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Reproductive Technology and the Law: The Future of Human Procreation

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NOTES

REPRODUCTIVE TECHNOLOGY AND THE LAW: THE FUTURE OF HUMAN PROCREATION

I. INTRODUCTION

Reproductive techniques such as artificial insemination, *in vitro* fertilization, cryopreservation, prenatal diagnosis, elective abortion and surrogate motherhood have taken on an increasingly significant role in American society.[1] Despite often bitter protest and controversy, these relatively new[2] methods of conception are here to stay.[3] There is no hope of putting the proverbial "genie back into the bottle."[4] Moreover, selective bans on research and development would serve no purpose because an individual unable to take advantage of a particular technique in one country could easily pursue the technology developed in another.[5] Because we live in a society where fifteen percent of all married couples are infertile,[6] new methods of reproduction offer

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1. *See, e.g.*, L. ANDREWS, NEW CONCEPTIONS (1984) [hereinafter NEW CONCEPTIONS] (which boasts subtitles including "A Consumer's Guide to the Newest Infertility Treatments" and "How to pick the right technology for you," *id.* at xviii). *See also* Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. 50 (Aug. 1984) [hereinafter *Stork Market*]; Shapiro, *New Innovations in Conception and Their Effects Upon our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37, 54 (1986). For a detailed definition of terms see *infra* notes 6, 20, 51-53, 55 and accompanying text.

2. Note that the term "new" is used merely to indicate the newness of the technologies' acceptance as a medical reality in modern society. Surrogate motherhood has been around since biblical times; *see Genesis* 16:2, 30:3, where Sarah and Rachel called upon their servants to bear children for them because they were barren. It is not until recently, however, that surrogate motherhood has come to the forefront as a viable, medically feasible alternative.

3. NEW CONCEPTIONS, *supra* note 1, at 263.

4. Pilpel, *New Methods of Conception and Their Legal Status*, 3 N.Y.L.S. HUM. RTS. ANN. 13 (1985) (quoting NEW CONCEPTIONS, *supra* note 1, at 263).

5. NEW CONCEPTIONS, *supra* note 1, at 263.

6. Infertility is defined as one year of unprotected coitus without conception. L. SPEROFF, R. GLASS & N. KASE, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 467 (1983). For more statistics on infertility see NEW CONCEPTIONS, *supra* note 1, at 2.

new hope.[7] The new techniques are a blessing to couples who otherwise would be unable to have children.[8]

New methods of conception, however, trigger implications for the future of human procreation much greater than simply providing childless couples with the ability to reproduce.[9] This technology not only offers infertile couples the opportunity to conceive, but also our society the opportunity for a "new control."[10] Control, however, has its price. One author suggests that in many ways "the technology is a threat: [offering us] control [but] toward what end? For what purpose? For whose purpose?"[11] The possibility exists that while this "new control" offers new hope, it also leaves us powerless as a society to prevent selective creation of certain types of offspring, thereby "improving" on nature.[12] A result of this new-found ability to shape human development is an evolving American value system in which society is learning to see its children as "the products of conception" and to think of babies as "marketable commodities."[13] New reproductive technology has this "commodification" at its root[14] and is forcing us, as a society, to deal with questions

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7. For some couples, infertility can be devastating to their marriage. It can change the couple's outlook on their relationship and their opinion of themselves. NEW CONCEPTIONS, *supra* note 1, at 7.

8. *Id.* at 4.

9. *Id.* at 263.

10. B. ROTHMAN, THE TENTATIVE PREGNANCY: PRENATAL DIAGNOSIS AND THE FUTURE OF MOTHERHOOD 3 (1986).

11. *Id.*

12. NEW CONCEPTIONS, *supra* note 1, at 263. Perhaps our "Brave New World" has brought "us at last . . . out of the realm of mere slavish imitation of nature and into the much more interesting world of human invention." A. HUXLEY, BRAVE NEW WORLD 8 (1969).

13. ROTHMAN, *supra* note 10, at 2.

14. *Id.* Rothman also suggests that even in a " 'naturally' occurring pregnancy, the new technology of reproduction encourages and reinforces the commodification process: genetic counseling serves the function of quality control, and the wrongful life suits are a form of product liability litigation." *Id.* (footnote omitted). *See also* notes 172-82 and accompanying text. The commodification of human procreation, however, is not perceived by all to be a negative outcome of new reproductive technology. *See, e.g.*, Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U. L.J. 147, where the author states in reference to surrogate motherhood:

> [R]inging denunciations of baby-buying and declarations that children are not property may make stirring reading, but it is difficult to specify precisely why the "commercialization" of a surrogate motherhood arrangement is inconsistent with public policy. In a commercial society, "commercialization" is the usual way in which many individual needs are satisfied.

that we may not be morally or legally ready to answer.[15]

This article provides a broad overview of various reproductive techniques and their current legal status. Part II of this article examines artificial insemination. Parts III and IV focus on *in vitro* fertilization and cryopreservation, respectively. Part V discusses the surrogate motherhood arrangement and the varying influences on its enforceability. The second section of that part focuses mainly on litigation surrounding surrogate motherhood arrangements thus far, and the Baby "M" decision. Finally, Part VI comments on the future of human procreation and mankind due to the "commodification" of the baby-making process.

II. ARTIFICIAL INSEMINATION

A. Medical Background

In the United States, an estimated 20,000 babies conceived through artificial insemination are born each year.[16] Artificial insemination is accomplished when a female patient is implanted with male sperm by way of a needleless syringe.[17] No sexual intercourse between the parties is involved.[18] Rather, artificial insemination takes place in one of three ways:[19] first, a woman can be inseminated[20] with her husband's sperm by Artificial Insemination Homologous (AIH);[21] second, a woman can be inseminated with a donor's sperm through a procedure known as Artificial Insemination Heterologous (AID);[22] finally, a woman can be inseminated with a mixture of her husband's sperm and a donor's sperm through Confused Artificial Insemination (CAI).[23] This latter procedure is distinct from *in vitro* fertilization be-

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Id. at 156.

15. ROTHMAN, *supra* note 10, at 3.

16. *Stork Market*, *supra* note 1, at 50.

17. Williams, *Differential Treatment of Men and Women by Artificial Reproduction Statutes*, 21 TULSA L.J. 463, 464 (1986).

18. Note, *Artificial Conception: A Legislative Proposal*, 5 CARDOZO L. REV. 713, 714 (1984) (footnote omitted) [hereinafter *Artificial Conception*].

19. Shapiro, *supra* note 1, at 42.

20. Insemination is defined as "the deposit of seminal fluid within the vagina." STEDMAN'S MEDICAL DICTIONARY 714 (24th ed. 1982).

21. Williams, *supra* note 17, at 464.

22. *Id.*

23. *Id.*

cause actual conception takes place within the woman's body and not in a test tube.[24]

B. Legal Status

Through the years, AID has been considered an unacceptable means of achieving pregnancy.[25] In 1921, the Supreme Court of Ontario, in *Orford v. Orford*,[26] held that a wife's participation in AID as a means of achieving pregnancy without her husband's consent was tantamount to adultery. The court reasoned that adultery occurred not only when the parties actually had intercourse, but that it was " 'the voluntary surrender . . . of the reproductive powers or faculties' by the wife to someone other than her husband" that constituted an adulterous act.[27] In *Doornbos v. Doornbos*,[28] the court concluded that any AID, even if performed with the husband's consent, was adultery and declared any child born as a result of that procedure illegitimate.[29] Unlike the courts in *Orford* and *Doornbos*, the Scottish Court of Sessions in *MacLennan v. MacLennan*[30] held that during AID, even without the husband's consent, no physical contact proscribed by adultery occurred, hence AID could not be considered an adulterous act.[31] More recently a ruling of the California Supreme Court in *People v. Sorenson* dismissed the idea that AID is adultery,[32] reflecting the modern view in the United States.[33]

Issues tangential to adultery, such as legitimacy and paternity, also arose with the advent of AID. For example, in *Gursky v. Gursky*[34] the New York Supreme Court found that children born as a result of AID were illegitimate. There has, however, been a departure from this view in light of the enactment of ar-

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24. *Id.*

25. *Id.* at 465. In England, one commission concluded that the use of artificial insemination should be criminally punished. *Id.*

26. *Id.* at 466 (citing Orford v. Orford, 58 D.L.R. 251 (Ont. 1921)).

27. *Id.* (quoting Orford v. Orford, 58 D.L.R. 251 (Ont. 1921)).

28. *Id.* (citing Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., 1954), *aff'd*, 139 N.E.2d 844 (1956)).

29. *Id.*

30. *Id.* (citing MacLennan v. MacLennan, 1958 Sess. Cas. 105).

31. *Id.*

32. People v. Sorenson, 68 Cal.2d 280, 284, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) (en banc).

33. Williams, *supra* note 17, at 466.

34. 39 Misc.2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

tificial insemination statutes.[35]

State legislatures had not dealt with AID prior to the 1940s.[36] Indeed, no legislation relating to artificial insemination was adopted until the mid-1960s.[37] As of 1986, twenty-seven states had artificial insemination statutes.[38] Also, the Uniform Parentage Act,[39] enacted by eight states,[40] attempts to determine the legal status of the husband, the donor, and the child[41]

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35. *See infra* note 38 and accompanying text.

36. *Artificial Conception, supra* note 18, at 716 (footnote and citation omitted).

37. Shapiro, *supra* note 1, at 42.

38. ALA. CODE § 26-17-21 (1986); ALASKA STAT. § 25.20.045 (1983); ARK. STAT. ANN. § 61-141(C) (1971); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. ANN. §§ 45-69f to -69n (West 1981); FLA. STAT. ANN. § 742.11 (West Supp. 1986); GA. CODE ANN. §§ 19-7-21 (1982), 43-34-42 (1984); IDAHO CODE §§ 39-5401 to -5407 (1985); ILL. ANN. STAT. ch. 40, §§ 1451-1453 (Smith-Hurd Supp. 1987); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1987); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MD. HEALTH-GEN. CODE ANN. § 20-214 (1982); MASS. GEN. LAWS ANN. ch. 46, § 4B (West Supp. 1987); MICH. COMP. LAWS §§ 700-111(2), 333.2824(6) (1980); MINN. STAT. ANN. § 257.56 (West 1983); MONT.CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. § 126.061 (1985); N. J. STAT. ANN. § 9:17-44 (West Supp. 1987); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, § 551-553 (West Supp. 1987); OR. REV. STAT. §§ 109.239, .243, .247 and 677.355, .360, .365, .370 (1983); TENN. CODE ANN. § 68-3-306 (1985); TEX. FAM. CODE ANN. § 12.03(a) (Vernon 1975); VA. CODE § 64.1-7.1 (1987); WASH. REV. CODE ANN. § 26.26.050 (1986); WIS. STAT. ANN. § 891.40 (West Supp. 1986); WYO. STAT. § 14-2-103 (1978).

39. Uniform Parentage Act 5, 9A U.L.A. 592 (1979) (UPA). "The UPA was promulgated by the National Council of Commissioners of State Laws in 1973 and approved by the House of Delegates of the American Bar Association in 1974." *Artificial Conception, supra* note 18, at 719 n.38. Section 5 of the Uniformed Parentage Act provides:

> § 5 [Artificial Insemination]
>
> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with the 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 husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

Unif. Parentage Act § 5, 9A U.L.A. 579, 592-93 (1979).

40. California, Colorado, Minnesota, Montana, Nevada, New Jersey, Washington, and Wyoming. *Artificial Conception, supra* note 18, at 719 n.39.

41. *Id.* at 719.

by creating a presumption of paternity in the "husband."[42]

Despite legislation in this area, AID is still fraught with legal as well as ethical problems.[43] Records of individuals donating sperm are often kept confidential and not made available except by court order.[44] Thus, it is possible that the same donor's sperm may be used to inseminate many women.[45] It is not unimaginable that the resultant offspring, unknowing of their blood relationship, could someday be attracted to each other and unknowingly enter into an incestuous relationship.[46]

Most AID statutes create a presumption of paternity in the husband of the wife receiving the sperm donation, as opposed to the actual sperm donor.[47] The outcome is thus predictable when the sperm donor wishes to remain anonymous and relinquish all paternal rights to the child, but it is problematic when the sperm donor does not wish to relinquish parental rights, as in the surrogate parenthood arrangement. When these statutes are applied to the surrogate situation, they frustrate the entire purpose of the relationship as they place a presumption of paternity with the surrogate's husband rather than the child's biological father who intended to take custody.[48]

III. *In Vitro* Fertilization

A. *Medical Background*

In vitro fertilization (IVF) is an option which is used with increasing frequency[49] as a greater number of couples discover they are infertile.[50] Many causes of infertility exist, but the women most likely to consider IVF are women who cannot ovulate. While some surgical techniques can help some infertile women, others are left with little choice.[51] The IVF process be-

42. *See supra* note 39.

43. Pilpel, *supra* note 4, at 15.

44. New Conceptions, *supra* note 1, at 191.

45. *Id.* at 174. "It is biologically possible for a single donor's sperm to father as many as twenty thousand AID children in one year." *Id.*

46. *Id.*

47. *See supra* note 39.

48. *See infra* note 39 and accompanying text.

49. Saltarelli, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 Syracuse L. Rev. 1021, 1026 (1985).

50. *See supra* note 6.

51. Some available surgical techniques for women with blockage or damage to the

gins by monitoring the time at which the woman ovulates.[52] Upon ovulation, the physician removes the woman's oocytes, or immature eggs.[53] The oocytes are then placed in a "culture medium" and are allowed to mature.[54] Subsequently, the ova is placed with a sperm sample and the egg (or eggs) becomes fertilized.[55] The immediate result of fertilization is the zygote which remains in the "culture medium" for a few days and divides into an eight-cell embryo.[56] The next step requires impregnation of the receiving woman by implanting the embryo into her womb at the correct time in her menstrual cycle.[57] From that point on, save any complications, the woman carries the child to term in the usual fashion.[58] Unfortunately, however, only three out of ten women undergoing this procedure are successful and achieve pregnancy.[59]

B. Legal Status

For a brief period in American history, from 1974 to 1979, the federal government legally suspended all IVF research.[60] Because of the delicate issues involved, the federal government established an Ethics Advisory Board (EAB).[61] If an organization or individual wanted to receive federal funding for IVF research,

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oviducts are: salpingolysis (freeing the fallopian tube from adhesions); resection (excision of a segment of a part, as in wedge resection, where a wedge of the ovary is removed to treat ovarian cystic disorder); and anastomosis (a recreation of the tubular connection). STEDMAN'S MEDICAL DICTIONARY 1251, 1220, 62 (24th ed. 1982).

52. Ovulation is the release of an ovum from the ovarian follicle. STEDMAN'S MEDICAL DICTIONARY 1009 (24th ed. 1982).

53. The oocytes are surgically removed in a procedure known as laparoscopy. Saltarelli, *supra* note 49, at 1027.

54. *Id. See also* Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 205 (1983).

55. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. MED. 336, 337-38 (1981). Fertilization is defined as "the process that begins with the penetration of the secondary oocyte by the spermatozoon and is completed with the fusion of the male and female pronuclei." STEDMAN'S MEDICAL DICTIONARY 520 (24th ed. 1982).

56. Saltarelli, *supra* note 49, at 1028.

57. Shapiro, *supra* note 1, at 50.

58. *Id.*

59. NEW CONCEPTIONS, *supra* note 1, at 137.

60. Saltarelli, *supra* note 49, at 1033. *See* 45 C.F.R. § 46.204(d) (1984).

61. *Id.*

they had to seek approval from the EAB.[62] The EAB made several proposals with regard to programs dedicated to IVF research and recommended that the legislature act[63] by passing a uniform law which the EAB hoped would establish more firmly the legal status of IVF children.[64]

While there is no legislation that specifically bans IVF, the laws passed prior to its development seem to include IVF within the scope of their general language.[65] For example, many states have enacted laws that regulate fetal research.[66] These laws were not originally intended to cover IVF.[67] Rather, most of these statutes were promulgated as a result of *Roe v. Wade*[68] for the purpose of prohibiting experimentation on aborted fetuses; they were not enacted with *in vitro* fertilization in mind.[69] Legislatures felt that such enactments were necessary "in order to maintain respect for human dignity."[70]

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62. *Id.* at 1033 n.68.

63. *Id.* at 1034.

64. *Id.* at 1033-34. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research eventually replaced the EAB.

65. NEW CONCEPTIONS, *supra* note 1, at 148.

66. As of 1986, the following statutes concerning IVF had been enacted: ARIZ. REV. STAT. ANN. § 36-2302 (1986); ARK. STAT. ANN. §§ 82-436 -442 (Supp. 1985); CAL. HEALTH & SAFETY CODE § 25956 (West 1984); FLA. STAT. ANN. §§ 390.001(6), (7) (West 1986); ILL. ANN. STAT. ch. 38, §§ 81-26, 81-32, 81-32.1 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 35-1-58.5-6 (Burns 1985); KY. REV. STAT. ANN. § 436.026 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 14:87.2 (West 1986); ME. REV. STAT. ANN. tit. 22, § 1593 (West 1980); MASS. GEN. LAWS ANN. ch. 112, § 12J (West 1983); MICH. COMP. LAWS ANN. §§ 333.2685-2692 (West 1980); MINN. STAT. §§ 145.421-.422 (West Supp. 1985); MO. ANN. STAT. § 188.037 (Vernon 1983); MONT. CODE ANN. § 50-20-108(3) (1985); NEB. REV. STAT. §§ 28-342, 28-346 (1985); N.M. STAT. ANN. § 24-9A-1(K)-9A-5 (1978); N.D. CENT. CODE §§ 14-02.2-01-02 (1981); OHIO REV. CODE ANN. § 2912.14 (Baldwin 1982); OKLA. STAT. ANN. tit. 63 § 1-735 (West 1987); PA. STAT. ANN. tit. 18 § 3216 (Purdon 1983); R.I. GEN. LAWS §§ 11-54-1 -2 (Supp. 1986); S.D. CODIFIED LAWS ANN. § 34-23A-17 (1986); TENN. CODE ANN. § 39-4-208 (1982); UTAH CODE ANN. § 76-7-310 (1978); WYO. STAT. § 35-6-115 (1977).

67. *See generally* NEW CONCEPTIONS *supra* note 1, at 148-57 (discussing state laws with respect to fetal research and *in vitro* fertilization).

> Nearly half the states have enacted laws restricting experimentation on fetuses. The impetus behind many of these laws was the legalization of abortion in the mid-1970s. Legislators felt that in order for people to maintain respect for human dignity, it was necessary to pass laws restricting or prohibiting doctors' experimentation on fetuses and on pregnant women who intended to abort.

Id. at 148-49.

68. 410 U.S. 113 (1973).

69. Saltarelli, *supra* note 49, at 1041-42.

70. NEW CONCEPTIONS, *supra* note 1, at 148-49. Some states only restrict such experimentation when an abortion is anticipated. *Id.*

Laws which restrict research when abortion is anticipated or subsequent to an abortion would not hamper the use of *in vitro* fertilization because that procedure is not done within the context of or in anticipation of an abortion.[71] More general laws, however, which restrict or bar research on any fetus, whether abortion is anticipated or not, may indirectly restrict or bar IVF because that procedure necessarily involves manipulation of a fetus.[72]

Fetal research laws present an even greater barrier to the newest areas of reproductive technology,[73] artificial embryonation (AE) and embryo adoption (EA).[74] In artificial embryonation, a woman is artificially inseminated with the sperm of a man whose wife cannot produce an egg, but is able to carry a child.[75] After fertilization, the embryo is flushed out of the woman's uterus and implanted into the uterus of the husband's wife.[76] The wife then carries the embryo, which was fertilized *in vivo,* to term.[77] Embryo adoption is virtually the same procedure as artificial embryonation, that is, fertilization *in vivo,* except that rather than the husband donating the sperm, an anonymous sperm donor may be used.[78] Because the flushing technique used in embryo transfer seems to fall within the definition of abortion under some fetal research laws, these laws preclude the use of this technique.[79]

To date, the Supreme Court has not found a fundamental right to participate in new reproductive procedures such as IVF, as it has in those cases concerning rights to marriage,[80] procreation,[81] contraception[82] and the right to give birth or sire chil-

71. *Id.* at 149. The fetus is therefore not the object of some scientific experiment, but rather, it is given a chance for life by being implanted. *Id.*

72. *Id.* Massachusetts, Michigan, North Dakota, and Rhode Island bar research where a viable embryo's life or health is in imminent danger. *Id.*

73. Shapiro, *supra* note 1, at 52.

74. *New Conceptions, supra* note 1, at 251.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 252. Adopting an embryo has been analogized to adopting a child. *Id.* "[T]he adoption simply occurs at a much earlier stage of the child's development." *Id.*

79. *Id.* at 253.

80. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (race may not be a basis for restricting an individual's right to marry).

81. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate is funda-

dren.[83] Procreation is, in fact, "one of the basic civil rights of man[kind]."[84]

One author suggests that the Court protects procreation rights so vehemently only because they implicate the broader concepts of "freedom of intimate association" and "values of caring and commitment, intimacy, and self-identification."[85] The Court, in deciding whether a couple has a fundamental right to use the IVF procedure, must balance that right against the state's interest in ensuring that IVF is not used to create some form of "superior" race.[86] Thus, if the IVF procedure was only used for the purpose of allowing an otherwise infertile couple to procreate, and not for the purpose of creating a genetically "superior" offspring, the Court would most likely find the IVF procedure constitutional.

IV. CRYOPRESERVATION OF HUMAN EMBRYOS

A. Medical Background

Although its use on human embryos is relatively new, cryopreservation has proven effective.[87] During cryopreservation, an embryo is frozen in liquid nitrogen[88] and kept frozen until ready for implantation in a fertile woman.[89] A high percentage (30 to 50 percent) of embryos are destroyed by the freezing process,[90] but this number is comparable to the number of fertilized eggs

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mental and a basic liberty).

82. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686-689 (1977) (restrictions upon the distribution of contraceptives are at the heart of the decision to bear or beget a child and are deserving of strict scrutiny).

83. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (the individual, whether married or single, has a fundamental right to decide whether to bear or beget a child).

84. *See Skinner*, 316 U.S. at 541.

85. *See* Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850, 1869 (1981) (quoting Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 640 (1980)).

86. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 980 (1986).

87. The first baby born as a result of the cryopreservation process was born in Melbourne, Australia. The embryo had been frozen for two months. Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1082 n.20 (1986).

88. *Id.* at 1083.

89. *Id.*

90. *Id.* at 1086.

never making it through the natural reproductive process.[91] What effect, if any, the process will have on the health of infants born as a result of this process is as yet unknown.[92] To date, though, neither greater abnormalities nor increased health problems are reported among children conceived through cryopreservation as opposed to those conceived in the traditional way.[93]

B. Legal Status

The United States does not recognize embryos as persons and thus no legal rights inhere in the fetus.[94] Regulations restricting experimentation on fetuses such as those prohibiting cryopreservation and embryo transfer procedures seem to provide some protection to embryos.[95] Some of these regulations seem to prohibit cryopreservation and embryo transfer procedures.[96] Federal law regulating fetal research defines the fetus as the product of conception from the moment of fertilization. Defined this way, embryos used in cryopreservation are drawn within its coverage.[97] Traditionally, embryos were recognized only as part of the pregnant woman and not autonomous entities with standing to sue for damages occurring before birth. As our society moves away from that notion, however, in more and more cases, children are suing their parents to recover for prenatal, and even preconception, injuries.[98] It must be noted, however, that success in these cases seems to require as a prerequisite the infant's actual birth.

Courts have yet to consider the rights of the unborn embryo as an entity with rights separate from its mother. In *Del Zio v. Columbia Presbyterian Medical Center*,[99] a jury awarded the

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91. "Only 84 per 100 female eggs that are exposed to sperm become fertilized, and of these, only 69 are implanted in the uterine wall; only 37 implanted embryos survive to the sixth week of pregnancy, and only 31 implanted embryos survive birth." *Id.* at 1086 n.48 (quoting Grobstein, *External Human Fertilization*, 240 SCI. AM. 57, 61 (June 1979)).

92. Note, *supra* note 87, at 1086.

93. *Id.*

94. Robertson, *supra* note 86, at 973.

95. 45 C.F.R. § 46.203(c) (1987).

96. *Id.*

97. *Id.*

98. Robertson, *supra* note 86, at 973.

99. No. 74-3588 (S.D.N.Y. 1978) (memorandum decision), *noted in* NEW CONCEP-

plaintiff mother $50,000 for emotional distress after doctors destroyed her fertilized eggs prior to implantation.[100] The issue in the case, however, did not focus on the rights of the fertilized egg, but rather whether the plaintiff was injured by the doctors' actions.[101] The court in *Del Zio* did not consider that the rights of the fertilized egg were distinct from the injury inflicted on the plaintiff.[102]

Embryo protection raises questions distinct from those raised by abortion. In the landmark case, *Roe v. Wade*,[103] the Supreme Court established a woman's constitutional right to an abortion.[104] While *Roe* held that a woman is free to remove a fetus from her body, the Court did not rule on whether a woman could control the fetus after its removal from her body or exert control over the fetus that was never connected to her body. Although *Roe* allows a woman to be free from an unwanted pregnancy, the court did not address the question of what should be done with an embryo or fetus which was never, or is no longer, physically connected to the mother.

An interesting question arises with respect to the status of the fetus or embryo within a constitutional framework. Namely, does the fetus or embryo enjoy constitutional protection? Professor Laurence Tribe argues that:

> But for its biological dependence on the woman, it is . . . arguable that the fetus could be regarded as a holder of rights under the due process clauses of the fifth and fourteenth amendments, as well as the equal protection

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TIONS, *supra* note 1, at 155-57.

100. NEW CONCEPTIONS, *supra* note 1, at 157.

101. *Id.*

102. *Id.*

103. 410 U.S. 113 (1973).

104. *Id.* The Court established a woman's right to an abortion with certain qualifications. The Court, per Blackmun, divided the nine-month gestation period into three trimesters. During the first trimester, the abortion decision is left to the "medical judgment" of the woman's attending physician (the term "medical judgment" is broadly construed). During the second trimester, the state's interest in promoting the woman's health is more substantial, therefore the state may choose to regulate the abortion procedures in ways which are reasonably related to the woman's health. Finally, in the third trimester, the state's interest in protecting the potential human life becomes compelling so that the abortion may be regulated by the state in regard to all aspects of the abortion except where the abortion is necessary for the preservation of the life or health of the woman. *Id.* at 162-66.

> clause of the latter. Any such "right to life" could hardly be deemed alienable by the unborn or on their behalf. The inalienability of that right suggests that the government bears an affirmative duty to protect the interests of the fetus to the extent that it may do so without coercing involuntary pregnancy.[105]

Following Tribe's reasoning, one can argue that once the attachment of the fetus or embryo to the mother is severed, a constitutional right to protection inheres in that fetus or embryo. Thus, embryos which were never implanted or aborted fetuses which survived the abortion process would be protected under this analysis.[106] If, in fact, the embryo enjoys a constitutional right to protection, then conceivably an affirmative duty may exist to transfer all embryos to a woman's uterus or to freeze them for future use.[107] Arguably, the state should mandate artificially gestating all embryos and live fetuses or mandate freezing all such embryos for future use.[108]

Discarding unwanted embryos raises further complicated moral and legal questions. No law on the books calls for the implantation of embryos fertilized outside a woman's body. However, any policy condoning the unthoughtful destruction and discard of embryos appears contrary to public policy.[109] Thus, conflict arises on occasions where it is desired to discard the embryo or fetus.[110] At issue here is the inverse to the constitutionally protected right to procreate, namely, an individual's right to choose *not* to procreate by destroying the embryo.[111] Hence, a question remains unanswered: is the right to avoid biological procreation embodied in the constitutional right to procreate?

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105. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 340-41 (1985) (footnote omitted).

106. *See* Commonwealth v. Edelin, 359 N.E.2d 159 (1976) (a doctor performing an abortion has the duty to rescue a viable fetus that is born alive).

107. Robertson, *supra* note 86, at 977-81.

108. *Id.*

109. In America, some doctors who administer IVF sometimes falsely state that they have implanted all of the frozen embryos so that the hospitals will approve and to appease certain "right to life" organizations. *Id.* at 977.

110. An example might be where the parents have both died and the remaining family does not wish to have remaining biological links. *Id.*

111. *Id.* at 978.

Mandatory donation of an unwanted embryo does not necessarily infringe a "couple's right to procreate because it does not interfere with any actions designed to relieve infertility."[112] However, a couple may have a very real concern in not having unknown lineal descendants. Arguably such a right would have to be founded on constitutional principles in order for it to be viable in the courts:

> The claim of a right to avoid having an unknown descendant would have to be grounded in the importance of avoiding an unwanted biological link with offspring. Although the biological link at issue involves procreation, something more than the procreative label is necessary to establish a right. Whether an unwanted but unidentified biological link is sufficient to ground a right will depend upon the social and psychological significance which individuals and society place on the existence of lineal descendants when anonymity and no rearing obligations exist.[113]

The Supreme Court must balance the individual or couple's interest in avoiding a biological connection with the right of the embryo or the interests of society in preserving the life of the embryo. If the Court were to consider this issue it might very well find that because the biological parents would not have to bear the burden of gestating and/or rearing the child, their interest in avoiding a biological link does not pass constitutional muster.[114]

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112. *Id.*

113. *Id.* at 979.

> Persons may differ in their perception of the burdens entailed by such a link. Some persons might be exceedingly troubled by the knowledge that a person of their blood is "out there" raised by another and might experience guilt or an intense desire for contact that leaves them frustrated and angry. Others might fear unwanted contact with genetic offspring. Although intended to be an anonymous link, offspring may discover the identity of their genetic parents and want to make contact, form a relationship, or seek financial support. For others, however, the genetic link alone may have little or no negative impact and may even be a source of satisfaction once established.

Id.

114. Robertson, *supra* note 86, at 980.

V. SURROGATE MOTHERHOOD

A. *Introduction*

A surrogate mother[115] is a woman who is artificially inseminated with a donor's sperm but who intends to surrender the child to the donor at birth.[116] Often, the surrogate mother formally contracts with a couple and receives compensation in exchange for her services.[117] Such an arrangement comes under scrutiny, however, when considered in light of competing statutes and public policy such as: adoption and anti-baby-selling laws; artificial insemination statutes; and questions of adultery and legitimacy. The following sections focus specifically on each of these problems.

1. Application Of Adoption And Anti-baby-selling Laws To The Surrogate Motherhood Arrangement

Because of the lack of legislation in the area of surrogate motherhood, adoption[118] and anti-baby-selling laws[119] are often applied in the surrogate motherhood situation.[120] Inasmuch as

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115. Surrogate motherhood, it has been argued, is a misnomer. If motherhood is defined in terms of love and nurturing and raising the child, then it is the wife of the sperm donor husband who should brandish the term mother. Perhaps the term "surrogate gestator" or "carrier" would be more appropriate for the woman who carries the child.

116. Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 2 (1986). Unmarried couples or individuals may employ a surrogate mother. They may also consider employing a surrogate carrier, a woman who is artificially inseminated with an embryo which is the result of *in vitro* fertilization of another couple's egg and sperm. However, the present discussion is limited to the legal position of married couples who opt to artificially inseminate the surrogate mother with the donor husband's sperm.

117. *Id.* at 2 n.6. While the price range may vary, the standard fee for a surrogate mother is $10,000 plus medical expenses. *Id.* at 3 n.7. Compensation outside of medical expenses may, however, be barred by statutes which were designed to prohibit the black market sale of babies. *See infra* note 123 and accompanying text.

118. Adoption is defined as "a state created judicial procedure whereby a child's natural parents, for whatever reason, relinquish their parental rights and responsibilities with respect to their child and a new couple permanently assumes the legal position of mother and father." *Id.* at 7 (footnote omitted).

119. *See infra* note 123.

120. Katz, *supra* note 116, at 52. *See also* Note, *Surrogate Parenthood - An Analysis of the Problems and a Solution: Representation for the Child*, 12 WM. MITCHELL L. REV. 143, 148 (1985) [hereinafter *Representation for the Child*]; *Stork Market*, *supra* note 1, at 56; Smith, *The Razor's Edge of Human Bonding: Artificial Fathers und Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 651 (1983); Note, *Surrogate Motherhood: Contrac-*

adoption of what is considered a "desirable" child is extremely difficult, a black market has developed where children are bought and sold[121] for a large profit.[122] To prevent this black-market sale of babies, as of 1986 twenty-four states had adopted laws prohibiting such action.[123] The admirable purpose these laws serve is obfuscated, however, when they are applied to a situation not anticipated by the legislature at the time of enactment, such as the surrogate motherhood arrangement.

Legal presumptions established under these laws, concerning who the "natural" parents of the child are, effectively frustrate the surrogate motherhood arrangement. For example, statutes in some states invoke a presumption that when a married woman gives birth to a child that child is the product of the marriage, thereby legitimizing the child.[124] "Because the presumption works to place paternity in the surrogate mother and *her* husband, the sperm donor and his wife are [legally] strangers to the child."[125] The sperm donor or biological father's wife must then adopt the child in order to be recognized as a parent.[126]

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tual Issues and Remedies under Legislative Proposals, 23 WASHBURN L.J. 601, 604-09 (1984) [hereinafter *Contractual Issues and Remedies*]; Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 468, 482-83 (1982).

121. Katz, *supra* note 116, at 7-8.

122. *Id.*

123. ALA. CODE § 26-10-8 (1986); ARIZ. REV. STAT. ANN. § 8-126 (West Supp. 1987); CAL. PENAL CODE § 273 (West 1970); COLO. REV. STAT. § 19-4-115 (1986); DEL. CODE ANN. tit. 13 § 928 (1981); FLA. STAT. ANN. § 63.212 (West 1985); GA. CODE ANN. § 19-8-19 (1982); IDAHO CODE § 18-1511 (1987); ILL. REV. STAT. ch. 40 §§ 1526, 1701, 1702 (Smith-Hurd 1980); IND. CODE ANN. § 35-46-1-9 (Burns 1985); IOWA CODE ANN. § 600.9 (West 1981); KY. REV. STAT. § 199.590 (Supp. 1986); MD. FAM. LAW CODE ANN. § 5-327(a) (1984); MASS. GEN. LAWS ANN. ch. 210 § 11A (West 1987); NEV. REV. STAT. § 127.290 (1985); N.J. STAT. ANN. § 9:3-54 (West Supp. 1987); N.Y. SOC. SERV. LAW § 374 (McKinney 1983) N.C. GEN. STAT. § 48-37 (1984) OHIO REV. CODE ANN. § 3107.10 (Anderson Supp. 1987); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984); TENN. CODE ANN. § 36-1-135 (1984); UTAH CODE ANN. § 76-7-203 (1978); WIS. STAT. ANN. § 946.716 (West 1982)

124. *See, e.g.*, Bariuan v. Bariuan, 106 Kan. 605, 609, 352 P.2d 29, 31 (1960).

125. *Contractual Issues and Remedies*, *supra* note 120, at 614 n.85 (emphasis added).

126. Ironically, this would require the contractual couple to adopt a child who is biologically linked to one of them.

2. Application Of Artificial Insemination Statutes To The Surrogate Motherhood Arrangement

A number of artificial insemination statutes[127] may inadvertently, but nonetheless dramatically, affect the surrogate motherhood arrangement and, in some cases, preclude such arrangements altogether.[128] For example, section 5 of the Uniform Parentage Act[129] creates a presumption that the semen donor is not to be considered the biological father of the child.[130] In the surrogate agreement, however, the semen donor wants to be recognized as the biological father. Hence, if artificial insemination laws are applied to the surrogacy scenario, the biological father is estopped from legally gaining custody of the child.[131] Such an application would "invalidate [the] surrogate parenthood agreements and place paternity in parents unwilling to accept that role."[132] Presumptions created by these statutes, however, could be avoided. For example, at least one case suggests that the surrogate mother and the biological father could effectuate an affidavit declaring that they are the biological parents of the child.[133] Alternatively, the statutory presumption can be overcome by the surrogate's spouse signing an "affidavit of nonconsent" to the artificial insemination thereby negating his claim as natural parent.[134]

3. Surrogate Motherhood And The Question Of Adultery And Legitimacy

During the AI process, a woman may be inseminated with sperm from a man to whom she is not married. While some

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

128. *See Representation for the Child, supra* note 120, at 151.

129. *See supra* note 39.

130. *See supra* note 39 and accompanying text.

131. *Representation for the Child, supra* note 120, at 152.

132. *Id.*

133. *See* Syrkowski v. Appleyard, 362 N.W.2d 211, 212 (1985) (where the husband of the surrogate mother signed a Statement of Non-Consent to the artificial insemination in order to circumvent the Michigan Paternity Act which declared that artificial insemination with the husband's consent produces legitimate offspring of *that* marriage). *See infra* notes 146-151 and accompanying text.

134. *Representation for the Child, supra* note 120, at 153. This solution is problematic because it may force an agreeing spouse to claim that he does not consent to the artificial insemination, when, in fact, he does.

courts have declared this a form of adultery,[135] the adultery issue casts a shadow on the closely related question of the child's legitimacy. Some case law supports the argument that a child born to a woman who has been artificially inseminated by a man to whom she is not married is illegitimate.[136] Recent decisions, however, have ruled to the contrary. A child conceived through artificial insemination, even though the sperm donor is not married to the woman inseminated, is legitimate at least in situations where the husband of the inseminated woman consents to the insemination.[137] A number of states have enacted statutes legitimizing children conceived through artificial insemination with the husband's consent.[138] Thus, as one observer notes, "[t]he offspring of a surrogate mother may be born illegitimate—but he need not remain that way for long."[139]

B. Litigation And The Baby "M" Decision

The uncertainty of the legal status of surrogate motherhood has given rise to often bitter litigation. Lack of appropriate legislation and the application of collateral legislation not enacted with surrogate motherhood in mind has led to discordant results in the courtroom.

One of the first cases to reach the courts regarding the proscription of surrogate motherhood by state statutes prohibiting payment in connection with adoption is the case of *Doe v. Kelley*.[140] The plaintiffs, an infertile couple, sought to have a Michi-

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135. Pilpel, *supra* note 4, at 14. *See, e.g.*, Doornbos v. Doornbos, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956); Orford v. Orford, 49 O.L.R. 15, 58 D.L.R. 251 (1921). For a general discussion see *supra* notes 25-35 and accompanying text.

136. Keane, *supra* note 14, at 149-150. *See, e.g.*, Gursky v. Gursky, 39 Misc. 2d 1083, 1088, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (citing Doornbos v. Doornbos, No. 54 S. 14981 Super. Ct. Cook Cty., Ill., Dec. 13, 1954), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956)).

137. Keane, *supra* note 14, at 150. But note the proverbial Catch-22 which arises where the husband has filed an "affidavit of non-consent" only to ensure that the sperm donor will be treated as the biological father. *See supra* note 133 and accompanying text.

138. *Id. See* GA. CODE ANN. § 19-7-21 (1982); KAN. STAT. ANN. § 23-129 (1981); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, § 552 (West Supp. 1987).

139. Keane, *supra* note 14, at 152 (enforcement of the contract, and the basic constitutional rights of the parties).

140. 6 Fam. L. Rep. (BNA) 3011 (Wayne Cty. Ct. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

gan statute that proscribes payment in exchange for adoption of a child[141] declared unconstitutional. The trial court held that "the right which plaintiffs assert is not of the same personal nature that the constitutional right of privacy protects."[142] The court also went on to say that "even if the constitutional right of privacy is applicable, such right is not absolute. It must be considered against important state interests in regulation."[143] The court reasoned that "baby bartering" is against public policy and that it is a "fundamental principle that children should not and cannot be bought and sold."[144] The Michigan Court of Appeals affirmed the decision. The court held that:

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141. The Michigan statute in question provides as follows:

Sec. 54. (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:

(a) The placing of a child for adoption.

(b) The registration, recording or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.

(c) A release.

(d) A consent.

(e) A petition.

2. Before the entry of the final order of adoption the petitioner shall file with the court a sworn statement describing money or other consideration or thing of value paid or exchanged by any party in the adoption proceeding, including anyone consenting to the adoption or aiding the adoptee, any physician, attorney, social worker or member of the clergy, and any other person, corporation, association, or other organization. The court shall approve or disapprove fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

3. To assure compliance with limitations imposed by this section, by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, and by section 4 of Act No. 263 fo the Public Acts of 1913, as amended, being section 331.404 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements which, directly or indirectly, led to placement of the person for adoption.

Sec. 69. A person who violates any of the provisions of section 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony.

Doe v. Kelley, 6 Fam. L. Rep. (BNA) 3011 (Wayne Cty. Ct. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

142. *Id.*

143. *Id.*

144. *Id.* Note that the court failed to say *why* this was a fundamental principle, they stated merely that it was.

> [W]hile the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement.[145]

In another Michigan case,[146] a husband and wife entered into an agreement with a woman who was to conceive and bear a child for them. Before the child was born, the husband of the contracting couple attempted to declare his paternity under Michigan's Paternity Act.[147] The Michigan Court of Appeals affirmed the trial court's denial of paternity decision holding that "the Paternity Act's purpose of providing support for children born out of wedlock does not encompass the monetary transaction proposed in this case."[148] The court explicitly chose not to decide whether surrogacy contracts are against public policy,[149] but called on the legislature to address the issue. The Michigan Supreme Court, reversed, however, holding that the Michigan courts did have "subject-matter jurisdiction over a biological father's request . . . for [an] order of filiation declaring his paternity [when the biological mother and father have] entered into a surrogate parenting agreement."[150] The court stated that "[i]n this suit, plaintiff seeks only an order of filiation formally stating something that no one seriously disputes, viz., that the plaintiff is the biological father of [the child]."[151] The two Michigan decisions seem incongruous. While the Michigan courts recognize a

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145. Doe, 307 N.W.2d at 441 (citation omitted). The court went on to state:

> The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child—i.e., its right to support, intestate succession, etc. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

Id.

146. Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983), *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985).

147. *Id.* at 509, 333 N.W.2d at 91.

148. *Id.* at 515, 333 N.W.2d at 94.

149. *Id.* at 515, 333 N.W.2d at 93-94.

150. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985).

151. *Id.* at 373, 362 N.W.2d at 213.

biological father's paternity in a surrogacy situation, it appears that Michigan's adoption statute and the holding in *Doe* bar his wife from adopting the child.

In *Kentucky ex rel. Armstrong v. Surrogate Parenting Associates, Inc.*,[152] the Kentucky Court of Appeals reversed the lower court's decision and declared surrogate motherhood a violation of the state's anti-baby-selling statute.[153] The court of appeals rejected the trial court's finding that surrogate arrangements are not governed by the adoption statutes.[154] The court explained that "[s]urrogate parenting, and the SPA surrogate parenting procedure logically contemplate adoption by the infertile wife of the intended biological father."[155] The court felt that the "termination of parental rights by the surrogate mother is simply a necessary predicate to a subsequent adoption by the infertile wife . . . . "[156] Hence, the court concluded that Surrogate Parenting Associates violated the Kentucky anti-baby-selling statute because the essence of the transaction was a transfer of money for a child who would eventually be adopted.[157]

In another Kentucky case, *In re Baby Girl*,[158] the court decided that "Kentucky law does not permit a surrogate mother to terminate rights to a child conceived through artificial insemination under a contract to transfer custody to the sperm donor . . . ."[159] The circuit court stated:

> There is a long line of cases setting forth the requirement of clear and compelling proof to show that a child born to a husband and wife is an illegitimate child of a third person. The mere affidavit as to artificial insemination without other positive proof of nonaccess and blood grouping is not sufficient for this court to assume and adjudge the donor to be the natural and biological father of the

152. 11 Fam. L. Rep. (BNA) 1359 (Ky. Ct. App. 1985).

153. *Id.* at 1360.

154. *Id.*

155. *Id.* at 1359.

156. *Id.*

157. *Id.* at 1360. "In sum, SPA by its contracts and procedures, seeks to financially benefit from the contractual creation of human life and its subsequent transfer for what must be considered adoptive purposes." *Id.*

158. 9 Fam. L. Rep. (BNA) 2348 (Ky. Cir. Ct. Jefferson Cty. 1983).

159. *Id.*

child.[160]

The preceding cases all involved parties who sought to uphold and enforce, by one means or another, the surrogate motherhood agreement into which they entered. Even more tragic is the litigation ensuing when one or more of the parties to the agreement reconsiders. For example, in the case of *Malahoff v. Stiver*,[161] the contractual couple no longer wanted the child after they learned that the child was born with microcephaly, a disorder indicating retardation.[162] This case presents perhaps the worst possible scenario—where a child, intentionally brought into the world, is unwanted.

A New Jersey case posed the exact opposite problem as was raised in the *Malahoff* case. *In re Baby "M"*[163] presented a situation in which a surrogate mother, after giving birth, refused to relinquish the child. Unlike the *Malahoff* case where neither the biological parents nor the contractual parents wanted the child, in *Baby "M,"* both biological parents claimed rights to the child.

The trial court in *In re Baby "M"* held that the surrogate parenting agreement entered into by the contractual and biological father, William Stern, and the biological mother, Mary Beth Whitehead, "is a valid and enforceable contract pursuant to the laws of New Jersey."[164] Furthermore, the court ruled that "[t]he rights of the parties to contract are constitutionally protected under the 14th Amendment of the United States Constitution."[165] The court also found "that Mrs. Whitehead breached her contract in two ways: (1) by failing to surrender to Mr. Stern the child born to her and Mr. Stern and (2) by failing to renounce her parental rights to that child."[166] The court found that "[m]onetary damages [could not] possibly compensate plaintiff for the loss of his bargain because of defendant's breach."[167] Therefore, the court ordered a remedy of specific

160. *Id.*

161. Malahoff v. Stiver, No. 83-4734.

162. *Stork Market, supra* note 1, at 56.

163. *In re* Baby "M," 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (Apr. 7, 1987).

164. *Id.* at 388, 525 A.2d at 1166.

165. *Id.*, 525 A.2d at 1170-71.

166. *Id.* at 388-89, 525 A.2d at 1171.

167. *Id.* at 389, 525 A.2d at 1175-76.

performance of the contract.[168] "In addition to specific performance," the court also considered the principle "that equity regards and treats as done that which in fairness and good conscience should or ought to have been done."[169] The court concluded by calling for an end to litigation and for stability and peace for Melissa (nee Baby "M") "so that she can be nurtured in a loving environment free from chaos and sheltered from the public eye."[170]

Litigation did not end, however, as Mary Beth Whitehead, the surrogate mother, appealed the court's decision. The Supreme Court of New Jersey, reversing in part the decision of the lower court, found that while custody should remain vested with the contractual parents, the Sterns, the surrogate mother should

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168. *Id.* at 398, 525 A.2d at 1171.

169. *Id.*, 525 A.2d at 1171. The court entered a judgment as follows in favor of the plaintiff:

1) The surrogate parenting agreement of February 6, 1985, will be specifically enforced.

2) The prior order of the court giving temporary custody to Mr. Stern is herewith made permanent. Prior orders of visitation are vacated.

3) The parental rights of the defendant Mary Beth Whitehead are terminated.

4) Mr. Stern is formally adjudged the father of Melissa Stern.

5) The New Jersey Department of Health, Bureau of Vital Statistics and its ancillary and/or subordinate state or county agencies are directed to amend all records of birth to reflect the paternity and name of the child to be Melissa Stern.

6) Defendants, Mary Beth Whitehead, Richard Whitehead, Joseph Messer and Catherine Messer, their relatives, friends, agents, servants, employees or any person acting for and/or on their behalf, are restrained from interfering with the parental and custodial rights of the plaintiff, his wife or their agents, servants, employees or any other persons acting for and/or on their behalf.

7) As heretofore ordered, unpleaded claims for money damages are reserved to plaintiffs.

8) Counsel for plaintiffs will submit a certification of services pursuant to R. 4:42-9 in support of their application for counsel fees.

9) The court will enter judgment against defendants on all prayers for relief in the first and second counts of their counterclaim.

10) The guardian *ad litem* shall file a certification of services pursuant to R. 4:42-9 to support her application for fees. She shall also submit to the court the statements of fees from her experts for allocation by the court.

11) The sum of $10,000, being held by the Clerk of the Superior Court, shall be the property of Mary Beth Whitehead.

12) The guardian *ad litem* shall be discharged herewith except for the purposes of appeal. *Id.* at 408-09.

170. *Id.* at 409.

be allowed visitation rights.[171]

VI. The Future Of Human Procreation: Commodifying The Baby-making Process

It is true that "most people make babies the old fashioned way—they have intercourse."[172] Infertility, however, is on the rise. Thus, the advent of new reproductive technology discussed above is forcing our society to examine issues we never before faced.[173] Unfortunately, however, legislation has not been able to "keep up" with scientific advancements.

"[N]ew reproductive technology is offered to us in terms of expanding choices."[174] We have entered a new era of procreational commodification[175] and yet we have no laws which directly address the various medical techniques. Practices such as banking sperm, hiring a surrogate mother and terminating an "imperfect fetus," are tantamount to treating the creation of babies as the production of commodities.[176] Consider the following:

> Womb for rent. $15,000.00 plus expenses. Limited Warranty on services, professional supervision, confidentiality guaranteed. References upon request.[177]
>
> * * * *
>
> Bank your sperm just like the Astronauts did! Does your job expose you to toxic substances? If so, you may still father healthy children by banking your sperm at XY Corporation. Low maintenance fee. No penalty for early withdrawal.
>
> * * * *
>
> A little short on cash this month? Sell us your sperm! Let XY Corporation help you solve your financial difficulties. Confidentiality guaranteed.[178]

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171. *In re* Baby M, 56 U.S.L.W. 2442 (N.J. Feb. 3, 1988) (No. A-39).
172. Pilpel, *supra* note 4, at 13.
173. Rothman, *supra* note 10, at 3.
174. *Id.* at 11.
175. *Id.*
176. *Id.*
177. *Contractual Issues and Remedies, supra* note 120, at 601.
178. Today sperm banking has become commonplace. *See* Pilpel, *supra* note 4, at 15. *See also* Shapiro, *supra* note 1, at 44.

Newspaper advertisements (like the hypothetical ones above) advertising various reproductive techniques, have appeared in a number of publications[179] and yet our legislatures are still blind to the necessity for the regulation of such trade. While there is no doubt that new techniques of reproduction are wonderful when used for aiding infertile couples, the abuses of such techniques must be guarded against. Our society must begin to realize just exactly what we are becoming capable of in terms of "creating" when we procreate. These new techniques have given otherwise hopeless couples the potential for deciding whether or not to bear a child, but they have also given couples the potential to decide what kind of a child to bear.[180] Our society, through technological advancements, strives to make the perfect product—a "blue ribbon baby."[181] It is important that legislation is enacted which recognizes and regulates new means of reproduction before we reach a point in our society where we are simply administering this new technology as a form of "quality control" over the act of procreation.[182]

Janet A. Di Giorgio

179. *See Contractual Issues and Remedies, supra* note 120, at 601 n.1 (setting forth surrogate motherhood advertisements placed in the *Los Angeles Times* and the *Topeka Capital-Journal*). *See also* Griffin, *Womb for Rent*, 9 STUDENT LAW., Apr. 1981, at 28, 29 (describing ad placed by infertile couple seeking a surrogate mother).

180. ROTHMAN, *supra* note 10, at 242.

181. *Id.* at 2. Sir Francis Crick has stated that "no newborn infant should be declared human until it has passed certain tests regarding its genetic endowment and . . . if it fails the tests, it forfeits the right to life."

182. ROTHMAN, *supra* note 10, at 13.