# *Legal Conceptions*

## The EVOLVING LAW and POLICY of ASSISTED REPRODUCTIVE TECHNOLOGIES

Susan L. Crockin, J.D.
and
Howard W. Jones, Jr., M.D.

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# Legal Conceptions

*To Michael*
—without whom the twenty-year journey from
"Legally Speaking" to *Legal Conceptions*
would have been inconceivable

*And to our children—Ben, Melea, and Jon*
—who have made the journey such a joyous one

My heartfelt gratitude and deepest love
*S.L.C.*

*To the memory of Georgeanna*
—my late loving wife, companion,
and colleague of sixty-five years

*And to our children—*
*Howard III, Georgeanna, and Lawrence*
—whose presence and subsequent careers
enhanced and inspired our daily activities
and made it possible to pursue our efforts
with a song in our hearts.
*H.W.J.*

# PREFACE

BY Susan L. Crockin

By 1990 it had become clear to the courts that "the in vitro fertilization genie is out of the bottle and you can't put it back."[1] The first divorce dispute over frozen embryos, *Davis v. Davis,* had erupted and captured the nation's attention as an intriguing "brave new world" fight over "preembryos" and all the competing views and values attendant to them. As *Nightline* and Ted Koppel aired the dispute night after night, highlighting the legal issues in this case, other fertility-related disputes were percolating up through the courts.

It seemed to this lawyer that the time had come to gather and share legal information and insights into how the courts were both viewing and responding to the issues surrounding these new families and the medical professionals whose talents and energies had made them possible. The idea for "Legally Speaking" was born. In 1990, this author proposed, wrote, and submitted a pilot column to the American Fertility Society (now the American Society for Reproductive Medicine) entitled, "Legally Speaking: A Column Highlighting Recent Court Decisions Affecting the Assisted Reproductive Technologies (ART) and the Families They Create." It was accepted by the board of AFS on an experimental basis, to be published in *Fertility News,*[2] which was issued four or five times a year, with a distribution to all members of the Society. That experiment has now spanned twenty years, almost a hundred columns, with reports on close to a thousand legal cases, statutes, and developments. All, except those noted as guest authored, were written by this

1. *Johnson v. Calvert,* 5 Cal. 4th 84 (Cal. 1993); *cert. denied,* 510 U.S. 874 (U.S. 1993). The quotation comes from the trial court's 1990 opinion. Cases are formally cited within each substantive chapter and in the table of cases and referenced by name and year within the commentaries.

2. Now *ASRM News.*

author. Guest authors appeared occasionally—columns by Terri Finesmith Horwich, J.D.; Ami Jaeger, J.D.; Wendy Parmet, J.D.; and Kimberly Zieselman, J.D., are featured in this book—and brought particular expertise to a topic and column.

In December 1990, "Legally Speaking"™ debuted in *Fertility News*. It reported on six novel assisted reproductive technology–related court cases. Remarkably, each of those cases addressed issues that still vex courts today. In addition to the *Davis* dispute over frozen embryos, the column reported on the first parental claim by a gestational carrier (*Johnson v. Calvert*); a successful challenge to insurance coverage for infertility treatment (without a statutory mandate); a class action lawsuit by doctors asserting that Illinois's statute banning fetal experimentation was having a chilling effect on their research; a known sperm donor's assertion of paternity rights over a child he helped a lesbian couple to conceive; and a prisoner claiming an unconstitutional denial of access to artificial insemination services.

Unique among analyses of legal developments, "Legally Speaking" has reported in "real time" and in plain English on hundreds of court cases and legal developments as novel lawsuits were filed, appealed, settled, or decided and as legislation moved through the process from bills and revisions to laws or vetoes. By reporting on developing cases and legislation instead of merely the final decision or legal "bottom line," "Legally Speaking" has been able to illustrate, and thereby aid professionals in the field to understand, the changing legal landscape within which their actions and decisions are questioned and ultimately judged. To help contextualize the developing law and policy in the United States, selected international developments were also reported, as were selected non-ART cases that raised issues such as professional liability with respect to patients in other contexts, genetic testing claims, stem cell research, wrongful life and birth claims, and discrimination in health care, to name but a few.

Nearly twenty years after the first column appeared and thirty years after the birth of the world's first IVF baby, this book synthesizes and analyzes the still-evolving and conflicting legal developments for those interested in understanding both the distance we have come and the many legal and policy challenges we have yet to face and resolve. The

case reports that have been published continuously since 1990 form the basis of this analysis and commentary, as we now pause to better understand the past and anticipate the future.

Our hope is that this work will help guide the myriad stakeholders to a better understanding of the evolving legal and policy issues as well as the inherent tensions and challenges in this multidisciplinary area and, by doing so, help shape the development of thoughtful policies that will influence and guide the future of reproductive medicine, law, and policy.

I would be remiss in ending this preface without thanking the many individuals who have supported this work and its underlying goals. First and foremost, I owe a very deep and personal thank you to Dr. Howard W. Jones, Jr., for twenty years ago believing in a young lawyer and her vision of the nascent legal field his pioneering medical work would spawn. Without his unwavering support, neither "Legally Speaking" nor *Legal Conceptions* would ever have been born. And without his vision, dedication, and willingness to reject a well-earned retirement and instead create the country's first IVF program together with the late Dr. Georgeanna Jones—his wife and life partner—this field of medicine and its prominence in the United States might have taken a very different course, and this lawyer would have missed the opportunity and career of a lifetime.

Thanks is also owed to the local business community in Norfolk, Virginia, including my father, who recognized the need for and helped establish Eastern Virginia Medical School, which would become the home of the Jones Institute.

I am grateful to Dr. Alan DeCherney and the 1989 board of what was then the American Fertility Society for taking the chance on an eager young lawyer and agreeing to publish "Legally Speaking" as an experiment. Twenty years later I believe we agree it was a successful one.

More recently and more hands-on, absolutely invaluable support for *Legal Conceptions* has come from Nancy Garcia, whose tireless efforts at inputting mountains of data for this book at lightning speed made me actually believe this day might come. This is the Nancy Garcia who for thirty years has been the administrative right arm of Dr. Howard Jones, who says that with Nancy's help anything is possible.

And to my research assistants, Melea Atkins, Lisa Berger, and Alexis Sherman, and editors at the Johns Hopkins University Press, thank you for everything each of you did to make this work a reality.

And a final and enduring thanks to my husband, for always believing in my work and in me.

# Legal Conceptions

# CONTENTS

# Introduction

THE BIRTHS OF the first English, Australian, and American IVF babies (Louise Brown in 1978, Candice Reed in 1980, and Elizabeth Carr in 1981) heralded a revolution in reproductive medicine and the modern family—creating previously and literally inconceivable babies and families. When news of Louise Brown's 1978 birth burst onto the public stage and caused a worldwide uproar, few immediately thought of the implications for the law. As medical advances brought more and more unique baby-making techniques into the public eye, including cryopreservation and the world's first frozen embryo babies, the public's attention remained firmly fixed on the medical breakthroughs. News reports and magazine covers touted or decried the "brave new world" of baby-making, but the challenges these new forms of baby-making would quickly force courts and legislatures to confront received little attention. If modern medicine could now make babies in totally new ways and combinations, it became the law's critical, if less publicly heralded, job to turn those babies, and those who would make them, into legally recognized and legally protected families.

For the first time in history, in vitro fertilization technology made it possible to separate embryos from the patients who created them. Until then, reproductive law was defined by constitutional decisions involving abortion, contraception, and sterilization, all inescapably intertwined with issues of bodily integrity. IVF created a new legal paradigm for reproductive rights outside a woman's body and inside an embryology lab. IVF with cryopreservation not only transformed patients' reproductive rights and timetables but also created new responsibilities and vulnerabilities for the professionals who maintained the cryopreserved tissue. IVF also made possible egg and, less frequently, embryo donation as well as gestational surrogacy. These procedures have exponentially expanded not only the pool of potential parents but also the number of individuals,

both men and women, who could contribute genetically or gestationally to the creation of babies that they did not intend to raise. Access to reproductive services became fertile ground for constitutional arguments over discriminatory treatment, equal protection and due process rights, and legislative efforts to expand insurance coverage. Recent developments in preimplantation genetic diagnosis are currently transforming the field of genetic testing, creating yet another new arena where courts and legislatures are being called upon to address access and insurance coverage and to help shape additional new laws and policies around reproductive genetics.

By changing the ways families were created, IVF and the assisted reproductive and genetic technologies that followed have given birth to a host of novel legal issues, tensions, and challenges as well as an emerging body of sometimes inconsistent law and policy. Obstetrics, gynecology, genetic testing, and urology, all once seen as discrete specialties involving private medical decisions between patients and their doctors, instead increasingly became part of a complex set of interlocking medical, legal, and ethical issues and vulnerabilities.

In the process, providers, patients, third parties, and the children they all sought to create have become part of a grand social experiment, still unfolding today as courts and legislatures struggle to define and protect these newly possible families and those who help create them. One ongoing challenge for the professional communities is how to define the applicable rules to protect those involved in these new technologies. A second is to determine what values and societal frameworks we want to foster to protect participants and guide society at large, even as newer technologies and possibilities continue to emerge.

This book chronicles how the law has responded to these revolutionary medical advances and how courts have struggled to apply and expand legal principles and precedents to shape families and guide patients and providers in a terrain combining law and medicine that literally did not exist thirty years ago. Unlike medicine, the law is seldom accused of moving too quickly or revolutionizing a field with a singular, unanticipated development. By capturing the many disparate court decisions and arguments in real time and by examining the judicial perspectives that unfolded within individual cases as they moved through multiple appel-

late levels, this book provides a unique lens through which we can examine and, one hopes, learn from history.

If as a society we hope to create workable policies, laws, and guidelines for both existing and future reproductive technologies and those whose lives are touched by them, it is critical to understand the short, intense history of reproductive technology law. The still unfolding and often inconsistent rulings, what has gone right and what has gone, at times, terribly wrong with these families and providers is a story best understood by tracing the history of the controversies that have come before courts and legislatures.

Both the commentaries and the real-time case descriptions that make up this book give readers a rare glimpse into the evolution of the jurisprudence of reproductive technology law and provide an unparalleled opportunity to understand the thinking behind these decisions and the context within which they were reached. Most importantly, as the technologies and their applications continue to advance, they suggest paths to address and ways to meet future policy needs.

## Making Reproductive History: One Doctor's Perspective on the Law

✣ BY Howard W. Jones, Jr.

When my wife, Georgeanna, and I came to Norfolk, Virginia, in 1979, it was not with the intention of making medical history. Recruited from the Johns Hopkins Medical School to start a division of reproductive medicine in the obstetrics and gynecology department at the fledgling Eastern Virginia Medical School, we arrived just as Louise Brown's momentous birth was announced from England. Halting our unpacking to take a call and questions from a local reporter, we gave an answer that launched an American odyssey. Asked if in vitro fertilization could be done here, we answered yes, and with that, opened the door on a revolutionary period of both medical and legal advances in the United States.

When the IVF project was initiated in Norfolk in 1979, it was not expected that a portion of the general public would regard IVF as contrary to good public policy. We thought that we were merely taking the next technical step to overcome infertility, our area of special interest for a

number of years. However, the seemingly routine process of obtaining from the State of Virginia Health Department a Certificate of Need for the IVF project at Norfolk General Hospital triggered an unexpected series of public hearings, with witnesses from across the country testifying. Our initial application was denied as a result of protests, and it quickly became apparent that some vocal constituencies viewed our project not as a technical medical advancement but as a fundamental and unacceptable alteration to the concepts of life and family. After much, frequently contentious, debate, the Certificate of Need was eventually granted in February 1980, and what was to become the Jones Institute at Eastern Virginia Medical School opened its doors the following month.

Following the advice of IVF pioneers Drs. Robert Edwards and Patrick Steptoe of the United Kingdom, the Jones Clinic initially used the natural cycle—that is, retrieving only one egg by laparoscopy—after predicting with certain tests when the egg was ripe. During 1980, forty-one patients were processed without a single success. Beginning in 1981, the IVF technique was changed to use controlled ovarian stimulation through gonadotropins to stimulate in normally menstruating women more than the single egg that is characteristic of a typical menstrual cycle. With controlled ovarian stimulation, two, three, or four eggs could be obtained by laparoscopy after identifying the expected time of ovulation or the use of other drugs to induce ovulation. By using this new technique, success was achieved in Norfolk: Elizabeth Carr, the first IVF baby in the New World, was born in December 1981.

Throughout the early days of the Norfolk IVF Project, opposition continued, particularly from the right-to-life community. Many times, small picket lines were organized outside the hospital so that it was necessary for both patients and physicians to cross the picket line to carry out the medical procedures. Furthermore, the local newspaper editorially opposed the effort and occasionally printed both editorials and letters to the editor in opposition to the IVF.

In 1981, one particular editorial was published, claiming that the IVF program would not allow an abnormal child to be born because, by testing any pregnancy that occurred for abnormalities, the patient would be required to have a termination. This false but provocative claim led the IVF program to its next interaction between this new medical technology and the law, this time in the form of a lawsuit. A local attorney

sought us out, urging us to sue the paper for libel in order to put a stop to the public opposition. This we did, and a settlement was finally reached that required the newspaper to recant its libelous statements, apologize for publishing the editorial, and provide financial support for research at the Foundation for Eastern Virginia Medical School and the IVF program. Unfortunately, this settlement did not end the legal and ethical battles that the Institute and we faced.

In 1984, we received an invitation to come to the Vatican for a conference about the "licitness"—that is, lawfulness according to Canon law—of IVF. During this five-day meeting, the technique of IVF was described in great detail, and moral theologians debated its merits. At the end of the conference, eight of the nine voting members indicated that they thought IVF would be licit; the sole dissenter was Monsignor Carlo Caffarra. In the end, that single dissenting vote became the Vatican's position. In 1987, the Vatican published the result of the group's deliberations under the title "Donum Vitae," in which the position of the Catholic Church was set forth: because IVF creates life outside the bonds of conjugal love, it is, indeed, illicit. To this day, this remains the official position of the Roman Catholic Church, as set forth in a new publication, *Dignitas Personae,* issued in December of 2008. That document goes into more detail in setting forth the church's opposition to IVF and related and newer techniques and practices. However, it should be noted that at the level of the parish, there is some liberality in the interpretation of the original document and the most recent document.

On the way home from the Vatican, we realized that in the United States IVF seemed to be carried out without any guidelines, regulations, or supervision. Our experience at the Vatican reinforced our view that there were (and remain today) segments of the population greatly concerned over the use of IVF to solve the problem of infertility. Therefore, it was suggested to the president of the American Fertility Society (AFS, now ASRM), Dr. Charles Hammond, that the AFS might wish to look into this matter and perhaps suggest guidelines for those practicing IVF. As a result, I was asked to form an AFS Ethics Committee. This committee of lawyers, ethicists, biologists, and physicians met a number of times, and in 1986, the AFS published "Ethical Considerations of the New Reproductive Technologies" as a supplement to *Fertility and Sterility* (1986; Supp 1, vol. 46, no. 3). Subsequent to this publication, the AFS appointed

a permanent Ethics Committee, with the task of updating these guidelines at regular intervals and making them available on the ASRM website (www.asrm.org).

The challenges continue.

## The Emotional Aspects of Infertility: One Physician's Perspective

✣ BY Howard W. Jones, Jr.

One item in the calculus of excellent patient care for infertility is attention to the emotional status of the couple confronting infertility. In practical terms, this means dealing with the frustrations over failure to achieve the innate drive for children and family. My experience leads me to believe that although this drive is usually more pronounced in the female, there is great individual variation; I have encountered some couples in which the husband's drive for a family seemed much higher than that of his wife.

There are several components to this drive, including ones with biological, sociological, and cultural roots. For example, in some African cultures, the infertile woman is ostracized. Not so long ago in some European cultures, it was a requirement that the bride be pregnant before marriage was considered. Indeed, in the early twentieth century, 80 percent of Dutch brides were pregnant at the time they were married.

There is an instinctive drive to reproduce common to all species that is readily observed in many mammals. It is an almost magical experience to observe the unattended birth of a barnyard mammal and the maternal protective action of the mother as the offspring wobbles to its feet and instinctively seeks the nipple for its first essential sustenance.

While the details of the experience are greatly modified in the human, the drive is nevertheless there. It needs to be added, however, that in American culture there are certainly exceptions, and many couples decide not to reproduce.

There are also those who delay having children for various reasons. All reproductive specialists are familiar with this situation of a female patient with fertility problems who has reached the age of forty or older and is frustrated because her reproductive system does not respond as it would have earlier in her reproductive years.