

# THE LEGAL STATUS OF THE EX UTERO EMBRYO: IMPLICATIONS FOR ADOPTION LAW

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## INTRODUCTION

It has been more than thirty years since human conception was first externalized and human embryos created ex utero in the process known as in vitro fertilization (IVF).<sup>1</sup> This advance in the treatment of infertility requires hyper-stimulation of the ovaries in order to retrieve sufficient numbers of eggs for attempts at IVF.<sup>2</sup> Furthermore, more embryos are created than can safely be transferred to the woman's body for implantation in any one cycle of IVF.<sup>3</sup> Before the cryogenic preservation of embryos became a reality, the woman undergoing IVF was subjected to the rigors of repeated egg-retrieval

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<sup>1</sup> Helen Pitt, *IVF Babies Gather for Reunion of Living Proof*, SYDNEY MORNING HERALD, July 18, 1988, at 6 (noting that the world's first pregnancy from an externally fertilized egg occurred in 1971); see, e.g., *J.B. v. M.B.*, 783 A.2d 707, 708 (N.J. 2001). In IVF, multiple eggs are harvested from the woman and fertilized outside her womb in a dish (in vitro). John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 440 (1990). The resulting zygotes go through several cell divisions in the laboratory over a period of forty-eight to seventy-two hours. *Id.* at 443. Once the embryos have progressed from single-cell organisms to four- to eight-cell entities, they are ready for implantation in the woman's uterus or fallopian tubes. *Id.* at 440–41. In vitro fertilization is defined by the federal government as “any fertilization of human ova which occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means.” 45 C.F.R. § 46.203(g) (2001). The term “donor human sperm” is something of a misnomer, as in many cases the sperm contributor is the woman's husband or partner.

<sup>2</sup> Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 463, 467 (1992) (describing development of method of cryopreserving embryos created through IVF).

<sup>3</sup> Anne Drapkin Lyerly et al., *Factors that Affect Infertility Patients' Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623, 1623 (2006). Because of the dangers of multiple gestations—i.e., pregnancies with four or more fetuses—current medical wisdom dictates that only two or three embryos are returned to the woman's body in a treatment cycle. See Mary Ann Davis Moriarty, *Addressing In Vitro Fertilization and the Problem of Multiple Gestations*, 18 ST. LOUIS U. PUB. L. REV. 503, 516 (1999).

procedures.<sup>4</sup> Freezing unused embryos, however, is now standard practice at most fertility clinics.<sup>5</sup> The ability to freeze embryos allows the creation of more embryos than are required for implantation at any one treatment cycle while preserving the option of future pregnancies and avoiding the destruction of the unused embryos.<sup>6</sup>

The progenitors have a number of options for the disposition of their frozen embryos.<sup>7</sup> They may use the embryos for attempts at a future pregnancy, donate them to be used for research, give them to another couple who hopes to initiate a pregnancy, leave them in cryostorage indefinitely, or request that they be discarded.<sup>8</sup> Many of the individuals with unused embryos feel that none of the available choices for disposition of the stored embryos are “ideal or even acceptable.”<sup>9</sup> Keeping the embryos cryopreserved, therefore, is a way to avoid making a difficult and distressing decision. At present there are approximately 400,000 frozen embryos in storage in the United States.<sup>10</sup> Both their sheer number and the length of time that embryos have existed would suggest that we have reached closure on the question of their legal status. That is not the case, however. As the vigorous and at times

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<sup>4</sup> Cryopreserved embryos are frozen in liquid nitrogen to delay further cellular development and then stored in case the gamete providers wish to undergo further attempts to achieve a pregnancy. *See Perry & Schneider, supra* note 2, at 468. Cryogenic preservation obviates the necessity of the woman undergoing the rigors of repeated egg-harvesting procedures. *See id.*

<sup>5</sup> Lyerly et al., *supra* note 3, at 1623.

<sup>6</sup> *Id.*

<sup>7</sup> *E.g.*, PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 34, 178 (2004) [hereinafter REPRODUCTION & RESPONSIBILITY] (“There are no federal limits or regulations governing what one can do to or with an *ex vivo* human embryo, so long as one is privately funded and so long as the embryos are acquired in a legal manner.”).

<sup>8</sup> Lyerly et al., *supra* note 3, at 1623, 1628; *see also* REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 34 (noting that among the dispositions of unused embryos is the option of thawing and destroying), 178 (“There is no uniform guidance regarding the disposition of . . . frozen embryos, once their progenitors no longer want them.”).

<sup>9</sup> Lyerly et al., *supra* note 3, at 1627.

<sup>10</sup> Rick Weiss, *400,000 Human Embryos Frozen in U.S.*, WASH. POST, May 8, 2003, at A10; *see also* Lyerly et al., *supra* note 3, at 1623. The question of excess frozen embryos also has worldwide dimensions. *E.g.*, Karin Hammarberg & Leesa Tinney, *Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples’ Decisions and the Factors Influencing Their Choice*, 86 FERTILITY & STERILITY 86, 86 (2006).

contentious debates over stem cell research demonstrate,<sup>11</sup> there is assuredly no consensus as to the moral status of these preimplantation embryos, and questions of their legal status are inextricably combined with the issue of their moral status.

The constitutionalization of abortion law made evident the scientific, ethical, religious, political, and social controversy engendered by the question of when human life begins.<sup>12</sup> This controversy has extended beyond fetal life to the ex utero embryo.<sup>13</sup> Questions of the morality of government funding for stem cell research have intensified the debate.<sup>14</sup> Views on the moral status of the ex utero embryo range across a wide continuum. Arguing the embryo has a unique genome and is capable of becoming a child if all goes well, many believe that the embryo is the equivalent of a born human being even if it is in storage.<sup>15</sup> They believe that “[f]ailure to show full respect for embryonic life is to de-value all human life.”<sup>16</sup> Supporters of this view oppose stem cell research and embryo freezing,<sup>17</sup> and some espouse embryo

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<sup>11</sup> See generally RONALD M. GREEN, *THE HUMAN EMBRYO RESEARCH DEBATES* (2001) (discussing the debates of the National Institutes of Health’s (NIH) Human Embryo Research Panel from the view of a panel member); see also R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 6 *STAN. L. & POL’Y REV.* 11, 11–23 (1995) (describing deliberations of NIH’s Human Embryo Research Panel).

<sup>12</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing freedom to choose to terminate a pregnancy as part of the liberty protected by the Fourteenth Amendment’s Due Process Clause). The firestorm of controversy ignited by this decision continues today. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O’Connor, J., concurring) (“The issue of abortion is one of the most contentious and controversial in contemporary American society.”); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 1–8 (1984). See generally Rickie Solinger, *Introduction to ABORTION WARS: A HALF-CENTURY OF STRUGGLE, 1950–2000* (Rickie Solinger ed., 1998) (discussing the many changes that have occurred regarding abortion during the past fifty years).

<sup>13</sup> See generally Robertson, *supra* note 1.

<sup>14</sup> See GREEN, *supra* note 11, at xii–xiii (noting the “powerful opposition” to embryo research).

<sup>15</sup> See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 102 (1994).

<sup>16</sup> Richard W. Momeyer, *Embryos, Stem Cells, Morality and Public Policy: Difficult Connections*, 31 *CAP. U. L. REV.* 93, 94 (2002).

<sup>17</sup> E.g., Paul Lauritzen, *Neither Person Nor Property*, *AM.: THE CATHOLIC WKLY. MAG.*, Mar. 26, 2001, <http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=1781&issueID=332>.

donation of surplus embryos and/or their mandatory transfer to other women's uteri for attempts at pregnancy.<sup>18</sup>

At the other end of the continuum is the view that the ex utero embryo is just another type of bodily tissue, nothing but a clump of cells.<sup>19</sup> Because these cells lack sentience, have no interests to be protected, and are neither conscious nor self-conscious, embryos enjoy no moral claims of their own.<sup>20</sup> Some scholars find significance in the fact that "[t]he fertilized egg *in vitro* cannot develop into a fetus 'all by itself.'"<sup>21</sup> Almost everyone concedes, however, that the gamete providers should have dispositional authority over their embryos.<sup>22</sup> So long as the progenitors consent, there should be no limitation on the use of the embryos.<sup>23</sup> An intermediate position holds that because of the embryo's potential for human life and its symbolic meaning to many, it is to be accorded greater respect than other human tissues.<sup>24</sup> In many instances, the progenitors themselves disagree with each other as to the moral status of the embryos which they have created together by the union of their eggs and sperm.<sup>25</sup>

Despite the lack of consensus on the moral status of the embryo, courts have been forced to determine the legal status of the ex utero embryos in a variety of contexts. In the usual case, the court has no legislative guidance at either the state or federal level.<sup>26</sup> In fact, there is more legislation dealing

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<sup>18</sup> See Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 67 (1999).

<sup>19</sup> See Lauritzen, *supra* note 17.

<sup>20</sup> Momeyer, *supra* note 16, at 94; see also N.Y. STATE TASK FORCE ON LIFE & THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES 380 (1998) [hereinafter N.Y. TASK FORCE]; Coleman, *supra* note 18, at 67–68 (discussing various theories of the moral status of embryos).

<sup>21</sup> BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 199–200 (1992).

<sup>22</sup> Some hold the view that there are no limits on what may be done with embryos except the requirement of the consent of those with decisionmaking authority. See, e.g., ROBERTSON, *supra* note 15, at 102. This position ignores the reality that "a new genome has been formed and that actions with this tissue could affect whether a new child will be born." *Id.*

<sup>23</sup> Ethics Comm. of the Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY 31S, 34S (1990) [hereinafter *Ethical Considerations*].

<sup>24</sup> *Id.* at 34S–35S.

<sup>25</sup> See *infra* text accompanying notes 52–81.

<sup>26</sup> See, e.g., STEM CELL STUDY GROUP, IND. UNIV. CTR FOR BIOETHICS, DIVERSE PERSPECTIVES: CONSIDERATIONS ABOUT EMBRYONIC STEM CELL RESEARCH 15 (2002), available at [http://www.bioethics.iu.edu/Diverse\\_Perspectives.pdf](http://www.bioethics.iu.edu/Diverse_Perspectives.pdf); Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish*, 27 J. LEGAL MED. 167, 193–94 (2006) ("[M]any  
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with the as-yet-unrealized prospect of human cloning than there is legislation addressing the reality of hundreds of thousands of existing embryos.<sup>27</sup> In this Article, I examine the legal characterization of ex utero embryos in the United States to date. Just as with the debate over their moral status, the controversy over the legal characterization of cryopreserved embryos has yielded diverse and opposing views. I consider the implications for reproductive freedom and adoption law that follow from the legal definitions of the ex utero embryo, whether as a person, property, or as an interim category entitled to special respect. The unregulated practice of donating surplus embryos to other couples for attempts at pregnancy is of particular interest because in some ways it parallels the adoption of born children, or would if the law permitted pre-pregnancy adoption.

I conclude that defining embryos as persons, if carried to its logical extreme, will have a profound effect not just on reproductive issues, such as the law of abortion or the use of IVF, but also upon adoption law and practice.

Eventually embryo donation to other couples will come under the control of the state, rather than be a medical matter as it is now. If embryo donation remains primarily a medical matter, supporters of the current system of adoption laws and regulations may have to justify the system's control over eligibility for adoptive parenthood.

### I. CHOICE OF TERMS: WHY IT MATTERS

The disagreement over the moral and legal status of ex utero, fertilized eggs is reflected in the debate over the proper nomenclature for these entities.

The courts believe that semantical distinctions matter greatly in this area.<sup>28</sup> "There is an almost magical power in naming things,"<sup>29</sup> and "[l]anguage both reflects and shapes the public perception of biomedical truths."<sup>30</sup> The word that is chosen to describe the fertilized egg may affect perceptions of when

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states have enacted legislation dealing with embryos in the context of human cloning and abortion, relatively few states have legislation directly on the legal status of frozen embryos and their disposition in the context of IVF.").

<sup>27</sup> See, e.g., Adrienne N. Cash, *Attack of the Clones: Legislative Approaches to Human Cloning in the United States*, 2005 DUKE L. & TECH. REV. 26, ¶ 4, <http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0026.pdf> (stating that fourteen states have passed legislation prohibiting human cloning); Langley & Blackston, *supra* note 26, at 193.

<sup>28</sup> See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992) (noting that language can confer legal status and "inaccuracy can lead to misanalysis").

<sup>29</sup> Paul Vitello, *Kiss Me, I'm Illegal*, N.Y. TIMES, Mar. 26, 2006, at WK5.

<sup>30</sup> ROBIN MARANTZ HENIG, PANDORA'S BABY 250 (2004).

life begins<sup>31</sup> or may reflect the user's view as to the developmental stage at which society should consider a human life to begin.<sup>32</sup> Some ethicists and scientists use terms such as "proto-embryo,"<sup>33</sup> "pre-implantation' embryo[,] and 'pre-embryo'"<sup>34</sup> to refer to eggs fertilized ex utero and not implanted in a womb.<sup>35</sup> Some refer to these eggs as embryos, but as the Arizona Court of Appeals noted, "Referring to a cryopreserved three-day old fertilized human egg as an embryo can imply that the egg is a 'person.'"<sup>36</sup> Of course, in many instances the ones referring to the fertilized egg as an embryo fully intend the inference of personhood.<sup>37</sup> Conversely, many scientists and ethicists hold that a fertilized human egg is not an embryo until it is implanted in the uterine wall and develops for two weeks.<sup>38</sup> In fact, even among research scientists the word embryo lacks a fixed meaning.<sup>39</sup> It must be noted, however, that the International Committee Monitoring Assisted Reproductive Technologies (ICMART) defines embryo as the "product of conception from the time of fertilization to the end of the embryonic stage eight weeks after fertilization."<sup>40</sup> Moreover, ICMART states that embryo has replaced "pre-embryo" and "dividing conceptus."<sup>41</sup>

Several state courts have had to resolve issues of the disposition of stored cryogenically preserved embryos when the divorcing gamete providers could

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<sup>31</sup> Louis M. Guenin, *On Classifying the Developing Organism*, 36 CONN. L. REV. 1115, 1121–30 (2004).

<sup>32</sup> *See id.* at 1123. This same debate over terminology plays out in debates over cloning in which participants use loaded terms such as "therapeutic cloning" or "embryo farms." HENIG, *supra* note 30.

<sup>33</sup> *E.g.*, Lars Noah, *A Postmodernist Take on the Human Embryo Research Debate*, 36 CONN. L. REV. 1133, 1152 (2004).

<sup>34</sup> Ann A. Kiessling, *What is an Embryo?*, 36 CONN. L. REV. 1051, 1088 (2004).

<sup>35</sup> *Id.*

<sup>36</sup> *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1258 n.1 (Ariz. Ct. App. 2005); *see also* Noah, *supra* note 33 ("The word 'embryo' comes from the Greek *embryon*, which . . . translates as 'thing newly born,' . . . [or] 'young of any organism in an early stage of development.'").

<sup>37</sup> *See* Kiessling, *supra* note 34, at 1063–64.

<sup>38</sup> *See id.* at 1088.

<sup>39</sup> Noah, *supra* note 33, at 1134.

<sup>40</sup> Fernando Zegers-Hochschild et al., *The International Committee Monitoring Assisted Reproductive Technologies (ICMART) Glossary on ART Terminology*, 86 FERTILITY & STERILITY 16, 17 (2006).

<sup>41</sup> *Id.*

not agree.<sup>42</sup> As the first order of business, however, the courts had to determine the proper designation for the fertilized eggs at the heart of the dispute.<sup>43</sup> This determination requires recourse to medical dictionaries, embryology texts, and genome studies.<sup>44</sup> In some instances, the parties contending for control of the embryos suggested different descriptive names—names reflecting their differing views as to the status of their fertilized eggs.<sup>45</sup> In one case, a spouse argued that “the term ‘child,’ rather than ‘pre-embryo,’ is the correct term and concept for the court’s consideration.”<sup>46</sup>

If the cryopreserved embryo is, in fact, a child, then the court must use a best interest of the child analysis in determining which party should be given dominion over the embryos.<sup>47</sup> No state high court, however, has taken the position that a frozen embryo is a child,<sup>48</sup> although trial court judges have used the terminology “children” and held that the law governing child custody disputes, including support, visitation, and final custody, apply in a dispute between the progenitors.<sup>49</sup> One trial court appointed a guardian ad litem to file a parenting investigation report for the frozen embryos—embryos that the judge considered children.<sup>50</sup>

In *Davis v. Davis*, the first decision involving a dispute between divorcing progenitors over custody of cryopreserved embryos,<sup>51</sup> the trial court judge rejected the term “pre-embryo” as serving “as a false distinction between the

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<sup>42</sup> See, e.g., *J.B. v. M.B.*, 751 A.2d 613, 614 (N.J. Super. Ct. App. Div. 2000); *Kass v. Kass*, 663 N.Y.S.2d 581, 583 (N.Y. App. Div. 1997); *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992); *Roman v. Roman*, 193 S.W.3d 40, 41–42 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261, 261–62 (Wash. 2002).

<sup>43</sup> See, e.g., *J.B.*, 751 A.2d at 614 n.1; *Kass*, 663 N.Y.S.2d at 585–86; *Davis*, 842 S.W.2d at 592–94; *Roman*, 193 S.W.3d at 41–42 n.1; *Litowitz*, 48 P.3d at 262 n.2.

<sup>44</sup> See, e.g., *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1265 n.6 (Ariz. Ct. App. 2005). “Given the lack of case law on the issue of the status of pre-embryos, it is appropriate to rely on legal and medical-legal treatises to address this argument.” *Id.* (citing *Davis*, 842 S.W.2d at 590).

<sup>45</sup> See, e.g., *Litowitz*, 48 P.3d at 269.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., *Litowitz*, 48 P.3d at 264; *Davis v. Davis*, No. E-14496, 1989 WL 140495, at \*11 (Tenn. Cir. Ct. Sept. 21, 1989).

<sup>48</sup> See Ellen Waldman, *King Solomon in the Age of Assisted Reproduction*, 24 T. JEFFERSON L. REV. 217, 218 (2002).

<sup>49</sup> *Davis*, 1989 WL 140495, at \*11.

<sup>50</sup> *Litowitz v. Litowitz*, 10 P.3d 1086, 1089 & n.7 (Wash. Ct. App. 2000).

<sup>51</sup> See Dan Fabricant, Note, *International Law Revisited: Davis v. Davis and the Need for Coherent Policy on the Status of The Embryo*, 6 CONN. J. INT’L L. 173, 173–74 (1990).

developmental stages of a human embryo.”<sup>52</sup> Instead, the judge referred to the divorcing couple’s fertilized eggs as “children, in vitro”<sup>53</sup> and found that “human life begins at the moment of conception.”<sup>54</sup> The trial judge’s findings were based on the expert testimony of Dr. Jerome Lejeune, a renowned French geneticist, who referred to the fertilized eggs “as ‘early human beings,’ as ‘tiny persons,’ and as his ‘kin.’”<sup>55</sup> Dr. Lejeune also testified that “he was deeply moved that . . . ‘the mother, wants to rescue babies from this concentration can,’”<sup>56</sup> and he spoke of the husband’s “moral duty to try to bring these ‘tiny human beings’ to term.”<sup>57</sup> Dr. Lejeune theorized that there is no distinction between embryos and pre-embryos, a theory rejected by all of the other expert witnesses.<sup>58</sup> The trial judge agreed with Dr. Lejeune’s assertion that “‘human life begins at the moment of conception.’”<sup>59</sup> The judge, therefore, “invoked the doctrine of *parens patriae* and held that it was ‘in the best interest of the children’ to be born rather than destroyed.”<sup>60</sup> Accordingly, the “custody” of the “children” was awarded to the wife for transfer to her uterus.<sup>61</sup> The ruling did not dictate whether the wife was to have all of the embryos transferred.<sup>62</sup>

The Tennessee Supreme Court, however, canvassed Tennessee law regarding the unborn<sup>63</sup> and concluded that the fertilized eggs occupied an “interim category” between full, legal persons and the view that they are items of property.<sup>64</sup> Although there was an absence of legal authority or guidance as to the characterization of and respect due to pre-embryos, the court noted that the Ethics Committee of the American Fertility Society (now the

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<sup>52</sup> *Davis*, 1989 WL 140495, at \*1.

<sup>53</sup> *Id.* at \*10.

<sup>54</sup> *Id.* at \*9.

<sup>55</sup> *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992). Dr Lejeune described the cell resulting from fertilization of the egg: “[A]t the very beginning of life the genetic information and the molecular structure of the egg, the spirit and the matter, the soul and the body must be that tightly intricated because it is a beginning of the new marvel that we call a human . . . .” *Davis*, 1989 WL 140495, at \*28.

<sup>56</sup> *Davis*, 842 S.W.2d at 593.

<sup>57</sup> *Id.* (citations omitted).

<sup>58</sup> *See id.* at 593–94.

<sup>59</sup> *Id.* at 594.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 594–95.

<sup>64</sup> *Id.* at 597.

American Society of Reproductive Medicine) had studied the question and issued a report finding that pre-embryo, while not just any human tissue, does not deserve “the respect accorded to actual persons.”<sup>65</sup> Because the pre-embryo “has not yet developed the features of personhood, it is not yet established as developmentally individual, and may never realize its biologic potential,” so it should not be accorded the rights of a person.<sup>66</sup> Nevertheless, ex utero embryos deserve greater respect than ordinary human tissue because of their biologic potential and their “symbolic meaning for many people.”<sup>67</sup>

In *Davis*, the Tennessee Supreme Court considered the Ethics Committee’s primary concern to be the treatment of the transferred pre-embryo as demonstrated by the Committee’s conclusion that “special respect” is required so that the welfare of potential offspring is protected and experiments that might harm such offspring are not conducted.<sup>68</sup> The court embraced the stance of the American Fertility Society and held that embryos enjoyed an interim status between persons and property that entitled them to special respect.<sup>69</sup> Accordingly, the interest of the progenitors was “not a true property interest,” but they did “have an interest in the nature of ownership”—that is, “decision-making authority concerning the disposition of the preembryos.”<sup>70</sup> In *Davis*, the Tennessee Supreme Court implicitly rejected the trial court’s best interest of the child analysis.<sup>71</sup>

In the end, the *Davis* case was resolved by resort to the doctrine of procreational autonomy, including the right to avoid procreation.<sup>72</sup> The court noted that the “essential dispute” was not about storage of the pre-embryos but “whether the parties will become parents.”<sup>73</sup> The court reviewed Supreme Court jurisprudence regarding both the affirmative right to procreate<sup>74</sup> and the

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<sup>65</sup> *Id.* at 596.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing *Ethical Considerations*, *supra* note 23, at 35S).

<sup>69</sup> *Id.* at 596–97.

<sup>70</sup> *Id.* at 597.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at 603–04.

<sup>73</sup> *Id.* at 598.

<sup>74</sup> *Id.* at 600 (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). In *Buck v. Bell*, the Court upheld compulsory sterilization of the feebleminded. *Buck*, 274 U.S. at 207. In *Skinner v. Oklahoma*, the Court held that a statute authorizing sterilization of certain categories of criminals violated equal protection, and that the right to procreate is “one of the basic civil rights of man.” *Skinner*, 316 U.S. at 536, 541.

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right to avoid procreation.<sup>75</sup> At the trial stage of the case, Mary Sue Davis wanted the pre-embryos for her own use in attempts to establish a pregnancy after the divorce.<sup>76</sup> Junior Davis, who had been reared apart from his genetic parents, did not want to father a child who would be unable to live with both parents, so he wanted the pre-embryos destroyed.<sup>77</sup> By the time the Tennessee Supreme Court heard the appeal, however, Mary Sue, who had remarried and moved out of state, wanted to donate the pre-embryos to a childless couple.<sup>78</sup> (It was clear throughout the litigation and its aftermath that Mary Sue regarded the untransferred pre-embryos as persons.)<sup>79</sup> The court held that the individual's interest in procreative autonomy outweighs the state's interest in potential life: "Certainly, if the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed, then surely there is no state interest in these pre-embryos which could suffice to overcome the interests of the gamete-providers."<sup>80</sup> Ultimately, the *Davis* court held that the interest of the husband in not becoming a father outweighed the wife's interest in donating the embryos to other persons rather than using them to achieve pregnancy herself.<sup>81</sup>

Subsequent to *Davis*, most state courts facing conflicts similar to the *Davis* dispute have adopted the "pre-embryo" terminology of *Davis* usually

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Moreover, the *Skinner* Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.*

<sup>75</sup> *Davis*, 842 S.W.2d at 600–01 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (indicating that the decision whether to beget or bear a child is fundamental to individual autonomy); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>76</sup> *Davis*, 842 S.W.2d at 589. Mary Sue testified at the trial that the embryos are "the beginning of life," and that she was the mother of the embryos to whom she felt an attachment. *Davis v. Davis*, No. E-14496, 1989 WL 140495, at \*25 (Tenn. Cir. Ct. Sept. 21, 1989).

<sup>77</sup> *Davis*, 842 S.W.2d at 590, 603–04.

<sup>78</sup> *Id.* at 590.

<sup>79</sup> See *7 Embryos in Custody Case Are Destroyed*, N.Y. TIMES, June 16, 1993, at A18. When the pre-embryos were ultimately destroyed, Mary Sue was reported to have been distraught. *Id.*

<sup>80</sup> *Davis*, 842 S.W.2d at 602.

<sup>81</sup> *Id.* at 604.

with little discussion.<sup>82</sup> In *Kass v. Kass*,<sup>83</sup> the New York Court of Appeals, however, used the terminology “pre-zygote,”<sup>84</sup> a term of dubious scientific accuracy—but one that appeared in the parties’ consent form regarding the disposition of the embryos in the event of the parties’ divorce.<sup>85</sup> As in *Davis*, the state’s high court and trial court judge in *Kass* had diametrically opposed views of the moral status of the couple’s embryos. The trial judge stated:

From a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process. Biological life exists from that moment forward.<sup>86</sup>

Accordingly, the court gave custody of the frozen embryos to the wife who desired to use them in hopes of bearing a child.<sup>87</sup> The New York Court of Appeals, however, treated the matter solely as one of contract law<sup>88</sup> and held that the consent forms signed by the parties required that the “pre-zygotes” be donated for research.<sup>89</sup>

*In re Marriage of Witten III (Witten III)*,<sup>90</sup> decided by the Supreme Court of Iowa, is the latest case in which a state’s highest court resolved a dispute between gamete providers over control of their frozen embryos.<sup>91</sup> The court used the term “embryo,” taken from the parties’ contract with the fertility center, interchangeably with the term “fertilized egg.”<sup>92</sup> The wife, however, contended that “the embryos [were] children and their best interest

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<sup>82</sup> See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052 n.1 (Mass. 2000) (pre-embryo); *J.B. v. M.B.*, 751 A.2d 613, 614 n.1 (N.J. Super. Ct. App. Div. 2000), *aff’d in part, modified*, 783 A.2d 707, 708 n.1 (N.J. 2001) (pre-embryo). *But cf.* *Litowitz v. Litowitz*, 48 P.3d 261, 262 n.2, 269 (Wash. 2002) (following the pre-embryo terminology after a detailed discussion).

<sup>83</sup> 696 N.E.2d 174 (N.Y. 1998).

<sup>84</sup> *Id.* at 175 n.1, 177.

<sup>85</sup> *Kass v. Kass*, 1995 WL 110368, at \*4 (N.Y. Sup. Ct. Jan. 18, 1995).

<sup>86</sup> *Id.* at \*3.

<sup>87</sup> *Id.* at \*5.

<sup>88</sup> See *Kass*, 696 N.E.2d at 180 (“The subject of this dispute may be novel but the common-law principles governing contract interpretation are not.”).

<sup>89</sup> *Id.* at 180–81.

<sup>90</sup> 672 N.W.2d 768 (Iowa 2003).

<sup>91</sup> *Id.* at 771–72.

<sup>92</sup> *Id.* at 772 n.1.

demand[ed] placement with her.”<sup>93</sup> Noting that it was “not called upon to determine the religious or philosophical status of the fertilized eggs,”<sup>94</sup> the court had only to determine whether Iowa’s dissolution of marriage statute conferred the legal status of children upon the embryos.<sup>95</sup> The court looked to its prior decisions determining whether an unborn fetus is a “person” or a “child” in the context of other statutory provisions<sup>96</sup> and concluded that the “common denominator” in those cases is the court’s “focus on the purpose of the law . . . and the legislative intent reflected by that purpose.”<sup>97</sup> Accordingly, the court noted that the goals of the best interest of the child standard “are to ‘assure the child the opportunity for the maximum continuing physical and emotional contact with both parents,’ and to ‘encourage parents to share the rights and responsibilities of raising [a] child.’”<sup>98</sup>

The *Witten III* court remarked that the issue was not about “maximizing physical and emotional contact between both parents and the child”; rather, the case involved a “more fundamental decision of whether the parties [were to] be parents at all.”<sup>99</sup> The court observed that the principles governing child custody did not apply because the real issue was who would “have decision-making authority with respect to the fertilized eggs.”<sup>100</sup> Accordingly, the court concluded that “the [Iowa] legislature did not intend to include fertilized eggs or frozen embryos within the scope of [the child custody statute].”<sup>101</sup>

In sum, state high courts have not treated the ex utero embryo as a human being. In fact, they have engaged in scant discussion of the question, instead viewing the issues through the prism of the progenitors’ procreative liberty.<sup>102</sup>

There is no decisional law according the pre-implantation embryo the legal status of a born child or third-trimester fetus, nor has an ex utero embryo ever been given standing in a lawsuit.<sup>103</sup> The courts do not apply a best interests of

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<sup>93</sup> *Id.* at 774.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 774–75.

<sup>97</sup> *Id.* at 775.

<sup>98</sup> *Id.* (quoting IOWA CODE § 598.41(1)(a) (West 2001)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 775–76.

<sup>101</sup> *Id.* at 776.

<sup>102</sup> See, e.g., Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 169–70 (2005) (“[A] property framework provides a more neutral basis for legal analysis, compared to the more value-laden procreative liberty framework.”).

<sup>103</sup> See *infra* text accompanying notes 176–82.

the child analysis in determining the rights of the parties.<sup>104</sup> In each of the disputes between progenitors, the party seeking to avoid procreation prevailed.<sup>105</sup> When the parties could not reach an accord on the disposition of their embryos in *Davis*, the court eventually permitted the husband to throw away the couple's embryos.<sup>106</sup> The New York Court of Appeals in *Kass v. Kass* put its imprimatur on the donation of the embryos for research.<sup>107</sup> By implication, the ex utero embryo does not enjoy a right to be implanted.<sup>108</sup>

Since *Davis*, courts routinely declare that the embryo occupies an interim category between personhood and the status of property.<sup>109</sup> Courts also iterate that this interim category is entitled to "special respect" because of the embryo's potential for life<sup>110</sup>—an assertion repeated in every discussion of the moral status of embryos, including debates over the morality of embryo research.<sup>111</sup> The courts have not adopted the approach that the spouse who favors implantation should prevail in a dispute between spouses.<sup>112</sup> Despite

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<sup>104</sup> See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992).

<sup>105</sup> See Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1027 (2004). For a discussion of the cases, see *id.* at 1030–40. Professor Waldman challenged the concept of coerced parenthood if one progenitor objects to becoming a genetic parent and offers a compelling discussion of the need for greater empathy for would-be mothers and fathers in frozen embryo disputes. *Id.* at 1061–62.

<sup>106</sup> See *7 Embryos in Custody Case Are Destroyed*, *supra* note 79.

<sup>107</sup> *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998).

<sup>108</sup> *Nachmani v. Nachmani* is a decision of the Israeli Supreme Court, the only high court to give one party, here the wife, the right to use the couple's embryos against the wishes of the other progenitor. See Dalia Dorner, *Human Reproduction: Reflections on the Nachmani Case*, 35 TEX. INT'L L.J. 1, 2 (2000). The *Nachmani* case presented an instance in which the wife was unable to produce more eggs. *Id.* Dalia Dorner is one of the judges who decided *Nachmani*. *Id.* The decision is not available in English. See also Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and Its Impact on Israeli In Vitro Fertilization Law*, 7 CARDOZO J. INT'L & COMP. L. 325 (1999).

<sup>109</sup> See, e.g., *Kass v. Kass*, 1995 WL 110368, at \*2 (N.Y. Sup. Ct. Jan. 18, 1995).

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Charo, *supra* note 11, at 11–12. The Human Embryo Research Panel of the National Institutes of Health Report concluded the moral status of embryos entitles them to "respect," even while the Report also recommends that they be used and destroyed for important research." *Id.*

<sup>112</sup> See *supra* note 105 and accompanying text. There is, however, some scholarly support for the implantation rule. See, e.g., Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles over Frozen Embryos*, 41 CASE W. RES. L. REV. 543, 578–79 (1991) (suggesting that courts should favor spouse who intends to implant the ex utero embryos).

paying lip service to the notion of special respect, in reality courts treat the embryo as the property of its progenitors.<sup>113</sup> It might be less disingenuous if the courts did away with the language of special respect and interim categories and simply acknowledged that the progenitors enjoy dispositional authority.

These decisions demonstrate that the courts have avoided reaching metaphysical and theological questions regarding the status of the ex utero embryo. Perhaps the courts are heeding the example of the Supreme Court in *Roe v. Wade*,<sup>114</sup> in which the Court stated:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.<sup>115</sup>

In *Stenberg v. Carhart*,<sup>116</sup> the Court returned to this theme. Justice Breyer, writing for the Court, acknowledged the “virtually irreconcilable points of view” on the morality of abortion.<sup>117</sup> “Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child . . . .”<sup>118</sup> Other millions believe that forbidding abortion would deprive women of dignity and equality.<sup>119</sup> In reaffirming that the Constitution “offers basic protection to the woman’s right to choose,”<sup>120</sup> the Court took note of the fact “that constitutional law must

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<sup>113</sup> Allison B. Newhart, *The Intersection of Law and Medicine: The Case for Providing Federal Funding for Embryonic Stem Cell Research*, 49 VILL. L. REV. 329, 332 (2004).

<sup>114</sup> 410 U.S. 113 (1973).

<sup>115</sup> *Id.* at 159.

<sup>116</sup> 530 U.S. 914 (2000). In *Stenberg*, the Court held that Nebraska’s partial birth abortion law violated the Constitution because it lacked an “exception ‘for the preservation of the . . . health of the mother’” and placed “‘an undue burden on a woman’s ability’ to choose a D&E [dilation and extraction] abortion, thereby unduly burdening the right to choose abortion itself.” *Id.* at 929–30 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874, 879 (1992)).

<sup>117</sup> *Id.* at 920–21.

<sup>118</sup> *Id.* at 920.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 921.

govern a society whose different members sincerely hold directly opposing views.”<sup>121</sup>

Personal beliefs on the moral, and consequent legal, status of the ex utero embryo are probably as irreconcilable as the polarity of views on the morality of induced abortion. In our pluralistic society there is no one view of the moral status of the embryo. Speaking to the issue of “whether human embryos, from the time of fertilization, are entitled to ‘full moral status,’ or whether they are entitled to less than that,” the President’s Council on Bioethics stated: “The Council, like the larger American public, is divided on this question.”<sup>122</sup> Since most of the opposition to stem cell and other research that would destroy the embryo is based on religious doctrine and belief,<sup>123</sup> asking the courts to rule on the moral status of the ex utero embryo is to seek the imposition of moral authority contrary to the sincerely held beliefs of those who do not worship at the same altar.

## II. THE EMBRYO AS A RIGHTS BEARING ENTITY

There is no agreement among scientists about the moral status of the ex utero embryo and when it is entitled to legal protection against interference with its further development.<sup>124</sup> Some believe that life begins two or three weeks after fertilization when the neurological tissues are first evident.<sup>125</sup> Others draw the line at later points in embryonic development.<sup>126</sup> Some draw the line at consciousness.<sup>127</sup> It is more probable than not that the majority of scientists who have considered the moral status of the ex utero embryo would not accord it legal status as full human being. It should be remarked that

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<sup>121</sup> *Id.*

<sup>122</sup> See REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 15.

<sup>123</sup> See Peter Steinfels, *Beliefs: Similar Questions of Faith Underlie Debates Over Stem Cell Research and Missile Defense Shields*, N.Y. TIMES, July 21, 2001, at B7.

<sup>124</sup> See Noah, *supra* note 33, at 1133–34; see also Charo, *supra* note 11, at 11 (noting the failure of federal Human Embryo Research Panel to find a “clear-cut answer” to the question of the embryo’s moral status).

<sup>125</sup> See Charo, *supra* note 11, at 17–18.

<sup>126</sup> See *id.* (describing various stages of embryo development and arguments concerning whether developmental markers suffice to confer protection on the ex utero embryo).

<sup>127</sup> See, e.g., Lisa Shaw Roy, *Roe and the New Frontier*, 27 HARV. J.L. & PUB. POL’Y 339, 375 n.164 (2003) (“Even in the scientific community . . . disagreement exists over whether life is present at fertilization, implantation, three or fourteen days after fertilization, or at some [other] point later in pregnancy.”).

when scientists speak to the beginning of life, it is most often in the context of the debate over the morality of stem cell research.<sup>128</sup>

The moral status of the embryo is also a question of great dispute among theologians, philosophers, and religious leaders. Some religious authorities and philosophers have denounced IVF from the earliest days of research into the possibility of fertilizing eggs in the laboratory and implanting them to achieve pregnancy.<sup>129</sup> In 1971, Paul Ramsey, a professor of religion at Princeton, stated, “‘In vitro fertilization constitutes unethical medical experimentation on possible future human beings, and therefore it is subject to absolute moral prohibition.’”<sup>130</sup> Dr. Ramsey’s condemnation was based on the belief that the subject of the experiment, the embryo, could not give informed consent, and further, that damaged babies would be the inevitable result.<sup>131</sup>

Although Dr. Leon Kass has since modified his disapproval of IVF,<sup>132</sup> before the first pregnancy had been achieved, Dr. Kass, the former head of the President’s Council on Bioethics,<sup>133</sup> denounced IVF as “part of a ‘new holy war against human nature.’”<sup>134</sup> Dr. Kass envisioned IVF as the first step on a very slippery slope that threatened “the sanctity of the nuclear family, monogamy, fidelity, [and] all the ties that bind families and generations.”<sup>135</sup> Other early critics of ex utero fertilization of eggs realized that it laid the groundwork for developments such as cloning and genetic engineering.<sup>136</sup>

Roman Catholic church teachings also condemned IVF for separating procreation from marital unity, for threatening the stability of marriage and family life, and causing the discard and destruction of embryos.<sup>137</sup> Moreover,

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<sup>128</sup> See Charo, *supra* note 11, at 15–19.

<sup>129</sup> See HENIG, *supra* note 30, at 10.

<sup>130</sup> *Id.* at 64, 71–72.

<sup>131</sup> *Id.* at 71.

<sup>132</sup> LEON R. KASS, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY* 95–96 (2002).

<sup>133</sup> The President’s Council on Bioethics, Leon R. Kass, <http://www.bioethics.gov/about/kass.html> (last visited May 2, 2007).

<sup>134</sup> HENIG, *supra* note 30, at 70. Dr. Kass’s statement denouncing IVF was made in 1971. *Id.* at 64. The first human conceived via IVF was born in 1978. KASS, *supra* note 132, at 95.

<sup>135</sup> HENIG, *supra* note 30, at 70. *But cf.* KASS, *supra* note 132, at 96 (stating that continuing work with IVF and embryo transfer to relieve infertility is a “worthy goal few, if any, would deny”).

<sup>136</sup> See, e.g., HENIG, *supra* note 30, at 74–75.

<sup>137</sup> See N.Y. TASK FORCE, *supra* note 20, at 105–07; see also Joseph G. Schenker, *Oocyte Donation: Religious Perspectives*, in *PRINCIPLES OF OOCYTE AND EMBRYO DONATION* 341, 353 (Mark V. Sauer ed., 1998) (discussing Roman Catholic views on assisted reproduction).

(continued)

many religious thinkers share the belief that human agency should not be involved in the creation of life.<sup>138</sup> When cryogenically preserving embryos became a reality, some religious leaders insisted that the embryos be treated as human persons even as they continued to declare that IVF is an evil.<sup>139</sup>

Although Pope John Paul II condemned IVF in 1987,<sup>140</sup> the Roman Catholic Church's position on the moral status of the ex utero embryo was not entirely clear. In February 2006, however, Pope Benedict XVI declared that there is "no moral distinction between an embryo before implantation and after."<sup>141</sup> Pope Benedict XVI further stated, "The Magisterium of the church has constantly proclaimed the sacred and inviolable character of every human life, from its conception to its natural end."<sup>142</sup> The Pope added,

This moral judgment is valid already at the beginnings of life of an embryo, before it is implanted in the womb of the mother . . . . The love of God doesn't make any difference between the newly conceived, still in the womb of his mother, and the baby, or the young person, or the mature man or the old man.<sup>143</sup>

The Pope continued, "He doesn't make the distinction because in each of them he sees his own image and similarity."<sup>144</sup>

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Schenker also discusses Buddhist, Anglican, Eastern Orthodox, Protestant, Hindu, Islamic, and Jewish teachings on the subject. *Id.* at 341–60.

<sup>138</sup> See, e.g., N.Y. TASK FORCE, *supra* note 20, at 107 ("The Eastern Orthodox . . . [church] object[s] to all other forms of assisted reproduction, including IVF using a married couple's own gametes, because of both the possible destruction of embryos and the separation of conception from the conjugal act.").

<sup>139</sup> See *id.* at 79. "In fact, the risk that embryos created through in vitro fertilization (IVF) will be used for research and then destroyed is one of the main reasons that some religious denominations oppose the use of IVF." *Id.*

<sup>140</sup> See *id.* at 105 (discussing the 1987 *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, wherein the Vatican Congregation for the Doctrine of Faith concluded that IVF is "morally illicit," even for married couples). The Vatican's instructions were approved by Pope John Paul II. Schenker, *supra* note 137, at 353.

<sup>141</sup> Nicole Winfield, *In Vitro Embryos Sacred, Pope Says: Pontiff Affirms Church Teaching on Conception as the Start of Life*, COLUMBUS DISPATCH, Feb. 28, 2006, at A1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Nicole Winfield, *Pope Says Pre-Implanted Embryo Is Sacred*, <http://www.comcast.net/includes/article/print.jsp?fn=/data/news/html//2006/02/27/334860.html> (last visited Mar. 6, 2007).

The view that there is no difference in moral stature between a fertilized egg and a human being is shared by many, but not all, who view abortion at any stage of a pregnancy as the destruction of a human being. Thus, destruction of the embryo, even in research, is forbidden to women with unused frozen embryos who define the embryo as a human being or person.<sup>145</sup>

For individuals with this view, donating the embryos to another couple may be the only acceptable disposition.<sup>146</sup> Some abortion opponents use the term “pre-born” not only for the in utero conceptus but also for the ex utero fertilized egg.<sup>147</sup> This position is based on the debatable belief that each fertilized egg has a unique and complete genome.<sup>148</sup> Some abortion opponents, however, believe that there is a fundamental difference between an implanted embryo growing within a uterus and a cryopreserved embryo. Abortion opponent and stem cell research supporter Senator Orrin Hatch, for example, has stated that he “cannot equate a child living in the womb, with moving toes and fingers and a beating heart, with an embryo in the freezer.”<sup>149</sup>

Senators Bill Frist and John McCain, who also strongly oppose abortion, supported a stem cell bill that to expand federal funding for research on

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<sup>145</sup> See Lyerly et al., *supra* note 3, at 1626.

<sup>146</sup> See *id.*

<sup>147</sup> See, e.g., Kathryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN’S L.J. 179, 191 (2003) (noting that the head of a program arranging embryo “adoptions” refers to the embryos as the “pre-born”).

<sup>148</sup> See Vatican, Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, in THE ETHICS OF REPRODUCTIVE TECHNOLOGY 83, 85 (Kenneth D. Alpern ed., 1992) (“[F]rom the first instant, the program is fixed as to what this living being will be: a man, this individual man with his characteristic aspects already well determined.”). *But cf.* Kiessling, *supra* note 34, at 1059–60 (noting that “it is difficult to define the beginning, and the end, of fertilization” and that fertilization is clearly completed when “proteins are synthesized from both maternal and paternal genes in order to bring about continued development” at approximately the thirty-two to sixty-four cell stage).

<sup>149</sup> Sheryl Gay Stolberg, *Reconsidering Embryo Research*, N.Y. TIMES, July 1, 2001, at 1; see also Roy, *supra* note 127, at 368 n.140; Jean Porter, *Is the Embryo a Person? Arguing with Catholic Traditions*, 129 COMMONWEAL 8, 8 (2002), available at [http://www.commonwealmagazine.org/article.php3?id\\_article=433&var\\_recherche=Jean+Porter](http://www.commonwealmagazine.org/article.php3?id_article=433&var_recherche=Jean+Porter) (discussing an article which suggested that Senator Hatch’s religious beliefs as a Mormon are behind his views on embryonic life); Angela Campbell, *Ethos and Economics: Examining the Rationale Underlying Stem Cell and Cloning Research Policies in the United States, Germany, and Japan*, 31 AM. J.L. & MED. 47, 65 n.152 (2005) (discussing anti-abortion Senator Strom Thurmond’s support for stem cell research in hopes of aiding his daughter with diabetes).

embryonic stem cells, utilizing embryos created for but not used in IVF.<sup>150</sup> In summer 2006, however, President George W. Bush vetoed the stem cell bill, stating, “Each of these human embryos is a unique human life with inherent dignity and matchless value.”<sup>151</sup> When the President made this statement he was surrounded by a number of children born as a result of the Snowflake Embryo Adoption Program,<sup>152</sup> a division of the California adoption agency Nightlight Christian Adoptions.<sup>153</sup> This agency has focused attention on the practice of donating surplus embryos to other infertile couples.<sup>154</sup> By naming the practice “adoption,” the implication arises that a baby is involved. If embryo donation is subject to adoption law, it could be “an important symbolic step toward the movement’s ultimate goal: granting embryos the rights of human beings.”<sup>155</sup>

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<sup>150</sup> See United States Senate, U.S. Senate Roll Call Votes 109th Congress, 2nd Session, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00206](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00206) (last visited Mar. 6, 2007); Stolberg, *supra* note 149, at 1–3 (noting that Senator John McCain, who is in the “pro-life camp” supported the bill); *Politics, Science, Morality of Stem Cell Issue*, CNN.COM, July 18, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/07/18/Bash.debrief.focus/> (reporting that Senator Bill Frist urged Bush to allow federal funding for the research on embryonic cells).

<sup>151</sup> Remarks on Signing the Fetus Farming Prohibition Act and Returning Without Approval to the House of Representatives the “Stem Cell Research Enhancement Act of 2005,” 42 WEEKLY COMP. PRES. DOC. 1362, 1363 (July 19, 2006); see also David Stout, *In First Veto, Bush Blocks Stem Cell Bill*, N.Y. TIMES, July 19, 2006, <http://www.nytimes.com/2006/07/19/washington/19cnd-stem.html?ei=5088&en=2df8fa1902399770&ex=1310961600&partner=rssnyt&emc=rss&pagewanted=print>; *Text: Bush’s Veto Message*, N.Y. TIMES, July 19, 2006, <http://www.nytimes.com/2006/07/19/washington/text-stem.html?ex=1162270800&en=a91a9d0e4b00bf10&ei=5070>.

<sup>152</sup> See Dr. John Agwunobi, Ask the White House (July 20, 2006), <http://www.whitehouse.gov/ask/20060720.html>. In 2001, during the Congressional debates over stem cell research, parents displayed their children born through the use of donated embryos, and President Bush spoke to the nation about the limits he would place on federal funding for stem cell research, because “‘like a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being.’” Katz, *supra* note 147, at 195–96.

<sup>153</sup> See generally Katz, *supra* note 147 (describing the program and discussing its ramifications).

<sup>154</sup> See *id.* at 191–94; see also Nightlight Christian Adoptions, Snowflakes Embryo Adoptions Fact Sheet, <http://www.nightlight.org/snowflakefactsheet.pdf> (last visited Mar. 6, 2007).

<sup>155</sup> Sarah Blustain, *Embryo Adoption*, N.Y. TIMES MAG., Dec. 11, 2005, at 67–68.

The debate over the moral status of the embryo is not a dispute between religion and nonreligion or between science and religion. In fact, it is an argument that at times involves opposing religious views, just as the debate over abortion does.<sup>156</sup> When IVF first became a reality, the leader of a Protestant consortium was quoted as saying that IVF was ““very exciting because it expands our knowledge—and knowledge is a gift of God . . . . [IVF] is good because it enhances life, enabling an infertile couple to procreate.””<sup>157</sup> There is disagreement concerning the moral status of the ex utero embryo even among co-religionists.<sup>158</sup> One Catholic ethicist believes that discarding surplus frozen embryos ““can demonstrate respect for the embryos’ potential humanity by ‘accepting the inevitable, namely that these embryos have no future with regard to the development of their potentiality and therefore should perish.’””<sup>159</sup>

Some Jewish authorities have stated, ““[A] fertilized egg not in the womb, but in an environment—the test tube—in which it can never attain viability, does not have humanhood and may be discarded or used for the advancement of scientific knowledge.””<sup>160</sup> On the other hand, a number of Orthodox Jewish commentators are greatly troubled about the possible destruction of

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<sup>156</sup> See, e.g., Neela Banerjee, *The Abortion-Rights Side Invokes God, Too*, N.Y. TIMES, Apr. 3, 2006, at A12, available at <http://www.nytimes.com/2006/04/03/us/03>; see also Brief of Amici Curiae Religious Coalition for Reproductive Choice et al. In Support of Respondent, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830), available at 2000 WL 340115, at \*9–23 (arguing, inter alia, that Nebraska’s statute prohibiting partial birth abortions violates religious freedom because there are a variety of religious views about abortion); N.Y. TASK FORCE, *supra* note 20, at 105–15 (discussing religious perspectives on reproductive technologies, including views of the Roman Catholic Church, the Eastern Orthodox Churches, various Protestant churches, the Mormon church, the Jewish faith, Islam, Buddhism and Hinduism). Cf. Brief Amicus Curiae of the United States Catholic Conference et al. In Support of Petitioners, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830), available at 2000 WL 223648, at \*8–15 (arguing that the Constitution permits states to prohibit destruction of partially-born children).

<sup>157</sup> HENIG, *supra* note 30, at 206 (omission and alteration in original).

<sup>158</sup> See, e.g., Porter, *supra* note 149. Professor Porter, who teaches theology at the University of Notre Dame, suggests that there are not ““any conclusive moral grounds ruling out embryonic stem-cell research.”” *Id.*

<sup>159</sup> Coleman, *supra* note 18, at 66 n.54 (quoting P.R. Koninckx & P. Schotsmans, *Spare Embryos: Symbols of Respect for Humanity and Freezing in the Pronuclear Stage*, 11 HUM. REPROD. 1841, 1842 (1996)).

<sup>160</sup> N.Y. TASK FORCE, *supra* note 20, at 110 (quoting F. ROSNER, *MODERN MEDICINE AND JEWISH ETHICS* 118 (Yeshiva Univ. Press 1986)) (citation omitted).

the embryo during IVF.<sup>161</sup> They propose the fertilization of “only those eggs that will immediately be transferred for implantation . . . unless the couple agrees to freeze the embryos for future transfer.”<sup>162</sup> There are similar disagreements among various Protestant denominations.<sup>163</sup>

The view that the ex utero embryo must be accorded full human status has not been adopted by the courts but has found legislative expression in Louisiana and New Mexico.<sup>164</sup> Louisiana has given the frozen embryo the status of a juridical person.<sup>165</sup> “As a juridical person, the . . . ovum shall be given an identification by the medical facility . . . which entitles such ovum to sue or be sued.”<sup>166</sup> Under Louisiana law the intentional destruction of a frozen embryo is illegal.<sup>167</sup> Gamete providers who renounce their rights in their frozen embryos must donate them to a married couple for “implantation” or make them available for adoption.<sup>168</sup> (There is no way to guarantee that implantation takes place. It would better accord with reality if the law mandated “transfer” to another couple.) Despite declaring that the embryo is a juridical person, Louisiana does not bring the ex utero embryo within its other provisions dealing with the rights of children or the responsibilities of parents.<sup>169</sup>

New Mexico amended its Maternal, Fetal and Infant Experimentation Act in 1985 to mandate that IVF performed to treat infertility must include provisions to insure that “each living fertilized ovum, zygote or embryo is implanted in a human female recipient.”<sup>170</sup> Although the New Mexico statute treats the embryo as a person where it mandates implantation, it has not

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (citation omitted).

<sup>163</sup> See, e.g., Arthur L. Greil, *The Religious Response to Reproductive Technology*, CHRISTIAN CENTURY, Jan. 4–11, 1989, at 11, 12 (discussing disagreements between fundamentalists of various religions and more liberal views regarding reproductive technologies).

<sup>164</sup> See Diane K. Yang, Comment, *What’s Mine is Mine, But What’s Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL’Y 587, 614 n.158 (2002) (listing state statutes that regulate various aspects of IVF).

<sup>165</sup> LA. REV. STAT. ANN. § 9:124 (2000).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 9:129.

<sup>168</sup> *Id.* § 9:130.

<sup>169</sup> See Yang, *supra* note 164, at 593–94, 622–24 (discussing the details of and constitutional difficulties created by the mandatory implantation provisions of the Louisiana legislation).

<sup>170</sup> N.M. STAT. ANN. § 24-9A-1(D) (2000).

declared the ex utero embryo to be a juridical person.<sup>171</sup> Both the Louisiana and New Mexico mandatory implantation provisions are of dubious constitutionality.<sup>172</sup> Moreover, they share the same element of futility, at least in theory. If a woman does not want to have other individuals rearing her genetic children, the woman whose ova were used to create the embryos could have them returned to her body for attempts at implantation. If a pregnancy resulted, she could then seek an abortion.<sup>173</sup> Other ways of avoiding mandatory transfer to another woman's uterus include having the embryos transferred to the progenitor's uterus at a time in her menstrual cycle when it is unlikely that a pregnancy will result or when she is ingesting oral contraceptives.<sup>174</sup> The progenitors would undoubtedly no longer have the right to choose to donate the embryos for research, nor would they be able to instruct the fertility clinic to discard them, options which they presently have in most states.<sup>175</sup>

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<sup>171</sup> See Cynthia Reilly, *Constitutional Limits on New Mexico's In Vitro Fertilization Law*, 24 N.M. L. REV. 125, 137–38 (1994).

<sup>172</sup> See *id.*

<sup>173</sup> Yang, *supra* note 164, at 625. Other states have laws specifically addressing the ex utero embryo, but it is not clear that the legislative intention is to grant these entities legal status so much as it is to determine the rights of the progenitors, prevent cloning, and make certain that experiments are not done on embryos that are then implanted. See, e.g., N.H. REV. STAT. ANN. § 168-B:15(I) (LexisNexis 2001) (“No preembryo shall be maintained ex utero in the noncryo-preserved state beyond 14 days post-fertilization development.”); *Id.* § 168-B:15(II) (“No preembryo that has been donated for use in research shall be transferred to a uterine cavity.”). Compare FLA. STAT. ANN. § 742.13(12) (West 2005) (“‘Preembryo’ means the product of fertilization until the appearance of the embryonic axis.”), with FLA. STAT. ANN. § 742.17 (requiring couple and treating physician to enter into a written agreement providing for the disposition of the pre-embryos in event of death, divorce, or other unforeseen circumstances).

<sup>174</sup> Cf. Robertson, *supra* note 1, at 485–86 (stating that under *Roe*, while an embryo is in a woman's body, it is solely her decision to continue or terminate the pregnancy, and she may exercise a variety of options if she decides to terminate the pregnancy).

<sup>175</sup> See REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 178 (discussing lack of limits on disposition of unused frozen embryos). Very few states have laws that limit experimentation on pre-embryos. See *id.* at 136–37. Various states have embryo-protective statutes that were enacted with the implanted embryo in mind, not the ex utero embryo. See, e.g., ARIZ. REV. STAT. ANN. §§ 36-2301, 36-2302 (2003) (requiring physician performing abortion in which a human fetus is born alive to promote and preserve the life of such fetus, and prohibiting certain types of research on any human fetus or embryo resulting from an induced abortion).

Litigation asking specifically to have embryos recognized as persons has not been successful. In 1994, a lawsuit, *Doe v. Shalala*,<sup>176</sup> was brought seeking to halt the work of the National Institutes of Health Embryo Research Panel with respect to human fetal research.<sup>177</sup> One of the plaintiffs was an ex utero embryo, Mary Doe, described in the complaint as “a pre-born child in being as a human embryo.”<sup>178</sup> Mary Doe was alleged to represent a class of 20,000 embryos located in various IVF facilities throughout the United States.<sup>179</sup> The court, however, held that it could not proceed as to Mary Doe.<sup>180</sup> The court relied on *Roe v. Wade*’s holding “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>181</sup> The *Shalala* court saw “no distinction between fetuses *in utero* or *ex utero*.”<sup>182</sup>

As the *Shalala* decision indicates, the Supreme Court’s jurisprudence on abortion does not recognize the fetus as a rights-bearing entity under the constitution. Even the dissenters from the abortion holdings do not base their dissents on a right-to-life-of-the-fetus objection.<sup>183</sup> Rather, the dissenting justices are concerned with questions of interpretive methodology, particularly the recognition of unenumerated rights.<sup>184</sup> Justice Rehnquist’s dissenting opinion in *Roe v. Wade* was concerned with the appropriate standard of review—in his view mere rationality—and proper deference to a state’s legislative judgment.<sup>185</sup> The dissenters in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>186</sup> would overturn *Roe v. Wade* and return the matter to the states.<sup>187</sup> Giving the states discretion whether to permit abortion would mean that some, perhaps most, would re-criminalize abortion but others would permit abortion to varying degrees.<sup>188</sup> The

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<sup>176</sup> 862 F. Supp. 1421 (D. Md. 1994).

<sup>177</sup> *Id.* at 1423.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1426.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 158 (1973)).

<sup>182</sup> *Id.*

<sup>183</sup> *See, e.g., Roe*, 410 U.S. at 172–77 (Rehnquist, J., dissenting).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 173.

<sup>186</sup> 505 U.S. 833 (1992).

<sup>187</sup> *See id.* at 944 (Rehnquist, C.J., dissenting), 979 (Scalia, J., dissenting).

<sup>188</sup> *See Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (“If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.”).

dissenting justices in *Stenberg v. Carhart*, moreover, did not call for the recognition of the fetus as a rights-bearing entity; they did, however, view partial-birth abortion as the killing of a born human child.<sup>189</sup>

The Supreme Court's abortion jurisprudence does not necessarily prevent states from seeking to protect fetal life in contexts other than abortion. Because there is no pregnancy involved so long as the embryo is ex utero, *Roe v. Wade* may not be apropos, although courts have read *Roe* as governing the issue of whether the ex utero embryo is a person.<sup>190</sup> Nevertheless, embryo protective legislation is in conflict with the progenitor's procreative rights under current notions of reproductive liberty, at least if one has the right to avoid genetic parenthood.<sup>191</sup> If *Roe* is overruled, the states would undoubtedly have leeway to privilege "the embryo/fetus . . . over the woman's interest in freedom from gestational burdens."<sup>192</sup> If the surplus ex utero embryo is viewed as a child, the progenitors would have no right to deprive it of life. If it is not wanted or needed for further attempts by the progenitors to achieve a pregnancy, the embryo would end up in state custody and could be offered to other infertile couples just as children whose parents will not or cannot care for them are available for adoption.

The Supreme Court has never ruled on any aspect of assisted reproduction, including the status of the ex utero embryos. In fact, it is not clear that one has the right to use assisted reproductive technology in procreation or to have access to IVF.<sup>193</sup> In *Webster v. Reproductive Health Services*,<sup>194</sup> a plurality of the Court declined to rule on the constitutionality of the preamble to Missouri's abortion provisions—a preamble declaring that life begins at conception—as the Court assumed that the language would not apply in the context of abortion.<sup>195</sup> In her concurrence, Justice O'Connor acknowledged that the plurality's opinion might threaten the development of IVF programs.<sup>196</sup> Nevertheless, she voted to uphold the Missouri statute since

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<sup>189</sup> *Id.* at 953.

<sup>190</sup> *See, e.g., Doe v. Irvine Scientific Sales Co.*, 7 F. Supp. 2d 737, 742 (E.D. Va. 1998) (embryos not persons under *Roe*); *Doe v. Shalala*, 862 F. Supp. 1421, 1426 (D. Md. 1994) (same); *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992) (same).

<sup>191</sup> *See, e.g., Robertson*, *supra* note 1, at 484–85.

<sup>192</sup> *Id.* at 487.

<sup>193</sup> *See generally* Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792 (2005) (analyzing the Court's indeterminate substantive due process jurisprudence).

<sup>194</sup> 492 U.S. 490 (1989).

<sup>195</sup> *Id.* at 490, 506–07.

<sup>196</sup> *Id.* at 522 (O'Connor, J., concurring).

the possibility was too hypothetical and there was no indication that Missouri might try to prohibit IVF programs.<sup>197</sup>

### III. EX UTERO EMBRYOS AS PROPERTY

At the other extreme from the view that the ex utero embryo is a rights-bearing entity is the view that embryos are simply bodily tissue, not even entitled to the special respect that many courts have granted them, at least in dictum.<sup>198</sup> Arguably, embryos should be classified as the property of their progenitors, at least to the extent of recognizing dispositional authority on the part of the progenitors.<sup>199</sup> Although a number of courts have recognized the dispositional authority of the gamete providers, they have taken care not to classify the embryos as property but rather as occupying an interim category.<sup>200</sup> In actuality, the law treats embryos as the progenitor's property despite their reproductive potential.<sup>201</sup> It may be that courts are hesitant to provoke the outcry that would result from a ruling that the ex utero embryo is nothing but a clump of cells with no special moral status. Nevertheless, when the courts state that contracts may govern the disposition of the unused embryos, they are tacitly treating the embryos as property.

There is a paucity of legal authority on the question of whether embryos are property outside the context of divorce litigation between the progenitors.

The few decisions characterizing embryos as property involve claims by the progenitors against third parties and two of them date from the early days of IVF.<sup>202</sup> The first litigation involving loss of a couple's embryo is the unreported *Del Zio v. Presbyterian Hospital* decision. The case arose before there had been a successful IVF pregnancy, that is, one that resulted in a live birth.<sup>203</sup> Nevertheless, the Del Zios sued for damages for conversion and the

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<sup>197</sup> *Id.* at 523.

<sup>198</sup> See Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 610, 634 (1997).

<sup>199</sup> *Id.*

<sup>200</sup> See Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 357-58 (1994).

<sup>201</sup> See Joseph Russell Falasco, *Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition*, 45 JURIMETRICS 273, 281 (2005).

<sup>202</sup> See *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at \*1 (S.D.N.Y. Nov. 9, 1978); *York v. Jones*, 717 F. Supp. 421, 421 (E.D. Va. 1989).

<sup>203</sup> Lynne M. Thomas, Comment, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY'S L.J. 255, 276 (1997).

emotional distress caused by the intentional destruction of their incubating mixture of sperm and egg by a hospital doctor who objected to their efforts at in vitro fertilization without institutional review board approval.<sup>204</sup> Even though Mrs. Del Zio suffered no direct physical harm from the loss of the (possibly) fertilized egg, she had lost something of great value to her, particularly because she was unable to provide further eggs for use in attempts at IVF.<sup>205</sup> In fact, it is not known whether the attempt to fertilize Mrs. Del Zio's egg was successful.<sup>206</sup> Nor is it known whether the jury recognized the Del Zio's claim for conversion. The jury did not award damages under that doctrine but may have found liability for conversion and included it in the award for emotional distress.<sup>207</sup>

Although the *Del Zio* case began in 1974, it did not go to trial until 1978.<sup>208</sup> The jury may well have been influenced by the fact that during the course of the trial the first IVF baby, healthy and normal, was born in England,<sup>209</sup> an occurrence which received world-wide attention.<sup>210</sup> Due to the novelty of IVF, the *Del Zio* case also attracted a great deal of notice.<sup>211</sup> The case, however, set no precedent and settled no questions as to the legal or moral status of an ex utero embryo.<sup>212</sup>

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<sup>204</sup> *Del Zio*, 1978 U.S. Dist. LEXIS 14450, at \*1–11.

<sup>205</sup> *Id.* at \*3; see also HENIG, *supra* note 30, at 23. Henig described how the physician mixed the wife's follicular fluid and tubal mucosa, some sterile human placental blood serum, and two drops of the husband's freshly collected semen in a test tube and placed the mixture in an incubator that was not designed for human egg preservation. *Id.* Later the head of the Columbia University Medical School removed the test tube from the incubator, took out the rubber stopper and later put in a deep freeze, an act that killed the gametes if they were not already dead from prolonged exposure to room temperature. *Id.* at 100. At trial, the defense's main contention was that the "mixture was not a zygote at all but a contaminated brew that would have endangered Doris Del-Zio's health had it been inserted into her uterus." *Id.* at 190.

<sup>206</sup> See HENIG, *supra* note 30, at 100.

<sup>207</sup> See Thomas, *supra* note 203, at 277–78.

<sup>208</sup> HENIG, *supra* note 30, at 157–58.

<sup>209</sup> *Id.* at 197.

<sup>210</sup> See *id.* at 173.

<sup>211</sup> See *id.* at 194 (noting the "frantic media attention" produced by the trial and IVF generally).

<sup>212</sup> See, e.g., *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1271 n.20 (Ariz. Ct. App. 2005) (holding the plaintiffs in action for alleged wrongful destruction of couple's frozen pre-embryos could not cite *Del Zio* because it was an unpublished opinion from another jurisdiction).

*York v. Jones*<sup>213</sup> was the first judicial decision that treated a couple's ex utero embryos as property, thus subjecting embryos to a bailment contract.<sup>214</sup> The Yorks sought to obtain their one remaining frozen embryo from the in vitro fertilization program where it had been created.<sup>215</sup> They planned to ship it to an institution in California for transfer to the wife's uterus there.<sup>216</sup> A federal district court held that the relationship between a fertility center and the progenitors of the embryos created at the clinic was that of bailor-bailee.<sup>217</sup> Accordingly, the clinic was under a legal obligation to release the embryos to the Yorks' control when the Yorks wished.<sup>218</sup>

The *York* court did not engage in metaphysical speculations in characterizing the fertilized egg. The Cryopreservation Agreement, prepared by the defendants, consistently referred to the remaining pre-zygote as "property" of the Yorks.<sup>219</sup> The Agreement explicitly provided "that in the event of a divorce, the legal ownership of the pre-zygote 'must be determined in a property settlement' by a court of competent jurisdiction."<sup>220</sup> The court seems to have had no difficulty in finding that the defendant institution had fully recognized the "plaintiffs' property rights in the pre-zygote and ha[d] limited their rights as bailee to exercise dominion and control over the pre-zygote."<sup>221</sup> The court was aided in its result by the position of the American Fertility Society's Ethical Statement on IVF: "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines as outlined herein."<sup>222</sup>

*Jeter v. Mayo Clinic Arizona*<sup>223</sup> is the latest decision in which a court has had to grapple with the question of the legal status of embryos.<sup>224</sup> The Jetters

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<sup>213</sup> 717 F. Supp. 421 (E.D. Va. 1989).

<sup>214</sup> *Id.* at 425; see also Robertson, *supra* note 1, at 463.

<sup>215</sup> *York*, 717 F. Supp. at 422.

<sup>216</sup> *Id.* at 424. The court used the term "pre-zygote" and "embryo" interchangeably. See *id.*

<sup>217</sup> *Id.* at 425.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 424–25.

<sup>220</sup> *Id.* at 426.

<sup>221</sup> *Id.* at 427.

<sup>222</sup> *Id.* at 426 n.5 (quoting Ethics Comm. of the Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 89s (1986)).

<sup>223</sup> 121 P.3d 1256 (Ariz. Ct. App. 2005).

<sup>224</sup> See *id.* at 1258.

alleged the negligent loss or destruction of their five cryopreserved embryos that the defendant clinic had agreed to freeze and store.<sup>225</sup> Accordingly, the Jeters brought a number of claims against the clinic: wrongful death, negligent loss of irreplaceable property, and breach of fiduciary duty.<sup>226</sup> The trial court granted the defendant's motion to dismiss all the causes of action, holding that the Arizona "wrongful death statute d[id] not provide relief for frozen cell [sic] embryos and that the same are not 'persons.'"<sup>227</sup> Additionally, the trial court found that Arizona does not have a common law cause of action "for the alleged negligent loss of viable human embryos."<sup>228</sup> The court also rejected the Jeters' breach of fiduciary duty and bailment claims as barred by the state's medical malpractice statute.<sup>229</sup>

On appeal, the most difficult question before the court was whether frozen three-day-old, eight-cell embryos were persons for purposes of recovery under Arizona's wrongful death statute.<sup>230</sup> The plaintiffs referred to their fertilized eggs as "viable embryos"<sup>231</sup> and argued for a broad interpretation of the term "person" such that the embryos would be included.<sup>232</sup> The court, however, rejected an interpretation that would include "conception outside the woman's womb."<sup>233</sup>

The court based its decision in part on prior Arizona decisional law holding that the term "person" under the wrongful death statute includes a claim arising from the death of a *viable* fetus.<sup>234</sup> The court noted the distinction between a viable fetus and a fertilized egg outside the womb—that many variables affect whether the ex utero fertilized egg "will eventually result in the birth of a child."<sup>235</sup> It is too speculative, therefore, to conclude that "but for the injury" to the embryo, "a child would have been born and therefore entitled to bring suit for the injury."<sup>236</sup> The court reached its conclusion that a fertilized human egg outside the womb is not a person

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1258–59.

<sup>227</sup> *Id.* at 1260.

<sup>228</sup> *Id.* The trial court also found that the state's medical malpractice act is constitutional.

*Id.*

<sup>229</sup> *Id.* at 1259.

<sup>230</sup> *See id.* at 1261, 1267–69.

<sup>231</sup> *Id.* at 1259.

<sup>232</sup> *Id.* at 1261.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1261–62 (citing *Summerfield v. Superior Ct.*, 698 P.2d 712, 724 (Ariz. 1985)).

<sup>235</sup> *Id.* at 1262.

<sup>236</sup> *Id.*

within the wrongful death statute “regardless of whether that fertilized egg constitutes human life or potential human life.”<sup>237</sup> The court noted that if it adopted the plaintiffs’ view that the embryos should be included in the term “person” because of their potential to become viable, then under their logic, frozen sperm and unfertilized eggs would also be “persons” under the wrongful death statute because they would become “viable” once fertilized.<sup>238</sup> (In this regard it is worth noting that the President’s Council on Bioethics has suggested that in addition to the special respect due to embryonic life, eggs and sperm, “in view of their standing as the potential seeds of a new child and a new human generation,” might merit some regard.)<sup>239</sup>

The Jeters contended that “eleven jurisdictions now provide that viability of a fetus is not an element for a claim for wrongful death.”<sup>240</sup> The court reviewed the case law from other jurisdictions and found that none of the cases supported the Jeter’s position.<sup>241</sup> In fact, several of the decisions relied upon by the Jeters actually reject their view and deny recovery unless the fetus is born alive.<sup>242</sup> Furthermore, not one of the decisions cited by the Jeters involved in vitro embryos.<sup>243</sup>

The *Jeter* court also looked to the goals of the wrongful death statute—compensation for survivors and, in the case of viable fetus, protection.<sup>244</sup> Although permitting the Jeters to maintain a wrongful death action would serve the compensation goal, “[c]urrently, no statute in Arizona protects fertilized eggs outside the womb” in the way implanted fetuses and embryos are protected.<sup>245</sup> The court noted that the compensation goal could be accomplished by other legal actions for the loss of their pre-implantation fertilized eggs.<sup>246</sup> As so many other courts have done, the *Jeter* court mentioned the “the special types of respect due embryos and pre-embryos”

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<sup>237</sup> *Id.* at 1263.

<sup>238</sup> *See id.* at 1265 & n.7.

<sup>239</sup> REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 15.

<sup>240</sup> *Jeter*, 121 P.3d at 1269.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1262.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1263. The court noted that under ARIZ. REV. STAT. ANN. § 13-1103(A)(5), (B) (Supp. 2005), “a person commits manslaughter for knowingly or recklessly causing death of unborn child in womb at any state of development by physically harming mother,” compared with ARIZ. REV. STAT. ANN. § 36-2301 (2003), which imposes a “duty on physicians performing abortions to maintain life of any fetus or embryo *delivered alive*.” *Id.* at 1262–63.

and concluded that it could be met without expanding the definition of “person” for the wrongful death statutes.<sup>247</sup>

The *Jeter* court took care to note that its conclusion—“three-day-old, eight-cell pre-embryos are not ‘persons’ under the wrongful death statutes” in the absence of legislative direction—did not mean that the pre-embryos constituted property.<sup>248</sup> Nevertheless, the court held that the Jeters could sue the fertility clinic for the loss or destruction of the pre-embryos under a provision of Arizona law stating:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.<sup>249</sup>

Because the fertility clinic undertook the harvesting and storage of their pre-embryos for consideration, the Jeters could sue for the loss of “things”<sup>250</sup>—a holding that would seem to be at odds with the statement that the pre-embryos are not property. The court, however, finessed that issue by holding that the “special respect” due the pre-embryos, meant that the Jeters could maintain a cause of action “for any physical or economic harm resulting from that failure to exercise reasonable care to the extent [the defendant’s] actions either caused the alleged harm, the loss or destruction of the pre-embryos, or increased the risk of that harm.”<sup>251</sup> Because the court found that cryopreservation and storage documents constituted a written bailment contract, the Jeters were also able to bring a claim for breach of a bailment

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<sup>247</sup> *Id.* at 1264; *see also* *Doe v. Irvine Scientific Sales Co.*, 7 F. Supp. 2d 737, 741–42 (E.D. Va. 1998) (holding that no status would entitle ex utero embryos to special treatment because of their potential as human life, and, when ex utero embryos were rendered unfit for implantation due to exposure to possibly tainted albumin, embryos did not suffer an actionable tort).

<sup>248</sup> *Jeter*, 121 P.3d at 1270.

<sup>249</sup> *Id.* at 1272 (quoting RESTATEMENT (SECOND) OF TORTS § 323 (1965)) (citation omitted). This section has been adopted as law in Arizona. *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 323).

contract.<sup>252</sup> Moreover, the court held that the plaintiffs could proceed with their breach of fiduciary duty claim.<sup>253</sup>

Plaintiffs who sued for deprivation of their embryo/property avoided a summary judgment in *Frisina v. Women and Infants Hospital of Rhode Island*.<sup>254</sup> The plaintiffs were three women who joined together to sue for the loss or destruction of their ex utero embryos by the defendant hospital.<sup>255</sup> The plaintiffs alleged medical malpractice, bailment, breach of contract and the loss of irreplaceable property.<sup>256</sup> The defendant contended that plaintiffs had not stated a claim upon which relief could be granted.<sup>257</sup> The defendant argued that as a matter of law the plaintiffs could not recover damages for their “severe trauma and emotional anguish, pain and suffering,” and that it would be “unfair and illogical to allow plaintiffs greater rights with respect to a frozen pre-embryo than with respect to a non-viable fetus.”<sup>258</sup> The court agreed that the pre-embryos themselves could not be victims, referring to *Davis v. Davis* and its progeny, but rejected the defendant’s claim that the plaintiffs were seeking to recover “for the loss of the possibility of achieving pregnancy.”<sup>259</sup> Rather, the court found that the plaintiffs were “seeking to recover for the physical loss of their pre-embryos”<sup>260</sup> and Rhode Island law permitted “damages for emotional distress based on the ‘loss of irreplaceable property.’”<sup>261</sup>

#### IV. THE CONSEQUENCES OF RECOGNIZING THE EX UTERO EMBRYO AS A PERSON

At the present time, no court and few legislatures have viewed the ex utero embryo as a person.<sup>262</sup> If the ex utero embryo is recognized as a person, the most powerful effect would be as an entering wedge in the fight against

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<sup>252</sup> *Id.* at 1275.

<sup>253</sup> *Id.*

<sup>254</sup> Nos. 95-4037, 95-4469, & 95-5827, 2002 WL 1288784 (R.I. Super. May 30, 2002), at \*8–10; see also Joshua Kleinfeld, Comment, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of “Procreative Injury”*, 115 Yale L.J. 237, 241 (2005) (discussing *Frisina* decision).

<sup>255</sup> *Frisina*, 2002 WL 1288784, at \*1–2.

<sup>256</sup> *Id.* at \*2.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at \*4–5, \*8, \*10.

<sup>260</sup> *Id.* at \*10.

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* text accompanying notes 164–82.

legal abortion.<sup>263</sup> If the ex utero embryo, which even if implanted has a small chance of resulting in a child,<sup>264</sup> is protected life, then surely the developing in vivo embryo or fetus should be protected. If the embryo is a person, it would follow that it cannot be intentionally destroyed, and that it must be given a chance to develop in someone's uterus or stay forever frozen. Research on unimplanted embryos would have to cease. In fact, if the embryo is child, then IVF itself could be outlawed because it is IVF that results in the creations of thousands of unused embryos and the dilemma of their ultimate disposition.

The notion of outlawing or severely restricting IVF is not entirely fanciful. There is a bill pending in the Kentucky legislature which would create a new class D felony: "Any person performing an in vitro fertilization or allowing an in vitro fertilization to occur shall not fertilize more than one (1) egg during the in vitro fertilization process."<sup>265</sup> If enacted, the law would avoid the disputes between progenitors over the disposition of unused embryos as well as avoid their destruction.<sup>266</sup> Nevertheless, although this bill does not entirely outlaw IVF, it would make its practice very difficult. The odds of achieving a pregnancy with IVF when multiple embryos are transferred to a woman's uterus are already quite low.<sup>267</sup> Limiting the number of fertilized eggs to just one in IVF attempts would be particularly problematic for older patients.<sup>268</sup> Greater success is achieved by prescreening

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<sup>263</sup> See, e.g., Katz, *supra* note 147, at 193 (discussing politics of those advocating for embryo adoption).

<sup>264</sup> The chances of achieving a successful pregnancy with frozen embryos is roughly 20.3%. REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 33 n.†.

<sup>265</sup> H.B. 145, 2005 Leg., Reg. Sess. (Ky. 2005), available at <http://www.lrc.ky.gov/record/05rs/HB145/bill.doc>.

<sup>266</sup> Germany limits the number of eggs fertilized in any given retrieval to three. Coleman, *supra* note 18, at 76 n.112.

<sup>267</sup> See REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 31, 33 n.†. The average number of never-frozen embryos transplanted are: 2.8 embryos for women under thirty-five, 3.1 embryos for women thirty-five to thirty-seven, 3.4 embryos for women thirty-eight to forty, and 3.7 embryos for women forty-one to forty-two. *Id.* at 31. In 32% of assisted reproductive technology cycles in 2001, four or more embryos were transferred. *Id.* In 2001, 32.8% of the transfers using assisted reproductive technology resulted in clinical pregnancy. *Id.*

<sup>268</sup> Catherine M. H. Combelles et al., *Optimum Number of Embryos to Transfer in Women More Than 40 Years of Age Undergoing Treatment with Assisted Reproductive Technologies*, 84 FERTILITY & STERILITY 1637, 1637, 1641 (2005). In women older than forty years of age, five is the optimum number of embryos to transfer. *Id.* at 1637. Limiting transfer to just one egg in IVF attempts would be particularly problematic for older patients.

the embryos and implanting the healthiest.<sup>269</sup> This practice, however, carries with it “the likelihood that embryos deemed genetically undesirable will be destroyed.”<sup>270</sup> If the embryo is a person, the selecting out of less suitable embryos will have to cease.

Limiting the fertilization to one egg at a time would also make IVF more rigorous for the woman whose egg is harvested.<sup>271</sup> The limitation could mean repeated attempts at egg retrieval, because it would be necessary to have a retrieval procedure each time there is an IVF procedure.<sup>272</sup> It would also result in an untold increase in the number of treatment cycles.<sup>273</sup> There is no question that freezing unfertilized eggs, rather than embryos, would obviate the difficult legal and moral issues associated with embryo cryopreservation. Although freezing human eggs is possible, there is still debate over its efficacy in IVF treatment.<sup>274</sup> At the present time the freezing of “human oocytes still generally yields unsatisfactory results and is therefore considered experimental,”<sup>275</sup> so it cannot be said to be the answer to the dilemma of frozen embryos.

If the ex utero embryo is a child, it follows that laws protecting children should apply to the frozen embryo. It seems doubtful that even the strongest supporters of personhood for embryos intend that embryos should be treated as exemptions for income tax purposes, be counted in the census, or require passports if they are transported across international boundaries. However, if the law determines that the embryo is a legal person, at a minimum the embryo should be recognized as a victim in wrongful death and homicide statutes. Should that occur, the practice of IVF may become one that is too risky to the medical profession and storage facilities to continue.

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<sup>269</sup> See REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 90; see also Kathy L. Hudson, *Preimplantation Genetic Diagnosis: Public Policy and Public Attitudes*, 85 FERTILITY & STERILITY 1638, 1640 (2006) (noting use of pre-implantation genetic diagnosis in IVF to select one or more embryos over others to be transferred to woman’s uterus).

<sup>270</sup> Hudson, *supra* note 269, at 1640.

<sup>271</sup> See, e.g., N.Y. TASK FORCE, *supra* note 20, at 47–48 (detailing the health risks associated with the use of ovulation-stimulating hormones in the practice of egg harvesting).

<sup>272</sup> See REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 24.

<sup>273</sup> See *id.*

<sup>274</sup> Yehudith Ghetler et al., *Human Oocyte Cryopreservation and the Fate of Cortical Granules*, 86 FERTILITY & STERILITY 210 (2006); cf. *Success Reported in New Egg-Freezing Method*, CNN.COM, June 19, 2006, [http://www.fertilehope.org/resources/news\\_detail.cfm?NID=230](http://www.fertilehope.org/resources/news_detail.cfm?NID=230) (reporting new method by Japanese researchers of rapidly freezing eggs that is more effective than standard technique).

<sup>275</sup> Ghetler et al., *supra* note 274, at 210.

If the ex utero embryo is a person, then mandating transfer to another woman's uterus may seem a reasonable response to the question of disposition of unused frozen embryos. Such laws, however, raise troubling issues. Mandatory transfer laws ignore sound medical practice and trigger concern about the procreative rights of the progenitors. If individuals have the right to avoid genetic parenthood, even if it carries with it no rearing duties or support obligations, then mandating that unutilized embryos be given to others for attempts at achieving a pregnancy does violence to the notion of reproductive freedom.<sup>276</sup> Any children born as result of forced donation are still the genetic children of the progenitors. A number of studies have made clear that the great majority of couples with unused, frozen embryos do not want to donate them to other couples for attempts at implantation.<sup>277</sup> Among the reasons listed are “‘not wanting to donate to another couple as the resulting child would be a sibling to their own children,’ ‘not wishing to be contacted in the future by a child born after donation,’ and ‘not knowing who the recipients would be.’”<sup>278</sup> Moreover, some infertility patients do not want to contribute their excess embryos for research purposes for fear that the institution will donate them to another couple for use in IVF or mix them up.<sup>279</sup>

#### V. ADOPTION LAWS AND EMBRYO DONATION

It must be stressed that embryo donation is not the answer to disposition of surplus frozen embryos. It bears repeating that the great majority of progenitors do not want to give their spare embryos to others and few couples are interested in someone else's embryos.<sup>280</sup> Although the federal government has provided funds to promote embryo “adoption” since 2001, so far only 128

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<sup>276</sup> See ROBERTSON, *supra* note 15, at 108–09 (discussing the right to avoid reproduction, not just pregnancy, and offering counter-arguments).

<sup>277</sup> E.g., Hammarberg & Tinney, *supra* note 10, at 87 (noting donation to another couple is the least frequently chosen option for couples canvassed about their preferences for disposition of surplus embryos); see also Katz, *supra* note 147, at 221 (discussing other studies on preferences of progenitors).

<sup>278</sup> Hammarberg & Tinney, *supra* note 10, at 87.

<sup>279</sup> Lyerly et al., *supra* note 3, at 1626.

<sup>280</sup> See Pam Belluck, *It's Not So Easy to Adopt an Embryo*, N.Y. TIMES, June 12, 2005, § 4, at 5 (noting that where donated eggs are used to create the embryos for infertile couples, the egg donors do not want to see the egg “redonated”).

adoptions have taken place.<sup>281</sup> There are agencies such as Nightlight Christian Adoptions that arrange embryo adoptions, but adoption law has not been applied to embryo donation.<sup>282</sup> In fact, there is almost no law at all governing the transfer of embryos from the progenitors to other individuals who hope to achieve a pregnancy.<sup>283</sup> It appears that embryos are not bought and sold in the United States but it is not clear that such a practice is forbidden.<sup>284</sup> If embryos are persons, then logic dictates that adoption law with all of its regulations and restrictions should govern the process of embryo donation. In fact, one does not have to believe that the ex utero embryo has the status of a person to believe that some aspects of adoption law should apply to voluntary embryo donation. This is one area in which it is possible to show special respect for the child that the embryo may become.

Professor John A. Robertson, one of the foremost scholars on reproductive rights, has discerned a “loop” back to adoption law in the practice of reproductive collaboration in which biological and genetic ties are discounted and rearing intentions prevail in determining legal parentage.<sup>285</sup> The possibility exists that “the existing legal framework for adoption will necessarily be called into question.”<sup>286</sup> Hallmarks of adoption practice are restrictions on prebirth relinquishment of parental rights and the payment of money in exchange for surrender of rights.<sup>287</sup> The use of intermediaries is closely regulated.<sup>288</sup> Embryo donation challenges all of these strictures. If adoption law is changed in response to reproductive technology, it is possible that in time there will be “commissioned pregnancies and paid adoption.”<sup>289</sup>

As matters stand now, embryos may be donated with no record-keeping requirements and no screening of the donees.<sup>290</sup> Under the guidelines developed by the American Society of Reproductive Medicine, the emphasis

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<sup>281</sup> Eleanor Clift, *400,000 Frozen Embryos*, NEWSWEEK, July 21, 2006, <http://msnbc.msn.com/id/13973858/site/newsweek/MSMBC.com> (noting that only 128 “snowflakes” have been adopted even with federal funding available to promote “adoption”).

<sup>282</sup> See Katz, *supra* note 147, at 210–16.

<sup>283</sup> *Id.*

<sup>284</sup> REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 151–52.

<sup>285</sup> ROBERTSON, *supra* note 15, at 142–44.

<sup>286</sup> *Id.* at 143.

<sup>287</sup> *Id.*

<sup>288</sup> See *id.*

<sup>289</sup> *Id.* at 144.

<sup>290</sup> See generally REPRODUCTION & RESPONSIBILITY, *supra* note 7, at 148–49; Katz, *supra* note 147, at 227.

is on screening the donors.<sup>291</sup> The lack of record-keeping requirements means that the child born from a donated embryo may never be able to learn his or her genetic origins.<sup>292</sup> We have seen the quest of adult adoptees for information concerning their origins.<sup>293</sup> In recent years, children born from anonymously donated sperm are seeking to gain information about and even learn the identity of their fathers.<sup>294</sup> Some of these children are also searching for their half-siblings, that is, other children with the same donor father.<sup>295</sup> We know that donor-conceived children who want information about their donors are not trying to find another parental figure nor are they seeking support.<sup>296</sup> There is an opportunity to be proactive in the area of embryo donation and not wait until adult children born from a donated embryo have to engage in what may be a fruitless search for knowledge of their genetic parent.<sup>297</sup>

Opposition to requirements that would mandate revealing the identity of gamete or embryo donors are often based on the fear that such a requirement would discourage donation.<sup>298</sup> We might learn a lesson from the State of Victoria in Australia. Unlike the United States, Victoria has laws governing many aspects of assisted reproductive technology.<sup>299</sup> The Infertility Treatment Act (1995) sets five years as the maximum storage time for surplus embryos, although there is an option for an extension.<sup>300</sup> Couples may choose among the following options: “disposal, donation to approved research to

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<sup>291</sup> See Katz, *supra* note 147, at 227–29.

<sup>292</sup> See, e.g., Christopher De Jonge & Christopher L. R. Barratt, *Gamete Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500, 500 (2006) (“In the United States there is no government controlled or mandated donor registry.”).

<sup>293</sup> See Katz, *supra* note 147, at 221.

<sup>294</sup> De Jonge & Barratt, *supra* note 292, at 500.

<sup>295</sup> E.g., Amy Harmon, *Hello, I’m Your Sister, Our Father is Donor 150*, N.Y. TIMES, Nov. 20, 2005, at 1 (describing meetings between children sharing the same semen-donor father who were connected through the Donor Sibling Registry, and stating that donor-conceived children often describe themselves as “lopsided” or “half-adopted”).

<sup>296</sup> Joanna E. Scheib & Alice Ruby, *Impact of Sperm Donor Information on Parents and Children*, 4 SEXUALITY, REPROD. & MENOPAUSE 17, 18 (2006).

<sup>297</sup> See Ethics Comm. of the Am. Soc’y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 527 (2004) (recommending that gamete donor programs maintain donor information).

<sup>298</sup> See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 878 (Cal. Ct. App. 2000) (rejecting sperm bank’s claim that revealing identity of donor would harm its business because it would be unable to attract donors).

<sup>299</sup> See Hammarberg & Tinney, *supra* note 10, at 86.

<sup>300</sup> See *id.*

improve ART outcomes, or donation to another infertile couple.<sup>301</sup> The Act also provides for mandatory counseling before undergoing ART treatment.<sup>302</sup>

The counseling must include information about options for couples with surplus embryos.<sup>303</sup> The Act requires that couples who choose to donate their surplus cryopreserved embryos to other couples provide very thorough information about themselves.<sup>304</sup> Moreover, if a child results from the donation, the identity of genetic parents may be revealed.<sup>305</sup>

Although intuitively it would seem that the necessity of providing personal information and the possibility of being identified would result in an unwillingness to donate the embryos for transfer to another woman's uterus, the experience in Victoria is otherwise.<sup>306</sup> All studies, in Victoria and elsewhere, indicate that donation to another infertile couple is the least frequently chosen option for disposition of surplus embryos.<sup>307</sup> A survey of couples' decisions and the factors that influenced their choice in Victoria revealed, however, that the proportion of couples choosing donation to another couple was higher than that reported in other studies.<sup>308</sup> Further, the survey indicated that the requirements of providing information and the possibility of being identified as a progenitor does not deter embryo donation.<sup>309</sup>

## VI. CONCLUSION

In the main, American law regards the ex utero embryo as an entity that is the property of its progenitors, albeit property entitled to special respect.<sup>310</sup> Were the law to move to the position that the ex utero embryo is a person, profound changes in the practice of IVF would follow. Moreover, such a shift would be incompatible with the treatment of the fetus in abortion jurisprudence. Whether the woman's interest in her bodily integrity would outweigh the interest of the fetus is an open question. Another debatable issue is whether the law could mandate that surplus ex utero embryos be

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 89–90.

<sup>305</sup> *Id.*

<sup>306</sup> *See id.* at 90.

<sup>307</sup> *See id.* at 87; *see also* Belluck, *supra* note 280 (noting similar results in survey of preferences for embryo dispositions).

<sup>308</sup> Hammarberg & Tinney, *supra* note 10, at 89.

<sup>309</sup> *Id.* at 90.

<sup>310</sup> *See supra* text accompanying notes 109–10.

transferred to another woman for attempts at pregnancy without doing violence to notions of procreative liberty.

Some abortion opponents seek to have adoption law apply to the donation of excess embryos created for IVF.<sup>311</sup> If successful, either the practice of donation will have to change or the adoption laws governing the adoption of born children become less restrictive. Even if embryo donation is not brought within adoption law, there is a need to consider the interests of any children who may be born as a result of an embryo transfer to an infertile woman who is not the genetic mother. Mandating that identifying information about the progenitors be available would help to complete the donor-embryo child's sense of identity.

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<sup>311</sup> Aaron Zitner, *A Cold War on Embryo Adoptions*, L.A. TIMES, Mar. 22, 2002, at A1.