EXPLORATIONS INTO IN-VITRO FERTILIZATION AND EMBRYO TRANSFER: THEIR PHILO-ETHICAL AND LEGAL IMPLICATIONS

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Hamlet's *To Be or Not To Be* can aptly summarize a much-celebrated issue that has hit the headlines—a case of parentless embryos.

Unable to conceive together since they wed in the late 70's, Elsa and Mario Rios, a Los Angeles couple, aged 37 and 54 respectively, sought the help of Melbourne's Queen Victoria Medical Center IVF (in vitro fertilization) program in 1981. Each had children by previous marriage—Mario's living son, Michael, and Elsa's ten-year-old daughter who accidentally shot herself to death in 1978. Elsa's 65 year-old mother is still living. Since Mario was infertile, the doctors used sperm from an anonymous donor to fertilize a number of eggs from his wife, Elsa. Several were implanted and two spares were frozen for use in case the pregnancy failed. As it happened, Elsa Rios miscarried, but she decided to postpone any further attempts until she felt "emotionally ready." But in 1983, the couple died in a plane crash in Chile, leaving no wills. They did leave behind a million-dollar estate in California. The question as to who will inherit the fortune has created a stir in this controversial case.[1]

From the many twists of the case, several questions may arise: Do the frozen embryos have a right to life? Do these orphaned embryos have a right to a womb? For how long may animation be suspended, and who decides on the unfreezing of the iced embryos? Should these parentless, frozen embryos be artificially maintained or should they be allowed to perish naturally through thawing? To whom do they belong and who has the jurisdiction over their fate? Are these embryos persons or property? Do they have any rights to inheritance? Do the embryos have a legitimate status? Can the embryos be implanted to a "carrier" mother? Does the sperm donor have any legal rights? Is the fertilization of Elsa's ova by a donor's sperm adulterous? Who will be the parents of these embryos in the event that they are born alive?[2]

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1 *Quickening Debate Over Life on Ice,* TIME, July 2, 1984, p. 43; *Troubling Test-Tube Legacy,* NEWSWEEK, July 2, 1984, p. 10.

2 The State of Victoria, Australia, appointed a committee in 1982 to study these legal questions raised by IVF technology. That committee's report has not yet been published at the time of the writing of this paper. TIME, July 2, 1984, *supra* note 1. *See* also *A Legal, Moral, Social Nightmare,* TIME, Sept. 10, 1984, p. 51.

These queries are only a few of the many complexities that IVF and embryo transfer bring to the fore. One thing though is clear. There is an urgency to explore the philo-ethical and legal aspects surrounding these intricacies. Sad to say, however, that scientific advances have often outpaced legislations. There are not even sufficient guidelines to govern scientific researches being conducted, particularly experimentations that manipulate human life.

In vitro fertilization and embryo transfer are among the recent developments aimed to facilitate human reproduction. Artificial insemination (AI), their predecessor, has now gained a widespread acceptance. In the United States, at least 20,000 babies every year are reportedly conceived through artificial insemination, and perhaps an estimate of a million Americans alive today have been conceived through this mechanical method.[3] There are two ways of artificial insemination, the AIH (artificial insemination by the husband) and AID (artificial insemination by a donor). The main difference between AI and IVF lies in the fertilization process. With the first, the meeting of the egg and the sperm occurs *in vivo,* i.e., in the body of the mother after she has been artificially inseminated by the husband (AIH) or by a third party donor (AID). With IVF, however, fertilization takes place outside the mother's body or in a laboratory (*in vitro* means in a glass), and the fertilized egg or embryo is implanted into the womb of the mother, or transferred to a "carrier" (or even a surrogate) mother.[4]

This study is exploratory in nature and its value lies in the attainment of the following objectives:

1. To provide an adequate state-of-the-art review of in vitro fertilization and embryo transfer;
2. To identify legal trends and directions through a collation and analysis of legislations and/or court rulings relevant to IVF and embryo transfer;
3. To discuss the philo-ethical and legal implications of IVF and embryo transfer; and,
4. To lay down guidelines and recommendations for future reference.

It is true that this concern for IVF and embryo transfer is new and may not be that urgent in the Philippine setting, a nation beset by more crucial problems of survival as it reels from both political and economic crises. But the questions that this scientific advance bring may soon invade

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[3] Grossman, *The Obsolescent Mother: A Scenario,* 227 THE ATLANTIC MONTHLY 39, 47 (May 1971).

[4] For the purposes of distinction, "surrogate" refers to a third party donor who provides both the ovum and the womb for the embryo, while "carrier" refers to the third party donor who only provides her womb to carry the embryo for the entire period of the gestation until the child is born. *See* Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile For Litigation,* 35 S.W. L.J. 973, 976 n. 24, 993 n. 167 (1982).

our courts as society becomes more modern and international; as mobility reduces the distance between Asia, Europe, and the United States; and as technology delves into areas that were once untrodden frontiers. Perhaps we may already have AI children in our midst, and later IVF babies—particularly, from those more affluent families who have all the money to travel abroad. It is always safe to project ahead and explore the implications of new scientific discoveries, a contribution which this study hopes to accomplish. Thus, we may avoid falling into the danger of over-stretching general legislation because of inadequacy and even absence of rules to resolve issues that can arise from IVF and embryo transfer, the sad results of which are often decisions that are arbitrary and even detrimental to the general interest and welfare of society.

There are actually not enough literature that have been written about IVF and embryo transfer. Neither do we have court rulings that deal directly with this new technology. Except for one or two, most decisions resolve questions surrounding artificial insemination. But because the process of AI and IVF are somewhat similar (except that fertilization in AI happens *in vivo* while IVF takes place in the laboratory) and the questions surrounding the issues are quite analogous, this paper will discuss AI rulings that have a bearing on IVF. Appendix I provides a classified listing of such rulings.

I. THE ADVANCES OF SCIENCE

Earliest accounts of *in vitro* fertilization were experiments conducted on rabbits, guinea pigs and much later, farm animals. As early as 1890, Walter Heape reported his successful transfer of two fertilized eggs from an Angora rabbit into the oviduct of a Belgian hare rabbit, an endeavor that produced six offspring, two of which were Angoras.[5] The entire process of IVF and embryo transfer involves the following steps: retrieval of the egg, its culture and fertilization *in vitro,* and the reimplantation as cleaving embryos in the womb of the mother animal. Initially, the egg retrieval phase in farm animals was highly limited by the availability of few oocytes during ovulation, but the subsequent discovery of gonadotrophins aimed to induce ovulation facilitated the task. The increasing control over preimplantation development greatly enhanced the culturing of animal embryos *in vitro* up to a point where cleavage developed into blastocysts. Edwards (1974), after so much experimentation with animal subjects arrived at these vital information and conclusions: first, there is the capacity of preimplanted embryos to adapt to the artificial conditions of culture, and undergo normal development because of their considerable powers of regulation even after their disorganization in culture; second, they have a resistance to malformation even after having been exposed *in vivo* to X-rays and to chilling; and

[5] *Id.* at 977.

finally, damage induced in cleaving embryos can actually be repaired.[6] With these discoveries, the stage was to be set for the first test-tube baby.

Credit is often attributed to Dr. Landrum Shettles of Columbia who, in the 1950's, first mentioned of the possibility of IVF for human beings.[7] But it was ultimately the pioneering work of gynecologist Patrick Steptoe, 71, and Cambridge University physiologist Robert Edwards, 58, that led to the birth of the first test-tube baby, Louise Brown, on July 25, 1978 at Oldham Hospital in England.[8]

Lorio gives a concise description of the entire IVF process with human embryos and the subsequent embryo transfer:

> In vitro fertilization is the process by which an oocyte (or egg) is removed from the female, placed in a culture medium, and subsequently fertilized by sperm. After several days, when the fertilized egg reaches the blastocyst stage that coincides with the normal time of implantation, it is transplanted into the female body, resulting in embryo transfer. To retrieve the ripe oocyte from the female donor, the donor is placed under general anesthesia and a laparoscopy[9] is performed. The process involves making a small incision in the patient's abdomen and inserting into the incision a laparoscope, an instrument allowing the doctor to view the reproductive organs. Follicular fluid containing the mature follicle or egg is then aspirated from the ovary by use of a needle. The fluid is mixed with pre-washed semen and diluted to simulate conditions found in the Fallopian tubes. A few hours after the mixture, fertilization may occur, and about twelve hours later, the embryo is transferred to a solution suppportive of embryo development. Approximately two days later, the fertilized egg develops into an eight-celled embryo or blastocyst,[10] and is transferred by means of a fine tube or cannula into the uterus of the carrier female for implantation in the uterine wall.[11]

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[6] Edwards, *Fertilization of Human Eggs In Vitro: Morals, Ethics and the Law*, 49 THE QUARTERLY REVIEW OF BIOLOGY 3, 5 (March 1974).

[7] Lorio, *supra* note 4, at 977 n. 26.

[8] *The New Origins of Life*, TIME, Sept. 10, 1984, p. 38; *The First Test-Tube Baby*, TIME, July 31, 1978, p. 38, 39. The very first American baby born *in vitro* was Samantha Steel but she was born in England on October 2, 1981. Lorio, *supra* note 4, at 973. The first U.S.-born American test-tube baby was born later on December 28, 1981. *Id.* at 978. England's first test-tube twins, Daniel and Christopher Smith, were born in London on April 29, 1982. *Test-Tube Twins*, XV MOD No. 583, Oct. 22, 1982, p. 11. A United Press International News release reported that as of August 3, 1981, there had already been 13 successful *in vitro* births, 11 of which were in Australia. Lorio, *supra* note 4, at 976. A later report, however, states that

> [i]n the six years that have passed since the birth of Louise Brown, some 700 test-tube babies have been born as a result of the work done at Bourn Hall and the approximately 200 other IVF clinics that have sprung up around the world. By year's end, there will be about 1,000 such infants. Among their number are 56 pairs of test-tube twins, 8 sets of triplets, and two sets of quads. TIME, Sept. 10, 1984.

[9] "Laparoscopy" is a technique for exploring the abdomen and observing the reproductive tract by means of a long thin telescope equipped with a fiber optics light. TIME, July 31, 1978, *supra* note 8, at 41.

[10] For the purposes of distinction, an "embryo" or "blastocyst" refers to the development of fertilization in the first three months after conception; thereafter, the term applied is "fetus".

[11] Lorio, *supra* note 4, at 975.

Figure 1 graphically illustrates the process. Primarily therefore, IVF and its subsequent embryo transfer are meant to cure infertility due to disorders in the fallopian tube by bypassing altogether the blockade. Securing the oocytes to be used for fertilization in vitro has to be collected from the ovary about three to four hours before ovulation, so timed that they can be aspirated before ovulation is expected. The timing should neither be too early nor too late. A premature collection of oocytes could jeopardize the chances of successful embryonic development after fertilization, whereas delayed collection may result in the irrevocable loss of oocytes in the abdominal cavity or oviduct after ovulation. The use of gonadotrophins to induce ovulation and sometimes superovulation (the shedding of large number of oocytes) carries the serious risks of hyperstimulation of the ovary and multiple births.[12] The reimplantation of the embryos through the cervix is simple and rapid, demanding no anesthetic nor operation, and it is free from dangers such as infection. Risks of disorders such as perforation of the uterus and abnormality of offspring seem to be very low. Even if such abnormalities do exist, they can easily be checked at the early stage. Such prenatal diagnosis of the fetus is, to a great extent, facilitated by the IVF technology — providing conditions much better than in the normal fertilization process where everything takes place deep inside the body of the mother. These are among the assuring contentions that Edwards gives.

> 1. The woman is treated with hormones to stimulate maturation of eggs in the ovary.
> 2. To locate the ovary, an optical system, called a laparoscope, is inserted through an incision in the abdominal wall. Under direct vision, a needle is then inserted into the ovary to draw out the eggs.
> 3. An egg is placed in a dish containing blood serum and nutrients, to which sperm is added for fertilization.
> 4. Once an egg is fertilized by one of the many spermatozoa, it is then transferred to another dish of blood serum and sustaining nutrients. For the next three to six days, the fertilized egg divides, creating a cluster of cells called a blastocyst.
> 5. After the woman receives further hormone treatment to prepare the uterine lining, the blastocyst is placed in the uterus, where it attaches to the wall and normal embryo development proceeds — as it would from a natural conception.[13]

How much hope does IVF and embryo transfer offer? How much of a "miracle of the century" is it? To the so many childless marriages resulting from infertility, this new technology is really a light of hope at the end of a dark long tunnel. Figures claim that 7% of all couples in the United States are infertile, and one-third of these is due to the wife's sterility. Forty percent or 560,000 of these infertile women are sterile due to diseased oviducts or fallopian tubes; others because of their inability to produce eggs, and still some may be able to conceive but are unable to carry a child full term.[14]

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[12] Edwards, *supra* note 6, at 6.
[13] *Id.* at 8.
[14] Lorio, *supra* note 4, at 975.

In the United Kingdom, 2% of all women suffer from tubal occlusion.[15] But the picture is becoming more bleak as latest figures show a steady rise. Infertility now affects one in six American couples (16%), and the incidence of infertility among married women ages 20 to 24, normally the most fertile age group, jumped 177% between 1965 and 1982. But these childless marriages can no longer be blamed on women alone for research says that "male deficiencies are the cause 40% of the time, and problems with both members of the marriage account for 20% of the reported cases of infertility."[16]

How can we explain this meteoric rise in infertility? "Doctors place much of the blame for the epidemic on liberalized sexual attitudes, which in women have led to an increasing occurrence of genital infections known collectively as pelvic inflammatory disease. Such infections scar the delicate tissue of the fallopian tubes, ovaries and uterus," one article concludes.[17] It is true that microsurgery can restore fertility in 70% of the women with only minor scarring around the fallopian tubes. But for those whose tubes are completely blocked, the chance of success ranges from a minimal 20% to zero. And these are the women who are the likely candidates for *in vitro* fertilization.[18]

The chances of pregnancy for infertile couples via IVF and embryo transfer is truly a very slim 5% margin as shown by the data of successful procedures in England and Australia.[19] The greatest risk lies in the implantation and the period shortly after that, where one-third of IVF pregnancies spontaneously miscarry within the first three months;[20] and often, the hormonal disorders (caused by induced ovulation) endanger the fertilized egg so that a third of all potential pregnancies end at the time of implantation.[21] The practice, however, of transferring more than one embryo at a time has increased the chances of pregnancy: 20% chance if one embryo is inserted, a 28% chance if two are used, and a 38% chance when three are utilized. But as mentioned earlier, transferring more than one embryo also increases the likelihood of multiple births.[22]

Prior to the successful birth of Louise Brown, the first test-tube baby, it is believed that Steptoe and Edwards must have attempted in vitro fertilization in hundreds of women. And of about half that were fertilized, successful implantations were even rarer.[23] Dr. Pierre Soupart of Vander-

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[15] Edwards, *supra* note 6, at 10. Other estimates report that 10-15% of all married couples are childless, the result of involuntary sterility of one form or another. *The Case of Adoption and Artificial Insemination*, LIFE TODAY 6 (Dec. 1981).

[16] *The Saddest Epidemic*, TIME, Sept. 10, 1984, p. 46.

[17] *Ibid.*

[18] *The New Origins of Life*, TIME, Sept. 10, 1984, p. 40.

[19] Lorio, *supra* note 4, at 991 n. 155. Other figures optimistically put it at 10-15% chance of pregnancy. *Test-Tube Twins* XV MOD No. 583, pp. 11, 63 (Oct. 22, 1982).

[20] TIME, Sept. 10, 1984, *supra* note 18, at 46.

[21] *The First Test-Tube Baby*, TIME, July 31, 1978, p. 38, 43.

[22] TIME, Sept. 10, 1984, *supra* note 18.

[23] TIME, July 31, 1978, *supra* note 21.

CONCEPTION IN A GLASS

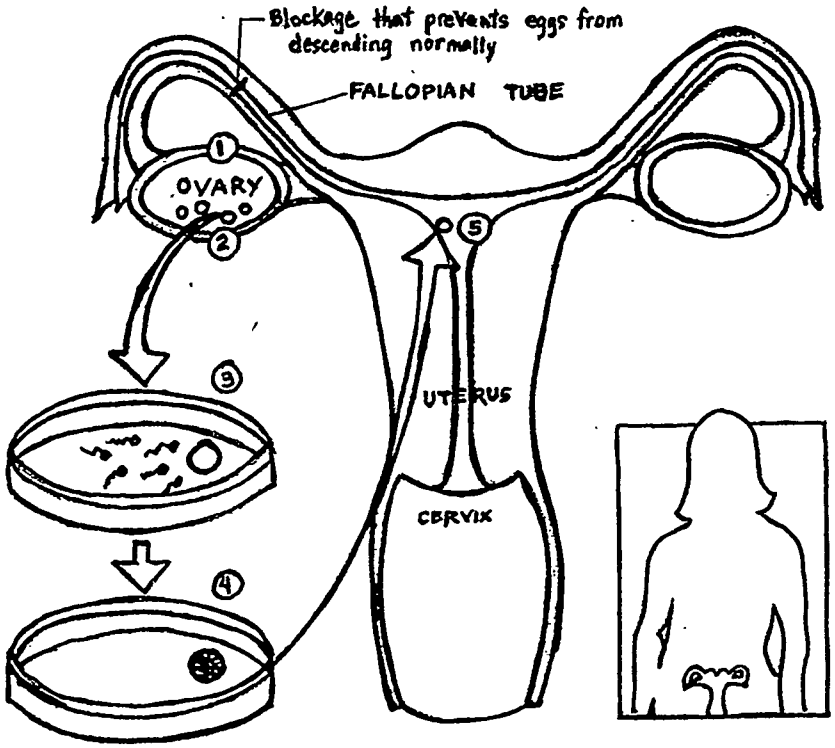

Figure 1

SOURCE: TIME, July 31, 1978, p. 39.

bilt Unversity suggests three possible explanations: first, there are the difficulties in transferring the tiny egg from the culture chamber into the uterus; second, there may be undetected chromosomal abnormalities that doom the egg before it has a chance to implant itself; and third, there is interference in the acceptance of the egg by the very hormones that were used to encourage ovulation.[24]

Even if the process of IVF and embryo transfer is somewhat simple and requires no operation, financially speaking it is quite expensive. Each attempt may cost between $3,000 to $5,000.[25] But to facilitate things, the cryopreservation has been used. It is a process where the unused embryos produced from superovulation are frozen in liquid nitrogen—similar to what was done in the aforementioned case of Elsa Rios. The embryos can later be thawed and then transferred to the woman's uterus, eliminating the need to repeat egg retrieval and fertilization. Sadly, however, 30% to 50% of the embryos do not survive the deep freezing.[26] Recently, a team in California headed by obstetrician John Buster has come up with a new variation of the IVF. Instead of fertilizing the ova in a dish, doctors simply inseminate the donor with the husband's sperm. About five days later, the fertilized egg is washed out of the donor's uterus by means of a painless method called lavage. The fertilized egg is then placed in the recipient's womb. This method definitely has an advantage over the IVF—it is non-surgical and it can be repeated easily until it works. But the danger is: if the lavage process does not flush the fertilized egg out, the donor faces the consequence of an unwanted pregnancy. It is reported that two children so far have been born using this much more simplified method.[27] Science, indeed, advances so fast, that perhaps, people will soon talk of IVF and embryo transfer as outmoded methods as new discoveries surface.

Reactions to IVF and embryo transfer seem to be generally positive, as reflected by two surveys. Shortly after the birth of Louise Brown, 52% of the 1,501 American women interviewed indicated their approval of the procedure, 24% were not sure. However, 85% of those surveyed felt that "the procedure should be available to married couples who are otherwise unable to have children."[28] A second survey, conducted by Gallup Poll in August 1978, revealed a similar trend: 60% favored in vitro procedure, 27% were against, and 13% had no opinion.[29] To the many infertile couples hoping and longing for a child, nothing can be more beautiful and relieving than the promise that IVF and embryo transfer offers them. As Cleveland businessman James Popela speaks out his heart: "[i]f you want to illustrate your story of infertility, take a picture of a couple and

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24 *Ibid.*
25 TIME, Sept. 10, 1984, *supra* note 18.
26 *Ibid.*
27 *Id.* at 47.
28 Lorio, *supra* note 4, at 974 n. 5.
29 *Ibid.*

tear it in half." Or hear it from the many experiences of Betty Orlandino, a counselor of infertile couples: "[i]t is not just the pain and indignity of the medical tests and treatment. Infertility rips at the core of the couple's relationship; it affects sexuality, self-image and self-esteem. It stalls careers, devastates savings and damages associations with friends and family."[30]

Consequently, a lot of medical practitioners and scientists have pinned their hopes on this novel technology. It will mark a great leap in coping with genetic diseases, will open vistas for new methods of contraception and will deepen the knowledge in reproductive biology. But new opportunities such as these cannot be without dangers, as some few have expressed their fears. "The potential for misadventure is unlimited," Dr. John Marshall remarks.[31] Along the same direction, Poet Laureate James Watson gives his caution—there is truly a potential for "all sorts of bad scenarios."[32] But to all these, Steptoe confidentially replies, "all that I am interested in is how to help women who are denied a baby because their tubes are incapable of doing their small part."[33]

Even if the pioneering Edwards and Steptoe wish nothing but the good of their infertile patients, the very invention of a technology that can directly manipulate and control fertilization and the process of human reproduction opens itself to abuse and other forms of danger. A reason, indeed, for people to be wary and fearful.

Figure 2 lists down the many possible combinations that can be worked out under IVF and embryo transfer. As noted earlier, what is evident is the analogous situation between AID and IVF (illustration shows the similarities between 1 and 2, 4 and 3, 3 and 4, 2 and 5). If the mother is unable to carry the child, there is the choice between hiring a carrier mother (donor of the womb only), or a surrogate mother (donor both of the ovum and the womb). This possibility will mean more combinations added to those already represented in the illustration.

II. PHILOSOPHICAL AND ETHICAL CONSIDERATIONS

The vista unfolded by IVF and embryo transfer carries with it many implications, at the core of which are profound philosophical and ethical concerns. These provide the solid foundations on which sound legislation, meant to protect the individual and society, stands. After all, the task of philosophizing involves a continual process of dialoguing with the truth, with culture, and with history. The first is an act of fidelity, a faithfulness to the truth that remains solid and firm amidst the passing changes of time. The second sets a humanistic thrust, a philosophizing that serves all men and every man. The third is relevance, or being able to dialogue with

30 TIME, Sept. 10, 1984, *supra* note 18, at 38.
31 TIME, July 31, 1984, *supra* note 21, at 39.
32 *Id.* at 40.
33 *Id.* at 41.

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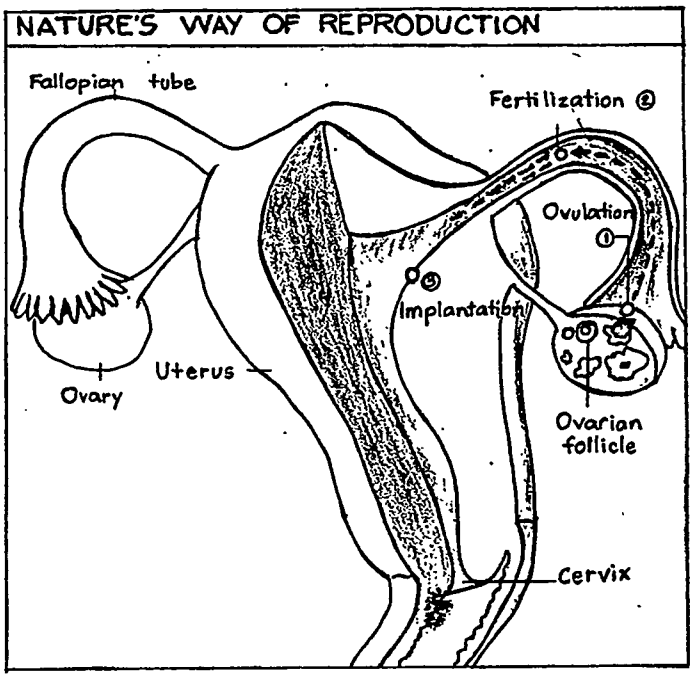

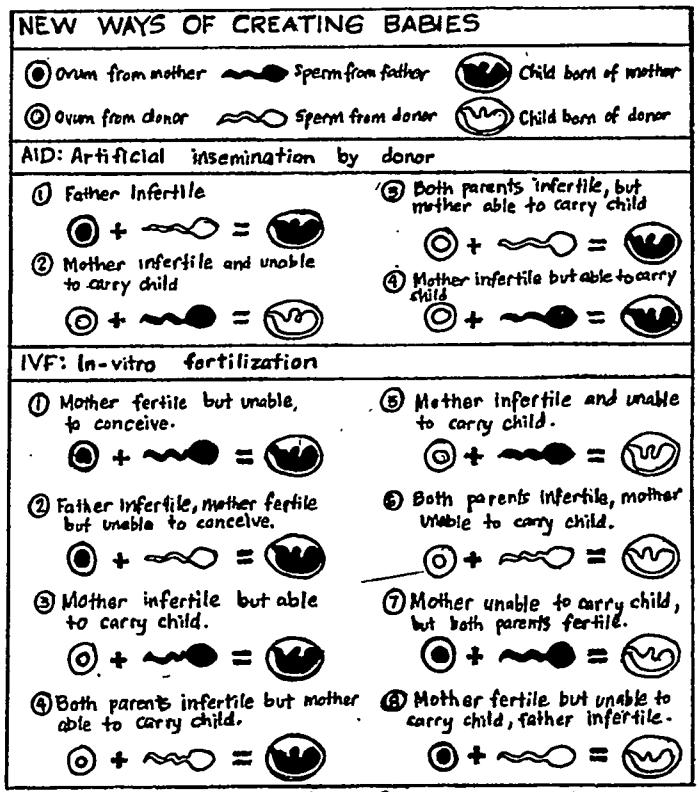

Figure 2

SOURCE: TIME. Sept. 10, 1984. p. 45.

the varying moments of historic events. A dialogue with the truth is a search beyond; a dialogue with culture is a search within; and a dialogue with history is a search without. That is why this ongoing process of threefold dialogue always involves, in the words of Bonifacio,[34] reflection and analysis, reconstruction and systematization. The following section is a reflection and analysis of certain key areas intimately linked with the discussion of IVF, namely: nature, person and life, marriage and the family.

A. NATURE

Can man "interfere" with the normal course of human reproduction? Or should he just let nature take care of itself? Is IVF natural or unnatural? These are among the more profound questions that may crop up.

There has been a lot of dissatisfaction and consequent departure from the traditional scholastic framework of matter and form, act and potency to explain St. Thomas' philosophy of nature. St. Thomas defines nature as "the principle and cause of the motion and the rest of the thing in which that principle exists fundamentally and essentially, and not accidentally."[35] This understanding has led to his often quoted doctrine of finality of nature (that all mobile beings act for an end), and the doctrine of natural necessity which says that a thing cannot be other than what it is. From these are derived the concepts of natural law with its immutable, fundamental and universal principles. Many have found wanting this absolutist and determinist framework to fully explain the complex realities of life and human interaction. To capture the dynamic, personal and revelatory aspects of relationship, Buber and the existentialists, for instance, talk in terms of the I-Thou and I-It relations. To underscore man's role and personal responsibility in the changing situations of the world, the phenomenologists crown the rational nature of man. Today, there is a marked shift from the central concern of the absolute to historicity and its contingencies, essential to existential, mechanical to personal and relational; from natural law finality to wholistic and integrated approach, and from static to a more dynamic and progressive concept of the world.

Contemporary understanding of the world and of nature is not something that is static, as if it were a reality "out there" and "ready-made". The understanding is more dynamic—a world that moves on, grows and progresses; a nature that is developing and evolving. The world is a reality that progressively defines itself and realizes its capacities. Man is the crown of the world, and he participates in this continuing process of creation. By the "mediation" that he performs, man becomes a co-creator himself who realizes best his human capacity by enhancing this on-going movement. To use a somewhat different imagery, man can be seen in the context of

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[34] Bonifacio, *Philosophy of Education: Perspective from Philosophy*, PHILIPPINE PHILOSOPHY OF EDUCATION 30, 33-34 (Botor, Ed., 1980).

[35] 1 H. GRENIER, THOMISTIC PHILOSOPHY 299 (1948).

gifts. 'What I am is God's gift to me but what I (and the world) become is my gift to God'. This adequately captures the dynamic concept of nature and man's role in the world. A gift realizes most its "giftness" when it is used, and man becomes most himself when he actualizes his giftness.

By way of illustration, let us mention some of the ideas of one leading writer of the twentieth century—Pierre Teilhard de Chardin, a man very profound in his thoughts and highly controversial. He attempts to integrate faith and science, and in the process, coins his own lingo. His "scientific memoir" on evolution is more a message born out of his personal conviction and faith.[36] He believes that the evolution of life involves a directive ascent towards complexity—consciousness. It is not only an infallible movement but more important, it has a direction with man as a personal center. Evolution is branching off, moving to a "step of reflection," man standing as the head of the universe which is continually moving on to higher states of consciousness.[37] There is, therefore, a progressive movement towards complexity and consciousness, centricity and unity, coherence and growth in the spirit—until man finds his fullness, "pleroma," in the "Omega-Point." Evolution is a progressive emancipation of the Spirit and a sense of personalization toward the Cosmic Christ. This is a relief to avant-garde Christians, for Teilhard implies God but without saying so in clear-cut apologetic terms. Teilhard de Chardin's progressive evolution is more physical, directive than blind, and personal than mechanical. "Evolution is no longer seen as an invincible force, triumphantly accomplishing what it set out to do but as something entrusted to human freedom... evolution is a means of meditating on our end and desiring its integrity."[38] For biological evolutionists to find solace in Teilhard de Chardin's thoughts is to misread his mind, to simplify his vision, and to water down the impact of his pioneering reflection.

> [H]e took care to note, as his conclusion, that biological does not explain everything in man. The secret of man, he said, does not lie in the early stages of embryonic (ontogenetic or phylogenetic) life which he has now passed beyond; it lies in the spiritual nature of his soul. But this soul which is a synthetic unity in action, escapes the grasp of science, whose work is essentially that of analyzing things in their elements and their material antecedents. Only intuition and philosophical reflection can discover it.[39]

To get back to our discussion after this digression, which was nevertheless helpful, if man were to leave nature to take care of itself, it would merely be hoping for the best. It is simply waiting for the pie-in-the-sky. And perhaps, man would still be living in the caves; there would not have been these cures discovered to meet different forms of sickness and plagues.

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[36] *See* P. T. DE CHARDIN, THE PHENOMENON OF MAN (1959).
[37] O. RABUT, TEILHARD DE CHARDIN: A CRITICAL STUDY 97 (1961).
[38] *Id.* at 224-225.
[39] N. COUTE, PIERRE TEILHARD DE CHARDIN: HIS LIFE AND SPIRIT 21 (1961).

Human "interference," therefore, should not be devoid of context, taken as it were in an absolutist abstract manner. It must not be interpreted apart from an intervening subject and the purpose of his intervention. Human interference is an exercise of mature responsibility. Nevertheless, we do not deny the danger that it could become an occasion for man's inhumanity to fellow man. To say that IVF is "unnatural" should be clarified. As something not within the realm of normal functioning, then truly it is "unnatural" ("artificial" may be a much better term for it). But to mean something that goes against nature, it is definitely not. On the contrary, IVF comes to the aid of that part of nature which has ceased to function properly. It is interfering with the unnatural or non-normal functioning of the body's organ but only to bring it back to its normal function. It naturalizes that unnatural misfunction or disfunction of nature. Nothing can be more human and natural than that—trying to restore nature's "natural" functions. In this sense, it is no different from a kidney or a heart transplant, from an artificial respirator or an incubator. To repeat, therefore, IVF is neither unnatural nor a preventive interference, but a purposive exercise of human responsibility. And as such, there is nothing wrong about it. But what may be wrong is when it becomes an unnatural or artificial substitute for a bodily organ that is healthy or is functioning properly and normally. The fear lies in the possible misuse and abuse of IVF, not so much in IVF itself. It is already the task of legislation to govern and regulate its proper usage. Definitely, IVF should be limited to certain and definite conditions where the normal processes of reproduction are not functioning. Never should it be recommended outside the noble purpose of helping infertile couples (as in the case of avoiding pregnancy, or for single people, to use it outside marriage). For one thing, though, let us not throw away the hope that IVF brings, merely in view of a possible but avoidable danger that it may bring.

B. PERSON AND LIFE

The second area of concern hinges on the question: When does human life begin, and when is this existence a person? At the outset, it is worth noting two levels of the question—the level of conclusion as to the moment when human life and personal existence take place and, second, the criteria used for arriving at such a conclusion. The latter is as important as the first, because criteria serve as the sound and solid foundation of any logical conclusion. Curran[40] provides a four-criteria classification, namely: individual-biological, relational, multiple criteria, and conferral of rights by society. But by way of pre-note to the discussion, and in order to avoid any confusion in terminologies, some authors make a distinction between human life and personal life, human being and human person, biological existence and fully human existence. For our purposes here, the usage of the terms "truly human life" or "truly human being" will be limited to

[40] C. CURRAN, TRANSITION AND TRADITION IN MORAL THEOLOGY 208 (1979).

"human life deserving the value, rights and protection due to human person as such."[41]

1. INDIVIDUAL-BIOLOGICAL CRITERION

The more traditional criterion used to determine when human life begins is the individual-biological, and the different opinions taken are: moment of conception; two to three weeks after conception; delayed animation or hominization; and birth. Those who hold that conception is the crucial moment of one's human existence stress the continual, progressive development of the fetus. Noonan,[42] for instance, comes up with three solid reasons: first, the characteristics present in both the embryo and the adult are similar; second, there is a great difference between the sperm, the ovum and the fertilized product which is the zygote; and third, modern genetics shows that the zygote is a dynamic blueprint that grows and develops from the inside, if afforded the proper nourishment and environment. The anchor of this position is a sort of physico-biological determinism, so that once the combining constructive elements for life are present, then there is a true human being. But a serious question can be raised along this line of reasoning. Is mere biological existence of potential human life synonymous to a truly human person?

Curran and Ramsey[43] seem to answer in the negative, and contend that an individual person is not truly present until sometime between the second and third week after conception. They stress (each, however, using a different approach)[44] that biological information alone does not suffice, but the "ultimate reason on the recognition that individuality, which is most fundamental characteristic of the truly human being, is not achieved before this time, up to which twinning and recombination can occur."[45] It is only at this time that there is an organizer, an individuality, that directs the differentiation of the pluripotential cells, and without this organizer, hominization cannot occur. Besides, about 50% of the fertilized ova are spontaneously aborted; either they fail to implant or are shed off even before the mother is aware of having conceived. It is quite unthinkable to say that these fertilized ova are truly human beings that nature spontaneously abort! So we see that aside from the notion of physical determination and potentiality for life, the second opinion adds individuality as a more adequate criterion for a truly human life.

The third opinion holds for the delayed animation-hominization theory. It is based on the Thomistic concept of hylomorphism which establishes

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[41] *Id.* at 207.

[42] *Id.* at 211 n. 6.

[43] P. RAMSEY, FABRICATED MAN: THE ETHICS OF GENETIC CONTROL (1970).

[44] From the highly philosophical argumentation of individuality, Ramsey adds a religious Christian dimension. He claims that the value and dignity of a person is not something intrinsic to biological human existence, but is conferred by God. *See id.* at 132.

[45] CURRAN, *supra* note 40, at 212.

the complementarity of matter and form in being. The scholastic principle, *Quidquid recipitur ad modum recipiendis recipitur* (literally, whatever is received is received according to the mode of one's receiving it), states that the soul (as the form of being) is received into the matter (the body) which is capable of receiving it. The unity of the human person, therefore, demands that the material body should be so developed and organized in order to be capable of receiving the human form or the soul.[46] Within this framework, Donceel[47] claims that the fetus must have the sense organs, the nervous system and the brain (particularly the cortex) properly developed so that the fetus is animated by the soul, and a fully human being is present. Some even insist the early formation and appearance of the major organs of the body to mark the beginning of a full human existence. However, there are those who claim that consciousness and self-reflection are the characteristics of a personal life. As seat of these faculties, the cortex of the brain must, therefore, be actively present, and brain activity is detectable at the eighth week. But does this brain activity consistently draw the threshold line dividing personal life from non-personal life? Or does it just measure the potentiality for life functioning of the fetus?

The fourth opinion, the birth theory, introduces new aspects—independence and viability. Human experience shows that at birth the person becomes viable and independent of the mother. However, this position is not without its weakness. A question can be raised: Is there any qualitatively significant difference between a fetus one day before birth and the child on the day of birth? Even if the child is outside the womb of the mother, for all practical purposes, it is not independent. To continue to live, it would need the care and attention of the mother; it has to be nourished. Upon birth there may be physical distance and separation between the child and the mother, but not independence in the full sense of the word. Independence is a term that is not merely physical but, more important, it is also psychological, social and economic in nature. "Birth, in fact, does not really tell much about the individual as such but only where the individual is—either outside the womb or still inside the womb," Curran comments.[48] Viability cannot also be a conclusive reason to support the birth theory, because a fetus can very well be viable weeks or even months before the expected delivery, especially with the help of an artificial incubator. And when the artificial womb is finally invented, the fetus can be outside the womb of the mother for the greater part of its gestation period. The point remains that viability is not synonymous with birth; rather, it

[46] St. Thomas More himself seems to accept the theory of delayed animation. But some say that it was based on his far-from-adequate biological knowledge. According to him, the seed was considered as the primary active element in human generation (the ovum was yet undiscovered), and the seed had to die before new life could come into existence in the mother's womb. *Id.* at 210.

[47] Donceel, *Immediate Animation and Delayed Hominization*, 31 THEOLOGICAL STUDIES 76, 82-83 (1970).

[48] CURRAN, *supra* note 40, at 209.

is a very imprecise criterion to determine the beginning of a truly human life since it is greatly dependent on scientific advances. Viability can better indicate where the fetus can live than where it is.[49]

In the light of recent developments that stress relationality and responsibility over the teleological approach, the individual-biological criterion has greatly been found inadequate. It zeroes in on biological determination and potentiality for life: highly individualistic in character. Though intimately linked together, there should be a distinction between personal life and biological existence. Personal life is more than mere biological existence for there are other aspects to be considered—such as the psychological, social and economic.

> Biological, genetic or scientific data alone will not be able to solve the problem of when truly human life begins. The ultimate judgment remains a philosophical or human judgment, which gives meaning and interpretation to the biological and other data involved. Such a conclusion is based on the recognition that human existence involves more than the biological and genetic and cannot be simply identified with only one aspect.[50]

Curran sums up the main criticisms of the individual-biological criterion: first, it goes against common experience which does not consider the embryo or early fetus to be human being; second, it absolutizes the biological and genetic, and does not give enough importance to a broader understanding of the human; third, it fails to recognize that in addition to genetic factors environmental aspects are necessary for human growth; and fourth, it overemphasizes potentiality and does not give enough importance to development.[51] But sometimes, overly stressing the distinction between human existence and physico-biological nature (both of which are intimately joined and never separated in the natural order) may lead to sad consequence. Curran opines that "potentiality based on something intrinsic in the being itself is a better criterion than a developmental approach that could open the door to differing values attributed to different human lives depending on their developed potential."[52] Euthanasia and sterilization of the deformed and the hardened criminals may be the sad consequences of these dangers, greatly undermining the fundamental right of equality and equal protection.

Working along a similar perspective, Ramsey[53] strongly attacks the insistence of some modern authors on a personal dimension that is something other and beyond the biological dimension, which at the same time implies that the biological is entirely submissible to man's limitless dominion. Of course, Ramsey's criticism must be seen in the context of his moral and religious evaluation of genetic control. He is afraid of a "genetic apoca-

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[49] *Ibid.*
[50] *Id.* at 208.
[51] *Id.* at 213.
[52] *Ibid.*
[53] RAMSEY, *supra* note 43, at 131.

lypse and end of man" that may result from the modern intellect's "penchant for species-suicide."

> Because those who come after us may not be like us, or because those who like us may not come after us, or because after a time there may be none to come after us, mankind must now seek to work to ensure that those who come after us will be more and more unlike us.[54]

2. RELATIONAL CRITERION

Because of the inadequacy of the individual-biological approach, the second group proposes a relational criterion, according to which being human is not limited to nor identical with biological existence. "In fact it is futile to look for a biological moment when fully human life begins even if it were possible to determine such a moment."[55] An example given to illustrate this point is the brain wave test to ascertain death. This means that lower biological life can still exist even when truly human life is ended. This points to the distinction between human life and human person, between biological life and personal life. The focal interest in determining when truly human life starts is relationship, and relationship is seen within the context of psychological, cultural and economic considerations.

> The mere fact of biological procreation does not constitute a fully human personal life, especially if the parents were not intending such a result and were trying to prevent it. The fetus must be accepted by the parents and also to some extent by the society into which it will be born.[56]

From this, it is evident that aside from the constitutive physico-genetic determinant of human existence and the aspect of independence and viability, some amount of social relationship enters into the consideration. But this relational criterion theory can become dangerously subjective, and it is a great departure from previously verifiable and objective indicators. There are people born who may not be able to establish full relationship either with the parents or with society—such as the handicapped, invalid and those deformed. What happens to them? Can they be killed as per relational criteria?

Based on the relational criterion, we can expect proponents to hold that the child becomes fully a human person much later—maybe, after the first year or so, as Lederberg holds.[57] This is so because genuine human relationships require reciprocity of giving and taking, a process that requires full consciousness. There is a great difference between a mother-fetus relationship which is physico-biological in nature and something necessary, and the mother-child relationship which is willed and conscious.

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[54] *Id.* at 22.
[55] CURRAN, *supra* note 40, at 213.
[56] *Id.* at 214.
[57] *Ibid.*

3. MULTIPLE CRITERIA APPROACH

The third approach, providing multiple criteria, tries to avoid both the shortcomings of the individual-biological and the dangers of the relational criterion. Talking of abortion, Daniel Callahan develops a consensus approach based on the multiple criteria of biological, psychological and cultural factors. He maintains that "even a zygote is individual human life, but full value should not be assigned at once to the life thus begun."[58] With this approach, he opens the possibility of women wanting to decide on abortion, avoids the unilateral approach of the biological and shuns away from the dangers that the relational criterion carries. Callahan himself is quite vague at what time truly human life is to be valued as such, but he seems to point to the period of brain activity which is a few weeks after birth. What is strikingly new about his approach is the introduction of a new element—a consensus of valuation. But a series of comments and questions can arise. Who decides on this consensus? Will it be a definitive valuation that at such a specific stage a truly human life is present? Or will it be based on the degree of development as evaluated, possibly resulting in non-uniform valuation of cases? Valuation then becomes vulnerable to inconsistencies. Besides, the psychological and cultural processes do not develop uniformly and in parallel manner with the biological. In fact, these develop much later than the biological. This will result in certain difficulties. For how about those unfortunate human beings in whom the psychological and cultural may be impaired or have ceased to develop? Nevertheless, this approach makes a positive contribution by introducing an external element—society's act of valuing.

4. CONFERRED RIGHTS CRITERION

The fourth approach, conferred rights criterion, is anchored on the belief that whether or not the fetus is human is a matter of definition and not of fact.[59] Since life is a continuum it is difficult, if not truly impossible, to pinpoint at what moment the fetus becomes truly a human person. The rights, therefore, of a human person have to be fixed by society—particularly by impartial individuals. The several standards proposed for the conferring of rights on others are: on the basis of the effect on the impartial individual's capacity for sympathy; on the effect on the possible interests of particular agents; and finally, on the effect on the character or moral worth of rational agents generally. With these criteria, it is possible to confer rights on the newborn but not on the eight-week-old fetus, although they would place some value on that life.[60]

It is quite evident that this conferred rights criterion as an approach does not directly solve nor answer the question when truly human life

[58] *Id.* at 216.
[59] *Id.* at 217.
[60] *Id.* at 218.

begins. It concerns itself primarily with the recognition and conferral of rights by the state to the individual born or to be born. Though it may place value on the life of the fetus, it distinguishes and separates the actual conferral of rights. But again several uncertainties and other problems surface. For one, the supposedly impartial agents or evaluators cannot seemingly avoid the question as to when human life begins, for their concern and sympathy (as the criteria put it) would depend primarily on what they believe the fetus is. If they believe that the fetus is truly human life, then they would have a pro-life stance; if they look at it merely as a living vital organ, a pro-abortion position is more likely. Aside from the arbitrariness that the method employs, with little or no regard to the biological data, it will definitely fail in anchoring their conferral of rights—for the very question of moment of life that it wishes to avoid is, in truth, the basis (consciously or unconsciously) of the agent's sympathy and concern. Taking a position must first necessitate a prior evaluation of life, and this evaluation is premised on an assumption as to when truly human life begins. But if there is one thing that this approach clearly manifests, it is the "philosophical problem that human rights must exist prior to any conferral of rights by the state or by individual representing society."[61] These rights are rooted on the very existence of truly human life in the individual.

In the light of the above discussion on person and life, it is interesting to examine what the Civil Code of the Philippines says, and what can be implied from it.

> Article 40. Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided that it be born later with the conditions specified in the following article.
>
> Article 41. For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb.

Birth, *de facto,* establishes that the child is a person for personality is a quality derived only from persons. The criterion implied is seemingly the individual-biological with an emphasis on physical separation from the mother and viability of the child by virtue of one's birth. This physical viability is further underscored in the consideration of premature deliveries of less than seven months, specifying that the child should at least live for twenty-four hours. The articles[62] do not categorically define the beginning of human life nor say that the foetus in the womb is a person. We can surmise that before birth, the foetus is biologically "not a person but merely a part of the internal organs of the mother. However, because of the expectancy that it may be born, the law protects it and reserves its rights,

[61] *Id.* at 219.
[62] CIV. CODE, arts. 40 and 41.

making its legal existence, if it should be born alive, retroact to the moment of its conception."[63] It is clear though that the Code recognizes the value of the foetus and gives it legal existence in virtue of its potentiality for life (on the condition that it is born alive). The interest of the articles is definitely the relationship that the child establishes with society by birth and is, therefore, conferred its rights which retroact to the point of conception. The retroactive movement to the point of conception again implies an acceptance that biologically, the embryo is potential human life. In summary, the Civil Code combines aspects of the different criteria for truly human life (particularly, the individual-biological moment of conception and birth, and the conferral of rights) but without definitively stating when truly human life begins.

C. MARRIAGE AND THE FAMILY

Marriage and the family are basic social institutions that both the Church and State respect and recognize. The Church deeply realizes that "the well-being of the individual person and of the human and Christian society is intimately linked with the healthy condition of that community produced by marriage and family."[64] For its part the State explicates that "marriage is not a mere contract but an inviolable social institution,"[65] and the family is "a basic social institution which public policy cherishes and protects."[66] Will the sanctity and unity of marriage and the family as fundamental institutions be greatly endangered by IVF and embryo transfer? Will this new technology go against the very nature of marriage and violate the integrity of the family—by the fact that a child can already be produced without the necessity of physical intercourse between the husband and the wife; since a third party donor, either of the egg or the sperm, has to enter into the consideration; and because the child can be fertilized and even be raised outside the womb of the natural mother? As Grad succintly addresses the question:

> Is the family primarily a biological unit composed of a fertile male, a fertile female and children who are genetically theirs, or is the family an essentially consensual unit wherein a man and a woman raise children, to regard themselves and the children as a family, and to give each other the comforts of material and emotional support, regardless of any genetic nexus?[67]

Let us go into a discussion of the basic concepts underpinning these important questions, so that our subsequent analysis of the intricate legal implications can be firmly anchored and seen in a wider perspective.

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[63] 1 A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 175 (1974).

[64] *Gaudium Et Spes*, No. 47, THE DOCUMENTS OF THE VATICAN II 249 (W. Abbott ed., 1966).

[65] CIV. CODE. art. 52.

[66] CIV. CODE, art. 216.

[67] As quoted by Lorio, *supra* note 4, at 973.

The Church has always upheld the sanctity of marriage and the family with an emphasis on the centrality of conjugal love. Thus, partnership of married life "is rooted in the conjugal covenant of irrevocable personal consent, . . . whereby spouses mutually bestow and accept each other. . . . For the good of the spouses and their offsprings as well as of society, the existence of this sacred bond no longer depends on human existence alone."[68] It is along the same line that the State says that "marriage is not a mere contract but an inviolable social institution,"[69] and to which Tolentino comments:

> Marriage is a contract only in form, but in essence it is an institution of public order, founded on custom and morality. It is a contract *sui generis*[70] which cannot be compared to any other contract. It is a convention of a social character, based on consent of the parties, which unites a man and a woman in a juridical act for the purpose of procreation and the other material and moral ends necessary for the development of personality. It is the foundation of the family and the origin of domestic relations of the utmost importance to civilization and social progress; hence the State is deeply concerned in its maintenance in purity and integrity.[71]

There lies the fundamental role and indispensability of marriage as an institution that supports the family, which in turn serves as the foundation of society. Marriage renders not only the good of the spouses and guarantees the welfare of the children, but it strengthens as well the very core of society.

Man has been called into existence through love and for love, but this love must be seen in the context of man's unified totality as an embodied existence. Man's sexuality expresses his whole personhood and its values, and love becomes uniquely expressed and perfected through the marital act.[72] As Pope John Paul II elaborates in clear terms:

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[68] *Gaudium Et Spes*, No. 48, *supra* note 64, at 250.

[69] CIV. CODE, art. 52.

[70] "It is a contract *sui generis* because of its very special character that distinguishes it from an ordinary contract, namely:

a) Ordinary contracts may be entered into by any number of persons, whether of the same or different sex, while marriage can be entered into only by a man and a woman;

b) In ordinary contracts, the agreement of the parties have the force of law between them, while in marriage, the law fixes the duties and rights of the parties;

c) Ordinary contracts can be terminated by mutual agreement of the parties, while marriage cannot be so terminated; neither can marriage be terminated when one of the parties becomes incapable of performing his part;

d) Breach of ordinary contracts gives rise to an action for damages, while breach of the obligations of the husband or a wife does not give rise to such an action; the law instead provides for penal and civil sanctions, such as prosecution for adultery or concubinage, and proceedings for legal separation."

1 A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 225-227 (1983).

[71] *Ibid.*

[72] *Gaudium Et Spes*, No. 49, *supra* note 64, at 253.

> Sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concern the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themsleves totally to one another until death. The total physical self-giving would be a life if it were not the sign and fruit of a total personal self-giving, in which the whole person, including the temporal dimension, is present: if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.
>
> This totality which is required by conjugal love also corresponds to the demands of responsible fertility. This fertility is directed to the generation of a human being, and so by its nature it surpasses the purely biological order and involves a whole series of personal values....
>
> The only "place" in which this self-giving in its whole truth is made possible is marriage, the covenant of conjugal love freely and consciously chosen....[73]

Thus, it is clear that the core of marriage lies in the irrevocability of personal consent that is animated by love, and this relationship exists not only for the good of the spouses and their offspring but of society as well. "By their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children, and find in them their ultimate crown."[74] These are the ends of marriage.[75]

Children are the precious gift of marriage, and they are a living reflection of love, a permanent sign of conjugal unity and a living and inseparable synthesis of the couple's being a father and a mother. But even if procreation is not possible, conjugal life does not for this reason lose its value,[76] "Marriage to be sure is not instituted solely for procreation. Rather by its very nature as an unbreakable compact between persons, and the welfare of the children, both demand that the natural love of spouses, too, be embodied in a rightly ordered manner, that it may grow and ripen."[77] In view of its unitive and procreative aspects, this covenant of marriage demands indissolubility, fidelity and exclusivity. Indissolubility is the permanency of the covenant of love entered into; fidelity preserves the integrity of the relationship; and the exclusivity protects the uniqueness of the bond that binds the couple in mutual gift to each other.

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[73] *Familiaris Consortio,* No. 11, APOSTOLIC EXHORTATION: FAMILIARIS CONSORTIO OF HIS HOLINESS POPE JOHN PAUL II TO THE CLERGY AND TO THE FAITHFUL OF THE WHOLE CATHOLIC CHURCH REGARDING THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD 9-10 (1982); hereinafter referred to as *Familiaris Consortio.*

[74] *Gaudium Et Spes, supra* note 68.

[75] Vatican II avoids the traditional formulation that distinguishes between the procreation of children as the primary end of marriage, and their education as the secondary end. It is stressed that the intimate unity and dynamism of the marriage and conjugal love is for the procreation and education of children, without recoursing to the old formulation with its distinctions. *Ibid.* n. 155.

[76] *Familiaris Consortio,* No. 14, *supra* note 73, at 12-13.

[77] *Gaudium Et Spes,* No. 50, *supra* note 64, at 255.

The family lies at the very core of society as its "first and vital cell,"[78] its foundation, and the home is the first school with the parents as the first teachers. As such, the family is faced with the responsibility of forming a community of parents, of serving life through procreation and the education of children, and finally, of participating in the development of society.[79] Love is the principle and permanent power of communication, and likewise, the final goal—for without love the family cannot live, grow and perfect itself as a community of persons. This conjugal communion is characterized not only by its unity but also by its indissolubility: "As a mutual gift of two pesons, this intimate union, as well as the good of children, imposes total fidelity on the spouses and argues for an unbreakable oneness between them."[80]

In the transmission of life the spouses actualize the fruitfulness of their conjugal love, and they become cooperators and interpreters of God's mandate "to increase and multiply." But this responsibility to transmit life is coupled by the duty to educate the children so that they are progressively introduced into the human community.

> By begetting in love and for love a new person who has within himself or herself the vocation to growth and development, parents by that very fact take on the task of helping the person effectively to live a fully human life.... The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.[81]

As the first and fundamental school of social living, the family provides the vital and organic link with society:

> [I]t is from the family that citizens come to birth and it is within the family that they find the first school of social virtues that are the animating principle of the existence and development of society itself.... The family is the place of origin and the most effective means for humanizing and personalizing society....[82]

And it is for this reason that every family has to have its own home, as the natural environment that preserves it and makes it grow. The State must safeguard the sanctity of a family's abode and recognize that "the family is a society in its own original right."[83]

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[78] *Apostolicam Actuositatem*, No. 11, *supra* note 64, at 503.
[79] *Familiaris Consortio*, No. 17, *supra* note 73, at 15.
[80] *Familiaris Consortio*, Nos. 19-20, *Id.* at 16-17.
[81] *Familiaris Consortio*, No. 36, *Id.* at 34-35.
[82] *Familiaris Constortio*, Nos. 42-43, *Id.* at 40-41.
[83] *Familiaris Consortio*, No. 45, *Id.* at 43. The document *Familiaris Consortio*, No. 46, *Id.* at 44, explicitly enumerates the rights of the family which must be defended:

Civil law has always expressed its interest to protect the sanctity of the family, for it is "an ethical natural institution, founded on the conjugal relations of the sexes, in which the members are bound together by ties of love, respect, authority and obedience—an institution necessary for the preservation, multiplication, and development of mankind in all the spheres of life."[84] Because of the indispensability and natural necessity of the family to maintain order and cohesion in society, the State leans toward upholding the solidarity of the family— "... No custom, practice or agreement which is destructive of the family shall be recognized or given any effect."[85] "In case of doubt, all presumptions favor the solidarity of the family" so that the intent of the law or fact leans toward the "validity of marriage, the indissolubility of the marriage bonds, the legitimacy of children, the community of property during the marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression."[86] Even in questions involving members of the same family, "no suit shall be filed or maintained . . . unless it should appear that earnest efforts toward a compromise have been made, but that the same have failed, subject to the limitations in article 2035."[87] Nevertheless, the State recognizes and deeply respects the sanctity of family relations which must not be interferred with unnecessarily, unless third party or public interest demands it. Tolentino opines:

> It is only in the external aspect that the law fixes rules regulating family relations, because it is only here that third persons and the public interest are concerned. The internal aspect of the family relations is essentially

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a) The right to exist and progress as a family, that is to say, the right of every human being, even if he or she is poor, to found a family and to have adequate means to support it;

b) The right to exercise its responsibility regarding the transmission of life and to educate children;

c) The right to the intimacy of conjugal and family life;

d) The right to the stability of the bond and of the institution of marriage;

e) The right to believe in and to profess one's faith and to propagate it;

f) The right to bring up children in accordance with the family's own traditions and religious and cultural values, with the necessary instruments, means and institutions;

g) The right, especially of the poor and of the sick, to obtain physical, social, political, and economic security;

h) The right to housing suitable for living family life in a proper way;

i) The right to expression and to representation, either directly or through associations, before the economic, social and cultural public authorities and lower authorities;

j) The right to form associations with other families and institutions, in order to fulfill the family's role suitably and expeditiously;

k) The right to protect minors by adequate institutions and legislations from harmful drugs, pornography, alcoholism, etc.;

l) The right to wholesome recreation of a kind that also fosters family values;

m) The right of the elderly to a worthy life and a worthy death;

n) The right to emigrate as a family in search of a better life.

[84] TOLENTINO, *supra* note 70, at 515; citing Valverde.

[85] CIV. CODE, art. 218.

[86] CIV. CODE, art. 220.

[87] CIV. CODE, art. 222.

natural and moral; it is commonly known to be sacred to the family and inaccessible to the law.[88]

III. LEGAL IMPLICATIONS

After an extensive treatment of the philo-ethical considerations underpinning IVF and embryo transfer, this section will discuss the legal intricacies surrounding this new technology. By way of pre-note, let us realize that, so far, there has not been any statute directly dealing with IVF and embryo transfer. But because of the analogous situations arising from artificial insemination and in vitro fertilization (as shown in figure 2), to a great extent we shall base our discussions on artificial insemination rulings and some few legislative norms. The purpose is not so much to come up with a definite judgment and stand, but to show the trends. These trends chart the direction that courts take and can pave the way for possible guidelines and recommendations in the context of the Philippine legal system.

A. MARRIAGE RELATIONSHIP

1. RIGHT TO MARITAL AND REPRODUCTIVE PRIVACY

At the core of the issues surrounding IVF and embryo transfer is how this new technology affects the sacred institution of marriage and the family, and interferes with the natural process of human conception and reproduction. There is the accompanying fear that the IVF process will mean a "degradation of parenthood," "defiance of the laws of nature," "debiologization and mechanization of conjugal love," and it involves "switching the marital bed into a chemistry set."[89] But as discussed earlier, the individual acts of marriage and sexual love should not be taken separately but within the total context of loving persons and the marriage relationship.

There is nothing so fundamental to the marriage as the procreation of children, growth in their conjugal love, and the strength and stability of the home and the family. The right to procreate is so "fundamental to the very existence and survival of the race."[90] Will the many infertile couples earnestly desiring to have children be delivered from their mental agony and pains by the promise that IVF gives? Is it true that there is the normally accepted course to legal adoption but the availability of children for adoption has been decreasing? Besides, between having a child not at all of the genes of either spouse (as in the case of adoption), and having a child who is of the genes of one spouse or to say the least, carried by the mother's womb—the latter example will still be preferred over adoption. The crux of the problem is: Do the infertile parents have a right to opt to bear a

[88] TOLENTINO, *supra* note 70, at 517.
[89] Lorio, *supra* note 4, at 979; *To Fool (Or Not) With Mother Nature*, TIME, July 31, 1978, p. 44.
[90] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

child via in vitro fertilization? Can the state regulate such without an infringement on the right to marital and reproductive privacy?

The law upholds and protects privacy in intimate family matters as illustrated in a number of court decisions. It is evident that as much as possible the state distances itself from interference, but if such is warranted if must be for a "compelling state purpose," it must pass the "strict scrutiny test," and the regulation must be the least restrictive means of achieving the state purpose.[91] In *Meyer v. Nebraska*[92] the US Supreme Court listed "the right . . . to marry, establish a home and bring up children" as included among the rights of "liberty" guaranteed by the fourteenth amendment. Both *Pierce v. Society of Sisters*[93] and *Prince v. Commonwealth of Massachusetts*[94] recognized the right to rear children. In *Pierce,* the court stated that the "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[95] In *Prince,* on the other hand, the court ruled that the parent's claims to authority in her own household and in the rearing of her children are "sacred private interests;" however, this right is balanced against the interest of the State to protect the welfare of children.[96] Even in cases upholding a state's right to sterilize the mentally retarded children and deprive them forever of the right to procreate have required observance of constitutional process, as in *Buck v. Bell.*[97] It specified "scrupulous compliance" of the statute and "months of observation" of the subject to assure that the state's interest existed. This compelling state interest vis-a-vis sterilization may not always require a showing that potential offspring of the patient would be similarly inflicted with deficiencies, but still it emphasizes that the state is interested in the inability of the parent to care properly for the resulting child.[98] The freedom to marry was declared fundamental, with the court protecting interracial marriage from state prohibition.[99] In *Zablocki v. Redhail*[100] the court even invalidated a state statute restricting parents with support obligations to minor children from marrying without court approval. Touching the right of procreation were three decisions—*Griswold v. Connecticut,*[101] *Eisenstadt v. Baird,*[102] and *Carey v. Population Services International.*[103] The court, in *Griswold,* protected the right of married persons

91 Shapiro v. Thompson, 394 U.S. 618, 660 (1969).
92 262 U.S. 390, 399 (1923).
93 268 U.S. 510 (1925).
94 321 U.S. 158 (1944).
95 268 U.S. 510, 535 (1925).
96 *Pierce,* 321 U.S. at 165, 167.
97 274 U.S. 200 (1927).
98 North Carolina Association for Retarded Children v. North Carolinan, 420 F. Supp. 451 (1976).
99 Loving v. Virginia, 388 U.S. 1, 12 (1967).
100 434 U.S. 374, 390 (1978).
101 381 U.S. 479 (1965).
102 405 U.S. 438 (1972-.
103 431 U.S. 678 (1977).

to use contraceptives and declared unconstitutional a Connecticut statute that restricted the right.[104] It reaffirmed the right to marital privacy as fundamental and free from government intrusion under the penumbra of guarantees in the Bill of Rights. Likewise, the *Eisenstadt* ruling held unconstitutional a Massachusetts statute banning the distribution of contraceptives to unmarried persons, and declared that if "the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[105] Running along a similar trend, in *Carey* the Supreme Court also declared unconstitutional a New York statute that regulated the distribution and advertisements of contraceptives, stating that the "decision whether or not to beget or bear a child . . . [lies] at the very heart of [the] cluster of constitutionally protected choices."[106]

2. IVF AND THE SINGLE WOMAN

The *Eisenstadt* ruling that includes single women to have the right to decide whether or not to beget a child is somewhat intriguing. For if the court, wanting to protect the right to privacy, has held as unconstitutional a statute banning the distribution of contraceptives to unmarried persons, then it can serve as an argument favoring the availability of IVF to single women. To deprive them of the access to IVF may be construed as an infringement on the fundamental right to procreate. On the other hand, however, it can undermine and destroy the revered fundamental institution of marriage and the family. In this case, which becomes more fundamental that the State has to protect—right to procreate and privacy or the basic institutions of marriage and the family?

Let us recall the case of *C.M. v. C.C.*,[107] where an unmarried woman successfully inseminated herself with the sperm of her fiance without any physical contact. The court ruled that the fiance was to be treated as the father of the child, and he was consequently obliged to support the child and allowed visitation rights. The reason behind such ruling was a consideration of public policy; that it was in the best interest of the child to have two parents. Psychologically and financially, a child can be better taken care of by two parents than by just one. But still a further question may be raised: Why was not the fiance considered as sperm donor which, in most cases, would free him from any obligation? Perhaps, it was because C.C. was unmarried and there are nineteen American states that have statutes prohibiting the practice of performing AID upon single women. Even if the decision to procreate is a fundamental interest within the scope of the right to privacy, Shaman says that it "does not mean that it is an

[104] *Griswold,* 381 U.S. 479.
[105] *Eisenstadt,* 405 U.S. at 453.
[106] *Carey,* 431 U.S. at 685.
[107] 377 A. 2d 821 (1977).

absolute right that cannot be limited in any way by the state."[108] For compelling reasons, such as protecting the well-being of children, the State can limit fundamental interests. Nevertheless, he says that it is possible to challenge the constitutionality of statutes limiting a single woman's access to AID. If such will be the case, the same can apply to IVF.

3. ADULTERY, CONSENT AND CONSUMMATION

The question as to whether IVF through a third party donor would constitute adultery is a very important issue. It is so central that the child's legitimate status and his subsequent rights flow from it. If both spouses give their consent, does it become justifiable?

There seems to be two main directions related to the interpretation of adultery. The first adopts a strict interpretation of the law which states that "adultery is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently declared void."[109] Therefore, the elements that must be present to convict a woman of adultery are: a) that she is a married woman; b) that she unites in sexual intercourse with a man not her husband; and c) that the act of intercourse is voluntary.[110] The sexual intercourse involves a physical contact and a penetration of the female sexual organ by that of the male. This line of reasoning is found in three rulings that decided AID was not equivalent to adultery. The first case ruling AID as not adulterous was *Hoch v. Hoch*.[111] Years later, *MacLennan v. MacLennan*[112] provided a more detailed explanation of its decision that it is the sexual act itself that is adulterous, not the artificial insemination or the placing of the male seed into the female body. For an act to be adulterous, two parties must be present and engaged in the sexual act at the same time, with some degree of penetration of the female organ. "... [t]he idea that a woman is committing adultery when, alone in the privacy of her bedroom, she injects into her ovum by means of a syringe the seed of a man she does not know and has never seen is one which I am afraid I cannot accept,"[113] the judge concluded. Whether the divorced husband was bound to support the child born during their marriage through AID with consent was the issue being contested in *People v. Sorensen*.[114] The Supreme Court

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108 Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 345 (1979-1980).

109 REV. PEN. CODE, art. 333.

110 A. GREGORIO, FUNDAMENTALS OF CRIMINAL LAW REVIEW 503 (1981).

111 (Unreported) No. 44-C-9307 (Cir. Ct., Cook County, Ill. 1945), as cited in Notes, *A Legislative Approach to Artificial Insemination*, 55 CORNELL L. REV. 497, 500 (1968). *See also* Castillo, *A Legal Perspective on Artificial Insemination*, 51 PHIL. L.J. 142. 147 (1976).

112 1958 Sess. Cass. 195. 1958 Scots L.T.R. 12, as cited in Notes. *supra* note 111. at 501; *see also* Castillo, *supra* note 111, at 146.

113 1958 Sess. Cass. 113. 1958 Scits L.T.R. 17, as cited in Notes, *supra* note 111 at 501; *see also* Castillo, *supra* sote 111 at 147.

114 66 Cal. Rptr. 7 (1968); 437 P. 2d 495.

ruled in favor of support for the child because the relationship was not adulterous:

> Since the doctor may be a woman or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead is equally absurd.[115]

The second direction seems to depart from the strict interpretation of the law on adultery and expands it with some shift in emphasis. *Orford v. Orford*[116] deviated from a consideration of the moral turpitude of the sexual act itself to the voluntary surrender of the reproductive organs facilitating the introduction of spurious heirs into the family. With this line of reasoning, the actual physical contact and penetration of the sexual organ should not necessarily be present to constitute adultery; rather, the mere voluntary surrender of the reproductive organs to facilitate the introduction of spurious heirs into the family suffices. It was ruled that impregnation per se by AID is the test of adultery and the union of the bodies or moral turpitude is of no consequence. This is a marked shift from the strict definition of the sexual intercourse now understood as an act in relation to the effect of the insemination—that of introducing a false strain of blood into the husband's family. Justice Orde wrote:

> In my judgment, the essence of the offense 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 process or faculties of the guilty person; and any submission of those persons to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery". Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous.[117]

Another case, *Doornbos v. Doornbos*,[118] echoed the *Orford* dictum and ruled that with or without consent, AID constituted adultery. It was not surprising that many criticisms have been expressed against the *Orford* decision. Shifting the essence of adultery from the sexual act of penetration to *any* act which might introduce a false strain of blood into the family of the husband could lead to absurdity. A married woman, for instance, could engage in sexual intercourse with a man not her husband so long as she prevents the possibility of introducing false strain of blood into the family of the husband by taking a contraceptive pill. As per criteria set by the *Orford* ruling, it would seem that this particular instance is not adulterous.

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115 *Sorensen*, 66 Cal. Rptr. at 13; 437 P. 2d at 501.

116 58 D.L.R. 251 (Ontario Sup. Ct. 1921), 49 ONT. L. REV. 15, as cited in Castillo, *supra* note 111, at 146.

117 *Ibid.*

118 139 N.E. 2d 844 (1956).

Is it the violation of the marriage vow that makes the act adulterous, or is it in view of the possible effect of introducing an offspring not of the husband's family? Gregorio seems to agree with the former view and contends that even a married woman, who due to her old age can no longer conceive, is liable for adultery.[119] To talk of adultery with consent on the part of the husband is quite unthinkable, if not totally a contradiction in terms. If it is only the offended party or the husband who can initiate the filing of adultery against the wife, how can he complain when he consented to AID or IVF with a third party donor?

From the discussion above, it seems that the present trend is to consider in vitro fertilization and artificial insemination through a third party donor as not adulterous—if both the spouses consent to the process. This is demonstrated by some nineteen states that have enacted legislation favorable to artificial insemination.[120]

Closely linked with the above discussion on adultery is the question: Is artificial insemination equivalent to the consummation of a marriage? There are three rulings that express a negative opinion. The annulment case of *L. v. L.*[121] ruled that artificial insemination by the husband (AIH) did not constitute consummation of the marriage. Since impotence, or the physical incapacity to copulate is a ground for annulment,[122] the petition was granted. The court stated further that the wife's conduct in recoursing to AIH showed a determination and dominant intention to establish a normal relationship rather than an acquiescence or approbation of an abnormal marriage. The two other cases, *Slater v. Slater*[123] and *Gursky v. Gursky*,[124] dealt with AID and annulment. In both decisions the wife was granted an annulment due to the failure of the husband to consummate the marriage. In *Slater*, no child was conceived after recoursing to AID, but in *Gursky* a child was conceived.

4. CARRIER-SURROGATE MOTHER AND ADOPTION

Referring back to Figure 2, we see many other possibilities that IVF ushers in. Among them are: the mother is infertile but is able to carry the child, and recourses to a third party ovum donor (IVF #3); the mother is infertile and is unable to carry the child—thus, recourses either to a carrier mother (who bears the child throughout pregnancy until birth)or to a surrogate mother who offers both her ovum and womb (IVF #5); both parents are fertile but the mother is unable to carry the child, and she

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119 GREGORIO, *supra* note 110, at 504.

120 Shaman, *supra* note 108, at 334.

121 1 All. E.R. 141 (1949), as cited in Notes, *The Legal Status of Artificial Insemination: A Need for Policy Formulation*, 19 DRAKE L. REV. 409, 417 (May 1970), and in Lorio, *supra* note 4, at 987.

122 The same grounds for annulment of marriages are found in Philippine laws. *See* CIV. CODE, art. 85.

123 1 All. E.R. 246 (1953) as found in Notes, *supra* note 121, at 417.

124 242 N.Y.S. 2d 406 (1963).

resorts to a carrier mother (IVF #7); both parents are infertile but the mother is able to carry the child, and consequently, they seek the help of both male sperm donor and female ovum donor (IVF #4); both parents are infertile and the mother is unable to carry the child—they recourse to a third party sperm donor and a surrogate mother (IVF #6); the mother is fertile but unable to carry the child, and the father is infertile—the solution is a third party sperm donor and a carrier mother (IVF #8).

It is true there can be other variations, but for the moment let us focus on the legal questions surrounding carrier and surrogate motherhood. Many strongly react against this practice of hiring carrier and surrogate mothers for they demean the woman and motherhood, and smacks of commercialization of the body—womb for rent, just like incubators. The practice can greatly endanger the stability of marriage, and the welfare and future of the child. To get the service of a carrier or surrogate mother, it is likely that a contract will be entered into so as to make the agreement legally binding. But will such contract hold — stipulating some sort of adaption where upon the birth of the child, the host mother surrenders all her rights to the couple? Generally, the legal trend is to frown at payments to induce adoption, not to favor pre-natal releases to adoption, and to prohibit private adoption except to step parents and close relatives.[125] The California Penal Code (Section 273), for instance, states:

> a. It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his child. This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption.
>
> b. It is a misdemeanor for any parent to obtain the financial benefits set forth in subdivision (a) with the intent to receive such financial benefits without completing the adoption or without consenting to the adoption.[126]

There is also a Michigan Statute which says:

> Except for charges or fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
>
> a. The placing of a child for adoption.

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[125] Surrogate Parenting Association, Inc. of Louiseville, Kentucky has been organized to bring together couples desiring a child with surrogates. The surrogate agrees to be artificially inseminated with the husband's sperm, hoping to become pregnant and carry a child that the surrogate later would relinquish to the couple. Combined legal, medical and surrogate fees range between $13,000 to $20,000. Cited by Lorio, *supra* note 4, at 993.

[126] CAL. PENAL CODE, sec. 273, as cited by Lorio, *supra* note 4, at 993.

b. The registration, recording, or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
c. A release.
d. A consent.
e. A petition.[127]

This Michigan statute that prohibits such payments was challenged for its constitutionality on the ground of privacy in *Doe v. Kelly,*[128] involving a payment of $5,000 to a surrogate plus medical expenses in exchange for the surrender and agreement to the adoption of the child conceived through artificial insemination. The court upheld the statute and stated that the constitutional right to privacy was not absolute and must be weighed against the compelling state interest in preventing "baby bartering." Payments to induce adoption seem to counter public policy that safeguards the best interests of the child. In *Wiley v. Lawton,*[129] for instance, the court denied recovery on a note given to a natural father as consideration for his consent to an adoption by the mother and her second husband. A mother's consent to adoption was declared void in *Downs v. Wortman,*[130] when the mother was offered her plane fare to her parent's home provided that she consented. Payments, however, not directly made to induce adoption but more to motivate consent that shall be in the best interest of the child have received favorable rulings. In *In re Estate of Shirk,*[131] the Kansas Supreme Court upheld an oral contract which provided that a mother would consent to having her daughter adopted by the child's grandmother in exchange for having the grandmother leave part of her estate to both the mother and the child. Similarly, in *Reimche v. First National Bank*[132] the court upheld an agreement where the mother of an illegitimate child consented to having the father adopt the child in exchange for his providing for the mother in his will. The court found that the adoption was in the best interest of the child and the pecuniary gain was not the motivating factor on the mother's part. In Kentucky, the attorney general gave an advisory opinion which declared surrogate mother contracts illegal and unenforceable. He pointed out that "the strongest legal prohibition against surrogate parenting in Kentucky is founded in the strong public policy against the buying and selling of children."[133] The state of Kentucy has statutes prohibiting a mother from consenting to an adoption before the fifth day after the child's birth, and which also prohibit a parent from petitioning for voluntary termination of parental rights until the fifth day after the child's birth.[134]

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[127] MICH. COMP. LAWS ANN., sec. 710.54 (Supp. 1981-82), as cited by Lorio, *supra* note 4, at 993-994.
[128] 6 FAM. L. REP. (BNA) 3011 (1980), as cited by Lorio, *supra* note 4, at 994.
[129] 132 N. E. 2d 34, 35 (1956).
[130] 185 S. E. 2d 387 (1971).
[131] 350 F. 2d 1 (1960).
[132] 512 F. 2d 187 (1975).
[133] Lorio, *supra* note 4, at 994-995.
[134] *Ibid.*

Aside from the main issues mentioned above, there are other thorny questions that can arise from this contract between the adopting couple and the carrier or surrogate mother. Can the carrier/surrogate mother change her mind about the agreement and decide to abort the child? Will this be a breach of contract, or does the carrier/surrogate mother have the right to privacy and consequently, to control her own body? *Roe v. Wade*[135] deemed the right of privacy as broad enough to encompass a woman's decision whether or not to terminate her pregnancy. In restricting a mother's absolute right to abortion to the first trimester of pregnancy, the court recognized the state's interest in protecting the mother's health during the second trimester and the interest of the potential human life in the third. In the light of this ruling, it would seem that the carrier/surrogate mother has such right of privacy to control her body over the contractual claims of the adoptive couple. Perhaps for health reasons the host mother may decide to abort the child on the second trimester. But what about the expenses or payments incurred by the adoptive couple? Can they file a breach of contract and recover such loss? What if it is the adopting couple that change their mind and would not want to continue the payment as specified in the contract? Will the child belong to the carrier/surrogate mother? But if neither the host mother wants the child to be born, can she sue for specific performance? What can she do with the child if the pregnancy is on the third trimester, and cannot be legally aborted?

For the protection of the child, the adoptive parents would want the best care be given to the fetus during pregnancy. May they require then the host mother to take precautionary measures, such as a regular visit to the doctor, a regular sleep and to refrain from smoking or drinking? Can such restriction hold? Another difficulty can arise if the couple die prior to the birth of the child. Will the adoption pass on to the nearest kin?

Let us suppose that the child is born. It can happen that the host mother, after going through all the hardships of pregnancy, decides to keep the child. Or perhaps, she claims that the first pregnancy was aborted and the child that is born is entirely a different one. What if upon birth the child is defective—can the adoptive parents refuse to accept the child? These are only some of the many complicated questions that will soon flood the courts, and perhaps the legal system may not have enough legislative basis and rulings to meet these novel problems. Between carrier mother and a surrogate, it will be more difficult to deal with the latter since the surrogate mother does not only carry the child throughout pregnancy but she has a genetic link with the child as well. With the carrier mother, it is easy to argue that it is in the best interest of the child to be with genetic parents rather than the womb mother. Still it can be asked whether the child has any right at all from the carrier/surrogate mother. Or are they merely donors with no interest at all to establish any link with the child? If such is the case,

[135] 410 U.S. 113 (1973).

can the law prohibit single women from being donors, either as carriers or as surrogates?

B. LEGAL STATUS AND RIGHTS OF THE CHILD

1. LEGITIMACY

Most court rulings tend to favor legitimacy to AID children conceived with the consent of the husband. The only two exceptions are the earlier cited cases of *Doornbos v. Doornbos*[136] and *Gursky v. Gursky*.[137] Since both *Doornbos* and *Gursky* ruled in favor of the adultery theory, it follows that children born of such act are illegitimate. In *Gursky*, the husband was held liable to support the illegitimate child because he consented to the procedure. The court further stated that what is "deeply imbedded" in the legal system is to maintain that "a child who is begotten through a father who is not the mother's husband is deemed to be illegitimate."[138]

Among the early rulings to state the legitimacy of the AID child, the first was *Strnad v. Strnad*.[139] The consent of the husband entitled him to the same rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled. However, the introduction of the notion that the AID child has been "potentially adopted or semi-adopted" stirred reactions and presented some difficulties. As cited earlier, the *Gursky* decision has disagreed and maintained that in the absence of a statutory device equivalent to adoption, it had no authority to make legitimate an AID child.[140] Adoption necessitates formal legal proceedings and it can only be initiated after the birth of the adopted child. Shaman, however, makes a very valuable comment: "While it is true that adoption is strictly a statutory procedure with legislatively designated requirements, a declaration of legitimacy is a procedure that exists independently of adoption, and therefore need not be limited by the confines of an adoption statute."[141] Declaring the legitimacy or illegitimacy of an AID child is definitely within the jurisdiction and authority of the court. To substantiate this opinion is a 1964 Georgia statute, the first in the United States that created a legal presumption of legitimacy for AID children when both the mother and her husband have given their written consent to the entire procedure.[142] Since then twenty-four other states have enacted similar statutes declaring legitimate AID children conceived with the consent of the parents.[143]

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136 139 N. E. 2d 844 (1956).
137 242 N.Y.S. 2d 406 (1963).
138 242 N.Y.S. 2d 406, 411, 408, as cited in Shaman, *supra* note 108, at 334.
139 78 N.Y.S. 2d 390 (1948).
140 242 N.Y.S. 2d 406, 410, as cited in Shaman, *supra* note 108, at 334.
141 Shaman, *supra* note 108, at 335.
142 *Id.* at 336.
143 Romero, *Legal Aspects of Artificial Insemination*, 58 PHIL. L.J. 280, 284 (1983).

In *Anonymous v. Anonymous,*[144] a wife sought temporary alimony and attorney's fees from her husband in a divorce action. The court ordered alimony and, more significantly, noted that the husband's written consent for his wife to undergo AI implied a promise on his part to support any offspring resulting from the insemination. A valuable argument is found in the more recent landmark decision of *People v. Sorensen.*[145] Aside from stating that AID with consent was not adulterous as discussed above, the court also rejected *Gursky's* thesis and held that a husband who consents to his wife's use of AID cannot disclaim his lawful fatherhood of the child for the purpose of child support. It expanded the term "father" as something not merely restricted to biological or natural father. Looking for a genetic nexus is not necessary to establish the required father-child relationship. What is important, as applied in the case, is to establish whether there was a legal existence of father-and-child relationship. This relationship cannot be strongly established between the sperm donor "father" and the child for the former did nothing more than donate his seed. But with the consenting husband and the child there is a relationship and a strong link, for "one who consents to the production of a child cannot create a temporary relation to be assumed and impose an obligation of supporting those whose existence he is directly responsible,"[146] Romero comments. If the husband consented and signed the agreement to artificial insemination, registered the child with his surname, treated it as his own, and before everybody's eyes he was considered as the father, nothing can be more solid a father-child relationship as this. In the final analysis "no valid purpose is served by stigmatizing an artificially conceived child as illegitimate,"[147] the court declared. Public policy favors legitimation.

The importance of this decision is reflected in its shift from pure biological nexus between the father and child (such that if the sperm were of somebody other than the husband—it is illegitimate) to a consensual nexus agreed upon and acted on. The ruling also established that legitimacy, as a legal status, can exist even if the husband was not the natural father of the child.

In *C.M. v. C.C.,*[148] the case where an unmarried woman succeeded in inseminating herself with her fiance's sperm without physical contact, it held that C.M. was the natural father of the child through the use of his sperm, and was accordingly granted custodial and visitation rights, and obligated to support and maintain the child. The ruling did not make any distinction between a child conceived naturally and one who was conceived artificially insofar as rights and obligations of the father are concerned.

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144 246 N.Y.S. 2d 835 (1964).

145 66 Cal. Rptr. 7 (1968); 437 P. 2d 495. *See supra* notes 114 and 115 and accompanying texts.

146 Romero, *supra* note 143, at 283.

147 People v. Sorensen, 66 Cal. Rptr. 1, 12 (1968); 437 P. 2d 495, 501.

148 377 A. 2d 821 (1977).

The case of *In Re Adoption of Anonymous*[149] gave a different focus to the question of legitimacy. Finding a strong state policy favoring legitimacy, the court ruled that a child born of consensual artificial insemination by a donor and accomplished as such during a valid marriage is legitimate. Here the point of reference is the standing marital status of the couple at about the time of birth of an AID child. This leads us into a discussion of the legitimacy of AID, AIH and IVF in the light of Philippine Law.

In our country, it is generally accepted that a child born in lawful wedlock (or of parents who were married at the time of the child's birth) is presumed to be legitimate. The Civil Code, however, also considers as legitimate a child who may be born outside lawful wedlock provided certain conditions and specifications are met. Article 255 states that:

> Children born after one hundred and eighty days following the celebration of marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.
>
> Against this presumption no evidence shall be admitted other than of the physical impossibility of the husband's having access to his wife within one hundred and twenty days of the three hundred which preceded the birth of the child.
>
> This physical impossibility may be caused:
>
> 1) by the impotence of the husband;
>
> 2) by the fact that the husband and wife were living separately, in such a way that access was not possible;
>
> 3) by the serious illness of the husband.

Article 256 even goes further and declares that "the child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress." In Article 258,

> [a] child born within one hundred eighty days following the celebration of the marriage is prima facie presumed to be legitimate. Such a child is conclusively presumed to be legitimate in any of these cases:
>
> 1) If the husband, before the marriage, knew of the pregnancy of the wife;
>
> 2) If he consented, being present, to the putting of his surname on the record of the birth of the child;
>
> 3) If he expressly or tacitly recognized the child as his own.

From these regulations, it is evident that the tendency is to favor the presumption that the child is legitimate. The basis, however, is the assumption that there is sexual union in marriage particularly during the period of conception.[150] The only condition that can prevent the recourse to this presumption is the physical impossibility of the husband having access to his wife within the first one hundred twenty days of the three hundred preceding the birth of the child—due to the impotence of the husband, the spouses were living separately, or the serious illness of the husband.[151]

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[149] 345 N.Y.S. 2d 430 (1973).

[150] TOLENTINO, *supra* note 70, at 497 n. 26.

[151] CIV. CODE, art. 255.

Thus, the crux of the discussion is to determine whether artificial insemination is tantamount to sexual access. Does sexual access mean sexual intercourse, and thus, the physical contact of the sexual organs? Is it equivalent to consumation, or will the union of two seeds suffice to constitute sexual access? This picture is further complicated by IVF where fertilization of the contact of the sperm and the egg happens outside the womb. But does the subsequent implantation of the fertilized ovum or the embryo transfer constitute sexual access? The Code may not have envisioned yet the possibility of AI and IVF, for with these new technologies the specification of physical impossibility caused by the impotence of the husband can already be vitiated. In the light of the cases previously discussed, where the trend favors legitimacy of the child but at the same time not to consider artificial insemination as an act of consumation nor adulterous in character, such artificial process is deemed to be equivalent to sexual access. If this is the case, legal issues will not be very complicated. It is true AIH children can be born even if the husband is impotent but not sterile. Nevertheless, they would be deemed legitimate so long as the impregnation is considered sexual access, and the children are born in lawful wedlock or after one hundred eighty days following the celebration of marriage, and before three hundred days following its dissolution or the separation of the spouses. Such legitimacy applies to AID (which is resorted to and can produce a child even if the husband is both impotent and sterile) so long as the wife's impregnation is not considered adulterous, and sexual access is not equated with actual contact of the sperm and the egg in the body of the mother. Recent variation by way of AIC (artificial insemination confused), which mixes the sperm of the husband with that of the donor, may resolve the question of legitimacy in cases of impotency that is not sterile—since the possibility of the husband's sperm fertilizing the egg remains. Impotency, therefore, no longer becomes total impossibility of sexual access to the wife. There are other possibilities opened by IVF as illustrated in Figure 2. One problem is case no. 4 where both parents are infertile but the mother is able to carry the child. In this case, the only possible argument or link to legitimacy would be the expanded meaning of "fatherhood" (and by extension, "motherhood") as ruled in *People v. Sorensen.*[152] And if the husband is impotent as well, what is the ground left for legitimacy? What happens to the sexual access issue? The mother carrying the child in her womb, the parents registering and recognizing the child as theirs, and they acting as mother and father to him—these can be the link to legitimacy. But these too, can become complicated as in instances where the mother is unable to carry the child (nos. 5, 6, 7 and 8 of Figure 2), and resorts to the hiring of carrier mothers. There will definitely be other possibilities and variations that the mind can think of, and they become all the more complicated. The need warrants the formulation of specific statutes to confront press-

[152] 66 Cal. Rptr. 7 (1968). *See supra* notes 145-147 and accompanying texts.
[153] 78 S.Y.S. 2d 390 (1948).

ing issues. We can not just rely on the present Code that has proved itself somewhat inadequate to meet new developments in reproductive technology. As aptly demonstrated by the many contradictory decisions, such inadequacy has often led to arbitrary interpretations of the law.

2. INHERITANCE, SUPPORT AND VISITATION PRIVILEGES

This concern for the rights of inheritance, support and visitation privileges would really depend and flow from the status accorded to AID and IVF children—whether legitimate, natural, acknowledged natural, natural by legal fiction, spurious or adopted. But in all these cases they inherit; the amount and extent, however, being subject to the status assigned to them by Philipppine law. From what we have discussed in the preceding section, the general trend is toward legitimacy. For instance, *Strnad v. Strnad*[153] granted visitation rights of an AID child conceived with the husband's consent, and stated that since the child was not illegitimate the husband was entitled to the same rights as that acquired by a foster parent who has formally adopted the child, if not the same rights as those to which a natural parent under the circumstances would be entitled. Similarly, in *Abajian v. Dennett*[154] it was held that a former husband was entitled to visitation rights with his AID child, not only because it was equitable for the husband, but also because it was in the best interests of the child and it preserved a sense of family to the extent possible after the mother and her husband have been divorced. *Adoption of Anonymous* ruled that a child born of consensual AID during a valid marriage is legitimate and entitled to the rights and privileges of a naturally conceived child of the same marriage. A more direct argument was penned in *People v. Sorensen,*[155] and which upheld a criminal prosecution against a divorced man for failure to provide support for a child born to a former wife as a result of AID with consent. The court stated that one who consents to the production of the child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible. It is true there were also cases that pursued and adopted the opposite direction—for instance *Doornbos v. Doornbos*[156] and *Gursky v. Gursky*[157] which ruled that AID, with or without consent, constituted adultery and the child is consequently illegitimate. Likewise, *Anonymous v. Anonymous*[158] confirmed the illegitimacy of an AID child even if the consent of the husband was obtained. But in both *Gursky* and *Anonymous,* even if the children were ruled as illegitimate, the husband was held liable to support them. The decision hinged on an implied contract theory (promissory estoppel) because the consent of the husband to AID "constituted an implied promise that the

154 184 N.Y.S. 2d 178 (1958).
155 66 Cal. Rptr. 7 (1968).
156 139 N.E. 2d 844 (1956). *See supra* note 118 and accompanying text.
157 242 N.Y.S. 2d 406 (1963).
158 246 N.Y.S. 2d 835 (1964). *See supra* note 144 and accompanying text.

child could become part of his family be supported by him and, in addition, by the wife's reliance and action on this promise the husband would then be estopped from refusing to support the child."[159]

In essence, the cases discussed above focused on the importance of consent which when given, assumes responsibility for the child, or at most an implied promise to support the child which may not be repudiated at a later time, even after a divorce.[160] The effect of such a consent establishes a relationship to the child similar to that of a natural father or a foster parent formally adopting a child.[161] Seemingly, this trend implies that the sperm or ovum donor is relieved of all obligations to and rights on the child. A Georgia statute and those of other 24 states that followed suit formalized this legitimacy of the child and recognized his subsequent rights.[162]

If there is a will that is left upon the death of the parents of an AID or IVF child, not many problems will arise as regards inheritance (especially in places where there are existing statutes legitimizing such birth). But if the couple died intestate, then the determination of the inheritance rights would necessarily go back to the legitimacy question. On the other hand, if the child is formally adopted, then the specifics of the adoption law will apply, and Articles 341 and 342 of the New Civil Code state that the adoption shall "give to the adopted child the same rights and duties as if he were a legitimate child of the adopter" and "the adopter shall not be a legal heir of the adopted person, whose parents by nature shall inherit from him."[163] This aspect of adoption, however, offers some difficulties. The common practice is to safeguard the anonymity of the donor and such adoption proceedings and inquiries for purposes of defining the extent of the inheritance rights would be a detriment to this medical secrecy. Undue publicity that may arise could possibly result in a harm to the good name and reputation of the adopted AID-IVF child.

In the area of child support, the responsibility hinges not only on the consent of the couple. But the very fact that upon the birth of the child, he enters into the family unit and treated as such, the couple stands in loco parentis in relation to the child and is compelled to support the child. If the Civil Code presumes the legitimacy of the child although the mother may have declared against its legitimacy or may have been sentenced as an adulteress[164] how much more of an AID-IVF child who at the very start was conceived with the consent of the couple, was received into the family and treated as their child upon birth? Child support is warranted because a parent-child relationship has been willed and has existed.

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[159] Castillo, *supra* note 112, at 156.
[160] *Sorensen*, 66 Cal. Rptr. 7 (1968).
[161] Strand v. Strand, 78 N.Y.S. 2d 390 (1948).
[162] Romero, *supra* note 143, at 284. *See supra* notes 142 and 143 and accompanying texts.
[163] This has been carried over into the amending law, The Child and Youth Welfare Code, Pres. Decree 603, sec. 39 (1975).
[164] CIV. CODE, art. 256.

3. ISSUES ON QUASI-DELICT

Since IVF and embryo transfer directly manipulate the process of human conception, damages could be inflicted on the child to be born, in terms of defects, deformation, prenatal injuries or wrongful death. And perhaps, an action for wrongful life may be initiated where a child would claim that no life is better than deformed or defective existence. Legal suits may be filed by the parents or by the child against the doctor, hospital and other similar institutions; or the child may initiate an action against his own parents as in the instance of wrongful life.

Del Zio v. Manhattan's Columbia Presbyterian Medical Center[165] was the very first case involving the wrongful death of a pre-implanted egg fertilized by *in vitro* process. Due to infertility caused by defective oviducts, Mrs. del Zio consented to an *in vitro* fertilization using the sperm of her husband, Dr. del Zio. But later, without the consent of Mrs. del Zio, Dr. Wiele (the chief obstetrician-gynecologist) ordered the fertilized embryo to be destroyed prior to its implantation. He claimed that the attending physician of Del Zio lacked the skills to properly perform IVF and embryo transfer process, and besides, the hospital has not approved such experimentation. Even if the implantation were successful, Dr. Wiele added, Mrs. del Zio would have contracted peritonitis and might have died. In the complaint, the plaintiff stated that her chance of having a child was denied, and it has caused her physical damage and emotional stress. The court awarded her damages for emotional stress, with nominal damages being assessed to her husband. However, the relief afforded to Mrs. del Zio was not specifically for the wrongful death of the fetus, but it was rather a recognition of a severe loss, somewhat analogous to a property loss.[166] This was an important distinction because in most American states the action of wrongful death is recognized only if the fetus is viable or at least "quick." New York statutes even specify that it must apply only to a live born child.[167]

In IVF and embryo transfer there are always accompanying risks. If the parents are not properly informed of such dangers or if consent has not been given, these could be grounds for possible legal action. It can also happen that the attending physician has been negligent of his duty, or else did not exercise utmost care in the performance of his function. Let us go over some of the rulings that may have a bearing on the questions surrounding quasi-delict, specifically prenatal injury and wrongful life. To prove prenatal injury, the elements that constitute professional negligence or medical malpractice must be present, namely: duty of the physician to his patient, physician's failure to perform his duty to the patient, damage suffered by

[165] No. 74-3588 (S.D.N.Y. filed April 12, 1978) as cited by Lorio, *supra* note 4, at 996.

[166] *Id.* at 997.

[167] *Ibid.*

the patient because of the physician's failure, and this failure is the direct cause of the damage.[168] Wrongful life, as differentiated from the wrongful act that causes prenatal injury, is an action brought by a child not for defects resulting from the defendant's negligence, but for the actual birth itself.[169] In discussing prenatal injury, let us bear in mind that the action can reflect the injury incurred before the conception of the child, wrongful acts after conception, or injury sustained during the period of viability and at the moment of birth itself. The recognition of a cause for action of a child for prenatal injuries is a relatively new development. Modern trends seem to allow recovery by the child for injuries sustained before viability, though some rulings require the child's viability at the time of the injury to sustain a cause of action.[170]

a. *Prenatal Injury*

Bonbrest[171] was the first ruling to sustain action for prenatal injury, and reversed the *Dietrich*[172] dictum that denied a child the right to maintain

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[168] Solis develops at great length the meaning and extent of these four elements.

A. The Physician has a duty to his patient.
   1. Duty to possess knowledge and skill of the profession;
   2. Duty to utilize such knowledge and skill with care and diligence;
   3. Duty to exercise the best judgment; and
   4. Duty to observe utmost good faith to his patient.

B. The Physician failed to perform his duty to his patient, due to:
   1. Violation of a positive law;
   2. Negligence;
   3. Ignorance; and
   4. Departure from accepted practice.

C. As a consequence of the failure of the physician to perform his duty, injury was sustained by the patient.

Injury is not construed only in its material sense but also moral damages which include "physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission" (CIV. CODE, art. 2217). Death, loss or impairment of earning capacity, disfigurement, physical disability are injuries, which may be the bases for damages.

D. The failure of the physician to perform his duty is the proximate cause of the injury sustained by the patient. The conditions that must be complied with in the determination of the proximate causes are:
   1. There must be a direct physical connection between the wrongful act of the physician and the injury suffered by the patient;
   2. The cause (wrongful act of the Physician) must be efficient, effective, and must not be too remote from the development of the injury suffered by the patient;
   3. The result must be the natural and probable consequence of the cause.

The tests to determine the causal link between negligence and injury are:
   1. "But for" (sine qua non) test; and
   2. "Substantial factor" test.

P. SOLIS, MEDICAL JURISPRUDENCE 111-116 (1980).

[169] Comments, *Wrongful Life: The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980).

[170] Lorio, *supra* note 4, at 999-1000.

[171] 65 F. Supp. 138 (1946).

[172] Dietrich v. Inhabitants of Northampton, 158 Mass. 14 (1884).

claims for injuries received prior to its birth. In this *Bonbrest* decision penned in 1946, the child prevailed in an action against the physician for injuries negligently sustained at delivery. Viability, however, at the time of injury was stressed as a necessary prerequisite. Some twenty years later, *Sylvia v. Gobeille*[173] echoed this *Bonbrest* ruling but extended it by allowing recovery to the child for injuries sustained before viability. The court stated that "[t]here is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion."[174] In Australia, the Supreme Court held that a living child could be awarded damages for a brain injury caused long before birth in a road accident.[175] The doctrine laid down in *Jorgensen v. Meade Johnson Laboratories, Inc.*[176] is uniquely important. Firstly, it traced the wrongful act that caused the damage to a time before conception; and secondly, the decision specifically noted the recognition of such a cause of action need not await approval by the Oklahoma legislature. The court, in this case, allowed a cause of action on behalf of Mongoloid twins against a pharmaceutical company that had manufactured birth control pills. These pills, which the mother had taken prior to the children's conception, allegedly altered the mother's chromosomal structure. Following a similar path set by *Jorgensen, Renslow v. Mennonite Hospital*[177] held that a child had a cause of action against the hospital and the doctor for the injuries sustained as a result of a negligently performed transfusion on the mother prior to the plaintiff's conception. These two decisions, *Jorgensen* and *Renslow,* were likewise cited and restated in *Bergstresser v. Mitchell*[178] that allowed an infant to recover from the doctor and hospital for brain damage resulting from the physician's negligent performance of a Caesarean section on the mother prior to the conception of the plaintiff.

These aforementioned rulings show a development that tends to recognize prenatal injury as a cause for action, and extends it even to the period before conception. With this trend, damages caused by IVF and embryo transfer could be sued in court. But where does the causative nexus between the physician and the unborn child (or even preconceived embryo) lie? There seems to be no other link except through the mother, to whom the doctor has the duty of care to exercise. And this duty runs through from the mother to the child even prior to his conception. *Renslow,* expounding on this duty theory states:

> The extension of duty in such a case is further supported by sound policy considerations. Medical science has developed various techniques which can mitigate or, in some cases, totally alleviate a child's prenatal harm.

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173 220 A. 2d 222 (1966).
174 *Id.* at 223.
175 Watt v. Rama, 1972 Victoria Reports (Australia) 353.
176 483 F. 2d 237 (1973).
177 367 N.S. 2d 1250 (1977).
178 517 F. 2d 22 (1978).

> In the light of these substantial medical advances it seems to us that sound social policy requires extension of duty in this case.[179]

Jorgensen, however, seems to pursue the same via a different route — in terms of causation and proximate cause.

b. *Wrongful Life*

To state it briefly, what lies at the core of a wrongful life action is a regret that a person has been born at all. It tantamounts to claiming that one has a right not to be born. Non-existence is better than a handicapped life. The alleged culpability is in the claim that had it not been for negligence of the physician or of the parents, a person would not have been born in a disadvantaged set of circumstances that he finds his life in.

The case of *Hornbackle v. Plantation Pipe Line Co.*[180] allowed recovery for injury but pointed out that it was a harm done to the mother and through the mother to the child. It stated that "the majority ruling allows the baby to sue for injury, not to itself, for it is not in being at the time of the injury and hence could not have suffered personal injury."[181] Realizing the dangerous precedence that wrongful life action can set and the wide and undefined limits that it can take (specifically if directed against parents), the dissenting opinion in *Sinkler v. Kneale*[182] stated:

> The next step would be the allowance of a unit by a baby against its mother and/or father... for shock of its nervous system or an allergy or feeble mindedness or a malformation and for every conceivable defect or disease as the alleged result of negligently or recklessly driving..., or against its mother for nervousness, shock and every imaginable injury or disease resulting from her playing golf.... Why create and greatly increase litigation and give new causes for family discord?[183]

This warning proved to be a genius forecast for three years later, the first serious action for wrongful life against the parents surfaced in *Zepeda v. Zepeda.*[184] The plaintiff sued his father for causing him to be born as an adulterine bastard. He claimed that his father, who was married to someone other than the plaintiff's mother, seduced the mother by promising to marry her. The damages sought were for the deprivation of the right to be a legitimate child, to have a normal home, to have a legal father, to inherit from the father and the paternal ancestors, and for the stigma of being a bastard. Even if the court realized that the case could be a "natural result" of pre-viability injury cases and consequently, the causal relation between

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179 367 N.E. 2d 1250, 1255 (1977).
180 93 S.E. 2d 727 (1956).
181 *Id.* at 505.
182 164 A. 2d 93 (1960).
183 *Id.* at 277-278, as cited in Tedeschi, *On Tort Liability for "Wrongful Life",* 1 ISRAEL L. REV. 513, 518 n. 12 (Oct. 1966).
184 190 N.E. 2d 849 (1963).

the wrongful act and the injury needs to be proven, the court nevertheless, rejected the action. It added that recognition of the plaintiff's claim would create a new quasi-delict of wrongful life, encouraging "all others born into the world under conditions they might regard as adverse" to bring suit, and in which case the lawmaking function of the judicial process "should not be indulged in where the result could be as sweeping as here." It concluded that being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court. In another case, *Williams v. State of New York*,[185] the action was against the Manhattan hospital which was under the responsibility of the State of New York. The plaintiff alleged that because of the negligent supervision of the hospital, a mental patient succeeded in raping her mother, a woman patient, and resulting in the plaintiff's birth. In denying this action, the court simply restated the conclusion in *Zepeda*.

The problem and difficulty of making value determination between no life and a life with handicaps in order to measure damages is what confronted the court in *Gleitman v. Cosgrove*.[186] The infant in *Gleitman* alleged that the defendant doctors were negligent for they failed to inform his mother during pregnancy of the effects that her contraction of German measles might have on the child to be born. The child was finally born with defects in sight, hearing and speech. Had his mother been properly informed of the possible consequences of the sickness, the child contended, she might have decided to abort the pregnancy. To prove this, the plaintiff has to establish the criteria for negligence on the doctor's part.[187] What is crucial is showing the causal link between the child's birth and the physician's action or inaction. But since "the unborn or conceived cannot act on the information given by the doctor, a duty exists toward the child derivatively, as the child would suffer most directly the consequences of a breach."[188] Stating its abhorrence in making a value determination, the court rejected the claim. "The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This court cannot weigh the value of life with impairments against the non-existence of life itself."[189]

The next three wrongful life actions again harped on the negligence of the physician either in failing to advise the patient on the effects of an illness or by giving a wrong advise. Had their parents been given the proper advise, they would have adopted a different course of action and the sad consequences on the plaintiff would have been avoided. In *Stewart v. Long Island*

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185 260 N.Y.S. 2d 953 (1965).
186 227 A. 2d 689 (1967).
187 SOLIS, *supra* note 168.
188 Comments, *supra* note 169, at 490.
189 Gleitman v. Coscove, 227 A. 2d 689, 692 (1967), as cited in Lorio, *supra* note 4, at 1003.

College Hospital[190] the court refused recovery to an infant born with birth defects who claimed that the defendant hospital advised the child's mother during her pregnancy that a therapeutic abortion was not necessary, even though the mother had German measles in her first trimester of pregnancy. The second case *Becker v. Schwartz*[191] concerned a brain-damaged child who claimed that the physician treating his mother during her pregnancy failed to advise her of the higher incidence of Down's Syndrome children born to women over thirty-five, or of the availability of an amniocentesis to determine whether the child would be born with Down's Syndrome. The *Becker* child, therefore, insisted that he should have been aborted. In the third case, *Park v. Chessin,*[192] the claim of the Park child stated that his parents had not been properly informed that the polycystic kidney disease from which the latter suffered was an inherited condition and of a high risk such that the plaintiff, who had a sibling with disease, would also be afflicted. Both pleas the court rejected and stated that firstly, the infants suffered no "legally cognizable injury," holding that no one has a "fundamental right" to be born perfect, and secondly, that the court could not and, indeed, would not attempt to create a hypothetical formula for the measurement of the infants' damages.

Berman v. Allan,[193] in rejecting an infant's wrongful life claim, adopted a different reasoning from the *Gleitman* position which stated the difficulty of measuring damages. The court believed that the Mongoloid child whose mother had not been informed of the risk or of the possibility of amniocentesis had suffered no damage cognizable by law, because "one of the mostly deeply held beliefs of our society is that life — whether experienced with or without a major physical handicap — is more precious than non-life." Here really lies the crux of the question that underpins most of the wrongful life actions. Is non-existence sometimes preferrable than a deformed or handicapped life? Or is life, with or without handicaps, always better than non-existence? Or perhaps, life is not always better than non-existence. If these different positions are settled, wrongful life theory could be evaluated with ease. But still, more questions arise: Is the court in a position to make such a value determination? Can there be a set of objective standards to be followed? Or is it a determination that is highly subjective in character?

If there is a gradual shift and perhaps partial acceptance of the wrongful life theory, the evidence is found in two later actions — *Curlender v. Bio-Science Laboratories*[194] and *Scales v. United States.*[195] In *Curlender* the injured child claimed damages against a medical testing laboratory for its

[190] 313 N.Y.S. 2d 502 (1970).
[191] 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978).
[192] 400 N.Y.S. 2d 110 (1977).
[193] 404 A. 2d 8 (1979).
[194] 165 Cal. Rptr. 477 (1980), as cited in Lorio. *supra* note 4, at 1004.
[195] No. A-79-CA-70 (W.D. Tex., filed June 9, 1981, amended June 12, 1981), *appeal docketed,* No. 81-1367 (5th Cir., Aug. 12, 1981). Cited in Lorio, *supra,* note 4, at 1004.

neglect in conducting genetic tests which, if properly performed, would have disclosed the probability that the child would be born with Tay-Sachs disease. The court established a clear duty owed to the parents but rejected the notion that wrongful action involved a right not to be born. Instead it indicated that the child's damages were for the pain and suffering to be endured during the child's life span and any special pecuniary loss resulting from the condition. A similar reasoning is found in *Scales* where a federal district court in Texas awarded a judgment of $624,000 to a three-year old child born with damage to almost every organ due to the physician's negligence to test the plaintiff's mother for pregnancy when she had German measles. Interestingly enough, the money was spread out: $400,000 of the amount awarded for the care and treatment of the child to the age of eighteen, $24,000 for the child's pain, suffering and mental anguish, and $200,000 for his lack of potential employability.[196]

From the cases discussed above, it was the child that initiated the action for wrongful life. A similar plea for damage can also be made by the parents of these children, but this time for wrongful birth. The wrongful birth action will not pinpoint the causal link between the wrongful act and the injury, but will simply establish the negligence of the doctor. The parents can claim that they would have either avoided conception or terminated pregnancy if they had been properly advised of the risks of having a deformed child.[197] And because of the defendant's negligence in not properly informing the parents of the risk, such damages could result such as: pain, suffering and emotional distress of the parents in having to rear a defective child, and also the cost and other medical expenses related to it.

After this lengthy discussion of the legal implications of IVF and embryo transfer, we now ask the question: Has this new technology ushered in a rainbow of hope to many infertile parents? Or has it opened a Pandora's box resulting in philo-ethical complications and bringing in a new brand of legal battles?

IV. PROSPECTS FOR THE FUTURE

By way of concluding this study, let us be future-oriented. What can we do so that man benefits from the advance of science, specifically IVF and embryo transfer, but without sacrificing the basic and fundamental rights of man, the sanctity of life, and the integrity of marriage and the family. These are only four main points that the researcher wishes to offer for further reflection.

A. THE NEED FOR GUIDING NORMS AND/OR LEGISLATION

Passivity and a refrain from legislative measures cannot provide us with a sufficient response into this forward thrust of science and technology.

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[196] Lorio, *supra* note 4, at 1004.
[197] *Id.* at 1005.

It is an easy temptation to prefer to remain in a state of "legal limbo," but it will lead us nowhere. All the more will it complicate matters and intricate the legal-judicial system into a Gorgian knot of inadequate and unclear laws, arbitrary decisions, and utter confusion. Precisely because IVF and embryo transfer touch the delicate area of life and human reproduction, there is a greater urgency to have a normative guide and a set of standards. The choice is between a comprehensive statute or a general one. In the light of new discoveries and continuing scientific progress, a comprehensive statute may not be warranted—for this will mean going into concrete and specific processes, and which may be quite premature and may later become a legal obstacle. A general statute is what the present situation may call for, leaving the specifications to interested groups such as the doctors, scientists, parents and other associations or institutions. Of course, this statute must be formulated after an extensive study of the interests of public policy vis-a-vis fundamental rights of the individual, so that there is no uncalled for intrusion into private and personal domains. Mixed groups possibly composed of representatives from legal circles, religious sectors, scientists, educators and family associations, can be organized precisely to assist in the formulation of guidelines as well as in the monitoring of activities. There has to be a cooperative effort toward this goal, for it is not the task of legal minds and legislators alone.

B. PROMOTION, REGULATION AND FUNDING OF RESEARCH AND EXPERIMENTATION

Any advancement will always involve risks, scientific progress included. On the one hand we do not want that science, for the sake of technological progress, endanger human life and the venerable institutions of marriage and the family. We cannot just allow fetal deaths to occur in the interest of discovering novel approaches to human reproduction. But on the other hand, it will be a mistake to put an iron clamp into research and human experimentation, not until a relatively "perfect" process or formula has been arrived at. That may never come and meanwhile, independently conducted experiments are taking place in the dark corners of the laboratory—neither regulated nor monitored. The golden mean lies in the successful dynamic balance between the two opposites, through a regulated promotion of research and experimentation, well supported and financed by government funds. Individual initiatives must not be stifled but neither should limits be uncharted. For instance, there has to be some regulation limiting the time duration that an embryo can be frozen so that the danger of adopting parents dying before the birth of the child is lessened; or perhaps, both a written contract and a will must be accomplished before recoursing to IVF in order to avoid the pitfall of a seeming deadlock as in the *del Rios* case. It can also be specified that human experimentation may not be allowed until extensive trials and research have been conducted with animal subjects. There can be other valuable guidelines but what is important is the

existence of a group to work on them. Perhaps the structure and functions of the American Ethical Advisory Board can provide adequate examples in the aspects of laying down norms and regulations covering research, processing and assessing proposals, making recommendations for government funding, and monitoring the strict implementation of prescribed rules and regulations.

C. DUTIES AND LIABILITIES OF PHYSICIANS

Inasmuch as the attending doctors in IVF and embryo transfer process can become highly vulnerable to legal actions, there must be safeguards to protect their profession, and at the same time to specify areas of liabilities. In the final analysis, these laws are really for the benefit of the parents, the child and the practising physicians. Among their important duties are record-keeping and strict confidentiality of the donor's identity. This is to protect the potential donors from a possible legal action and likewise, to help preserve the unity of the family. In that record details of the donor's background and life history are documented. Only a court order and for reasons of good cause can this record be looked into. For eligibility to practise IVF and embryo transfer both skills and expertise are to be required of them, and these physicians must be properly licensed. There must also be certain set standards for donor selection, such as blood seriological testing, so that through a rigorous examination of the prospective donors, those with diseases or genetic defects can be excluded. To avoid incest, the number of donations should be limited, and the processing of information can be facilitated through a centralized recording. The manner of dealing with court claims for damages and similarly, the method for determining the type amount of relief must be specified so that the court does not grope in the dark when confronted with IVF cases.

D. OTHER SIGNIFICANT TRENDS

What can greatly prove helpful in the determination of the vital areas of concern in relation to this new technology is to read the signs as reflected in the trends. As made evident by the many court rulings previously discussed, the direction is toward the legalization of the IVF process (thus, looking at the relationship as not adulterous), and treating the IVF children as legitimate. However, this technical help must be made available only to infertile couples who are greatly desirous of having children. IVF has to be a big and flat *NO* to single women and minors, while surrogate motherhood is somewhat frowned at as posing potential dangers to the stability and integrity of marriage and the family. Recoursing to a carrier mother for certain grave reasons is not remotely probable, but there should be a strict regulation allowing it as a practice so as to avoid the abuses of commercializing child-bearing. The anonymity of the donors is to be protected as much as possible, and they should be free from any obligation

to the children born of such a process. To formalize the guidelines, there must be a written contract and an informed consent on the part of the adopting couples before any IVF is carried out.

This is but a sketchy projection that can pave the way for a possible set of guidelines and legislation. Shall the IVF and embryo transfer create a rainbow of hope to many childless couples? Or will it become a harbinger of death and doom to the fundamental institution of marriage and the family? It will ultimately depend on how we chart the course of our history through legislation and the judicial system.

APPENDIX I

FOREIGN COURT RULINGS, NOTES AND STATUTES RELEVANT TO ARTIFICIAL INSEMINATION/IN-VITRO FERTILIZATION

A. ADULTERY

1. *Orford v. Orford (1921)* 58 D.L.R. 251 (1921) Ontario Sup. Ct.
   — denied alimony to a wife who had undergone AID without her husband's consent.
   — shifted the emphasis for determining adultery from physical penetration to any act introducing a false strain of blood into the husband's family.
2. *Hoch v. Hoch (1945)* [Unreported] No. 44-C-9307 (Cir. Ct. Cook County, Ill. 1945), cited by Chandler, *Legis. Approach to AI,* 53 CORNELL L. REV. 500 (1968).
   — the first case to hold that AID, whether undertaken with or without the husband's consent, was not equivalent to adultery.
3. *Doornbos v. Doornbos (1945)* 23 U.S.L.W. 2308 unrep. decision of Super. Ct., Cook County, Ill., Dec. 13, 1954; *Gursky v. Gursky (1963)* 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct., 1963).
   — seemed to take a step backward in finding that AID constituted adultery, whether or not the husband's consent was obtained.
4. *MacLennan v. MacLennan (1958)* Sess. Cass. 105 (Scot), 1958 Scots L.T.R. 12, as cited by Chandler 53 CORNELL L. REV. 500 (1968).
   — that it is the sexual act itself that is adulterous, not the placing of the male seed in the female body.
5. *People v. Sorensen (1968)* 68 Cal. 2d 280, 66 Cal. Rptr. 7, 13 (1968); 437 P. 2d 495.
   — on the question of whether, as had been suggested, the doctor and the wife committed adultery by the process of artificial insemination, the Supreme Court said that it would be patently absurd, since the doctor may be a woman or the husband himself may administer the insemination by a syringe; and to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles or may even be a thousand miles or may even be dead is equally absurd.

B. LEGITIMACY

1. *Strnad v. Strnad (1948)* 190 Wisc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948)
   — that the child conceived through AID with the husband's consent was not illegitimate and therefore, the husband was entitled to the same rights as that acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled.
2. *Anonymous v. Anonymous (1948)* 7 FAM. L. REP. (BNA) 2549, 2550 (N.Y. Sup. Ct. 1981).
   — a wife sought temporary alimony and attorney's fees from her husband in a divorce action. Although the husband had signed a written agreement consenting to his wife's AI he nevertheless maintained that the two daughters so conceived were illegitimate. The Court ordered alimony but noted that the husband's written consent for his wife to undergo AI

implied a promise on his part to support any offspring resulting from the insemination.

3. *People v. Sorensen (1968)*
   - — the husband was indeed the father of the AID child, since the term "father" is not limited to the biological or natural father. The determinative factor is whether the legal relationship of father and child exists, since the anonymous donor of the sperm cannot be considered the "natural father" as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney.
   - — one who consents to the production of the child cannot create a temporary relation to be assumed and disclaimed at will; but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.
   - — no valid purpose is served by stigmatizing an artificially conceived child as illegitimate. The public policy favors legitimation.
4. *In the Matter of the Adoption of Anonymous (1973)* 74 Misc. 2d 99, 345 N.Y.S. 2d 430, 434 (Sup. Ct. 1973).
   - — a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.
5. *C.M. v. C.C. (1977)* 152 N.J. Super Ct. 160, 377 A. 2d 821 (Lumberland County Ct. 1977).
   - — an unmarried woman successfully inseminated herself with the sperm of her fiance without any physical contact. While her sweetheart assumed that he would be treated as the father of their child, he was not even allowed visitation rights after the birth of the child. The court here invoked considerations of public policy when it ruled that, whenever possible, it was in the best interest of a child to have two parents.
   - — inspite of the artificiality and "strained uniqueness" of the conception, CM was held to be the natural father of the child through the use of his sperm, and was accordingly granted custodial and visitation rights, as well as obligated to support and maintain the child. In other words, no distinction was drawn between a child who is conceived naturally and one who is conceived artificially insofar as the rights and obligations of the natural father are concerned.
   - — the court's opinion does not explain why the doctor refused to accept CC for AID. A probable reason was that CC was unmarried; many doctors refuse to perform AID upon single women; in 19 states it is prohibited by statute.
6. In the U.S. it was the state of Georgia that first passed a legislative enactment in 1964 which created a legal presumption of legitimacy for AID children when the mother and her husband, the putative father, have given their consent to the procedure. Some 24 other states have since passed laws relating to artificial insemination.

C. ANNULMENT

1. *L. v. L. (1949)* 1 All E.R. 141, 146.
   - — whether or not AIH constituted consumation of the marriage for purposes of an annulment, the court held that it did not and granted the wife's request for an annulment som seven years after the couple had conceived a child through AIH.

D. VISITATION RIGHTS

1. *Abajian v. Dennett (1958)* 15 Wisc. 2d 260, 184 N.Y.S. 2d 178 (Sup. Ct. 1958).
   - — it was held that a former husband was entitled to visitation rights with

his AID child, not only because it was equitable for the husband, but also because it was in the best interests of the child and preserved a sense of family to the extent possible after the mother and her husband have been divorced.

E. RESPONSIBILITY OF PHYSICIANS RE CONFIDENTIALITY OF *AID RECORDS*

1. *In re Ann Carol S. (1974)* 172 N.Y.L.J. 31, Aug. 13, 1974, at 12, Col. 6.
   — a New York Surrogate Court granted an adoptee access to her birth records to foster her emotional well-being, social adjustment, and psychological needs.
2. *Spillman v. Parker (1976)* 332 So. 2d 573 (La. Ct. of App. 1976).
   — it was held that an adoptee's desire to determine whether he had inherited property from his biological parents constituted a valid reason for a court order releasing his adoption records to him.
3. *Chattman v. Bennett (1977)* 57 App. Div. 2d 618, 393 N.Y.S. 2d 768 (1977).
   — where an adopted child sought access to her records of adoption to obtain medical information about her biological parents, the court allowed access to the medical information, but not to the identity of her natural parents.
   — another reason for disclosing the identity of AID donors is to prevent incestous marriages.
4. *In re Adoption of Female Infant (1979)* 5 FAM. L. REP. (BNA) 2311, 2313-14 (D.C. Super. Ct. 1978).
   — an adoptee requested that her adoption records be opened and that she be allowed to copy them. She asserted four reasons for her request: 1) her need to resolve the question of her identity; 2) her desire to love and help members of her biological family; 3) her need to obtain medical information to guard her children against any possible hereditary diseases; and 4) her children's right to know their blood relatives. The court concluded that this constituted "good cause" for disclosure, and not only granted the adoptee access to the information that she sought, but also ordered the Dept. of Human Resources to initiate an investigation to ascertain the whereabouts of the adoptee's natural parents.

F. WRONGFUL LIFE, DESTRUCTION AND DEFORMATION THEORY

1. *Dietrich v. Inhabitants of Northampton (1884)* 138 Mass. 14 (1884).
   — denied a child the right to maintain an action for injuries received prior to its birth.
2. *Harnbackle v. Plantation Pipe Line Co. (1956)* 212 Ga. 504, 505.
   — allowed recovery for injury but pointed out that it is harmful to the mother and through the mother to the child. It stated that "the majority ruling allows the baby to sue for injury, not to itself, for it is not in being at the time of the injury and hence could not have suffered personal injury."
3. *Bonbrest v. Katz (1946)* 65 F. Supp. 138 (D.D.C. 1946).
   — in this case a child prevailed in an action against the physician for injuries negligently sustained at delivery.
   — viability at the time of injury was a necessary prerequisite.
4. *Zepeda v. Zepeda (1963)* 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963, cert. denied, 379 U.S. 945 (1964).
   — the plaintiff sued his father for causing him to be born as an adulterine bastard. The claim was that the father, who was married to someone

other than the plaintiff's mother, seduced the mother by promising to marry her.

— damages were sought for the deprivation of the right to be a legitimate child, to have a normal home, to have a legal father, to inherit from the father and the paternal ancestors, and for the stigma of being a bastard.

— the court, however, rejected the action, noting that recognition of the plaintiff's claim would create a new tort of wrongful life, encouraging "all others born into the world under conditions they might regard as adverse" to bring suit, and stating that the lawmaking function of the judicial process "should not be indulged in where the result could be as sweeping as here."

— that being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court.

5. *Williams v. State of New York (1965)* 46 Misc. 2d 824, 260 N.Y.S. 2d 953.
   — proceedings have been taken against the State of New York, to hold it liable for an institution for which it was responsible, a Manhattan hospital. It was alleged that the hospital by its negligent supervision had enabled a mental patient to commit rape on a woman patient, resulting in the plaintiff's birth.

6. *Sylvia v. Gobeille (1966)* 101 R.I. 76, 220 A. 2d 222, 223 (1966).
   — allowed recovery to the child for injuries sustained before viability.
   — stated that there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and rejected viability as a decisive criterion.

7. *Gleitman v. Cosgrove (1967)* 49 N.J. 22, 227 A. 2d 689 (1967).
   — the infant in Gleitman claimed that the defendant doctors negligently failed to inform his mother during her pregnancy of the effects that her contraction of German measles might have on the unborn child.
   — the child, born with sight, hearing, and speech defects, claimed that his mother might have decided to abort him had she been properly informed by the doctors.
   — in rejecting the claim, the SC of New Jersey noted: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself."

8. *Stewart v. Long Island College Hospital (1970)* 35 A.D. 2d 531, 313 N.Y.S. 2d 502 (1970).
   — the court refused recovery to an infant born with birth defects who claimed that the defendant hospital advised the child's mother during her pregnancy that a therapeutic abortion was not necessary, even though the mother had German measles in her first trimester of pregnancy.

9. *Watt v. Rama (1972)* 1972 Victoria Report (Australia), p. 353.
   — in Australia, the SC of Victoria has held that a living child could be awarded damages for a brain injury caused long before birth in a road accident.

10. *Jorgensen v. Meade Johnson Laboratories, Inc. (1973)* 983 F 2d 237 (10th Cir. 1973).
    — the Tenth Circuit, interpreting Oklahoma law allowed a cause of action on behalf of Mongoloid twins against a pharmaceutical company that

had manufactured birth control pills. The pills, which the mother had taken prior to the children's conception, allegedly altered the mother's chromosomal structure.

— the court specifically noted the recognition of such a cause of action need not await approval by the Oklahoma legislature.

11. *Renslow v. Mennonite Hospital (1977)* 67 Ill. 2d 348, 367 N.E. 2d 1250 (1977).

— the SC of Illinois held that a child had a cause of action against the hospital and the doctor for injuries sustained as a result of a negligently performed transfusion on the mother prior to the plaintiff's conception.

12. *Bergstreser v. Mitchell (1978)* 577 F. 2d 22, 25 (8th Cir. 1978).

— the Eighth Circuit, citing both *Renslow* and *Jorgensen*, allowed an infant to recover from the doctors and hospital for brain damage resulting from physician's negligent performance of a ceasarean section on the mother prior to the conception of the plaintiff.

13. *Becker v. Schwartz (1978)* 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978); *Park v. Chessin* 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977); modified, 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978).

— the brain-damaged *Becker* child claimed that the physician treating his mother during her pregnancy failed to advise her of the higher incidence of Down's Syndrome in children born to women over thirty-five, or of the availability of an amnocentesis to determine whether the child would be born with Down's Syndrome.

— the *Park* child's claim was that his parents had not been properly informed that the polycystic kidney disease from which he suffered was an inherited condition and of the high risk that the plaintiff, who had a sibling with the disease, would also be afflicted.

— thus, the *Becker* child was claiming he should have been aborted and the *Park* child was claiming he never should have been conceived.

— the court rejected both pleas on two grounds: first, that the infants suffered no "legally cognizable injury," reasoning that no one has a "fundamental right" to be born perfect, and secondly, that the court could not and, indeed, would not attempt to create a hypothetical formula for the measurement of the infants' damages.

14. *Del Zio v. Manhattan's Columbia Presbyterian Medical Center (1978)* No. 74 3588 (S.D.N.Y. filed April 12, 1978) cited in Lorio.

— suit brought by Dr. and Mrs. John del Zio in a New York federal court, claiming $1.5 million in damages from Manhattan's Columbia Presbyterian Medical Center and Dr. Raymond Vande Wiele for the wrongful termination of an in vitro fertilization procedure.

— Mrs. del Zio, who was infertile because of diseased oviducts, agreed in 1972 to allow Dr. Landrum Shettles to proceed with the in vitro fertilization procedure using her husband's sperm. After fertilization but prior to implantation, the specimen was destroyed by Dr. Wiele, the Chief of Obstetrics and Gynecology. Wiele claimed that Dr. Shettles lacked the skills to perform the procedure properly, and that the hospital's committee on experimentation had not approved the procedure. Referring to the procedure as "slipshod," doctors at the hospital claimed that if the egg had been implanted successfully, Mrs. del Zio would have contracted peritonitis and might have died.

— Mrs. del Zio claimed that the destruction of the fertilized egg without her consent denied her the chance of having a child, causing her physical damage and emotional distress.

— a jury of four women and two men awarded Mrs. del Zio damages of $50,000 for emotional distress, with nominal damages being assessed to her husband.

— the relief afforded Mrs. del Zio was not specifically for the wrongful death of the fetus, but rather was a recognition of a severe loss, somewhat analogous to a property-loss.

15. *Berman v. Allan (1979)* 80 N.J. 421, 404 A. 2d 8 (1979).

— the New Jersey Supreme Court again rejected an infant's wrongful life claim. The Gleitman reasoning that it was difficult to measure damages, was not adopted; rather, the court believed that the Mongoloid child whose mother had not been informed of the risk or of the possibility of amniocentesis had suffered no damage cognizable by law, because "one of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life."

Because of the *Roe v. Wade* decision, the later wrongful life—wrongful birth cases like these (including nos. 13 and 15), not surprisingly recognized the parents' cause of action, although denying the child's.

Interestingly, in the *Becker* and *Park* cases, the court sustained the causes of action for pecuniary damages suffered by the parents caused by the birth, but denied relief for the emotional harm suffered by the parents citing the latter as a "question best left for legislative address."

In contrast *Berman* recognized the right of the parents to recover for mental and emotional damage, but denied recovery for the expenses of rearing the defective child because such recovery would be "wholly disproportionate to the culpability involved."

16. *Curlender v. Bio-Science Laboratories (1980)* 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

— the first case to recognize a cause of action for wrongful life which arose in California.

— the injured child claimed damages against a medical testing laboratory for negligently conducting genetic tests which, if performed correctly, would have disclosed the probability that the child would be born with Tay-Sachs disease.

— the court found a clear duty owed to the parents. Rejecting the notion that the wrongful life action involved a right not to be born, the court indicated the child's damages were for the pain and suffering to be endured during the child's life span and any special pecuniary loss resulting from the condition. Costs of care would also be appropriate if the parents did not have a suit pending for such relief.

17. *Shirley v. Bacon (1980)* 154 Ga. App. 203; 267 S.E. 2d 809 (1980).

— recognized a cause of action for the wrongful death of a "quick" fetus.

18. *Scales v. United States (1981)* No. A-79-CA-70 (W.D. Tex., filed June 9, 1981, amended June 12, 1981, appeal docketed, No. 81 1367 (5th Cir. Aug. 12, 1981.

— a federal district court in Texas awarded a judgment of $624,000 to a three-year old child born with damage to almost every major organ due to the physician's negligence to test the plaintiff's mother for pregnancy when she had German measles. Four hundred thousand dollars were awarded for the care and treatment of the child to the age of eighteen, $24,000 for the child's pain, suffering and mental anguish after the age of eighteen, and $200,000 for his lack of potential em-employability.

G. PROTECTION OF PRIVACY IN INTIMATE FAMILY MATTERS

I. RIGHT TO MARITAL PRIVACY/RIGHT TO REPRODUCTIVE PRIVACY

1. *Meyer v. Nebraska (1923)* 262 U.S. 390 (1923).
   — the US Supreme Court included the right to marry, establish a home and bring up children among the rights of "liberty" guaranteed in the 14th amnedment.
2. *Pierce v. Society of Sisters (1925)* 268 U.S. 510 (1925) and *Prince v. Commonwealth of Massachusetts (1944)* 321 U.S. 158 (1944).
   — the right to rear one's children was recognized.
   — in *Pierce,* the court stated that the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.
   — in *Prince,* the court referred to the "parent's claim to authority in her own household and in the rearing of her children" as "sacred private interests." Note, however, that the court balanced this right against the state's interest "to protect the welfare of children."
3. *Skinner v. Oklahoma (1942)* 316 U.S. 535, 541 (1942).
   — the right to procreate, was recognized as "fundamental to the very existence and survival of the race."
   — the court subjected to strict scrutiny an attempt by the Oklahoma Legislature to impinge on that right by sterilization of habitual criminals.
4. *Griswold v. Connecticut (1965)* 381 U.S. 479 (1965).
   — protected the right of married persons to use contraceptives.
   — the court held a Connecticut statute restricting the right unconstitutional, reasoning that the right of marital privacy was fundamental and protected from governmental intrusion under the penumbra of guarantees in the Bill of Rights.
5. *Loving v. Virginia (1967)* 388 U.S. 1, 12 (1967).
   — the freedom to marry was deemed fundamental, with the court protecting interracial marriage from state prohibition.
6. *Eisenstadt v. Baird (1972)* 405 U.S. 438 (1972).
   — a case in which the SC held a Massachusetts statute banning the distribution of contraceptives to unmarried persons unconstitutional.
   — according to the court, if the right of privacy means anything, it is the right of the individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
7. *Roe v. Wade (1973)* 410 U.S. 113 (1973).
   — the right to privacy was deemed broad enough to encompass a woman's decision whether or not to terminate her pregnancy. In restricting a mother's absolute right to abortion to the first trimester of pregnancy, the court recognized the state's interest in protecting the mother's health during the second trimester and the interest of the potential human life in the third.
8. *Carey v. Population Services International (1977)* 431 U.S. 678 (1977).
   — the SC rendered unconstitutional a New York statute that regulated the distribution and advertisement of contraceptives, labelling the decision whether or not to beget or bear a child at the very heart of cluster of constitutionally protected choices.
9. *Zablocki v. Redhail (1978)* 434 U.S. 384, 390-91 (1978).
   — the court likewise invalidated a statute restricting parents with support obligations to minor children from marrying without court approval.

II. RIGHT TO PRIVACY (ADOPTION)

1. *Willey v. Lawton (1956)* 8 Ill. App. 2d 344, 132 N.E. 2d 34, 35 (1956).
   — even in states without laws specifically rendering such payment criminal, courts have deemed payments to induce an adoption to be against public policy.
   — court denied recovery on a note given to a natural father as consideration for his consent to an adoption by the mother and her second husband.
2. *In re Estate of Shirk (1960)* 186 Kan. 311, 350 P. 2d 1 (1960).
   — in this case the Kansas SC upheld an oral contract that provided that a mother would consent to having her daughter adopted by the child's grandmother in exchange for having the grandmother leave part of her estate to both the mother and child.
3. *Downs v. Wortman (1971)* 228 Ga. 315, 185 S.E. 2d 387, 388 (1971).
   — the Georgia court held a mother's consent to adoption void when the mother was offered her plane fare to her parents' home provided that she consented.
4. *Reimche v. First National Bank (1975)* 512 F. 2d 187, 189 (9th Cir. 1975).
   — the court upheld an agreement whereby the mother of an illegitimate child consented to having the father adopt the child in exchange for his providing for the mother in his will. The court found that the adoption was in the best interest of the child and the pecuniary gain was not the motivating factor on the mother's part.
5. *Doe v. Kelley (1980)* 6 FAM. L. REP. (BNA) 3011 (Wayne Co., Mich., Cir. Ct. 1980).
   — involved an arrangement to pay the surrogate $5,000 plus medical expenses in return for her surrendering and agreeing to the adoption of a child.
   — she conceived by artificial insemination. The court, in upholding the statute, recognized that the constitutional right to privacy was not absolute and should be weighed against the compelling state interest in preventing "baby bartering."
6. *Kentucky Statutes*
   — Kentucky's attorney general rendered an advisory opinion declaring surrogate mother contracts illegal and unenforceable. In declaring that the strongest legal prohibition against surrogate parenting in Kentucky is founded in the strong public policy against the buying and selling of children, the attorney general cited Kentucky statutes that prohibited a mother from consenting to an adoption before the fifth day after the child's birth and that prohibited a parent from petitioning for voluntary termination of parental rights until the fifth day after the child's birth.

H. REGULATION

I. COMPELLING STATE INTEREST

1. *Buck v. Bell (1927)* 274 U.S. 200 (1927).
   — even cases upholding a state's right to sterilize the mentally retarded and deprive them forever of the right to procreate have required observance of constitutional due process.
2. *Shapiro v. Thompson (1969)* 394 U.S. 618, 634 (1969).
   — to determine whether a state may regulate the procedures of in vitro fertilization and embryo transfer, one must determine whether a fundamental right is being affected. Making this determination requires an examination to see if the right is one explicitly or implicitly guaranteed by the Constitution.

— if it is, then courts must examine with "strict scrutiny" any attempts to impinge on that right. Only if a "compelling state purpose" exists for interfering with that right may a statute doing so be upheld, and even then the regulation must be the least restrictive means of achieving the state purpose.

3. *North Carolina Ass'n for Retarded Children v. North Carolina (1976)* 420 F. Supp. 451 (M.D.N.C. 1976).
   — although recent sterilization cases do not seem to require a showing that potential offspring of the patient would be similarly inflicted with deficiencies to approve a sterilization, many emphasize that the state is interested in the inability of the parent to care properly for the resulting child.

II. GOVERNMENT FUNDING

1. *Poelker v. Doe (1977)* 432 U.S. 519 (1977).
   — recognized a right of cities to refuse funding for hospital services for nontherapeutic abortions, but to provide it for childbirth.
2. *Harris v. McRae (1980)* 448 U.S. 297, 315 (1980).
   — the SC held that New York, as a participant in the Medicaid Program, was under no obligation to fund abortions for which federal reimbursement was unavailable under the Hyde Amendment.
   — the court held additionally that the amendment neither deprived indigent women of their "liberty" guaranteed in the due process clause of the first amendment, merely because it corresponds to tenets of the Roman Catholic Church.