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Constitutional Limits on New Mexico's In Vitro Fertilization Law

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CONSTITUTIONAL LIMITS ON NEW MEXICO'S IN VITRO FERTILIZATION LAW

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Development in medical technology during the 1970s opened doors for many infertile couples to have children.[1] While one technique, in vitro fertilization (IVF), provided new opportunities for procreation, it also evoked images of George Orwell's *1984*[2] society and test-tube babies. In 1985 the New Mexico state legislature amended the human research statute which limits IVF to infertility treatments and requires implantation of all resulting embryos.[3] This article analyzes the constitutional problems posed by this statute and argues that the statute violates the prospective parents' right to privacy and the physician's procedural due process rights.

I. IN VITRO FERTILIZATION

Infertility and its treatment are rapidly expanding concerns in American society and culture. Nearly ten percent of married American couples of child-bearing age are infertile.[4] The number of couples seeking medical treatment for infertility has tripled in the last twenty years, from 600,000 in 1968 to 1.6 million in 1984, despite an unchanged incident rate.[5] This increase is largely due to the availability of improved treatment techniques such as fertility drugs, artificial insemination, and surgery of the reproductive tract.[6] Ten to fifteen percent of infertile couples will require more sophisticated treatment such as IVF or gamete intrafallopian transfers (GIFT).[7] Approximately $1 billion was spent on fertility medical care in 1988, $7 million of which was spent on IVF.[8]

In an attempt to achieve pregnancy, in vitro fertilization unites a woman's ovarian eggs with male sperm outside the body and then places

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1. Louise Brown, the first child born from in vitro fertilization, was born in 1978 in England.

2. GEORGE ORWELL, 1984 (1949). Orwell's book describes a "utopian" society in which the government controlled reproduction through eugenics. *See also* ALDOUS HUXLEY, BRAVE NEW WORLD (1931), in which reproduction resulted solely from test-tube babies determined to be genetically desirable.

3. Maternal, Fetal and Infant Experimentation Act, 1979 N.M. Laws ch. 132 §§ 1-7 (codified as amended at N.M. STAT. ANN. §§ 24-9A-1 to -7 (Repl. Pamp. 1991)) [hereinafter "the Act"].

4. HOUSE COMM. ON GOVERNMENT OPERATIONS, INFERTILITY IN AMERICA: WHY IS THE FEDERAL GOVERNMENT IGNORING A MAJOR HEALTH PROBLEM?, H.R. REP. No. 389, 101st Cong., 1st Sess. 3 (1989) [hereinafter INFERTILITY IN AMERICA]. Infertility is the failure to conceive after twelve months of intercourse without contraception. *Id.*

5. INFERTILITY IN AMERICA, *supra* note 4, at 3.

6. *Id.*

7. *Id.* GIFT transfers uncombined sperm and egg to a woman's fallopian tube for fertilization to occur. *Id.* This article restricts its analysis to IVF.

8. *Id.*

the resulting embryo in the uterus for implantation.[9] Several steps are involved in this process, beginning with the chemical stimulation of the ovaries to increase the number of eggs, or oocytes, produced.[10] The "superovulation" technique provides oocytes for multiple preembryos from one ovulation cycle, thereby increasing the probability of a resulting pregnancy from placed preembryos.[11]

The oocytes are then harvested by a minor surgical technique[12] and placed in a laboratory dish containing sperm.[13] Fertilization, or the penetration of an oocyte by a single sperm, may take up to twenty-four hours.[14] The resulting single-cell organism, or zygote, now contains the pairing of chromosomes necessary to create a unique genetic identity.[15] The zygote begins to subdivide into a multi-cell, yet undifferentiated, organism labeled a "preembryo."[16] The preembryos are placed into the uterus in the four-to-eight-cell stage, usually two to three days after the harvest of oocytes.[17] The successful embryo develops the ability to interact with the uterine lining.[18] It embeds itself in the uterine wall after six to nine days and then pregnancy is achieved.[19]

After implantation, the embryos continue to subdivide and develop into two-cell populations. One population gives rise to the placenta and the other population produces the fetus.[20] Approximately fourteen days after fertilization the primitive streak appears, an opaque line which marks the first development of the central nervous system of the fetus.[21] After the primitive streak appears, the embryo develops fetal characteristics, such as body parts and organs.[22]

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9. For an excellent account of in vitro fertilization, see Machelle M. Seibel, *A New Era in Reproductive Technology: In Vitro Fertilization, Gamete Intrafallopian Transfer, and Donated Gametes and Embryos*, 318 NEW ENG. J. MED. 828 (1988); *see also* Ethics Comm. of Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY 1S (Supp. 2 1990) [hereinafter *Ethical Considerations*].

10. Seibel, *supra* note 9, at 829; *see also* Andrew L. Speirs et al., *Analysis of the Benefits and Risks of Multiple Embryo Transfer*, 39 FERTILITY AND STERILITY 468 (1983).

11. Speirs, *supra* note 10, at 468; *see also* BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 120 (1991).

12. The techniques for removal of oocytes are laparoscopy or aspiration through a hollow needle. The harvesting of multiple oocytes reduces the physical risk of these procedures, as well as reducing the financial and emotional toll on the couple. FURROW, *supra* note 11, at 120.

13. Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 633-34 (1991).

14. Seibel, *supra* note 9, at 829-31.

15. *Id.*

16. Most legal and medical scholars have settled on the term "preembryo" which refers to "[a] number of developmental stages before the embryonic stage whose different names (zygote, morula, blastocyst) are not pertinent to the issues . . . ." Raymond C. Grandon et al., 264 JAMA 2382 (1990) (reply to letter calling "preembryos" a "ridiculous term"). The term was adopted by the Ethics Committee of the American Fertility Society. *Id.*; *see also Ethical Considerations*, *supra* note 9, at vii.

17. Seibel, *supra* note 9, at 829-31.

18. Clifford Grobstein, *The Early Development of Human Embryos*, 10 J. MED. & PHIL. 213, 219 (1985).

19. *Id.*

20. Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 263-64 (1990) (citing CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN 58-62 (1988)).

21. *Id.*

22. *Id.*

II. THE NEW MEXICO STATUTE

The New Mexico legislature passed the Maternal, Fetal and Infant Experimentation Act (the Act) in 1979.[23] The Act regulates research conducted on mothers and babies in New Mexico. The Act contains definitions[24] and sections which limit research conducted on a pregnant woman,[25] a fetus,[26] or a live-born infant.[27] Additionally, the Act requires precursor animal studies,[28] forbids compensation to a research subject[29] and requires informed consent from the appropriate party before a pregnant woman, a fetus, or an infant can participate in clinical research.[30] The Act also precludes the researcher from involvement in decisions concerning termination of a pregnancy,[31] determinations of fetal viability[32] and changes in termination protocol solely for research purposes.[33] Finally, the Act imposes criminal penalties on anyone who knowingly and willfully conducts research in an unlawful manner on a pregnant woman, infant or fetus.[34]

In 1985, the legislature amended the definitions section to include regulation of IVF (the IVF Act).[35] In an attempt to classify IVF as research and yet allow its application in fertility treatment, the legislature amended the statutory construction clause of the IVF statute to read:

> "clinical research" . . . *includes research involving human in vitro fertilization*, but shall not include diagnostic testing, treatment, therapy or related procedures conducted by formal protocols deemed necessary for the care of the particular patient upon whom such activity is performed *and shall not include human in vitro fertilization performed to treat infertility; provided that this procedure shall include provisions to insure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient, and no physician may stipulate that a woman must abort in the event the pregnancy should produce a deformed or handicapped child.*[36]

The implantation requirement[37] in the amendment creates two difficulties. First, it invites troublesome medical problems despite its presum-

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23. 1979 N.M. Laws ch. 132 §§ 1-7 (codified as amended at N.M. STAT. ANN. §§ 24-9A-1 to -7 (Repl. Pamp. 1991)).
24. *Id.* § 24-9A-1.
25. *Id.* § 24-9A-2.
26. *Id.* § 24-9A-3.
27. *Id.* § 24-9A-4.
28. *Id.* § 24-9A-5(A)(1).
29. *Id.* § 24-9A-5(B).
30. *Id.* § 24-9A-5(C).
31. *Id.* § 24-9A-5(A)(2)(a).
32. *Id.* § 24-9A-5(A)(2)(b).
33. *Id.* § 24-9A-5(A)(3).
34. *Id.* § 24-9A-6.
35. 1985 N.M. Laws, ch. 98 (codified as amended at N.M. STAT. ANN. § 24-9A-1(D) (Repl. Pamp. 1991). The remainder of the Act was unchanged.
36. N.M. STAT. ANN. § 24-9A-1(D) (Repl. Pamp. 1991) (emphasis shows added language). The remainder of this article's citations to the Act refer to the Act as amended in 1985.
37. "[P]rovided that this procedure shall include provisions to insure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient." *Id.*

able statutory goal of maternal and fetal protection. The requirement makes no allowance for medical protocol designed to insure the health of the mother or fetus that might discourage a physician from implanting every preembryo.[38] The substantive requirement of complete implantation thus may increase risks to mothers and babies instead of fulfilling the apparent and laudatory legislative goal of protecting these patients. Interestingly, the medical solution to at least one of these risks, multiple gestations, would require the mother and her physician to abort some or all of the fetuses after the preembryos are implanted.[39] This solution presents no legal liability for either mother or physician, whereas the decision to reduce medical risk by implantation of fewer than all embryos may give rise to liability.[40]

The second difficulty created by the implantation requirement is that the legislation contains substantial constitutional infirmities. The implantation requirement infringes on procreative rights of IVF participants without identifying an interest the state seeks to protect.[41] Further, it is unclear how the legislature intended the courts to enforce the IVF clause. The section applying possible criminal penalties to IVF physicians raises the issues of vagueness and notice required by the due process clause of the Fourteenth Amendment.[42]

Due to these difficulties, the legislature should repeal the 1985 amendment to the Act. If the legislature desires to regulate emerging reproductive technologies, it must do so in a manner that neither increases medical risk nor offends the United States Constitution.

III. CONSTITUTIONAL CONSIDERATIONS

The New Mexico IVF statute gives rise to two constitutional problems. Because the Act mandates implantation of all preembryos, it impermissibly infringes on an IVF participant's substantive due process right to privacy in making reproductive decisions. Additionally, the Act's lack of adequate notice of civil and criminal liability for physicians and IVF participants who choose less than total implantation may violate these parties' procedural due process rights. The United States Court of Appeals for the Seventh Circuit considered fatal similar constitutional infirmities in a comparable Illinois statute.[43] If challenged, the New Mexico statute faces a similar fate.

A. The Right to Privacy

The United States Constitution does not specifically enumerate a right to privacy. The United States Supreme Court, however, has found that

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38. Speirs, *supra* note 10.
39. *Id.*
40. *See infra* notes 139-40 and accompanying text.
41. *See* N.M. STAT. ANN. § 24-9A-1(D) (Repl. Pamp. 1991); U.S. CONST. amend. XIV, § 1. *See infra* notes 102-35 and accompanying text.
42. U.S. CONST. amend. XIV, § 1. *See infra* notes 136-74 and accompanying text.
43. Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991).

a right to privacy exists within the liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[44] Generally characterized as "substantive due process rights," the right to privacy concept "refers to the principle that a law adversely affecting an individual's life, liberty or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective."[45] The personal liberty to choose a profession, become educated, marry and raise a family, among others, are included within the broad definition of the right to privacy.[46]

The Court has developed a two-step process to determine whether a law infringes upon the right to privacy.[47] First, a court must determine the character of the right upon which the law infringes.[48] If the right is fundamental, a court will apply a strict scrutiny standard and require the state to show a compelling interest in the regulation.[49] If the right is characterized as less than fundamental, the state need only show a rational basis for its legislation.[50]

Legal ethicists have applied this analysis to regulation of IVF for over thirteen years.[51] There is general agreement that IVF involves a fundamental right to privacy and, therefore, state regulation must be narrowly tailored to avoid unwarranted infringement on that right.[52] Because the Act mandates implantation of each preembryo produced through IVF, it is unlikely that the New Mexico statute would pass a constitutional challenge based on a woman's right to procreative privacy.

Ethicists reach the conclusion that IVF triggers substantive due process rights because of two important policy issues that transcend this two-pronged analysis. The first issue is the determination of who has decision-making rights under the Act. An analysis of decision-making rights will help determine the characterization of the right as fundamental or as simply a liberty interest. The second issue involves the legal status of the preembryo, which will control the nature of the state's interest. The Act raises these issues in its implantation requirement by impliedly vesting decision-making authority in the state without describing the interest the

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44. "No state shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

45. Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 733 (1976).

46. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

47. *See* Skinner v. Oklahoma, 316 U.S. 535, 540-42 (1942).

48. *See id.*

49. *Id.* at 541. Strict constitutional scrutiny requires the state to show that the limitation on a fundamental right is both necessary and narrowly tailored to serve a compelling governmental interest. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

50. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955).

51. *See* DEP'T OF HEALTH, EDUC., AND WELFARE, PROTECTION OF HUMAN SUBJECTS: HEW SUPPORT OF HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER: REPORT OF THE ETHICS ADVISORY BOARD, 44 Fed. Reg. 35,033, 35,048 (1979) [hereinafter HEW REPORT].

52. *See, e.g., id.*; *see also* Antoinette Sedillo Lopez, *Privacy and The Regulation of the Technologies: A Decision-Making Approach*, 22 FAM. L.Q. 173 (1988); *Ethical Considerations*, *supra* note 9, at 2S; Eggen, *supra* note 13, at 644; Martin, *supra* note 20, at 279.

state seeks to protect. By leaving these issues unresolved in the Act, the New Mexico legislature provided little guidance to the courts.

1. The Nature of the Right

The United States Supreme Court has long recognized reproductive freedom as a fundamental right. The Court first addressed this right in *Skinner v. Oklahoma*,[53] where a mandatory sterilization law for habitual criminals was struck down. The Court characterized the right to procreate as among "the basic rights of man."[54] Beginning with *Griswold v. Connecticut*,[55] later cases included the right to reproductive freedom within a "zone of privacy created by several fundamental constitutional guarantees."[56] In *Eisenstadt v. Baird*,[57] the Court extended procreative choice within the right to privacy to unmarried individuals. Justice Brennan declared: "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."[58]

This precedent established by the Supreme Court suggests that the New Mexico IVF Act infringes on a fundamental right. The right to privacy in procreative decisions constitutionally protects a person's decision whether to become a parent. The Act, however, requires an IVF patient to proceed with implantation as soon as the process produces a preembryo. The implantation requirement thus shifts the locus of decision-making control from the parents to the state, thereby infringing on the patient's right to be free from the infringement upon procreative choice prohibited in *Eisenstadt*. This legislative intrusion is unconstitutional unless the state can show a compelling state interest which the Act protects.[59]

The conclusion that the Act infringes upon a patient's fundamental right to procreate is subject to two attacks. First, the United States Supreme Court may have narrowed its characterization of privacy rights as fundamental in recent cases. Second, the Court has examined narrowly whether American society traditionally values the privacy or family interest at issue in determining whether the privacy right is fundamental in nature.

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53. 316 U.S. 535 (1942).

54. *Id.* at 541; *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right of an individual "to marry, establish a home and bring up children"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and 'rights far more precious . . . than property rights.'").

55. 381 U.S. 479 (1965).

56. *Id.* at 484.

57. 405 U.S. 438 (1972).

58. *Id.* at 453 (emphasis omitted). The Court also has characterized reproductive rights as fundamental in the abortion context. In Roe v. Wade, 410 U.S. 113 (1973), the Court declared that fundamental rights are included in the guarantee of personal privacy. *Id.* at 153. The Court included activities relating to marriage, family relationships, and child rearing and education among the protected rights. *Id.* Recognizing that the right was not explicit in the Constitution, the *Roe* court found the locus of the right within the liberty interest of the Fourteenth Amendment Due Process Clause. *Id.*

59. *See supra* notes 44-50 and accompanying text.

These trends suggest that the Court may not recognize the parents' interest in freedom from governmental interference in IVF decisions as a fundamental right.

The Court has retreated from its characterization of procreative rights as fundamental in two cases. A plurality decision, *Webster v. Reproductive Health Services*,[60] characterized the right to abortion as merely a "liberty interest protected by the Due Process Clause."[61] While *Planned Parenthood v. Casey*[62] affirmed the constitutional basis of fundamental privacy rights under the Due Process Clause,[63] the Court's reasoning reduces a woman's right to freedom in abortion choices as compared to other rights surrounding family relationships. The Court in *Casey* recognized that the abortion interest is similar, but not equivalent, to the procreative interests fundamentally protected in *Griswold*.[64] Because the interest is less than a fundamental one, the plurality attempted to craft a new intermediate analysis.[65]

Further, the *Casey* opinion contains strong dissents written by Chief Justice Rehnquist[66] and Justice Scalia,[67] both of whom are joined by Justices White and Thomas. The four dissenting justices would overrule *Roe v. Wade*'s finding of a fundamental right to abortion and apply the rational basis test to uphold the questionable statute in *Casey*.[68] If a court applied the dissenters' view to regulation of reproductive technology, a rational basis analysis would apply rather than strict scrutiny. The New Mexico IVF Act would thus have a lesser burden to meet, although the implantation requirement would most likely render the Act unconstitutional because it requires a woman to become pregnant.

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60. 492 U.S. 490 (1989).

61. *Id.* at 508. The Court recently refrained from classifying the right to refuse medical treatment as a fundamental right to privacy. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990). The *Cruzan* court also chose to express the right as a due process clause liberty interest. *Id.* at 279 n.7.

62. 112 S. Ct. 2791 (1992).

63. *Id.* at 2807.

64. *Id.*

65. Justice O'Connor advocates a third level of scrutiny for state infringement in the area of substantive due process rights. Her paradigm is an intermediate level between strict scrutiny and rational basis which measures whether the regulation "unduly burdens" a fundamental right. She first articulated this rationale in Webster v. Reprod. Health Servs., 492 U.S. 490, 522 (1989) (O'Connor, J., concurring). In *Casey*, 112 S. Ct. at 2820, she described "undue burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* She was unable to assemble a majority opinion on this point, however, when Justice Blackmun insisted that the Court retain strict scrutiny of governmental interference in abortion decisions. *Id.* at 2846.

The New Mexico Act, however, contains an absolute mandate requiring implantation. Under Justice O'Connor's intermediate scrutiny, the Court would likely find that such an absolute mandate unduly burdens a person's privacy right because the statute replaces all personal choice with a statutory mandate of attempted pregnancy and/or parenthood once a couple initiates IVF. Thus even under a standard which is arguably lower than strict scrutiny the statute is unlikely to pass constitutional muster.

66. *Id.* at 2855.

67. *Id.* at 2873.

68. *Id.* at 2867, 2874.

The trend reducing the level of constitutional protection given to the right to abortion may have limited application to legislation regulating IVF. The abortion cases arise in a different procreative context than medical technology regulation; abortion ends a pregnancy, while IVF attempts to create one. Further, a woman's right to procreative privacy which is violated by the Act's implantation requirement derives from pre-*Roe* precedent which is based upon a Due Process Clause definition of fundamental right.[69] The New Mexico IVF Act, therefore, still must survive strict scrutiny.

The second trend which has negative overtones for individual fundamental rights in procreative decision-making is illustrated by two subsequent cases concerning privacy and family issues. In *Bowers v. Hardwick*,[70] the Court analyzed the right to privacy by upholding a Georgia statute which criminalized sodomy. The Court concluded that the privacy right does not protect homosexual activities, despite analogies to protection of activities conducted in the privacy of one's home.[71]

Even more troublesome is the Court's opinion in *Michael H. v. Gerald D.*[72] In *Michael H.* a man who was the undisputed biological father of a child born to another man's wife challenged a California statute which gave paternal rights solely to the woman's husband.[73] In a plurality opinion which upheld the statute, the Court refused to recognize a non-traditional paternal right in the child's natural father.[74] In his refusal to find a fundamental right at issue, Justice Scalia implied that only interests that are traditionally protected by our society would be considered fundamental.[75] Justice Scalia concluded that the United States Constitution does not protect a right that can only arise from an adulterous relationship.[76]

Legal and medical ethicists agree that, while the privacy jurisprudence clearly protects coital reproduction, non-coital reproduction, such as IVF, may require a jurisprudential leap to gain constitutional protection.[77] A non-traditional method of having children such as IVF, therefore, may not be recognized as a fundamental right under a *Michael H.* analysis. Society traditionally protects the values surrounding marriage and procreation, however, and those values transcend the specific means of creating a family.[78] The Ethics Committee of the American Fertility Society

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69. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 534, 541 (1942).
70. 478 U.S. 186 (1986).
71. *Id.* at 196.
72. 491 U.S. 110 (1989). The Court produced a majority opinion, albeit 5-4, in *Bowers* while Justice Scalia could only muster a plurality in *Michael H.* However, the Court's composition changed dramatically between 1986 and 1989 and is perhaps more conservative today. Both Justices Brennan and Marshall, dissenters in *Bowers*, have been replaced with justices who may find Justice Scalia's reasoning in *Michael H.* persuasive.
73. *Id.* at 114.
74. *Id.* at 125 & n.6.
75. *Id.*
76. *Id.*
77. *See Ethical Considerations*, *supra* note 9 at 3S-5S; *HEW Report*, *supra* note 51, at 35,048.
78. Eggen, *supra* note 13, at 647.

succinctly stated, "[c]oital reproduction is legally protected not for the coitus but for what the coitus makes possible: it enables the couple to unite egg and sperm in order to acquire the possibility of rearing a child . . . ."[79] A couple's right to control decisions surrounding IVF, including whether to implant some, none, or all of their preembryos, should have the same constitutional protection that was afforded procreation before the advent of helpful medical technology.

A case presenting issues similar to those raised by the New Mexico IVF statute completely sidesteps the dispute concerning the nature of the protected right. In *Lifchez v. Hartigan*,[80] a class of Illinois endocrinologists sought declaratory relief in federal district court. The physicians petitioned the court to strike down an Illinois statute which regulated IVF and imposed criminal liability for fetal experimentation. The court held that the statute was unconstitutional, in part because it restricted a woman's right to make reproductive choices free of governmental interference.[81] Although the court concentrated on the physician's procedural due process challenge, it did not hesitate to characterize the woman's right to reproductive choice as fundamental when it briefly addressed the issue.[82] The court marched through the traditional fundamental right to privacy cases, beginning at *Griswold* and quickly arriving at *Roe*, apparently ignoring *Roe*'s questionable status.[83] Affirming the *Lifchez* decision in a memorandum opinion, the Seventh Circuit was similarly unconcerned about the strength of the legal precedent upon which the district court relied.[84] Thus, the highest federal court which has considered the issue affirmed the grant of fundamental status to an individual's right to control decisions concerning IVF.

More recently, the Tennessee Supreme Court addressed the nature of the right to procreational autonomy in a dispute concerning IVF and held the right to be "a vital part of an individual's right to privacy."[85] *Davis v. Davis* began as a divorce action between a couple who struggled for years to have a child. After several unsuccessful IVF attempts, a highly productive oocyte harvest allowed them to cryopreserve additional preembryos for later attempts at fertilization. Three months after the oocyte harvest, the husband, Junior Davis, filed for divorce. The fate of the frozen preembryos was the only contested matter in the divorce.[86]

The trial court found the preembryos to be "children," awarded custody to Mary Sue Davis, and ordered that she "be permitted the opportunity

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79. *Ethical Considerations*, *supra* note 9, at 4S.

80. 735 F. Supp. 1361 (N.D. Ill.), *aff 'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991).

81. *Id.* at 1376.

82. *Id.* The procedural due process challenge is discussed *infra* notes 136-175.

83. *Id.*

84. 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991).

85. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

86. *Id.* at 589.

to bring these children to term through implantation."[87] Junior Davis appealed the trial court's ruling on the theory that the trial court's order infringed upon his constitutional right "not to beget a child where no pregnancy has taken place."[88] The court of appeals agreed and reversed the trial court's decision. Mary Sue Davis then sought review of the validity of the appellate court's constitutional rationale.[89]

Tennessee does not have a statute regulating IVF; nor is there local or national case law on point. Instead, the Tennessee Supreme Court relies upon the "extensive comment and analysis in the legal journals."[90] The resulting opinion attempts to resolve the legal and ethical dilemmas in a thoughtful and thorough manner. The opinion concludes that the myriad of policy, ethical, constitutional and scientific factors are resolvable only by "weigh[ing] the interests of each party to the dispute"[91] within the framework of their constitutional rights.

In analyzing what it labeled as "The Right of Procreational Autonomy," the court follows the development of the right to privacy in the federal courts.[92] Additionally, the court notes that the Tennessee Constitution so firmly establishes the concept of individual liberty that it provides "the right to resist governmental oppression and interference with liberty . . . even to the extent of overthrowing the government."[93] The court held, therefore, that "the right of procreation is a vital part of an individual's right to privacy."[94] Undaunted by the uncertainty created by the *Webster* plurality concerning the scope of the right to procreate, the court departs familiar territory to apply the right to in vitro fertilization.[95]

Although the Tennessee Supreme Court avoids the label "fundamental," it analyzes the locus of decision-making authority in its attempt to define the scope of the right to procreate. The unique facts of the *Davis* case, a dispute between two persons who jointly created preembryos, causes the court to focus on the parallel aspects of the right to procreational autonomy. The court notes that the right "is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[96] The court realizes that IVF disputes bring both the "equivalence of and inherent tension between these two interests"[97] to a head. Refusing to avoid the irreconcilable result, the court views the parties as entirely equivalent gamete-providers and, thus, sees their interests as equal.[98] This logic creates a three-dimensional conflict between the hus-

87. *Id.*
88. *Id.*
89. *Id.* at 590.
90. *Id.*
91. *Id.* at 591.
92. *Id.* at 598-99; *see also supra* notes 62-71 and accompanying text.
93. *Davis*, 842 S.W.2d at 599.
94. *Id.* at 600.
95. *Id.* at 601.
96. *Id.*
97. *Id.*
98. *Id.* The court distinguishes decision-making authority in the abortion context from that in

band, the wife, and the state regarding decision-making authority. The court partially resolves this conflict by holding that "decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status."[99]

The *Davis* decision thus firmly places decision-making authority in the hands of the gamete-providers and requires the state to show a sufficient interest before it infringes on the gamete-providers' procreational autonomy.[100] Little doubt exists that the court intended the scope of the right to decisional authority to be equal to that of other fundamental rights explicitly or implicitly guaranteed by the United States Constitution. Indeed, the court nearly elevated procreational autonomy in this context to an absolute right when it declared that "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do."[101]

Both the federal and the state courts that have addressed the nature of reproductive rights in the context of IVF agree that the right involved is one of fundamental dimensions. This conclusion is consistent with the views of many legal, medical and ethical scholars who have studied the issue. The characterization of the right to procreative autonomy as fundamental places the New Mexico statute at risk of being struck down as unconstitutional—unless the state succeeds in presenting a compelling interest that will outweigh such a fundamental right.

2. The Nature of the State's Interest

The second prong of the constitutional test to determine when state regulation infringes upon a fundamental right is an analysis of the state's interest. Even fundamental rights are not absolute and must yield if the state's interest is sufficiently compelling and the regulation is narrowly tailored to meet that interest.[102] Some commentators have struggled, however, to imagine a state's interest that could constitutionally trump a person's right to participate in IVF free of governmental interference.[103]

The usual response to the question concerning a state's interest lies within the state's police powers, specifically, the state's interest in health and safety. The argument that this is indeed the interest the state sought

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an IVF context. It notes that a woman's interest in bodily integrity, inherent in the abortion analysis, is not an issue in IVF, despite the emotional stress and physical discomfort of the IVF procedures. The court focuses on the competing equities involved in the desire to create or avoid parenthood. Interestingly, the court concludes that avoiding genetic parenthood, the interest Junior Davis sought to protect, is an interest equivalent to more traditional parenting interests, such as childrearing. *Id.*

99. *Id.* at 602.

100. *Id.*

101. *Id.*

102. Roe v. Wade, 410 U.S. 113 (1973).

103. *See* Martin, *supra* note 20, at 287 ("[I]t is hard to conceive of any state interest which would be sufficiently compelling to override the progenitors' decision-making freedom.").

to protect in the New Mexico statute is consistent with the overall context of the Act. The Act purports to protect pregnant women, fetuses and infants from unregulated experimental research, particularly research not designed to benefit the individuals.[104] The language of the New Mexico IVF clause further supports this assumption. The Act allows IVF if "each living fertilized ovum, zygote or embryo is implanted in a human female recipient . . . ."[105] A reasonable construction of the purpose of this phrase indicates that the state desired to protect the life of the preembryo. In other words, the state expressed an interest in the life that the preembryo potentially might have.

Roe, however, requires viability before the state's interest in potential human life is compelling.[106] In the case of IVF, the state's interest is reduced further by the fact that the preembryos the statute protects are not yet implanted. Under a medical definition, therefore, the preembryos are not yet *potential* human life.[107] Rather, they are collections of four to eight undifferentiated cells.[108] The preembryos do not have fetal characteristics, such as organs or a nervous system.[109] They do not develop fetal characteristics, if they survive at all, until more than two weeks after successful implantation when the primitive streak appears.[110] New Mexico is therefore protecting the potentiality of potential human life, an attenuated position at best, and certainly insufficient to warrant infringement on a fundamental right.

This protection argument presumes, however, that courts and scholars agree on the legal status of a preembryo and that the legal status is that of potential human life. Quite the contrary is true. The debate on the nature of the preembryo itself continues both in the courts and in legal and medical journals. It is impossible to characterize the state's interest without a clear understanding of the subject of the legislation or court action. Clarity in this area is elusive, however, and is destined to remain out of reach because of the intersection of science, medicine, moral and legal thought which occurs at the beginning and ending edges of life.[111]

Some courts resort to principles of property law when addressing the legal status of a preembryo. This approach completely rejects the notion that the preembryo is a potential human life. In *York v. Jones*,[112] a dissatisfied couple attempted to transfer a frozen preembryo from an IVF program in Virginia to one in California. The IVF clinic refused to release or to ship the preembryo, relying on a "Cryopreservation

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104. *See, e.g.*, N.M. STAT. ANN. §§ 24-9A-2(1), 24-9A-3, 24-9A-4(A), 24-9A-5(C)(3) (Repl. Pamp. 1991).

105. § 124-9A-1(D).

106. 410 U.S. at 163. Justice O'Connor would replace the *Roe* trimester analysis with a viability determination. *Casey*, 112 S. Ct. at 2816.

107. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 445 & n.27 (1990).

108. *Id.*

109. *Id.*

110. Martin, *supra* note 20, at 264.

111. *See* FURROW, *supra* note 11, at 35-40.

112. 717 F.Supp. 421 (E.D. Va. 1989). *York* involved a contract dispute between a couple who

Agreement" between the parties.[113] The couple's complaint created the framework for the court's implied holding that the preembryo had property status. The couple filed an action in detinue and breach of contract.[114]

The Virginia federal district court accepted the parties' characterization of the preembryos as property subject to a contract. The court determined that the clinic was a bailee and therefore liable for the return of the property to the couple.[115] The court rejected the defendant's assertion that the Virginia Human Research Statute, incorporated into the couple's agreement, required the clinic to refrain from activity such as inter-institutional transfer of cryopreserved preembryos because it would fall outside the clinic's approved protocol and thus constitute impermissible human research.[116] Instead, the court strictly construed the agreement against the clinic, and held that the clinic must recognize the plaintiffs' proprietary rights in the preembryo.[117]

The court's solution in *York* leaves many commentators uneasy. The classification of a preembryo as property fails to recognize the "qualitative difference between the preembryo and other 'things' recognized as property,"[118] such as "Cuisinarts, sofas, and other property often contested in divorce proceedings."[119] Professor Robertson, on the other hand, sees no other way to fully recognize the locus of decision-making authority in the IVF participants than to classify the preembryo as property.[120] He moderates this characterization, however, by saying that "property" does not equal "property" when it comes to preembryos. Professor Robertson would limit the bundle of property rights for preembryos to locating decision-making authority in the providers.[121] Perhaps sensing dissatisfaction with this limitation, Robertson analogizes to parental authority over children.[122] The usefulness of the analogy stops, however, at the limit placed on parental authority by consideration of the children's interests.

An approach at the opposite extreme would classify the preembryo as a person, entitled to the full panoply of constitutional rights. Louisiana passed legislation in 1986 that defines an "in vitro fertilized human ovum"[123] as a "juridical person,"[124] entitled to sue and be sued and to

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froze preembryos at a university hospital but later desired to move outside the area. *Id.* at 424. They requested the hospital transfer the preembryos but the hospital, concerned with the efficacy of a transfer, refused. *Id.* The hospital moved to dismiss for failure to state a claim. *Id.* at 427. The *York* court held the couple stated a cause of action based on their property interest in the preembryos. *Id.*

113. *Id.* at 425.
114. *Id.* at 423.
115. *Id.* at 425.
116. *Id.* at 425-26.
117. *Id.* at 426-27.
118. Martin, *supra* note 20, at 269.
119. FURROW, *supra* note 11, at 125.
120. Robertson, *supra* note 107, at 454-55 & n.48.
121. *Id.*
122. *Id.*
123. LA. REV. STAT. ANN. § 9:123 (West Supp. 1990).
124. *Id.* § 9:126

have a curator appointed to protect its rights.[125] Another section of the Louisiana statute unequivocally labels a preembryo "a biological human being."[126] This characterization appears to be a minority view because, due to the holding in *Roe*, there is little question that a fetus is not a "person" within the meaning of the Fourteenth Amendment.[127] Nevertheless, the view that a preembryo is a biological human being is consistent with the mandatory implantation language of the New Mexico IVF Act.

The most recent court to tackle the legal status of the preembryo concluded that it belongs in neither the human life model nor the property model.[128] Adopting an approach which ethicists have long advocated,[129] the *Davis* court characterized the preembryos as "not, strictly speaking, either 'persons' or 'property.'"[130] Instead, the court found preembryos "occupy an interim category that entitles them to special respect because of their potential for human life."[131]

Advocates of this interim characterization hope that it will allow the courts to develop the status of the preembryo in terms of specific issues and concrete facts.[132] The *Davis* court used the middle-level approach to vest decision-making authority concerning disposition of the preembryos in the providers while denying them a "true property interest."[133] This qualified characterization may allow an expression of values that promotes respect for the preembryo but avoids "bright line principles which do not seem appropriate at the edge of life."[134] Professor Robertson cautions, however, that it may "seem like empty rhetoric if it leads to no limits at all on what may be done with embryos."[135]

The struggle to legally define the preembryo calls for a legislative process which addresses the competing theories and provides consensus and guidance for the courts. Certainly, the current New Mexico solution fails to fulfill this need. Furthermore, without a clear statement of the state's interest, the New Mexico IVF Act is doomed under a constitutional challenge.

B. Procedural Due Process

The United States Supreme Court has held that a statute that does not give sufficient notice to an actor of the legality of his behavior is unconstitutional.[136] The right to procedural due process is explicit in the

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125. *Id.*
126. *Id.*
127. *See* Roe v. Wade, 410 U.S. 113, 156 (1973); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2839 (1992) (Stevens, J., concurring in part and dissenting in part); Webster v. Reprod. Health Servs., 492 U.S. 490, 568 & n.13 (1989) (Stevens, J., concurring in part and dissenting in part).
128. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).
129. *See HEW Report*, *supra* note 51, at 35,056; *Ethical Considerations*, *supra* note 9, at 32S-33S; Martin, *supra* note 20, at 276-78; Robertson, *supra* note 107, at 446-49.
130. *Davis*, 842 S.W.2d at 597.
131. *Id.*
132. Martin, *supra* note 20, at 278.
133. *Davis*, 842 S.W.2d at 597.
134. Martin, *supra* note 20, at 278.
135. Robertson, *supra* note 107, at 448-49.
136. *See* Pierce v. United States, 314 U.S. 306 (1941).

Fourteenth Amendment of the United States Constitution.[137] Vague laws make it impossible for people to conform their behavior to the law and increase the risk of arbitrary and discriminatory enforcement.[138] The Court has said that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[139] Applied to the New Mexico IVF Act, the doctrine of procedural due process suggests that the act may be constitutionally void for vagueness because it is unclear whether the criminal penalty section applies to a physician engaged in an IVF treatment program. If the Act's criminal sanctions apply to an IVF specialist, it is also unclear what the Act requires of the physician.

1. Criminal Penalties Section

The New Mexico IVF Act contains a penalties section which mandates imprisonment of up to one year and/or a fine up to $1000 for an intentional violation of the Act's research provisions concerning pregnant women, fetuses and infants.[140] This penalty may apply to a physician[141] treating infertility with IVF even though the penal section does not include the definitions section that purports to regulate IVF. The IVF specialist must determine whether the penalty section constrains his activities with a preembryo and if so, which activities are constrained.

a. Penalty Section and Preembryos

The IVF Act defines "fetus" as the "*product of conception from the time of conception* . . . but shall not include *cultured cells.*"[142] Whether a preembryo falls within this definition is unclear. The Act does not define conception, nor does it account for technological change in the concept of conception. A preembryo is the result of the fertilization process.[143] Arguably, "product of conception" and "fertilization" are synonymous. Certainly the preembryo is the product of fertilization. Under this interpretation, preembryos would be included in the fetus section. On the other hand, an equally persuasive argument is that "time of conception" is synonymous with "implantation." Only preembryos that are successfully implanted would thus qualify as fetuses.

An alternate interpretation is that the definition of fetus does not include preembryos. Preembryos may be considered "cultured cells," and therefore not subject to the research restrictions. It is well established

137. U.S. CONST. amend. XIV § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

138. *See* Pierce v. United States, 314 U.S. 306 (1941).

139. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

140. N.M. STAT. ANN. § 24-9A-6 (Repl. Pamp. 1991).

141. Presumably any criminal liability would attach only to the physician because the language of the IVF clause speaks to the physician. A prospective parent also may be liable, however, because the penalty section states "*[w]hoever* knowingly and wilfully violates . . . ." *Id.* (emphasis added).

142. § 24-9A-1(G) (emphasis added).

143. *See supra* notes 9-22 and accompanying text.

that preembryos are no more than collections of undifferentiated cells when they are implanted.[144] This interpretation seems inconsistent, however, with the Act's requirement of implantation, presumably to prevent physicians from conducting research on them.

Further, exclusion of preembryos as fetuses creates an inconsistency within the structure of the Act. The penalty section provides enforcement for other protected classes identified in the Act. There is no other protected category in which they logically can belong, i.e., pregnant women and live born infants. Absent application of the penalty section, the Act fails to provide an enforcement mechanism for the protection it attempts to create for preembryos. This result more likely stems from the ad hoc inclusion of IVF in the Act rather than legislative intent to draft unenforceable legislation. The creation of a newly protected class supports the conclusion that the legislature intended the existing penalty section to aid in enforcement.

The only interpretation that seems reliable is that the Act is unclear whether the fetus section would include preembryos and, therefore, whether the penalty section applies to activities with preembryos. This confusion makes it impossible for a fertility specialist to determine whether he must conform his medical practice to the terms of the Act in order to avoid criminal penalties. On this basis alone a court can conclude that the Act violates the physician's due process rights.

b. "Research" and IVF

The Act defines "clinical research" as "any biomedical or behavioral research involving human subjects, including the unborn, conducted according to a formal procedure,"[145] including "research involving human in vitro fertilization . . . ."[146] The Act somewhat narrows the definition of clinical research by excluding treatment-related protocols applied to benefit a particular patient.[147] Coupled with the willful and knowing requirement of the penalty section and the language of the fetus section which allows minimally risky research if beneficial to the particular fetus, the limitations can generally be called therapeutic intent exceptions.[148] These exceptions may exempt a physician from criminal penalties for research procedures if his intent is to help a patient.

This statutory construction may not yet provide constitutional notice to a physician, however, because "clinical research" as applied to IVF remains confusing under the statute. The Act provides little guidance in part because it is internally inconsistent. For example, the Act treats IVF activities differently than it treats other clinical research. First, IVF research is the only area of biomedical or behavioral research specifically

144. *See supra* notes 17-20 and accompanying text.

145. N.M. STAT. ANN. § 24-9A-1(D) (Repl. Pamp. 1991).

146. *Id.*

147. *See, e.g.*, § 24-9A-2A(1) (allowing research if "the purpose of the activity is to meet the health needs of the mother or the fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such").

148. *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1372-76 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991).

enumerated in the Act. This special status creates curiosity as to legislative intent that the Act fails to satisfy. Should a court assume that the legislature intended to create a different standard for IVF research than other medical research? If yes, then what is that standard?

Second, the Act does not contain a section which explains the meaning of research in the context of preembryos as it does with the other protected classes. This omission provides little guidance as to permitted and sanctioned IVF activities. Moreover, the Act removes IVF from the overall statutory scheme whereby therapeutic intent possibly provides guidance as to permissible research activities. Does the Act thus imply an absolute ban on IVF research while allowing therapeutic exceptions in other areas? Statutory interpretation arguments can be made to import the scope of therapeutic research allowed in the Act's other sections. Alternatively, statutory interpretation principles may also dictate an interpretation that the absence of a parallel section for preembryos indicates legislative intent to create a different and more limited scope of permissible research for preembryos by prohibiting it altogether.[149]

Third, the Act creates a unique test for non-research IVF activities; it excludes IVF from its purview if it is "performed to treat infertility" and the procedure insures that every preembryo will be implanted. Although this language reinstitutes therapeutic use of IVF, it does not create a therapeutic exception for IVF research. A logical explanation for the Act's prohibition against IVF research is that the legislature wished to broadly prevent experimentation on preembryos. This argument depends, however, on the ability of the legislature, the court, and the physician to distinguish between treatment and experimentation when addressing IVF. In addition to the issues raised by the unorthodox implantation requirement, the Act simply fails to recognize the blurred lines between research and clinical treatments in medicine—a matter of particular import in leading edge medicine, for example, IVF protocols.

2. Case Law

The two federal courts that addressed the issue of criminal penalties struck down state statutes that imposed such penalties on physicians who performed non-therapeutic research or experimentation on fetuses.[150] Both courts reasoned that the distinctions between these concepts in many instances cannot be determined. The *Lifchez* court found this particularly true in the context of IVF.[151]

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149. *See* NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1984) ("[A]ll omissions should be understood as exclusions.").

150. Lifchez v. Hartigan, 735 F. Supp. 1361, 1364-66 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991); Margaret S. v. Edwards, 794 F.2d 994, 998-99 (5th Cir. 1986) (striking down as impermissibly vague a Louisiana statute imposing criminal penalties for non-therapeutic experimentation on unborn children and aborted fetuses).

151. *Lifchez*, 735 F. Supp. at 1367-69. Because the *Lifchez* court specifically addressed these issues in an IVF context as well as developed them more fully, the discussion is limited to its opinion.

In *Lifchez*, the federal district court construed a section of the Illinois Abortion Law very similar to the New Mexico Maternal, Fetal and Infant Experimentation Act in a declaratory judgment action brought by fertility specialists. The challenged statute provided:

> No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.[152]

Interestingly, two of the uncertainties inherent in the New Mexico Act are missing from the Illinois statute. The therapeutic exception provides clarity to the scope of the Illinois prohibition which the New Mexico act lacks. In addition, the Illinois criminal penalty clearly applied to IVF experimentation. Nevertheless, the court held the statute unconstitutionally void for vagueness.[153]

The *Lifchez* court began its analysis by describing three ways in which vague laws violate due process. First, a vague law's inadequate notice of the precise conduct proscribed renders it "impossible for people to regulate their conduct within legal bounds."[154] Second, vague proscriptions "invite arbitrary and discriminatory enforcement" by authorities, including judges and juries.[155] Third, these deficiencies cause people to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[156] The court concluded that such vagueness violates due process when "persons of common intelligence . . . [must] guess at the meaning of the criminal law."[157]

The court then applied this due process standard to the Illinois statute.[158] It accepted Dr. Lifchez's argument that the scientific and medical communities use numerous definitions of "experimentation."[159] One definition the court considered described experimentation as pure research with the goal of furthering the researcher's knowledge.[160] Insurance companies apply a different definition. They will consider a procedure experimental and deny coverage if the procedure departs from present-day practice.[161] The American Fertility Society considers standard techniques experimental when they are performed by a practitioner or clinic for the first time.[162] Finally, in *Margaret S. v. Edwards*, the court classified medical therapy as experimental whenever a practitioner applies what he learns from one

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152. *Id.* at 1363 (citing ILL. REV. STAT. ch. 38 ¶ 81-26, § 6(7) (1989)).
153. *Lifchez*, 735 F. Supp. at 1363.
154. *Id.* at 1364.
155. *Id.*
156. *Id.* (quoting Grayned v. Rockford, 408 U.S. 104, 109 (1972)).
157. *Lifchez*, 735 F. Supp. at 1364 (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)).
158. *Lifchez*, 735 F. Supp. at 1364-65.
159. *Id.* at 1364.
160. *Id.* at 1365.
161. *Id.*
162. *Id.*

patient to another.[163] The *Lifchez* court found the *Margaret S.* definition consistent with the federal guidelines on protection of human research subjects which define "research" as "a systematic investigation designed to develop or contribute to generalizable knowledge."[164] The court concluded that this spectrum of definitions for experimentation made it difficult to align the physicians' activities with the statutory prohibition.[165]

Narrowing its focus to IVF, the court noted that the increasing variations of IVF and related reproductive technologies do not enjoy a statutory imprimatur.[166] Further, the variations represent uneven advances in IVF techniques and undoubtedly deserve classification as experimental regardless of what that term means.[167] The court reasoned that the fertility specialists could attempt to improve their IVF techniques only "at their peril."[168] It was concluded that "[t]he fact that many current procedures fall within the twilight zone between experiment and test, coupled with a lack of consensus as to how these terms should be defined in the first place, leaves it hopelessly uncertain as to which procedures are allowed and which are forbidden."[169] Because the statute fails the "common intelligence" test, the court held it unconstitutionally vague in violation of the Fourteenth Amendment.[170]

Unfortunately, New Mexico law on criminal statutory interpretation provides little guidance to IVF specialists. New Mexico courts attempt to interpret statutes in a manner which will not render their application unreasonable nor defeat the intended objective of the legislature.[171] What constitutes reasonable interpretation of a statute which first equates IVF with research before allowing a treatment exception is difficult to predict in such an emotionally and politically charged subject as fetal research and fetal rights. Further, courts have much latitude to divine legislative intent in New Mexico in the absence of legislative history. In an attempt to restrict its own power, the New Mexico Supreme Court has said that it will "read the entire act as a whole, each part construed in connection with every other part . . ." in order to ascertain legislative intent.[172] The court could apply this rule to either strike the statute or to uphold it, depending on whether the criminal penalty section applies to IVF, whether preembryos are considered fetuses, and whether nascent IVF treatment advances are considered research.

Following *Lifchez*, New Mexico will likely apply a "common intelligence" test to a criminal statute to determine whether the statute violates

163. *Id.* (citing as example, Margaret S. v. Edwards, 794 F.2d 994, 997 (5th Cir. 1986)).
164. *Lifchez*, 735 F. Supp. at 1365 (citing 45 C.F.R. § 46.102(e) (1989)).
165. *Lifchez*, 735 F. Supp. at 1365.
166. *Id.* at 1367.
167. *Id.*
168. *Id.* at 1369.
169. *Id.* at 1372.
170. *Id.* at 1376.
171. State v. Garcia, 93 N.M. 51, 53, 596 P.2d 264, 266 (1979).
172. General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

procedural due process rights.[173] This test may not be applicable to the IVF statute, however, because the court will attempt to consider the statute's words and phrases in their generally accepted meaning.[174] New Mexico courts find constitutional those statutes containing words that are easily defined.[175] While "research" and "fetus" have dictionary definitions, those definitions will not be helpful in determining whether treatment improvements, such as cryopreservation, constitute research on preembryos. Even if the test is modified to the common intelligence of a physician, or more specifically, an IVF specialist, the meaning of the statute's words and phrases do not appear to be reasonably discernable.

Without amendment, therefore, the New Mexico IVF Act remains vulnerable to constitutional attack. The unusual implantation requirement, questions concerning the legal status of the preembryo, and the possible application of the criminal penalty section together lead to one conclusion: the New Mexico IVF statute is unconstitutional.

IV. CONCLUSION

The Act's definition of research which purports to regulate in vitro fertilization in New Mexico is unconstitutional in two respects. First, it violates prospective parents' fundamental right to pursue procreation free of unnecessary governmental interference. Second, it violates a physician's due process rights by failing to give adequate notice of prohibited conduct so that the physician may conform his or her conduct accordingly. The New Mexico legislature should repeal the research section of the Act which contains the offending language. If the legislature desires to regulate reproductive technologies, it should enact legislation which substantively addresses this area in a manner sufficiently flexible to allow the medical technologies to evolve without infringing upon constitutional rights. By so doing, the legislature may accomplish the laudable goal of protecting the health and welfare of New Mexico women who must use reproductive technology to become pregnant.

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173. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969) (statute violates due process if its language is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application); *see also* Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

174. State v. Segotta, 100 N.M. 498, 500, 672 P.2d 1129, 1131 (1983).

175. *See* State v. Jim, 107 N.M. 779, 783-84, 765 P.2d 195, 199-200 (Ct. App.), *cert. denied*, 107 N.M. 720, 764 P.2d 491 (1988) (applying Webster's dictionary definitions, "protracted impairment" found not constitutionally vague).