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"You Belong To Me": Unscrambling The Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs

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“YOU BELONG TO ME”: UNSCRAMBLING THE LEGAL RAMIFICATIONS OF RECOGNIZING A PROPERTY RIGHT IN FROZEN HUMAN EGGS*

BROWNE LEWIS**

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INTRODUCTION

Dana was two months behind on her storage locker payments. Thanks to caller ID, Dana was able to avoid the collection calls. Eventually, the owner of the storage facility sued to get the right to sell the contents of Dana’s storage locker. This type of activity is shown on the popular television show *Storage Wars*.¹

* In this article, eggs and oocytes will be used interchangeably.

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Dana was also two months behind on her rent. Her landlord obtained a writ of eviction to have Dana removed from the premises. Dana left the apartment, but she did not take her belongings with her. In accordance with the landlord-tenant statute, the landlord placed Dana's belonging in a storage facility for the required amount of time.² When Dana did not retrieve her property, the landlord sold her belongings.

Dana paid two hundred dollars per month to store her frozen oocytes at a fertility clinic. Dana was two months behind on payments. Should the fertility clinic—like the landlord or the storage facility owner—be able to sell Dana's oocytes to recoup the past due payments? Should the law treat Dana's frozen oocytes like any other piece of personal property? This article explores the possible answers to those questions and attempts to unscramble the complicated issues that may arise because of the growing use of human oocytes cryopreservation.³

Property law governs the relationship between people and the objects they own or seek to own.⁴ The United States Supreme Court has declared that almost anything can be considered property.⁵ Once an object is legally classified as property, legal recognition of ownership is possible. Ownership gives a person certain legal rights towards his or her property;⁶ these rights are included in the

assistance.

1. *Storage Wars* is a reality television series on the A&E network.

2. See, e.g., *Parker v. Taylor*, 150 P.3d 127, 129 (Wash. Ct. App. 2007); IND. CODE § 32-31-4-2(e) ("If the tenant fails to remove the tenant's personal property before the date specified in the court's order . . . , the landlord may remove the tenant's personal property in accordance with the order and deliver the personal property to a warehouseman . . . or to a storage facility approved by the court.").

3. Oocyte cryopreservation is freezing a woman's eggs. "This technique allows women to freeze and store their eggs until they want to start or expand their families." USC Fertility, <http://uscfertility.org/egg-freezing/oocyte-cryopreservation> (last visited Apr. 4, 2016).

4. Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 680 (2014).

5. See *Till v. SCS Credit Corp.*, 541 U.S. 465, 488 (2004) (the term "property" encompasses "cash, notes, stock, personal property or real property; in short, anything of value." (internal quotation marks omitted)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) ("[T]he word 'property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed.").

6. J.E. Penner, *"The Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) (Ownership should be regarded as "a series of rights I hold against all other, each of whom has a correlative duty not to interfere with my ownership . . .").

“bundle-of-sticks”—a metaphor that is often used to illustrate the nature of property rights. The owner of the bundle of sticks has several rights (represented metaphorically by the sticks) in relation to the object, such as the right to include, the right to exclude, the right to destroy the object, and the right to dispose of the object.⁷ The right to include and the right to exclude refer to the ability to decide who can and cannot use the object. The latter two rights mentioned indicate that the person is entitled to control the disposition of the object.

Every time assisted reproductive technology (ART) permits life to be created without sexual intercourse, there is the possibility that questions of ownership as well as the rights flowing from ownership will arise. Courts may be reluctant to classify anything that is remotely biologically related to humans as property.⁸ The most courts have been willing to hold is that a person has decision-making authority over sperm that has been extracted from a man’s body.⁹ One reason why courts may be hesitant to explicitly recognize sperm as property is America’s legacy of slavery. From a legal perspective, slavery was one person’s ownership of another person being legally recognized.¹⁰ Now, the law and public policy both discourage any attempt to treat people as commodities. Nevertheless, because of ART it is possible to create a “baby market” in the United States.¹¹ This technology allows persons to conceive without sexual intercourse. Therefore, the intimate human part of the procreative process may be removed. This may lead to babies being treated like commodities in the market place.

The ownership of children is not a new concept. Under the Supreme Court’s parental rights doctrine, parents traditionally had such absolute control over their children that, legally, parenthood resembled ownership.¹² The parental rights doctrine refers to the

7. *Id.* at 741.

8. Christine A. Djalleta, *A Twinkle in a Decedent’s Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 357 (1994).

9. *See Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993).

10. Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 224–25 (1986).

11. Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 211–16 (2009) (discussing baby markets in the United States).

12. Alexander Lutz, Comment, *Constitutional Parental Rights and the Childhood Obesity Epidemic*, 3 WAKE FOREST J.L. & POL’Y 211, 215–20 (2013) (discussing the evolution of the parental rights doctrine); Marcia Yabion-Zug,

superior right that is given to parents with regards to making decisions that impact the lives of their children.¹³ Historically, the law appears to have supported the idea that children were the property of their parents. A man owned his children just like he owned his cattle.¹⁴ Even though women did not have the legal right to own property,¹⁵ the law recognized their right to raise their children as they saw fit. The Supreme Court has consistently recognized the fact that parents have a fundamental right to make decisions concerning the care, custody, and control of their children.¹⁶ The Court first acknowledged this right in 1923¹⁷ and reaffirmed it in 2000 with its decision in *Troxel v. Granville*.¹⁸ Some politicians act as if a parent's right to make medical decisions for his or her children stems from some type of property interest. For example, when defending his belief that a vaccination program should remain voluntary rather than mandating immunization, Rand Paul, a Republican senator from Kentucky, stated that "[p]arents own the children, and it is an issue of freedom . . ." ¹⁹ It was clear that Senator Paul was referring to the freedom of the parents and not the children.

Traditionally, the government was hesitant to interfere with parents' rights to control their children. As a result, parents frequently avoided punishment for abusing their children.²⁰ For example, the first well-documented child abuse case in the United States happened in 1874.²¹ The victim of that case, ten-year-old orphan Mary Ellen Wilson, was severely abused by her foster

Separation, Deportation, Termination, 32 B.C. J.L. & SOC. JUST. 63, 68–71 (2012).

13. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Quillion v. Walcott*, 434 U.S. 246 (1978); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977).

14. Kevin Noble Maillard, *Rethinking Children As Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 237–40 (2010).

15. Keith Sealing, *Dear Landlord: Please Don't Put A Price On My Soul: Teaching Property Law Students That "Property Rights Serve Human Values,"* 5 N.Y. CITY L. REV. 35, 85 (2002) (discussing the evolution of women's property rights).

16. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972).

17. *Meyer*, 262 U.S. at 400.

18. 530 U.S. 57, 66 (2000).

19. Elise Viebeck, *Rand Paul: Parents 'Own' Children not the State*, THE HILL (Feb. 2, 2015, 5:29 PM), <http://thehill.com/policy/healthcare/231501-rand-paul-the-state-doesnt-own-your-children>.

20. See Nancy Wright and Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-Threatening Child Abuse*, 16 AM. U. J. GENDER SOC. POL'Y & L. 1, 11–12 (2007).

21. Holly Elizabeth Hopper, *Exploring the Evolution of Drug Endangered Children's Movement and Drug Courts*, 82 N.D. L. REV. 1443, 1445 (2006).

mother.²² Since the child was an orphan, the foster mother was considered to be the child's legal mother. In spite of numerous reports that the child was being beaten daily, the government was unwilling to remove the child from the home. It took the efforts of a Methodist missionary and the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA) along with pressure from the local media to get the court to issue an order to have Mary removed from the home.²³

As a result of advances in ART, children are once again being treated like property. Two recent events support this assertion. The first occurrence involved Jennifer Cramblett, a white woman who sued a sperm bank because it sent her the vials of an African-American donor's sperm instead of those of the white donor that she ordered.²⁴ One of the claims stated in her complaint was breach of warranty.²⁵ That cause of action is usually reserved for cases involving the sale of goods under the Uniform Commercial Code.²⁶ When discussing the case, CBS News legal analyst Rikki Klieman opined: "[B]reach of warranty sounds like a commodity—you bought a car and it was defective."²⁷ The second incident involved an Australian couple that allegedly traveled to Thailand to use its in-vitro-fertilization (IVF) services so that a Thai surrogate could carry their child.²⁸ The surrogate gave birth to twins.²⁹ According to news

22. *Id.* at 1445–46.

23. Mary Renck Jalongo, *The Story of Mary Ellen Wilson: Tracing the Origins of Child Protection in America*, 34 EARLY CHILDHOOD EDUC. J. 1, 1 (2006).

24. Cramblett's lawsuit was dismissed by DuPage County Judge Ronald Sutter who ruled that she had failed to state claims for wrongful birth and breach of warranty. Cramblett plans to re-file the lawsuit and claim that the clinic was negligent. Associated Press & Dailymail.com Reporter, *Court Throws Out Lesbian's Lawsuit over Sperm Donor Mix Up . . .*, DAILYMAIL.COM, <http://www.dailymail.co.uk/news/article-3223365/Mother-s-lawsuit-mistaken-sperm-donation-dismissed.html#ixzz43SKcJ4c6> (last updated Sept. 5, 2015, 11:19 PM).

25. Complaint at 8, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. 2014).

26. Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the Distinction*, 61 BAYLOR L. REV. 783, 789 (2009).

27. "Wrongful Birth": *White Woman Sues After She Mistakenly Receives Sperm from Black Donor*, CBS NEWS (Oct. 2, 2014, 11:21 AM), <http://www.cbsnews.com/news/wrongful-birth-white-woman-sues-after-she-mistakenly-receives-sperm-from-black-donor/>.

28. Jonathan Pearlman, *Australian Couple Abandon Surrogate Twin with Down's Syndrome—But Keep His Sister*, THE TELEGRAPH (Aug. 1, 2014, 10:28 AM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11005285/Australian-couple-abandon-surrogate-twin-with-Downs-syndrome-but-keep-his-sister.html>.

reports, the couple left the twin with Down's syndrome in Thailand with the surrogate and returned to Australia with the healthy twin.³⁰ If the case involved widgets,³¹ the couple would probably have had a strong product liability case.³²

In both of the above-referenced cases, the child was treated more like a defective product than a person. In the first case, the woman accepted the good and sued for damages because she did not receive a white child, the commodity for which she bargained. That is an example of a classic breach of warranty case.³³ Some of the comments posted on the Internet in reaction to the lawsuit maintained that the clinic should pay damages because the woman ordered white sperm, but she received black sperm.³⁴ In response to a story about the case posted on Yahoo, an anonymous person posted a comment arguing that the woman's case is similar to someone who goes to a restaurant and orders a steak, but receives a hamburger. In the second case, the couple refused to accept the disabled twin because it was a substandard product.³⁵ Both of these cases involved contracts that resulted in the birth of a child, however, the dissatisfied "customers" acted as if they had contracted for goods.

Comments on social media and statements made on television news broadcasts indicated that the public response to both of these cases was mainly negative. The parties were accused of rejecting babies who did not measure up to their standards. Nonetheless, the parties involved in the cases would probably argue that children were not the subjects of the contracts. In the first case, the product the woman contracted with the sperm bank to deliver was the sperm and not the child. Thus, her lawsuit against the sperm bank focused upon a breach of contract caused by the delivery of the wrong sperm.³⁶ In response to its mistake, the sperm bank treated the sperm like property. The owner of the sperm bank appeared to think

29. *Id.*

30. *Id.*

31. A widget is an unidentified object that is often used in hypotheticals. *Widget*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/widget> (last visited Mar. 28, 2016).

32. See *Salerno v. Innovative Surveillance Tech. Inc.*, 932 N.E.2d 101, 108–10 (Ill. App. 2010) (setting forth the theories of products liability).

33. See Davis, *supra* note 26, at 803.

34. See, e.g., Jeff Jacoby, *Wrong Sperm, Right Baby: So Why Sue?*, BOSTON GLOBE (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/08/the-baby-was-wrong-color-but-that-reason-for-lawsuit/ZCxZswYITdM0mSEz1TkSbP/story.html#comments>.

35. See Pearlman, *supra* note 28.

36. Complaint, *supra* note 25, at 8.

that because the woman did not receive the product for which she paid, she was entitled to a refund. Therefore, prior to the lawsuit the sperm bank offered to return the amount that the woman had paid.³⁷

In the second case, the couple relied on the fertility clinic to create a viable embryo. Trisomy 21, the most common type of Down's syndrome, develops when an embryo has three copies of chromosome 21 instead of the usual two.³⁸ The embryo that the clinic implanted resulted in one of the children being born with Down's syndrome. Because the clinic did not meet its contractual obligation of implanting a healthy embryo, the couple may have felt justified in not accepting the resulting child. One could argue that if the embryo was the couple's property, they should have been given the opportunity to have it genetically tested so that they could make an informed decision regarding whether it should be implanted in their surrogate. The idea of returning "defective" or "undesirable" children is not limited to children born from using ART. In the last few years, some parents have attempted to "rehome" their adoptive children by posting advertisements on the Internet seeking new parents for the children. Most of the children "auctioned" on the web have been adopted from countries outside of the United States.³⁹ The acceptance of this practice may make it easier for persons to justify treating children conceived using ART like products.

In the cases discussed above, the ability of the people to recover damages may be impacted by whether they have any legally recognized property interests in the sperm and embryo involved in the case. The manner in which courts have resolved the property interests in those reproductive components will be discussed later in this article to demonstrate the options available to the courts with regard to the law's treatment of frozen human eggs.

This article is divided up into four parts. Part I includes a discussion of just a few examples of when babies conceived as a result of surrogacy arrangements have been treated like personal property. Part II explains the process that makes human oocyte cryopreservation a viable option for young women. That section also explores the ways that human eggs may end up in the market place. Part III examines the options open to courts with regard to the

37. *Id.*

38. Melissa Reynolds, *How Old is Too Old?: The Need For Federal Regulation Imposing a Maximum Age Limit on Women Seeking Infertility Treatments*, 7 *IND. HEALTH L. REV.* 277, 284–85 (2010).

39. Allya Davidson & Julia Whalen, *Online Adoption 'Rehoming': Legal Loopholes Allow Children to be Given Away*, *CBC NEWS* (Nov. 13, 2014, 10:38 AM), <http://www.cbc.ca/news/canada/online-adoption-rehoming-legal-loopholes-allow-child-ren-to-be-given-away-1.2833796>.

extent of a woman's property interest in her frozen eggs. Part IV contains an analysis of some of the property law causes of action that may be available to women in the event that frozen human eggs are classified as property.

I. BABIES IN THE MARKET PLACE (THE SURROGACY EXAMPLE)

Babies conceived using assisted reproductive technology are treated like market place goods. The transaction that is most recognizably market-like in this context is surrogacy. In some jurisdictions, surrogacy is illegal; in some, it is against public policy; and in some, it is both.⁴⁰ Some opponents of surrogacy have argued that it is tantamount to baby selling.⁴¹ This is especially true when traditional surrogacy⁴² is involved. The concern is that poor women, in a desperate attempt to make money, may sell their eggs and/or rent their wombs to provide babies for wealthy people.⁴³ In order to address these types of concerns, some jurisdictions have statutes banning traditional surrogacy and/or regulating gestational surrogacy.⁴⁴ Even with regulations, people opposed to surrogacy still see the potential for exploitation of impoverished women. Objections

40. See, e.g., N.Y. DOM. REL. LAW § 122 (McKinney 2010) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); see also *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 906, 910–11 (Cal. Ct. App. 1994) ("declin[ing] to enforce the traditional surrogacy contract"); *Doe v. Attorney General*, 487 N.W.2d 484, 489 (Mich. Ct. App. 1992) (limiting the types of surrogate parentage contracts that are enforceable).

41. Susan A. Ferguson, *Surrogacy Contracts in the 1990's: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903, 906 (1995).

42. The term traditional surrogate is used to refer to a female who conceives a child by being artificially inseminated with the sperm supplied by the intended father. The intended mother may also use the sperm of a donor that is not the intended father. The surrogate supplies the genetic material needed to create the child. Browne C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*, 87 ST. JOHN'S L. REV. 899, 903 (2013); Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 639 (2005).

43. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 475–77 (2004).

44. See, e.g., 750 ILL. COMP. STAT. ANN. § 47/25 (West 2009); FLA. STAT. ANN. § 742.15 (West 2012) (setting out the requirements for gestational surrogacy contracts). A gestational surrogate is a woman who is implanted with an embryo provided by the intended parent(s). The surrogate has no genetic connection to the child. Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. LOUISVILLE L. REV. 371, 376 (2011).

to surrogacy have increased due to the rise in reproductive tourism, which is the practice of women and men from developed countries going to places like India and Thailand to hire poor women to gestate their babies.⁴⁵ These persons go to developing countries in search of a bargain just as they would if they were searching for a cheaper version of any other type of good or service. Reproductive tourism is a booming business because surrogacy costs about twelve thousand dollars in India, including all medical expenses and the surrogate's fees.⁴⁶ In the United States, the same process can cost up to seventy thousand dollars.⁴⁷ The treatment of babies as commodities also occurs in the United States.⁴⁸

Babies have been the subjects of contract disputes like any other tangible personal property. The facts of *Johnson v. Calvert*⁴⁹ illustrate that point. *Johnson* involved a custody dispute that occurred after the surrogate refused to surrender custody of the baby to the intended parents.⁵⁰ Mark and Crispina Calvert entered into a surrogacy arrangement with Anna Johnson.⁵¹ In the writing memorializing the arrangement, Johnson agreed to gestate an embryo created using Mark's sperm and Crispina's oocytes.⁵² The Calverts agreed to pay Johnson \$10,000 for her services and to take out a \$200,000 life insurance policy on her behalf.⁵³ Johnson promised that she would relinquish custody of the child to the Calverts when the baby was born.⁵⁴ After a monetary dispute between the parties, Johnson refused to give up custody of the child.⁵⁵ The court relied on contract principles to decide in favor of

45. April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 259–64 (2014); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 23–24 (2008).

46. Seema Mohapatra, *Stateless Babies and Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 435 (2012).

47. Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE (July 29, 2007), <http://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/>.

48. See Mark Garavaglia, *The Value of the Post-Modern Child: Property, Personhood or Purgatory?*, 80 U. DET. MERCY L. REV. 1, 4–5 (2002) (discussing babies being sold).

49. 851 P.2d 776, 778 (Cal. 1993).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

the Calverts.⁵⁶ In essence, the court enforced the terms of the surrogacy contract in order to give the Calverts the benefit of their bargain. In its written opinion, the court did not discuss the best interests of the child. Instead, the court appeared to treat the baby like any other subject of a contract.

Another interesting case involving a surrogacy dispute, *In re M.M.M.*, occurred in Texas.⁵⁷ Arguably, the case could be categorized as an involuntary surrogacy case. Cindy Close and Marvin McMurrey had been friends for years.⁵⁸ Each of the parties expressed a desire to have children, and McMurrey's sperm and an unknown egg were implanted in Close. The intention of each party regarding the future care of the children was disputed.⁵⁹ Due to Close's age, the parties decided to purchase donor eggs to reduce the possibility of birth defects.⁶⁰ After Close gave birth to twins, McMurrey revealed that he was gay and claimed that Close was merely a surrogate.⁶¹ He filed a lawsuit asking the court to declare him the child's legal father and Close as his surrogate.⁶²

McMurrey argued that the embryo belonged to him because Close had not contributed any genetic material to create it.⁶³ The court held that, under Texas law, Close was the child's legal mother because the woman who gives birth is the legal mother unless there is a surrogacy agreement.⁶⁴ McMurrey wanted the court to treat the case as a contract dispute with the twins being the subject of the contract. Instead, the court relied upon the state's family law statute.⁶⁵

Although the court ended up relying on a family law analysis, the court did not reject a contract analysis because the babies would have been the subjects of a surrogacy contract. The court deemed a family law analysis to be appropriate for two reasons. First, McMurrey was unable to provide the court with a written surrogacy agreement.⁶⁶ Second, in Texas the law only recognizes surrogacy agreements between a surrogate and a married couple.⁶⁷ Because

56. *Id.* at 787.

57. *In re M.M.M.*, 428 S.W.3d 389 (Tex. App. 2014).

58. *Id.* at 392.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 393.

65. *Id.* at 394-95.

66. *Id.* at 392.

67. *Id.* at 395.

Texas had banned same-sex marriage, McMurrey and his partner did not qualify as a married couple.⁶⁸ Thus, even if Close and McMurrey had signed a surrogacy agreement, it would have been invalid. It seems that, if the process is done in accordance with the statute, Texas courts are comfortable enforcing contracts signed by persons seeking to acquire babies.

The use of ART to conceive babies may contribute to the dehumanization of babies by courts. Parties involved in the process may view these babies as created products rather than living, breathing human beings. The Cramblett case and Thailand surrogacy case mentioned in the introduction may bolster this argument. In the Ohio case, when Cramblett filed what amounted to a breach of warranty case, she did not seem to consider the negative impact the lawsuit might have on the little girl.⁶⁹ Even though the child's identity was hidden in the court case, Cramblett permitted pictures of the child to be shown on several different television shows. In addition, the child's name and image were posted all over the Internet.⁷⁰ As a result, when the child is old enough to understand, she may think that her mother settled for her because she could not have the child that she really wanted.

A case involving comedian Sherri Shepherd is also disturbing. Shepherd and her then husband, Lamar Sally, paid Jessica Bartholomew, a white woman, \$25,000 to act as their gestational surrogate.⁷¹ The embryo was created using Sally's sperm and eggs that Shepherd purchased from an African-American donor.⁷² According to the terms of the contract, Shepherd was identified as the unborn child's intended mother.⁷³ During Bartholomew's pregnancy, Sally and Shepherd separated. Then, Sally told Bartholomew that Shepherd did not want to have anything to do

68. The ban was declared unconstitutional by the United States Supreme Court. Thus, the availability of surrogacy in Texas may change in the future. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

69. Complaint, *supra* note 25, at 1.

70. See, e.g., Tracy Connor, *Black Donor Sperm Mistakenly Sent to White Mom Jennifer Cramblett: Suit*, NBC NEWS (Oct. 2, 2014, 6:42 AM), <http://www.nbcnews.com/health/womens-health/black-donor-sperm-mistakenly-sent-white-mom-jennifer-cramblett-suit-n215801>.

71. Brenna Williams, *Sherri Shepard's Surrogate Slams Her for Acting Like 'Baby is Non-Existent'*, HUFFINGTON POST (Jan. 30, 2015, 3:24 PM), http://www.huffingtonpost.com/2015/01/30/sherri-shepherds-surrogate-jessica-bartholomew-breaks-silence_n_6581112.html (last updated Feb. 4, 2015).

72. *Id.*

73. *Id.*

with the baby.⁷⁴ Because Shepherd was not present during the birth, the hospital listed Bartholomew on the birth certificate as the child's legal mother.⁷⁵ Consequently, this made it possible for a court to obligate Bartholomew, a surrogate with no genetic connection to the child, to pay child support.⁷⁶ Sally took sole physical custody of the baby. After Shepherd refused to provide financial support for the baby, Sally turned to the state of California for assistance.⁷⁷ In response, the State filed a child support action against Bartholomew, the child's legal mother.⁷⁸ Sally claimed that Shepherd abandoned the baby, and he filed a child support action against her.⁷⁹

There are two sides to every story, but following the advice of her attorneys, Shepherd did not tell her side.⁸⁰ Nevertheless, there was speculation that Sally had the baby conceived just so he could get child support from Shepherd because he filed for divorce shortly after the surrogate told him that she was pregnant.⁸¹ When discussing the case, the parties, including the surrogate, mainly focused on Shepherd's failure to honor the terms of the contract; the impact on the child was seldom mentioned. It was as if Shepherd ordered a pair of shoes and refused to take receipt of them because she was not satisfied with the customer service she had received. Given the ease with which society has accepted babies being treated like property, it is not surprising that the number of eggs in the market place has grown.

II. EGGS IN THE MARKET PLACE (HUMAN OOCYTE CRYOPRESERVATION)

Donor eggs have been a part of the marketplace for several years.⁸² A simple Google search yields advertisements recruiting young women to serve as egg donors.⁸³ In this context, the word

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Brittany King, *Sherri Shepherd: Lamar Sally to Sue for Child Support Over Unborn Surrogate Baby*, HOLLYWOOD LIFE (July 21, 2014, 4:49 PM), <http://hollywoodlife.com/2014/07/21/sherri-shepherd-sued-child-support-unborn-surrogate-baby-lamar-sally/>.

81. *Id.*

82. Suriya E.P. Jayanti, *Guarantors of Our Genes: Are Egg Donors Liable For Latent Genetic Diseases?*, 58 AM. U. L. REV. 405, 412 (2008).

83. See, e.g., Rachael Rettner, *Eggs Donors Often Recruited Unethically, Study*

“donor” is a misnomer because the young women get paid a hefty sum for their eggs. For instance, a young woman with an Ivy League education can get as much as \$50,000 for her eggs.⁸⁴ The Internet is also full of websites soliciting people to purchase donor eggs.⁸⁵ The availability of human oocyte cryopreservation has given persons engaged in the fertility industry a new source of revenue.⁸⁶ They have not wasted time taking advantage of the opportunity. Consequently, the number of frozen eggs in the marketplace will likely continue to increase.

A friend of mine who is in her mid-thirties recently received an email from a well-regarded hospital advertising its egg freezing services. Because she is already married with children, we had a good laugh, and she deleted the email. However, thousands of other young women in the United States who receive such an email would probably seriously consider freezing their oocytes for later use. In 2012, representatives from the American Society for Reproductive Medicine (ASRM) announced that doctors should no longer consider human oocyte cryopreservation to be an experimental procedure.⁸⁷ Since that new technology is now available to young women who want to defer motherhood, we can expect to see even more frozen eggs in the market place.

Diane Kruger⁸⁸ said, “I don’t want to let my life as a woman pass me by. There’s a time to work, there’s a time to be young and crazy, and there should be a time to enjoy motherhood. I’m actually looking forward to that.”⁸⁹ Many young women share Kruger’s sentiments with regard to motherhood. Medical doctors have not been able to rewind a woman’s biological clock. Once it starts ticking, a woman

Finds, LIVESCIENCE (Aug. 14, 2012, 5:42 PM), <http://www.livescience.com/22368-egg-donation-ethics-violations.html>; Google Search of “Egg Donation,” (revealing an advertisement stating “[b]ecome an egg donor — earn \$8,000–\$10,000 today”).

84. Valarie K. Blake, *Ovaries, Testicles, and Uteruses, Oh My! Regulating Reproductive Tissue Transplants*, 19 WM. & MARY J. WOMEN & L., 353, 387 (2013).

85. J. Brad Reich & Dawn Swink, *You Can’t Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1, 3 (2010).

86. John A. Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, J.L. & BIOSCIENCES 1, 4 (2014).

87. Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1080 n.23 (2014).

88. Diane Kruger is a German born actress and former fashion model that has starred in several movies including *Troy* (Warner Bros. 2004) and *National Treasure* (Walt Disney Pictures 2004). *Diane Kruger*, IMDB, <http://www.imdb.com/name/nm1208167/> (last visited Apr. 5, 2016).

89. *Quotes About Moms*, NEW KIDS-CENTER, <http://www.newkidscenter.com/Quotes-about-Moms.html> (last visited Apr. 5, 2016).

has to worry about her fertility if she wants children. However, the ability to freeze her eggs may permit a woman to pause the clock until she is ready for motherhood. This is a possibility because studies have shown that a woman's eggs age, but her uterus maintains its youthful function.⁹⁰ Thus, after a woman has cracked the "glass ceiling" in her profession, she may be able to break out the glass vials containing her healthy, young eggs.

Women are not the only ones who view human oocyte cryopreservation as a valuable medical procedure. Physicians believe that the use of the procedure may increase the supply of donor oocytes by allowing one donor to store oocytes that may be used by several recipients.⁹¹ This is helpful because it will prevent the oocyte donor from having to undergo multiple cycles of oocyte retrieval.⁹² Physicians also insist that the availability of human oocyte cryopreservation may enable them to create oocyte banks in order to provide more options for infertile people seeking donor eggs.⁹³ Doctors envision the oocytes banks functioning like sperm banks.⁹⁴

It has not always been feasible for a woman to conceive a child using frozen eggs. When scientists first tried to freeze eggs, they used a slow-freezing procedure.⁹⁵ Because human eggs are mainly made of water, they were frequently damaged during the freezing and thawing stages of the slow-freezing process.⁹⁶ The two primary types of injuries to the frozen eggs were intracellular ice formation and cellular dehydration.⁹⁷ Intracellular ice formation occurred

90. Joe Brownstein, *Pregnant Women over 50 'Do Pretty Well,' Study Finds*, LIVESCIENCE (Feb. 3, 2012, 9:31 AM), <http://www.livescience.com/18289-pregnant-women-age-50-complications.html>.

91. Ana Cobo et al., *Oocyte Cryopreservation for Donor Egg Banking*, 23 REPROD. BIOMEDICINE ONLINE 341, 342 (2011).

92. The woman is injected with drugs to stimulate ovulation. *Treatments and Drugs*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/infertility/basics/treatment/con-20034770> (last visited Apr. 5, 2016). The eggs are given time to mature. A hollow needle attached to an ultrasound probe is passed through the vaginal wall and into the follicles to extract the eggs. *In vitro fertilization (IVF)*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/multi-media/egg-retrieval-technique/img-20008644> (last visited Apr. 5, 2016).

93. *Id.*

94. *Id.* at 344.

95. *Id.* at 342.

96. Yun-Xia Cao et al., *Comparison of Survival and Embryonic Development in Human Oocytes Cryopreserved by Slow-Freezing and Vitrication*, 92 FERTILITY & STERILITY 1306, 1306 (2009).

97. Bumsoo Han et al., *Direct Cell Injury Associated with Eutectic Crystallization During Freezing*, 48 CRYOBIOLOGY 8, 9 (2004).

when frozen ice chips developed inside the egg.⁹⁸ In cases where the ice developed in the extracellular solution, the egg was damaged as the result of cellular dehydration.⁹⁹ In both cases, the egg suffered a direct injury, so doctors were unable to use it.¹⁰⁰ Currently, doctors rely on vitrification, a new process that permits them to flash-freeze the eggs.¹⁰¹ That process maintains the integrity of the eggs, so doctors can implant them years or decades later.¹⁰² Further, this new high-speed method improves pregnancy success rates among women who use frozen eggs to conceive.¹⁰³

Women who want to be mothers and society in general may benefit from the availability of human oocyte cryopreservation. Doctors can use the process to help infertile people and to give an opportunity to women seeking to preserve their fertility for personal or medical reasons. Moreover, the use of human oocyte cryopreservation may result in an increase in the supply of frozen oocytes available to be donated for infertility treatments or scientific research. The ability to have their oocytes frozen may be especially beneficial to women.

Historically, women occupied traditional roles in marriages. While husbands provided financial support, women stayed at home and raised the children.¹⁰⁴ Eventually, women received college educations and pursued their own careers. In order to avoid being placed on the “mommy track,” women are often forced to postpone motherhood.¹⁰⁵ Unlike men, women may have a difficult time conceiving children later in life.¹⁰⁶ Consequently, women who focus on their careers during the first part of their lives are often forced to forego motherhood.¹⁰⁷ Some professional women are trying to pause

98. *Id.*

99. *Id.*

100. *Id.*; Shee-Uan Chen et al., *Observational Clinical Follow-Up of Oocyte Cryopreservation Using a Slow-Freezing Method with 1, 2-Propanediol Plus Sucrose Followed by ICSI*, 20 HUM. REPROD. 1975, 1975 (2005).

101. Tae Ki Yoon et al., *Survival Rates of Human Oocyte and Pregnancy Outcomes After Vitrification Using Slush Nitrogen in Assisted Reproduction Technologies*, 88 FERTILITY & STERILITY 952, 952 (2007).

102. *Id.*

103. *Id.*

104. Elizabeth A. Heaney, *Pennsylvania's Doctrine of Necessities: An Anachronism Demanding Abolishment*, 101 DICK. L. REV. 233, 235–37 (1996).

105. Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 49–50 (2005).

106. Melinda Mills et al., *Why Do People Postpone Parenthood? Reasons and Social Policy Incentives*, 17 HUM. REPROD. UPDATE 848, 849–50 (2011) (discussing the difficult time women over the age of 35 have conceiving).

107. Kelly M. Zigaitis, *The Past, Present and Future of the Working Woman:*

their biological clock. Human oocyte cryopreservation may give women that opportunity.

When it comes to having children later in life, biology is a woman's greatest foe. The approximately two million oocytes that females have when they are born¹⁰⁸ are the only weapons in their fertility arsenal. The moment a girl reaches puberty and has her first menstrual cycle, her biological clock starts running. At that time, the girl's supply of oocytes with the potential to mature has been reduced to only about 400,000.¹⁰⁹ Although that estimate is quite high, a female loses an average of 750 oocytes each month during her reproductive years.¹¹⁰ Thus, statistics show that a woman's journey to infertility can be a quick one.¹¹¹ For example, a woman's fertility peaks when she is just twenty-seven years old.¹¹² After she reaches the age of thirty-five, a woman's fertility starts to significantly decline.¹¹³ The American Society for Reproductive Medicine (ASRM) claims that a woman older than forty has only a five percent chance, or less, of becoming pregnant naturally.¹¹⁴

In addition to having to deal with the problem of a declining number of oocytes, women have to accept that the ones they do retain are often of poor quality.¹¹⁵ Accordingly, the risk of chromosomal abnormalities in newborns increases with the age of the woman's oocytes.¹¹⁶ For example, a thirty-year-old woman has a 1 in 385 chance of having a baby with a chromosomal abnormality.¹¹⁷

Solutions for Substantive Inequality in the Workplace, 81 WASH. U. L.Q. 1147, 1148–49 (2003).

108. Eric Nagourney, *What Happened to All Those Eggs?*, N.Y. TIMES (Feb. 1, 2013), http://www.nytimes.com/2013/02/01/booming/womens-eggs-diminish-with-age.html?_r=0.

109. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 127 (2001).

110. *Your Health History*, LATER BABY, <http://www.laterbaby.org/facts-health.asp> (last visited Apr. 5, 2016).

111. Sara B. Forbus, *Age-Related Infertility: Tuning in to the Ticking Clock*, 9 AWHONN LIFELINES 128, 129 (2005) (“[W]hen compared to other major organ systems in the human body, the female reproductive system ages to the point of failure at a relatively young age.”).

112. Lloyd Vries, *Fertility: Less Time Than You Think*, CBS NEWS (Apr. 30, 2002, 7:17 AM), <http://www.cbsnews.com/news/fertility-less-time-than-you-think/>.

113. *Id.*

114. AM. SOC'Y FOR REPROD. MED., *AGE & FERTILITY: A GUIDE FOR PATIENTS 4* (2012), available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/agefertility.pdf.

115. Reynolds, *supra* note 38, at 284.

116. *Id.* at 287.

117. *Id.*

When a woman reaches the age of forty, the odds that she will give birth to a child with a chromosomal abnormality increases to 1 in 66.¹¹⁸

Women now have the possibility of having healthy children long after the age of forty, after achieving success in their careers and finally meeting “Mr. or Mrs. Right.” The availability of human oocyte cryopreservation permits women to delay pregnancy because their frozen eggs can be safely stored indefinitely.¹¹⁹ The reasons women may choose to have their eggs frozen are as varied as the women who may select human oocyte cryopreservation.¹²⁰ Three of the main sources of frozen eggs are elective egg freezing, medical egg freezing, and posthumous harvesting.

A. Elective Egg Freezing

Women appear to have a knack for planning. In the 1960s and 70s, women started entering the workforce in large numbers, and it became more common for couples to engage in family planning.¹²¹ The primary focus of that planning was pregnancy prevention.¹²² Women sought help at organizations like Planned Parenthood to obtain contraceptives and other services to ensure that an “unplanned” pregnancy did not derail their career plans.¹²³ After years of watching older career women struggle to have children, a new generation of women is taking matters into their own hands.¹²⁴ Like their mothers and grandmothers, these young women have decided to engage in family planning. The main difference is that, instead of pregnancy prevention, these women are focusing on fertility preservation. To achieve their goals, these fertile women are

118. *Id.* at 288.

119. Nancy Hass, *Time to Chill? Egg-freezing Technology Offers Women a Chance to Extend Their Fertility*, VOGUE (Apr. 28, 2011, 12:00 PM), <http://www.vogue.com/865443/time-to-chill-egg-freezing-technology-offers-a-chance-to-extend-fertility/>.

120. See Rebecca Harrington, *Elective Human Egg Freezing on the Rise*, SCI. AM. (Feb. 18, 2015), available at <http://www.scientificamerican.com/article/elective-human-egg-freezing-on-the-rise/> (discussing the recent boom in the number of women undergoing the procedure and one clinic that had conducted 2,200 egg freezing procedures, eighty-five percent for elective reasons).

121. ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 3–4 (2013), available at <https://www.guttmacher.org/pubs/social-economic-benefits.pdf>.

122. *Id.* at 27.

123. *Id.* at 11–13.

124. Some companies, such as Facebook and Apple, have announced that they would pay for employees' elective procedures. Harrington, *supra* note 120.

choosing to have their eggs retrieved and frozen for later use.¹²⁵ Faced with the possibility that it may be difficult for them to conceive naturally when they are older, these women opt to use human oocyte cryopreservation as a backup plan.¹²⁶

The ability to have their young eggs thawed so that they can use them to become pregnant later in life is likely comforting to the women that take advantage of cryopreservation. This likely removes at least some of the pressures of dating for women who want to have children. Instead of evaluating every partner that she meets to determine if they are someone she would raise a child with, the woman can just relax and enjoy dating.¹²⁷ A woman's relationship status does not disqualify her as a candidate for human oocyte cryopreservation.¹²⁸ For example, a woman who has not yet met the person with whom she would like to procreate, for whatever reason, may decide to take advantage of oocyte cryopreservation. Moreover, a career-minded, married or unmarried woman may have her eggs frozen in order to postpone motherhood.¹²⁹ Maternal instincts are not an innate part of every woman. Those instincts are triggered for some females early in life. For other women, the desire to be mothers may be like a seed that sprouts slowly or not at all. Hence, human oocyte cryopreservation gives a woman who is undecided about motherhood the luxury of time.

When we were in our twenties, one of my friends said that she had no desire to be a mother. Nevertheless, the moment she celebrated her fortieth birthday her maternal instincts kicked in, and she desperately wanted to have a child. Unfortunately, when we were in our twenties, the technology allowing women to have their eggs retrieved and frozen did not exist. As a result, when my friend realized that she did want to have children, she did not have the option of using eggs that had been preserved when she was in her

125. Seema Mohapatra, *Using Egg Freezing to Extend the Biological Clock: Fertility Insurance or False Hope?*, 8 HARV. L. & POL'Y REV. 381, 385 (2014).

126. Hass, *supra* note 119, at 1.

127. See *From Women for Women: Advice About Egg Freezing and Dating*, SHADY GROVE FERTILITY (Dec. 3, 2015), <https://www.shadygrovefertility.com/blog/treatments-and-success/egg-freezing-and-dating/> (providing advice and testimonials from women who have chosen to freeze their eggs and are currently actively dating).

128. Jane Ridley, *We have a baby, but I still froze my eggs!*, N.Y. POST (Jan. 19, 2015, 9:15 PM), <http://nypost.com/2015/01/19/we-have-a-baby-but-i-still-froze-my-egg> s.

129. See, e.g., *Egg Freezing Program*, THE FERTILITY CTR. OF CHARLESTON, <http://www.fertilitycharleston.com/our-services/egg-freezing-program/> (last visited Apr. 5, 2016) (stating that "[e]gg freezing is a great way to 'preserve' fertility regardless of . . . relationship status . . .").

twenties. Her choices were to use her forty-year-old eggs or to buy eggs from a young donor. Even married women may choose to take advantage of the availability of human oocyte cryopreservation. For instance, Joanna Krupa, one of the stars of *Real Housewives of Miami*, revealed that because she and her husband were not ready to be parents; she had her eggs extracted and frozen.¹³⁰ Sometimes life circumstances make the decision to have eggs frozen more of a necessity than a choice.

B. Medical Egg Freezing

For some women of childbearing age, human oocyte cryopreservation is not an elective procedure. It is a medical necessity if the woman wants to retain her ability to conceive a child naturally.¹³¹ These women take action because something threatens their fertility. For example, young women with military careers or other jobs that may negatively impact their fertility often view freezing their eggs as the only feasible way for them to leave open the possibility of motherhood.¹³² Likewise, young women diagnosed with cancer often decide to have their eggs extracted before undergoing a potentially toxic medical treatment, like chemotherapy or radiation therapy. Undergoing those types of procedures puts a woman's fertility at risk.¹³³ Thus, in the event that the woman survives the disease and is rendered infertile by the treatment, she may still have the opportunity to have a baby.¹³⁴

The availability of human oocyte cryopreservation also gives hope to women with family histories of early menopause or endometriosis.¹³⁵ Instead of just waiting to become infertile, these

130. Gabrielle Olya, *Joanna Krupa: Why I'm Freezing My Eggs*, PEOPLE (Dec. 8, 2014, 8:00 AM), <http://www.people.com/article/joanna-krupa-freezing-eggs-fertility-treatments>.

131. Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 193, 195 (2014).

132. Several fertility clinics offer egg freezing at a reduced price to women in the military. See, e.g., *Pre-Deployment Fertility Preservation for Military Families*, FERTILITY CTR. OF CAL., <http://www.spermbankcalifornia.com/military-sperm-bank.html> (last visited Apr. 5, 2015) (offering a military discount not offered to the public).

133. D. Meiorow & D. Nugent, *The Effects of Radiotherapy and Chemotherapy on Female Reproduction*, 7 HUMAN REPROD. UPDATE 535–543 (2001).

134. *Preserving Fertility Before Treatment*, MD ANDERSON CANCER CTR., <https://www.mdanderson.org/patients-family/diagnosis-treatment/a-new-diagnosis/preserving-fertility-before-treatment.html> (last visited Apr. 5, 2016).

135. *Egg Freezing (Oocyte Cryopreservation)*, REPROD. MED. ASSOC. OF N.Y., <http://rmany.com/patient-resources/infertility-glossary/egg-freezing-oocyte-cryopreservation/> (last visited Apr. 5, 2016).

women may choose to be proactive by using human oocyte cryopreservation as a sort of insurance policy. These women react to the discovery of what I call the “infertility gene” by having their eggs extracted and frozen while they are still fertile.¹³⁶ Some women with serious medical conditions like lupus and rheumatoid arthritis are determined to not let their disabilities or chronic diseases ruin their plans to have children. Consequently, instead of calmly accepting the cards that life deals them, they may choose to store their healthy oocytes before they are damaged by their medical treatments.¹³⁷ In addition to all the benefits for those living and struggling with medical issues, cryopreservation has made it so that death may no longer be an impediment to a person becoming a parent.

C. Posthumous Egg Retrieval

It has been more than a decade since Diane Blood first went to court to get the right to conceive a child using the sperm of her dead husband.¹³⁸ Since that time, the number of children conceived using the gametes of deceased persons has increased.¹³⁹ Traditionally,

136. J.P. de Bruin et al., *The Role of Genetic Factors in Age at Natural Menopause*, 16 HUMAN REPROD. 2014–2018 (2001) (concluding “[a] woman with a family history of early menopause risks early menopause and consequently early reproductive failure herself.”).

137. *Egg Freezing/Fertility Preservation*, LANE FERTILITY INST., <http://www.lane.fertilityinstitute.com/egg-freezing-fertility-preservation> (last visited Apr. 5, 2016).

138. Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J.L. & HEALTH 29, 29 (2014).

139. In 1997, the director of the Center for Bioethics at the University of Pennsylvania, Dr. Arthur Caplan, teamed up with several colleagues to conduct a study of fertility clinics to determine if the clinics had removed sperm from dead men. The results of the study indicated that the practice of removing and storing the sperm of dead men was becoming more common. Gina Kolata, *Uncertain Area for Doctors: Saving Sperm of Dead Men*, N.Y. TIMES (May 30, 1997), <http://www.nytimes.com/1997/05/30/us/uncertain-area-for-doctors-saving-sperm-of-dead-men.html>; see also *Should Dead Men’s Sperm Be Stored?*, MIAMI HERALD, Jan. 8, 1997, at 1D (discussing cases of widows having sperm extracted from the corpses of their dead husbands); Graham Tibbetts, *Widow Launches Legal Fight for Child Using Husband’s Sperm*, DAILY TELEGRAPH (May 19, 2008), <http://www.telegraph.co.uk/news/1988585/Widow-launches-legal-fight-for-child-using-husbands-sperm.html> (discussing a forty-two-year-old English woman who went to court to get permission to have a child using the sperm she had extracted from her dead husband); Evelyn Harvey, *Widow Fights for Right to Use Late Husband’s Sperm to Conceive*, BIONEWS (May 27, 2008), http://www.bionews.org.uk/page_13397.asp (discussing case involving Diane Blood, who successfully fought for the right to use her comatose husband’s sperm to conceive a child).

most cases of posthumous reproduction involved wives seeking to get pregnant using the stored frozen sperm of their dead husbands.¹⁴⁰ Men who were undergoing chemotherapy or radiation often had their sperm extracted in case the medical treatment made them sterile.¹⁴¹ In addition, men who were going off to war frequently had their sperm banked for later use.¹⁴²

Eventually, women started pursuing court orders to have the right to have fresh sperm retrieved from the bodies of men who were dead or in vegetative states.¹⁴³ In some cases, the women requesting the sperm were not married to the men.¹⁴⁴ Recently, parents have started getting permission to harvest the sperm of their dead sons.¹⁴⁵ In 2011, an Israeli court made history when it decided that the eggs of a dead woman could be harvested and donated.¹⁴⁶ The family of the seventeen-year-old accident victim planned to donate the eggs to the girl's infertile aunt.¹⁴⁷ Courts increasingly allowing egg retrieval in this context has the potential to put even more frozen eggs in the marketplace.

III. EXTENT OF THE PROPERTY INTEREST

In some sense, a woman's eggs are her property. A woman's ownership interest in her eggs stems from the fact that she has

140. See, e.g., *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

141. Joseph H. Karlin, Comment, "Daddy Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1322 (2006).

142. Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir From the Freezer*, 33 WM. MITCHELL L. REV. 433, 435 (2009); Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY (Jan. 27, 2003), http://usatoday30.com/news/nation/2003-01-26-bank-usat_x.htm.

143. See, e.g., Pl.'s Mem. of Law in Supp. of Her Emergency Mot. for a TRO at 2, *Dhanoolal v. U.S. Dep't of the Army*, No. 4:08-CV-42(CDL) (M.D. Ga. Apr. 4, 2008) (young widow sought removal of deceased husband's sperm where husband had made intent known that he wanted children but was killed in war).

144. Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159, 1177-78 (2009).

145. Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 404 (2009).

146. Mikaela Conley, *Israeli Court Allows Family to Harvest Dead Daughter's Eggs*, ABC NEWS (Aug. 11, 2011), <http://abcnews.go.com/Health/israeli-family-permission-freeze-dead-daughters-eggs/story?id=14272156>.

147. *Israeli Court Approves Harvesting of Dead Woman's Eggs*, JEWISH JOURNAL (Aug. 8, 2011, 10:35 AM), http://www.jewishjournal.com/israel/article/israeli_court_approves_harvesting_of_dead_womans_eggs_20110808.

autonomy over her own body. However, the government may regulate a woman's bodily autonomy. For example, the majority of states have placed some type of restriction on a woman's right to obtain an abortion. Even *Roe v. Wade* did not give a woman an absolute right to have an abortion.¹⁴⁸ Government regulation does not entirely negate a woman's control over her body. Hence, because she owns her body, a woman has the right to refuse medical treatment even if her decision results in her body's destruction.¹⁴⁹ When eggs are inside of a woman's body, it seems clear that she has an ownership interest in them. In fact, legally no one can remove a woman's eggs from her body without her informed consent.¹⁵⁰ However, once a woman's eggs are extracted and frozen, it is unclear how those eggs will be legally categorized. Courts have several available options if they choose to rely on past cases and public policy.

A. *Excised Tissue*

One option is for the law to treat frozen eggs in the same way that the court treated the excised cells in the *Moore* case.¹⁵¹ The *Moore* case stands for the proposition that a person only maintains a limited right to control the use of excised cells.¹⁵² This leads to the belief that a person does not retain any ownership interest in the parts of his or her body that he or she voluntarily permits to be removed.¹⁵³ In *Moore*, scientists used some of the cells from the spleen of Moore, a cancer patient, to create a cell line.¹⁵⁴ When Moore discovered that the hospital and the inventors of the cell line were making a profit, he filed suit asking the court to hold that he was entitled to a share of the money that the hospital made from the

148. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (holding that after the fetus is viable, the state may regulate or prohibit abortions unless necessary to preserve the health or life of the woman); Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled*, 23 ISSUES L. & MED. 3 (2007) (discussing state regulations of abortion).

149. Kristen L. Beebe, Comment, *The Right to Die: Who Really Makes the Decision?*, 96 DICK. L. REV. 649, 653 (1992).

150. See, e.g., *What is Egg Donation and How to Become an Egg Donor*, GLOBAL DONOR EGG BANK, <https://www.globaldonoreggbank.com/donate-your-eggs/> (last visited Apr. 5, 2016).

151. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 492 (Cal. 1990).

152. *Id.*

153. *Id.*

154. *Id.* at 481–82.

cell line.¹⁵⁵ In rejecting Moore's conversion claim, the court held that because California statutory law aggressively restricted the rights of patients over their excised cells, it amounted to a denial of the proposition that patients have property rights in excised cells.¹⁵⁶ If state legislative bodies and courts decide to treat women's frozen oocytes like the excised cells in *Moore*, the government may be legally able to prevent a woman from using them to conceive a child once she reaches a certain age.¹⁵⁷ Hypothetically, a woman could be deemed to have a quasi-ownership interest in her frozen eggs, which could be subject to the government's interest in protecting the welfare of children. Accordingly, the government could decide that it is not in the best interests of the child to be born to a woman over a certain age.

The precedent established in *Moore* should not be applied to cases involving human oocyte cryopreservation. Unlike the plaintiff in *Moore*, a woman that has her oocytes retrieved and frozen expects to retain an ownership interest in them because she plans to use them to conceive a child. Moore's cells were excised from his body in the course of treatment for a life-threatening disease.¹⁵⁸ Thus, Moore's primary objective was to be cancer-free. Therefore, Moore did not necessarily expect to retain an ownership interest in his cells. On the other hand, a woman does not have oocytes removed and frozen as a form of treatment but with the intention of preserving her ability to have children. If a woman is not permitted to use the frozen oocytes to conceive a child, her purpose will be defeated. In light of the unique facts of the *Moore* case, the government should not be able to rely on the holding of that case to justify restricting the manner in which a woman uses her frozen oocytes.

B. Organs

A second alternative is for the law to treat a woman's eggs like her organs. Some scholars have examined the consequences of applying laws meant to regulate organ donation to situations involving the donation of oocytes.¹⁵⁹ Generally, a person cannot be

155. *Id.* at 487.

156. *Id.* at 489.

157. *See id.* at 492.

158. *Id.* at 480.

159. *See* Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 130–152 (2001); *see also* Valarie K. Blake et al., *Conflicts of Interest and Effective Oversight of Assisted Reproduction Using Donated Oocytes*, 43 J.L. MED. & ETHICS 410, 419–20 (2015).

forced to donate an organ.¹⁶⁰ For example, one court denied a request to order a man to donate bone marrow to his relative.¹⁶¹ Likewise, a woman could not be legally required to donate some of her oocytes to her infertile sister. The government has regulated a person's control over his or her organs. For example, the National Organ Transplant Act of 1984 prohibits the sale of organs or other tissue for use in transplantation.¹⁶² However, the act does not apply to blood, sperm, or eggs.¹⁶³

While a person is alive, he or she can donate renewable tissue and tissue that is not necessary for a donor to maintain their health.¹⁶⁴ The dead donor rule prevents a living person from donating a life-sustaining organ.¹⁶⁵ In addition, a person can sell blood, sperm, or eggs.¹⁶⁶ People can donate organs for the purposes of transplantation or research.¹⁶⁷ The Uniform Anatomical Gift Act (UAGA) permits competent people to agree to have their organs taken for transplantation after they die.¹⁶⁸ For individuals who have not made a gift but have not expressed opposition to the use of their organs, family members may authorize their organs being

160. *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 667 (Ariz. Ct. App. 1998) (quoting *Lyon v. United States*, 843 F. Supp. 531, 536 (D. Minn. 1994)) (stating that the Uniform Anatomical Gift "Act does not compel organ donations nor does it establish a presumption that organs will be donated.").

161. *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 90-92 (Allegheny County 1978).

162. National Organ Transplant Act of 1984, 42 U.S.C. § 274e(a) (2012); *see also* Uniform Anatomical Gift Act § 10(a) (1987), available at http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga87.pdf. A comparison between older women who seek to conceive using assisted reproductive technology and older men who conceive naturally would not be accurate. The purchase or sale of organs is a felony that can result in a \$50,000 fine and/or a five-year prison sentence. 42 U.S.C. § 274e(b); *see also* Uniform Anatomical Gift Act § 10(c) (1987).

163. 42 U.S.C. § 274e(c) (providing that human blood, sperm, and eggs are not included in the National Organ Transplant Act of 1984's definition of the term "human organ").

164. Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 53 (1995).

165. Robert O. Truog & Walter M. Robinson, *Role of Brain Death and the Dead-Donor Rule in the Ethics of Organ Transplantation*, 31 CRIF. CARE MED. 2391, 2391 (2003).

166. Charles M. Morgan, Jr. & Casey J. Price, *First Moore, Then Hecht: Isn't It Time We Recognize A Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 158 (2002).

167. *Id.*

168. Unif. Anatomical Gift Act § 1(1) (1984).

donated.¹⁶⁹ Section four of the UAGA allows states to enact statutes permitting the removal of corneas from persons who have died and are undergoing an autopsy by a coroner or medical examiner as long as the next of kin does not object to the procedure.¹⁷⁰

If the government were to regard frozen oocytes in the same way that they currently regard organs, a law that prohibited human oocyte cryopreservation would likely be upheld. It would likely also be deemed permissible for the government to require the woman to have the oocytes fertilized within a certain time period. Hypothetically, the government could pass laws stating that, after eggs have been stored for a specified period of time, a woman's frozen eggs could only be used for research or donation to a younger woman, but could not be used for implantation in a woman over a certain age. Like with organ donation, the government could give the woman's next of kin the right to donate her eggs if she were to die prior to using them to conceive. However, these examples are only conjectural. The laws regulating the use of organs has specifically exempted blood, sperm, and egg, so it is doubtful that the law would treat a woman's frozen oocytes as if they were her kidneys.

C. Embryos

Because they both have the potential to produce human life, the law may choose to treat oocytes like embryos. Courts have struggled with the manner in which to classify frozen embryos. In *York v. Jones*,¹⁷¹ which was a case involving a dispute between a married couple and a fertility clinic, the court treated the frozen embryo like personal property.¹⁷² The couple started IVF at the Jones Institute for Reproductive Medicine in Virginia.¹⁷³ During the process, the couple relocated to California.¹⁷⁴ As a result, the couple asked the clinic to transfer the remaining frozen embryo to a fertility clinic in San Diego so that they could have it implanted.¹⁷⁵ After the clinic refused to comply with their request, the couple filed suit.¹⁷⁶ The court ruled in favor of the couple by relying on bailment law.¹⁷⁷ The

169. Unif. Anatomical Gift Act § 3(a) (984) (listing the next of kin who can make the decision in order of priority).

170. Unif. Anatomical Gift Act § 4 (1987).

171. *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

172. *Id.* at 422–23.

173. *Id.* at 423.

174. *Id.*

175. *Id.* at 424.

176. *Id.*

177. *Id.* at 425, 429.

court treated the frozen embryo like any other piece of property.¹⁷⁸ It reasoned that the cryopreservation agreement between the couple and the clinic created a bailment relationship and that the clinic was legally obligated to return the subject of the bailment to the couple after the purpose of the bailment had ended.¹⁷⁹

In *Davis v. Davis*, a subsequent case, the court rejected the *York* court's categorization of the frozen embryos as property.¹⁸⁰ The *Davis* case involved a dispute between a divorcing couple over the disposition of seven frozen pre-embryos.¹⁸¹ After the couple divorced, the woman wanted to donate the pre-embryos to a childless couple, but the man wanted the pre-embryos to be destroyed.¹⁸² The court determined that the pre-embryos were neither people nor property.¹⁸³ The court reasoned that the pre-embryos deserved to be placed in a special category because of their potential to become human beings.¹⁸⁴ The court held that the couple did not have a property interest in the pre-embryos; however, the court opined that the couple had an interest in the nature of ownership that gave them decision-making authority concerning the disposition of the pre-embryos.¹⁸⁵ The court made it clear that the couple's decision-making power was limited by the scope of public policy set by law.¹⁸⁶ For example, the couple could not have decided to use the pre-embryos to clone body parts because that would be outside of the scope of their decision-making power with regard to public policy.¹⁸⁷

Courts are reluctant to treat embryos as personal property because embryos have the potential to become human beings.¹⁸⁸ The law, however, should not place oocytes in the same legal category as embryos because, oocytes, by themselves, do not have the capacity to become human beings.¹⁸⁹ Embryos are at the end of the reproductive

178. *Id.* at 425.

179. *Id.* at 424-427 ("The essential nature of a bailment relationship imposes on the bailee . . . an absolute obligation to return the subject matter of the bailment to the bailor.").

180. 842 S.W. 2d 588, 596 (Tenn. 1992).

181. *Id.* at 589.

182. *Id.* at 590.

183. *Id.* at 596.

184. *Id.*

185. *Id.* at 597.

186. *Id.*

187. *See id.*

188. *Id.* at 596; Erin Colleran, *My Body, His Property?: Prescribing a Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1204 (2007) (citing Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CTR. REP., 28, 29 (1986)).

189. *But see* *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, n.7 (Ariz. 2005). In

chain; they are fertilized oocytes.¹⁹⁰ Once the embryo is created, it just has to be implanted and gestated.¹⁹¹ On the other hand, the retrieval of the oocytes is just the first step in the reproductive process. After the oocytes are thawed, they must be fertilized before they have the potential for personhood.¹⁹²

D. Sperm

The strongest argument is for the law to treat a woman's oocytes in the same manner that the law has treated a man's sperm: as personal property.¹⁹³ Because a man's sperm is legally regarded as personal property, a man may donate or sell his sperm.¹⁹⁴ Courts have also recognized a man's ability to bequeath his sperm.¹⁹⁵ For example, in *Hecht*, the court honored the deceased man's bequest of his sperm to his girlfriend.¹⁹⁶ The man's sperm was treated just like any other piece of property in his estate.¹⁹⁷ Given the similarities between oocytes and sperm, it would not be unreasonable for the law to conclude that a woman has the same property rights in her oocytes that a man has in his sperm. Oocytes and sperms are both sexual gametes that serve the same functions. They are the two the key components in the reproductive process.

If a woman's oocytes were to be regarded by the law in the same way as a man's sperm, it would follow that she would have a legally recognized property interest in the oocytes.¹⁹⁸ Therefore, in a scenario like that in *Hecht*, if a woman were to die intestate before she uses her frozen oocytes, then the eggs should be released to her relatives in accordance with the relevant intestacy statute.¹⁹⁹ If a

dicta, the court indicates that frozen sperm and eggs have just as much potential to become persons as embryos. *Id.*

190. See John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990).

191. *Id.*

192. *Embryo Freezing vs. Egg Freezing*, FERTILITY PRO REGISTRY, <http://www.fertilityproregistry.com/article/lab-techniques/embryo-freezing/embryo-freezing-vs-egg-freezing> (last visited Apr. 6, 2016) (describing the basic steps for egg freezing as "[f]reezing, thawing, fertilization, and transfer to the mother's uterus" and embryo freezing as "fertilization, freezing, thawing, and transfer to the mother's uterus").

193. *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 226 (1996) (finding sperm to be a "unique form of property") (internal quotation marks omitted).

194. See *Flynn v. Holder*, 684 F.3d 852, 858 (9th Cir. 2012).

195. *Id.*

196. *Hecht*, 59 Cal. Rptr. 2d at 228.

197. *Id.* at 226.

198. See *id.*

199. See *id.* at 228.

woman were to dispose of her frozen oocytes in her will, the court should honor her wishes.²⁰⁰ Currently, the law permits women to receive money for the sale of their eggs.²⁰¹ However, although the law permits women the right to dispose of their eggs how they see fit, it does not provide them with the other rights and protections afforded to property owners. In the event that the law acknowledges that a woman has an ownership interest in her oocytes, it would likely be difficult for a statute prohibiting a woman from using her frozen oocytes to conceive to survive a constitutional challenge.

Arguably, women may even be entitled to a stronger property interest in their oocytes than men have in their sperm. Men have the capacity to produce more sperm because it is similar to renewable tissue. However, because a woman has a limited number of oocytes, the law should give her more control over the use of her oocytes. Moreover, the process to retrieve sperm is less invasive than the procedure used to harvest oocytes. If a woman is willing to go through the ordeal of having her oocytes extracted and frozen, she should have the right to use them to become a mother. Thus, if the government were to be able to successfully prevent her from using them to conceive a child, the woman should be able to decide what happens to her oocytes even if she is not able to use them to conceive.

IV. EGGS AND PROPERTY LAW

A woman's decision to freeze her eggs may raise property law issues. In a perfect world, after freezing her eggs, a young woman meets a partner with whom she would like to raise a child, retrieves her cryopreserved eggs, and uses them to conceive a child. Unfortunately, litigation exists because we are flawed people living in an imperfect world. If a court decides that frozen human eggs are personal property that can be owned by the women who produced them, that determination will limit the actions that fertility clinics can take with regard to the eggs.

Now that human cryopreservation is no longer classified as an experimental procedure,²⁰² the demand for and the use of the procedure will probably increase. In response, the government may enact more laws and issue more regulations to control the activities of the industry. If a woman's eggs are eventually classified as

200. *Id.*

201. See *Flynn v. Holder*, 684 F.3d 852, 858 (9th Cir. 2012).

202. John A. Robertson, *Egg Freezing and Egg Banking: Empowerment and Alienation in Assisted Reproduction*, 1 J.L. & BIOSCIENCES 113, 113–136.

personal property that may provide her with the ability to enforce her ownership rights through the court system.

A. *The Government Regulation*

The government has been slow to regulate the use of ART. The regulations that exist focus more on the behavior of the fertility clinic than on the parties using the technology to conceive children.²⁰³ Bioethicists and other opponents of human oocyte cryopreservation have urged the government to ban or restrict the use of the procedure. In particular, opponents have raised concerns about permitting a woman to thaw out her frozen eggs to use them to conceive a child after she reaches a certain age. Technology permits oocytes to be frozen for an indefinite period of time.²⁰⁴ Consequently, a woman could use her frozen oocytes to conceive a child when she is beyond her natural childbearing years. Some people think that it is “immoral and dangerous” for a physician to assist women in their quests to get pregnant later in life because of the health risks.²⁰⁵ For example, women over the age of thirty-five are more susceptible to gestational diabetes and high blood pressure during pregnancy and more likely to have a baby with a low birth weight, have a premature delivery, need a C-section, or even to lose the baby.²⁰⁶

Fertility clinics may be reluctant to perform IVF on older women using their own oocytes because as women age they typically possess fewer eggs, react poorly to traditional ovarian stimulation, and get pregnant at lower rates.²⁰⁷ Some clinics are concerned that cases involving older women will lower their reportable statistics.²⁰⁸ In

203. CTRS. FOR DISEASE CONTROL AND PREVENTION, STATES MONITORING ASSISTED REPROD. TECH. COLLABORATIVE (2015), available at <http://www.cdc.gov/art/smart/index.html>.

204. Cyrene Grothaus-Day, *From Pipette to Cradle, From Immortality to Extinction*, 7 RUTGERS J.L. & RELIGION 2, 16 (2005) (quoting Michael R. Soules, *Commentary: Posthumous Harvesting of Gamete's — A Physician's Perspective*, 27 J.L. MED. & ETHICS 362, 363 (1999)).

205. Anne L. Goodwin, *Oh Brave New World of Parenthood!*, 12 DEL. LAW 25, 29 (1994).

206. *Pregnancy After 35: Healthy Moms, Healthy Babies*, MAYO CLINIC (July 29, 2014), <http://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/pregnancy/art-20045756>.

207. Norbert Gleicher et al., *Too Old For IVF: Are We Discriminating Against Older Women?*, 24 J. ASSISTED REPROD. & GENETICS 639, 639–644 (2007); ADVANCE FERTILITY CTR. OF CHI., *Fertility After Age 40—IVF in the 40s*, <http://www.advancedfertility.com/fertility-after-age-40-ivf.htm> (last visited Apr. 6, 2016).

208. Virginia Godoy, *Where is Biotechnology Taking the Law?: An Overview of*

addition, older women usually require huge doses of expensive drugs that can add to the cost of conventional IVF. In response to the increased demand by women over the age of forty, fertility clinics have started offering IVF using donor oocytes. The use of oocytes from a young donor often addresses some of the medical concerns. Dr. Lawrence C. Udoff, medical director of the Genetics and IVF Institute in Fairfax, Virginia has stated: "Fortunately, the uterus does not age in the same way that eggs do. This makes the goal of carrying a child after menopause easier to achieve, with the use of appropriate replacement hormones."²⁰⁹ Dr. Udoff acknowledged that older women have more complicated pregnancies. Nevertheless, he has stated that the use of donor oocytes is "the most common way that menopausal women are able to conceive."²¹⁰ Human oocyte cryopreservation gives women an alternative to relying on donor eggs and provides them the opportunity to use their own eggs instead.

Physicians from southern California conducted a study in which they used IVF in seventy-seven women aged fifty to sixty-three.²¹¹ The women were implanted with fertilized oocytes from donors under the age of thirty-three.²¹² As a result, forty-six of the women became pregnant and delivered babies.²¹³ When discussing the results of the study, Dr. Richard Paulson, the lead researcher stated: "We cannot beat the biological clock of the aging egg. We are beating the biological clock of pregnancy."²¹⁴ The availability of donor oocytes has not lessened the criticism of doctors using IVF to help older women have children. One scholar has argued that, because donor oocytes are in such short supply, physicians should limit the use of those oocytes to women of "normal reproductive age."²¹⁵

Assisted Reproductive Technology, Research on Frozen Embryos and Human Cloning, 19 J. JUV. L. 357, 369 (1998) (stating that "[m]ost fertility clinics in the United States will only treat women under fifty . . ."). The Fertility Clinic Success Rate Act of 1992 requires American fertility clinics to report data to the CDC annually on every assisted reproduction procedure they perform. Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. 263a-1(a) (1992).

209. C. Claiborne Ray, *Very Late Motherhood*, N.Y. TIMES (May 27, 2013), http://www.nytimes.com/2013/05/28/science/having-a-baby-after-menopause.html?_r=0.

210. *Id.*

211. *In Vitro Fertilization Makes Motherhood Possible for Women After Menopause*, VOICE OF AMERICA (Oct. 27, 2009, 6:23 AM), <http://www.voanews.com/content/a-13-a-2002-11-12-9-in-66463097/551615.html>.

212. *Id.*

213. *Id.*

214. *Id.*

215. Anna Smajdor, *The Ethics of Egg Donation in the Over Fifties*, 14 POST REPROD. HEALTH 173 (2008), available at <http://min.sagepub.com/content/14/4/173>.

Opponents of older women using assisted reproductive technology to become pregnant would, for instance, object to a woman over the age of fifty using her own previously stored oocytes to conceive a child.²¹⁶ For those people, it is not about the woman's reproductive rights or her health; it is about the government's obligation to promote the best interests of children.²¹⁷ If a woman becomes pregnant when she is in her fifties, she is more likely to have a high-risk pregnancy.²¹⁸ As a result, there is a chance that she will die in childbirth, so it is more likely that the child will be motherless.²¹⁹ If the woman were single, then the child would be an orphan. Internet responses to the tragic story of Lisa Swinton McLaughlin indicate that people may not be ready to let go of biases when it comes to older women having babies.²²⁰

McLaughlin set goals and achieved most of them. She graduated from law school and became a special assistant attorney general.²²¹ Then, she graduated from medical school and "became medical director for the American Red Cross in Baltimore, Maryland."²²² Despite these accomplishments, McLaughlin's biggest dream was to be a mother.²²³ It took "more than a decade of fertility treatments and in-vitro procedures," but McLaughlin finally became pregnant.²²⁴ Even though McLaughlin was fifty-six, she delivered two healthy baby boys.²²⁵ McLaughlin died of a bowel obstruction less than a month later.²²⁶ Some people may incorrectly attribute McLaughlin's death to the fact that she became pregnant at such an

216. Rita Rubin, *Study: Older Women can have Babies With Donated Eggs*, USA TODAY (Nov. 12, 2002, 3:09 PM), http://usatoday30.usatoday.com/news/health/2002-11-12-menopause-babies_x.htm.

217. *Id.*

218. Reynolds *supra* note 38, at 300; Dana Dovey, *Pregnancy Over 50: Ethical Considerations That Must Go Into Deciding When You're Too Old to Give Birth*, MEDICAL DAILY (Feb. 15, 2015), www.medicaldaily.com/pregnancy-over-50-ethical-considerations-must-go-deciding-when-youre-too-old-give-322184.

219. Reynolds, *supra* note 38, at 295.

220. Betsie Freeman, *CU Law Grad, Former Nebraska Assistant AG Dies Days after Giving Birth to Twins*, OMAHA METRO (Jan. 22, 2015, 5:44 PM), http://www.omaaha.com/news/metro/cu-law-grad-former-nebraska-assistant-ag-dies-days-after/article_c0c568bf-f289-5312-b453-941ae6e00c8b.html.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*; Meredith Engel, *Baltimore Woman, 56, Dies After Delivering Twins She Waited Years for*, DAILY NEWS (Jan. 27, 2015), <http://www.nydailynews.com/life-style/health/baltimore-woman-56-dies-delivering-twins-article-1.2094085>.

advanced age. In reaction to stories like this, people may call for the government to place more regulations on the use of all types of assisted reproductive technology, including human oocyte cryopreservation. In addition to expressing concerns about the health of the mother, some opposing parties worry about the health of the child.²²⁷ Although it is true that older women are more likely to have low-weight and premature babies and thus that their child could face medical problems, there is still the countervailing consideration of reproductive freedom, which opponents give little to no acknowledgment.

Critics would likely not be silenced even if the baby and the mother were both healthy at the end of the pregnancy. Opponents point out that having an older mother may negatively impact the child.²²⁸ For instance, some bioethicists have expressed concern that a child of an older mother may be forced to become a caretaker for his or her aging parent at an early age.²²⁹ Some have opined that children born to older women may be denied the opportunity to have normal childhoods.²³⁰ Dr. Arthur Caplan, a bioethicist at the University of Pennsylvania, has stated, "The central question is what can we do to enhance the best interests of the children. And, if you're going to be entering a nursing home when your child is entering junior high school, I think that's trouble."²³¹ It is clear that Dr. Caplan would have been troubled if a woman waited until she was menopausal to have a child, even if she had used her own previously frozen younger oocytes. Dr. Caplan's concerns focused upon the manner in which a woman's chronological age might negatively impact the child, and Dr. Caplan's concerns may not be entirely unfounded. For instance, if a woman has a child when she is fifty years old, by the time the child turns eighteen years of age, the woman will be sixty-eight years old. Like many people that age, the woman may suffer from declining physical and mental health. As a

227. Reynolds, *supra* note 38, at 287–88.

228. Godoy, *supra* note 208, at 369 (citing Michael D. Lemonick, *The New Revolution in Making Babies a Host of Breakthroughs—From Frozen Eggs to Borrowed DNA—Could Transform the Treatment of Infertility. But Tampering with Nature can be Risky*, TIME, Dec. 1, 1997, at 40) ("Some take the view that it is not fair to the child to have a parent in her seventies or eighties or possibly dead by the time the child reaches college age.").

229. Anne L. Goodwin, *Oh Brave New World of Parenthood!*, 12 DEL. LAW 25, 29 (1994).

230. *Id.*

231. Sean Dooley, *Oldest Mom of Twins is 65 and 'More Excited' than Ever*, ABC NEWS (Aug. 31, 2012), <http://abcnews.go.com/Health/oldest-us-mom-twins-frieda-birnbaum-65-excited/story?id=17020254>.

consequence, the child may be torn between taking college classes and taking care of his or her aging mother. Persons making these types of arguments seem to ignore the fact that older men regularly have children. This double standard may result from the expectation that women act as the primary care takers of children. Moreover, older men are more apt to conceive naturally than older women. Therefore, the persons availing themselves of ART are women. There is no legal way to prevent an older person from conceiving a child naturally, but the government may be able to limit the use of ART.

In order to protect the health of the women and to promote the best interests of children, legislators could decide to impose a maximum age limit on women seeking access to fertility treatments. To achieve that goal in the context of human oocyte cryopreservation, legislatures would have to enact laws and regulations limiting the length of time a fertility clinic can store a woman's frozen eggs. In this scenario, such legislation would likely state that if a woman fails to use her frozen eggs within the specified time period, she would lose the right to have them fertilized and implanted in her body. At first glance, an age-limit appears to be a relatively reasonable solution. After all, older people seeking to adopt may encounter obstacles to adopting later in life.²³² Nonetheless, this situation is different from adoption. It is one thing for an adoption agency to have a policy in place that prevents a fifty-year-old man or woman from adopting someone else's child. It is another, more troubling thing for the government to enact a law stating that a fifty-year-old woman cannot use her own oocytes to conceive a child.

1. Fifth Amendment Takings Challenge

One of the main property law challenges that a woman may be able to bring if the government chooses to strictly regulate the use of her frozen oocytes is a Fifth Amendment takings challenge. According to the Fifth Amendment, the government cannot take private property "for public use without just compensation."²³³ In cases where the government actually exercises its eminent domain power, it usually voluntarily offers compensation.²³⁴ Thus, the only

232. See, e.g., *Older Parent Adoption: Adoption used to be Limited for Older Parents, But Opportunities are Opening all the Time*, ADOPTION (Apr. 15, 2014), <http://adoption.com/older-parent-adoption>.

233. *Rumber v. D.C.*, 487 F.3d 941, 943 (2007).

234. See *United States v. Blankinship*, 543 F.2d 1272, 1275 (1976) (citing *United States v. Miller*, 317 U.S. 369 (1943)) ("Payment of just compensation to one from

issue to be litigated would likely be the fairness of the amount of money that the government proposes to pay for the acquired property.²³⁵ The issue of just compensation would only be relevant with regards to frozen eggs if the government used its eminent domain power to mandate that a certain number of those eggs be set aside for infertile low-income women. That action would represent the taking of private property for the public use, so the government would have to pay compensation. Because making sure that low-income women are able to have children is not a priority for the government it would probably never exercise its power in that manner.²³⁶ The fundamental right to procreate without governmental interference has not been interpreted to mean that all women have a right to have children.²³⁷ Once courts recognize a woman's property interest in her eggs, the stage will be set for a possible regulatory takings case.

A regulatory taking can occur when a law or regulation substantially interferes with a person's use and enjoyment of his or her property.²³⁸ In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes, writing for the Supreme Court, stated that if a regulation goes too far, it is a taking.²³⁹ In general, the analysis to determine whether a regulatory taking has occurred appears to be similar to an obscenity analysis.²⁴⁰ There is no bright-line rule to determine when a regulatory taking has occurred, but the Court knows it when it sees it.²⁴¹ Nonetheless, the United States Supreme Court *has* adopted

whom property is taken by eminent domain is required by the Fifth Amendment.”).

235. *Id.*

236. See Camille M. Davidson, *Octomom and Multi-Fetal Pregnancies: Why Federal Legislation Should Require Insurers to Cover In Vitro Fertilization*, 17 WM. & MARY J. WOMEN & L. 135, 154 (2010) (quoting Lisa M. Kerr, Note, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 605 (1999)).

237. See Reynolds, *supra* note 38, at 303–04 (arguing that the Supreme Court is unlikely to recognize a fundamental right for post-menopausal women to reproduce).

238. See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (identifying factors that bear on the takings analysis, including “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action”).

239. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

240. This statement is in reference to Justice Potter Stewart's famous phrase “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.” (emphasis added)).

241. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978).

categorical rules that presume that certain types of acts automatically constitute a taking.²⁴² The per se taking rule that may apply to laws regulating the use of frozen eggs is the *Lucas* rule.²⁴³ In *Lucas v. S.C. Coastal Council*, the Court held that if the government enacts a law that deprives the property owner of all economically viable use of the owner's property, a taking occurs.²⁴⁴

The main reason a woman freezes her eggs is to conceive a child later in life. Thus, if the government passes a law preventing an older woman from using her frozen eggs to have a baby, the woman may be able to successfully argue that she has been denied all viable use of her eggs. Consequently, the government would be required to pay her just compensation for her frozen eggs.²⁴⁵ Traditionally, courts have stated that the Fifth Amendment protects personal property.²⁴⁶

The Supreme Court has indicated that personal property is entitled to less protection than real property.²⁴⁷ The most recent case

242. See Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 329–30 (2007) (describing various tests and rules used in regulatory takings cases).

243. *Lucas v. South Coastal Council*, 505 U.S. 1003, 1016 (1992) (quoting *Agins v. City of Tiburon*, 497 U.S. 255, 260 (1980)).

244. *Id.* (quoting *Agins*, 447 U.S. at 260).

245. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

246. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (holding that interest earned on lawyer trust accounts is “private property” for Fifth Amendment purposes); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (holding the same for trade secrets).

247. In *Lucas*, the Court stated the following:

[O]ur “takings” jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.” And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

to test the personal property/real property theory involved a complaint by a family of raisin growers.²⁴⁸ In 1937, Congress passed the Agricultural Marketing Agreement Act that gives the Secretary of Agriculture the authority to issue “marketing orders” to ensure that the markets for certain agricultural products remain stable.²⁴⁹ In accordance with the United States Department of Agriculture California Raisin Marketing Order, in specified years, growers have to reserve a percentage of their crops for the government.²⁵⁰ The growers are not compensated for the crops. The government has the right to dispose of the raisins in the manner it deems necessary to stabilize the market.²⁵¹ If the government sells the raisins, the growers have a right to a portion of the net proceeds acquired from the sale.²⁵²

In 2002, when governmental workers arrived at the Hornes’ farm to pick up the raisins, the Hornes refused to let them on the premises.²⁵³ In response, the government fined the Hornes the fair market value of the raisins.²⁵⁴ The Hornes also received a civil penalty for ignoring the government’s order demanding that they release the raisins.²⁵⁵ Instead of paying the fine and penalty, the Hornes filed suit claiming that the reserve requirement was a taking.²⁵⁶ The Ninth Circuit held that the per se takings rules established in *Lucas and Loretto v. Teleprompter Manhattan CATV Corp.*²⁵⁷ did not apply to personal property.²⁵⁸

The United States Supreme Court reviewed the Ninth Circuit’s decision with regard to whether the government’s regulation of the raisin industry constituted a per se taking.²⁵⁹ Writing for the Court, Justice Roberts noted that the personal/real property distinction did

Lucas, 505 U.S. at 1027–28 (second alteration in original) (citation omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

248. *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

249. Agricultural Marketing Agreement Act of 1937 § 672, 7 U.S.C.A. § 671.

250. See United States Department of Agriculture California Raisin Marketing Order, 7 U.S.C.A § 608(c).

251. *Horne*, 135 S. Ct. at 2419.

252. *Id.* at 2424.

253. *Id.*

254. *Id.*

255. *Id.* at 2425.

256. *Id.*

257. 458 U.S. 419, 441 (1982) (“[A] permanent physical occupation of property is a taking.”).

258. *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1149–40 (9th Cir. 2014) (*rev’d*), 135 S. Ct. 2419 (2015).

259. *Horne*, 135 S. Ct. at 2419.

not apply when the case involves a per se taking.²⁶⁰ The Court ruled that the reserve requirement imposed by the government was a physical taking because the government actually received a portion of the raisins. The Court reasoned that the growers “lose the entire ‘bundle’ of property rights in the appropriated raisins.”²⁶¹ The reasoning of the *Horne* case would support a woman’s taking argument. In order to bring a successful Fifth Amendment claim, a woman would have to prove that the frozen eggs are her private property; that the government’s regulation caused her to lose all of her interest in her eggs; that the government’s actions resulted in her eggs being taken for public use; and that she is entitled to just compensation for her frozen eggs unless the government repeals the challenged law.

Because eggs are now in the marketplace like any other piece of tangible property, a woman will probably be able to easily satisfy the “private property” requirement. A law that prevents a woman from using her frozen eggs once she reaches a certain age would result in a forfeiture of those eggs. As a result, it is likely that a woman could successfully argue that the government regulation caused her eggs to be forfeited and that this amounts to a taking under the Fifth Amendment. The woman would still, however, have to prove “public use” and “just compensation.”

According to the Supreme Court, “public use” for Fifth Amendment purposes refers to a public purpose.²⁶² Thus, if the government’s action serves a public purpose, it is deemed to satisfy the public use requirement of the amendment.²⁶³ Courts have broadly defined “public purpose” to give deference to legislative judgments.²⁶⁴ The focus is not on where the property ends up, but rather on the government’s motivation in enacting the regulation.²⁶⁵

260. *Id.* at 2422.

261. *Id.* at 2428.

262. *See* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896).

263. *See* *Kelo v. City of New London*, 545 U.S. 469, 485 (2005) (holding that economic development constitutes a public purpose even if the condemned land is transferred to a private entity); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015–16 (1984) (holding that taking data from one private company and giving it to another private company to eliminate barriers to entry in the pesticide market serves a public purpose); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding that breaking up a land oligopoly by transferring land to private individuals serves a public purpose).

264. *Kelo*, 545 U.S. at 480.

265. *See* *Midkiff*, 467 U.S. at 244 (indicating that “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny”).

Hence, courts have given legislatures "broad latitude in determining what public needs justify the use of the takings power."²⁶⁶

Supporters of a governmental restriction on the use of frozen eggs by post-menopausal women assert that such a law is necessary to protect the health of the woman and to promote the best interests of the child.²⁶⁷ This type of argument has also been made to justify restrictions on a woman's right to have an abortion. Once the fetus becomes viable, the state has a right to protect it from adverse actions that may be taken by its mother.²⁶⁸ If it enacted laws limiting a woman's use of her frozen eggs, the government would be motivated by a perceived need to protect women and children. Under the current takings jurisprudence, that governmental motivation may be enough to satisfy the "public use" requirement.²⁶⁹

With regards to "just compensation", the Supreme Court has stated the following:

The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.²⁷⁰

The Supreme Court has interpreted just compensation to mean fair market value.²⁷¹ Fair market value is "what a willing buyer would pay in cash to a willing seller' at the time of the taking."²⁷² It is not as easy to assess the fair market value of frozen eggs as though they were a piece of land. Nonetheless, it is not an impossible task. Currently, a market exists for donor eggs.²⁷³ Information from that market could assist a court in placing a value on a woman's frozen eggs. The purpose of just compensation is to attempt to put the property owner back in the position they were in prior to the property being taken,²⁷⁴ so, theoretically, the government should at least have to pay a woman the amount she paid to have the eggs

266. *Kelo*, 545 U.S. at 483.

267. *See, e.g., Reynolds, supra* note 38, at 295.

268. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) ("[T]he State has an interest in protecting the life of the unborn.").

269. *See Midkiff*, 467 U.S. at 244.

270. *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

271. *United States v. Miller*, 317 U.S. 369, 374 (1943).

272. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *Miller*, 317 U.S. at 374).

273. *Godoy, supra* note 208, at 365 n.71.

274. *See Bauman*, 167 U.S. at 574.

retrieved and stored. Even if a market for eggs did not currently exist, the woman could supply expert testimony pertaining to the fair market value of her frozen eggs. The law permits such testimony in wrongful death and other types of tort cases.²⁷⁵

B. The Fertility Clinic

After a woman has her eggs retrieved, she will turn them over to a fertility clinic for safekeeping. The contractual relationship between the woman and the clinic creates a special relationship—also known as privity—between the parties. That relationship obligates the woman to pay storage fees and gives the fertility clinic the duty to protect the woman's eggs from harm.²⁷⁶ Sometimes the fertility clinic may not live up to its responsibility. Neither Congress nor state legislatures have acted to strictly regulate the actions of fertility clinics.²⁷⁷ As a consequence, some clinics are not as well run or organized as others,²⁷⁸ which may put the woman's eggs at risk.

1. Conversion Challenge

A fertility clinic, for example, could accidentally "convert" the woman's eggs by accidentally using them to create an embryo for another woman.²⁷⁹ If this were to happen, it is unlikely that the woman will be able to claim ownership of the embryo or parentage of the resulting child. The main remedy available to the woman would instead be a conversion cause of action.

In order to bring such an action, the woman would have to be considered the owner of the eggs that she alleges were converted.²⁸⁰ To set forth a prima facie case for conversion, the woman would have

275. See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1212–13 (6th Cir. 1988) (permitting expert testimony on contaminated land's fair market value in a toxic tort case).

276. See, e.g., *In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003) (describing a standard embryo storage contract).

277. Judith F. Daar, *Regulatory Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 639 (1997).

278. For example, instead of keeping electronic records like most fertility clinics, the clinic involved in the *Cramblett* case labeled its vials of sperms using pen and ink. Complaint, *supra* note 25, at 5.

279. In 2009, a fertility clinic implanted Carolyn Savage, an Ohio woman, with the wrong embryo. Lewis, *supra* note 144, at 1162.

280. See *Branham v. Prewitt*, 636 S.W.2d 507, 512 (Tex. App. 1982) (citing *Terry v. Witherspoon*, 255 S.W. 471, 473 (Tex. Civ. App. 1923)), *aff'd*, 267 S.W. 973 (Tex. Comm'n App. 1925) ("Ownership of the property at the time of the conversion is material as bearing on the issue of conversion.").

to show that the fertility company had possession of her eggs, that she demanded that the eggs be returned to her, and that the fertility clinic refused to return the eggs.²⁸¹ In the alternative, the woman would be required to show that the fertility clinic actually converted the eggs before she filed suit.²⁸² Some courts have treated eggs like property capable of being traded in the market place.²⁸³ Thus, the woman would be required to show that she has a property interest in her frozen eggs. For instance, in the above example once the fertility clinic accidentally fertilized the woman's eggs with the sperm of another woman's donor, the owner of the eggs (the woman) may have a cause of action for conversion.²⁸⁴ Her action would lie in conversion—and not theft or trespass to chattels—because the woman's eggs would no longer exist in the form in which she delivered them to the fertility clinic.²⁸⁵ In this hypothetical, the woman would have a solid claim against the fertility clinic. However, it would be a hollow victory because when the property cannot be returned the remedy for a conversion action is damages determined by using a fair market value analysis.²⁸⁶ Money alone will provide little comfort for a woman who has had her eggs frozen to become a mother later in life and will no longer be able to do so.

2. Bailment Challenge

If the law prohibits a woman from using her frozen eggs to conceive once she reaches a certain age, fertility clinics may have to decide what to do with the statutorily forfeited eggs in order to maintain compliance with the law. In that case, the woman would presumably be available to participate in the decision-making process. Nonetheless, under some circumstances, the fertility clinic may be forced to act without the woman's input. This situation may occur if the woman abandons her frozen eggs for whatever reason. For example, the woman may die before she has the opportunity to

281. *Taylor v. Powertel, Inc.*, 551 S.E.2d 765 (Ga. App. 2001).

282. *Id.* (citing *Atl. Coast Line R.R. Co. v. McRee*, 76 S.E. 1057, 1057).

283. *Daar, supra* note 277, at 634.

284. This approach has been used in a case involving a fertilized egg that was accidentally destroyed. Robert E. McGough, *A Case for Federal Funding of Human Embryonic Stem Cell Research: The Interplay of Moral Absolutism and Scientific Research*, 18 J. CONTEMP. HEALTH L. & POL'Y 147, 177 (2001).

285. RESTATEMENT (SECOND) OF TORTS §§ 218, 222A (AM. LAW INST. 1965). These causes of action would be more appropriate if the fertility clinic has misplaced or accidentally destroyed the woman's eggs.

286. *R.J. Suarez Enter., Inc. v. PNYX L.P.*, 380 S.W.3d 238, 242 (Tex. App. 2012).

have her eggs frozen or fertilized. In that instance, the fertility clinic must determine whether it should dispose of the eggs or turn them over to the woman's next of kin.²⁸⁷ In addition, the woman may fail to retrieve her frozen eggs because she is able to conceive a child naturally or because she determines that she does not want children. Once the fertility clinic concludes that the woman has forsaken her eggs, it must decide what is to be done with them.

The relationship between the woman and the fertility clinic will become adversarial when the clinic acts in a way that is contrary to the woman's wishes. The following two scenarios may give rise to litigation. First, the fertility clinic may insist on retaining the woman's eggs if she fails to pay her storage fees. Second, the fertility clinic may refuse the woman's request to transfer her eggs to another facility. The woman's response to either of these situations may be to file a bailment action.

Bailments may be voluntary or involuntary.²⁸⁸ A voluntary bailment is created when a person willingly gives possession of personal property to someone for safekeeping.²⁸⁹ The owner retains ownership of the property after the bailee receives possession.²⁹⁰ For example, when a person goes to a restaurant and checks a coat, a voluntary bailment relationship is established. An involuntary bailment arises when a person loses his or her property or leaves it some place without the permission of the owner of the premises.²⁹¹ To recover under a bailment theory, the woman would have to prove: 1) the existence of an express or implied agreement to create the bailment; 2) the delivery of the property in good condition; 3) the acceptance of the property by the bailee; and 4) the failure of the bailee to return the property, or return of the property in a damaged condition.²⁹² After establishing the existence of the bailment relationship, the woman would have to show that the bailee

287. See Darr, *supra* note 277, at 621–22 (discussing open questions as to the disposition of unused reproductive material).

288. See *Aegis Investigative Grp. v. Metro. Gov't of Nashville & Davidson Cnty.*, 98 S.W.3d 159, 163 (Tenn. Ct. App. 2002) (“Although bailments are generally founded on a contractual relation, . . . [t]here is also a class of bailments which arise by operation of law.”).

289. See *id.* at 163.

290. *Am. Ambassador Cas. Co. v. City of Chicago*, 563 N.E.2d 882, 884 (Ill. App. Ct. 1990).

291. See, e.g., *Moore v. Moore*, 835 P.2d 1148, 1153 (Wyo. 1992) (finding an involuntary bailment when horses were left on a ranch without consent); *Shamrock Hilton Hotel v. Caranas*, 488 S.W.2d 151, 153 (Tex. Civ. App. 1972) (finding an involuntary bailment when a purse was left in a hotel restaurant).

292. *Robinson v. St. Clair Cnty.*, 493 N.E.2d 1154, 1155 (Ill. App. Ct. 1986).

breached the bailment by failing to exercise reasonable care or by violating the terms of the bailment agreement.²⁹³ She would also have to show that she was somehow harmed by the bailee's actions.²⁹⁴

If the fertility clinic intentionally or accidentally disposes of, destroys, or retains a woman's frozen eggs, she will probably be able to present a strong bailment case. The woman's relationship with the fertility clinic is a contractual one,²⁹⁵ so there will likely be a written agreement setting forth the terms of the bailment arrangement. Thus, the woman would be able to satisfy the first element necessary for a bailment cause of action. At the time a woman's eggs are retrieved, a fertility clinic performs tests to determine which ones are of high enough quality to warrant being frozen.²⁹⁶ As a result, the woman will also be able to prove that her eggs were in good condition when she stored them at the clinic. Because the fertility clinic staff members are in charge of the retrieval process,²⁹⁷ it will be easy for the woman to show that the clinic accepted responsibility for the safekeeping of her eggs. After she has met all of the elements to prove a bailment, the woman will need to show the ways in which the fertility clinic violated the terms of the bailment agreement.

CONCLUSION

From the moment a parent brings a child home from the hospital, the parent claims an ownership interest in that child against everyone but the other parent. As a result, parents have a legal and a moral obligation to financially and emotionally support their children unless they voluntarily terminate their parental rights. That obligation entitles parents to the freedom to raise their children with the least amount of governmental interference. Society gives parents the space to rear their children because there is a presumption that parents will act in the best interests of their children. Generally, the availability and use of reproductive technology to conceive children provides people the opportunity to treat children like commodities. Most notably, a person is able to

293. *Id.* at 1156.

294. *Id.*

295. *See In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003).

296. *See The Egg Banking Process*, CTR. FOR FERTILITY PRESERVATION AT SHADY GROVE FERTILITY, <http://centerforfertilitypreservation.com/egg-freezing/the-egg-banking-process> (last visited Apr. 6, 2016) (describing one clinic's retrieval, testing, and storage procedures).

297. *See id.*

plan their idea of the “perfect” child or to reject one that he or she considers to be defective or unacceptable. Cryopreservation of eggs has given women even more reproductive freedom. Because of the increasing use of cryopreservation, legislatures and courts will likely face the difficult task of deciding whether or not women should be able to treat their frozen eggs like any other personal property.