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PROCREATIONAL AUTONOMY V. STATE INTERVENTION: OPPORTUNITY OR CRISIS FOR A BRAVE NEW WORLD?

GEORGE P. SMITH, II*

Although the question of whether an ovum that has been fertilized is a baby or has the “moral certainty” of becoming one should not be viewed as a uniquely “Catholic” or religious question,¹ but rather as a question best answered by scientists,² the fact remains that ethicists and theologians have been grappling with this very question for quite some time.³ This question and its “answers,” together with their various permutations, structure the framework upon which today’s laws are interpreted and future ones enacted.

The official teaching of the Catholic Church is simple and direct: at all stages of life, from fertilization through adulthood, human life is to be accorded equal protection.⁴ Yet, prominent Church theologians continue to question this official magisterium by positing that—based upon their studies of the advances of reproductive biology⁵—“truly human life” cannot be recognized until two or three weeks after fertilization.⁶ Accepting this position would thus condone the right to perform tests upon excess frozen embryos—undertaken as such to conduct genetic experiments—with the end result being the abortion (or death) of the embryo upon completion of the experiment. For some, this action is abhorrent; for others, it is recognized as a scientifically humane undertaking, grounded in utilitarianism, whose singular purpose is to explore the science of genetics

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6. See the writings of McCormick, Curran, Di Ianni and Rahner, as cited in Tauer, supra note 3, at 3 nn.1-4.
with the hope of improving the genetic profile or genetic pool of mankind by ridding it of inheritable diseases.  

The issue of when individuality is established biologically and when the law should, accordingly, protect such individuals, was determined by the United States Supreme Court in *Roe v. Wade*, when it held, in essence, that the full protection of the laws could not be extended to a fetus until it was born. Interestingly, in March, 1983, Mr. Chief Justice, Sir Harry Gibbs, of the Australian High Court, ruled "that a fetus has no right of its own until it is born and has a separate existence from its mother." The common law tied the commencement of life to the time when an unborn first moved in the womb—or, in other words, when it quickened. Thus, it was only after the fetus quickened that its destruction could be classified as murder.

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9. It is only when the fetus reaches a "compelling" point of viability or that time when it "presumably has the capability of meaningful life outside of the mother's womb" that the state's interest in protecting fetal existence will be asserted. *Id.* at 163-64. It is at the third trimester of development that the state's interest becomes controlling. See *infra* note 107; King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, in 1 Ethical, Legal and Social Challenges to a Brave New World 110 (G. Smith ed. 1982).


And in Canada, Mr. Justice Matheson of the Saskatchewan Court of Queen's Bench held that a fetus was not to be regarded as a person within the meaning of the law and thus not within the scope of the term "everyone" as used in the Canadian Charter of Rights and Freedoms. The Charter provides, in pertinent part, that "[e]veryone has the right to life . . . and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Borowski v. Attorney-General of Canada, 4 D.L.R. 4th 112, 121 (1983) (quoting CAN. CHARTER OF RIGHTS AND FREEDOMS § 7).


12. *Id.* at 21. The present position is summarized:

A child is not considered in law to be in being, so as to be the subject of a charge of murder or manslaughter, until the whole body of the child is extruded from the womb and has an existence independent of the mother. Whether the child has an indepen-
The new reproductive biology, in all its complexity, promises untold opportunities for resolving heart-breaking problems of infertility and will clearly expand the meaning of the very term, procreational autonomy, as a reference to both unmarried and married women. Still, the new biology presents equally untold problems for the physician, lawyer, ethicist, theologian and, for that matter, the average person. This article will consider, essentially, one major medical, legal, ethical and religious challenge of the new reproductive biology: in vitro fertilization (IVF). The article will first survey the force of religion in shaping new attitudes and directions in this area and then summarize the ethical and philosophical concerns about the use and development of IVF procedures. The now famous case of the frozen “orphan” embryos of Melbourne, Australia will serve as a focal paradigm for analysis and point of reference to the work of two study commissions—the Waller Committee in Australia and the Warnock Committee in England—that have charted investigative parameters for work and experimentation in in vitro fertilization procedures. Finally, the article will probe the complications of complete utilization of IVF by unmarried women and its devastating effect on the sanctity of the family unit. This article concludes that as long as procreation continues to remain the central driving force in a marital relationship and, indeed, in a progressive society, men will undertake new and sometimes controversial endeavors—with or without state or religious approval—in order to expand the period of fecundity and combat infertility. The state must begin to regulate the field now, rather than allow it to develop haphazardly.

I. LAW AND RELIGION: PARTNERS OR ANTAGONISTS?

That faith and religion have played a dynamic role in the
political life of the United States is a given. Indeed, the very "bedrock of moral order is religion." Thus, politics and morality become inseparable. "And as morality's foundation is religion, religion and politics are necessarily related. We need religion as a guide; we need it because we are imperfect." Religious values have, throughout history, played an important part in public policy debates. In fact, today's democratic commitment to pluralism is nurtured and sustained as a consequence of that insistence on recognizing the inviolability of individual conscience. To exclude societal values, which are grounded in a religious base, from the public arena would pose a serious threat to the very principle of pluralism.

An obvious distinction must be made between moral and religious principles and the subsequent application of those principles in the public forum. Principles may be agreed upon, yet without sacrificing Catholic integrity, disagreement may exist as to their political application. Indeed, Dignitatis Humanae, the Second Vatican Council's Declaration on Religious Freedom, affirmed specifically the principle of religious freedom for Catholics and non-Catholics alike, and foreswore the use of coercion of any nature in forcing the exercise of a particular act of faith. From the time of Archbishop John Carroll to the present, the fundamental principle of the separation of church and state has always been accepted by the American hierarchy. Yet, while all churches have tried to avoid political involvement with the state, they have refused steadfastly to limit their participation in the formation of na-

15. Id.
16. Id. at 10. Indeed, it has been stated that, "The state must be subject to the higher law of God." C. Rice, Beyond Abortion: The Theory and Practice of the Secular State 135 (1979).
19. Id. at 43.
20. Id.
22. Id. at 59.
23. J. Ellis, supra note 17, at 157.
tional moral policies. Basil Cardinal Hume, the Archbishop of Westminster in England, has observed that the crisis of modern society is to be found in "the abandonment of objective moral principles and the dogmatism of permissiveness." Perhaps this is but another way of observing that—as to Americans at least—emotions and prejudices commonly override reason. There can be little doubt that the self-centered doctrine of ME is important and all-consuming to many members of modern society. Perhaps in no greater area of concern than procreation do emotions rise to high and often uncontrolled levels; for it appears that an inextricable concomitant of procreation is abortion.

The depth of ferment and controversy within the Roman Catholic Church was displayed in early 1985, in the results of a private survey of Roman Catholic theologians and biblical scholars from three important Catholic organizations—the Catholic Theological Society, the Catholic Biblical Association and the College Theology Society. The survey revealed that 62% of those polled (almost 500 persons, including 325 priests and religious) refused to equate abortion with murder; 49% acknowledged that, on some occasions, abortion can be recognized as a moral choice; and 49% believed that there are times when an act of abortion should be left legally to the pregnant woman.

Given this disparity of attitudes among the clergy and the ranking theologians, it is easy to understand how the laity are bewildered as they consider the mysteries of in vitro fertilization and how their fundamental attitudes and perceptions concerning abortion will be translated into similar problem areas of the new reproductive biology. Tragically, the percentage of Catholics supporting the legalization of abortion

25. London Times, June 6, 1985, at 12, col. 2. As Joseph Cardinal Ratzinger has observed, "Economic liberalism creates its exact counterpart, permissivism, on the moral plane." J. Ratzinger, The Ratzinger Report of the Church 83 (1985). He continued by stating that, "Separated from motherhood, sex has remained without a locus and has lost its point of reference: it is a kind of drifting mine, a problem and at the same time an omnipresent power." Id. at 84.
26. J. Ellis, supra note 17, at 159.
countenanced by *Roe v. Wade* has continued to rise since the decision in 1973; today, ten to twelve per cent of Catholics agree with the official church teaching that abortion is always wrong.

The problem of abortion cannot truly be passed off as another governmental failure, for no administrative agency or department within government is forcing women to have abortions. And, as observed, the statistics demonstrate clearly that Catholics support the "right" to abortion proportionately with the rest of the population and thus ignore the teaching of the Church that such acts are sinful. What is evident in the efforts to criminalize abortion is perhaps little more than a plea to the government "to make criminal what we believe to be sinful because we ourselves cannot stop committing the sin." Accordingly, perhaps the better view here is to recognize that, "[t]he failure is not Caesar's. This failure is our failure, the failure of the entire people of God." The goal set by the members of the pro-life movement has been nothing less than a total prohibition of abortion. Yet, the feasibility of obtaining this goal in a pluralistic society is doubtful, to say the least.

In answer to the question whether Catholics would choose to cooperate with other like-minded Americans of similar ethical persuasion in working for a more restrictive abortion law, one would hope that they would cooperate; for surely there would be no compromise of the fundamental belief in the sanctity of all human life.

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As Charles E. Rice has observed so eloquently, "We cannot look to government to relieve the problems it has helped to create. The decline of the churches' influence, it is fair to say, has been in direct proportion to their willingness to turn their responsibilities over to the state and to become beneficiaries of government handouts." C. Rice, supra note 16, at 134.
31. Hyer, supra note 29.
33. Id. One preeminent authority has concluded, "The disintegration of the family is reflected in American law which in turn accelerates that disintegration. Apart from the rapidly growing adoption of no-fault divorce laws, the decisions of the Supreme Court reflect an atomistic view of the family that is hostile to the Christian tradition." C. Rice, supra note 16, at 84.
35. Id.
"We should continue to hold ourselves to a higher standard than we can persuade society at large to write into law."\textsuperscript{36} In this regard, then, what some may consider to be extremism in the defense of life can never be viewed correctly as a vice just as moderation in the pursuit of common justice for all cannot be prized as a real virtue.\textsuperscript{37}

"Extremism" in the defense of traditional family structures and their inherent social, ethical, religious and political values can never be viewed as a vice, just as "moderation" in the pursuit of justice can never be prized as a real virtue. We must be ever vigilant to the need to protect the orthodoxy and sanctity of the family unit.

II. To Be or Not to Be?

The issue of abortion, as it arises in the process of \textit{in vitro} fertilization, becomes topical during the laparoscopy (or procedure whereby eggs are removed from a woman's reproductive tract). Following this procedure, eggs that may have been produced in response to drug therapy for super-ovulation are stored for subsequent fertilization and implantation or experimentation.\textsuperscript{38} If all the eggs are fertilized by the sperm from a married woman's husband and placed in her uterus, there is no problem. But when some eggs are stored for later efforts to impregnate—should the first attempt fail—or for the purpose of genetic experimentation, the contentious issue of abortion rises to the fore. Ethical complexities attend each of the many variations on the basic IVF theme. When, for example, artificial insemination is used to fertilize a married woman's egg with the sperm of a man other than her husband because her husband's sperm is defective, a serious ethical issue is posed. The same is true when a third party surrogate carries an embryo to term for a genetic mother who is unable to do so for herself or when a single woman seeks to avail herself of IVF procedures. Because of restrictions on space and coverage, this article will not take on all of the ethical

\textsuperscript{36} Id.
\textsuperscript{39} Smith, \textit{The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers}, 5 W. NEW ENGL. L. REV. 639 (1983) [hereinafter cited as \textit{Razor's Edge}]. See generally Smith, Through a Test Tube Darkly: Artificial In-
issues raised by IVF. It will instead proceed selectively.

By way of summarizing broadly, attention is now drawn to what might be termed as the "ethical morality" of in vitro fertilization—or the benefits and the harms of its use. The most obvious benefit of the procedure is that it circumvents infertility and thereby allows those married couples with a strong desire to have children of their own to raise a family and to bring fulfillment and happiness to their marriage. Should it be determined conclusively that frozen embryos can be used without damage to the resultant child, in vitro fertilization will enable women who so wish to pursue careers and then have children by using embryos created some years earlier—thereby reducing the chance of producing a child with Down’s syndrome. Outside the scope of family expansion, in vitro fertilization could be used to provide embryos that could be used in scientific and medical experiments, not only in cancer research but as a source of obtaining embryonic tissue used in the treatment of diseases such as diabetes and to harvest organs for transplantation.

There are several major objections to in vitro fertilization. The first is tied to the concern that separating sex from procreation is inherently wrong. The practice of in vitro fertilization followed by embryo transfer to the uterus of the

married woman severs the very connection between sex and reproduction. The second major objection maintains that \textit{in vitro} fertilization is morally wrong because it involves the risk of harm to the individual who is subsequently brought into existence. The harm (although not documented factually) could be either in the nature of physical damage or abnormality resulting from the IVF process or from the subsequent process of transferring the embryo to the genetic mother's or birth mother's womb (in the case of a surrogate) or from psychological harm that might inure to the infant born of the total process.

The third objection holds that the use of IVF as a means to produce embryos to be used for experiments or as sources of tissue and organs—as opposed to being implanted—is wrong because it subjects the embryo to pain. This objection would have considerable merit where experiments were, in fact, to be conducted on substantially developed fetuses. When conducting such scientific interventions with embryos in the first several weeks of their development, such embryos probably do not experience pain, owing to the absence of a critical nervous system.\footnote{M. Tooley, \textit{supra} note 2, chs. 5-7.}

The fourth objection is that even though IVF may be properly viewed as neither wrong in itself nor wrong because of its effects upon those immediately involved, it may be wrong because of the "slippery slope" to which it is likely to lead. Thus, \textit{in vitro} fertilization together with embryo transfer may lead to unimpeded use of surrogate mothers as substitutes for genetic mothers, the dissolution of the family unit by the use of the process by women who do not wish to marry or have sexual relations with a man, or even lead to the development of artificial wombs (ectogenesis) whereby women no longer need to have "contact" with their children until after they are, so to speak, born.\footnote{Test-Tube Babies, \textit{supra} note 40, chs. 8, 11. See generally D. Kelly, \textit{The Emergence of Roman Catholic Medical Ethics in North America} (1979).}

Finally, as noted previously, the last objection to the IVF process is that it involves either the destruction or freezing of embryos not implanted. In the former situation, an action morally akin to abortion is committed; but in the case of freezing, there may or may not be a comparable action—for such depends upon whether it is possible to thaw the embryo successfully, and upon whether it is likely that the embryo
will ultimately be implanted. The only apparent way to resolve these uncertainties would be to continue with limited experimentation in the field, using lower animal life forms.

III. THE AUSTRALIAN AND BRITISH INITIATIVES

In 1982, the National Health and Medical Research Council of Australia structured national ethical guidelines for use of *in vitro* fertilization procedures.\(^{43}\) Guideline seven suggests an upper time limit of ten years upon the storage of embryos—the storage would not be extended beyond "the time of conventional reproductive need or competence of the female donor."\(^{44}\) Thus, applied to a woman's *capability* to conceive, it is clear that at death, a woman's reproductive capability has ended and any fertilized ovum left in cryopreservation could be destroyed. The Council endorsed not only the use of IVF as an acceptable scientific procedure to correct infertility among married couples,\(^{45}\) but also the use of donor eggs in women to produce embryos,\(^{46}\) and the use of artificial insemination by anonymous male donors.\(^{47}\)

In early 1982, the Victorian government entered the vanguard of the new reproductive biology by establishing a committee, headed by Professor Louis Waller, to investigate the problems arising from *in vitro* fertilization and donor gametes (or the male sperm and female eggs). Soon to follow are similar governmental inquiries organized in Queensland and Western Australia.\(^{48}\)

The Waller Report on the Disposition of Embryos Produced by *in vitro* Fertilization was released in August, 1984, in Melbourne, Australia, by the Attorney General of the state of Victoria. The Committee concluded, among other matters, that the disposition of stored embryos is not to be determined by the hospital where they are in fact stored;\(^{49}\) that

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43. **NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL, ETHICS IN MEDICAL RESEARCH INVOLVING THE HUMAN FETUS AND HUMAN FETAL TISSUE (1983).**
44. *Id.* at 36 (supplementary note 4, guideline 7).
45. *Id.* at 35 (supplementary note 4, guideline 2).
46. *Id.* at 35-36 (supplementary note 4, guidelines 3-4).
47. *Id.* at 36 (supplementary note 4, guideline 6).
49. **THE COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, ON THE DISPOSITION OF EM-**
such embryos do not possess legal rights or rights to lay claim to inheritance; and in cases where "by mischance or for any other reason, an embryo is stored which cannot be transferred as planned, and no agreed provision has been made at the time of storage... the embryos shall be removed from storage." The Committee also held that embryos could be frozen and that experimental research "shall be immediate and in an approved and current project in which the embryo shall not be allowed to develop beyond the state of implantation, which is completed 14 days after fertilization." Some of the recommendations of the Committee will be incorporated in the Victorian government's in vitro legislative proposals for subsequent parliamentary consideration, while others will be open to further debate and study.

A. Melbourne's Orphan Embryos

On May 20, 1981, a married couple from Los Angeles—Mario and Elsa Rios—were allowed to participate in the in vitro fertilization program in Melbourne, Australia—specifically, the one operating from the Queen Victoria Medical Center. Because of his infertility, Mr. Rios consented to the participation of an anonymous donor from Melbourne and thereupon artificial insemination was achieved successfully for three eggs provided by his wife. One embryo was implanted in Mrs. Rios on June 8, 1981, and the other two frozen for subsequent use. Because of the trauma associated with a miscarriage of the implanted embryo, Mrs. Rios was not emotionally fit to participate in another attempt at impregnation. Before she was physically and mentally willing to seek an implantation of the remaining embryos, she and her husband died in a plane crash in Chile. Because Mr. and Mrs. Rios had not executed a will, the California laws of intestate succession allowed Mr. Rios' son by a previous marriage a right to his father's share of the estate and the mother of Mrs. Rios was entitled to take her daughter's

BRYOS PRODUCED BY IN VITRO FERTILIZATION § 2.16 (1984) [hereinafter cited as Waller Report].
50. Id. § 2.19.
51. Id. § 2.18.
52. Id. §§ 3.25-3.28.
53. Id. § 3.29.
54. See Victoria Will Bar Payments to Surrogate Mothers, Sydney Morning Herald, Sept. 4, 1984, at 3, col. 2.
55. Elsa Rios, supra note 48, at 25.
56. Id. at 23.
Professor Louis Waller, Chairman of Victoria's Law Reform Commission, determined in August, 1984, that the embryos had no independent legal "rights" to be unfrozen and implanted in a surrogate mother and, therefore, he recommended that they should be thawed and discarded. The Victoria state legislature ordered that the remaining Rios' embryos be preserved in their liquid nitrogen container. As of August 29, 1985, the embryos remained in cryopreservation awaiting the appearance of a volunteer surrogate mother for their thawing and implantation.

B. The Warnock Committee

In 1982, four years after the birth of the world's first test-tube baby, the British government constituted a Committee of Inquiry into Human Fertilization and Embryology and directed its members, chaired by Dame Mary Warnock, to examine not only the social implications of the new reproductive biology but its ethical and legal implications as well. The Committee submitted its report in July, 1984, and great debate and discussion has followed.

In essence, the Warnock Committee approved the cryopreservation of embryos—but only under strict constraints and subject to review by a statutory licensing authority. The Committee recognized that even though embryos enjoyed an ethical or moral ("special") status, research could continue on them—but subject to careful monitoring for a fourteen day period after they had been fertilized. Further, "spare" embryos could be proper subjects for research within

57. CAL. PROB. CODE ANN. §§ 6401-6402 (West 1985). See also Wallis, Quickening Debate Over Life on Ice, TIME, July 2, 1984, at 46.
60. See Letter from Louis Waller, Chairperson of The Law Reform Commission of Victoria, to George Smith (August 29, 1985) (available in the offices of the Notre Dame Journal of Law, Ethics and Public Policy).
64. Priest, supra note 62 passim.
this time period if informed consent to such actions is obtained from the couple generating the embryo. The Committee also recommended that legislation be enacted to allow research on any embryonic life derived from \textit{in vitro} fertilization—regardless of the fact that the embryo was intentionally or unintentionally developed for research—and that ten years be the maximum allowable time for storage (with the right of disposal passing to the storage authority after that time period).

Regarding rights of inheritance, the Committee proposed legislation which would eliminate the dilemma of Australia's "orphan" embryos by providing that any child born of an IVF procedure that had used an embryo either frozen or stored, "who was not \textit{in utero} at the death of the father shall be disregarded for the purposes of succession to the inheritance from the latter." And, concerning the issue of surrogation, or the use of surrogate mothers, the Committee proposed legislation that would impose a criminal sanction for the maintenance of surrogate mother agencies, but the Committee simultaneously suggested that those individuals entering into private surrogation arrangements, in connection with \textit{in vitro} fertilization procedures for example, be exempted from criminal prosecution.

In the United States, because of a \textit{de facto} moratorium set in 1975, no federally funded research has been undertaken on \textit{in vitro} fertilization, even though the 1979 Report of the Ethics Advisory Board of the Department of Health, Education and Welfare (now Department of Health and Human Services) concluded that federal support of research on human \textit{in vitro} fertilization, in order to establish both the safety and the effectiveness of IVF procedures, would be ethically permissible so long as certain conditions were met. The report has never been accepted, however, nor the mora-

65. Id.
66. Id.
67. Id., proposal 63.
68. Id.
70. Ethics Advisory Board of the Department of Health, Education and Welfare, Report and Conclusions: HEW Support of Research Involving Human in Vitro Fertilization and Embryo Transfer, 44 Fed. Reg. 35,034, 35,057 (1979). Among these conditions were that the blastocyst be sustained no longer than beyond the implantation stage and that \textit{in vitro} fertilization be used only by married couples who had donated their sperm and ova. Id.
torium ended—nor is there any real likelihood that action of this nature will be taken soon.\textsuperscript{71}

IV. A Basic Right to Procreate—For Whom?

As modern society continues to evolve and change, so too do many of its values, including privacy.\textsuperscript{72} Autonomy, self-representation, personhood, identity, intimacy and dignity are all essentials of privacy.\textsuperscript{73} The extent to which these essentials play a role in shaping a degree of sexual, procreational autonomy must surely remain largely fluid and flexible, for to attempt to define them with precision would challenge and erode any efficacy that they may enjoy.\textsuperscript{74} The right of the state to control and shape the behavior of both individuals and groups regarding the birth of children is always an area of high emotion and legitimate concern.

The most widely held view is that private conduct between consenting adults or, for that matter, personal conduct of any nature, should be regulated only to the extent necessary to prevent harm to others.\textsuperscript{75} Conformity is thus not a value of momentous concern and certainly not a value worth pursuing.\textsuperscript{76} The counter or conservative view is that the business of the law is to suppress vice and immorality simply because if violations of the very moral structure are indulged and promoted, such actions would surely undermine the whole basis of society itself.\textsuperscript{77} Under the former view, the state would be justified—arguably—in acting to control personal decision-making—if not for the need to prevent illegitimates from proliferating, then to prevent the ultimate economic harm to society of having to help bear the expenses associated with the maintenance and education of a fatherless child born of artificial insemination. Similarly, the prevention of harm theory could be invoked in surrogation where the state, by preventing such acts, seeks to maintain the dignity and continuity of the family unit.

\textsuperscript{71} Abramowitz, \textit{supra} note 69, at 6.
\textsuperscript{72} L. Tribe, \textit{American Constitutional Law} § 15-2 (1978).
\textsuperscript{73} \textit{Id.} § 15-2, at 889.
\textsuperscript{74} \textit{Id.} § 15-2, at 892.
\textsuperscript{76} \textit{Id.}
A. The Foundation

The first case to address tangentially what has now come to be regarded as a fundamental right to procreate was *Buck v. Bell.* In *Bell,* the Supreme Court upheld a Virginia statute that permitted the sterilization of inmates in state institutions who suffered from a hereditary form of insanity or imbecility. This opinion, authored by Justice Holmes, was written before the development of the fundamental right/compelling state interest standard. Thus, it must be determined whether the Court's opinion implicitly recognized the existence of a compelling state interest, or whether the Court merely failed to perceive procreation as a fundamental right. The latter appears to be the case; indeed, it has been suggested that the Court's pervasive emphasis on the state's right to promote the general welfare approximates a rational basis standard of judicial review. In *Skinner v. Oklahoma,* the Supreme Court again considered the validity of compulsory sterilization laws. Unlike the Court in *Bell,* which found no equal protection violation, the *Skinner* Court struck down Oklahoma's Habitual

78. 274 U.S. 200 (1927).
79. Id. at 207.
81. Id.

Writing for the Court in *Bell,* Justice Holmes stated:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call on those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

*Buck v. Bell,* 274 U.S. at 207.

83. 316 U.S. 535 (1942).
84. The *Bell* Court had used a revolving door rationale in rejecting the claim of equal protection:

[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.
Criminal Sterilization Act on equal protection grounds. The statute provided for the sterilization of habitual criminals—anyone convicted of three felonies—but did not consider felonies which arose from the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses. The Court recognized initially that marriage and procreation are fundamental to both the existence and survival of mankind. It then proceeded to observe, however, that a classification distinguishing larcenists from embezzlers, for purposes of criminal sterilization, represented a form of invidious discrimination. Consequently, the Court subjected the classification to strict scrutiny and found it violated the equal protection clause.

Although a number of Supreme Court decisions have since cited the Skinner case as at least validating—if not in fact creating—a constitutional right to procreate, it is important to recognize precisely the contours of that right. In both Bell and Skinner, the Court was confronted with sterilization statutes. Sterilization, unlike other methods of control over human reproduction, is irreversible. Thus, in discussing the procreative “right” affected by Oklahoma’s Habitual Criminal Sterilization Act, the Skinner Court aptly observed that this “right [was] basic to the perpetuation of a race.” Given this background, the procreative right recognized in Skinner was simply a right to remain fertile, and not an uninhibited right to engage in potentially procreative conduct. Subsequent decisions which have focused on a fundamental right to privacy have further delineated the contours of this

274 U.S. at 208.
85. Skinner v. Oklahoma, 316 U.S. at 537.
86. Id. at 541.
87. Id.
89. Comment, supra note 80, at 1056. Indeed, it has been suggested that this case has been incorrectly interpreted since “the Skinner Court neither denied the state’s right to sterilize nor established a constitutional right to procreate. Rather, the Court expressly declared that the scope of the states’ police power was unaffected by its holding.” Id.
91. Skinner v. Oklahoma, 316 U.S. at 536. Writing for the Court, Justice Douglas stated: “The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or wreckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches.” Id. at 541.
right.

B. Searching for a Fundamental Right to Sexual Privacy

Nowhere in the Constitution is there mention of a right to privacy. Nor is any right of sexual freedom found within the gambit of procreative rights recognized by the Supreme Court; nor for that matter has the Court fashioned a general right of personal privacy which is sufficiently broad-based to permit sex outside marriage. In *Griswold v. Connecticut*, however, the Supreme Court, for the first time, recognized a constitutionally protected zone of privacy, and invalidated part of a Connecticut statute forbidding the use of contraceptives by married persons. The protection of this aspect of procreative autonomy "was largely subsumed within a broad right of marital privacy" which "stressed the unity and independence of the married couple and forbade undue inquiry into conjugal acts." From this, however, it cannot be argued that there must exist a corresponding fundamental right to reproduce or to use artificial reproductive technology. For, as Justice Goldberg made clear in his concurring opinion, *Griswold* "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct," and thus the constitutionality of Connecticut's statutes prohibiting adultery and fornication remained beyond dispute.

93. 381 U.S. 479 (1965).
94. The Court observed that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from the guarantees that help give them life and substance." *Id.* at 484. Thus, it is those "[v]arious guarantees [which] create zones of privacy." *Id.*
97. Comment, supra note 80, at 1058.
98. *Griswold v. Connecticut*, 381 U.S. at 498-99. But, Professor Laurence Tribe has observed that since *Griswold* recognized as valid individual decisions not to bear a child, read as such and considered with *Skinner*, it forces the conclusion that whether in fact one's body is to be the source of new life must be regarded as a personal decision for the concerned individual *alone*. *L. Tribe*, supra note 72, at 923.
In *Eisenstadt v. Baird*, the Supreme Court was confronted with construing a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. In holding that the statute violated the equal protection clause of the fourteenth amendment, the Court observed that, "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." Accordingly, the *Eisenstadt* Court fleshed out the procreative skeleton of *Griswold*, which initially appeared confined to the so-called "sacred" precincts of relations between married persons. This decision, however, did no more than refine a qualified right to procreative autonomy blurred by the *Griswold* Court's emphasis on the marital relation.

In *Roe v. Wade*, the Court addressed squarely an integral part of the individual's right to procreative autonomy when an unmarried woman in a class action suit challenged the constitutionality of the Texas criminal abortion laws. The Court articulated a new source of privacy derived from the fourteenth amendment's standard of personal liberty and inherent restrictions upon state action and held that this right was sufficiently broad to embrace a decision made by a wo-

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100. *Id.* at 453 (emphasis in original).
101. *Id.*
102. "It has been suggested that the Court's opinion was lacking in candor, for it stated in broad dictum a major extension of the 'privacy right' which could have justified its decision, while purporting to rest on a strained conclusion that the statute involved failed even the minimal rationality test." Comment, *supra* note 96, at 1184.


A narrow, more conservative construction views *Eisenstadt* as merely recognizing a freedom to decide issues related to the birth of a child. See, e.g., *Neville v. State*, 290 Md. at 374, 430 A.2d at 575; *People v. Onofre*, 51 N.Y.2d 476, 499, 415 N.E.2d 936, 946, 434 N.Y.S.2d 947, 957 (Gabrielli, J., dissenting); *State v. Santos*, 122 R.I. 799, 816-17, 413 A.2d 58, 68 (1980).

103. 410 U.S. 113 (1973).
man whether or not to terminate her pregnancy.\textsuperscript{104} The Court, however, went further to state that it was \textit{not} recognizing “an unlimited right to do with one’s body as one pleases.”\textsuperscript{105}

The final pertinent case of interest in this area is \textit{Carey v. Population Services International.}\textsuperscript{106} In \textit{Carey}, the Supreme Court invalidated a New York statute which regulated the sale and distribution of contraceptives to minors and stated that “at the very heart of [the] cluster of constitutionally protected choices,” recognized in the previous privacy cases,\textsuperscript{107} was “the decision whether or not to beget or bear a child.”\textsuperscript{108} This decision is particularly instructive on the question of the

\textsuperscript{104} \textit{Id.} at 153. This right, however, was not absolute and the degree of involvement allowed would be continued on the length of the pregnancy. “[P]rior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” \textit{Id.} at 164. After this stage, the “State may . . . regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” \textit{Id.} Finally, after viability, the state may protect fetal life and “may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.” \textit{Id.} at 163-64.

Unless scientists develop an artificial womb, Dr. Robert Hayaski, the head of obstetrics at the University of California, Los Angeles-Harbor Medical Center, does not foresee any dramatic changes of survival rates for infants before the twenty-fourth week of pregnancy. In addition to this observation made at the annual meeting of the American Association for the Advancement of Science held in May, 1985, in Los Angeles, several participants argued that the importance of viability has been inflated and that the United States Supreme Court should determine a legal time frame in the second half of pregnancy “beyond which states could not prohibit abortion.” It was pointed out that in 1973 when \textit{Roe v. Wade} was decided, the threshold of viability was around 28 weeks of pregnancy and only approximately 50\% of infants born then could be expected to survive. Today, with advances in medical technology, the threshold has dropped to about 24 weeks—with nearly all 28-week-old babies surviving. Russell, \textit{Lawyers Question Letting Fetus Viability Shape Abortion Law}, Wash. Post, May 29, 1985, at A4, col. 1. See also Comment, \textit{Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law}, 29 UCLA L. REV. 1194 (1982).

\textsuperscript{105} \textit{Id.} at 154. In support of this proposition, the Court cited \textit{Buck v. Bell}, which led one commentator to observe: “As it is difficult to imagine a more substantial interference with procreation than compulsory sterilization, the limited nature of the recognized procreative ‘right’ is apparent.” Note, \textit{supra} note 95, at 1868.

\textsuperscript{106} 431 U.S. 678 (1977) (plurality opinion).

\textsuperscript{107} In addition to the privacy cases already analyzed in this article, the Court cited Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Loving v. Virginia, 388 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

\textsuperscript{108} \textit{Carey}, 431 U.S. at 685.
unmarried woman's right to artificial insemination or in vitro fertilization procedures, for it examines the previous privacy cases and delineates the extent of the individual's right to procreative autonomy.

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

First, with regard to contraception and abortion, the Court made clear that it is "[the] individual's right to decide to prevent conception or terminate pregnancy" that is protected. Such unequivocal language, however, lends little or no support to the argument that a concomitant right to conceive is also protected. Second, the Court emphasized that its decision did not encompass any constitutional questions raised by state statutes regulating either sexual freedom or adult sexual relations. This reading of Carey is supported by a later decision of the Court which stated that if "the right to procreate means anything at all, it must imply some right to enter the only relationship in which the [s]tate . . . allows sexual relations to legally take place." Thus, the lesson from the Court's decisions in Skinner, Griswold, Eisenstadt, Roe, and Carey is plain: "procreative autonomy . . . includes both the right to remain fertile and the right to avoid conception," but absolutely nothing more.

C. State Justification for Intervention

Since the unmarried woman's decision to be artificially

110. Carey, 431 U.S. at 688 (emphasis added).
111. Id. at 688 n.5. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973) (implication that state fornication statutes do not violate the federal constitution). But see State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) (holding that fornication statute involves by its very nature a personal choice and that it infringes upon the right of privacy).
113. Comment, supra note 96, at 1185. See also Wilkinson & White, supra note 102, at 591-94.
inseminated or to participate in an *in vitro* fertilization procedure does not fall within the gambit of any recognized fundamental right, state statutes limiting this procreative technology to married women "[may] be sustained under the less demanding test of rationality . . . ."114 Under this test, the distinction drawn must be "rationally related" to a "constitutionally permissible" objective.115 In employing this rather relaxed standard, courts must be sensitive to the fact "that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."116

Absent a suspect classification or the infringement of a fundamental right, the Supreme Court has recognized that legislation "protecting legitimate family relationships" as well as both the regulation and protection of the family unit are "venerable concerns of the state."117 Statutes limiting the availability of artificial insemination to married women and those which might (indeed, should) be drafted to limit the use of IVF procedures to married women, fall squarely within this classification.

As early as 1888, the Court recognized marriage as "the foundation of the family and society, without which there would be neither civilization nor progress."118 Recently, the Court observed that "a decision to marry and raise a child in the traditional family setting must receive . . . protection."119 Thus, although certain aspects of an individual's right to procreative autonomy have correctly been divorced from the familial and marriage relationship, the Court has also implicitly recognized that, whenever possible, childbearing should take place within the traditional family unit.120 An unmarried woman's decision to seek artificial insemination or to participate in an IVF procedure goes directly against the tide of these pronouncements.

An instructive analogy may be made to the law of adoption. Adoption statutes, like the statutes regulating artificial

insemination, have their genesis in state law. Although all states currently allow adoption by unmarried adults, it occurs only in rare cases. In In re Adoption of Infant H., an unmarried middle-aged woman sought to adopt a thirteen-month-old child, for whom parental care by a young couple was available. In rejecting her application, the court observed:

Adoption by a single person has generally and in this Court's experience been sought and approved only in exceptional circumstances, and in particular for the hard-to-place child for whom no desirable parental couple is available. In the universal view of both experts and laymen, while one parent may be better than none for the hard-to-place child, joint responsibility by a father and a mother contributes to the child's physical, financial and psychic security as well as his emotional growth. This view is more than a matter of present convention, anthropologists pointing out that the institution of marriage, which is a method of signifying commitment to such joint responsibility, evolved in response to the need for two-parent care of children.

This observation applies with equal force to artificial insemination for an unmarried woman as well as her participation in an in vitro fertilization program. Indeed, if a state may

122. Kritchevsky, supra note 109, at 31.
123. 69 Misc. 2d 304, 330 N.Y.S.2d 235 (1972).
124. Id. at 314, 330 N.Y.S.2d at 245. Cf. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977). In upholding the statutory and regulatory procedures for the removal of foster children from foster homes, the Court stated in Smith that: "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to the natural parents." Id. at 847.
125. It has been suggested that the artificial insemination process in fact makes it less likely that the parent will be indigent or emotionally unfit to care for the child. First, because the procedure of AI itself is expensive, its use would tend to be limited to the nonindigent. Second, prospective AI mothers receive screening and counseling to ensure that they are fit to become parents. Third, use of AI guarantees that the child is born into a home that sincerely wants it, and there is no reason to believe that this is less true in the single parent than the dual parent home. Finally, since a woman refused AI remains free to choose to conceive through sexual intercourse, any state rationale arguing that
reasonably regulate unmarried adults in their quest to adopt children, it would be anomalous to suggest that it could not regulate the use of a procreative technology designed to bring children into the world.

More importantly, however, the unmarried woman's access to artificial insemination, *in vitro* fertilization and, thus, surrogation, directly undermines not only the concept of marriage, but the family as well and hence the very foundation of society.126 The courts have repeatedly recognized the desirability of having a child reared within a traditional family unit. Moreover, it is clear that the marital relationship serves as the very genesis of the family unit.127 Accordingly, the inherent procreative potential of this union,128 together with the stability that this provides to the social fabric,129 would be dealt a mortal wound by permitting unmarried women to assert total procreational autonomy through the use of the new reproductive technologies.130

Another argument made against state intervention is that action taken by the state in this area of procreational autonomy seeks to paint with too broad a brush when it limits artificial insemination to married couples or withholds approval or licensure of IVF procedures unless one is married. Although the Supreme Court has failed to formulate a con-

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eliminating AI will protect it financially or will protect children is irrational.


128. If approved and encouraged by the state, artificial insemination tends to upset the traditional, totally private, monogamous method of human reproduction. By sanctioning the intervention of a third party (the donor) into the process, the state is approving a trend toward treating reproduction as a social, as opposed to a private, act. Artificial insemination also creates a potential for direct state intervention into the reproductive process. Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 Hastings L.J. 1401, 1409 (1972).


130. See Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980), where it is maintained that procreation is considered fundamental because it “strongly implicates the values of intimate association, particularly the values of caring and commitment, intimacy, and self-identification.” *Id.* at 640. These values may not be found in the unmarried woman's desire to engage in artificial insemination—thus lending further credence and support to a state's interest in limiting the use to married women. *Id.*
crete definition of the family, *Moore v. City of East Cleveland* 131 represents a clear extension of protection that is routinely afforded to the “nuclear” family to one recognized as a “quasi-familial group.” 132 In *Moore*, a zoning ordinance which limited an area to single family dwellings was challenged by a woman who shared her home with her two grandsons. The Court merely recognized that the extended family occupies a place in American tradition similar to that of the nuclear family, and thus is to be guaranteed protection by the Constitution. 133

As the procreation and privacy cases clearly illustrate by analogy, however, the fact that a mother and her offspring may find protection within the nuclear family structure does not imply a right to freely bring about that condition—nor does it demonstrate that the limitations placed on artificial insemination, or on *in vitro* fertilization for that matter, with respect to unmarried women are in any way irrational or unreasonable. Thus it assuredly demands an expanded definition of family in order to contend that statutes limiting artificial insemination or the new reproductive technologies to married women are not rationally related to a constitutionally permissible objective. The line of demarcation may be drawn imprecisely, but the Constitution is not offended “simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’ ” 134

V. CONCLUSIONS

The legal system, by protecting such relationships as kinship and formal marriage, promotes not only those interests of private parties, but the interests of society in those social and political structures which ensure a long-term individual view of liberty. 135 In judicial decisions affording familial and marital relationships a higher degree of constitutional protection, traditions have played a pivotal role. In the procreative field, the Supreme Court has carved out a limited degree of autonomy for the individual.

As this article has demonstrated, a woman’s fundamental

133. *Id.* at 1271.
135. *Hafen, supra* note 92, at 559.
right to privacy or procreation does not encompass a right to artificial insemination or use of new reproductive technologies, such as in vitro fertilization, or surrogation. Accordingly, statutes limiting the use of these new reproductive technologies need only be rationally related to the promotion of a constitutionally permissible state interest. A state's desire to promote the raising of children in the traditional family setting while at the same time promoting the institution of marriage and the family is an unquestionably permissible, if not laudable, objective.

Thirty years ago, Justice Felix Frankfurter cautioned: "Children have a very special place in life which the law should reflect. Legal theories and their phrasing in cases readily lead to fallacious reasoning if uncritically transferred."\(^{136}\) The legislature, in limiting the practices and use of the new biological technologies to married women, have taken—and should continue to take—this admonition seriously. The extended use and application of these procedures primarily through artificial insemination and surrogation must be controlled strictly by legislative design. Surrogation should only be tolerated by a married woman, with her husband's actual consent, and then only under proper medically supervised standards. As a medical aid to infertility, in vitro fertilization and surrogation should then be allowed only as last relief adjuncts to medical treatment of this impediment and not as a popular or novel experience to be championed on street corners and smoke-filled convention floors.

A legislative program designed to validate, and thereby license, the in vitro fertilization process and its inextricable use and reliance upon surrogation for married women, as well as the married surrogates participating therein, would not only seek to protect the health and well-being of the issue born but also would assure the safety of the surrogate. Such a legislative program would ideally include provisions shaping the rights and determining the extent of the liabilities of the contracting parents in the IVF-surrogate compact vis-à-vis not only the infant, but give due consideration as well to shaping the sphere of responsibility for various types of errors that intermediaries—such as doctors and lawyers—might commit in facilitating the whole process. Ideally, the specific policy matters coincident with the administration of an IVF-surrogation program, once structured, would be

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implemented by an administrative body or licensing board, where the policies and standards for evaluating and processing requests for surrogate mothering would be both comprehensive and equitable in their design and utilization.\(^{137}\)

The new reproductive biological techniques for parenthood portend an enormous opportunity of untold significance for humanity and demand the need for a searching inquiry into the parameters for future development.\(^{138}\) The legislative branch of government is far better equipped to deal with this inquiry than is the executive or judicial, and is potentially a more responsive forum for posturing and advocacy by the various religions which must assume their roles as stalwart guides in the search for insightful, yet humane, law-making responses.\(^{139}\) Thoughtful study and a cautious plan of action are needed now, before advancing complexities become genuine crises that overwhelm, confuse and confound the role of the rule of law in meeting the challenges of the brave and pluralistic new world of tomorrow which—in actuality—are already here.

\footnotesize{\begin{enumerate}
\item[137.] Razor's Edge, supra note 39. See also Brophy, A Surrogate Mother Contract to Bear Child, 20 J. Fam. L. 263 (1981).
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