EXPLORING REPRODUCTIVE TECHNOLOGIES: THE PURSUIT TOWARDS PROCREATIVE LEGISLATION

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TABLE OF CONTENTS

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> As a mother who would have been devastated by infertility, I have only the strongest sympathies for those who desperately desire to become parents and whose fondest wish is for children with a genetic tie to at least one of the rearing parents.
>
> —*Ann MacLean Massie*[1]

I. INTRODUCTION

The moment a new baby is born into a family, one of the first questions asked is "Who does the baby look like— the mother or the father?" The natural tendency is to figure out who the baby resembles.[2] This only illustrates how much we value the existence of a genetic tie with our children. Most parents probably feel great satisfaction in seeing children who take after them.[3] There is some sense of achievement of immortality in seeing little replicas of yourself which you carried to term and brought into the world.

But, it is a sad fact that not all couples are able to conceive and give birth to their own children. In our society, the inability to produce one's own children is

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[1] Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 145 (1995).

[2] Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 215 (1995).

[3] *Id.*

often seen as one of nature's tragic curses.[4] Infertile couples often experience depression, anger, and helplessness. The anxiety associated with it is distracting and reduces productivity both at home and at work.[5] Furthermore, blood ties are a powerful cultural symbol of stability in human relationships—the one true guarantee against loneliness and isolation, amidst the fragility of contemporary friendships and marriages,[6] which of late have been increasingly mutable.

However, although not every couple is able to conceive the natural way, producing genetically related children can be made possible through the use of assisted reproductive technologies. These technologies also allow the couple to share in the full experience of the gestational period and birth of the child.[7] Infertile couples are given another chance to successfully produce their genetically-linked child. Though success of the procedure to be undertaken is not assured, these couples' hope for a child and a family is renewed. Groundbreaking fertility specialists have often justified their work by promoting the right to found a family.[8]

The fact is that assisted reproductive technologies are now available and being utilized in the Philippines. However, the law has failed to address their advancement in Philippine society. Although the Family Code mentions artificial insemination and gives the status of legitimacy to children conceived through this procedure,[9] it is silent with respect to other kinds of assisted reproductive technologies. The Family Code is wanting in responding to the problematic legal consequences brought about by these technological breakthroughs. The legality of their use and the status of the children produced thereby are left in doubt. Moreover, the actual practice of utilizing these reproductive techniques is not

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[4] *Id.* at 215 (citing Alison Solomon, *Infertility As Crisis: Coping, Surviving — and Thriving, in* INFERTILITY: WOMEN SPEAK OUT ABOUT THEIR EXPERIENCES OF REPRODUCTIVE MEDICINE 169 (Renate D. Klein ed., 1989).

[5] Melissa O'Rourke, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 346 (1992).

[6] *Id.* at 216 (citing Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood, in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 10, 21 (Michelle Stanworth, ed., 1987).

[7] Dominick Vetri, *Reproductive Technologies and United States Law*, 37 INT'L & COMP. L.Q. 5, 6 (1988).

[8] Laura Shanner, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 825 (1995) (citing *In Vitro Fertilization and the Right Reproduce*, 1 BIOETHICS 241, 245 (1987)).

[9] *See* FAMILY CODE, art. 164.

regulated. This is unfortunate because couples may hesitate in availing of these procedures which could be the only remedy to their infertility problems. What the law should do, at least, is to provide regulatory measures in order to protect the rights and interests of the couple and the child born out of these procedures. Providing the technologies and regulating their use are the keys to blessing infertile couples with the child they so desire. Responsive legislation should, therefore, be enacted to accost these problems.

II. OBJECTIVES

Scientific technologies have paved the way to cure medical and social illnesses such as infertility. Through the aid of science, childless couples are given another opportunity to realize a dream of completing their family life with their own children. However, the development of assisted reproductive technologies like artificial insemination, in vitro fertilization, and surrogacy are not without its legal consequences.

It has been observed that "[t]he area of reproductive technologies is one where science has rapidly outpaced the development of the law."[10] Hence, this study primarily aims to at least close the gap between science and law.

To achieve this purpose, this study sets out to accomplish the following objectives:

1) To discuss the different types of reproductive technologies;

2) To identify and analyze the legal problem areas in using and regulating reproductive technologies; and

3) To promote legislation that would incorporate reproductive technologies in building the Filipino family.

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[10] Vetri, *supra* note 7, at 527. *See* Wendy Dullea Bowie, *Multiplication and Division — New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 156 (1990). Bowie observes that "[t]he science of assisted human reproduction has developed more rapidly than has the law's ability to accommodate its development."

The grim reality of unregulated access and misguided utilization of reproductive technologies faces the Filipino citizenry and bold efforts must be exerted to protect the right to procreate as well as the institutions of marriage and family.

III. SCOPE AND LIMITATIONS

This study focuses on the Philippine setting and utilizes developments in other countries such as the United States, United Kingdom and Australia to further explore legal consequences and possible solutions. At present, our laws do not recognize any of the assisted reproductive technologies save for artificial insemination. In foreign jurisdictions, on the other hand, there is no uniform legislation on this matter. In the United States, only a few states have undertaken affirmative legislative action, either by allowing or proscribing the use of assisted reproductive technologies. There is also a variance in legal treatment of these technologies in Australia, while in the United Kingdom, there is definitive legislation on the matter.

This exploratory and analytical study is limited to the commonly used reproductive technologies, namely artificial insemination, in vitro fertilization, and surrogacy.

Other forms of technological advancements such as cloning,[11] hormonal treatments[12] to cure infertility, gamete intrafallopian tube transfer,[13] pro-nuclear

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[11] John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1373-74 (1998) (citing FUNK AND WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1919)). "Clone" and "cloning" are originally horticultural terms referring to a plant group the members of which have been grown from an original stock, but which do not come from true seed. In biology, cloning is defined as an asexual replication of an existing genome or individual; *see also* M. Cathleen Kaveny, *Cloning and Positive Liberty*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 15, 15 (1998); *see also* Ronald Chester, *To Be, Be, Be. Not Just to Be: Legal and Social Implications of Cloning for Human Reproduction*, 49 FLA. L. REV. 303 (1997); *See also* Dean Bell, *Human Cloning and International Human Rights Law*, SYDNEY L. REV. 202 (1999); Lawrence Wu, *Family Planning Through Human Cloning: Is There a Fundamental Right?*, 98 COLUM. L. REV. 1461 (1998); Janet L. Dolgin, *Symposium on Human Cloning: Legal, Social, and Moral Perspectives for the Twenty-First Century*, 27 HOFSTRA L. REV. 473 (1999); Lisa Sowle Cahill, *No Human Cloning: A Social Ethics Perspective*, 27 HOFSTRA L. REV. 487 (1999); Nanette Elster, *Who is the Parent in Cloning?*, 27 HOFSTRA L. REV. 533 (1999); Sophia Kolehmainen, *Human Cloning: Brave New Mistake*, 27 HOFSTRA L. REV. 557 (1999); Emily Marden and Dorothy Nelkin,

stage transfer,[14] and egg donation[15] are excluded from this study. These are excluded from this study because they are merely variations or advanced

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Cloning: A Business Without Regulation, 27 HOFSTRA L. REV. 569 (1999); Eric A. Posner and Richard A. Posner, *The Demand for Human Cloning*, 27 HOFSTRA L. REV. 579 (1999); John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609 (1999); Karen H. Rothenberg, *"Being Human": Cloning and the Challenges for Public Policy*, 27 HOFSTRA L. REV. 579 (1999); Lee M. Silver, *How Reprogenetics Will Transform the American Family*, 27 HOFSTRA L. REV. 649 (1999); and Lewis D. Solomon, *Reflections on Human Cloning*, 27 HOFSTRA L. REV. 659 (1999).

[12] O'Rourke, *supra* note 5, at 350-53 (citing R. Herbert Wiebe, UNIVERSITY OF SOUTH DAKOTA OB/GYN UPDATE, INFERTILITY: AN OVERVIEW (October 1989)); *See* Sharon B. Jaffe and Raphael Jewelewicz, *The Basic Infertility Investigation*, 56 FERTILITY & STERILITY 599, 601 (1991); and OFF. OF TECHNOLOGY ASSESSMENT (OTA), OTA-BA-357, *Infertility: Medical and Social Choices* 38, 119 (1988)). Proper treatment of infertility begins with systematic attempts to diagnose the factors impairing infertility. The first step in the infertility investigation is a detailed health history and physical examination, involving both partners. In addition to the general physical exam, the female's internal pelvic exam should screen for pathological or anatomic abnormalities, and the male's general physical should include examination of the external genitalia. When testing results have yielded a diagnosis of treatable conditions, a variety of drug therapies may be utilized. Surgery, either traditional (surgery on large, easily visualized structures), or microsurgery, (microsurgery requires fine, delicate surgical procedures performed with the aid of a microscope or other magnifying apparatus) may also be resorted to.

[13] *Id.* at 355 (citing the OTA report, at 123-24). *See* Pamela J. Prager, *Infertility: The Unrecognized Illness in the Health Insurance Industry*, 39 DRAKE L. REV. 617, 625 (1990) (citing C. HARKNESS, THE INFERTILITY BOOK: A COMPREHENSIVE MEDICAL AND EMOTIONAL GUIDE 256-57 (1986). Gamete intrafallopian transfer (GIFT) is a procedure similar to IVF. First, superovulation is induced with the use of fertility drugs, the follicles are monitored, and the egg or eggs retrieved. Beyond this point, however, the procedures become different. Instead of being fertilized in a cultured dish, the retrieved eggs and sperm are immediately transferred into the fallopian tubes, allowing fertilization to take place therein. A GIFT procedure can only be used where the female has at least one intact fallopian tube. If the tubes are completely blocked, or nonexistent, there is no way for the fertilized egg to get to the uterus for implantation and development. The advantage in using GIFT is that the patient need not be put under general anesthesia. GIFT is the only reproductive technology accepted by the Catholic Church.

[14] *Id.* . Pro-Nuclear Stage Transfer (PROST) is a variation of IVF and GIFT. In PROST, the eggs remain in the laboratory only until the sperm penetrates and fertilizes the eggs, and are then placed into an intact fallopian tube. The egg is not allowed to develop into more than one cell, unlike in IVF where the eggs are left in the laboratory to develop into about eight cells. Unlike IVF, implantation occurs naturally.

[15] Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is there International Consensus in the Debate over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 155-56 (1996) (citing John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1, 2-6 (1988)). Egg donation is the female equivalent of artificial insemination. It is most often used to treat infertile women who lack ovarian function.

procedures of either artificial insemination or in vitro fertilization. They are also the least known and utilized kinds of assisted reproductive technologies.

IV. DEFINITION OF TERMS

A. Assisted reproductive technologies

Assisted reproductive technologies (hereinafter ARTs) generally refer to "any form of non-coital conception and includes artificial insemination and in vitro fertilization."[16] These techniques are used to cure infertility.[17]

B. Procreative liberty

Procreative liberty is defined as "both the freedom to reproduce and the freedom to avoid reproduction."[18] Proponents of procreative liberty assert that "[a] person's interest in engaging in reproduction is as important as her interest in avoiding reproduction."[19]

C. Infertility

Infertility is described as the "inability of a couple to conceive a pregnancy after a year or more of regular sexual relations without contraception."[20] Restated, infertility is defined as a lack of pregnancy after a year

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In this process, donor eggs are removed from one woman and fertilized in vitro. The embryo is then implanted into the recipient mother who is unable to produce eggs of her own. In the same way that sperm donation is a widely accepted practice, egg donation is more ethically acceptable than many other forms of assisted reproduction. The practice is limited, however, by the fact that, in contrast to sperm, the preservation of human ova is extremely difficult. Attempts to freeze ova result in extremely low fertilization rates.

[16] *Id.* at 150.

[17] *Id.*

[18] John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1028 (1994).

[19] *Id.* at 1029.

[20] O'Rourke, *supra* note 5, at 344-45 (citing UNITED STATES CONGRESS, OFF. OF TECHNOLOGY ASSESSMENT (OTA), OTA-BA-358, *Infertility: Medical and Social Choices* 38-43 (1988)).

of unprotected intercourse.[21] This definition of infertility may be expanded to include the "incapacity to carry a pregnancy to a live birth."[22]

D. Artificial insemination

Artificial insemination (hereinafter AI) is the introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means.[23] AI may be performed in three ways:

1. Homologous artificial insemination

In Homologous Artificial Insemination (hereinafter AIH), the recipient's husband is the sperm donor. Couples who suffer physical difficulties may use AIH. Actual intercourse may be prohibited anatomically by the presence of vaginal tumors, vaginal obliterations, abnormal position of the uterus, a very small cervical opening, or obesity.[24] The husband may also possess conditions which interfere with fertilization, such as impotence, malformation of the penis, retrograde ejaculation, physical impotence, low fertility, or obesity.[25] In addition, psychological problems in either or both partners may also render intercourse impossible.

2. Heterological artificial insemination

Heterological Artificial Insemination (hereinafter AID) is the technical term applied to instances where the seminal fluid to be used must be taken from a male other than the husband of the recipient.[26] The donor is usually anonymous

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[21] John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 911 (1996). [hereinafter *ART and the Family*].

[22] O'Rourke, *supra* note 5, at 345. *See* CATHERINE H. GARNER ET. AL., SERONO LABORATORIES, INSIGHTS INTO INFERTILITY 25 (1991). The basic definition of infertility is further broken down into primary and secondary infertility. Primary infertility generally refers to a couple who has never been able to conceive, while secondary infertility refers to the inability of a couple to conceive or carry a pregnancy after having successfully conceived and carried one or more pregnancies.

[23] Denise S. Kaiser, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 793 (1988).

[24] Guttmacher, *Artificial Insemination*, 18 DEPAUL L. REV. 566, 569 (1969) *cited in* Jeffrey M. Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 321, 322 (1980).

[25] Jeffrey M. Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 321, 322 (1980) (citing Guttmacher, *supra* note 24, at 569).

[26] Jerry W. Amos, Notes and Comments, 40 N.C. L. REV. 110, 111 (1961).

and is required to sign a written waiver of all parental rights.[27] AID may be utilized to solve two very serious problems: permanent sterility and the presence of a genetic factor in the husband which could produce genetic disorders in the offspring, such as sickle cell anemia, Tay-Sachs disorder, hemophilia, or Huntington's chorea. Other reasons for AID include incompatible Rh blood factors, possible chromosomal damage due to excessive exposure to drugs, or radiation.[28] AID is also being increasingly used by unmarried women who want children without the legal and emotional attachment to the child's biological father.[29] Typically, semen is obtained from donors who are compensated and assured of anonymity.[30]

3. Combination artificial insemination

Combination or mixed artificial insemination (hereinafter AIC) is a process whereby semen from the husband and an unrelated donor are combined[31] to provide the husband with some hope that he is the natural father of the child who is conceived by the procedure.[32] It is also used by doctors as a rationalization to avoid perjury when the name of the husband is listed on the birth certificate as the child's father.[33] This process may also provide a rationalization in court to make a legal presumption of paternity of the husband.[34]

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[27] Mika and Hurst, *One Way To Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 997 (1996) (citing Christine Djalleta, *A Twinkle in the Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMPLE L. REV. 335, 335 (1994)).

[28] Shaman, *supra* note 25, at 332.

[29] Mika and Hurst, *supra* note 27, at 997 n.33.

[30] Comments, *Artificial Insemination: A New Frontier for Medical Malpractice and Medical Products Liability*, 32 LOY. L. REV. 411, 413 (citing R. SNOWDEN AND G. MITCHELL, THE ARTIFICIAL FAMILY: A CONSIDERATION OF ARTIFICIAL INSEMINATION BY DONOR, 17, 63 (1981)). Due largely to their availability, cooperation, and level of scholastic achievement, medical students are the most frequently used donors.

[31] Kaiser, *supra* note 23, at 795.

[32] Shaman, *supra* note 25, at 332 (citing Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 782 (1970)).

[33] Shaman, *supra* note 25, at 782 (citing W. FINEGOLD, ARTIFICIAL INSEMINATION 5 (1964)).

[34] *Id.* at 782 (citing Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 782 (1970)).

E. In vitro fertilization

In vitro fertilization (hereinafter IVF) literally means "fertilization in glass."[35] This technology is also sometimes called "test tube fertilization."[36] The egg and sperm are united mechanically on a petri dish or a laboratory dish, hence the label "fertilization in glass."[37] IVF refers to "the process whereby an egg and sperm unite outside the human body."[38] Vetri details the IVF procedure as follows:

> The process of *in vitro* fertili[z]ation (IVF) is obviously a complicated medical procedure. Typically, the doctor will stimulate the ovaries of the woman by the use of chemicals to produce multiple eggs. Multiple egg production is considered important because pregnancy rates are higher with the transfer of more than one embryo. After stimulation, the egg development process is monitored carefully. At the right time, egg recovery is achieved through the use of a surgical procedure known as laparoscopy or an ultrasound directed method. The eggs and sperm are placed together in a culture medium *in vitro* and incubated for a period of twelve to eighteen hours to allow for fertili[z]ation. Then, after an additional forty-eight to seventy-two hours the resulting embryos can be transferred to the uterine cavity of the woman through the use of a catheter. Implantation should take place within two to three days and a determination of pregnancy can usually be made within two weeks.[39]

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[35] Pitrolo, *supra* note 15, at 152.

[36] O'Rourke, *supra* note 5, at 355.

[37] *See Fertilitext In Vitro Fertilization at* http://www.fertilitext.org/ivf.html. IVF is the name for in vitro fertilization, a procedure that involves retrieving eggs and sperm from the bodies of the male and female partners and placing them together in a laboratory dish to enhance fertilization. Fertilized eggs are then transferred several days later into the female partner's uterus where implantation and embryo development will hopefully occur as in a normal pregnancy. IVF is performed by physicians who specialize in reproductive medicine and have received additional education and training in the evaluation and treatment of male and female infertility (emphasis supplied).

[38] *Id.*

[39] Vetri, *Supra* note 7, at 507. *See* ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 147 (1989) cited in Pitrolo, *supra* note 14, at 152-53. Bonnicksen reports:

During ovulation induction, the woman takes a combination of hormones to stimulate her ovaries and her body "reacts abnormally, producing two, three, four or more eggs . . . .Eggs are retrieved most commonly in a surgery known as the laparoscopy . . . .It is increasingly common to replace the laparoscopy with an aspiration conducted in an office procedure with physicians watching the process through ultrasounds. [A] suctioning needle may be inserted through the

In short, the procedure which takes approximately two weeks includes the following stages: "ovulation induction, egg retrieval, fertilization, and embryo transfer."[40] The term IVF generally refers to the medical procedure involved in impregnating a woman.[41] However, variations of IVF have developed across time such as the use of donor semen instead of a husband's, the use of donor eggs instead of a wife's, and the use of a surrogate for gestation.[42]

Not only is IVF considered as a highly technical medical procedure, but more importantly, it is considered as a treatment to cure "a variety of infertility problems in both females and males."[43] IVF is used to treat tubal blockages or

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abdomen and bladder or through the vagina . . .The test tubes [containing the suctioned fluid] are taken to a laboratory where technicians examine the fluid for eggs . . . If eggs are found in the fluid, the husband is asked to produce a semen sample . . . The spermatozoa given . . are treated in the laboratory as eggs mature in culture . . . .During fertilization, each egg is put in a glass dish combined with some of the sperm. The egg lies on the bottom of the dish and the sperm, which are swimming are pulled toward the egg by the force of gravity . . . The dishes with the eggs and sperm go into an incubator with a temperature and moisture level of approximating that of the fallopian tubes. Most of the time a fertilization occurs . . .Approximately eighteen hours after fertilization, the egg divides into two cells. Ideally, the cells will be of equal size, looking, as one embryologist put it, like the Olympiad logo but with only two circles. Approximately six hours later each cell divides and the egg becomes a four-celled entity. Divisions proceed in this rippling fashion as each cell divides and then each new cell divides. The embryos, technically known as pre-implantation embryos, each take on their own appearances and are graded by the technicians Generally most embryos are transferred, irrespective of their appearance because the science of knowing whether appearance makes a difference is imperfect and it is assumed the body will slough the abnormal ones in any case.

Most IVF centers transfer the embryos to the woman's uterus when the embryos are at four- or eight-cell stage. The embryo transfer itself is a simple procedure, performed in an office

The physician then inserts the catheter [loaded with embryos] into the vagina and through the cervix. The embryos are released The catheter is then examined under the microscope to make sure no embryos remain . . . .

Two weeks later, if menstruation has not started, [the woman's] blood is tested to detect the chemical changes associated with pregnancy.

[40] Pitrolo, *supra* note 15.

[41] *Id. See also Fertilitext In Vitro Fertilization*, *supra* note 37. This article gives a detailed discussion of the four-stage procedure in IVF. The stages are denominated as follows: Stage One – Ovarian Stimulation and Monitoring, Stage Two – Egg Retrieval, Stage Three – Fertilization, and Stage Four – Embryo Transfer.

[42] *Id.*

[43] Pamela J. Prager, *Infertility: The Unrecognized Illness in the Health Insurance Industry*, 39 DRAKE L. REV. 625 (1990) (citing C. HARKNESS, THE INFERTILITY BOOK: A COMPREHENSIVE AND EMOTIONAL GUIDE 169 (1986)).

adhesions and endometriosis in females.[44] In the case of males, IVF is utilized to cure infertility caused by sperm antibodies or low sperm count.[45] In cases when infertility is unexplained, IVF is also recommended.[46]

F. Surrogacy

Surrogacy is an arrangement between a couple and a female third party by which a woman, the third party, agrees to be impregnated by assisted conception, carries the resulting fetus, and relinquishes all parental rights to the child at birth.[47]

1. Surrogate mother or surrogate

A surrogate is defined as the "gestational carrier of any embryo, a fetus, or a child.[48] Her relation to the child depends upon the type of surrogacy arrangement and the reproductive problem which the married couple encounters.[49]

2. Surrogate motherhood contract

A surrogate motherhood contract generally provides for the surrogate mother to carry a baby to term and then to turn the child over to the contracting couple, relinquishing any parental rights.[50]

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L. REV. 205, 206 (1996) (citing DEBORAH L. RHODE, JUSTICE AND GENDER 221 (1989)).

[48] Denise E. Lascarides, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1225 (1997) (citing American Bar Association, *Model Surrogacy Act*, *in* SURROGATE MOTHERHOOD 270, 271 (Larry Gostin ed., 1990)).

[49] *Id.* at 1225.

[50] Ian McAllister, *Modern Reproductive Technology and the Law: Surrogacy Contracts in the United States and England*, 20 SUFFOLK TRANS. L. REV. 303, 304 (1996). *See* Mindy A. Baggish, *Surrogate Parenting: What We Can Learn from Our British Counterparts*, 39 CASE RES. L. REV. 217, 217 (1989).

3. Traditional surrogacy

In a traditional surrogacy, the sperm of an intending father (or the husband of an infertile wife) is used to fertilize a surrogate's ovum which the surrogate will then carry to term.[51] Here the baby is genetically related to the intending father and to the surrogate mother, a result of artificial insemination.[52]

4. Gestational surrogacy contract

In gestational surrogacy, the baby is created by producing a zygote from the husband's sperm and the wife's egg and implanting it in the surrogate's uterus.[53] The result is a baby genetically related to the intending father and mother (husband and wife) and having no blood relation to the surrogate.[54]

5. Commercial surrogacy

In commercial surrogacy, the promise to conceive and bear a child for another is made in exchange for a promise of payment,[55] usually in the form of money.

6. Altruistic surrogacy

Altruistic surrogacy is the term used to describe the informal arrangement where no money is paid to the surrogate.[56]

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[51] Lascarides, *supra* note 48, at 1225. Lascarides further defines the term "traditional" as referring to the original form of surrogacy arrangements.

[52] McAllister, *supra* note 50, at 305. *See* Susan A. Ferguson, *Surrogacy Contracts in the 1990s: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903 (1995).

[53] *Id.* at 305. *See ART and the Family*, *supra* note 21, at 924. Couples using gestational surrogacy usually involve women who have functioning ovaries but lack a uterus or for other reasons cannot carry a pregnancy to term.

[54] *Id.* at 306 (citing Anne R. Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 266, 266 (1995)).

[55] Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts*, 27 J. FAM. L. 587, 588 (1989).

[56] Anita Stuhmcke, *For Love or Money: The Legal Regulation of Surrogate Motherhood*, 3 MURDOCH UNIV. ELECTRONIC J.L. 1, *available at* http://www.murdoch.edu.au/elaw/issued/v3n1/stchumck/1.html (visited 23 December 1999).

V. THE PHILIPPINE SETTING

A. Infertility dilemma

> *Children grow out of the blood of their mothers, of their bodies and being. The maternal tie is based on the growing of children; the patriarchal tie is based on genetics, the seed connection.*
>
> —*Barbara Katz Rothman*[57]

Infertility is not merely a medical problem which serves as a challenge to the scientists' abilities to cure a medical condition. It is not merely a physical state that debilitates a person's capacity to reproduce. It is a crippling social illness which infects the most basic of social institutions—the family. Infertility has been characterized as "an impediment to family growth." [58] Thus, infertility is more than a medical diagnosis because in reality, it is a dilemma affecting society.

Infertility is a problem that is faced by a pertinent sector of the married population. The usual reaction of a person who complains about infertility is to seek medical help. Dr. Angela G. Sison-Aguilar, M.D., a junior fellow at the Department of Obstetrics and Gynecology at the Philippine General Hospital, the country's premiere government hospital, outlines the procedure for such a medical undertaking. First, the physician examines both the husband *and* the wife.[59] This enables the doctor to detect as to who, between the spouses, is suffering from infertility.[60] The problem could either be a male or a female factor.[61] The female factor could either be an egg problem or tubal[62] problem.[63] The male factor is related to the quality of the sperm[64] characterized by either a poor sperm

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[57] Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1245 (1996).

[58] George P. Smith II, *Australia's Frozen "Orphan" Embryos: A Medical, Legal and Ethical Dilemma*, 24 J. FAM. L. 27, 40 (1986).

[59] Interview with Dr. Angela G. Sison-Aguilar, M.D., Junior Fellow, Section of Reproductive Endocrinology, Infertility and Menopause, Department of Obstetrics and Gynecology, Philippine General Hospital (10 February 2000).

[60] *Id.*

[61] *Id.*

[62] The most common problem related to a female's fallopian tubes is its blockage. Thus, the egg is unable to pass through them so that fertilization with the sperm may occur.

[63] Sison-Aguilar, *supra* note 59.

[64] *Id.*

production or a poor sperm transport.[65] Now, if the problem lies with the female egg and it relates to ovulation, then the physician may recommend ovulation induction by tablets or by injectables.[66] Ovulation induction enjoys a sixty percent to eighty percent success rate.[67] On the other hand, if the problem is with the male, the usual remedy is to likewise treat him hormonally.[68] Otherwise, if it is financially feasible to the couple, AI may be recommended so that the normal, ablest and most motile sperm is inserted into the uterus.[69] In other cases, IVF is recommended.[70] Infertility patients who qualify for treatment using IVF generally fall into two categories.[71]

> The first category includes patients who require IVF as the initial approach in attempting pregnancy because of the expected failure of the more standard approaches as natural intercourse with or without ovulation induction after appropriate medical or surgical intervention Included in this category are those with irreparable tubal damage and severe male factor infertility.
>
> The second category includes patients who require IVF as the next approach after repeated failure of the more standard approaches previously mentioned. These patients may come with a long history of numerous failure of ovulation induction using various drug regimen, intrauterine insemination trials, protracted treatment of endometriosis of varying severity, and repeated pelvic surgery. . . [72]

The Philippine Obstetrics and Gynecological Society,[73] prescribes minimum guidelines for physicians to follow in conducting IVF.[74] Prominent

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[65] Florante P. Gonzaga., Greg B. Pastorfide, Felix Y. Salgado,. *Infertility*, *in* REFERENCE MANUAL IN REPRODUCTIVE ENDOCRINOLOGY, INFERTILITY AND MENOPAUSE 80, 81 (Florante P. Gonzaga and Rosalina B. Arceo. eds., 1998).

[66] Susan-Aguilar, *supra* note 59.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Virgilio M. Novero, Jr., *Assisted Reproductive Technology*, *in* REFERENCE MANUAL IN REPRODUCTIVE ENDOCRINOLOGY, INFERTILITY AND MENOPAUSE 130, 130 (Florante P. Gonzaga and Rosalina B. Arceo, eds., 1998)).

[72] *Id.*

[73] The Philippine Obstetrics and Gynecological Society (POGS) is a private association of obstetricians and gynecologists in the Philippines.

[74] Sison-Aguilar, *supra* note 59.

amongst these ethical rules is that there be no third party participation either by donation or by acting as a surrogate.[75]

Moreover, any unused frozen embryos may still be utilized by the couple in any succeeding attempt, should there be any.[76] In the event some frozen embryos are kept in the clinic, it is the couple who pays for their upkeep and the clinic may not use them in any other way without the consent of the couple.[77] In both technologies, there is no one hundred percent guarantee that a child will be conceived.[78]

Dr. Sison-Aguilar further adds that whereas reproductive technologies enjoy media exposure in foreign jurisdictions through advertisements, the same does not apply to the Philippines.[79] There is not much information being disseminated about AI and IVF as well as the other assisted reproductive technologies already being used abroad, specifically in the United States and in most European states.[80] However, she postulates that if these technologies be made available on a wider scale here in the Philippines, it would be more advantageous for the Filipino couple.[81] For one thing, the wife must be near the clinic throughout the whole process and the ensuing pregnancy, if there be any.[82] For another, this will save the couple from additional transportation and lodging expenses which may be incurred by the same if they have no choice but to go abroad to undergo treatment.[83] Also, the success rate here in our country is actually comparable to that of the region.[84]

To further understand the infertility situation in the country, shown below is the most recent data on out-patient census in the infertility clinic of the Philippine General Hospital from 1 January 1999 to 31 November 1999.[85] The

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Philippine General Hospital, Annual Report Census, Section of Reproductive Endocrinology, Infertility and Menopause, Department of Obstetrics and Gynecology (1999) (unpublished annual report, on file with the Philippine General Hospital).

tables provide the factual bases for this study. Note must be taken that this is only a sample size of the estimated number of infertility cases in the country.

OUT PATIENT CENSUS — INFERTILITY CLINIC

From 1 January 1999 to 31 November 1999

Table 1. Number of Patients Seen

Month	New Patients	Old Patients	Total
January	96	96	192
February	39	153	192
March	51	159	210
April	60	204	264
May	46	146	192
June	54	138	246
July	91	197	288
August	56	183	239
September	52	174	226
October	54	133	187
November	74	143	217
TOTAL	**673**	**1,726**	**2,553**

Table 2. Diagnosis

Month	Primary Infertility	Secondary Infertility	Others	Total
January	212	94	6	312
February	124	58	10	192
March	141	53	16	210
April	116	74	25	215
May	138	42	12	192
June	113	65	14	192
July	167	100	21	228
August	184	36	19	239
September	149	61	16	226
October	130	37	20	187
November	136	67	14	217
TOTAL	**1,610**	**687**	173	2,410

Table 1 shows the number of patients examined in the Department of Obstetrics and Gynecology of the Philippine General Hospital. Table 2 represents the number of patients suffering from primary infertility and secondary infertility. Primary infertility is defined as "infertility that recurs without any prior

pregnancies"[86] whereas secondary infertility is a condition of "infertility which occurs after a previous conception."[87]

B. Cultural climate

Filipinos are known for being a family-oriented race. We are known for our propensity for maintaining strong family ties. Having extended families is not unusual. Until they decide to get married and build families of their own, children reside with their parents. Closely-knit family ties are bound by strong traditions such as family reunions and other family-centered activities. As a result of which, newly-married couples are expected to have planned their family life prior to their marriage. The number of children they want down to the detail of their future children's professions have been carefully mapped out in the minds of the future parents. Parenthood is an integral component of the ideal family life. Thus, the typical Filipino scenario is a family blessed with children.

Social norms dictate that "[t]he biological link between parents and children is a fundamental part of this vision—most people assume that someday they will have their own children."[88] A premium is given to having "one's own child." For some couples experiencing difficulties in biologically producing their own child, adoption is considered an option. However, other couples who believe the medical situation may be remedied resort to ARTs.

It is a fact that coping with infertility is a major dilemma for the couple. Societal attitudes greatly affect the couple experiencing difficulties in child-bearing. It has been asserted that, "[p]artly due to societal attitudes toward infertility, couples struggling with this problem often find themselves angry at and isolated from friends, other family members, and even from each other."[89]

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[86] F. JOHN BOURGEOIS, OBSTETRICS AND GYNECOLOGY RECALL 330 (1997).

[87] *Id.*

[88] *Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1526 (1990). This article mentions the following social norms: "Women are raised to see themselves as future childbearers [and] men, to understand fertility as central to masculinity."

[89] O'Rourke, *supra* note 5, at 343. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 945 (1986). Robertson enunciates:

> Infertility open implicates the most fundamental feelings about self and one's relation to the natural order, and may leave persons feeling handicapped or defective in an area central to personal identity and fulfillment. Infertile couples often experience, and may suffer enormously from, isolation, guilt, marital strife, and intense assaults on feelings of self-worth.

Infertile couples suffer from a social stigma. It is not of common knowledge but the infertility problem is a serious social and cultural concern. The following is an enlightening description:

> Infertility is a painful experience. The fertile world is unprepared to provide a comfortable opening for the individual or couple who is experiencing the pain of wanting a child and not being able to achieve a pregnancy and birth. Sadness, depression, and avoidance of baby showers, maternity shops, children's toys, and pregnant friends can often be misunderstood.
>
> The couple finds that the infertility experience invades many areas of their lives. Work, at times the only escape from other distresses, can become a place of deception and some risk. The business trip conflicts with scheduled intercourse [to optimize impregnation]. Frequent late arrivals due to [the] doctor's visits and irritability from stress or drug side effects are disguised as some other illness or problem.[90]

Women also suffer from this social castigation. The general perception of society of women as child-bearers and nurturers affects a woman's disposition when she learns she is infertile.[91] The patriarchal society also looks down on men who are infertile and unable to fulfill the desire of producing their own children.

At present, scientific advancements have paved the way for infertile couples to realize their dream of having a child. Technology provides for a viable cure to this medical and social disease which cripples the growth of the family in the form of scientific procedures such as AI, IVF, and surrogacy. Yet, it is still of utmost importance to probe into these reproductive technologies in order to

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[90] *Id.* at 346-47 (citing JANET STROUP FOX & SERONO SYMPOSIA, INFERTILITY INSURANCE 2 (1991). *See also* Lorraine Dennerstein and Carol Morse, *Psychological Issues in IVF*, 12 CLINICS IN OBSTETRICS AND GYNAECOLOGY 835 (1985).

[91] Laura M. Purdy, *Children of Choice: Whose Children? At What Cost?*, 52 WASH. & LEE L. REV. 197, 211-12 (1995). Related to the social stigma suffered by women is the view of feminists on reproductive technologies. Feminists advance the position that in the final analysis, the politics of adopting ARTs is disadvantageous to women. *See* Norma Juliet Wilker, *Society's Response to the New Reproductive Technologies: The Feminist Perspective*, 59 S. CAL. L. REV. 1043, 1043 (1986). Wilker asserts: "Feminists, who base much of their critique of existing institutions on the claim that the social context of reproduction has been disadvantageous to women, are understandably concerned that the new developments will similarly operate against the interests of women."

determine which is the most legally feasible technology to be recognized and hopefully regulated by our laws.

VI. KINDS OF REPRODUCTIVE TECHNOLOGIES

A. Artificial insemination

1. History

Among the reproductive technologies, AI is the oldest, simplest, and most common technique.[92] It dates back to centuries, as early as 1322, when Arab sheiks inseminated their enemies' mares with sperm of inferior stallions.[93] There are indications that the possibilities of AI were considered by the Hebrews as early as 220 A.D.[94]

The first recorded successful artificial insemination of a human was accomplished in 1770 by John Hunter, an English surgeon.[95] The wife was artificially inseminated with the semen of her husband who could not impregnate her by the usual means because of hypospadias, a condition wherein the urethral opening occurs on the underside of the penis.[96] In the United States, AID was reportedly first performed at the Jefferson Medical College in Pennsylvania in 1884.[97] In 1886, AIH was successfully performed in the United States by Marion Sims, a gynecologist, who inseminated six women with their husbands' sperm in a total of fifty-five procedures.[98] In the same year, Italian scientist Montegazza found that human sperm could survive freezing and suggested that widows whose husbands were killed at war could impregnate themselves using frozen sperm kept

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[92] Kaiser, *supra* note 23, at 793.

[93] Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 30 (1996) (citing Shaman, *supra* note 24, at 331).

[94] Kaiser, *supra* note 23, at 794 (citing W. FINEGOLD, ARTIFICIAL INSEMINATION 5 (1964)).

[95] E. Donald Shapiro and Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J. OF LAW & HEALTH 229, 234 (1987) cited in Mika and Hurst, *supra* note 27, at 995.

[96] Andrew D. Weinberger, *A Partial Solution to Legitimacy Problems Arising From The Use of Artificial Insemination*, 35 IND. L.J. 143, 143 (1960).

[97] Kaiser, *supra* note 23, at 794 (citing R. SNOWDEN AND G.A. MITCHELL, THE ARTIFICIAL FAMILY 13 (1981)).

[98] *Id.* at 794 (citing W. FINEGOLD, ARTIFICIAL INSEMINATION 5 (1964)).

in sperm banks.[99] The process of using frozen sperm yielded no results until 1949 when it was discovered that the addition of a small amount of glycerol before freezing would increase the sperm's chances of survival.[100] In the 1960's, freezing or cryopreservation of sperm was made accessible to some astronauts so that they could still father healthy children in the event that space travel would injure their reproductive systems.[101] During the Vietnam War, some soldiers sent frozen sperm back to their wives so that they could still become fathers when they returned home in case they were injured in the war.[102]

Today, there is a steady increase in the number of people who are turning to artificial insemination as an answer to fertility problems.[103] The increase is due to improvements in medical technology, the shortage of adoptable babies, and the removal of some of the legal complications that previously surrounded AI through new statutes and court rulings.[104] Cryopreservation of sperm has also gained widespread acceptance.[105] Activity in sperm banks is highest during times of war, but there are also other reasons for the storage of sperm,[106] such as insurance against future infertility due to chemotherapy, radiation treatment, vasectomy, or exposure to toxic substances.[107] Cryopreservation has also afforded unmarried women an opportunity to conceive without sexual intercourse.[108] The current technology of sperm preservation requires that sperm be frozen and stored in a tank filled with liquid nitrogen at negative three hundred twenty-eight degrees Fahrenheit.[109] Healthy children have been produced from sperms which have been preserved for over ten years.[110]

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[99] Mika and Hurst, *supra* note 27, at 995 (citing Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Post-Mortem Insemination*, 22 HOFSTRA L. REV. 521, 525 (1994))

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Shaman, *supra* note 25, at 331 (citing W. FINEGOLD, ARTIFICIAL INSEMINATION 58 (1964)).

[104] *Id.* at 331.

[105] Mika and Hurst, *supra* note 27, at 996 (citing Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Post-Mortem Insemination*, 22 HOFSTRA L. REV. 521, 526 (1994))

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*.

Since AI is a relatively simple medical procedure that consists of inserting a syringe into the vagina and squirting semen toward the uterine opening, women have even performed it upon themselves in the privacy of their homes.[111] As the frequency of births through AI has increased, so has the rise in the number of legal problems associated with it. This is probably due to the fact that the law can only respond to, and not predict the improvements of medicine.[112] Neither legislation nor court decisions have caught up with developments in reproductive technology.

2. Jurisprudence

Since its arrival, AI has generated a lot of controversy. Through the years, several questions regarding its effects on the family, status of the child, rights of the donor, and other issues have been settled by the courts. Nonetheless, there are still several areas of dispute which have to be cleared and settled by legislation and case law.

a. Orford v. Orford

The early view was that AI made the treating physician and the inseminated woman guilty of adultery by participating in the process.[113] This interpretation of the ramifications of AI was first expressed in the Canadian case of *Orford v. Orford*[114] where the Court held that artificial insemination was equivalent to adultery because the "essence of adultery" was "not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties."[115]

b. Doornbos v. Doornbos

The same view was expressed by the Illinois court in *Doornbos v. Doornbos*.[116] This is a divorce case wherein the legitimacy of the child was at issue. The court held that the child born via AI was illegitimate because the woman was

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[111] Shaman, *supra* note 25, at 333 (citing Pendleton, *Sperm Banking: A Practice in Infancy Shows Promising Growth*, CHI. TRIB., May 19, 1979, Sec. 1, at 13).

[112] Mika and Hurst, *supra* note 27, at 994 (citing Hutton Brown, et al, *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 603 (1986)).

[113] *Id.* at 997 (citing Shapiro and Sonnenblick, *supra* note 99, at 237).

[114] Orford v. Orford, 58 D.L.R. 251 (1921).

[115] *Id.*

[116] Doornbos v. Doornbos, 139 N.E.2d 844 (Ill. Ct. App. 1956).

inseminated with the sperm of a donor, and not of her husband, even if the AID was performed with the husband's consent.[117]

c. Strnad v. Strnad

Due to heightened criticism by the medical and legal community, the notion that AID and adultery were equivalent was eventually abandoned.[118] Nonetheless, courts still hesitated to decide on the legal status of the child.[119] In *Strnad v. Strnad*,[120] for instance, the New York court held that the legitimacy of a child born via artificial insemination depended on the circumstances. It applied the analogy of a child who is born out of wedlock but who becomes legitimate after the marriage of the parents, and stated that artificially inseminated children were in effect "potentially adopted or semi-adopted."[121]

d. Gursky v. Gursky

The ruling in *Strnad v. Strnad* was rejected by the New York court fifteen years later in *Gursky v. Gursky*.[122] The Court held that the ruling in *Strnad* did not rest on any legal precedent and was unsupported by current legislation and therefore, the inevitable conclusion was that the child was illegitimate.[123] However, the court still held the husband financially responsible for the child by the application of contract law. The court reasoned that because the husband had consented to the AID, he made an implied promise to provide support for the child. He is also estopped from denying support of the child as the wife had already relied upon his promise of support.[124]

e. People v. Sorenson

The 1968 case of *People v. Sorenson*,[125] depicts the more progressive approach toward a child born thru AI. The *Sorenson* case was the first to rule that a child conceived by AI during a marriage was not the product of an adulterous

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[117] *Id.*

[118] Mika and Hurst, *supra* note 27, at 998 (citation omitted).

[119] *Id.*

[120] Strnad v. Strnad, 190 Misc. 786 (N.Y. Sup. Ct. 1948).

[121] *Id.* at 787-88.

[122] Gursky v. Gursky,, 39 Misc. 2d 1083 (N.Y. Sup. Ct. 1963).

[123] *Id.* at 1087.

[124] *Id.* at 1089.

[125] People v. Sorenson,, 437 P.2d 495 (Cal. 1968).

relationship and that the child was presumed legitimate.[126] The court stated that the determining factor in establishing legitimacy was whether the legal relationship of father and child exists.[127] It dismissed the notion that the sperm donor should be considered the father of the child by stating "the anonymous donor of sperm cannot be considered the natural father as he is no more responsible for the use made of his sperm that is the donor of blood or a kidney."[128] The court held that only the lawful father had to be determined as there was no natural father.[129] The decision reflected public policy concerns as labeling the child "illegitimate" would serve no worthwhile public purpose.[130]

f. In re Adoption of Anonymous

Adoption of Anonymous declared the child's legitimacy for purposes other than support.[131] In this case, a husband and wife consented to AID, conceived, and the wife gave birth to the child. The husband was indicated as the father in the birth certificate of the child. The couple later separated and the wife remarried.[132] The wife's new husband sought to adopt the child and insisted that consent of the prior husband was not needed because the child was not legitimately his.[133] The court held that consent of the first husband was required because the child born via artificial insemination was his legitimate child.[134] It relied primarily upon a recent enactment of a Domestic Relations Law, that provided "a child born of a void . . . or voidable . . . marriage, even if the marriage is deliberately and knowingly bigamous, incestuous, or adulterous, is legitimate and entitled to all the rights . . . of a child born during a perfectly valid marriage."[135] Given such provision of law, the *Anonymous* court therefore concluded that it would be absurd to find a child born of a valid marriage illegitimate when the parents consented and agreed to the impregnation by

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[126] *Id.* at 498 (Cal. 1968).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 499. The court noted in dicta that, "[t]he child is the principal party affected, and if he has no father, he is forced to bear not only the handicap of social stigma, but financial deprivation."

[131] In re Adoption of Anonymous, 74 Misc. 2d 100.

[132] *Id.* at 101.

[133] *Id.* at 100.

[134] *Id.* at 105.

[135] *Id.* at 100.

artificial insemination.[136] The ruling echoed New York policy favoring a strong presumption of legitimacy for AID children.[137]

g. C.M. *v.* C.C.

Jurisprudence on AI has not limited itself to situations involving married couples. Courts have also determined cases involving unmarried women who were inseminated with donor sperm.[138] In C.M. *v.* C.C.,[139] decided by a New Jersey court, an unmarried couple attempted the AI procedure themselves. During C.C.'s pregnancy, the couple's relationship ended.[140] C.M. still wanted to be acknowledged as the father of the child and sought visitation rights.[141] The court granted him paternal rights, relying in part on the public policy interests of a child having two parents whenever possible.[142] It declared that when a known donor intends to act as the father and the intention is made known to the woman, he is indeed the legal father of the child despite their marital status.[143]

h. Loftin v. Fluornoy

Loftin v. Fluornoy[144] also involves the artificial insemination of an unmarried woman. One partner of a lesbian couple was artificially inseminated with the semen of her lover's brother.[145] One partner was the biological mother while the other was the biological aunt, but considered by the couple as the child's "legal" father.[146] The couple separated and the lesbian "father" was ordered to pay monthly support.[147] Upon petition of the lesbian "father," the court granted her

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[136] *Id.* at 105.

[137] *Id.* at 104.

[138] Mika and Hurst, *supra* note 27, at 1000.

[139] C.M. v. C.C., 377 A.2d 821 (1977). *See also* the discussion in Ellen Crabtree, *Protecting Inheritance Rights of Children Born Through In Vitro Fertilization and Embryo Transfer: Suggestions for a Legislative Approach*, 27 ST. LOUIS U. L.J. 901, 912-13 (1983).

[140] *Id.* at 821, 822.

[141] *Id.* at 823.

[142] *Id.* at 825.

[143] *Id.* at 822.

[144] Loftin v. Fluornoy, N.Y.L.J., Oct. 1, 1984, at 9 (Cal. Super. Ct. 4 September 1984).

[145] *Id.*

[146] *Id.*

[147] *Id.*

standing to sue for visitation rights, and it analogized the relationship to that of a "de facto psychological parent."[148]

i. Parpalaix v. CECOS and Hecht v. Superior Court

Cases involving posthumous conception thru AI have also been decided by the courts. *Parpalaix v. CECOS*[149] involved the situation of a man who had been diagnosed with testicular cancer. His doctor told him that chemotherapy would leave him sterile.[150] The young man, Alain Parpalaix, made a sperm deposit at the Centre d'Etude et de Conservation du Sperme (CECOS), a government supported research center and sperm bank. However, he left no instructions regarding what to do with the sperm.[151] When Alain died, his wife Corrine asked for his sperm deposit from CECOS. The center's procedures, however, did not allow them to return the sperm to her.[152] Corrine, together with Alain's parents, filed suit, basing their claim on contract theory.[153] They argued that as natural heirs, they were now the owners of Alain's sperm and CECOS breached its contract by not returning the sperm to them.[154]

In ordering the return of the sperm deposit to Corrine, the court refused to apply the contract principles and went on to describe the sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive.[155] This fundamental right, the court stated, should be zealously protected by the state and not governed by the rules of contracts. The court enunciated that the fate of the sperm must be determined by the person from

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[148] *Id.*

[149] Shapiro and Sonnenblick, *supra* note 99, at 229. (citation omitted).

[150] Sabine Mauboache, *Life After Death: French Woman Wins Sperm Bank Decision*, WASH. POST 2 August 1984, at B1.

[151] *Id.*

[152] *See Awarding the Seeds of Life*, TIME, August 13,1984, at 35.

[153] Mika and Hurst, *supra* note 27, at 1009 (citing Shapiro and Sonnenblick, *supra* note 99, at 230).

[154] *Id.* As support for their argument, Mika and Hurst relied on article 1939 of the French Civil Code, which governed contracts of deposit of material goods in general and provided, "[i]n the case of death of the person who made the bailment, the thing bailed may be returned only to the heir [I]f the thing bailed is indivisible, the heirs must agree among themselves in order to receive it."

[155] *Id.*

whom it was taken. After taking all facts into account, the court said that it was Alain's intent that the sperm be used by Corrine for her to bear his child.[156]

The *Parpalaix* decision played a role in *Hecht v. Superior Court*[157] which involved the case of William Kane who made a sperm deposit in a Los Angeles sperm bank. The deposit was made in anticipation of his intended suicide.[158] He executed various contracts and wrote letters which signified his intent to have Deborah Hecht, a woman he had been living with, to bear his child subsequent to the planned suicide.[159]

After the suicide, Kane's two children claimed they were entitled to one hundred percent of the frozen sperm as their father's heirs.[160] The court, in awarding the sperm to Hecht, noted that the case of *Parpalaix* was instructive and pertinent to the issue although it dealt with a married couple.[161] The court decided that Hecht was entitled to the sperm because the sole issue in determining the outcome of the sperm was that of intent of the decedent.[162]

2. Legislation

a. United States

The United States is the pioneer in legislation regulating AI, with some states creating its own laws since the mid-1960s.[163] Typically, states regulate only who may perform the insemination and who may donate the sperm.[164] Of the thirty-five states that have implemented laws to regulate AI, fourteen have

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[156] *Id.*

[157] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

[158] *Id.* at 276.

[159] *Id.* at 281.

[160] *Id.* at 287.

[161] *Id.* at 281.

[162] *Id.* at 288.

[163] Mika and Hurst, *supra* note 27, at 1014. *See also* Vetri, *supra* note 6, at 510. The States with legislation related to artificial insemination include the following: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

[164] *Id.* at 1015.

adopted some version of the Uniform Parentage Act (UPA.)[165], section 5 of which provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.
>
> (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.

Noting the provision, it can be deduced that the UPA addresses the use of AI only by married couples. Among the states with legislation regarding AI, some require the husband's and wife's written consent as does the UPA.[166] Other states require written consent of the husband only.[167]

Under American law, and as declared by the UPA, the donor is not granted parental rights and the husband is instead treated as the natural father of the child conceived. In cases where the UPA cannot apply, the donor can be denied parental status under the doctrine of equitable estoppel, according to which a party who makes a misrepresentation of a fact upon which another party justifiably relies to his detriment is estopped from denying the fact.[168] California, for instance, in an applicable statute, declares that even if the woman is unmarried, the donor in AID cases is not considered the father, provided the sperm was supplied by a licensed physician.[169] By contrast, the New York State

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[165] *Id.*

[166] *Id.* The Uniform Parentage Act of 1973, sec. 5(a) provides:

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.

[167] *Id. See e.g.*, Ala. Code, §§ 26-17-21 (1992); Alaska Stat. § 25. 20.045 (1992); Ohio Rev. Code Ann. § 3111.37-3111.38 Okla. Stat. Ann. Tit. 10 § 552 (West 1987).

[168] Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 440 (1998).

[169] CAL. FAM. CODE § 7005(6) (West 1995).

Domestic Relations Law denies paternal rights to a donor in AID cases only if the recipient is unmarried, and even if the procedure is performed without the intervention of a licensed physician.[170]

The trend in legislation has been to focus only on situations involving married donees.[171] However, a somewhat broader law than the UPA is the Uniform Status of Children of Assisted Conception Act (hereinafter USCACA) which contemplates participation of unmarried women in the AI process, and also discusses posthumous conception.[172] Nonetheless, the USCACA still fails to answer all the issues regarding AI as it appears only to contemplate sorting out the rights of the parties to the AI in a marital context.[173]

b. United Kingdom

The United Kingdom has also enacted legislation regulating AI. The Human Fetili[z]ation and Embryology Act (HFE Act) of 1990 regulates donor insemination, storage of gametes, storage of embryos and embryo research.[174] It also mandates counseling and requires physicians to take into account the interests of non-patients, including emphasis on the welfare of children born from these procedures.[175] Britain's Law Commission has also responded to the issue of post-mortem insemination. Under the British codes, the child born through post-mortem insemination would be considered illegitimate.[176]

c. France

In 1994, the French parliament gave final approval to a bill limiting the use of new reproductive technologies.[177] The provisions of the act limit artificial

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[170] N.Y. DOM. REL. LAW § 73 (McKinney 1988).

[171] Mika and Hurst, *supra* note 27, at 1015.

[172] *Id.* at 1016-1017.

[173] *Id.* at 1016. The definition of "assisted conception" (Sec. 1(a)) does not make reference to married or unmarried, but the remaining provisions of the Act do not settle any of the dilemmas left unanswered under the UPA.

[174] Pitrolo, *supra* note 15, at 175 (citing Arlene J. Klotzko, *Immortality Through the Fertility Clinic: Commentary — An English Legal Perspective*, 4 CAMBRIDGE Q. HEALTHCARE ETHICS 380, 381 (1995)).

[175] *Id.* (citing §§ 5-10, 13(5, 6) of the Human Fertili[z]ation and Embryology Act).

[176] *Id.* at 177. See Shapiro and Sonnenblick, *supra* note 99, at 247-48. *See also* S. Kling, SEXUAL BEHAVIOR AND THE LAW 59-60 (1965).

[177] *Id.* at 190 (citations omitted).

fertilization to heterosexual couples, and only as a remedy for infertility.[178] In addition, couples receiving treatment must be of child-bearing age and either married or able to prove they have lived together for two years or more.[179] Post-menopausal women are barred from receiving treatment[180] and third-party gamete donation (AID) is only permissible as "an exceptional measure."[181]

d. Philippines

In the Philippines, the Family Code follows the UPA, in requiring written consent of the husband and wife, and treats the husband as the legal father of the child when he consents to insemination of the wife with semen of a donor. Like the UPA, the Family Code limits the application of AI to married couples. However, unlike the UPA, the Family Code does not require that the procedure be performed by a physician.

B. In vitro fertilization

1. History

As early as the 1950s, studies were undertaken testing the viability of IVF. In fact, the first reported study regarding IVF was conducted by Dr. M.C. Chang using rabbits as subjects.[182] It took scientists and medical practitioners more than twenty years after testing on rabbits to conduct a successful IVF procedure on humans. On 25 July 1978, Louise Brown was born in England to be known as the first child to be conceived using the process of IVF.[183] Success at this point was

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[178] *Id.* (citing Art. L-152-2).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 152 (citing ARTHUR L. WISOT AND DAVID R. MELDRUM, NEW OPTIONS FOR FERTILITY 3 (1990)).

[183] *Id.* at 149. *See* Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 325 (1986). Dickey described the development of IVF procedures on humans as slow. Dickey observes "[a]fter the first successful birth in 1978, it was nearly two years before a second baby was born in England." Only after a decade, was the IVF practiced by countries other than the United State, Great Britain or Australia. The birth of Louise Brown is compared with the opening of Pandora's box. The first successful birth through IVF "brought undefinable and immeasurable joy to Louise's parents, came a plethora of equally undefinable and immeasurable ethical and legal dilemmas for generations to follow." (Kathryn Venturatos Lorio, *In Vitro Symposium: Introduction*, 32 LOY. L. REV. 311, 311 (1986)).

not determined by the technical fusion of the egg and sperm.[184] It was measured by the live birth of an IVF-conceived child, thus, the birth of Louise Brown signified such success.[185]

In the United States, the first "[b]irth resulting from in vitro fertilization occurred in 1981."[186] Judith Carr[187] is known as the first American born through IVF technology. The births of Louise Brown and Judith Carr symbolized the development in the contemporary infertility business as well as the increase in the number of IVF treatments.

Ever since the phenomenal birth of Louise Brown, IVF became an accepted procedure by which a woman may achieve pregnancy.[188] IVF with the eggs and sperm of the couple desiring to have a child became generally permitted.[189] In fact, IVF procedures were conducted in many parts of the world.[190] Pitrolo observes that "IVF now appears to be an internationally sanctioned technique when used to remedy infertility."[191] Among the different countries in the world where IVF is practiced, "the Vatican stands alone in its absolute condemnation of IVF."[192] Pitrolo traces the significant developments as follows:

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[184] *Id.* at 161.

[185] *Id.*

[186] *ART and the Family*, *supra* note 21, at 911.

[187] Judith Carr was recently featured in a front-page story in the New York Times. Elisabeth Rosenthal, *From Lives Begun in a Lab, Brave New Joy*, N.Y. TIMES, January 10, 1996, at A1, B7.

[188] Wendy Dullea Bowie, *Multiplication and Division - New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 161, at A1, B7. Bowie claims that since 1978, "[t]he extracorporeal fertilization of human ova and subsequent transfer into the uterus has become an accepted method by which to achieve pregnancy."

[189] ROBERT H. BLANK, REGULATING REPRODUCTION 155 (1990) *cited in* Kathryn Venturatos Lorio, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn form our Neighbors - What Translates and What Does Not*, 45 LOY. L. REV. 247, 260 (1999).

[190] *Id.*.

[191] Pitrolo, *supra* note 15, at 199.

[192] *Id.*

> Births of IVF children followed in Australia in 1980 and the United States in 1981. In 1989, delegates to an international conference on IVF reported that an estimated 15,000 births had resulted world-wide from IVF Delegates reported approximately 5,500 successful IVF births in the Unites States, 3,125 in Australia, 1070 in Asia and Africa, 57 in Warsaw Pact Nations, 750 in Israel, and 100 in Japan. France reported one of the highest success rates with 3,600 IVF babies born in 1987, and 4,880 IVF pregnancies in progress. The Soviet Union, Nigeria, and Thailand had IVF programs in the early stages. Even in China, where population control is a top state priority and population reduction policies are stringently enforced, the first IVF birth was announced in 1988. One major hospital in China boasted that by 1993, fifty-one babies had been born at its facilities using the technique.[193]
>
> The IVF procedure developed and included ancillary procedures such as cryopreservation and the use of fertility drugs to induce multiple ovulation.[194] Cryopreservation is "the very rapid freezing of fresh gametes or of unused *in vitro* embryos in anticipation of future use in establishing pregnancies, either for the persons who are the sources of the gametes or for persons who are third party recipients of donated gametes or embryos."[195] Such a technological leap "[m]ade it possible to freeze and store embryos created through IVF."[196] Experts even attribute the success of IVF to cryopreservation techniques.[197] This

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[193] *Id.* at 150-51 (citing extensively Sabra Chartrand, *Experts Assess a Decade of In Vitro Fertilization*, N.Y. TIMES, April 11, 1989, at C5; Gerri Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUST. J. INT'L. L. 557, 566, 568-74 (1996); and Lisa Handwerker, *Social and Ethical Implications of In Vitro Fertilization in Contemporary China*, *in* 4 CAMBRIDGE Q. HEALTHCARE ETHICS 355, 357 (1995)).

[194] Mary Z. Pelias & Margaret M. DeAngelis, *The New Genetic Technologies: New Options, New Hope, and New Challenges*, 45 LOY. L. REV. 287, 291 (1999).

[195] *Id.* Cryopreservation is also defined as "a process by which pre-embryos are frozen in liquid nitrogen at sub-zero temperatures, to preserve and store pre-embryos that are not immediately transferred to a woman's uterus." Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM L. REV. 2205, 2211 (1997).

[196] Saltarelli, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021, 1028 (1985) *cited in* Bowie, *supra* note 187 at 161.

[197] Pitrolo, *supra* note 15 at 153. Pitrolo adds that "[o]nce freezing of animal embryos was developed in the 1970s, it became obvious that if the technique could be extended to human embryos, the need for repeated hormonal treatment and painful laparoscopies would be eliminated." See Pitrolo, supra note 15, at 153 (citing Alan Trounson, *In Vitro Fertilization and*

> technological advancement not only brought scientific-know-how to higher realm, but also produced legal debates on the status of the cryopreserved embryo—whether or not a cryopreserved embryo is a person. On the other hand, the use of fertility drugs facilitates the multiple ovulation of the woman. The use of fertility drugs is vital to provide the "only viable alternative for a couple to conceive and bear their own children."[198]

2. Jurisprudence

Our Supreme Court has yet to decide a case dealing with IVF. The decisions in the United States are, therefore, useful in understanding the legal treatment of IVF.

a. York v. Jones

The case of *York v. Jones*[199] dealt with the status of the cryopreserved embryo. Notably, this is a "significant case because it is the first case directly dealing with a dispute between an IVF program and a couple over a custody of a frozen embryo."[200] This case originated from unsuccessful IVF procedures performed on the York spouses. The spouses York underwent the IVF process at the Jones Institute in Virginia on four separate occasions but unfortunately, each trial was unsuccessful.[201] As a result, the spouses York sought to have their one remaining cryopreserved embryo transferred to the Institute for Reproductive Research in California. The Jones Institute refused.

The court found that ownership of the embryos remained with the gamete providers, hence the remaining cryopreserved embryo may be transferred to the institute in California. The court ruled that the cryopreservation agreement

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Embryo Preservation, *in* IN VITRO FERTILIZATION AND EMBRYO TRANSFER 111, 123 (Alan Trounson & Carl Wood eds., 1984)).

[198] Pelias and DeAngelis, *supra* note 194 at 292. *See also* Dominique de Ziegler and René Frydman, *Different Implantation Rates After Transfers of Cryopreserved Embryos Originating from Donated Oocytes or from Regular in Vitro Fertilization*, 54(4) FERTILITY AND STERILITY 682 (1990); ISLAT Working Group, *Art into Science: Regulation of Fertility Techniques*, 281 SCIENCE 651 (1998).

[199] 717 F. Supp. 421 (E.D. Va. 1989). See also the discussion in Pitrolo, *supra* note 15, at 162.

[200] John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 463 (1990).

[201] York v. Jones, 717 F. Supp. 421, 423-24 (E.D. Va. 1989).

consistently referred to the frozen embryo as the Yorks' property and referred to their rights to exercise dominion and control over it. The court concluded that a bailment existed between the spouses York and the Jones Institute.[202] The embryos in this case were treated by the court as property of the gamete providers.[203] The court also found that "a transfer or relinquishment of their dispositional authority must be explicitly stated in the documents of participation provided by the program."[204]

b. Davis v. Davis

The *Davis v. Davis*[205] case dealt with the controversy over the ownership of cryopreserved embryos when the dispute is between a former husband and wife. Mrs. Mary Sue Davis underwent six separate IVF procedures and each procedure produced unsuccessful results.[206] The IVF process produced nine embryos. The two were unsuccessfully implanted into Mrs. Davis and seven embryos cryopreserved. The spouses Davis did not enter into any written agreement with respect to the disposition of any unused frozen embryos.[207] The dispute arose when

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[202] *Id.* at 425, 427.

[203] *In the Beginning, supra* note 200.

[204] *Id.*

[205] 842 S.W. 2d 588 (Tenn. 1992). See also the discussion in Pitrolo, *supra* note 15, at 163. Compare with the discussion in Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1071 (1996). Colker disagrees with the *Davis* ruling. She asserts that the *Davis* court advanced the legal misnomers brought about by the decision in *Roe v. Wade*. She argues that—

"The reasoning in *Davis* is insulting to women's status in society, in particular to their role with respect to pregnancy, in the way that it equates men's and women's reproductive experiences. The *Davis* court discounted the enormous discomfort faced by women during nine months of pregnancy in equating men's and women's reproductive experiences. Even a "normal" pregnancy includes nausea, tremendous weight gain, and enormous tiredness, to say nothing of restricted mobility and the increased risk of medical problems like high blood pressure and diabetes. To say that men who have ejaculated so that their sperm can be used to fertilize an egg in a petri dish have faced a comparable imposition on their lives as women who face *in vivo* pregnancies, is to continue the myth that *Roe* involved the rights of two independent entities (the fetus and the woman), as if the fetus resided outside a woman's body."

See also Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM L. REV. 2205, 2212-16 (1997).

[206] Davis v. Davis, 842 S.W. 2d 588, 591.

[207] *Id.* at 590. Pelias and DeAngelis emphasize the absence of the couple's prior agreement or contract which led the court to deny the claim of Ms. Davis. Conversely, in the ruling in *Kass v. Kass*, the court said that "a prior written agreement about the disposition of frozen embryos

the spouses Davis divorced and Mrs. Davis requested she be granted custody of the frozen embryos and that the embryos be implanted into her uterus.[208]

The Tennessee Supreme Court held that there is no compelling state interest to justify the implantation against the will of either party. The following hierarchy of dispositional factors was established:

> 1) the preferences of the progenitors should be looked at to resolve disputes about IVF pre-embryos;
>
> 2) if the wishes of the progenitors cannot be ascertained, or there is still disagreement, then their prior agreement should be carried out;
>
> 3) if there is no prior agreement, then the relative interests of the parties should be weighed, with the party wishing to avoid procreation usually prevailing;
>
> 4) if the party wishing to use the pre-embryos has no reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question, the argument in favor of using the pre-embryos should prevail;
>
> 5) finally, if the party seeking custody of the pre-embryos intends to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[209]

c. Kass v. Kass

The *Kass v. Kass*[210] case dealt with an issue similar with the one in *Davis*. The Kass spouses, Maureen and Steven attempted IVF procedures ten times at

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should be honored, and in the event of disagreement, the partner who seeks to avoid procreation with frozen embryos should prevail." Pelias and DeAngelis, *supra* note 193, at 302.

[208] *Id.* at 589.

[209] Pitrolo, *supra* note 15, at 165. See also the critique of Janet Dolgin in *An Emerging Consenus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 270 (1998). Dolgin criticizes:

> [I]n the absence of a contractual agreement, the Tennessee Supreme [C]ourt in *Davis* relied on an approach—generally categorized as an aspect of family or family constitutional law—which assumed the disputing progenitors to have been autonomous individuals. Thus, the court took the independent person, rather than the family, as a social whole as the unit of legal analysis. The court delineated the progenitors' reproductive rights (understood as part of the "right to privacy") and balanced the rights of each progenitor against those of the other.

the infertility clinic of the John T. Mather Hospital.[211] All ten attempts were unsuccessful.[212] Eventually, Maureen Kass instituted a divorce action and asked for "sole custody" of the frozen embryos.[213]

This case is distinct from *Davis* because the estranged couple signed consent forms provided by the infertility clinic.[214] This spells the difference in the resulting opinions of the court.[215]

The trial court ruled in favor of Maureen due to a "particular understanding of the ontological status of the embryos."[216] The trial court explained that "[t]he rights of the parties are dependent upon the nature of the zygote not the stage of its development or its location."[217] The court argued, "[i]f the wife is awarded possession the pre-embryos will be afforded an opportunity to realize their potential; if the husband is successful such potential will be extinguished as part of a scientific inquiry."[218]

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[210] 696 N.E. 2d 174 (N.Y. 1998). *See Kass v. Kass*, 663 N.Y.S. 2d 581 (App. Div. 1997). See also the discussion in Janet Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 261 (1998). See also the analytical works of Vincent F. Stempel, *Procreative Rights in Assisted Reproductive Technology: Why the Angst?*, 62 ALB. L. REV. 1187-1202 (1999); Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM L. REV. 2216-17 (1997).

[211] Kass v. Kass, 663 N.Y.S. 2d 583 (App. Div. 1997).

[212] *Id.*

[213] *Id.*

[214] *Id.* at 176 (N.Y. 1998).

[215] Dolgin asserts that "the *Davis* court concluded that, had such an agreement existed, it would have been dispositive." Janet Dolgin, *An Emerging Consenus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 268 (1998) (citing Davis v. Davis, 842 S.W. 2d 597 (Tenn. 1902)). Dolgin continues by quoting the *ponencia*,

> We believe, as a starting point, that an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as death of one more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.

[216] *Id.* at 263.

[217] *Id.*

[218] *Id.*

This line of reasoning was not adopted by the appellate court nor by the supreme court. The final *Kass* ruling "resolved the dispute between the Kasses by reference to their consent agreements."[219] The court opined, "[a]greements between progenitors . . . should generally be presumed valid and binding, and enforced in any dispute between them."[220] Pursuant to the agreement embodied in Addendum No. 2-1, the court held that the embryos or "pre-zygotes were donated to the IVF program for approved research purposes."[221]

Addendum No. 2-1 contains in part the following:

> In the event that we no longer wish to initiate pregnancy or unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition or our pre-zygotes and direct the IVF program to (choose one): . . .
>
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be *disposed of by the IVF Program for approved research investigation as determined by the IVF Program* . . . . (emphasis supplied)[222]

3. Legislation

Developments in laws regulating reproductive technologies such as IVF are varied. Firstly, some countries still do not provide for laws regulating IVF procedure. Secondly, there appears "no detailed code regulating IVF . except the Australian state of Victoria."[223] Thirdly, some countries or states opt to use laws regulating AI to apply to cases on IVF. For example, New Hampshire enacted a statute dealing solely with IVF which included restrictions provided for in AI statutes.[224] Lastly, some state legislatures view the "statutory and case law of AI as the closest analogy to IVF."[225]

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[219] Kass v. Kass, 696 N.E. 2d 182 (N.Y. 1998).

[220] *Id.* at 180.

[221] *Id.* at 182.

[222] *Id.* at 176-77.

[223] Russel Scott, *Legal Issues in IVF*, 12 CLINICS IN OBSTETRICS AND GYNAECOLOGY 893, 896 (1985).

[224] Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 339 (1994) (citing N.H. REV. STAT. ANN. § 168-B:13-B:15 (1992). Among other things, this New

a. United States

In the United States, Louisiana is one of the few states which "enacted a series of statutes intended to address the growing concerns with IVF."[226] Among others, these statutes declare that the in vitro fertilized human embryo is not property.[227] Also, these laws promote the best interest of the embryo especially in cases of resolving disputes.[228] Other states have similar statutes which regulate and restrict IVF procedures and ancillary experimentation.[229]

Illinois has also enacted a statute to "explicitly regulate ovum transfer or in vitro fertili[z]ation."[230] The Illinois statute reads:

Hampshire statute fixes the requirements for eligibility for IVF as well as the requirements for those who may perform IVF.

[225] Dennis M. Flannery, et al. *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295, 1299 (1979).

[226] Pitrolo, *supra* note 15, at 169. *See* Vetri, *supra* note 6, at 524. Vetri elucidates—

Only Louisiana has to date adopted a statute directly related to *in vitro* fertili[z]ation and embryo transfer. That law was adopted in 1986 and has not yet been interpreted by the courts. The Louisiana law considers an embryo created through *in vitro* fertili[z]ation to be a juridical person until implantation. The law imposes a "high duty of care and prudent administration" on behalf of the embryo. Intentional destruction of viable embryo is prohibited. A fertili[z]ed ovum that fails to develop further over a 36-hour period is considered non-viable unless it is frozen. IVF can be practiced solely for the development of a human through implantation. Embryos may not be "farmed or cultured solely for research purposes or other purposes." The sale of an ovum, fertili[z]ed ovum or an embryo is expressly prohibited.

An embryo cannot be owned by the parents or the medical facility. As a juridical person, in all disputes the courts must decide what is in the best interests of the embryo. The parents are entitled to the implantation of the embryo in the wife; if the parents renounce their right, then the embryo shall be available for adoptive implantation. The parents may renounce in favor of another married couple. No compensation may be paid for renunciation of rights. A constructive adoption takes place when a married couple "executes a notarial act of adoption . . . and birth occurs." Inheritance rights do not develop unless the embryo develops into an unborn child that is born in a live birth.

[227] Pitrolo, *supra* note 15, at 170.

[228] *Id.*

[229] *Id.* (citing MICH. COMP. LAWS ANN. § 333.2685 (West 1996); MINN. STAT. ANN. § 145.422 (West 1989); N.M. STAT. ANN. § 24-9A-5 (Michie Supp. 1994)).

[230] Scott, *supra* note 223, at 909 (citing G.G. Blumberg, *Legal Issues in Nonsurgical Ovum Transfer*, 251 J. AM. MED. A. 1178-81 (1984)).

> Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female, shall, with regard to the human being thereby produced, be deemed to have the care and custody of the child . . . [231]

b. Australia

The Victorian Parliament enacted the Infertility (Medical Procedures) Act in 1984.[232] This legislative act is known to be "the first attempt in the world to regulate IVF and embryo experimentation."[233] This law mandated that "all parties and their spouses, including spouses of donors, receive counseling, and give written consent."[234] It also provides that "parties must undergo medical examinations to determine if pregnancy is impossible through means other than IVF."[235] Criminal penalties are imposed for the "fertilization of eggs removed from a woman for uses other than implantation of an embryo in her uterus."[236]

Initially, this law expressly prohibited the creation of embryos for research purposes.[237] But the law "has since been altered to permit embryo creation for embryo research."[238] The policy of the law changed in order "to facilitate research on the viability of egg freezing and thawing and the micromanipulation of eggs and sperm."[239] Yet, a limitation is still imposed on this kind of research by only permitting experimentation for twenty-hours following fertilization."[240]

In addition to the limitations to embryo research and consent requirements, counseling is stressed by Victoria legislation. It is required "that patients undergoing IVF treatment have to be counseled by independent

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[231] *Id.*

[232] Pitrolo, *supra* note 15, at 178-79.

[233] *Id.* at 179 (citing Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 157 (1993) and Dan Fabricant, Note, *International Law Revisited: Davis v. Davis and the Need for Coherent Policy on the Status of the Embryo*, 6 CONN. J. INT'L L. 173, 184 (1990)).

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

counselors to ensure that they qualify for treatment and that they understand the nature and implications of the treatment."[241]

C. Surrogacy

1. History

Although the advent and swift expansion of reproductive technology began only in the 1970s,[242] it is interesting to note that the first recorded surrogate birth dates back to the Old Testament of the Bible.[243] Natural insemination was the method of procreation used to bring about the surrogate birth of Ishmael as told in the book of Genesis:[244] "When Abraham wanted an heir, his barren wife, Sarah, sent him to Hagar, her young Egyptian handmaiden, who bore him Ishmael."[245]

Surrogacy became possible with the advent of two distinctly different reproductive technologies: artificial insemination and in vitro fertilization.[246] Surrogate births have been unrecorded for the most part; it is only recently that the persons involved are publicizing the arrangement.[247] Since 1978 approximately five hundred couples in the United States alone have received an infant through the use of a formal surrogate motherhood contract.[248] During the same period of time, an equal number of informal surrogate contracts are estimated to have been performed.[249]

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[241] C. Wood and A. Trounson, *Current State and Future of IVF*, 12 CLINICS IN OBSTETRICS AND GYNAECOLOGY 753, 757 (1985).

[242] Janet Dolgin, *An Emerging Consenus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 225 (1998).

[243] Russell, *supra* note 55, at 614.

[244] Genesis 16:20.

[245] John W. Phillips and Susan D. Phillips, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KENTUCKY L. J. 877, 880 (1981).

[246] Lieber, *supra* note 47, at 206.

[247] Phllips and Phillips, *supra* note 245, at 887.

[248] Keith J. Cunningham, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L. J. 721, 721 (1988) (citing N.Y. TIMES, 27 February 1987, at B1, col. 1).

[249] *Id.*

Originally, surrogate motherhood was limited to the traditional[250] sense—the surrogate is inseminated with the sperm of an intending father,[251] who is usually the husband of an infertile woman.[252] The surrogate becomes pregnant and carries the pregnancy to term. But with the rising popularity of IVF as a means to battle infertility came the possibility that a genetic parent no longer had to give birth to her own child.[253] The IVF technology expanded surrogacy to include gestational surrogacy since any suitable woman could serve as an incubator for an IVF embryo.[254] As a result, surrogate motherhood contracts were created and used.[255] These contracts generally require the surrogate, to consent to third party adoption of the child following the birth and to facilitate the transfer of child custody among others.[256]

The first child born in the United States of gestational surrogacy was in 1985.[257] Before then, one woman served as both the genetic mother and gestational mother of the child.[258] Some couples are fortunate enough to have a relative or friend as the surrogate.[259] Other couples who do not want the arrangements disclosed resort to formal methods of locating a surrogate mother.[260] In the United States, organizations such as Surrogate Parenting Associates, Incorporated in Louisville, Kentucky and Surrogate Family Services in Dearborn, Michigan help match infertile couples with potential surrogate mothers.[261] Originally potential surrogates were sought by placing advertisements in local newspapers.[262] Today, Surrogate Parenting Associates, Incorporated and Surrogate

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[250] The term "traditional" is used to indicate the original form of surrogacy arrangements. Gestational surrogacy did not come into use in the United States until 1985.

[251] Lascarides, *supra* note 48, at 1225. This procedure is called artificial insemination. It involves the injection of sperm into the surrogate's birth canal by non-coital means.

[252] Lieber, *supra* note 47, at 207 (citing CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 58 (1989)).

[253] Pitrolo, *supra* note 15, at 154.

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] Lascarides, *supra* note 48, at 1226.

[258] *Id.*

[259] Lizabeth A. Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 230 (1985).

[260] *Id.*

[261] *Id.*

[262] *Id.*

Family Services receive hundreds of applications from women across the country who are willing to be surrogate mothers.[263]

2. Jurisprudence

a. In re Baby M

The enforceability of a commercial surrogacy contract was first addressed in the controversial case of *In re Baby M.*,[264] a case decided by the New Jersey Supreme Court in 1987.[265] This case involved a traditional surrogacy contract between one William Stern and Mary Beth Whitehead whereby Mrs. Whitehead agreed to be impregnated with Mr. Stern's sperm, bear the child and surrender her parental rights in exchange for US$10,000.00 plus payment of all fees and expenses incurred for the pregnancy.[266] The legal dispute arose when before the birth of the child Mrs. Whitehead decided that she wanted to retain custody of the child.[267]

In this case, the court held that the surrogacy contract is void and unenforceable[268] because it conflicted with existing "(1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions."[269] Furthermore, the court concluded that the contract was against public policy[270] and that a mother could not contract away her parental rights under the New Jersey statutes.[271] Thus, the court compared the practice of commercial custody to baby-selling, arguing that state laws prohibiting the sale of babies also applied to surrogacy contracts for public policy reasons.[272] The court stated:

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[263] *Id.*
[264] In re Baby M., 537 A.2d 1227 (N.J. 1988).
[265] *Id.*
[266] *Id.* at 1235.
[267] *Id.* at 1236.
[268] Lascarides, *supra* note 48, at 1228.
[269] Lieber, *supra* note 47, at 208.
[270] In re Baby M., 537 A.2d 1251 (N.J. 1988).
[271] Lieber, *supra* note 47, at 208.
[272] Lascarides, *supra* note 48, at 1228-29.

> This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here.[273]

Thereafter, the court transformed the case into a custody battle. The court accepted the parental status of the contracting father without scrutiny of the contractual basis for that status.[274] It ruled in favor of the Sterns, taking into consideration the *best interests of the child*.[275]

b. In re Adoption of Paul

Just like the *Baby M Case, In re Adoption of Paul*[276] also involved a traditional surrogacy contract. Here, the surrogate likewise agreed to be artificially inseminated with the sperm of the contracting male for payment of US$10,000.00.[277] The agreement was embodied in a forty-page surrogate parenting agreement.[278] Here, the court held that the contract was void under existing New York law[279] which, like the adoption statutes of New Jersey, prohibit any compensation in connection with adoption.[280] The New York court clearly found "[t]he analysis and conclusion reached by the New Jersey Supreme Court compelling."[281] However, the court required the surrogate to submit an affidavit that she would not request, accept, nor receive the US$10,000.00 promised to her in order for the adoption to take place.[282]

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[273] *Id.* at 1229.

[274] Russell, *supra* note 55, at 600. This is not to suggest that the Supreme Court accepted Mr. Stern's parenthood inadvertently or without recognition of the influence of the contract on its determination of parental status. On a related question, the custody determination itself, the court noted the distinction between giving effect to a contract and considering the existence of the contract as a circumstance. "[W]e now must decide the custody question without regard to the provisions of the surrogacy contract that would give Mr. Stern sole and permanent custody. (That does not mean that the existence of the contract and the circumstances under which it was entered may not be considered to the extent deemed relevant to the child's best interests.)"

[275] Lieber, *supra* note 47, at 208. (emphasis supplied)

[276] In re Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).

[277] *Id.*

[278] Lieber, *supra* note 47, at 208.

[279] In re Adoption of Paul, 550 N.Y.S.2d 815 (1990), 818.

[280] Lieber, *supra* note 47, at 209.

[281] In Re Adoption of Paul, *supra* 279, at 819.

[282] *Id.* at 209

c. In re Adoption of Matthew B.-M.

In the case of *In re Adoption of Matthew B.-M.*,[283] the surrogate mother was likewise artificially inseminated with the sperm of the intending father.[284] She subsequently gave birth and signed a consent to the adoption.[285] However, eight months later, she petitioned to withdraw the same consent to the adoption.[286] While the court refused to rule on the legality of the contract, it stated that, even assuming that the contract is illegal, the adoption rested on the surrogate's signed consent and not on the alleged illegal contract.[287] Moreover, the court found that while the contract in dispute is not void, it is not binding on the court, but instead *it is the best interests of the child which determine child custody* (emphasis supplied).[288]

d. Johnson v. Calvert

In 1993, or some five years after the celebrated *Baby M.* case[289] the enforceability of a commercial surrogacy contract was again tested in *Johnson v. Calvert*.[290] In this case, the ruling of the court was different from that of the *Baby M. Case*. The reason for this is because the facts are completely different.. Unlike *Baby M.*,[291] *Johnson* involved a gestational surrogacy contract[292] between Mark and Crispina Calvert (hereinafter Calverts) and the surrogate Mrs. Johnson[293] whereby the Calverts agreed to pay the latter US$10,000.00 in cash and a US$200,000.00 life insurance policy.[294] However, as the pregnancy progressed, relations between the parties soured when the Calverts learned of Mrs. Johnson's previous miscarriages and stillbirths.[295] Thereafter, Mrs. Johnson demanded immediate payment of the balance of the money due her or she would keep the

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[283] In re Adoption of Matthew B.-M., 284 Cal. Rptr. 18 (1991), *cert. Denied*, 112 S. Ct. 1685 (1992).

[284] *Id.* at 21.

[285] *Id.*

[286] *Id.* at 24.

[287] *Id.* at 25.

[288] *Id.* at 27.

[289] In re Baby M., *id.* at 1227.

[290] Johnson v. Calvert, 851 P.2d 776 (cal. 1993) (en banc).

[291] In re Baby M., *id.* at 1227.

[292] The zygote was formed in vitro using the sperm of Mark Calvert and the egg of Crispina Calvert.

[293] Johnson v. Calvert, 851 P.2d 776 (cal. 1993) (en banc), at 778.

[294] *Id.*

[295] *Id.*

child.[296] This resulted in both parties going to court and seeking to be declared the legal parents of the unborn child.[297] The California Supreme Court ruled that a surrogate has no parental right to a child who is not genetically linked to her.[298] Instead, the custody should be awarded to the couple who supplied the zygote and intended to raise the child—in this case, the Calverts.[299] The court stated that, "[w]hile all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents* (emphasis supplied)."[300]

e. In re Marriage of Moschetta

After the *Johnson v. Calvert* case, it was seemingly inevitable that a state court would be asked to apply *Johnson's* intent-analysis to a case occasioned by a traditional surrogacy arrangement.[301]

A year after the *Johnson* case, the California courts considered the limits of intentional parentage in a case involving a traditional surrogacy agreement.[302] *In re Marriage of Moschetta*[303] involved a dispute between an intending father, Robert Moschetta and a surrogate, Elvira Jordan.[304]

The intending parents, Robert and Cynthia Moschetta negotiated a surrogacy contract with Elvira Jordan whereby the latter would be artificially inseminated with Robert's sperm and bear the resulting child, after which Elvira would then terminate her parental rights and finally assist[305] in the subsequent adoption process that would make Cynthia the legal mother.[306]

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[296] *Id.*
[297] *Id.*
[298] *Id.* at 777-78, 782.
[299] *Id.*
[300] *Id.*
[301] Dolgin, *supra* note 242, at 241.
[302] *Id.*
[303] In re Marriage of Moschetta, 30 Cal. Rptr.2d 893.
[304] *Id.*
[305] *Id.* at 895.
[306] *Id.*

Before the birth of the child, the Moschetta's marriage began to deteriorate and they considered divorce.[307] After the baby's birth in May 1990, Cynthia petitioned the court to declare a dissolution of her marriage to Robert and to grant parental rights to and custody of the baby.[308] The trial court ruled that Robert and Elvira were the parents of the baby born pursuant to the surrogacy contract and granted them joint legal and physical custody.[309] Hence, Cynthia dropped the request that she be named the mother of the baby.[310] Robert then argued that Cynthia is the legal mother such that Elvira's maternity and his corresponding joint custody with the latter will be rendered nugatory.[311] The appellate court, however, affirmed Elvira's maternity as there is "[n]o question about biological parenthood to settle.[312] Furthermore, in the absence of natural maternity, the court held that a woman could establish a mother-child relationship only by complying with procedures provided in the adoption laws of the state.[313] The surrogacy agreement did not and could not substitute with such requirement.[314] To put it succinctly, the court premised maternity on either nature or adoption.[315] Unlike the *Johnson* case, the *Moschetta court* limited natural maternity to women with some biological connection with the child.[316]

f. In re Marriage of Buzzanca

The case of *In re Marriage of Buzzanca*,[317] a case decided in 1998, is quite similar with the case of *In re Marriage of Moschetta*. Both involve cases wherein the marriage of the intending parents dissolved before the birth of the child resulting from a surrogacy agreement.[318] However, *Buzzanca* differed from *Moschetta* in that neither intending parent in the former was a genetic parent of the baby.[319] Instead,

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[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.* at 895-96.
[311] *Id.* at 897.
[312] *Id.* at 897 (emphasis omitted).
[313] *Id.* at 900.
[314] *Id.* at 900.
[315] Dolgin, *supra* note 242, at 244.
[316] In re Marriage of Moschetta, 30 Cal. Rptr.2d 893, at 897.
[317] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280.
[318] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 282.
[319] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 282.

the embryo was formed from the sperm and ovum of anonymous donors at an infertility clinic in California.[320]

After the birth of the child and the separation in fact of the intending parents (Luanne and John Buzzanca), the wife Luanne sought child support from John in the divorce proceedings between the said commissioning parents.[321] While John admitted signing the surrogacy agreement, he denied paternity of the resulting baby.[322]

The trial court declared the baby to be a child without parentage.[323] The child was neither that of the commissioning parents nor of the surrogate mother. Hence, John was relieved of the monthly child support payment.[324] Luanne's prospective maternity was thereby made dependent on her willingness and capacity to comply with state adoption procedures.[325]

On appeal, the court concluded that the Buzzanca's parentage was established at the baby's birth by reason of their parental intentions.[326] This view of the ties that bind parent and child is a novel one.[327] Thus, according to the *Buzzanca* court, establishing natural parentage under the law need not depend on proof of any biological relation between mother and child.[328] Luanne, therefore, having consented to the conception and birth of the baby, presented a cognizable claim to be that baby's mother.[329] Hence, the court was able to reject the "adoption default model" of parentage in cases occasioned by reproductive technology.[330] Thus, in place of a model that would require Luanne to adopt the baby, the appellate court founded her maternity first on the state's statutory

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[320] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 282.

[321] Jaycee B. v. Superior Court of Orange County, 49 Cal. Rptr. 2d 694 (1996), at 696.

[322] Jaycee B. v. Superior Court of Orange County, 49 Cal. Rptr. 2d 694 (1996), at 696.

[323] Dolgin, *supra* note 242, at 247.

[324] *Id.* (citing Davan Maharaj, *Case May Redefine Fatherhood in State*, L.A. TIMES, September 14, 1997, at B1).

[325] *Id.*

[326] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 288-89.

[327] Dolgin, *supra* note 241 at 247.

[328] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 290

[329] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 288.

[330] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 289.

scheme for regulating parentage in cases of artificial insemination, and second, on an expansive reading of the state supreme court's decision in *Johnson v. Calvert*.[331]

The court then ordered John to pay child support to Luanne for the baby born out of the surrogacy agreement.

3. Legislation

a. Israel

Legislative response to the issues surrogacy contracts present falls within one of four probable categories: prohibition, facilitation, regulation, and a static approach.[332] In the first, prohibition operates to prevent surrogacy arrangements.[333] In the second, facilitation, or what is also called a private ordering approach, the government acts to enforce the agreements made by freely consenting parties.[334] On the other hand, a regulatory approach implies that the state would enforce only those surrogacy contracts which meet the ordered criteria.[335] Finally, the static approach provides no legislative input but allows the courts to address questions regarding custody and enforceability of said contracts.[336]

Israel, the first country to enact national legislation governing surrogacy arrangements,[337] followed the regulatory scheme of legislation. The Parliament legalized noncommercial surrogacy arrangements subject to the requirement that approval of the surrogacy contract must be given by a committee appointed by the Health Minister.[338]

In order for the contract to be given the stamp of approval, it must be shown that the agreement was reached freely by both parties and that there is no

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[331] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, at 288-90. The court thus declared:

The "adoption default " model is. . . inconsistent with both statutory law and the Supreme Court's *Johnson* decision. As to the statutory law, the Legislature has already made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility.

[332] McCallister, *supra* note 50, at 308.

[333] *Id.* at 308.

[334] *Id.* at 308.

[335] *Id.* at 308.

[336] *Id.* at 308-09.

[337] Lascarides, *supra* note 48, at 1232.

[338] *Id.*

danger to the mother's health or to the baby's health rights.[339] The law also requires adherence to the following strict regulations: (1) the sperm must be provided by the intending father; (2) the baby must be conceived through in vitro fertilization; (3) the surrogate must be an unmarried, Israeli resident; (4) the surrogate may be paid compensation for her suffering, her loss of time and income, and her legal fees and insurance, but additional compensation is prohibited; and (5) the surrogate may change her mind and keep the baby, subject only to court approval, or abort the fetus according to existing abortion law.[340]

b. United States

The United States has followed the static approach at the federal level while the individual states vary from a static approach to outright prohibition.[341] Even in the aftermath of the *Baby M.* case, there is still no federal legislation on surrogate motherhood in the United States. State legislatures likewise have not responded accordingly.[342] Only four states have enacted legislation providing for the legality and enforceability of surrogacy agreements: Florida,[343] Nevada,[344] New Hampshire,[345] and Virginia.[346] The Virginia and New Hampshire legislatures, in particular, have made surrogacy contracts legal but not enforceable, thereby allowing the courts to rule on surrogacy arrangements and to provide remedies in case of a breach by one of the parties.[347] However, all four states proscribe commissioning couples from paying compensation to the surrogate mother for services over and above the necessary and incidental expenses in carrying the child.[348] And it is only these four states which specifically deal with gestational surrogacy agreements.[349] The rest do not even distinguish between the two types of surrogacy agreements.[350]

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[339] *Id.* (citing John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 638 (1994)).

[340] *Id.* (citing Judy Siegel, *Surrogate Mother Bill Must Soon Be Law*, JERUSALEM POST, Dec. 19, 1995, at 3).

[341] McCallister, *supra* note 50, at 309.

[342] Lascarides, *supra* note 48, at 1230.

[343] *Id.* at 1231 (citing FLA. STAT. ANN. Sections 742.13, .15, .16.).

[344] *Id.* (citing NEV. REV. STAT. ANN. Section 126.045).

[345] *Id.* (citing N.H. REV. STAT. ANN. Sections 168-B:1 to -B:32).

[346] *Id.* (citing VA. CODE ANN. Sections 20-156 to -165).

[347] Lieber, *supra* note 47, at 218.

[348] Lascarides, *supra* note 48, at 1231 (citing VA. CODE ANN. Sections 20-156 to -165).

[349] *Id.* (citing FLA. STAT. ANN. Sections 742.15-.16 (West 1986 & Supp. 1996); N.H. REV. STAT. ANN. Sections 168-B:1 to -B:32; VA. CODE ANN. Sections 20-156 to -165).

[350] *Id.* at 1231.

On the other hand, surrogacy contracts are void in the following states: Arizona,[351] Indiana,[352] Louisiana,[353] Michigan,[354] Nebraska,[355] North Dakota,[356] and Tennessee.[357] Furthermore, surrogacy contracts are outlawed in the following jurisdictions: District of Columbia,[358] Kentucky,[359] Michigan,[360] New York,[361] Utah,[362] and Washington.[363]

c. *England*

In 1982, the English government established the Committee of Inquiry into Human Fertili[z]ation and Embryology (Warnock Committee) in response to perceived public concern at the rapid rate of scientific advancement in human reproductive technology.[364] Two years thereafter, the Committee issued the Report of the Committee of Inquiry into Human Fertili[z]ation and Embryology, known as the Warnock Report, which addressed in particular the commercial aspects of surrogacy.[365] The Report recommended that surrogacy agreements be considered illegal and unenforceable, and that commercial surrogacy be discouraged by criminalizing the operation of entities that assist in such arrangements.[366]

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[351] *Id.* at 1231. See ARIZ. REV. STAT. ANN. Section 25-218(A) (West 1991).

[352] *Id. See* IND. CODE ANN. Section 31-8-2-1 (West Supp. 1996).

[353] *Id. See* LA. REV. STAT. ANN. Section 9:2713(A) (West 1991).

[354] *Id. See* MICH. COMP. LAWS ANN. Section 722.855 (West 1993& Supp. 1996).

[355] *Id. See* NEB. REV. STAT. Section 25-21,200(1) (Supp. 1996).

[356] *Id. See* N.D. CENT. CODE Section 14-18-05 (Michie 1991 & Supp. 1995).

[357] *Id. See* TENN. CODE ANN. Section 36-1-102(46)(A)(1996).

[358] *Id. See* D. C. CODE ANN. Section 16-402 (Supp. 1996) (imposing a civil penalty or one year imprisonment, or both, for entering into, assisting, or inducing another to enter into a surrogacy contract).

[359] *Id. See* KY. REV. STAT. ANN. Section 199.990 (Michie 1995) (class D felony).

[360] *Id. See* MICH. COMP. LAWS ANN. Sections 722.857(2), 859 (deeming it a felony to enter into surrogacy contracts with a minor or a mentally infirm woman or to procure surrogacy agreements for compensation).

[361] *Id. See* N.Y. DOM. REL. LAW Section 123 (McKinney Supp. 1997) (imposing a civil penalty upon those entering into a surrogacy agreement and a felony for third parties who recruit or procure semen to become surrogates).

[362] *Id. See* UTAH CODE ANN. Section 76-7-204(1)(d) (1995) (class B misdemeanor).

[363] *Id. See* WASH. REV. CODE ANN. Section 26.26.250 (West Supp. 1997) (gross misdemeanor).

[364] McCallister, *supra* note 50, at 311.

[365] *Id.* at 311.

[366] *Id.* at 311.

In 1985, the Surrogacy Arrangements Act was passed.[367] While the original law failed to address whether noncommercial agreements were enforceable, later amendments expressly provided that all surrogacy agreements are unenforceable.[368] Further amendments later came in the form of the Human Fertili[z]ation and Embryology Act of 1990,[369] Section 30 of which allows the court to make an order establishing the legal relation between the parties to a marriage and a child born to a surrogate mother.[370] Moreover, this law requires, among others, full agreement to the order by the parties concerned, a minimum age of eighteen for the commissioning couple and no payment of money for the services rendered by the surrogate except for reasonable expenses.[371] In addition, the law allows for the declaration of legal parentage without having to resort to adoption proceedings.[372]

d. Australia

Five Australian jurisdictions, namely Victoria,[373] South Australia,[374] Queensland,[375] Tasmania,[376] and the Australian Capital Territory,[377] have also passed regulatory legislation on surrogacy.[378] While the laws are not the same, each jurisdiction distinguishes between the concepts of commercial and altruistic surrogacy.[379] Furthermore, each jurisdiction prevents advertising, thereby reducing the spread of people to whom surrogacy is available and preventing the emergence

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[367] *Id.* at 312.

[368] *Id.* at 312.

[369] *Id.* at 312.

[370] *Id.* at 312.

[371] *Id.* at 312.

[372] *Id.* at 312.

[373] Stuhmcke, *supra* note 56, at 1 (citing *Infertility (Medical Procedures) Act 1984 (Vic)* § 30 Note that this Act will be replaced upon commencement of the remaining provisions of the *Infertility Treatment Act 1995) (Vic)* (commencement is set down for 27 June 1997 or earlier if proclaimed).

[374] *Id.*

[375] *Id.* at (citing *Family Relationships Act 1975* (SA) as amended by the *Family Relationships Amendment Act 1988* (SA)).

[376] *Id.* at (citing *Surrogate Parenthood Act 1988 (Qld)*).

[377] *Id.* at (citing *Surrogacy Contracts Act 1993 (Tas)*).

[378] *Id.*.

[379] *Id.*

of commercial surrogacy agencies.[380] So in all five jurisdictions surrogate arrangements are unenforceable such that the surrogate mother to either a commercial or an altruistic contract cannot be required to relinquish custody of the child to the commissioning parents.[381] Lastly, the current legislation applies not only to a situation wherein a woman becomes pregnant pursuant to a surrogacy arrangement but also to a situation where a woman is already pregnant and then agrees to give the baby away.[382]

VII. CONSTITUTIONAL BASES OF PROCREATIVE LIBERTY AND ADOPTION OF REPRODUCTIVE TECHNOLOGIES

As defined, procreative liberty encompasses the right to procreate and the right not to procreate. John A. Robertson, the foremost proponent of procreative autonomy advances the belief that the epitome of procreative liberty is freedom from government interference. According to Robertson's view, such a liberty includes access to reproductive and abortive technologies.

> The right to procreative liberty that Robertson defends encompasses the right to choose—free from the interference of others, and in particular free from government interference—whether to reproduce. That right protects choices not to reproduce through the use of contraception and abortion, as well as choices to reproduce through either coital or non-coital means.[383]

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[380] *Id.* (citing *Infertility (Medical Procedures) Act 1984 (Vic)* s 30(3); *Family Relationships Act* 1975) (SA) ss 10(g)(1), 10 (g)(2); *Surrogate Parenthood Act 1988 (Qld)* s 2(2); *Surrogacy Contracts Act 1993 (Tas)* s 6; *Substitute Parent Agreements Act 1993* (ACT) s 7)).

[381] *Id.* at 1 (citing *Infertility (Medical Procedures) Act 1984 (Vic)* s 30(3); *Family Relationships Act* 1975) (SA) ss 10(g)(1), 10 (g)(2); *Surrogate Parenthood Act 1988 (Qld)* s 3(1); *Surrogacy Contracts Act 1993 (Tas)* s 7; *Substitute Parent Agreements Act 1993* (ACT) s 9)).

[382] *Id.* at 1 (citing *Infertility (Medical Procedures) Act 1984 (Vic)* § 30(1); *Family Relationships Act* 1975) (SA) §§ 10(f); *Surrogate Parenthood Act 1988 (Qld)* § 2(2); *Surrogacy Contracts Act 1993 (Tas)* § 3; *Substitute Parent Agreements Act 1993* (ACT) § 3)).

[383] Dan W. Brock, *Procreative Liberty*, 74 TEX. L. REV. 187, 191-92 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994)).

Robertson describes procreative liberty as a "negative right against state interference with choices to procreate or to avoid procreation."[384] This means that government can neither provide nor limit the access to reproductive technologies.

Similar to other freedoms granted by any democratic society, such a liberty must be limited when there exists compelling state interests. Contrary to Robertson's view,[385] this study believes that procreative liberty, as its origins may be traced from the constitution, is a limitable right. The state also validly has an interest in limiting this procreative right. Procreative rights may not only be limited but also be used as the bases for providing expanded social welfare services.

Government intervention is justified because it is important to protect the society from egregious harm as well as to safeguard the future of future generations.[386] The government should intervene in such a private area by means of imposing requirements and limitations or proscribing certain acts. The government should also secure the rights of infertile couples to produce their own children.

A. The right to procreate

Unlike the right to speech and freedom of the press, procreative liberty is not expressly enumerated in our bill of rights.[387] However, this does not mean that

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[384] *The Invisible Woman*, 108 HARV. L. REV. 948, 948 (1995) (reviewing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994).

[385] For a summary of JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994), see Gilbert Meilaender, *Products of the Will: Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 173-195 (1995). *Compare with* Purdy, *supra* note 95, at 200-01. Purdy criticizes the theory of Robertson. She advances the following counter-arguments:

> First, it encourages people to care too much about their ability to have children . . . .
>
> Second, this model of the self encourages people to see the decision to have children primarily as a personal decision about themselves and *not* as a moral decision affecting others.

Robertson addresses the criticisms to his theory. See his rebuttal discussion in John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233-267 (1995).

[386] Kathryn Venturatos Lorio, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from Our Neighbors—What Translates and What Does Not*, 45 LOY. L. REV. 247, 248 (1999) [hereinafter *The Process of Regulating ART*].

[387] *See* CONST. art. III.

this right does not exist nor that individuals cannot access assisted reproductive technologies. In the United States, the court in *Skinner v. Oklahoma*[388] "explicitly recognized a fundamental right to procreate."[389] In the said case, the court concluded that "procreation is essential to the survival of the human race and is a basic liberty."[390]

Justice Brennan, in *Einstadt v. Baird,*[391] sustained the antecedent declarations of the right to procreate. Justice Brennan articulates thus: "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[392]

Furthermore, the grant of this right may be inferred from the state policy of promotion and protection of family life. It is logical to infer that a state cannot promote family life without providing for the right to procreate. The state policy recognizing the sanctity of family life is explicit in the following constitutional provision:

> The state recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the government (emphasis supplied).[393]

It may also be argued that government intervention through regulation of reproductive technologies is a means of actively promoting the family as an institution. In effect, such government recognition and regulation permits infertile couples to broaden the possibility of having their naturally-born offspring. This

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[388] 316 U.S. 535 (1942).

[389] Skinner v. Oklahoma, 316 U.S. 541 (1942).

[390] Skinner v. Oklahoma, 316 U.S. 541 (1942) as cited in of Vincent F. Stempel, *Procreative Rights in Assisted Reproductive Technology: Why the Angst?*, 62 ALB. L. REV. 1187, 1193 (1999). *See also* the discussion in Flannery, et. al., *supra* note 234, at 1302-05. This article discusses the right to procreation and other related rights such as the specific right to decide whether to bear or beget a child and the right to marital privacy.

[391] Einstadt v. Baird, 405 U.S. 438 (1972).

[392] Einstadt v. Baird, 405 U.S. 453 (1972) (emphasis omitted).

[393] CONST. art. II, sec. 12.

argument finds its basis in the following constitutional provision: "The state recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and *actively promote its total development.*"[394]

The protection of this right also justifies the adoption of regulatory measures "that aim to prevent the worst effects."[395] Though regulation of the exercise of this right would be tantamount to limiting access to allowable ARTs, such regulatory mechanisms are geared towards further protection of the health and safety of ART participants and the children born by these technologies. Indirectly, the family as an institution in society is also preserved.

The right to procreate entitles an individual or a couple the choice to reproduce or not. In the event, an infertile couple chooses to reproduce it is the obligation of the state to effectuate this right by providing means so that this couple be able to actualize their choice. The means to effectuate this choice "should be secured for them by their society as part of the basic welfare right of all citizens and as necessary for equality of opportunity to construct and pursue one's own plan of life."[396]

B. The right to found a family

The Constitution mandates that, "[t]he state shall defend the *right of spouses to found a family* in accordance with their religious convictions and the demands of responsible parenthood." (emphasis supplied)[397] We are fortunate to have an express grant of the right to found a family. Usually, the right to found a family is not mentioned in most national constitutions.[398] However, this right need not be expressly stated in order to exist.[399] Interestingly, international conventions also articulated this right to found a family.[400]

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[394] CONST. art. XV, sec. 1. (emphasis supplied).

[395] John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 263 (1995). In this article, Robertson defends his position against his critics. He reasserts that procreative liberty which includes the right to procreate and not to procreate, must be recognized and there is an urgent need for regulation.

[396] Brock, *supra* note 383 at 193.

[397] CONST. art. XV, sec. 3(1).

[398] Bartha M. Knoppers, *Reproductive Technology and International Mechanism of Protection of the Human Person*, 32 MCGILL L.J. 336, 349 (1987).

[399] *Id.*

[400] *Id.* at 350-51, 64-65, 67-69. (citing G.A Res. 217A U.N. GAOR Pt I, U.N. DOC A/810 (1948), ART. 16(1)), 16 December 1996, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, Art. 23(2);

What needs interpretation is whether the right to reproductive technologies is part and parcel of this right to found a family. This concern may be answered in the affirmative because availing of AI or IVF is the pathway in order to found a family. This right is a constitutionally granted right which may also be inferred from the broad right to liberty or to privacy.[401] This right must be promoted and safeguarded by providing for implementing legislation in the problematic and controversial field of reproductive technologies.

Hence, to legislate on the adoption of reproductive technologies is well-founded within the parameters of our constitution. Recognizing and regulating assisted reproductive technologies enhance the rights of individuals to procreate and to found a family.

VIII. PROBLEM AREAS

A. Artificial insemination

1. Effects on the family

Artificial insemination is becoming increasingly common and has been recognized in the Philippines as an answer to the fertility problems of many childless couples.[402] In the past, there have been debates regarding the validity of AID and on occasion, it has been violently denounced by the courts, and has been said to constitute adultery.[403] However, due to the rulings of *People v. Sorenson*[404] and *In re Adoption of Anonymous*[405] not only has the view that AID constituted adultery been abandoned, it has also been recognized that the law favors

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16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, Art. 10(1); Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, vol 1 (Toronto: Ministry of the Attorney General, 19850 (Chair: J.R. Breinthaupt) at 37; 4 November 1950, 213 U.N.T.S. 221 E.T.S. No. 5, Art. 12).

[401] *Id.* at 350.

[402] *See* FAMILY CODE, art. 164.

[403] *See Orford v. Orford* 58 D.L.R. 251 (Ontario Sup. Ct. 1921). *See also Doornbos v. Doornbos* 23 U.S.L.W. 2308 (unreported decision of Super. Ct., Cook County, Ill., Dec. 13, 1954).

[404] 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

[405] 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Surr. Ct. 2973).

legitimation to protect the integrity of the family unit. Hence, children conceived thru AID have been conferred a legitimate status.[406]

However, there may be a fear of interference with the basic family unit in situations where the wife is inseminated with the sperm of a donor. Some donors may wish to participate in the lives of their biological children. In some cases, it is the children who wish to know the identity of and get in touch with their fathers.[407] This may pose a problem as a threat to the privacy of the family and the integrity of the legitimate father.

AI, furthermore, may also be taken advantage of by single women and unmarried couples who wish to raise their own children. Thus, different kinds of family units will be created. The Family Code answers only the question of legitimacy of the child of a married couple who was conceived through AI. Thus, it is still an inadequate means of regulation.

2. Paternity and filiation

The trend today is to narrow the area in which children would be labeled illegitimate.[408] Paternity and filiation of a child of married couples born through AI has already been determined by the Family Code. Article 164 of the Family Code provides:

> Children conceived or born during the marriage of the parents are legitimate.
>
> Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registrar together with the birth certificate of the child.[409]

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[406] Shaman, *supra* note 25, at 336.

[407] *Id* at 341-42. *See In re Adoption of Female Infant*, 5 FAM. L. REP. (BNA) 2311 (1979). *See also In re Ann Carol S.* 172 N.Y.L.J. 31, 13 August 1974, at 12, col. 6.

[408] Elliott L. Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. OF FAM. LAW 39, 43 (1965).

[409] FAMILY CODE, art. 164. (emphasis supplied)

Considering easy access to AI, a problem arises when the donor and the inseminated woman are not married. The Family Code does not provide for such scenario. Neither is it fully addressed by the UPA and USCACA. Most laws and cases dealing with AI have dealt with the husband's paternity rights and his obligations toward children conceived through AID.[410] There has been very little opportunity for courts to address the issue of donor rights because very few donors actually assert their claims, perhaps due to the obstacles to successful claims of paternity. In C.M. v. C.C.,[411] the AID donor who was not married to the inseminated woman was declared to be the child's legal father and was granted paternal rights, as he had consistently manifested his desire to participate in the child's life. The court also relied in part on the public policy interests of a child having two parents whenever possible.[412]

Unfortunately, successful assertion of a parent-child relationship is more likely where the donor was known to the recipient at the time of the procedure, considering that prior assertion of parental rights is necessary.[413] However, most unmarried women who choose AID prefer that the donor remain anonymous and be mandated to sign a written waiver of all parental rights.[414]

Determination of filiation of the child is also important because the AID child may have a strong psychological need to know the identity of his biological father. A healthy psyche may be impaired by a lack of information about one's natural parents.[415] The child may also need medical information about the donor. Furthermore, the child may want to learn his father's identity in order to seek support and to claim a share in his estate upon the latter's death. However, the granting of such rights to the child may be disadvantageous to the donor who had no intention of treating the child as his own and who may have a strong interest in keeping his identity confidential.

Another reason for disclosing the donor's identity to the child is to prevent incestuous marriages, that is, marriages between the AID child and the donor, her natural father, or between the AID child and the child of the donor.

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[410]Kaiser, *supra* note 23, at 798 (citing Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 (1985)).

[411] 377 A.2d 825 (1977).

[412] 377 A.2d 825 (1977).

[413] Kaiser, *supra* note 23, at 805.

[414] Mika and Hurst, *supra* note 27, at 997 (citing Djalleta, *supra* note 233, at 349).

[415] Shaman, *supra* note 25, at 338 (citing Note, *The Adult Adoptee's Constitutional Right to Know his Origins* 48 S. CAL. L. REV. 1196, 1200-04).

The probability of such marriages occurring may be remote, but there is a recorded case of it happening in Tel Aviv, Israel, and another in the United States.[416]

3. Donor selection

A recent study in *The New England Journal of Medicine*[417] reported that many doctors who perform AID are negligent in testing donors for genetic defects. Ninety-six percent of doctors took into consideration family histories of donors, but this consisted more of interviews or of presenting the donor with a short checklist of common familial diseases.[418] Doctors who perform AID in this manner are doing a great disservice to their patients, and are also exposing themselves to possible malpractice suits.[419]

The problem of donor selection may be exacerbated by payment of the donor. No state has prohibited the sale of sperm and sperm donors generally receive a nominal fee.[420] This makes sperm donation more attractive and opens the door to unsuitable donors who give semen anyway, in order to make money.

Many doctors who perform AID require the woman and her husband, if she is married, to sign a consent form which typically includes a provision relieving the doctor of responsibility for any genetic hereditary defects which the child might suffer from in the future. The legality of these forms, however, have not been scrutinized by the courts. However, as these consent forms take the form of an adhesion contract, they are strongly disfavored by the courts and would most likely not be given legal effect in an AID case.[421]

Even more precarious is the situation of a woman who inseminates herself without the intervention of a physician. Although she may know the donor, the most she could do is to ask about him and check his medical history. She would be

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[416] *Id.* at 339 (citing Hoffer, *The Legal Limbo of AID—Artificial Insemination by Donor*, MODERN MED., at 27 (1979)).

[417] *Id.* at 349 (citing Curie-Cohen, Luttrell, and Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENGLAND J. MED. 585 (1979)).

[418] *Id.* (citing Curie-Cohen, Luttrell, and Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENGLAND J. MED. 585, 586 (1979)).

[419] *Id.* (citing Curie-Cohen, Luttrell, and Shapiro, *Current Practice of Artificial Insemination by Donor in the United States* 300 NEW ENGLAND J. MED. 585, 589 (1979)).

[420] Pittolo, *supra* note 15, at 158-59 (citing Djalleta, *supra* note 239, at 340-41).

[421] Shaman, *supra* note 25, at 348-49.

ill-equipped to test him for genetic diseases; thus she may lack valuable medical information which might prove detrimental to her child.

4. Cryopreservation

With the advent of cryopreservation, posthumous conception could be a widely practiced phenomenon. Nonetheless, because of the lack of statutory regulation and case law on the matter, the filiation of the posthumous child and his rights are left uncertain

The Family Code is silent on the issue of posthumous conception. Among the various statutes regulating AI, only the USCACA discusses posthumous conception but only insofar as declaring that the posthumous child has no inheritance rights in the estate of his or her natural father.[422] In addition, cryopreservation raises the issue of who has a right to the disposition of the sperm.[423] *Parpalaix* and *Hecht* determined rights to the disposition of the sperm by discerning the intent of the donor. Should the same principle govern in the Philippines, considering that leaving the child's status in doubt may be due to the legislators' intent to discourage the practice of posthumous insemination?[424]

Another problem introduced by cryopreservation is the concept of eugenics, or the science of modification of heredity. AID semen from exceptional male donors has been urged as a way to improve the human race.[425] This method of alteration of genes is premised on the assumption that the highly endowed have a genetic duty to bear large families in order to perpetuate a "better man."[426]

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[422] Pitrolo, *supra* note 15, at 152 (1996) (citing ARTHUR L. WISOT AND DAVID R. MELDRUM, NEW OPTIONS FOR FERTILITY 3 (1990)).

[423] *Id.*, at 149. *See* Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317 (1986).

[424] Bowie, *supra* note 181, at 161.

[425] George P. Smith II, *Through A Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 147 (1968).

[426] *Id.* at 147 (citing Hermann Muller, *Human Evolution by Voluntary Choice of Germ Plasm*, 134 SCIENCE 643 (1961)).

B. In vitro fertilization

1. Change in the concept of family

The relationship between IVF and the family is a genuine legal concern. The IVF procedure, at present, is accessible to Filipinos regardless of their marital status or gender preference. The truth of the matter is IVF is comparable to an over-the-counter drug which may be dispensed with by any able pharmacist. There is no regulatory law prescribing eligibility requirements. One of the very few limitations to accessibility to IVF is its high cost. Thus, except for the high cost, it is very possible that a Filipino may undergo this expensive IVF procedure without any regard for the Filipino notion of a family.

The following are legitimate questions raised on the aspect of the use of IVF and its effects on the family:

> [S]hould IVF be restricted to the heterosexual married family? What about persons in 'de facto relationships' and homosexual relationships, or single women and single men, as prospective parents of an IVF child? What legislative policy is both just and acceptable on this question'[427]

These questions indicate the complexity in allowing all persons regardless of their marital status and gender preference to avail of IVF either as an infertility treatment or mode for child-bearing.

In cases[428] when a married heterosexual couple[429] contracts with a fertility clinic and consents to IVF, the notion of a basic family is preserved. The baby

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[427] Scott, *supra* note 222 at 894.

[428] There are various situations wherein married couples or single persons avail of IVF. Flannery, Weisman, Lipsett, and Braveman enumerate "at least five essential hypothetical situations which should be kept in mind to raise the relevant legal issues related to *in vitro* fertili[z]ation." The enumeration is as follows:

1. Utili[z]ation of IVF by a married couple where the ovum and semen are contributed by the wife and husband and the embryo is implanted in the wife. Assume also that procreation by the couple would otherwise be impossible.
2. Utili[z]ation of IVF by a married couple where the ovum is contributed by the wife but the semen is donated by a third party because the husband is sterile, and the embryo is implanted in the wife. Assume also that procreation by the couple would otherwise be impossible. (An alternative hypothesis is where the sperm is donated by the husband but the ovum is donated by a third party. The analysis of this situation should be the same.)

born of IVF is raised in a traditional environment wherein the baby has heterosexual parents. The fact that the heterosexual parents are married to each other also strengthens the family and marriage as an institution. In this situation,

> [w]hen IVF treatment is achieved using sperm and ovum from the intended social parents, and where the resultant embryos is implanted in the intended social mother, genetic truth coincides with gestational and social reality and no problems of legal definition arise.[430]

On the other hand, when an unmarried heterosexual couple undertakes IVF, a family not sanctioned by marriage grows. This greatly affects the status of the children born to these couples. Will the laws on legitimation of a child embodied in the Family Code[431] apply? If these existing laws apply, is this tantamount to giving equal treatment to children born naturally and children born through assisted reproductive technologies such as IVF?

The scenario worsens when a homosexual couple is given access to IVF. This union will produce children which may be considered as so-called born of homosexual parents. The status quo remains that homosexual marriages are not recognized by our laws. In addition to the lack of any legal sanction to the homosexual union, the legalities of oocyte or egg donors and sperm donors will be questionable.

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3. Utili[z]ation of IVF by a married couple where the ovum and sperm are contributed by the wife and husband and the embryo is implanted in a third party surrogate. Assume also that procreation by the couple would otherwise be impossible. (Alternatives to this hypothesis could involve the sperm of a third party donor or the ovum of a third party donor.)
4. Utili[z]ation of IVF by a single woman where she contributes the ovum, and the sperm is donated by a third party and the embryo is implanted in the single woman. Assume also that procreation by the single woman would otherwise be impossible.
5. Use of embryo transfer by a married couple where a surrogate is artificially inseminated with the husband's sperm, an embryo is then removed from the surrogate and the embryo is implanted in the wife. Assume that the wife otherwise could not bear a child.

Flannery, et al., *supra* note 224 at 1305-11. *See also* Vetri, *supra* note 6, at 521.

[429] See the first hypothetical situation described in note 442.

[430] Jacqueline Priest, *Assisted Reproduction—Developments in England*, 37 INT'L & COMP. L.Q. 535, 543 (1988).

[431] *See* FAMILY CODE, arts. 177–182.

Furthermore, unregulated IVF poses the following question, "[s]hould the procedures be available to single women?"[432] In the event, single women[433] avail of IVF as a cure to infertility, then it is possible to have a family with only a mother and a child. Though it is a reality that some children nowadays are born of unwed mothers, it is quite different to implicitly allow single women to bear children by not restricting access to IVF. Again, the legal issue with respect to sperm donors should be looked into and settled.

2. Paternity and filiation

As a consequence of the easy access to IVF by persons regardless of their marital status and gender preference, the matters of paternity and filiation will also be affected. Definitely legal parentage will depend on quite a number of factors like who consents to the IVF, whose ova and sperm are used and who intended to be the parents of the resulting infant.

Vetri expounds on this legal issue—

> No particular knotty problems arise regarding child or parental status of the ovum and sperm are from the husband and wife and the embryo is implanted in the wife. If the sperm is from a donor and the ovum is from the wife, then it is important that the husband be recogni[z]ed as the legal father and the donor's interests be cut off. The intent of the parties is the governing interest here . .
>
> If the ovum is from a donor and the sperm is from the husband, and the embryo is implanted in the wife, the wife should be recogni[z]ed as the legal mother. In fact her position is stronger than the husband in the previous example because she carried the baby to term and has been the necessary life-support of the child; she is a gestational mother. Indeed the baby may not be genetically related to the wife but she is biologically related. Intent plus the gestational characteristics would easily lead the courts to declare the wife the legal mother . . .[434]

Establishing paternity is essential for a number of reasons. For one, the status of the child will be determined based on the child's parentage. Whether or not a child is legitimate affects his economic rights, specifically his successional

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[432] Vetri, *supra* note 7, at 525.

[433] See fourth hypothetical situation described in note 442.

[434] Vetri, *supra* note 7, at 526.

rights.[435] For another, it is also important that IVF children "be able to trace their biological and gestational heritage for physical health and psychological reasons."[436]

3. Legal status of the embryo

This legal problem area[437] may be considered as the most controversial aspect of utilizing IVF. Vetri asserts that "[t]he status of the embryo is perhaps the most difficult legal question to be resolved . . . . "[438] There are two schools of thought with respect to the status of the embryo. The first school of thought believes that "the embryo is a human being and must be accorded all the rights of humans and that the destruction of an embryo would be tantamount to murder."[439] The second school of thought believes that the embryo is not a juridical person however, it must be treated with respect. It is common to "[v]irtually all commentators . . that the embryo is worthy of respect and must be treated accordingly."[440]

a. The embryo is a human being

As previously mentioned, the first school of thought in the embryo debate firmly defends the position that the fertilized ovum must be accorded the status of a human being. The Louisiana Human Embryo statute which was enacted in 1986

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[435] *See generally* CIVIL CODE, arts. 774–1105.

[436] Vetri, *supra* note 7, at 525-26. Vetri analyzes the legal issue on the legal status of children and parenthood by using by analogy existing AID statutes as legal framework.

[437] *See* Marie-Claude Gaudreault, *L'embryon en droit français: titulaire d'un statut juridique?*, 28 REVUE GÉNERALE DE DROIT 467 (1997). Gaudreault asserts that:

> [r]ecent progress in biotechnology has led to important discoveries in the field of life sciences and human reproduction. These discoveries have revived *the debate over the legal status of the embryo* . This dilemma is not a new one; it has persisted since the Roman law period. What is new, however, is the context in which is it is now raised: *reproductive technology*. (emphases supplied)

[438] Vetri, *supra* note 7, at 526. "The determination of when personhood begins remains an open question." Stephen C. Hicks, *The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society*, 19 FLA. ST. U. L. REV. 805, 820 (1991).

[439] Krimmel and Foley, *Abortion: An Inspection Into the Nature of Human Life and the Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725, 756-757 (1977) as cited in Vetri, *supra* note 6, at 526.

[440] Vetri, *supra* note 7, at 526.

adhered to this belief by "designating the embryo as a juridical person."[441] It is contended that "[i]t is an undeniable medical fact that the *in vitro* fertilized ovum is a union of human male sperm and human female ovum, requiring the conclusion that the fertilized cell is itself a *human cell.*"[442] The product of IVF is neither an "animal, vegetable, or mineral."[443] Thus, an "*in vitro* fertilized ovum is a germinated genetic embodiment of a novel human life. The newly united cell, or zygote, is a fertilized human ovum and has the *potential* to develop into a human person."[444]

According to this view, to treat the human embryo as merely tissues is to defy biological and scientific facts.[445]

b. The embryo is more than a tissue, but less than a human being

The second school of thought treats the fertilized ovum as a potential human being. This school of thought maintains that "the early embryo is genetically unique, living and human, with the potential to achieve personhood, but denies that those features and potential make the prenatal, living human entity a subject of rights or duties."[446] The Ethics Committee of the American Fertility Society adheres to this point of view. This committee pronounced that

> [t]he pre-embryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The pre-embryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, it is not yet established as developmentally individual, and may never realize its biologic potential.[447]

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[441] John Bologna Krentel, *The Louisiana "Human Embryo" Statute Revisited: Reasonable Recognition and Protection for the In Vitro Fertilized Ovum*, 45 LOY. L. REV. 239, 239 (1999) (citing LA. REV. STAT. ANN. § 9:121-133 (West 1991)).

[442] *Id.* at 240.

[443] *Id.*

[444] *Id.* at 240-41.

[445] *Id.* at 241.

[446] *In the Beginning*, *supra* note 200, at 445.

[447] ETHICS COMMITTEE OF THE AMERICAN FERTILITY SOCIETY, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND SOCIETY, SUPPLEMENT NO. 1 328 (September 1986) as cited in Pitrolo, *supra* note 14 at 171.

The human embryo cannot be considered a human being because the human embryo lacks the usual attributes of persons or rights-bearing entities.[448] The human ability to interact is different from the potential of the human embryo to actually interact. Genetic uniqueness is not sufficient to confer the embryo the status of a person.[449] However, it is more than a living tissue because it has the potential to develop into a human being. Thus, it is deserving of proper care and respect.

4. Prenatal injury

Generally, IVF procedures form part of a medical practitioner's treatment. It may be safely presumed that persons undergoing IVF procedures are under the care of doctors well-versed with this special kind of infertility treatment. However, it may not be guaranteed that the embryo will not be injured in any way.

It is a reality that "[h]arm to the embryo, and consequently to the potential child, can occur in various ways."[450] It has been found that

> [w]ithout proper care, and even in the absence of research, *contamination of the egg* can occur at any point after it has left the ovary through contamination of the petri dish, the culture medium, or the syringes used for implantation. When the clinic has cryostorage capabilities, . . . the *risks to embryo will increase*. (emphases supplied)[451]

Actually, "the longer the embryo is outside the body and the more that is done to it, the greater the risk of harm to the potential child through negligent treatment."[452] Thus, injury to the embryo may be caused by negligence on the part of doctors or medical practitioners.

Aside from negligent treatment, intentional acts may also cause harm to the embryo. Another "major risk of harm to the potential child is by willful

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[445] *In the Beginning*, *supra* note 200 at 444.

[449] *Id.*

[450] Lisa Tichauer, *Proposed Legislation to Regulate the Practice of In Vitro Fertilization in New Jersey*, 38 RUTGERS L. REV. 403, 409 (1986).

[451] *Id.* at 409-10.

[452] *Id.* at 410.

disruption of the embryo through toxicological or genetic experimentation."[453] For example,

> [s]ome researchers may decide that prior experimentation through embryology or the use of animal subjects warrants the risk of attempting a study on human subjects. If, however, a researcher underestimates the risks involved, a hoped-for cure at the embryonic stage of life could result instead in a malady in the child born through the experiment. Thus, a researcher using IVF runs the risk of harming a potential child when implantation after experimentation is attempted, unless the researcher is justified in believing that a child born through the experiment will probably be normal.[454]

Prenatal injury caused either by the negligent or willful acts of those persons responsible for the IVF procedure raises the legal problem area as to what remedy is to be given to those injured. Is prenatal injury an actionable wrong? It should be determined whether the cause of action of the child or person injured is a tort or a crime? At present, "[a]n injury to a child born through IVF, whether harmed through negligence or willful manipulation prior to, or at the time of, conception is an injury that the law does not adequately acknowledge . . ."[455]

It may be viewed that an infant born of an *in vitro* fertilization process, but with a genetic deficiency or other abnormality, would be within his rights to sue the experimenter-physician and the participating hospital for negligence, specially for damages caused by prenatal injury and for wrongful life.

Clearly, there is a need for a remedy in situations such as prenatal injury or what may be called as a claim for wrongful life. Also, with the threat of any penalty, physicians and IVF practitioners may improve their services and give utmost responsible treatment.[456]

However, this position is opposed by a general public policy argument.

> A public policy argument has been the most resilient and pervasive rationale by far for denying a cause of action to a child whose claim is

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[453] *Id.*

[454] *Id.*

[455] *Id.* at 410-11.

[456] Antithetically, "[n]ot allowing [prenatal injury] claims effectively immunizes physicians from liability and thus fails to deter professional irresponsibility." *Id.* at 419-20.

> that it would be better never to have been born at all than to live with defects. . . *life, in whatever form, is precious.* (emphasis supplied)[457]

The counter-argument to remedying prenatal injury is based on the value of life— whether or not born with abnormalities or defects. To compensate a person suffering from prenatal injury is tantamount to a diminution of the value of life.

Another public policy argument against granting of prenatal injury claims is the prevention of fraudulent claims. Indeed, "the possibility of fraud in the claims is heightened by the difficulty of proof."[458]

Aside from reasons of public policy, suits based on prenatal injury are discouraged because it is worrisome for the courts to establish causality of the claims.[459]

5. Cryopreservation and embryo research

Cryopreservation proved to be a useful procedure in conducting IVF. However, cryopreservation stirred legal debates as to the status of the embryo with respect to the preservation, transfer, and experimentation of human embryos. Cryopreservation raises numerous questions like:

> How long may embryos be stored? Can they be transferred for implantation in another woman? Who has the right to make such a decision? What happens if the wife, husband or both die while the embryos are stored? Can the embryos be used for research and can they be terminated?[460]

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[457] *Id.* at 412. Bowie asserts—

No justice is served by subjecting the frozen embryos' parents, and the legal system to the costs and heartaches of what should be a very private matter. The potential legal battles over the human status of an organism consisting of four to eight cells that are unlikely to reach birth seems most unjust.

Bowie, *supra* note 191, at 177.

[458] *Id.* at 415.

[459] *Id.* at 413. Equally significant in the court's denial of a child's cause of action for prenatal injury has been the attenuated causality of claims.

[460] Vetri, *supra* note 7, at 526.

Also, cryopreservation stirs the debate on the proper disposition of unused or unwanted cryopreserved embryos.[461] Prior unequivocal agreement by the consenting parties may possibly provide a solution to this problem.[462]

Hence, these are some of the problematic questions regarding IVF research. Before these questions may be resolved, it is necessary to determine whether the embryo should be treated as a human being or as property.[463]

C. Surrogacy

1. Change in the concept of family

Philippine law is silent on the practice of surrogacy. At the same time, there is no express prohibition in utilizing this assisted reproductive technology. Hence, its practice has been highly speculative. At present, there is yet to be a case brought to court resulting from surrogate motherhood contracts. But this is not to say that there are no such contracts entered into or being entered into by Filipinos. It is more likely that the parties have not resorted to judicial remedies in resolving disputes. Be that as it may, surrogacy gives rise to a number of problems in family law.

Our Family Code has a very restrictive definition of the family.[464] A man and a woman bound by legitimate ties of marriage is the basis for the creation of a family. However, changes wrought by technology in the basic procreative process[465] have expanded the notion of a "traditional family."[466] As earlier discussed, it is the technologies of IVF and AI which gave birth to surrogacy as an alternative form of reproduction.[467] At present, the lack of regulation limiting these two technologies to legally married heterosexual couples might result in family relationships not sanctioned by the state. For instance, homosexual couples

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[461] Howard W. Jones, Jr., *Children of Choice: A Doctor's Perspective*, 52 WASH. & LEE L. REV. 225, 231 (1995).

[462] *Id.*

[463] For a comprehensive discussion on the debate whether or not the embryo is property, see Bowie, *supra* note 190, at 164-71.

[464] *See* FAMILY CODE, art. 1.

[465] Shultz, Marjorie Maguire, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 298, 300.

[466] This traditional family ideally consisted of two married parents living in a household with their biological children. Dolgin, *supra* note 241 at 229.

[467] See *supra*, note 91.

may resort to surrogacy, using either a sperm or egg donated by anonymous donors, in order to raise children who are biologically related to either one of them.[468]

2. Paternity and filiation

In addition to the above-mentioned issue in family law, the practice of surrogacy may result in confusion in the traditional understandings about rules in determining maternity[469] and parental rights in our jurisdiction. Traditional concepts on motherhood become precarious. Stumpf opines, "[T]he legal definition of *mother* has traditionally carried an unshakable presumption: She was the one from whose womb the child came (emphasis supplied)."[470] With surrogacy, however, there is a third person involved—the woman who shall bear the child.[471] And in disputes resulting from who should be the legal parents of a child born out of a gestational surrogacy arrangement, the California Supreme Court, specifically in *Johnson v. Calvert*, granted parentage to the *intending genetic parents of the baby* (emphasis supplied).[472] Hence, strict biological ties may give way to intention in determining parentage. Since surrogacy arrangements are almost always embodied

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[468] Dolgin, *supra* note 242, at 233. Within the last two decades, cases occasioned by reproductive technology primarily have involved disputes about the consequences of surrogacy arrangements and disputes about cryopreserved (frozen) gametes and embryos. Of those cases involving disputes about surrogacy arrangements, some have involved the artificial insemination of surrogate mothers. *See, e.g., In re* Baby M., 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), 537 A.2d 1227 (N.J. 1988). This case should be termed a "traditional surrogacy case – with the goal of creating a baby to be raised by the genetic father and his wife. Other so-called traditional surrogacy cases have involved surrogates entering into agreements with single people, unmarried heterosexuals, or same-sex cohabitants as the intending parents. Still other surrogacy cases, termed "gestational" rather than "traditional" have involved surrogates gestating embryos created from donated ova. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

[469] Dolgin, *supra* note 242, at 279.

[470] Andrea Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 187 (1986).

[471] *See ART and the Family*, *supra* note 21. To buttress this fact, Robertson moreover asserts, "[A]ssisted reproductive techniques involving donors and surrogates raise additional issues because of the complications engendered by third-party contributors to family formation. *See also* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 197 (1986). There are two maternal actors in surrogate arrangements: the intending mother who initiates the biological process and later fulfills the social process of child rearing, and the surrogate mother who carries out the biological process and then ends her role as mother.

[472] Dolgin, *supra* note 242, at 235.

in a contract,[473] it has often been asked whether a contract can serve as a basis for parental rights.[474]

For traditional surrogacy, while the biological mother remains to be the surrogate, whatever maternal ties the surrogate has with the child are deemed surrendered upon delivery of the child. And in the absence of a legislative requirement for adoption by the commissioning wife, the same will be considered, for all intents and purposes, the legal mother. Surely there will be problems on successional rights of the child. Does the child still have the right to inherit from the surrogate as in the situation contemplated in an adoption? Or is such right precluded from the moment parental rights are deemed "surrendered?" Corollarily, does the child have the right to inherit from the grandparents of the commissioning wife, the child having no strict biological ties with the latter? These are just a few queries that may result herefrom.

Another legitimate concern arises when the gestational mother is also related to either of the commissioning couple. Double relationships may result that consequently affect successional rights. In extreme cases, the gestational mother is both the natural mother and grandmother of the child.

3. Custody disputes

Custody disputes figure largely when one of the parties to a surrogacy arrangement does not comply with his or her obligation. In this case, one party asserts his or her parentage over another, asserting that it is he or she who is entitled to the custody of the child born or to be born. It is interesting to note that the parental status of the parties profoundly affects the custody determination of the best interests of the child.[475] However, courts have long held that primary custody should be granted to the parent who would best serve the interests of the child,[476] and that when the parent's and child's interests conflict, the child's

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[473] *See* Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. OF FAM. L. 263 (1982). This article discusses a typical surrogate mother contract agreement. The author gives comments on each of the provisions embodied in the contract and its effect on possible breach by either of the parties.

[474] Russell, *supra* note 55, at 627.

[475] *Id.* at 600.

[476] *Id.* at 627. The court in *In re Baby M Case*, 537 A.2d 1227 (N.J. 1988) held that on the custody determination itself, the court noted the distinction between giving effect to a contract and considering the existence of the contract as a circumstance. The court ruled:

interests must prevail.[477] In one case, a United States court ruled that the "best interests" of the child is the controlling issue.[478] In other cases, the courts have ruled that even assuming that intent-based parentage is used to determine who has parental rights, it is still the "best interests" of the child which will be the only basis for determining custody of the child.[479] As a result, while courts refused to base parentage strictly on a surrogacy agreement, assuming it is void, the courts have not categorically laid down a rule on determining parental rights and custody and whether these two concepts are mutually exclusive or not.

4. Conflict-of-laws

While a number of states have enacted legislation on surrogacy contracts, it still remains largely unregulated. When drafting and enacting statutes, however, state legislatures rarely consider conflict-of-laws questions.[480] This issue is important in determining the validity, efficacy and enforceability of a surrogate motherhood contract when there are more than one jurisdictions involved. Appleton describes the "worst-case scenario," from the perspective of a state seeking to restrict surrogacy (hereinafter called the restrictive state),[481] as a situation wherein individuals seeking to evade local restrictions will attempt to obtain judicial decree of adoption (of a child born out of a surrogate agreement) in a more hospitable jurisdiction.[482] Appleton stipulates four paradigm cases:

> (1) First, a couple from the restrictive state and a surrogate from the same state might conclude an otherwise local arrangement by completing adoption proceedings along with the transfer of custody and payment in a more hospitable jurisdiction;

We must now decide the custody question without regard to the provisions of the surrogacy contract that would give Mr. Stern sole and permanent custody. (That does not mean that the existence of the contract and the circumstances under which it was entered may not be considered to the extent deemed relevant to the child's best interests.)

[477] *Id.* at 600.

[478] *Id.* at 599. *See* In re Baby M. Case 537 A.2d 1227 (N.J. 1988).

[479] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

[480] Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict-of-Laws*, 1990 WIS. L. REV. 399, 400 (1990) (*See* B. CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, *in* SELECTED ESSAYS ON CONFLICT-OF-LAW RULES 77, 82, 84 (1963)).

[481] *Id.* at 401.

[482] *Id.* at 401-02.

(2) Second, a couple from the restrictive state and a surrogate from the same state might travel to another jurisdiction to prepare and sign the agreement (containing an explicit stipulation for this jurisdiction's law), to perform the artificial insemination, and to deliver the resulting child – from the uterus of the surrogate to the arms of the couple; payment and adoption in this jurisdiction might follow;

(3) Third, a couple from the restrictive state might seek a surrogate domiciled in a more hospitable jurisdiction, then travel there for the execution of the agreement, the insemination, the transfer of custody, the payment and the adoption proceedings; and

(4) Finally, a woman from the restrictive state, eager to receive payment for serving as a surrogate and for relinquishing the resulting child, might travel to a more hospitable jurisdiction to participate, with a couple domiciled there, in both a transaction and an adoption in that jurisdiction.[483]

In all the above instances, the parties to a surrogacy contract rely on different laws in determining not only the efficacy of the contract but also their parentage. As earlier discussed, different states have passed their respective legislation on the matter and the doctrines have been varied. It can be therefore seen that different legal systems define both "mother" and "father" in different ways, and the potentiality is created for a real conflict-of laws issue to arise, the question being: Which legal system gives the rule for determining parentage?[484] For instance, if a relationship of parent and child has been found or established by judicial decree from a foreign country then recognition of that relationship in Scotland or England will depend upon the Scottish or English rules governing the recognition of foreign decrees.[485]

Another major concern is how to characterize parentage issues. When a person invokes the power of the courts to recognize one as either the child of one or the parent of another, what is he or she asking to be recognized?[486] What might

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[483] *Id.* at 402.

[484] Kenneth McK. Norrie, *Reproductive Technology, Transsexualism and Homosexuality: New Problems for International Private Law*, 43 INT'L. & COMP. L. Q. 757, 760 (1994).

[485] *Id.*

[486] *Id.* at 761-762.

be asked is recognition of either the parent-child relationship itself or the status of an individual party to that relationship.[487] It is important to know exactly what is sought to be recognized because different conflict-of-laws rules govern for each.[488] One school of thought asserts that the issue is clearly one of status.[489] Another school of thought maintains that parentage is not an issue of status at all.[490] The better approach is to regard parentage as an issue that affects the status of both, but which is in essence a relationship between the two.[491] This means that the basis for recognition must be something that looks into the relationship itself between the parties rather than the legal position of the involved.[492] It is suggested that the law which has the closest and most real connection with the relationship at issue is the appropriate legal system to determine whether the relationship is recognized as one of parentage.[493] The parent-child relationship is a two-way relationship and the country with which that relationship is most closely connected with seems ideally suited to determine whether such a relationship exists.[494]

IX. ETHICAL CONSIDERATIONS

> *To put radically asunder what God joined together in parenthood when He made love procreative, to procreate from beyond the sphere of love ... or to posit acts of sexual love beyond the sphere of responsible procreation (by definition, marriage), means a refusal of the image of God's creation in our own.*
>
> —*Paul Ramsay*[495]

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[487] *Id.* at 762.

[488] *Id.*

[489] *Id*

[490] *Id.*

[491] *Id.*

[492] *Id.*

[493] *Id.* at 763.

[494] *Id.* at 764.

[495] PAUL RAMSAY, FABRICATED MAN: THE ETHICS OF GENETIC CONTROL 39 (1970), *cited in* Richard A. McCormick, S.J., *Reproductive Technologies: Where are we Headed*, 45 LOY. L. REV. 269, 280 (1999).

A. Artificial intervention in a sanctified natural process

Special moral questions arise in relation to some fertility therapies.[496] The concept of marriage as a union of "one flesh" derives from the account of creation in the Book of Genesis[497] and is appropriated by the New Testament.[498] This is the standard point of reference in magisterial teaching on Christian marriage[499] which is further explained in The *Donum Vitae's*[500] exposition, "[t]he Church's teaching on marriage and human procreation affirms the inseparable connection, willed by God and unable to be broken by man on his own initiative, between the two meanings of the conjugal act: the unitive meaning and the procreative meaning."[501] However, with the introduction of ARTs, this concept of reproduction through strict spousal procreation has changed.[502] Through AI, IVF, and surrogacy, ARTs have paved the way for infertile couples to have children of their own through medical intervention, thus making these procedures substitutes for spousal intimacy. Hence, critics of ARTs espouse the idea that their use raises such important ethical questions as to the meaning of parentage, the values of family, and the sanctity of what some feel to be the natural order of human spousal procreation.[503]

B. ARTs as threat to the unity of marriage

It is believed that the use of ARTs erodes the concept of marriage as an institution. *The Donum Vitae* regards the use of third party gametes as "a violation of the reciprocal commitment of the spouses and a grave lack in regard to that essential property of marriage which is its unity."[504] It further states that "[t]he

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[496] Lisa Sowle Cahill, *In Vitro Fertilization: Ethical Issues in Judaeo-Christian Perspective*, 32 LOY. L. REV. 337, 338 (1996).

[497] Genesis 2.24 as cited in William Joseph Wagner, *The Ethical and Legal Implications of Hired Maternity*, 1990 AM. J. JURIS. 187, 191 (1990).

[498] *Id.* citing Matthew 19:4-6; Mark 10:5-8; Ephesians 5:31.

[499] *Id.*

[500] CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (1987).

[501] *Id.* at 23-25 as cited in Richard A. McCormick, S.J., *Reproductive Technologies: Where are we Headed*, 45 LOY. L. REV. 269, 282 (1999).

[502] Clifford Grobstein and Michael Flower, *Current Ethical Issues in IVF*, 12 CLINICS IN OBSTETRICS AND GYNECOLOGY, 877, 878 (1985).

[503] *Id.* at 878.

[504] Richard A. McCormick, S.J., *Reproductive Technologies: Where are we Headed*, 45 LOY. L. REV. 269, 279 n 45 (1999).

fidelity of the spouses in the unity of marriage involves reciprocal respect of their right to become a father and a mother only through each other."[505]

The common denominator in each of these ARTs is the involvement of third persons either as gamete donors or as gestational mothers and physicians who facilitate the procedure, in which case procreation is consummated with someone other than the legitimate spouse. In the strict sense, this violates the supposed sexual exclusivity between spouses of a valid marriage; hence, it can even be interpreted as adulterous.[506]

For instance, the Church has a view that surrogacy and other technologies of non-conjugal procreation are sinful.[507] The Church states that its position is not a policy decision, nor a precept based on outdated religious motives; rather, it argues that its position is a necessary defense of human values.[508] Human values require that any activity separating sex from procreation be excluded because it is morally wrong.[509] This position implies that participation of a third party such as a surrogate mother threatens the sanctity of a traditional family unit.[510]

There is also the probability of incest in instances of ARTs. There is a recorded case of a marriage in Tel Aviv, Israel between two AID children who have the same father[511] and another case in the United States.[512] The probability

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[505] *Id.*.

[506] In *Orford v. Orford*, 49
OLR 15 (1991), the court held that AID constituted adultery because:
[t]he essence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of adultery.

[507] Stuhmcke, *supra* note 56, at 1 (citing L. ANDREWS, BETWEEN STRANGERS, Harper & Row, New York (1989) which cites the official policy statement of the Vatican Congregation for the Doctrine of the Faith, Instruction on Report for Human Life in its Origin and on the Dignity of Procreation (1987)).

[508] *Id.*

[509] *Id.*

[510] *Id.* at 1.

[511] Shaman, *supra* note 25 at 339 (citing Hoffer, *The Legal Limbo of AID—Artificial Insemination by Donor*, MODERN MED., at 27 (1979)).

[512] *Id.* at 339 (citing Hoffer, *The Legal Limbo of AID—Artificial Insemination by Donor*, MODERN MED., at 27 (1979)).

of incestuous marriages increases dramatically as many doctors tend to use the same AID donors over and over again. [513]

Finally, another problem posed by the ARTs is the possibility of confusing lineage. For example, grandmothers may now give birth to their own grandchildren.[514]

ARTs also violate the notion of conjugal exclusivity which should include the genetic, gestational, and rearing dimensions of parenthood.[515] Of AID, Lauritzen says, "AID introduces life experiences that cannot be fully shared. This lack of mutuality may interfere with the couple's ability to care for and to love the child that is created."[516]

C. Promotion of single-sex families

The Donum Vitae regards the use of gametes from third parties as "a violation of the reciprocal commitment of the spouses and a grave lack in regard to that essential property of marriage which is its unity."[517] It is asserted that third party involvement separates procreation from marriage *in principle*. This opens the door to the formation of families by gay men, lesbians, single people, and post-menopausal women, visibly threatening the traditional image of the two-parent,

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[513] *Id.* at 339 (citing Currie-Cohen, Luttrell, and Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. L. REV. 585, 585 (1979).

[514] Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 951 (1996) (citing John B. Battersby, *South Africa Woman Gives Birth to Three Grandchildren, and History*, N.Y. TIMES, 2 October 1987, at A9). Arlette Schweitzer gestated and gave birth to twins created in vitro by the union of her daughter's ova and her son-in-law's sperm. *See* Djalleta, *supra* note 239, at 364.

Commentators have also raised concerns about cross-generational giving, which could lead to a situation such as a woman gestating her own sister. The American Fertility Society's Policy is that the transfer of embryos from one generation to another is "unacceptable." *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 54S, 55S (Supp. 1 1986). It is unclear whether the American Fertility Society is concerned about "incest" or about confusion resulting from a woman gestating and raising a child who is also her grandchild, niece, nephew, sister, or brother..

[515] McCormick, *supra* note 504, at 280.

[516] *Id.* at 279 (citing Paul Lauritzen, *Pursuing Parenthood: Reflections on Donor Insemination*, SECOND OPINION July 1990, at 57.

[517] McCormick, *supra* note 504, at 279 (citing DONUM VITAE at 23-26).

heterosexual, biologically-connected family.[518] Ultimately, the accessibility of ARTs has the potential to destabilize the traditional concept of the family, as is suggested by the fact that conservative organizations, such as the Catholic Church, are opposed to these technologies.[519]

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[518]Rao, *supra* note 514, at 959. *See e.g.* Loftin v. Fluornoy, No. 569630-7 (Cal. Super. Ct. Jan. 2, 1985 as cited in E. Donald Shapiro and Lisa Schultz, *Legal Essay Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 272 n.4 (1986). In this case, the court ruled that the plaintiff, enjoyed the status of a de facto psychological parent and thus was entitled to visitation rights to the child born to her former lesbian lover who was artificially inseminated with the semen of the plaintiff's brother.

Id. at 271.* *See also* C.M. v. C.C., 377 A.2d 821 (Juv. and Dom. Rel. Ct. 1977). This case dealt with the parental rights of a donor who was not married to the recipient in an AID procedure. The court granted the donor visitation rights and held that when a donor intends to act as the father and the intention is made known to the woman, he is indeed the legal father of the child despite their marital status.

[519] Rao, *supra* note 514, at 958. In his most recent encyclical letter "on the value and inviolability of human life," Pope John Paul II condemned assisted ARTs, stating:

The various techniques of artificial reproduction, which would seem to be at the service of life, and which are frequently used with this intention, actually open the door to new threats against life. Apart from the fact that they are morally unacceptable, since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure: not just failure in relation to fertilization, but with regard to the subsequent development of the embryo which is exposed to the risk of death, generally within a very short space of time. Furthermore, the number of embryos produced is often greater than that needed for implantation in the woman's womb, and these so-called 'spare embryos' are then destroyed or used for research, which, under the pretext of scientific or medical progress, in fact reduces human life to the level of simple 'biological matter' to be freely disposed of.

On the Value and Inviolability of Human Life, Evangelium Vitae, Addressed by Pope John Paul II, March 30, 1995, Chapter I, Paragraph 14. In the same encyclical, the Pope also expressed reservations about prenatal diagnosis, observing:

Special attention must be given to evaluating the morality of prenatal diagnostic techniques which enable the early detection of possible anomalies in the unborn child ... When they do not involve these proportionate risks for the child and the mother, and are meant to make possible early therapy or even to favor a serene and informed acceptance of the child not yet born, these techniques are morally licit. But since the possibilities of prenatal therapy are today still limited, it not infrequently happens that these techniques are used with a eugenic intention which accepts selective abortion in order to prevent the birth of children affected by various types of anomalies. Such an attitude is shameful and utterly reprehensible since it presumes to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well.

Id. Chapter III, paragraph 63.

D. Commodification

One of the more compelling criticisms against ARTs is commodification. The word "commodification" builds on the word "commodity," and in one sense "commodity" has a very broad meaning: it can cover "something that can be bought and sold," or "a movable article of trade or convenience."[520] The issue of commodification hinges on the contention that reproductive capacity and all its incidents are treated as commodities.

Paul Lauritzen argues that the goal-oriented production mentality in infertility treatment lends some support to the claim that once procreation is separated from sexual intercourse, it is difficult not to treat procreation as the production of an object to which one has the right as the producer.[521] While not strictly adhering to this argument, Lauritzen, for purposes of academic discourse, refers to the Vatican's ideal of "unified totality" and warning of "one of the central difficulties of reproductive medicine: it approaches human reproduction as if it were nothing more than the union of bodily parts, namely of gametes."[522] To illustrate, IVF, AID, and surrogacy contracts allow the participation of third parties who either donate gametes, eggs or volunteer to act as gestational mothers. When some form of consideration is used in either of these processes then one can say that the result is commercialization of reproductive materials. At the very extreme, it could be said that the intent to assist couples with infertility problems may be overshadowed by the motive of third person participants gaining pecuniary advantage.

Another aspect of commodification is that ARTs are akin to baby-selling. In surrogacy, for instance, critics maintain that the act of giving up parental custody over a child and receiving "consideration" for health, transportation expenses and the like has reduced the transaction to a mere sale of babies. Critics of the transaction contend that payment to the surrogate mother represents compensation for her agreement to terminate her parental interest and to allow the natural father and his wife to take custody of the child.[523] The children then

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[520] Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2326 (1995).

[521] Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1192 (1986) (citing Paul Lauritzen, *Pursuing Parenthood: Ethical Issues in Assisted Reproduction* xiv, xiv (1993)).

[522] *Id.* at 1192 (citing Paul Lauritzen, *Pursuing Parenthood: Ethical Issues in Assisted Reproduction* xiv-xv at 5-6 (1993)).

[523] Bitner, *supra* note 258, at 235.

become mere commodities that could be traded just as in any ordinary goods market. Where one views the surrogate transaction from the perspective of the commissioning couple whose goal is to obtain a child, the unavoidable conclusion is that the child is "purchased" and a monetary value is placed on a human person.[524] Critics assert that a surrogate transaction contract is contrary to public policy because the payment of a fee endangers the child's psychological well-being by treating the baby as a mere commercial article.[525] Furthermore, procreation is understood in the Catholic tradition as more than merely transmitting life to a child; rather it is understood to mean both giving biological life to and rearing the child to maturity.[526] Having given life to the child, the parent has the duty and the right to rear it.[527]

It has also been said that ARTs have led to exploitation of women. The human person owes a duty to his or her neighbor not to actualize his or her sexual and procreative powers in a manner reducing the neighbor to a means rather than an end.[528] Many feminists believe that new reproductive technologies, surrogacy in particular, are forms of oppression and the long fight for years to enable women to gain control over their bodies has been rendered nugatory.[529] Most feminist writers see surrogacy as a form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of self-sacrifice, or both.[530] The woman is not treated as an end in herself, as is a wife who becomes a mother.[531] Instead, she is treated as a "vessel" and as a "source" of ova.[532]

Finally, there is also the problem of the disposition of frozen embryos. The introduction of cryopreservation has led to myriad custody battles over frozen embryos. Hence, controversial debate on whether or not frozen embryos be treated as property has ensued. There is likewise controversy as to how a frozen embryo should be regarded—whether as a human being who enjoys full rights, or

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[524] William Joseph Wagner, *The Ethical and Legal Implications of Hired Maternity*, 1990 AM. J. JURIS. 187, 193 (1990).

[525] Bitner, *supra* note 258, at 235.

[526] *Id.* at 229.

[527] *Id.*

[528] *Id.* at 196.

[529] Lieber, *supra* note 47, at 205.

[530] *Id.* at 211.

[531] Wagner, *supra* note 524, at 196.

[532] *Id.*

something which has the mere potentiality of being a human being and therefore, entitled only to some rights and respect.

E. Modification of heredity

Parents also have an interest in the type of children that they could conceive and raise.[533] Thus, ARTs may be employed to further these interests limitlessly. Advances in genetic science and technology, coupled with the use of ARTs, have the potential to encourage proportionate increase in births of those carrying desirable genes by the use of sperm or ova of persons deemed to possess desirable genes in place of the sperm of the husband or the ovum of the wife. This is accomplished through the use of sperm and ovum banks.[534] Professional concern for producing children with desirable traits is reflected in the factors which govern donor selection. Here the donor must be physically healthy, have no dysgenic hereditary traits, have a high spermatozoa count and motility index, and oftentimes, resemble the spouses in racial, physical, and emotional setup.[535]

Even if this practice does not lead society to reduce individuals to a single selectable trait, the proliferation of the practice may more subtly encourage society to lose respect for the dignity of the individual. Our respect for our fellowmen seems premised on our understanding that each individual represents a unique bundle of humanity or, stated differently, that each individual is greater than the sum of his or her parts. This, we are likely to lose if we begin to view our children or the persons with whom we interact as simply a combination of traits.[536]

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[533]Lori B. Andrews, *Prenatal Screening and the Culture of Motherhood*, 47 HASTINGS L.J. 967, 999 (1996).

[534]Lorence L. Bravenec, *Law and the Modification of Heredity Through DNA Chemistry*, 8 J. FAM. L. 13, 21-22 (1968). Dr. Hermann J. Muller was the most prominent advocate of this position. For a statement of his views, see H. Muller, *Genetic Progress by Voluntarily Conducted Germinal Choice*, in MAN AND HIS FUTURE 255, 259-261 (G. Wolstenhome ed., 1963). *See also* Robert M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 439 (1998).

[535] Comment, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457, 466-67 (1949) (citing Weisman, *Selection of Donors for Use in Artificial Insemination*, 50 WEST J. SURGERY 142 (1942)).

[536]Mary A. Crossley, *Choice, Conscience, and Context*, 47 HASTINGS L. J. 1223, 1233 (1996).

Further, reducing individuals to the sum of their traits also threatens to create new, and exacerbate existing bases for social division.[537] Many of the social divisions of today are traceable, at least in part, to social groups focusing on one "part" of individuals, such as their race, color, or sexual orientation, rather than on their humanity. It is easy to castigate a label; but it is difficult to hate an individual when one views him as being a bundle of humanity—with joys, fears, dreams, concerns, vulnerabilities, and strengths.[538]

X. ANALYSIS: RESPONDING TO THE PROBLEM AREAS

Weighing the interests of the state to protect its inhabitants and safeguard its future citizens on the one hand and the interests of infertile couples to bear children, it is suggested that legislation be made to regulate the matter of assisted reproductive technologies. In legislating for this specific concern, it must be "remember[ed] that each regulatory system is contextually unique, combining culture, religion, history, and politics."[539]

The state has an interest in safeguarding the rights of persons to procreate as well as their right to found a family. These are constitutionally mandated rights which the state must protect. Hence, regulating ARTs is a means of safeguarding these rights. Also, the state has an interest in protecting the embryo itself.[540] Whether the embryo is treated as a person, thus safeguarding the right to life, or treated as more than a tissue yet not a person, the state still has an interest in its protection. The consequences brought about by ARTs and its use by Filipinos directly affects the institutions of society such as marriage and family.

A. Coverage: Artificial insemination and in vitro fertilization

The existing law in the Philippines recognizes only artificial insemination, may it be AIH, AID, or AIC. This is embodied in Article 164 of the Family Code:

> Children conceived or born during the marriage of the parents are legitimate.

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[537] *Id.* at 1233 (citing Susan M. Wolf, *Beyond "Genetic Discrimination": Toward the Broader Harm of Geneticism*, 23 J.L. MED. & ETHICS 345, 347-49 (1995)).

[538] Crossley, *supra* note 536, at 1234.

[539] *The Process of Regulating ART*, *supra* note 386 at 249.

[540] Andrews, *supra* note 533, at 361.

> Children conceived as a result of artificial insemination of the wife with the sperm of the husband and his wife, are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child.

Thus, while it is true that artificial insemination is recognized as legal, there is nothing to govern the many details that need to still be regulated. AID began to be recognized and employed on a wide-scale basis as a response to the problem of male infertility.[541] On the other hand, in vitro fertilization and surrogacy are not allowed by law. There is no statute admitting the use of the same and making it lawful. This paper proposes to include IVF, thereby giving it the same legal status as AI.

The IVF method is similar to the AI method in that it is still the wife who gives her ovum, carries the child to full term and gives birth to it. The sperm can either come from the husband, just as it is done with the AI process. But IVF differs from AI in that fertilization occurs outside the womb of the wife. Hence, the method may be different but the material aspects of both procedures are the same. The present laws on family, particularly paternity and filiation will likewise apply to IVF as they apply to AI. For fear of stating the obvious, it is another method which can help infertile couples without running afoul of family law and public policy.

However, the case is different with surrogate motherhood contracts. This paper specifically excludes surrogacy contracts from its coverage. First, the two reproductive technologies above-mentioned are deemed adequate enough to meet the needs of an infertile couple. Therefore, resort to surrogacy is unnecessary. Second, surrogacy contracts, as earlier discussed, involves the participation of a gestational mother who could at the same time be the ovum donor. It is believed that an arrangement like this will give rise to more problems, legal and otherwise, than will benefit the infertile couple. In effect, adopting surrogacy will cause more harm than good. One author asserts that while artificial insemination is a technique of producing children without intercourse, surrogacy is not a reproductive technology.[542] Rather, it is a contractual relationship which involves

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[541] John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 353 (1991).

[542] Povarsky, *supra* note 168, at 411. Bartha Knoppers and Elizabeth Sloss share the same view. Their article puts forth the same contention. Bartha Knoppers and Elizabeth Sloss, *Recent*

the use of reproductive technology, mostly AID.[543] If the couple and the surrogate have entered into a contract, their respective rights and obligations may be determined by the contract terms.[544] To treat a surrogacy contract as merely a contract would mean that it is capable of judicial enforcement. Remedies in law such as specific performance, damages, and rescission are thereby made available to the injured party for any breach thereof. This simplistic treatment presupposes that the contract does not involve a compelling state interest. In truth, a surrogacy contract is not merely a contract but is an arrangement which involves an important public interest that ordinary remedies in law cannot be blindly applied to it lest we ignore the primordial role of the family in our society. In any case, whatever treatment must be afforded to it is subject of widespread controversy and debate. For purposes of this paper, it is believed that it should be excluded in the regulatory legislation hereinafter proposed.

Third, the legal ramifications of allowing surrogate contracts are enormous. For one, it would drastically change our concepts of legitimacy and filiation. The role of the surrogate mother must be clearly defined, otherwise the parent-child relationship will be muddled and issues of parental rights and successional rights, to name a few, will crop up and answers thereto will not be easy to find. Also, as earlier discussed the several cases involving surrogacy contracts were decided on the bases of either the best interests of the child or whether or not the contract *per se* is not contrary to public policy such that judicial enforcement is allowed. There is as yet no clear ruling on the matter as there is still no unanimous legislation in allowing surrogacy nor is the policy behind it definite.

Fourth, over and above the legal difficulties resulting from surrogacy, it is believed that the ethical implications of using a surrogate mother cannot be ignored. As earlier discussed, there are strong arguments against surrogacy because it is tantamount to baby selling and commodification. In addition, several feminist writers believe that it is another form of prostitution and it represents a regression of the women's struggle for independence and equality. It would be hard to look into the motives of the surrogate mother and the infertile couple in such an arrangement. How can the state determine whether or not the intent is

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Developments: Legislative Reforms in Reproductive Technology, 18 OTTAWA L. REV. 663, 707 (1986).

[543] *Id.* at 411.

[544] Suzanne M. Patterson, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 385 (1982).

merely monetary or a selfless giving of oneself to help others? Mere speculations and conjectures are dangerous. Corollarily, it would be too much for the law to assume that motivations are pure and unadulterated. It must be remembered that laws are passed for public policy reasons. Regulation of an activity that is contrary to public morals and policy will defeat the purpose for which the state enacts laws.

Finally, other matters are of particular concern in surrogacy. Gender inequality, social symbolism, matters of commodification, of incommensurability, and of inequality of bargaining power, are very legitimate issues that hamper its full recognition. For such reasons, the proposed law should include only AI and IVF and should expressly prohibit surrogacy.

B. Limiting accessibility

ARTs rarely serve to subvert conventional family norms. Rather than disrupt the stereotypical family as recognized by society, they enable infertile couples to create one. They complete a traditional nuclear family by providing a married couple with a child.[545] Article 164 of the Family Code has limited the application of artificial insemination to married couples. This cannot be said to be a mere accident or oversight. Although it is a fact that children are being born to single-sex families, a state has the wisdom to address such situations.[546] In the Philippines, however, it is only the procreative rights of the married couple which are defended by the constitution.[547] The law itself has assumed that an individual who chooses to marry deserves favorable treatment.[548] Also, traditionally, ARTs have been used to solve the problems of infertile unmarried couples. The basic reason for allowing a married couple to give birth to a child through ARTs—the expression and fulfillment of their love through procreation—does not apply when an unmarried woman or single-sex family, who cannot assure the child a normal, traditional family relationship, wish to procreate.[549] Therefore, restricting access to ARTs only to married couples is the sound policy in legislation attempting to

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[545] Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 936 (1996) (citing JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 145 (1995)).

[546] E. Donald Shapiro and Lisa Schultz, *Legal Essay, Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 281 (1986).

[547] *See* CONST. art. XV, sec. 3(1).

[548] *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 678 (1985).

[549] George P. Smith II, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. , 45 (1979).

regulate it. So long as the *family is the focal point of society*, legal and medical initiatives and safeguards must be explored in order to assure the very success of the family unit and to discover ways to neutralize if not stabilize the "unexpected."[550] Candidates seeking to avail themselves of ARTs must also be infertile, often evidenced by proof that other medical treatment has previously failed to yield a conception, or that the techniques are being sought to avoid the risk of transmission of a serious genetic disease.[551]

C. Protecting parentage and filiation

A significant reason for regulating assisted reproductive technologies is the future of society and country. Historically, courts and legislatures have fostered marriage as the preferred setting for childbearing and have discouraged the birth of illegitimate children.[552] As has been observed, "a due regard for the welfare of the resulting children would militate in favor of particular kinds of regulations . . . ."[553]

Article 163 of the Civil Code states that, "[t]he filiation of children may be by nature or by adoption. Natural filiation may be legitimate or illegitimate." Moreover, article 164[554] of the same law provides for the presumption of legitimacy of children born during the coverture of marriage. IVF births are in accordance with these articles. Since it is the wife who carries the child and gives birth to it, then the presumption of validity is applicable, regardless of who the sperm donor is. This is the same scenario envisioned in the AI process. For as long as both spouses consent to the procedure and the consent is not vitiated by mistake, fraud, violence, intimidation, or undue influence,[555] then it is effective as to the

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[550] *Id.* at 40.

[551] *The Process of Regulating ART*, *supra* note 386, at 255 (citing Infertility Treatment Act, No. 63, part 2, div. 2, § 8 (1995).

[552] Flannery, et al., *supra* note 225, at 1315.

[553] Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 144 (1995).

[554] FAMILY CODE, art. 164.

Children conceived or born during the marriage of the parents are legitimate.

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

[555] FAMILY CODE, art. 166.

Legitimacy of a child may be impugned only on the following grounds:

spouses and valid as to the state. Hence, the child is legitimate. However, the present law recognizes only AID, AIH, and AIC. In order to afford the same courtesy to IVF births, it is suggested that IVF births be recognized in much the same way. In so doing, the provisions on paternity and filiation are still apt. Successional rights remain the same.

D. Necessity of medical intervention

Legislation should attempt to resolve several issues in addition to the question of who may be considered for the assisted reproduction process. The first concern is whether it should be performed only by physicians. It seems that the answer should be in the affirmative, if only from the standpoint of assuring the effectiveness of the limitations on those who are to avail of ARTs. In fact, the standard practice has been to refrain from legal intervention and in effect, to delegate the regulatory function to medicine. Intervention of a physician will make possible the monitoring of the use of ARTs.[556] The number of births through ARTs will be determined and success rates will be properly calculated. The physician can also make sure that only married couples avail of the procedure. In addition, medical intervention is desirable from a health standpoint. By limiting the practice of ARTs to medical specialists, performance of such ARTs by persuasive but ineffective practitioners are avoided. Those without medical background are ill-equipped to perform these risky procedures. Cases in which aggressive infertility treatment is pursued without true informed consent are emblematic of the harms that can flow from two strong triggers of desire: The

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(1) That it was physically impossible for the husband to have sexual intercourse with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child because of:

(a) the physical incapacity of the husband to have sexual intercourse with his wife;

(b)the fact that the husband and wife were living separately in such a way that sexual intercourse was not possible; or

(c)serious illness of the husband, which absolutely prevented sexual intercourse;

(2) That it is proved that for biological or other scientific reasons, the child could not have been that of the husband, except in the instance provided in the second paragraph of Article 164; or

(3)That in case of children conceived through artificial insemination, the *written authorization or ratification of either parent was obtained through mistake, fraud, violence, intimidation, or undue influence.* (emphasis supplied).

[556]Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1030-31 (1996).

providers' desire for profit and the infertile couple's desire for genetically related offspring.[557]

Legislation should spell out the physician's duties to conduct medical examinations and to maintain minimum health standards.[558] This brings us to the problem of donor selection which is probably the most difficult of all the issues legislation has to address. One alternative is the current system in most jurisdictions of leaving the selection process entirely to the individual doctor, with the possible addition of some general guidelines as safeguards. The strongest argument for this approach is that the major considerations in donor selection are medical in nature, such as blood typing and assuring that the donor is in good condition, matters of which a doctor would be most knowledgeable. Also, professional physicians associations and hospital boards may be established. This will lead to collective judgment on the social and medical indications of the use of ARTs. Notably, in performing AI and IVF procedures, confidentiality of records and anonymity of sperm donors must be preserved. It is recommended that these confidential data be preserved by the medical practitioners and copies of which be turned over to the custody of a regulatory commission.

Another alternative is to require permission from a court whose role would remain confidential. Present requirements of filing a copy of consent forms in order to assure the legitimacy of the child do not require formal court approval to the intimate details of the artificial mating process.[559] A requirement of court approval, however, would insert a very substantial measure of judicial control over the whole procedure. It is unlikely that this measure would be favored by those who will press hardest for the legalization of ARTs, who will most likely desire to retain as much of the present procedural secrecy as possible and to treat the practice as a medical matter. Discretion vested in the individual physician, limited only by some clearly health-related standards is the most likely popular provision to meet these desires.

Some children born by ARTs may also need to learn the identities of the biological parents to obtain medical information about them which may be vital to them or to their own children. Another good cause for disclosing the identity of

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[557] Crossley, *supra* note 536, at 1230. *See* Trip Gaegbriel, *High-Tech Pregnancies Test Hope's Limit*, N.Y. TIMES, 7 January 1996, at 1.

[558] Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 803 (1970).

[559] *Id.* at 104. *See also* FAMILY CODE, art. 164.

donors is to prevent incestuous marriages. These situations emphasize the need for medical intervention. It may be the practice of the physician, and statutes can require him, to keep a medical history of the donors. Where this is the case, needed medical information about the donor may be provided to the child without necessarily exposing the donor's identity. Nevertheless, this approach, would not be sufficiently helpful to the child where the medical information on record is incomplete and not up to date. In such an instance, the identity of the biological parent can be disclosed upon court order. [560] The court must use its discretion to determine if there is good cause to disclose the records by balancing the interests of the donor who may have a strong interest in keeping his identity confidential against the strong medical, and perhaps emotional interest of the child.

E. Establishing a regulatory commission

Aside from proposing a comprehensive law, it is also recommended that a commission be established to determine the standards to be complied with by the AI and IVF participants. It is recommended that a governmental agency designed to serve as a watchdog might possibly be the best way to monitor participants of ARTs.[561] The agency will also keep records of the procedures performed. Although using the doctor's files to maintain the records is a relatively simple task and involves less bureaucracy, they do not have the security and longevity which accompany official state records which could be preserved by the agency tasked to oversee the use of ARTs.[562]

Establishing a commission is an accepted method of regulating the new reproductive technologies. This was successfully done by the Warnock Committee in the United Kingdom, the Walter Commission in the state of Victoria in Australia, the Law Reform Commission of Canada, and the New York State Task Force on Life and Law among others.[563] These commissions facilitated the passage of laws such as the Surrogacy Arrangements Act in 1985 and the Human Fertili[z]ation and Embryology Act in 1990 in Britain, as well as the Infertility (Medical Procedures) Act by the state of Victoria in Australia in 1984.[564]

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[560] Shaman, *supra* note 25, at 338-39.

[561] *Medical Technology and the Law*, *supra* note 92, at 1541.

[562] Vetri, *supra* note 7, at 517.

[563] *The Process of Regulating ART*, *supra* note 386, at 251.

[564] *Id.*

This commission is also given the duty to continuously study the developments in reproductive science and technology in the Philippines and in other countries. Issues will be studied and conferences and hearings will be conducted to achieve its secondary function which is to create specific rules and regulations. Mechanisms for enforcement will also be formulated.

F. Cryopreservation and embryo research

In order to address the issues of cryopreservation and embryo research, it is a prerequisite that the legal status of the embryo be determined. These legal consequences of cryopreservation and research are dependent on the treatment given to the embryo. It has been suggested that a possible solution to the embryo debate, whether the embryo be considered a person or property, may be achieved through legislation.

To settle the issue, it is advocated that the embryo be accorded legal status that of a potential human being. Thus, it is not a human being capable of possessing the rights of natural persons, rather it is a genetically unique living human tissue. Early embryos deserve "special respect" because it bears the potential of becoming a human being. Yet, it cannot be treated like property which will be the object of agreements and disposition. Neither can it be the object of legal commerce. Special respect is bestowed upon the human embryo "[p]recisely because the early embryo . . . operates as a powerful symbol or reminder of the unique gift of human existence."[565] Granting the human embryo such a special status in law would accordingly result in proscribing certain disrespectful deeds inclusive of injurious acts. This translates to limitations is carrying out cryopreservation procedures and scientific researches conducted on the embryos.

Research is vital to the progress of ARTs. Research could provide "useful knowledge about birth defects, contraception, cancer, and a wide range of other important topics."[566] However, there is another side to this embryo research. Embryo research gives rise to teeming legal and ethical questions. Taking all things together, embryo research per se is not contrary to the promotion of procreative liberty. But similar to the protection of other rights, it is not boundless and restrictions must be fixed. In fact, advisory committees in the United States,

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[565] *In the Beginning*, *supra* note 200, at 447.

[566] John Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S.C. L. REV. 942, 981 (1986) [hereinafter *Embryo Families*].

Great Britain, and Australia "consistently agreed [that] certain limits on research procedures are justified."[567] Research must be allowed only for a maximum length of time, as well as for legitimate purposes like uncovering medical solutions. The advisory committees in these technologically advance countries propose that "embryos should not be maintained in culture for more than fourteen days . . . "[568] The rationale behind this fourteen-day period is to provide a "conservative estimate of when implantation begins and the embryonic axis, along which the neuromuscular structure of the body will evolve, first appears."[569] This restriction is "intended to avoid the possibility of doing embryo research that possess a rudimentary nervous system and thus might be injured, as well as to symbolize respect for the embryo and potential persons generally."[570]

Hence, what the state regulates in the area of embryo research is not the researcher's choice of the topic of research, instead it regulates the "methods used in the research, in order to protect interests in health, order and safety with which unrestricted research might conflict."[571]

G. Punishing the guilty

To deter violations resulting in the injury to AI and IVF participants and the children born out of these procedures, it is recommended that violators be punished accordingly. The pertinent provisions of the Revised Penal Code on infanticide,[572] intentional abortion,[573] unintentional abortion,[574] abortion practiced by the woman herself or by her parents[575] and abortion practiced by a physician or midwife and dispensing of abortives[576] are adopted to define the crime involved as well as the penalty to be imposed. In addition to these provisions, prenatal injury is also criminalized.

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[567] *Id.* at 983.

[568] *Id.*

[569] *Id.* (citing John A. Robertson, *Embryo Research*, 24 W. ONTARIO L. REV. 15, 33-35 1996)).

[570] *Id* at 983-84.

[571] Flannery, et. al., *supra* note 225, at 1325-26. *See* John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203 (1978).

[572] REV. PEN. CODE, art. 255.

[573] REV. PEN. CODE, art. 256.

[574] REV. PEN. CODE, art. 257.

[575] REV. PEN. CODE, art. 258.

[576] REV. PEN. CODE, art. 259.

Applying the traditional definition of crimes like murder and homicide tend to suggest that there is a requirement that the child be born alive in order to charge a violator of the act committed. For purposes of AI and IVF, these traditional concepts may not suit the interest of the AI and IVF participants. To merely adopt the definition of murder, for example, may result in an anomalous situation as illustrated as follows:

> [I]t is not possible to charge with murder an offender who does the greatest harm to the fetus, i.e., killing it *in utero*, while it is possible to prosecute one who does less harm to the fetus, i.e. injuring it to the point that it survives birth but dies subsequently.[577]

To avoid this anomalous situation, it is necessary to extend the definition of murder and homicide to the killing of the fetus. In effect, a crime which may be properly labeled as feticide should be defined.

There are at least two ways to expand the definition of murder and homicide to apply to the fetus. The first approach is to "extend the common law treatment of [murder and] homicide, as codified in the [state] statute, to include the fetus."[578] This kind of revised homicide statute was legislated in New York and California.[579] The second approach "define[s] intentional harms to the fetus as a separate crime."[580] This kind of legislative enactment was done in Illinois and Iowa.[581] The drawback of choosing the latter approach is "to define the crime very completely and to specify the requisite intent and circumstances, including fetal age, necessary for a conviction."[582] At the initial stage of regulating ARTs, defining a crime of feticide is not necessary because the crimes defined in section two, chapter one, title eight, book two of the Revised Penal Code prove to be adequate with respect to injuries resulting in death. These are the crimes previously enumerated namely infanticide, intentional abortion, unintentional abortion, abortion practiced by the woman herself or by her parents and abortion practiced by a physician or midwife and dispensing of abortives.

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[577] Andrews, *supra* note 533, at 371.

[578] *Id.* at 373.

[579] *Id.* (citing CAL. PENAL CODE § 187 (West Supp. 1986) (citing N.Y. PENAL LAW § 125.00 (McKinney 1975)).

[580] *Id.* at 376.

[581] *Id.* (citing ILL. ANN. STAT. ch. 38, para. 9-1.1; (citing IOWA CODE ANN. § 707.7 (West 1979)).

[582] *Id.*

Feticide necessarily excludes prosecution of crimes causing harm to an extracorporeal embryo.[583] For example, harm caused to an embryo fertilized in a petri dish is not actionable.[584] The cause of action will not fall under feticide but under other laws to recover damages. Emphasis must be given to the difference between a fertilized embryo and a fetus. A fetus is "a conceptus at a later stage of development."[585]

Having punished acts resulting in death, it is also necessary to criminalize acts causing physical injuries to the fetus. Prenatal injuries which may clearly proven caused by any person, whether a medical practitioner or not, should be properly considered as criminal acts.

Aside from using the existing laws to enforce liability on violations falling under the nature of ART crimes, tort liability may also be used. In our jurisdiction, article 2176 provides a cause of action based on tort or quasi delict. Article 2176 provides: "Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called quasi-delict and is governed by the provisions of this Chapter." It is acceptable to use "tort law to hold third parties liable for injury inflicted on a fetus traditionally compensated the *parents* for the loss of their desired baby and recognized that any injury inflicted on the fetus was necessarily inflicted on the mother as well."[586] Tort liability may also be the basis of a cause of action against medical practitioners guilty of malpractice.[587] Tort action may also be the legal remedy of ART participants, who are also consumers in one sense, when their consumer rights are violated.[588]

H. ARTs and the conflict-of-laws

Article 15 of the Civil Code provides: "Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."[589] This is the so-called

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[583] *Id.*

[584] *Id.*

[585] *Id.*

[586] *Medical Technology and the Law*, *supra* note 93, at 1576.

[587] *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092, 2102 (1996).

[588] *Id.*

[589] CIVIL CODE, art. 15.

nationality principle.[590] An individual's personal law follows him wherever he is and governs those transactions which affect him most closely such as marriage, divorce, legitimacy and capacity to contract.[591] The Supreme Court has ruled that the nationality law theory is a conflict-of-laws theory by virtue of which jurisdiction over the particular subject matter affecting a person, such as status of a natural person, is determined by the latter's nationality.[592]

From the aforementioned, it can be gleaned that the act of infertile couples availing of reproductive technologies abroad renders inefficacious its nature, procedure and effects if it would be in conflict with the family law of the Philippines. Note must be taken, however, that under our present laws, it is only AIH, AID or AIC which are explicitly allowed. The other ARTs are prohibited and any use thereof are largely unregulated. For instance, our citizens cannot circumvent the law by travelling abroad, entering into surrogacy contracts and having a child. Such a child will not be protected by our laws on legitimacy and filiation. Hence, the status of the child is at most precarious. The couple cannot invoke the laws of a permissive state in order to gain legitimacy over such contractual arrangements precisely because our jurisdiction follows the *lex nationalii* principle on matters of family rights and duties and the status of persons. Wherever a citizen may be, his national law follows him even under the guise of establishing residence in a foreign country. There can be no qualification to this doctrine, otherwise another avenue will be made available to our citizens in breaking the law.

With regard to AI and IVF, therefore, it is imperative that the couple follow the requirements of our local laws in order to render their acts valid. Strict adherence to the procedural requisites in availing of these two technologies as embodied in the proposed legislation is a condition *sine qua non* for the legitimacy and effectiveness of the relevant procedure. The substantive laws on family relations, particularly parentage, apply and any digression thereof will invalidate the arrangement.

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[590] Also called the *lex nationalii* principle.

[591] JORGE R. COQUIA AND ELIZABETH AGUILING-PANGALANGAN, CONFLICTS OF LAW CASES, MATERIALS AND COMMENTS 154 (1999).

[592] *Id.* at 155 (citing *Ellis v. Republic*, 117 PHIL. 979, 75 SCRA 962 (1963)).

XI. PROPOSED BILL REGULATING REPRODUCTIVE TECHNOLOGIES AN ACT REGULATING ASSISTED REPRODUCTIVE TECHNOLOGIES

WHEREAS, the utilization of assisted reproductive technologies is slowly becoming prevalent in the Philippines;

WHEREAS, Filipino infertile couples suffer from physical, emotional, physiological and social pains and the adoption of assisted reproductive technologies is a viable option to cure their medical fate;

WHEREAS, legal developments of technologically advanced countries like the United States, United Kingdom and Australia inspired an answer to the myriad legal problems posed by the utilization of assisted reproductive technologies;

WHEREAS, it is the policy of the State to protect the institutions of marriage and family and safeguard the right to procreate and the right to found a family; and

WHEREAS, it is well-timed to enact procreative legislation advancing procreative liberty.

Sec. 1. *Short Title.* — This Act shall be known as the "Assisted Reproductive Technologies (ARTs) Act."

Sec. 2. *Declaration of Policy.* — It is hereby declared the policy of the State:

a) To promote the right to procreate by adopting and regulating assisted reproductive technologies;

b) To enliven the constitutional mandate found in article XV, section 1 of the Constitution that: "[t]he state shall defend the right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;"

c) To afford protection to persons availing of assisted reproductive technologies and the child to be born of these procedures;

d) To safeguard the institutions of marriage and the family; and

e) To accord the human embryo "special respect."

Sec. 3. *Definition of Terms.* —As used in this Act, the term:

a) *Assisted reproductive technologies (ART)* refers to any form of non-coital conception and includes artificial insemination and in vitro fertilization.

b) *Infertility* refers to inability of a couple to conceive a pregnancy after at least a year of regular sexual relations without contraception.

c) *Artificial insemination* refers to the introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means.

d) *Homologous artificial insemination (AIH)* refers to artificial insemination by using the sperm of the husband.

e) *Heterological artificial insemination (AID)* refers to artificial insemination by using the sperm of a donor.

f) *Combination artificial insemination (AIC)* refers to artificial insemination by using a combination of the sperm of the husband and a donor.

g) *In vitro fertilization (IVF)* refers to the process whereby an egg and sperm are united outside the human body and the fertilized ovum is implanted in the woman's uterus.

h) *Cryopreservation* refers to the process by which pre-embryos are frozen in liquid nitrogen at sub-zero temperatures, to preserve and store pre-embryos which are not immediately transferred to a woman's uterus.

i) *Commission* refers to the Assisted Reproductive Technologies Regulatory Commission created under this Act.

Sec. 4. *The Assisted Reproductive Technologies Regulatory Commission.* —There is hereby created the Assisted Reproductive Technologies Regulatory Commission, hereinafter referred to as the Commission, to act as the central authority in matters relating to ARTs. It shall act as the rule-making body for purposes of carrying out the provisions of this Act, in consultation and coordination with the Department of Health and government hospitals as well as

private hospitals, infertility centers, infertility clinics, and professional medical associations. As such, it shall:

a) Protect the rights of ART participants and the children to be born out of these reproductive technologies;

b) Ensure that "special respect" is given to the embryo resulting from these ARTs;

c) Provide counseling to ART participants;

d) Regulate the establishment and operations of hospitals, centers and clinics engaged in giving ART services to infertile couples;

e) Monitor the ART procedures undertaken in the Philippines by government hospitals as well as private hospitals, infertility centers, infertility clinics and professional medical associations;

f) Maintain confidential records of ART procedures and identities of ART participants and such information shall be disclosed only upon court order showing good cause such as obtaining vital medical information and preventing incestuous marriages;

g) Conduct scientific research and study on the development of ARTs;

h) Implement the state policy on the adoption of ARTs and ensure faithful compliance to the rules provided under this Act; and

i) Promulgate the necessary rules and regulations to implement the provisions of this Act.

Sec. 5. *Legal Status of the Embryo.* — The human embryo is a genetically unique tissue with a potential to become a human being. It deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. It deserves "special respect" because of its potential to become a human being and its symbolic meaning to many people.

Sec. 6. *Coverage.* —The following ARTs are covered by this Act:

a) Artificial insemination which is inclusive of AIH, AID, and AIC; and

b) In vitro fertilization.

Sec. 7. ***ARTs participants.*** —Only a lawfully married husband and wife may avail of assisted reproductive technologies. Accessibility to these procedures is limited to couples who experience infertility problems as diagnosed and certified by medical practitioners pursuant to the rules and regulations the Commission may implement.

Sec. 8. ***Requisites.*** — The following are necessary requirements to be complied with by the ARTs participants.

a) *Medical Examination and Diagnosis* — ARTs participants must be examined and diagnosed by medical practitioners who may recommend either artificial insemination or in vitro fertilization is recommended to cure infertility.

b) *Marriage certificate* — Presentation of a certified true copy of the marriage certificate is a prerequisite to the processing of application for the availment of these reproductive technologies.

c) *Counseling* — ARTs participants must undergo counseling prior to availment of any of the reproductive technologies to prepare them for the medical procedures to be undertaken. It is also necessary to apprise them of success rates and other consequences of their procreative choice.

d) *Other requirements* — The Commission, upon careful study and research, may obligate ART participants to comply with other requirements and conditions.

Sec. 9. ***Parentage and filiation.*** — Article 164 of the Family Code is hereby amended to include in vitro fertilization.

Article 164. Children conceived or born during the marriage of the parents are legitimate.

Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child.

Children conceived as a result of in vitro fertilization with the sperm of the husband and the ovum of the wife are also legitimate, provided both of them authorized or ratified such in vitro fertilization in a written instrument executed and signed by them before the birth of the child.

The written instrument containing the consent of AI or IVF participants shall be recorded in the civil registry together with the birth certificate of the child.

Sec. 10. ***Cryopreservation and Embryo Research.*** — Cryopreservation is allowed only in the following instances:

a) When it is incidental to the in vitro fertilization procedure undertaken by medical practitioners;

b) When the fertilized ovum is necessarily preserved for subsequent attempts at impregnating the wife; and

c) For research purposes, provided the cryopreservation period does not exceed fourteen days and the ARTs participants consent thereto in writing.

Sec. 11. ***Liability for Injuries.*** — Any person shall be held liable for harm caused to ART participants or the child born of these procedures.

a) *Criminal liability for acts resulting in death* — Crimes defined and penalized under section two, chapter one, title eight, book two of the Revised Penal Code are hereby adopted.

"Article 255. *Infanticide.*— The penalty provided for parricide in Article 246 and for murder in Article 248 shall be imposed upon any person who shall kill any child less than three days of age.

If any crime penalized in this Article be committed by the mother of the child for the purpose of concealing her dishonor, she shall suffer the penalty of

prision mayor in its medium and maximum periods, and if said crime be committed for the same purpose by the maternal grandparents or either of them, the penalty shall be *reclusion temporal.*

Art. 256. *Intentional abortion.*—Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusion temporal*, if he shall use any violence upon the person of the pregnant woman.

2. The penalty of *prision mayor*, if without using violence, he shall act without the consent of the woman.

3. The penalty of *prision correccional in* its medium and maximum periods, if the woman shall have consented.

Art. 257. *Unintentional abortion*—The penalty of *prision correccional* in its minimum and medium period shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

Art. 258. *Abortion practiced by the woman herself or by her parents.*—The penalty of *prision correccional* in its medium and maximum periods shall be imposed upon a woman who shall practice an abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of *prision correccional* in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor the offender shall suffer the penalty of *prision correccional* in its medium and maximum periods.

Art. 259. *Abortion practiced by a physician or midwife and dispensing abortives.*— The penalties provided in Article 256 shall be imposed in its maximum period, respectively, upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos."

b) *Criminal liability for acts resulting in prenatal injuries* — Any person who shall cause any harm or injury upon a fetus shall be punished for prenatal injuries, regardless of the extent of the injuries suffered by the fetus, and the offender shall suffer the penalty of *prision mayor.*

c) *Criminal liability for acts resulting in physical injuries* — Any person who shall cause any harm or injury upon a fetus shall be punished for physical injuries, regardless of the extent of the injuries suffered by the fetus, and the offender shall suffer the penalty of *prision mayor.*

d) *Tort liability* — Article 2176 of the Civil Code is hereby adopted to give rise to actions based on tort or quasi-delict.

> "Article 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called quasi-delict and is governed by the provisions of this Chapter."

Sec. 12. ***Conflict-of-Laws.*** — Article 15 of the Civil Code is hereby adopted to resolve conflicts- of-law situation involving the utilization of ARTs.

> "Article 15. Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

Sec. 13. ***Appropriations.*** — The amount of Five million pesos (Php5,000,000.00) is hereby appropriated from the funds in the National Treasury that are not otherwise appropriated for the initial operations of the Commission and the appropriations of the same shall be consequently included in the General Appropriations Act for the year following its enactment.

Sec. 14. ***Separability Clause.*** — If any provision or part hereof is held invalid or unconstitutional, the remainder of the law or the provision not otherwise affected, shall remain valid and subsisting.

Sec. 15. ***Repealing Clause.*** — Any law, decree, executive order, administrative order or rules and regulations contrary to, or inconsistent with the provisions of this Act are hereby repealed, modified or amended accordingly.

Sec. 16. ***Effectivity Clause.*** — This Act shall take effect fifteen (15) days after its publication in two (2) newspapers of general circulation.

XII. CONCLUSION

"How much do babies cost?" said he
The other night upon my knee;
And then I said: "They cost a lot;
A lot of watching by a cot,
A lot of sleepless hours and care,
A lot of heart-ache and despair,
A lot of fear and trying dread,
And Sometimes many tears are shed
In payment for our babies small,
But every one is worth it all."

—Edward Guest [593]

ARTs have proved to be a viable option to childless couples. AI and IVF technologies are, at their best, the fulfillment of dreams. But in the legal framework, these procedures cannot just be prohibited because of the myriad of complex legal and ethical problems they raise. Neither can they just be allowed without any government regulation and totally ignoring the rights of AI and IVF participants as well as that of the child. Thus, adoption of these technologies "poses a diverse range of legal and social issues with which legislatures must grapple."[594]

This study focused on the problems of determining which kinds of assisted reproductive technologies are to be recognized and regulated through legislation, defining who are entitled to avail of these technologies, protecting

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[593] EDGAR A. GUEST, *What a Baby Costs*, *in* COLLECTED VERSE OF EDGAR A. GUEST 5 (1934) as cited in Howard W. Jones, Jr., *Children of Choice: A Doctor's Perspective*, 52 WASH. & LEE L. REV. 225, 226-227 (1995).

[594] *Medical Technology and the Law*, *supra* note 88, at 1555.

parentage and filiation, foreseeing possible health problems, cryopreservation and embryo research, and deciding who should be empowered to monitor their use. After an analysis of these problems, a solution was provided through a proposed comprehensive and regulatory law.

Although the article extensively discussed artificial insemination, in vitro fertilization, and surrogacy, the proposed law includes only artificial insemination and in vitro fertilization as these two are the most widely used forms of assisted reproductive technologies in the Philippines. Hence, regulation of these two forms of ARTs is most imperative. In addition, the legality of artificial insemination and of in vitro fertilization have been upheld in several jurisdictions time and time again through legislation and case law. Surrogacy, on the other hand still raises much debate, mainly because of the confusion in its treatment as to whether it should be considered a form of assisted reproductive technology or a mere contract. Furthermore, the legal and ethical problems surrogacy raise may outweigh its value as a remedy to infertility problems of childless couples.

The proposed legislation is only a first attempt at finding a means of regulating the use of assisted reproductive technologies in the Philippines. However, advancements in medical technology introduce changes in our lives everyday and do not permit the luxury of time. That is why even in the field of assisted reproductive technologies, we must be ever vigilant in monitoring them and regulating their use through legislation. Considering the impact they have on the fundamental institutions of marriage and family, this is no small task which must be commenced forthwith.

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