize anyone to inspect the petition . . . relinquishment, agreement, order, report to the court from any investigating agency, or power of attorney or deposition or any portion of any such documents except in exceptional circumstances and for good cause approaching the necessitous.

Id. (emphasis in original).

115. See *supra* note 45.

116. CAL. CIV. CODE § 7005 (West Supp. 1983).

117. See *supra* note 91.

nology presents even newer conceptions, or as social policies change.¹¹⁸ The text of the proposed legislation is contained in Appendix A.

VII. CONCLUSION

As the rate of infertility increases,¹¹⁹ *in vitro* fertilization and embryo transfer will be looked to as alternative means of conception. The more widely available these procedures become, the greater will be the social problems and legal questions associated with them. Unclear rights and liabilities, the unsettled legal status of the embryo, the social impact of genetic manipulation, and the possibility of physical and emotional harm to mother and child are only some of these concerns.

Although regulation of IVF and ET is warranted in light of the above issues, there are constitutional limitations to government interference with the fundamental right to have children. The right of access to these procedures, at least for infertile people, is protected under the United States Constitution. This right is included within the right to privacy in connection with marriage, procreation, and contraception. Still, it is possible to address some of the more compelling state concerns without unreasonably infringing on a fundamental right of access to IVF and/or ET if such procedures are necessary for procreation.

The above guidelines suggest regulation of IVF and ET through provisions which would clarify the legal rights and responsibilities of the parties involved. The destiny of the embryos produced through IVF and ET must not remain uncertain. Effective donor screening should be employed as part of a standard of due care. These provisions balance fundamental individual rights that are involved against the profound social impact of widespread, unrestricted availability of these techniques.

Helen E. Williams

118. A change in social policy would be an acceptance of surrogate motherhood.

119. Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984, at 50. ". . . Reproductive Endocrinologist Martin Quigley of the Cleveland Clinic calls 'an epidemic' of infertility in the U.S. In the past 20 years, the incidence of barrenness has nearly tripled, so that today one in six American couples is designated as infertile . . ."

APPENDIX A

California Civil Code § 7005.1 *In Vitro* Fertilization and Embryo Transfer.

(a) If, under the supervision of a licensed physician, a husband and wife are found incapable of conceiving a child due to the infertility of the husband or the wife, the husband and wife may be permitted to use *in vitro* fertilization or embryo transfer to effect conception.

(1) As used in this section, *in vitro* fertilization means fertilization of an egg taken from the woman's body and joined with the sperm of her husband or a donor and then returned to the woman's uterus for gestation.

(2) As used in this section, embryo transfer means either:

(a) *in vitro* fertilization using a donor egg rather than an egg of the recipient or

(b) *in vivo* fertilization using a donor egg fertilized in the donor's body through artificial insemination and then withdrawn and inserted into the recipient for gestation.

(b) When a married woman, with her husband's consent resorts to *in vitro* fertilization or embryo transfer, she and her husband are treated in law as if they were the natural parents of any child thereby conceived.

(1) When *in vivo* fertilization or embryo transfer, as described in section 7005.1 (a)(2)(b) is utilized, the parental presumption of the husband and wife utilizing this method shall override that provided in section 7005 (parental presumption of sperm recipient and spouse).

(c) Prior to utilizing either *in vitro* fertilization or embryo transfer, the husband and wife shall consent in writing to assuming parental responsibility for any child conceived through *in vitro* fertilization or embryo transfer and the husband and wife shall provide such consent signed and in writing. The physician shall certify their signatures and the date of the *in vitro* fertilization or embryo transfer.

(d) If donor sperm or ova are used in either *in vitro* fertilization or embryo transfer, all parties shall consent in writing prior to fertilization that the donor(s) are prohibited from asserting, or being charged with parental responsibility for any child thereby conceived.

(e) Section 7005.1 (a) notwithstanding, a single woman shall not be denied access to either *in vitro* fertilization or embryo transfer, provided that her use of either *in vitro* fertilization or embryo transfer is supervised and approved by a licensed physician who has determined that the woman is incapable of conceiving a child without *in vitro*

fertilization or embryo transfer.

(1) The single woman who utilizes *in vitro* fertilization or embryo transfer shall be treated in law as the natural parent of any child thereby conceived. She shall have sole parenthood responsibility unless another person consents in writing to share such obligation.

(2) When a single woman utilizes *in vitro* fertilization or embryo transfer, donor(s) of sperm or ova shall consent in writing prior to fertilization that the donor(s) are prohibited from asserting, or being charged with parental responsibility for any child thereby conceived.

(f) Prior to fertilization, the husband and wife or single woman who utilize *in vitro* fertilization with any donor(s) of sperm or ova shall provide in writing for the disposition of the embryo(s) should the husband and wife divorce or die before implantation, or should the single woman die before implantation.

(1) The written agreement provided in section 7005.1 (f) shall also provide for the disposition of any extra embryos. If such extra embryos are to be donated for research, then such research shall conform to Cal. Health & Safety Code section 25956 (fetal research). If such extra embryo(s) are to be frozen, the agreement shall identify the ultimate beneficiary or beneficiaries of the embryo(s).

(g) Licensed physicians who supervise *in vitro* fertilization or embryo transfer shall be required to administer normal medical tests to reduce the chances of birth defects or disease. Such tests shall include, but not be limited to: venereal disease, hepatitis, Acquired Immune Deficiency Syndrome, Tay-Sachs, sickle cell anemia, as well as those tests which identify alcoholism and drug abuse.

(h) The written agreement specified in subsection (c), (d), (e), or (f) of section 7005.1 shall be kept as part of the medical record and shall be kept in a sealed file available to an interested party showing good cause to a judge of the superior court.