1999

# Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes

Carl H. Coleman

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## INTRODUCTION

The first pregnancy resulting from the implantation of an embryo[1] that had previously been frozen was reported in Australia in 1983.[2] Since then, the freezing, or cryopreservation, of embryos created through in vitro fertilization (IVF) has become

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1. Some commentators use the term "pre-embryo," rather than "embryo," to describe the entities that are the subject of this Article. The term "pre-embryo" refers to "that period of development from the end of the process of fertilization until the appearance of a single primitive streak," a period that lasts approximately fourteen days. Howard W. Jones, Jr. & Charlotte Schrader, *And Just What Is a Pre-Embryo?*, 52 FERTILITY & STERILITY 189, 190 (1989). Those who use the term "pre-embryo" emphasize that, during the first fourteen days of development, "the fate of the product of the fertilized egg is very much in doubt, with many possible alternative outcomes," *id.* at 189, and that "it is the exception rather than the rule that a single biologic individual will result." *Id.* at 190. Other commentators, however, criticize the use of the term "pre-embryo" "'as an exercise of linguistic engineering to make human embryo research more palatable to the general public.'" Richard A. McCormick, *Who or What Is the Preembryo?*, KENNEDY INST. ETHICS J. 1, 1 (1991) (quoting Michael Jarmulowicz, *Letters: Ethics, Science and Embryos*, THE TABLET, Feb. 10, 1990, at 181).

2. *See* Alan Trounson & Linda Mohr, *Human Pregnancy Following Cryopreservation, Thawing and Transfer of an Eight-Cell Embryo*, 305 NATURE 707, 709 (1983).

a standard part of the practice of assisted reproductive technologies (ARTs).[3] According to recent estimates, frozen embryos are now being accumulated at the rate of tens of thousands per year in the United States alone.[4]

The long-term storage of frozen embryos can give rise to complex legal dilemmas, particularly when the couple that created the embryos disagrees about the embryos' fate. If the couple divorces, may one partner use the embryos to achieve a pregnancy over the other partner's objection? Can one partner insist on the destruction of the embryos regardless of the other partner's views? Equally difficult questions can arise when one or both members of the couple dies, disappears, or loses decision-making capacity.

Most states have not enacted legislation addressing these issues,[5] and there are few judicial decisions on point. However, the statutes and cases that exist, as well as most of the academic and professional commentary in the area, largely support the same general approach. Specifically, they maintain that disputes over the disposition of frozen embryos could be avoided if couples signed contracts, at the time they create embryos through IVF, specifying their instructions for the disposition of any excess frozen embryos in a variety of scenarios.[6] These contracts would be binding unless both parties agree to modify their instructions at a later date. Proponents of this approach argue that it would promote the procreative liberty of the contracting parties and reduce burdens on practitioners, patients, and the courts.[7]

This Article argues that the widespread support for a contractual solution to questions surrounding the disposition of frozen embryos is misguided.[8] Rather than promoting procrea-

3. ARTs refer to a variety of procedures used to treat infertility, including assisted ovulation, assisted insemination, in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, assisted fertilization, and assisted sperm retrieval. *See* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 43-69 (1998) [hereinafter NEW YORK STATE TASK FORCE]. These procedures do not cure infertility but instead bypass it, allowing the individual to achieve pregnancy in a specific treatment cycle. *See id.* at 43.

4. *See* Gina Kolata, *Medicine's Troubling Bonus: Surplus of Human Embryos*, N.Y. TIMES, Mar. 16, 1997, at A1.

5. *But see infra* Part II.A.2.

6. *See infra* Part II.A.

7. *See infra* notes 77-79, 80-94, 99-111 and accompanying text.

8. A few other commentators have raised concerns about the application

tive liberty, requiring couples to make binding decisions about the future disposition of their frozen embryos undermines a central aspect of procreative freedom—the right to make contemporaneous decisions about how one's reproductive capacity will be used. In addition, contracts for the disposition of frozen embryos undermine important societal values about families, reproduction, and the strength of genetic ties. While advance agreements can play an important role when couples are unavailable to make disposition decisions,[9] such agreements should not be applied if either partner objects to the application of the agreement in a particular case.

Part I of this Article provides general background about IVF and embryo cryopreservation and summarizes major perspectives on the moral status of the human embryo. Part II summarizes the existing case law and commentary regarding the disposition of frozen embryos, the majority of which supports a contractual approach to resolving disposition disputes. Challenging that approach, the remainder of the article develops an alternative framework for resolving disputes about the disposition of frozen embryos. Part III explains the starting point for this framework—the principle that nothing should happen to a frozen embryo without the mutual consent of the couple that created it. Part IV argues that, although the contractual approach appears to comply with the letter of the mutual consent principle, it fails to adhere to its spirit. In place of the contractual approach, Part IV argues, the law should protect both partners' interest in making contemporaneous reproductive decisions by treating the right to control the disposition of one's frozen embryos as an inalienable right—one that can-

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of contract principles to decisions about the disposition of frozen embryos. *See, e.g.*, George J. Annas, *The Shadowlands—Secrets, Lies, and Assisted Reproduction*, 339 NEW ENG. J. MED. 935, 936-37 (1998) (noting "[t]he inadequacy of contract analysis in this area"); Kimberly E. Diamond, *Cryogenics, Frozen Embryos and the Need for New Means of Regulation: Why the U.S. Is Frozen in Its Current Approach*, 11 N.Y. INT'L L. REV. 77, 94 (1998) ("[A]llowing contract law to continue as the primary basis for U.S. courts' decisions in cryogenics cases is not the best approach."); Alexander Morgan Capron, *Parenthood and Frozen Embryos: More Than Property and Privacy*, HASTINGS CENTER REP., Sept.-Oct. 1992, at 32, 33 (criticizing "deference to prior agreements" as a means of resolving frozen embryo disputes); Ellen H. Moskowitz, *Some Things Don't Belong in Contracts*, NAT'L L.J., June 8, 1998, at A25 ("While there is merit in encouraging couples undergoing IVF to plan in advance how they would handle future disputes over frozen embryos, these plans should not be legally binding."). However, none of these articles addresses the issue of contracts at length.

9. *See infra* Part V.A.

not be relinquished irrevocably until a disposition decision actually is carried out. Part V explains how an inalienable right to mutual consent would operate in practice. Finally, Part VI responds to several objections that might be raised to the approach set forth herein.

## I. BACKGROUND

### A. IVF

Since the first child conceived through IVF was born in 1978,[10] the use of IVF and related ARTs has grown considerably. In 1996, nearly 65,000 ART treatment cycles were carried out at 300 programs in the United States.[11] The vast majority of these cycles involved IVF, a process in which fertilization occurs "in vitro"—in a laboratory dish—rather than inside the woman's body.[12]

The process of IVF typically begins with the administration of ovulation-stimulating hormones to the woman.[13] These drugs are designed to induce multiple egg-containing follicles to mature, so that numerous eggs—up to several dozen—can be obtained in a single treatment cycle.[14] Just prior to ovulation, the eggs are removed from the woman in a minor surgical pro-

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10. The first baby born through IVF was Louise Brown. *See generally* LESLEY BROWN & JOHN BROWN, OUR MIRACLE CALLED LOUISE: A PARENT'S STORY (1979).

11. *See* CENTERS FOR DISEASE CONTROL & PREVENTION ET AL., 1996 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 1, 6 (1998) [hereinafter CENTERS FOR DISEASE CONTROL]. 1996 is the most recent year for which national data about IVF and other ARTs are available.

12. *See id.* The other procedures included in this statistic were gamete intrafallopian transfer (GIFT) and zygote intrafallopian transfer (ZIFT). *See id.*

13. In "natural cycle" IVF, ovulation-stimulating hormones are not used. *See infra* notes 29-30.

14. *See* GEOFFREY SHER ET AL., IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES 49 (1995). To stimulate the ovaries, the woman generally receives injections of pituitary gonadotropins once or twice a day from early in the menstrual cycle until the day prior to egg retrieval. *See id.* at 54. Use of these drugs entails certain immediate and long-term risks, including possible allergic reactions, abdominal distension and pain, abnormal blood clotting, fluid in the abdomen or lungs, liver damage, kidney failure, stroke, life-threatening respiratory distress, or debilitating or fatal blood clots. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 47-48. In addition, concerns have been raised about a possible link between pituitary gonadotropins and ovarian cancer. *See, e.g.*, Robert Spirtas et al., *Fertility Drugs and Ovarian Cancer: Red Alert or Red Herring?*, 59 FERTILITY & STERILITY 291, 291 (1993).

cedure.[15] Then, sperm that has been obtained from the woman's male partner or a donor is introduced into individual culture dishes, each of which contains a culture medium and one egg. If fertilization occurs, the resulting embryos are allowed to mature in the culture medium for several days, after which some or all of them are transferred into the woman's uterus so that implantation can occur.[16]

Success rates of IVF vary considerably, depending on factors such as patient age, diagnosis, length of infertility, the number of previous ART attempts, and the skill and experience of the practitioners.[17] In 1996, the average live birth rate per ovarian stimulation procedure at IVF programs nationwide was 25.9 percent.[18]

### B. EMBRYO CRYOPRESERVATION

Because of the large number of eggs produced through hormonal stimulation and then fertilized, IVF frequently leads to the creation of more embryos than can safely be transferred

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15. In most cases, eggs are removed through ultrasound-guided transvaginal aspiration. Serious complications from the procedure are rare, although one death has been reported. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 55. One in 1,000 patients undergoing the procedure will require major surgery to stop bleeding or repair organ damage. *See id.*

16. *See generally id.* at 56-59. Usually, the embryos are transferred into the uterus of the woman who provided the eggs. In some situations, however, a woman will undergo ovarian stimulation and egg retrieval to produce eggs for donation to another woman. *See generally* Mark V. Sauer, *Oocyte Donation: Reviewing a Decade of Growth and Development*, 13 SEMINARS IN REPROD. ENDOCRINOLOGY 79, 79-80 (1995) (tracing the development of oocyte and embryo donation). In other cases, a woman who is unable to carry a pregnancy to term may have her eggs retrieved, fertilized, and then transferred to the uterus of a "gestational surrogate"—a woman who agrees to gestate the embryo and then relinquish the resulting child to the genetic mother after birth. *See generally* Paulo Serafini et al., *In Vitro Fertilization Surrogacy*, 4 ASSISTED REPROD. REV. 155 (1994) (discussing the process of gestational surrogacy). Both egg donation and gestational surrogacy result in a child with two biological mothers—one woman who provided the egg used to conceive the child (the "genetic mother"), and another who gestated the child and gave birth (the "birth mother" or the "gestational mother"). NEW YORK STATE TASK FORCE, *supra* note 3, at 334-40.

17. *See* CENTERS FOR DISEASE CONTROL, *supra* note 11, at 12; John Waterstone et al., *Embryo Transfer to Low Uterine Cavity*, 337 LANCET 1413, 1413 (1991) (finding substantial differences in pregnancy rates between two practitioners practicing at the same program).

18. *See* CENTERS FOR DISEASE CONTROL, *supra* note 11, at 12. The average live birth rate ranged from approximately 35 percent for women in their twenties to less than 5 percent for women in their forties. *See id.* at 15.

into the uterus at one time.[19] The ability to freeze embryos allows practitioners to store any embryos that cannot be transferred immediately for possible use at a later date. Embryos are frozen by replacing the cells' watery interior with a cryoprotectant solution, loading the embryos into straws that contain tiny amounts of fluid, and then freezing the straws using computer-controlled machines. The straws are stored in canisters kept frozen with liquid nitrogen.[20]

When cryopreservation first was introduced, many embryos were not viable after thawing.[21] The technology has improved, however, and some practitioners estimate that embryos can be stored safely for as long as fifty years.[22] However, pregnancy rates following the transfer of cryopreserved embryos are lower than those of cycles using fresh embryos.[23]

The availability of embryo cryopreservation offers several potential benefits to IVF patients. First, cryopreservation can reduce the number of times a woman must undergo ovarian stimulation and egg retrieval. If the woman does not become pregnant in her first IVF cycle (or if she wants to attempt an-

19. Determining an appropriate number of embryos to transfer per cycle has been the subject of considerable debate. To a certain point, transferring more embryos increases the likelihood of pregnancy, but it also increases the chance of multiple gestation, which entails significant risks for the woman and any children who result. *See* Maria Bustillo, *Imposing Limits on the Number of Oocytes and Embryos Transferred: Is It Necessary/Wise or Naughty/Nice?*, 12 HUM. REPROD. 1616, 1616-17 (1997). In the United States, practitioners routinely transfer four or more embryos in an IVF cycle. *See* François Olivennes & René Frydman, *The A.R.T. of Embroidery*, 11 HUM. REPROD. 699, 700 (1996). Other countries have laws that limit the number of embryos that may be transferred per cycle, most commonly to three. *See* Howard W. Jones, *The Time Has Come*, 65 FERTILITY & STERILITY 1090, 1090-91 (1996). While some commentators have urged the adoption of such laws in the United States, *see generally* ISLAT Working Group, *A.R.T. into Science: Regulation of Fertility Techniques*, 281 SCIENCE 651, 651 (1998) (calling for federal legislation), others claim that limits on the number of embryos transferred per cycle would unconstitutionally limit patients' procreative liberty by reducing the efficacy of IVF. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 206-07 (1994).

20. *See generally* NEW YORK STATE TASK FORCE, *supra* note 3, at 81-84.

21. *See* Etienne Van den Abbeel et al., *Viability of Partially Damaged Human Embryos After Cryopreservation*, 12 HUM. REPROD. 2006, 2006 (1997).

22. *See* R.G. Edwards & Helen K. Beard, *Destruction of Cryopreserved Embryos: UK Law Dictated the Destruction of 3000 Cryopreserved Human Embryos*, 12 HUM. REPROD. 3, 3 (1997).

23. *See* CENTERS FOR DISEASE CONTROL, *supra* note 11, at 21. In 1996, the average live birth rate per transfer in cycles using frozen embryos was 16.6 percent, compared to 27.9 percent for cycles using fresh embryos. *See id.*

other pregnancy), she can undergo a second cycle using frozen embryos, which substantially reduces the time, inconvenience, medical risks, and costs of the procedure.[24]

Second, cryopreservation allows women to preserve their ability to have genetically-related children even after they lose the ability to produce eggs. For example, a woman about to undergo chemotherapy can undergo IVF and freeze the resulting embryos to use after successful cancer treatment.[25] Some women approaching middle age may choose to create and freeze embryos because of concerns about age-related declines in fertility.[26]

Third, by making it possible to preserve any embryos not used immediately, the availability of cryopreservation makes it possible for persons morally opposed to the destruction of human embryos[27] to undergo ovarian stimulation and IVF with the knowledge that multiple embryos might result. If, by con-

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24. *See supra* note 14.

25. Although researchers have reported some success in freezing unfertilized eggs, *see* Eleonora Porcu et al., *Birth of a Healthy Female After Intracytoplasmic Sperm Injection of Cryopreserved Human Oocytes*, 68 FERTILITY & STERILITY 724, 725 (1997), the cryopreservation of eggs is still not part of standard clinical practice. Therefore, women who wish to freeze their eggs must fertilize them first, either with sperm from their partners or, if they do not have a partner, with donor sperm. As an alternative for women who wish to preserve their future reproductive options, some IVF programs will remove and freeze portions of a woman's ovary for possible re-implantation at a later date. *See* Gina Kolata, *Surgery Preserves Parts of an Ovary for Reimplanting*, N.Y. TIMES, Dec. 12, 1995, at A1. The first successful re-implantation of frozen ovarian tissue was reported in September 1999. *See* Denise Grady, *Balerina's Ovarian Tissue Transplant Gives Hope to Other Young Women Facing Infertility*, N.Y. TIMES, Sept. 25, 1999, at A9. However, some programs have actively marketed ovarian cryopreservation as accepted medical treatment for years, a practice that has raised ethical concerns. *See, e.g.*, The National Advisory Board on Ethics in Reproduction, *NABER Identifies Ethical Issues Raised by the Marketing of Two New Cryopreservation Techniques*, 2 NABER REP. 1, 1-2 (1996).

26. Women's fertility begins to decline gradually after age 30, with a steeper decline between ages 35 and 40 and a near loss of reproductive potential by the mid- to late-forties. *See* Daniel Navot et al., *Age-Related Decline in Female Fertility Is Not Due to Diminished Capacity of the Uterus to Sustain Embryo Implantation*, 61 FERTILITY & STERILITY 97, 97 (1994). Even after menopause, however, women are able to gestate an embryo created with an egg from a younger woman. *See id.* at 100; Mark V. Sauer et al., *Pregnancy in Women 50 or More Years of Age: Outcomes of 22 Consecutively Established Pregnancies from Oocyte Donation*, 64 FERTILITY & STERILITY 111, 113 (1997) (finding that implantation rates with donor eggs are as high in women over 50 as in younger women).

27. *See infra* Part I.D.

trast, any embryos not used immediately had to be discarded,[28] persons opposed to the destruction of human embryos would probably be unwilling to create multiple embryos. Although they might be willing to use "natural cycle" IVF, in which only those eggs that mature naturally in any given month are retrieved and fertilized,[29] the likelihood of becoming pregnant through natural cycle IVF is extremely low.[30] Cryopreservation therefore expands the reproductive options of persons who believe that the disposal of human embryos is immoral.

Fourth, the ability to preserve any untransferred embryos decreases the incentive to transfer high numbers of embryos in the initial IVF cycle, thereby reducing the likelihood that a multiple gestation will occur. Multiple gestations, particularly high-order multiple gestations such as triplets or greater, create significant risks for the woman, the developing fetuses, and any children who result, including a substantially greater chance of death during the first year of life.[31] Moreover, when high-order multiple gestations occur, patients often are asked to consider fetal reduction—a procedure in which one or more fetuses are destroyed so the remaining ones have a better

28. Theoretically, it would be possible for persons opposed to the destruction of embryos to donate excess embryos to other patients, but the demand for donor embryos is relatively low. *See infra* notes 38-42 and accompanying text. Moreover, without the ability to freeze embryos, donation could take place only if a recipient were available to use the embryos immediately.

29. Natural cycle, or unstimulated, IVF is performed without using most ovulation-stimulating drugs. Instead, practitioners monitor the woman's natural cycle and, at the appropriate time, remove any eggs that have matured. *See generally* Una M. Fahy et al., *In-Vitro Fertilization in Completely Natural Cycles*, 10 HUM. REPROD. 572, 574-75 (1995) (concluding that natural cycle IVF can be effective).

30. Natural cycle IVF has a lower success rate than cycles in which ovarian-stimulating drugs are used because fewer eggs are produced and the clinician cannot control the timing of ovulation. Of 26,961 IVF cycles initiated in 1994 (the latest year for which data on natural cycle IVF are available), 410 did not involve ovarian stimulation. Only 16 of these cycles resulted in deliveries. *See* Society for Assisted Reproductive Technology & the American Society for Reproductive Medicine, *Assisted Reproductive Technology in the United States and Canada: 1994 Results Generated from the American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry*, 66 FERTILITY & STERILITY 697, 698 (1996).

31. One in ten infants from multiple gestations dies before reaching twelve months of age, and survivors are far more likely than singletons to suffer complications leading to lifelong disability. *See* Joyce A. Martin et al., *Triplet Births: Trends and Outcomes, 1971-1994*, *in* VITAL HEALTH STATISTICS, at 1, 10 (National Ctr. for Health Statistics Series 21, No. 55, 1997).

chance—a decision that is agonizing for most patients and morally unacceptable for some.[32] However, the impact of cryopreservation on the number of embryos transferred remains unclear, and national data indicate that the rate of IVF-generated multiple births has not gone down since cryopreservation became widely available.[33]

Finally, cryopreservation offers increased options for women at risk of developing certain medical complications associated with ovarian stimulation and egg retrieval. For example, in some cases, hormones used to stimulate ovulation can lead to ovarian hyperstimulation syndrome (OHSS), a condition in which the ovaries become swollen and painfully filled with cysts.[34] Because pregnancy can aggravate the symptoms of OHSS, patients deemed at risk of developing the condition may be advised to freeze all of the embryos created following ovarian stimulation and to use them to establish a pregnancy once the risk of developing OHSS has passed.[35]

### C. DISPOSITION OF CRYOPRESERVED EMBRYOS

In many cases, cryopreserved embryos will be used by the couple that created them. If the couple is no longer willing or able to use the embryos together, they have five options: allow the embryos to be used by one or both of the partners, either alone or with a new partner; donate the embryos to another patient; destroy the embryos; allow the embryos to be used in scientific research (following which the embryos will be destroyed);[36] or keep the embryos in frozen storage indefinitely.

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32. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 458-60 (minority report) (arguing "that fetal reduction in ARTs be outlawed except in those instances where the destruction of the unborn life is necessary to prevent the death of the mother"); Mary McKinney et al., *The Psychological Effects of Multifetal Pregnancy Reduction*, 64 FERTILITY & STERILITY 51, 51-52 (1995).

33. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 151 (reporting that the percentage of IVF deliveries that were multiple births has risen steadily since 1987).

34. *See* Joseph G. Schenker, *Prevention and Treatment of Ovarian Hyperstimulation*, 8 HUM. REPROD. 653, 653 (1993).

35. *See* I. Wada et al., *Does Elective Cryopreservation of All Embryos from Women at Risk of Ovarian Hyperstimulation Syndrome Reduce the Incidence of the Condition?*, 100 BRIT. J. OBSTETRICS & GYNECOLOGY 265, 269 (1993) (finding that the severity, although not the incidence, of OHSS can be reduced if women considered at risk of developing OHSS freeze all of their embryos for transfer at a later date).

36. Research with excess embryos left over from infertility treatment is generally "basic" or "nontherapeutic" research, meaning that it is not designed

Some couples may agree that, if they are unable to use all of their embryos together, either one or both of the partners should have the right to use any remaining frozen embryos to start a new family. According to some reports, some couples decide that the partner with the predominant factor of infertility should have the right to use any excess embryos because that person may find it difficult to reproduce in any other way.[37]

Many cryopreservation programs offer the option of donating excess frozen embryos to other infertility patients, but it does not appear that this option is used frequently.[38] In one study, couples' interest in donating excess embryos declined substantially once the implications of the procedure were made clear—in particular, the fact that donation could result in the birth of genetic siblings of the couple's existing children.[39] Moreover, the demand for donor embryos appears to be relatively low.[40] No state or federal law limits the use of embryo donation,[41] although laws in some states require couples who donate excess embryos to undergo screening for infectious and/or genetic diseases.[42]

Destruction of unwanted embryos is another option at most cryopreservation programs, although some practitioners are unwilling to participate in the destruction of embryos they have

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to benefit the particular embryos that are the subject of the research. According to the American Society for Reproductive Medicine, basic embryo research "involves [a] prior declaration that no resulting [embryos] will be transferred to the uterus, either because the [embryo] is not expected to survive the experimental procedure or because there is obvious risk that abnormalities may be caused by the study procedures." Ethics Committee of the American Fertility Society, *Ethical Considerations of Assisted Reproductive Technologies*, 62 FERTILITY & STERILITY 78S, 78S (Supp. 1994).

37. Comments of practitioners, New York Academy of Medicine Symposium on Assisted Reproductive Technologies (June 16, 1998).

38. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 238-39.

39. Douglas M. Saunders et al., *Frozen Embryos: Too Cold to Touch? The Dilemma Ten Years On*, 10 HUM. REPROD. 3081, 3081 (1995).

40. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 238-39.

41. However, when embryo donation was first introduced, some commentators raised concerns that the procedure might run afoul of state laws prohibiting embryo research, given that embryo donation was arguably an experimental procedure. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 238; *see also infra* note 49.

42. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 245-54. In states with these requirements, many embryos now in storage could not be used for donation because the couples who created the embryos did not undergo the necessary medical screening before the embryos were frozen. *See id.* at 254.

worked hard to create.[43] Some programs comply with requests to destroy unwanted embryos by transferring the embryos to another facility, where the destruction is performed.[44] Two states have enacted laws that limit the ability of programs to destroy unwanted embryos. In Louisiana, the destruction of frozen embryos is prohibited by statute.[45] In Kentucky, public medical facilities may be used for IVF or IVF research only if "such procedures do not result in the intentional destruction of a human embryo."[46]

Some cryopreservation programs offer the option of donating excess embryos for scientific research. Embryo research is conducted for a variety of purposes, including increasing understanding of early embryo development, improving infertility treatment, diagnosing genetic abnormalities, and developing contraceptives or treatments for cancer.[47] Embryos also may be used to produce "stem cells"—a kind of cell that has the potential to develop into many types of human tissues—which may be used in research on human development or to develop drugs and other treatments for a wide variety of diseases.[48] In four states, statutes prohibit or significantly limit the use of embryos in scientific research.[49]

The final disposition option—indefinite storage—can be either an affirmative choice or the result of an unwillingness or inability to decide. While some cryopreservation programs set time limits on storage of human embryos, these limits are not always strictly enforced.[50] Moreover, couples who wish to pre-

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43. *See* Kolata, *supra* note 4, at A32.

44. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 301.

45. *See* LA. REV. STAT. ANN. § 9:129 (West 1998).

46. KY. REV. STAT. ANN. § 311.715 (Michie 1998).

47. *See* NATIONAL INSTS. OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL 2 (1994).

48. *See* Eliot Marshall, *A Versatile Cell Line Raises Scientific Hopes, Legal Questions*, 282 SCIENCE 1014, 1014 (1998).

49. *See* 720 ILL. COMP. STAT. ANN. § 510/6(7) (West 1998); LA. REV. STAT. ANN. § 9:122 (West 1998); N.M. STAT. ANN. § 24-9A-1–7 (Michie 1998); 18 PA. CONS. STAT. ANN. § 3216 (West 1998). New Hampshire is the only state that specifically permits embryo research, but it places some restrictions on the way embryos are handled. *See* N.H. REV. STAT. ANN. § 168-B:15 (1999). Federal funding is not available for research in which embryos will be destroyed or discarded. *See* Pub. L. No. 105-78, § 513, 111 Stat. 1467, 1517 (1997). However, the National Institutes of Health has taken the position that the ban on federal funding of embryo research does not preclude federal funding of research on stem cells derived from human embryos. *See* Eliot Marshall, *Ruling May Free NIH to Fund Stem Cell Studies*, 283 SCIENCE 465, 465 (1999).

50. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 306.

serve their frozen embryos after the time limit has expired have the option of transferring the embryos to another facility.[51]

### D. THE MORAL STATUS OF HUMAN EMBRYOS

Commentators hold widely differing perspectives on the moral status of the human embryo. Disputes over the disposition of frozen embryos often stem at least in part from these different ethical views.

At one end of the spectrum is the view that human embryos are persons from the moment of conception, a position exemplified by the Vatican's 1987 *Instruction on Respect for Human Life in Its Origins and on the Dignity of Procreation*.[52] Those taking this position emphasize that a person's unique genetic makeup is complete as soon as that person is conceived. As the Vatican's *Instruction* states, "from the first instant, the program is fixed as to what this living being will be: a man, this individual man with his characteristic aspects already well determined."[53]

Virtually all commentators who believe that embryos are persons object to the intentional destruction of human embryos, as well as to research on embryos that will result in the embryos' destruction.[54] Indeed, many of those who regard embryos as persons oppose any use of IVF, in large part because of

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51. In *York v. Jones*, 717 F. Supp. 421, 427 (E.D. Va. 1989), a federal district court rejected an IVF program's efforts to deny a couple the right to transfer their frozen embryo to another facility. *See also* Del Zio v. Columbia Presbyterian Med. Ctr., No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450, at *12-24 (S.D.N.Y. Nov. 14, 1978) (ordering IVF program to pay damages to a couple for intentional infliction of emotional distress after destroying an embryo rather than returning it to the couple).

52. Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, 16 ORIGINS 697, 701 (1987).

53. *Id.*

54. *See id.* at 702-03; *see also* BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 199 (1992) ("If embryos are human persons, with the same right to life as any other person, then discarding them or using them for research purposes because they are unwanted or defective is seriously wrong."). However, one Catholic ethicist has concluded that thawing and discarding excess cryopreserved embryos can demonstrate respect for the embryos' potential humanity by "accepting the inevitable, namely that these embryos have no future with regard to the development of their potentiality and therefore should perish." P.R. Koninckx & P. Schotsmans, *Spare Embryos: Symbols of Respect for Humanity and Freezing in the Pronuclear Stage*, 11 HUM. REPROD. 1841, 1842 (1996).

the risk that the resulting embryos will be destroyed or used in scientific research.[55] When couples who have undergone IVF are left with frozen embryos they no longer wish to use, adherents of the embryo-as-person perspective generally regard donation to other patients as the most acceptable option because it will give the embryos a chance to be born.[56]

At the other end of the spectrum is the position that embryos have no special moral status but instead should be viewed as the property of the couple that created them. This perspective—which few commentators explicitly embrace[57]—would give the couple unfettered discretion over how their frozen embryos are disposed.

Most commentators maintain that embryos are neither persons nor property.[58] Those who take this position generally agree that embryos have a heightened moral status and that, as a result, society should treat embryos with "special respect."[59] For example, in a 1994 statement, the American Fer-

55. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 105-14. In addition to concerns about the destruction of human embryos, the Catholic Church maintains that, by separating reproduction from the conjugal act, IVF "deprives human procreation of the dignity which is proper and conatural to it." Congregation for the Doctrine of the Faith, *supra* note 52, at 707. Some Catholic commentators, however, believe that IVF can be morally acceptable for married couples using their own gametes. *See, e.g.*, Richard A. McCormick, *Therapy or Tampering? The Ethics of Reproductive Technology*, AMERICA, Dec. 7, 1985, at 396, 399.

56. Although the Catholic Church generally opposes the use of ARTs, a Vatican ethicist endorsed the idea of "pre-natal adoption" as an alternative to the planned destruction of excess embryos in the United Kingdom in 1996. *See* Associated Press, *Vatican Shift on Embryos: Eyes "Pre-Natal Adoption,"* DAILY NEWS, July 24, 1996, at 6.

57. *But see* ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 40 (1989) ("Of all the things that the embryo can be . . . the one that emerges in the daily administration of IVF and cryopreservation is the legalistic notion of the embryo as property."); Diamond, *supra* note 8, at 87 ("[F]or public policy reasons, designating frozen embryos as pure property seems to be the best approach.").

58. Some commentators argue that although embryos are not themselves "property," individuals have "property interests" in their embryos insofar as they have the right to control how the embryos will be used. *See, e.g.*, John Dwight Ingram, *In Vitro Fertilization: Problems and Solutions*, 98 DICK. L. REV. 67, 75-76 (1993); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1038-39 (1994).

59. Most of these commentators regard the embryo's moral status as different from that of fetuses. Some emphasize that pre-implantation embryos are at a much earlier stage of development than fetuses already in the womb and that they clearly lack the capacity to experience pleasure or pain. *See, e.g.*, Samuel Gorovitz, *Progeny, Progress, and Primrose Paths*, *in* THE ETHICS

tility Society (now known as the American Society for Reproductive Medicine) concluded that an embryo is not a person but that it "is to be treated with special respect because it is a genetically unique, living human entity that might become a person."[60] Others have argued that embryos are entitled to special respect "because [they are] the result of procreative activity"[61] or because they may constitute "a potent symbol of human life."[62]

Commentators who believe that embryos are entitled to special respect generally oppose actions that contribute to the perception of embryos as commodities. For this reason, virtually all of these commentators oppose the purchase and sale of embryos.[63] Some also oppose the creation of embryos specifically for research purposes[64] or the creation of embryos "on

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OF REPRODUCTIVE TECHNOLOGY 117, 122-23 (Kenneth D. Alpern ed., 1992) (arguing that the "emergence" of personhood "begins to have moral force with the onset of fetal sentience"). Other commentators distinguish embryos from fetuses on the ground that embryos will not develop into children without significant technological intervention. *See* STEINBOCK, *supra* note 54, at 200 ("The fertilized egg *in vitro* cannot develop into a fetus 'all by itself.'").

60. Ethics Committee of the American Fertility Society, *supra* note 36, at 33S.

61. George J. Annas et al., *The Politics of Human-Embryo Research–Avoiding Ethical Gridlock*, 334 NEW ENG. J. MED. 1329, 1330 (1996).

62. STEINBOCK, *supra* note 54, at 196-97.

63. *See, e.g.*, Ethics Committee of the American Fertility Society, *supra* note 36, at 51S. Some states have laws prohibiting the purchase and sale of embryos. *See, e.g.*, FLA. STAT. ANN. § 873.05 (West 1998); LA. REV. STAT. ANN. § 9:122 (West 1991); MINN. STAT. ANN. § 145.422 (West 1998). Federal law lists specific body parts, including fetal tissue, that may not be sold. *See* 42 U.S.C.A. § 274e (1998). However, since federal regulations define a fetus as the product of human conception from implantation until birth, *see* 45 C.F.R. § 46.203(c) (1998), an embryo that has not yet been implanted would not fall within the definition of fetus or fetal tissue.

64. *See, e.g.*, Annas et. al., *supra* note 61, at 1331 (arguing that "it is the intention to create a child that makes the creation of an embryo a moral act" and that creating "embryos solely for research . . . seems to cheapen the act of procreation and turn embryos into commodities"). *But see* STEINBOCK, *supra* note 54, at 211 (arguing that, because embryos cannot be harmed or benefited, "it is as permissible to create embryos with the intention of using them in valuable scientific research as it is to create them with the intention of transferring them for implantation"). In a September 1994 report, the National Institutes of Health Human Embryo Research Panel recommended that federal funding should be available for the creation of embryos expressly for research under two conditions: when the research cannot by its nature be conducted otherwise, as with research on eggs prior to fertilization or on the process of fertilization itself, and when a representative group of embryos is needed to validate a study "of outstanding scientific and therapeutic value" and some of those embryos are not available through donations. NATIONAL INSTS. OF

speculation"—i.e., by fertilizing donor eggs with donor sperm not for the treatment of specific patients but in order to create an inventory of embryos to market to prospective patients in the future.[65]

Most adherents of the "special respect" position, however, do not oppose the destruction of unwanted embryos or the use of embryos in at least some forms of scientific research.[66] Some commentators who support embryo research note that society approves of research on other entities entitled to "special respect," such as cadavers.[67] One commentator argues that "symbolic value should not take precedence over the interests of real people" and therefore should not preclude embryo research that could lead to important medical advances.[68]

In addition to differing views on the embryo's moral status, other ethical and religious considerations may affect individuals' decisions about the disposition of frozen embryos. For example, some religious authorities object to embryo donation (as well as the donation of sperm and eggs) because of the potential impact on the purity of blood lines within families.[69] In some religions, a particular concern with embryo donation is the risk

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HEALTH, *supra* note 47, at xii. In response to the report, however, President Clinton announced that he would not approve any federal funds for the creation of human embryos solely for research. *See* Warren E. Leary, *Clinton Rules Out Federal Money for Research on Human Embryos Created for That Purpose*, N.Y. TIMES, Dec. 3, 1994, at A8.

65. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 275 (recommending regulations prohibiting facilities from creating embryos by fertilizing donor eggs with donor sperm except at the request of specific patients who intend to use the embryos for their own treatment).

66. Many commentators who support embryo research believe that such research should be limited to the first fourteen days of the embryo's development. During that period, the embryo is not yet committed to forming a single being, as it may still divide into twins or combine with other embryos to form a single entity. *See* Ethics Committee of the American Fertility Society, *supra* note 36, at 29S-30S. Fourteen days also is the point at which embryos generally implant in the uterine wall and when the "primitive streak," the precursor of the nervous system, first appears. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 983-84 (1986). Some commentators also believe that embryo research should be limited to questions "directly related to infertility." Annas et. al., *supra* note 61, at 1332.

67. *See* Annas et al., *supra* note 61, at 1330.

68. STEINBOCK, *supra* note 54, at 197, 209.

69. *See, e.g.*, Baruch Brody, *Current Religious Perspectives on the New Reproductive Technologies*, *in* BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 45, 55-56 (D.M. Bartels ed., 1990) (discussing Islamic law).

that the resulting children may marry their biological siblings later in life, unaware of their genetic relationship, thereby violating religious proscriptions against consanguineous marriages.[70]

## II. RESOLVING CONFLICTS OVER THE DISPOSITION OF FROZEN EMBRYOS: EXISTING LAW AND COMMENTARY

Conflicts over the disposition of frozen embryos can arise in a variety of circumstances. Couples that create embryos in the course of a committed relationship may disagree about what should be done with the embryos when the relationship dissolves. If one partner dies, disappears, or loses decision-making capacity, the other partner's decisions regarding the embryos may be challenged by the storage facility or by other family members, such as the adult children of the partner who is not present.[71]

These disputes can take a variety of forms. They can be conflicts between two persons who each want to use the embryos—a woman who wants to become pregnant herself and a man who wants the embryos for use with his new wife or partner. Alternatively, one partner may want to use the embryos and the other may want them donated to another person, used by researchers, or destroyed. Disputes can arise even when neither person seeks to use the embryos. For example, one person may insist on destroying the embryos while the other wants to donate the embryos to another patient or for scientific research.

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70. *See id.*; *see also* NOAM J. ZOHAR, ALTERNATIVES IN JEWISH BIOETHICS 73 (1997) (discussing Jewish law). In addition to violating religious proscriptions, inadvertent consanguinity also increases the likelihood of transmitting rare genetic conditions. *See* Anthonius de Boer et al., *Determination of a Maximum Number of Artificial Inseminations by Donor Children per Sperm Donor*, 63 FERTILITY & STERILITY 419, 419 (1995). For this reason, professional societies suggest that programs refrain from using gametes from the same donor to create more than a specified number of pregnancies. *See, e.g.*, American Fertility Society, *Guidelines for Therapeutic Donor Insemination: Sperm*, 59 FERTILITY & STERILITY 1S, 4S (Supp. 1993) (suggesting a limit of ten pregnancies per sperm donor).

71. Although no such cases have arisen involving frozen embryos, challenges to the use of frozen sperm have been brought by the adult children of the depositor. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993) (rejecting challenge by deceased man's adult children to distribution of man's frozen sperm to his former partner).

### A. THE CONTRACTUAL APPROACH

The contractual approach to decisions about frozen embryos seeks to avoid disposition disputes by requiring couples to enter into binding agreements about the future disposition of their frozen embryos before they undergo IVF. This approach has been endorsed by several courts and commentators, as well as some state legislators.

#### 1. Cases

*Davis v. Davis*,[72] a Tennessee case decided in 1992, was the first judicial decision in this country to address a conflict over the disposition of frozen embryos.[73] *Davis* involved a divorcing couple who disputed the custody of seven frozen embryos created during the couple's marriage.[74] When the case was initially filed, the wife wanted to use the embryos to attempt to have a child after the divorce.[75] Her husband, citing his own experience being raised apart from his natural parents, did not want to father a child who would not live with both parents.[76] By the time the case reached the Tennessee Supreme Court, the wife no longer wanted to use the embryos herself; instead, she wanted to donate the embryos to a childless couple. The husband wanted the embryos to be destroyed.

Although the couple had not signed any written agreement regarding the disposition of the embryos in the event of divorce, the Tennessee Supreme Court addressed the validity of such agreements to provide guidance for future cases. The court concluded that "an agreement regarding disposition of any untransferred [embryos] in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors."[77] The court stated that initial agreements could be modified as circumstances changed, but in the absence of a mutual modification

72. 842 S.W.2d 588 (Tenn. 1992).

73. *See id.* at 589.

74. *See id.*

75. *See id.*

76. *See id.* at 603-04. When Mr. Davis was a child, his parents divorced and his mother had a nervous breakdown. *See id.* at 603. Mr. Davis was "raised at a home for boys run by the Lutheran Church." *Id.* He had monthly visits with his mother but saw his father only a few times. *See id.*

77. *Id.* at 597.

the prior agreements should be considered binding.[78] According to the court, enforcing advance agreements regarding the disposition of frozen embryos "is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the [embryos], retain decision-making authority as to their disposition."[79]

In the absence of an advance agreement, the court held, the guiding principle for resolving disputes should be respect for the parties' procreative autonomy.[80] Procreative autonomy, the court concluded, includes both "the right to procreate and the right to avoid procreation."[81] The court specifically held that the individuals' interest in procreative autonomy outweighs the state's interest in potential human life: "Certainly, if the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed, then surely there is no state interest in these [embryos] which could suffice to overcome the interests of the gamete-providers."[82]

The court concluded that, on the facts before it, the husband's interest in avoiding genetic parenthood outweighed the wife's interest in becoming a genetic parent, largely because the wife no longer wanted to use the embryos herself.[83] If the wife had wanted to use the embryos herself, the court indicated that it would have considered whether she could have become a parent through other means, including adoption or additional attempts at IVF, without forcing the husband to become a genetic parent against his will.[84]

In the only other decision by a state's highest court involving a conflict over the disposition of frozen embryos, *Kass v. Kass*,[85] the New York Court of Appeals also endorsed the contractual approach, this time as the central holding of the case. *Kass*, like *Davis*, involved a dispute between a couple in the midst of a divorce. The wife wanted to use frozen embryos created during the couple's marriage in an attempt to become

78. *See id.*
79. *Id.*
80. *See id.* at 598.
81. *Id.* at 601.
82. *Id.* at 602.
83. *See id.* at 604.
84. *See id.*
85. 696 N.E.2d 174 (N.Y. 1998).

pregnant after the divorce.[86] The husband wanted the embryos donated to scientific research.[87] In support of his claim, the husband relied on a consent form signed at the time the embryos were frozen, which, he argued, reflected a clear intent that any excess embryos would be used for research purposes.[88] The wife argued that the consent form was meant to apply only in cases of death or incapacity, not if the couple divorced.[89]

In a unanimous opinion, the New York Court of Appeals concluded that the consent form "unequivocally manifest[ed]" the couple's intent to donate any excess embryos to scientific research in the event of a dispute, including disputes arising in the context of a divorce, and that this advance expression of the couple's intent should be enforced.[90] The court found that enforcing advance agreements governing the disposition of frozen embryos would serve important policy goals. First, "[e]xplicit agreements avoid costly litigation in business transactions: They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable."[91] Second, advance agreements "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."[92] Third, advance agreements "provide the certainty needed for effective operation of IVF programs."[93] Finally, the court suggested that the knowledge that advance agreements will be enforced "underscores the seriousness and integrity of the consent process" for couples undergoing IVF.[94]

In a footnote to the *Kass* opinion, the Court noted that advance agreements might be unenforceable if they violate public policy or if significantly changed circumstances preclude enforcement.[95] However, because the wife had not raised these arguments, the court did not address them in its opinion.[96]

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86. *See id.* at 177.
87. *See id.*
88. *See id.* at 176-77.
89. *See id.* at 181.
90. *Id.* at 180.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *See id.* at n.4.
96. *See id.* In addition to *Kass* and *Davis*, a Florida trial court has endorsed the contractual approach to the resolution of frozen embryo disputes.

2. Legislation

While most states have not adopted legislation regarding the disposition of frozen embryos, a statute in Florida expressly embraces the contractual approach by directing couples and physicians to "enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."[97] In other states, legislators have introduced similar bills.[98]

3. Commentary

Many academic commentators also advocate a contractual approach to disposition decisions.[99] John Robertson, a leading

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That case, however, is distinguishable from the situation addressed in this Article because the husband's sperm was not used to create the embryos. Instead, the embryos were created with the wife's eggs and donor sperm. *See* Associated Press, *Judge Gives Mother Custody of Embryos*, Sept. 19, 1990, *available in* LEXIS, Nexis Library, AP File (reporting on decision upholding advance agreement giving control over the embryos to the wife); *see also infra* Part V.C. (discussing the disposition of embryos created with donor sperm or eggs).

A Massachusetts trial court also held that written agreements concerning the disposition of frozen embryos should generally be enforced. *See* A.Z. v. B.Z., No.15-008-96 (Suffolk County Prob. Ct., Mar. 25, 1996). In that case, the couple had signed seven consent forms prior to freezing their embryos, all of which stated that if the couple separated, the embryos should be given to the wife. *See id.* at 8-11. Despite its general endorsement of the contractual approach, the court declined to enforce the couple's advance agreements because it concluded that the circumstances had changed so significantly that enforcement of the agreements would be unfair. *See id.* at 24. Specifically, the court found that, when the couple signed the agreement, they had not contemplated that they would have twins by IVF, the husband would file for divorce, and the wife would then seek to use the embryos to have an additional child. *See id.* The court concluded that "[t]hese concomitant events create[d] such a change in circumstances that it cannot be said that either party contemplated the current situation or contracted for the resolution of its occurrence." *Id.* at 25. Finding that "the man and woman are equal gamete-providers who should be given equal authority in the decisions regarding the [embryos'] disposition," *id.* at 22, the court permanently enjoined the wife from using the embryos. *See id.* at 28. While the opinion in *A.Z.* purports to endorse the contractual approach, the court's refusal to enforce the contract is arguably more consistent with the proposal set forth in this Article. As discussed below, however, the *A.Z.* court's reliance on the doctrine of changed circumstances was misplaced. *See infra* note 209.

97. FLA. STAT. ANN. § 742.17 (West 1998).

98. *See, e.g.*, S.B. 1120, 222d Leg. (N.Y. 1999) (pending bill that would require couples entering IVF programs to execute written directives concerning future disposition of any excess frozen embryos).

99. *See, e.g.*, Christi D. Ahnen, *Disputes over Frozen Embryos: Who Wins,*

authority on legal issues surrounding ARTs, argues that enforcing advance agreements for the disposition of frozen embryos is the only way to protect the couple's interest in procreative autonomy.[100] If advance agreements are not enforced, he maintains, "decisions about embryos will be made by others in ways which might insufficiently value the reproductive concerns of the persons involved."[101] Robertson compares advance agreements for the disposition of frozen embryos with living wills[102] and organ donor cards,[103] which, he argues, are ways to protect "one's current interests and autonomy" by "direct[ing] future events when the person is unable or unavailable to decide."[104] According to Robertson, "[f]reedom to contract or to make directives binding in future situations enhances liberty even though it involves constraints on what may occur once the future situation comes about."[105]

Robertson also argues that enforcing advance agreements is necessary for the administrative efficiency of IVF programs. If programs do not have the authority to rely on a couple's advance agreement, he contends, "[a] program would never be able to dispose of embryos" if the couple is unavailable or unable to agree.[106] In addition, Robertson claims that enforcing advance agreements will decrease the incidence of disputes over the disposition of frozen embryos, because parties are un-

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*Who Loses, and How Do We Decide?*, 24 CREIGHTON L. REV. 1299, 1344-50 (1991); Ingram, *supra* note 58, at 74-83; John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 463-73 (1990) [hereinafter Robertson, *In the Beginning*]; John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 407 (1990) [hereinafter Robertson, *Prior Agreements*]; Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 826 (1992); Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937 (1999); John A. Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CENTER REP., Nov.-Dec. 1989, at 7, 10-11 [hereinafter Robertson, *Resolving Disputes*].

100. Robertson, *Prior Agreements*, *supra* note 99, at 415.

101. *Id.* ("If the prior agreement is not binding, then the IVF program, a court, or a legislature will determine the disposition of frozen embryos.").

102. A living will is a document in which a competent adult sets forth directions regarding medical treatment to be used in the event of a future loss of decision-making capacity. *See* George J. Annas, *The Health Care Proxy and the Living Will*, 324 NEW ENG. J. MED. 1210, 1210 (1991).

103. *See* UNIF. ANATOMICAL GIFT ACT § 2 (1987) (authorizing individuals to make an anatomical gift to take effect upon or after death).

104. Robertson, *Prior Agreements*, *supra* note 99, at 415 n.28.

105. *Id.* at 415.

106. *Id.* at 417.

likely to challenge disposition decisions that are consistent with those set forth in an enforceable contract.[107] Those disputes that do arise, he suggests, will be less costly and less difficult to litigate because the only issue will be the existence and interpretation of the parties' agreement.[108]

The contractual approach to resolving disputes over the disposition of frozen embryos also has broad support among professional organizations and physicians involved in the practice of ARTs. The American Society for Reproductive Medicine recommends that all IVF programs "require each couple contemplating embryo storage to give written instruction concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage charges, inability to agree on disposition in the future, or lack of contact with the program."[109] Likewise, two prominent IVF practitioners have stated that no embryo should be frozen unless the program has obtained "explicit informed consent vis-à-vis future disposition."[110] A 1997 survey of IVF programs in New York State found that some programs would not begin the process of egg retrieval unless the couple had completed a form indicating not only their understanding of the procedures but also their wishes about various disposition options for both the eggs retrieved and any embryos created with those eggs.[111]

### B. OTHER APPROACHES

Several other approaches to resolving disputes over the disposition of frozen embryos also have been suggested in the literature.[112] One supports resolving the dispute in favor of the

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107. *See id.* at 418.

108. *See id.*

109. Ethics Committee of the American Society for Reproductive Medicine, *Ethical Considerations of Assisted Reproductive Technologies*, 67 FERTILITY & STERILITY 1S, 1S (Supp. 1997).

110. Zev Rosenwaks & Owen K. Davis, *On the Disposition of Cryopreserved Human Embryos: An Opinion*, 12 HUM. REPROD. 1121, 1121 (1997).

111. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 298-99.

112. Some commentators argue that there might be no need to resolve disputes over the disposition of frozen embryos if states limited the number of eggs that could be fertilized in any given cycle. *See* Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 496-97 (1992). This is the approach used in Germany, where practitioners may not fertilize more than three eggs per retrieval. *See* H.M. Beier & J.O. Beckman, *German Embryo Protection Act (Oct. 24, 1990): Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz-Eschg)*, 6 HUM. REPROD. 605, 605 (1991). The problem with this approach is that it subjects the woman to

partner who seeks to use the embryos to have a child, either in all cases or if certain specified circumstances exist. Another advocates destroying the embryos if the couple cannot agree. It is not always clear, however, whether those who support these positions view them as alternatives to the contractual approach or as second-best solutions in cases where the parties have not agreed to a disposition decision in advance.

1. Favoring the Partner Who Seeks To Use the Embryos

Giving the embryos to the partner who seeks to use them to have a child has been proposed for several distinct reasons. Some who take this position argue that embryos are persons and deserve an opportunity to be brought to term. The trial court in *Davis* adopted this approach, finding that disputes over frozen embryos should be decided in a manner that would promote the embryos' best interests.[113] Accordingly, the court granted full custody of the embryos to the wife because she would "bring [these children] to term through implantation."[114]

Others who believe that disputes should be resolved in favor of the party seeking to procreate do not rely on the embryos' moral status. Instead, they argue that, by undergoing IVF, a couple creates an implied contract to use any embryos they produce to attempt to have a child.[115] As a result, if one of the partners wishes to use the embryo to have a child and the other does not, the dispute should be resolved in favor of the partner seeking to reproduce—either the woman, by using the embryo herself, or the man, by transferring the embryo to his new wife

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additional medications and egg retrievals, which carry significant physical risks. *See supra* notes 14-15. In addition, many couples will be unable to afford the cost of multiple cycles.

113. *See* Davis v. Davis, 15 Family L. Rptr. 2097, 2097 (Tenn. Cir. Ct. 1989), *rev'd*, 842 S.W.2d 588 (Tenn. 1992).

114. *Id.*

115. *See* Tanya Feliciano, Davis v. Davis*: What About Future Disputes?*, 26 CONN. L. REV. 305, 345-46 (1993) ("It is . . . easy to find an implied contract between two parties who attempt IVF: participation in an IVF program is conduct that reasonably leads to the assumption that both parties have committed to reproduction."). Feliciano also relies on the doctrine of promissory estoppel: because the partner who wants to use the embryos reasonably relied, to her detriment, on the other partner's commitment to reproduce jointly, "the partner who opposes implantation of the embryos should be estopped from asserting his or her right not to reproduce." *Id.* at 346; *see* Trespalacios, *supra* note 99, at 829 (claiming that "through the bilateral exchange of promises to complete the IVF process by the exchange of gametes for the engineering of a[n] [embryo], the parties create a contract whether or not they have signed a written agreement").

or partner or to a surrogate.[116] Supporters of this approach acknowledge that the partner opposing reproduction will be forced to accept the "tremendous psychological burden in knowing that one has biological offspring," but they argue that this burden is justified by the implied commitment to reproduce at the time the embryos were created.[117]

Some commentators maintain that, while the rights of the partner seeking to avoid reproduction normally deserve protection, an exception should be made if the partner who seeks to use the embryos has no other way of having a biologically-related child. For example, Lee Silver and Susan Remis Silver argue that the critical question is "which party has a constitutional right that, once lost, can never be regained."[118] When the partner seeking to use the embryos is physically unable to produce additional sperm or eggs, they argue, both partners have "irrevocable constitutional rights" at stake—the right to avoid biological parenthood for one partner and the right to become a biological parent for the other. In such situations, they advocate a case-by-case analysis in which the interests of the partner seeking to use the embryos would carry considerable weight.[119]

Finally, some commentators argue that, when the woman seeks to use the embryos to have a child, her partner's objection is not entitled to respect because the woman's interest in the embryos is inherently greater than the man's. Ruth Colker, for example, emphasizes that, in most cases, it is far more difficult to retrieve an egg from a woman than it is to retrieve sperm

116. For a description of surrogacy, see *supra* note 16.

117. Feliciano, *supra* note 115, at 349 (arguing further that the partner opposing reproduction may be able to avoid the legal responsibilities of biological parenthood by consenting to the adoption of the child by the other partner's new spouse); *see also* Heidi Forster et al., *Comment on ABA's Proposed Frozen Embryo Disposition Policy*, 71 FERTILITY & STERILITY 994, 994 (1999) (reporting on a proposal by the American Bar Association's Section on Family Law that would have given control of frozen embryos to "'the party wishing to proceed in good faith and in a reasonable time, with gestation to term, and to assume parental rights and responsibilities'").

118. Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 614 (1998).

119. *See id.* at 614-16 (suggesting that, "[i]f the non-consenting party simply wants to avoid having custody or financial responsibility, a court could convert the party's status from being the *parent* of a frozen embryo to being an 'egg donor' or 'sperm donor' without the custody or financial obligations of parenthood").

from a man.[120] Because embryos, once created, are "more valuable to the woman than to the man and are more essential to her capability to become a parent," Colker argues, "we should generally decide these cases in favor of the woman when she desires to use the frozen embryos to further her reproductive capacity."[121]

Some commentators taking this position draw an analogy to the Supreme Court's decision in *Planned Parenthood v. Danforth*,[122] which struck down a law requiring spousal consent to most abortions on the ground that the woman's physical investment in pregnancy and childbirth gives her the right to determine whether a pregnancy should be continued.[123] The trial court in *Kass v. Kass* made this analogy, concluding that because pregnant women have the right to continue the pregnancy without regard to their partners' wishes,[124] they also should have the right to decide that a frozen embryo will be brought to term.[125] According to the court, allowing a man to stop a woman from using a frozen embryo, when he could not force her to abort a fetus already in the womb, would "favor situs over substance"[126] by conditioning the woman's right to make decisions about whether to have a child on whether conception occurs naturally or through IVF.

120. *See* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1063, 1074 (1996). However, while sperm is generally obtained through masturbation, invasive medical procedures may be required for men who cannot ejaculate or in whom part of the reproductive tract is missing or blocked. *See* Kwang-Yul Cha et al., *Approaches for Obtaining Sperm in Patients with Male Factor Infertility*, 67 FERTILITY & STERILITY 985, 985 (1997).

121. Colker, *supra* note 120, at 1079. The Israeli Supreme Court appeared to adopt this approach in a 1996 dispute between a divorcing couple. In that case, the wife, who wanted to use the embryos, was 42 years old and could probably not produce any more eggs. The court concluded that "[a] woman's right to be a parent prevails over the husband's right not to be a parent." Joel Greenberg, *Israeli Court Gives Wife Right to Her Embryos*, N.Y. TIMES, Sept. 13, 1996, at A10.

122. 428 U.S. 52 (1976).

123. *See id.* at 69. For comments, see, for example, Feliciano, *supra* note 115, at 318-19.

124. N.Y. L.J., Jan. 23, 1995, at 34 (Nassau County Sup. Ct. 1995), *rev'd*, 663 N.Y.S.2d 581 (1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

125. *See id.*

126. *Id.*

2. Destroying the Embryos If the Couple Cannot Agree

Some commentators maintain that when couples cannot agree about the disposition of their frozen embryos, the best solution is for the embryos to be destroyed. Those who take this position emphasize the harm that would arise if the embryos were used by either partner over the other's objection. Noting that "[g]enetic ties may form a powerful bond between an individual and his or her progeny even if the progenitor is freed from the legal obligations of parenthood," Patricia Martin and Martin Lagod suggest that "forcing one to become a genetic parent may work a quiet form of violence and violate a vital freedom."[127] To avoid this outcome, they argue that in cases where the couple cannot agree, the embryos should be thawed and discarded. "Preembryo loss," they maintain, "is the price of the progenitors' freedom and mutual dependence."[128]

In a still-pending case in New Jersey, a trial court appeared to adopt this view.[129] In that case, a couple undergoing a divorce could not agree about the disposition of seven frozen embryos created during the couple's marriage.[130] The wife wanted the embryos destroyed, but the husband wanted to preserve the embryos for possible use with a new partner or donation to another couple.[131] Finding that the *raison d'être* for the couple's infertility treatment was for the couple "to conceive a child for *themselves*,"[132] the court ordered the embryos destroyed.[133] The fact that the husband was not infertile and did not need to use the embryos to become a parent also contributed to the court's conclusion.[134]

## III. THE IMPORTANCE OF MUTUAL CONSENT

In place of the approaches described above, the remainder of this Article proposes an alternative framework for resolving

127. Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, The Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 290 (1990).

128. *Id.* at 291.

129. *See* J.B. v. M.B., FM-04-95-97 (N.J. Super. Ct. Sept. 28, 1998), *appeal docketed*, No. A-1544-98T3 (N.J. Super. Ct. App. Div. May 15, 1999).

130. *See id.* at 4.

131. *See id.*

132. *Id.* at 6.

133. *See id.* at 8.

134. *See id.* ("We know that the husband has a reasonable probability of achieving parenthood by means other than the use of the frozen embryos.").

disputes over the disposition of frozen embryos. Like the contractual approach, this framework starts with the premise that decisions about the disposition of frozen embryos belong to the couple[135] that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed. This Part explains why objections to disposition decisions by either partner should be respected, both to lay the groundwork for the critique of the contractual approach in Part IV and to respond to the approaches described in Part II that would give one partner greater decision-making rights.[136]

The basic point developed in this Part is that, in the absence of the partners' mutual consent, carrying out any of the affirmative disposition options outlined above—use by one partner, donation to another patient, destruction, or use in research—would impose greater burdens on the objecting partner than keeping the embryo frozen would impose on the partner whose preferred disposition option is not enforced. Thus, any rules for the disposition of frozen embryos should require the consent of both partners before any of these irrevocable disposition decisions is carried out.[137]

### A. OBJECTIONS TO THE USE OF THE EMBRYOS BY ONE PARTNER

Consider the case where one partner wants to use the couple's frozen embryos to have a child, but the other partner does not. In these situations, the partner who opposes the use of the embryos can claim a strong interest in avoiding genetic parenthood.[138] In some cases, this interest may reflect practical concerns about the possible legal and financial obligations resulting from becoming a biological parent.[139] Even if those

135. For purposes of this Article, the term "couple" refers to any heterosexual intimate relationship, regardless of whether the partners are married. Same-sex relationships are not included because they necessarily involve the use of either sperm or eggs from outside the relationship. In addition, the discussion that follows, like the cases and commentary discussed in Part II, assumes that both partners contributed their own gametes to the creation of the embryos. For a discussion of embryos created with donor sperm and/or eggs, see *infra* Part V.C.

136. *See supra* Part II.B.1.

137. The argument developed herein is grounded in considerations of public policy, not constitutional law. Thus, the point is not that the law *must* require mutual consent to disposition decisions. Rather, it is that enforcing a disposition decision over either partner's objection would be bad public policy.

138. *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

139. A child's biological parents are both responsible for supporting the child. *See, e.g.*, N.Y. FAMILY COURT ACT § 513 (McKinney 1999). In New

obligations were extinguished,[140] the objecting partner would still have to live with the knowledge that he has genetic offspring, and "with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite."[141] As demonstrated by the experience of parents who have relinquished their children for adoption, this knowledge can impose lifelong psychological and emotional burdens.[142] Regardless of whether the interest in avoiding genetic parenthood rises to the level of a constitutional right,[143] it is significant enough to warrant substantial consideration as a matter of public policy.

Balanced against this interest in avoiding genetic parenthood is the other partner's desire to use the embryos to have a child. However, if this partner is able to have children without using the couple's remaining frozen embryos (for example, through coital reproduction or additional attempts at IVF with another partner), she can achieve her goal of becoming a parent without making the objecting partner a genetic parent against

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York, a mother's agreement to waive the father's obligations will not be enforced unless a court determines that "adequate provision has been made" for the child through other means. *Id.* § 516(a); *see also* Straub v. B.M.T., 645 N.E.2d 597, 600 (Ind. 1994) (refusing to enforce an unmarried woman's preconception agreement not to hold a man liable for child support, finding that such agreements violate the state's "public policy of protecting the welfare of children" through ensuring their financial security from both parents).

140. Most states have laws that extinguish the parental rights and responsibilities of gamete and/or embryo donors, at least in some circumstances. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 327-34, 339-40. Some commentators have argued that these laws should be extended to situations where one partner uses a couple's frozen embryos over the other partner's objection; in such cases, the objecting partner would be treated as an embryo "donor" with no parental rights or responsibilities. *See, e.g.*, Silver & Silver, *supra* note 118, at 615.

141. Robertson, *In the Beginning*, *supra* note 99, at 479; *see also* Forster et. al., *supra* note 117, at 994 (arguing that "[t]he use of one's unique genetic material to create a child against one's will, even if one is not required to provide for the child, is a violation of one's bodily integrity and personal choice").

142. *See* Leverett Miller & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55(3) AM. J. ORTHOPSYCHIATRY 411, 412 (1985) (finding that women who have relinquished a child for adoption continue to feel a "bond of such enduring intensity that time and physical separation often do not seem to weaken the affinity of the mother for the child").

143. *See* Robertson, *In the Beginning*, *supra* note 99, at 499-500 (arguing that, although "[a] cogent argument, based on Supreme Court contraceptive cases, exists for finding a fundamental right to avoid biologic offspring," such an argument is unlikely to be recognized by a "Supreme Court disinclined to expand the menu of unwritten fundamental rights").

his will. In such cases, the interests of the partner seeking to use the embryos are comparatively weak.[144]

If the partner seeking to use the embryos is unable to have children through other means, her desire to use the couple's remaining frozen embryos may seem stronger.[145] Yet, the fact that a person has a deep desire to have genetic offspring does not mean that she has a right to do so through any possible means. The embryos would not exist but for the contribution of *both* partners' genetic material. Because the embryos are the products of the couple's shared procreative activity, any decision to use them should be the result of the couple's mutual choice.

It is true that requiring mutual consent for the use of the embryos may impose a hardship for the partner who is unable to have genetic children through other means. But it is important to keep in mind the context in which the embryos were originally created—a mutual undertaking by the couple to have children together.[146] Once the mutuality of the endeavor has ended, the fact that one partner is no longer able to have genetic offspring should not give her the right to disregard her partner's objections and appropriate the embryos for her own exclusive use. It is not as if the partner who objects to the use of the embryos was the cause of the other partner's inability to have genetic offspring. Rather, the inability to have children is the result of external factors, such as age or physiological impairment.[147] The objecting partner should not be forced to ex-

144. *See id.* at 480 ("As long as the party wishing to reproduce could create other embryos, the desire to avoid biologic offspring should take priority over the desire to reproduce with the embryos in question.").

145. *See supra* notes 118-19 and accompanying text.

146. *See* J.B. v. M.B., FM-04-95-97, at 6 (N.Y. Super. Ct. Sept. 28, 1998) (observing that the *raison d'être* for the couple's infertility treatment was for the couple "to conceive a child for *themselves*").

147. For a discussion of the factors that contribute to male and female infertility, see NEW YORK STATE TASK FORCE, *supra* note 3, at 16-35. One of the primary factors leading to female infertility is age. *See id.* at 16-18. Thus, if the law permitted the unilateral use of the embryos by a partner unable to have genetic children through other means, "any divorcing woman over 40 years old could reasonably claim disputed embryos on the ground that age-related infertility . . . makes it highly unlikely that she would be able to succeed with her own eggs during later cycles of IVF." John A. Robertson, *Disposition of Frozen Embryos by Divorcing Couples Without Prior Agreement*, 71 FERTILITY & STERILITY 997, 997-98 (1999). If this argument were accepted, an exception to the mutual consent principle for partners unable to have genetic children through other means could very well "swallow the rule." *Id.* at 997.

perience the burdens of unwanted genetic parenthood to remedy a situation he did nothing to create.[148]

In addition, requiring mutual consent for the use of frozen embryos would not impose an absolute limitation on either partner's ability to become a parent. Even if one partner is unable to produce additional embryos, adoption would still be an option.[149] While adoption does not further the individual's interest in becoming a *genetic* parent, it does further the interest in having children to rear.[150]

While some commentators have argued that a partner unable to produce additional embryos has a constitutional right to use the couple's remaining frozen embryos to have a child,[151] that argument rests on a distorted interpretation of the constitutional interests at stake. To the extent there is support for a constitutional right to procreate,[152] it is grounded in cases pro-

148. In some cases, the partner who wishes to use the embryos may claim that she is unable to have children because she delayed reproduction in reliance on the availability of her previously-frozen embryos, and that the objecting partner is responsible for this reliance-induced inability to procreate. For a response to this argument, see *infra* text accompanying notes 296-97.

149. In contrast to the low success rates of ARTs, *see supra* notes 17-18 and accompanying text, "[i]t is exceptionally rare for a couple who have carefully decided on adoption, responsibly educated themselves about its issues, and aggressively pursued a variety of avenues toward the goal not to be successful in finding a child to parent." PATRICIA IRWIN JOHNSTON, ADOPTING AFTER INFERTILITY 84 (1992). Some commentators criticize society's tendency to treat adoption as a second-best alternative to family building. *See, e.g.*, ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 164-86 (1993).

150. The Tennessee Supreme Court recognized this point in *Davis*. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (noting that even if the wife "were unable to undergo another round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption"). *But see* David L. Theyssen, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711, 712 (1999) ("In light of the special concerns and difficulties relevant to adoption, it should not be forced upon the parent wishing to implant the embryos as an equal alternative to child birth if no other genetic options are available.").

151. *See* Silver & Silver, *supra* note 118, at 614.

152. The Supreme Court has never explicitly recognized an affirmative right to procreate, as opposed to a right to avoid procreation through contraception or abortion. Nonetheless, most commentators agree that such a right can be inferred, at least for married couples, from cases recognizing a constitutional right of privacy. *See, e.g.*, ROBERTSON, *supra* 19, at 37 (arguing that "a married couple's right to reproduce would be recognized even by conservative justices if a case restricting coital reproduction ever reached the Supreme Court"). It is unlikely that such a right would extend to all forms of ARTs, particularly those that rely on the use of third parties, such as gamete donors or surrogate carriers. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN

tecting the intimacy of private relationships and promoting the development of family bonds.[153] As Radhika Rao has argued, it is the underlying relationship in which procreative decisions are made that is protected, not "the individual's solo right" to engage in activities that may lead to having a child.[154] An individual's unilateral decision to have a child without regard to her partner's views is simply not the sort of intimate activity to which the right to procreate is meant to apply. Even if the partner who wishes to use the embryos is unable to reproduce through other means, having a child by appropriating the genetic material of someone who objects cannot plausibly be interpreted as a constitutionally protected right.[155]

The gender of the partner seeking to use the embryos should not affect the analysis of the competing interests at stake.[156] While a woman has the right to decide whether to

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CONSTITUTIONAL LAW 1360 (2d ed. 1988) (arguing that the abortion and contraception cases do not "automatically entitle infertile couples (or individual men and women, fertile or infertile) to buy genetic material from others or to contract for gestation 'services'"). Yet, there is a strong argument that it should apply to a couple's use of frozen embryos created with both partners' gametes, as this type of activity implicates nearly all of the factors that underlie the constitutional protection of coital reproduction within marriage. For example, a couple's use of their frozen embryos takes place in the context of an intimate relationship; it allows the couple to produce and raise their genetic progeny; and it permits the woman to have the experience of pregnancy and childbirth. *See generally* NEW YORK STATE TASK FORCE, *supra* note 3, at 144-46.

153. *See* Ann M. Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's* Children of Choice, 52 WASH. & LEE L. REV. 135, 161 (1995) ("The marriage relationship, with its concomitant intimacy, thus lies at the heart of the constitutionally protected right of privacy.").

154. Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1103 (1998) ("Privacy does not simply guarantee individuals the right to sexual, reproductive, and parental autonomy. It protects the relationships between people that develop in the course of these activities, rather than the individual's solo right to engage in such activities."); *see also id.* at 1116 (arguing that, "[w]hen there is dissent among the individuals involved in a relationship, individual assertions of a right to privacy become incoherent").

155. The fact that the partner seeking to procreate does not have a constitutionally-protected right to use the embryos over the other partner's objection does not mean that a state could not choose to favor the wishes of the partner seeking to have a child as a means of promoting its interest in potential human life. However, a state is not required to assert an interest in the potential life of cryopreserved embryos, and to date only one state has arguably done so. *See* LA. REV. STAT. ANN. § 9:129 (West 1998) (prohibiting the destruction of human embryos).

156. *See supra* notes 120-26 and accompanying text.

terminate a pregnancy regardless of her partner's views,[157] that right stems from her interest in bodily integrity—her right to choose whether to use her body to carry a fetus to term. When embryos exist outside the body, the woman's interest in controlling her body during pregnancy is not at stake.[158]

It is true that the woman's physical investment in the creation of an embryo is usually greater than that of the man.[159] However, at the time a disposition dispute arises, those physical contributions have already occurred. At that point, the primary issue for both partners is whether they will become biological parents, an issue that affects both of them equally.[160] Moreover, the burdens of unwanted genetic parenthood will last a lifetime. As such, they will greatly outweigh either partner's short-term physical investment at the time the embryos were initially created.

It is also significant that any bodily invasions the woman experienced when the embryos were created were the result of her own voluntary choice. By contrast, when the Court struck down a law requiring spousal consent to abortions in *Danforth*, it did so because the law itself infringed on the woman's right to bodily integrity: absent the consent of the woman's partner, the law *required* the woman to undergo the physically invasive experience of pregnancy and childbirth.[161] Because honoring a man's objection to the use of frozen embryos does not require the invasion of his partner's bodily integrity, the physical imposition on the woman to create the embryos should not give her greater decision-making rights.

### B. OBJECTIONS TO DONATING THE EMBRYOS

If it is inappropriate to allow one partner to use a frozen embryo over the other partner's objection, there is even less justification for allowing the donation of a frozen embryo to another person when one partner objects. Donation does not fur-

157. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976).

158. *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (concluding that "disposition of these [embryos] does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice").

159. There are some cases where the man also must undergo invasive medical procedures. *See* Cha et. al., *supra* note 120, at 985.

160. *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (noting that, although "it is fair to say that women contribute more to the IVF process than men," the couple, "[a]s they stand on the brink of potential parenthood," have equivalent interests at stake).

161. *See* 428 U.S. at 67-71.

ther the procreative liberty of either partner. Although it may lead to the birth of biological offspring, the absence of any intention to develop a relationship with those offspring distinguishes it from the type of activity that the right to procreate is designed to protect.[162] Even if the partner who seeks to donate excess embryos has strong religious convictions that favor giving the embryos a chance to be born,[163] it would be unfair to allow that person to pursue those convictions by making the objecting partner a biological parent against his or her will.[164]

### C. OBJECTIONS TO THE DESTRUCTION OR RESEARCH USE OF THE EMBRYOS

Finally, the couple's mutual consent should be required before an embryo is destroyed, including cases where the embryo is used in scientific research and then destroyed.[165] A person whose religious or moral objections to destruction are ignored may be burdened with a profound sense of grief, regret, and guilt.[166] One need not agree with the perspective that embryos are persons to recognize that people who hold this position will

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162. *See, e.g.*, Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 80 (1992) (characterizing the right to procreate as the "right to produce one's own children to rear"); Bonnie Steinbock, *Review Essay/Procreative Liberty*, CRIM. JUST. ETHICS, Winter/Spring 1996, at 67, 72 ("[T]he 'right to reproduce' is meaningful only when there is an intention, as well as an ability, to assume the role of parent.").

163. *See supra* Part I.D.

164. It might be argued that if a partner's desire to donate the embryos is grounded in a religious conviction that the embryos deserve a chance to be brought to term, a rule prohibiting donation without mutual consent would implicate that partner's First Amendment rights. However, such an argument is difficult to reconcile with the Supreme Court's recent rulings in the area of religious freedom. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (holding that burdens on religious freedom that are incidental effects of generally applicable and otherwise valid laws do not violate the First Amendment).

165. Whether a state may prohibit the destruction of embryos even with the couple's mutual consent is not entirely clear. *Compare* Rao, *supra* note 154, at 1118-19 (stating that "even a decision to discard extracorporeal embryos, though distinguishable from the act of abortion because it implicates no right of bodily integrity, might well be included within the couple's right of relational privacy on the grounds that it involves their formation of a family"), *with* Robertson, *In the Beginning*, *supra* note 99, at 527-30 (suggesting that laws prohibiting the destruction of human embryos would be upheld because they do not burden the right to avoid gestation and pregnancy).

166. *Cf.* Perry & Schneider, *supra* note 112, at 494 ("When an embryo is lost, some gamete providers have mourned them as if a child has died.").

likely experience the destruction of their embryos as a significant loss.[167] While requiring mutual consent to destruction may frustrate the wishes of the partner who prefers that the embryos be destroyed, the burdens of continued storage on that partner do not compare to those that would be experienced by someone whose embryos are destroyed against her will. As long as it is clear that the embryo may not be used to create a child without the couple's mutual consent, a requirement that both partners consent to destruction would simply mean that the embryos would stay where they are—in frozen storage. It would not infringe on either partner's right to choose whether the embryos will be used.[168]

## IV. CONSENT, CONTRACTS, AND INALIENABILE RIGHTS

In theory, the contractual approach to the resolution of disputes over the disposition of frozen embryos adheres to the mutual consent principle articulated in Part III. According to the contractual approach, the couple's consent is provided before the embryo is initially frozen; a subsequent change of mind by one of the partners does not make the original consent any less valid. Indeed, the judicial decisions and academic commentary that support the contractual approach all emphasize the importance of respecting the couple's mutual right to control their embryos' fates.[169]

Yet, despite its apparent deference to the couple's mutual wishes, the contractual approach insufficiently protects the individual and societal interests at stake. First, decisions about the disposition of frozen embryos implicate rights central to individual identity. On matters of such fundamental personal importance, individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs.[170]

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167. Thus, in *J.B. v. M.B.*, the court was wrong to dismiss the husband's objection to destruction simply because frozen embryos are not considered "living entities" as a matter of law. FM-04-95-97, at 6 (N.J. Super. Ct. Sept. 28, 1998). The fact that *the law* does not regard embryos as persons is not the point; if one of the partners who created the embryos believes that embryos are persons, those views are entitled to the law's respect. Rather than ordering the embryos destroyed, the court should have entered an order prohibiting the use of the embryos but permitting the husband to store them indefinitely at his own expense. *See infra* Part V.A.

168. The financial burdens of continued storage could be imposed on the party who opposes destruction. *See infra* Part V.A.

169. *See supra* Part II.A.

170. *See infra* Part IV.B.1.

Second, requiring couples to make binding decisions about the future use of their frozen embryos ignores the difficulty of predicting one's future response to life-altering events such as parenthood.[171] Third, conditioning the provision of infertility treatment on the execution of binding disposition agreements is coercive and calls into question the authenticity of the couple's original choice.[172] Finally, treating couples' decisions about the future use of their frozen embryos as binding contracts undermines important values about families, reproduction, and the strength of genetic ties.[173]

In place of the contractual approach, this Part argues that the right to consent or to withhold consent to the disposition of one's frozen embryos should be treated as an inalienable right—a right that cannot be relinquished irrevocably until a disposition decision actually will be carried out.[174] Under this approach, advance disposition agreements would still play an important role,[175] but if one of the parties to the agreement changes his or her mind, the mutual consent principle would no longer be satisfied and the previously agreed-upon disposition decision could not be enforced. Instead, the embryo would remain in frozen storage until the parties reach a new agreement, the embryo is no longer viable, or storage facilities are no longer available.[176] As discussed below, this approach would respect the rights of both partners while providing clear and easily-administered rules for practitioners, storage facilities, and the courts.[177]

This Part begins by recasting the issue presented by advance disposition agreements. Rather than a simple choice between respecting the partners' decisions or allowing the decisions to be made by someone else, the question whether to enforce advance disposition agreements requires a judgment about the meaning of respecting a person's decisions when that person's values and desires change. The Part then defends the position that respecting the partners' decision-making authority with regard to the disposition of frozen embryos means al-

171. *See infra* Part IV.B.2.
172. *See infra* Part IV.B.3.
173. *See infra* Part IV.B.4.
174. *See infra* notes 184-98 and accompanying text.
175. *See infra* notes 255-56 and accompanying text.
176. *See infra* Part V.A.
177. For a discussion of the practical applications of this approach, see *infra* Part V.

lowing them to change their minds until a disposition decision is implemented.

### A. THE NATURE OF THE DILEMMA: RESPECTING CHOICE WHEN PEOPLE CHANGE

Consider the following scenario:

A married couple enters into an IVF program, hoping to have their first child after many years of infertility. Neither partner has ever had a child. Before treatment begins, the couple signs an agreement that will govern the disposition of their frozen embryos in a variety of circumstances, including death, incapacity, or divorce. The couple agrees that if one of these unlikely scenarios ever arises, the embryos should be donated to an infertile couple who is unable to produce embryos on their own. They reason that donating the embryos would be a charitable act that would allow some good to come out of a painful situation like death or divorce.

Several years pass. The couple, after producing several dozen embryos during multiple treatment cycles, has two children. Nine of the couple's embryos remain in frozen storage. Unfortunately, the couple's marriage deteriorates. What was unthinkable at the time treatment began becomes a reality: the couple decides to divorce. The husband, relying on the advance agreement, wants the nine frozen embryos donated to an infertile couple. The wife now finds this unacceptable. She states that when she signed the disposition agreement she had no idea what it would mean to her to be a parent. Now that she has two children, the idea of donating her embryos to another couple, who might give birth to and raise *her* children, offends her deeply. Rather than donating the embryos, she would prefer to use them herself, to destroy them, or to keep them frozen indefinitely.

According to the contractual approach, the solution to the couple's dispute is clear: the prior agreement to donate the embryos should be enforced. Because the prior agreement was based on the couple's mutual consent, supporters of the contractual approach would argue, enforcing it is the only way to protect both partners' right to determine how the embryos will be used.[178]

There is a peculiar quality to this argument, however. Although the rationale for enforcing the agreement is that doing

178. *See supra* notes 99-105 and accompanying text.

so will protect both partners' decision-making rights, the result—donating the embryos to an infertile couple—is precisely what the wife does not want. The position makes sense only if one assumes that the wife's original consent to donation remains "her decision" even after she has changed her mind. If donating the embryos can be considered the wife's own choice, it is possible both to ignore her current objections to donation and to claim respect for her underlying right to decide.

From the wife's current perspective, however, this argument is unlikely to carry much weight. Her original consent to donation, she might argue, was made before she became a parent. She had no idea what it would mean to her to give birth to her genetic offspring, and she could not possibly appreciate what it would feel like to have her children born to and raised by someone else. In fact, from her current perspective, her prior decision may seem like the decision of a completely different person—the person she was before she became a parent and understood what donating her embryos would really mean.[179] In the words of Anthony Kronman, she may regard this prior decision "as a foreign element whose continuing influence appears senseless from the standpoint of [her] present goals."[180] While donating the embryos might be respectful of the wishes of this previous version of herself, it does not respect the rights and interests of the person she is today.

Viewed in this light, the argument that enforcing prior agreements respects both partners' right to control the embryos' fate is only partially correct. Enforcing a couple's prior agreements respects the decision-making authority of the persons the partners were at the time the agreement was made, but if one of the partners has experienced a major change—if she has become a "new person," as many people perceive themselves after major life events such as parenthood—enforcing the agreement may be profoundly disrespectful of the person this partner has become.

The question, then, becomes this: If the principle of mutual consent set forth in Part III is accepted, and it is true that people change in fundamental ways over time, at what time does the partners' consent matter? Should the law protect the

179. Some philosophers maintain that people change in such substantial ways over time that they actually become different "selves." *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 326-29 (1984).

180. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 782 (1983).

wishes of the partners at the time the embryos are created, or should the mutual consent principle be interpreted to require the consent of the partners when the decision will be carried out? Put another way, the question is not simply *whether* the partners will control the disposition of their embryos, but *which* phase of an individual's evolving personality has priority when her wishes at the time the embryos were created differ from those at the time the decision will be carried out.

This question, of course, is by no means limited to the disposition of frozen embryos. In virtually all areas of human activity, people change their minds about agreements made in the past. For example, a person may commit to buying goods at a particular price and then regret it if the market price goes down. The owner of a business may agree to sell her company and then change her mind because she fears that she will have nothing interesting to occupy her time. In general, the law does not consider these changes of heart a sufficient excuse for failing to adhere to the original agreement. Except in a limited number of circumstances, such as those involving fraud,[181] duress,[182] or mental incapacity,[183] the law treats the individual's prior commitment as legally binding; her current wishes and interests are subordinated to those she expressed in the past.

In a few situations, however, the law takes a different approach. In some circumstances, the law treats certain rights as inalienable, meaning that promises to relinquish these rights are not enforceable if the person who made the promise changes her mind.[184] For example, the law in most states will not enforce a promise to marry,[185] nor will it enforce an agree-

181. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (stating that contracts induced by fraud are voidable).

182. *See id.* § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

183. *See id.* § 12 ("No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.").

184. The examples of inalienable rights discussed in the text involve private agreements between two individuals. Other types of inalienable rights also exist. For example, criminal defendants cannot irrevocably waive their right to be present at trial in a capital case, *see* Diaz v. United States, 223 U.S. 442, 455 (1912), to raise a plea of incompetence to stand trial, *see* Pate v. Robinson, 383 U.S. 375, 384-85 (1966), or to assert a privilege against self incrimination, *see* Stevens v. Marks, 383 U.S. 234, 244 (1966).

185. *See generally* Note, *Heartbalm Statutes and Deceit Action*, 83 MICH. L. REV. 1770, 1771 (1985) (discussing state statutes abolishing actions for breach of a promise to marry).

ment never to seek a divorce.[186] An individual may change her mind about whether or not to have children during marriage, even if a prior agreement about reproduction was the foundation on which the marriage was built.[187] A woman's promise to have an abortion, or to refrain from having an abortion, is not legally binding.[188]

Two important examples of inalienable rights relate to decisions about relinquishing a relationship with one's biological offspring. First, state laws governing adoption typically impose significant limitations on a parent's ability to relinquish a child. In most states, agreements to relinquish parental rights made before a child is born are ineffective if the mother changes her mind.[189] Even after birth, the law generally gives parents a "cooling off" period to reconsider any decision to relinquish parental rights.[190]

Similarly, in most states, agreements in which women promise to gestate a child and then relinquish it after birth—so-called "surrogate parenting" arrangements[191]—are void and

186. *See* 15 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1741-43 (3d ed. 1972). Under so-called "covenant marriage" statutes, couples may agree to narrow the circumstances under which divorce will be available, but these statutes do not foreclose the option of divorce entirely. *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1226-27 (1998) (discussing covenant marriage statutes in Louisiana and Arizona).

187. *See* Capron, *supra* note 8, at 33 ("Certainly a couple's agreement, prior to marriage, that they would have children would not be sufficient to compel them to go forward with reproduction if either concluded that he or she did not want to become a parent with the other."); *cf.* McCann v. McCann, 593 N.Y.S.2d 917, 923 (Sup. Ct. 1993) (holding that a husband's fraudulent promise to have children with his wife following their marriage, although "morally reprehensible," did not constitute an "egregious marital fault" for purposes of equitable distribution statute).

188. *See* Martha A. Bohn, *Contracts Concerning Abortion*, 31 U. LOUISVILLE J. FAM. L. 515, 525-27 (1992-1993) (discussing a Kentucky case that found that contracts in which one person pays another to obtain an abortion are void as against public policy).

189. *See, e.g.*, Sullivan v. Mooney, 407 So. 2d 559, 563 (Ala. 1981) (per curiam); Anonymous v. Anonymous, 439 N.Y.S.2d 255, 260 (Sup. Ct. 1981).

190. *See, e.g.*, KY. REV. STAT. ANN. § 199.500(5) (Michie 1998); OHIO REV. CODE ANN. § 3107.08(A) (Anderson 1998).

191. In some surrogate parenting arrangements, the child is conceived with the surrogate's own egg. In these situations (sometimes referred to as "traditional surrogacy" or "genetic/gestational surrogacy"), the surrogate is the child's biological mother in all respects. In other cases, embryos created with the egg and sperm of the intended parents are implanted in the surrogate, who then carries the pregnancy to term. In these situations (generally known as "gestational surrogacy"), the surrogate is the gestational mother but is not

unenforceable if the woman changes her mind. For example, under New York's surrogate parenting statute, if a surrogate mother changes her mind and refuses to relinquish the child after it is born, the woman retains the legal rights of any mother.[192] In such situations, the law directs courts to determine issues of custody, visitation, and support as they would in any dispute between a mother and father who are not living together. The law specifically prohibits courts from considering the woman's promise to relinquish the child "as adverse to her parental rights, status, or obligations."[193] Whether by statute or case law,[194] many other states have adopted comparable rules.[195]

It is important to recognize that making a right inalienable does not prevent people from making a contemporaneous decision to relinquish the right. In this sense, inalienability is distinct from waiver. To waive a right is to relinquish it "at the time that the right could have been invoked."[196] Alienating a right, by contrast, "means promising now to waive a right in the future."[197] Thus, the fact that a woman, while pregnant, may not *alienate* her right to maintain a relationship with her child after birth does not mean that, after the child is born, the woman cannot *waive* her right to a parent-child relationship by consenting to an adoption. Similarly, making the right to decide about the disposition of one's frozen embryos inalienable

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the genetic parent of the resulting child. *See generally* NEW YORK STATE TASK FORCE, *supra* note 3, at 84-85.

192. N.Y. DOM. REL. LAW § 122 (McKinney 1999). New York's surrogate parenting law was proposed by the New York State Task Force on Life and the Law. For a comprehensive analysis of the rationale behind the law, see NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (1988) [hereinafter SURROGATE PARENTING].

193. N.Y. DOM. REL. LAW § 124(1) (McKinney 1999).

194. Some courts have concluded that, even in the absence of specific legislation on surrogate parenting, a surrogate mother's prebirth relinquishment of parental rights is unenforceable because it conflicts with existing laws governing consent to adoption. *See, e.g., In re* Baby M., 537 A.2d 1227, 1240 (N.J. 1988).

195. *See, e.g.*, UTAH CODE ANN. § 76-7-204 (1998); *In re Baby M.*, 537 A.2d at 1242. Some states, however, have different rules for gestational surrogacy situations. For example, in Florida, the law recognizes gestational surrogacy as an exception to the rule that the birth mother is irrebutably presumed to be the child's mother. *See* FLA. STAT. ANN. § 742.11 (West 1998).

196. Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1941 (1986).

197. *Id.*

would not prevent individuals from consenting to the donation, destruction, or research use of their embryos at the time those decisions would actually be enforced. It would simply prevent persons from being forced to adhere to advance commitments regarding their embryos if they change their minds before the disposition decision has been effectuated.[198]

### B. WHY INALIENABILITY?

Many of the reasons that underlie the law's characterization of certain rights as inalienable apply to decisions about the disposition of frozen embryos.[199] First, inalienable rights generally relate to deeply personal decisions that are central to most people's identity and sense of self. Second, inalienable rights limit the enforceability of promises made in situations where it is particularly difficult to anticipate one's likely reaction to future events. Third, inalienable rights often are created to protect against the possibility of pressure, coercion, or fraud. Finally, the decision to make a particular right inalienable reflects important societal values, including values about families, reproduction, and the strength of genetic ties. Taken together, these factors suggest that, like the examples of inalienable rights set forth above, the right to consent or withhold consent to the disposition of one's frozen embryos also should be treated as an inalienable right.

#### 1. Individual Identity

An important feature of inalienable rights is that they tend to relate to deeply personal decisions that are central to most people's identity and sense of self. For example, decisions

198. In this respect, inalienable rights are distinct from rights that can *never* be relinquished, even contemporaneously. For example, persons may not relinquish the right against involuntary servitude, regardless of whether they do it contemporaneously or in advance. *See* 18 U.S.C. §§ 1581-88 (1994).

199. In addition to the factors discussed in the text, some inalienable rights also reflect considerations that are less applicable to decisions about the disposition of frozen embryos. For example, in the context of employment agreements, "the right to substitute damages for the actual performance of the contract is inalienable, and any agreement purporting to forfeit this entitlement is invalid as a matter of law." Kronman, *supra* note 180, at 779. The inalienability of the right to breach employment agreements and pay damages reflects concerns about involuntary servitude that are not applicable here. Other inalienable rights that do not apply here, such as the right to vote, are grounded in societal conceptions of the meaning of citizenship. *See, e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 961-63 (1985).

about marriage are generally considered "central elements in the identity of many people."[200] The same is true for decisions affecting the parent-child relationship, such as decisions about whether to have a child or decisions to relinquish a child for adoption. Because most decisions about these matters are constitutionally protected,[201] states must have a particularly strong justification for interfering with the individual's choice.

The law respects people's choices about rights central to individual identity because of the consequences to the individual of having these decisions subject to external control. A person who is forced to marry someone she detests, or denied the right to raise her biological offspring, is compelled to live in conflict with her most basic values, desires, and beliefs. As Jed Rubenfeld has argued in the context of the constitutional right of privacy, it is the "pervasive, far-reaching, lifelong consequences"[202] of forcing individuals to conform to an externally-imposed identity that underlies the law's protection of individual choice.[203] The right to control personal decisions protects people from being forced to deny who they are to conform to someone else's sense of who they should be.

If rights central to individual identity are protected because of the consequences of being forced to live in conflict with one's basic sense of self, it makes little sense to subordinate the individual's current wishes to those expressed in the past. What matters most is who she is at the time the decision will be carried out, not who she was at some other time. Making the right to control these decisions inalienable ensures that, as a person's identity changes over time, she will not be forced to live with the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become.

Like decisions about marriage or relinquishing a child for adoption, decisions about the use of one's reproductive capacity have lifelong consequences for a person's identity and sense of

200. Note, *Rumpelstiltskin Revisited, supra* note 196, at 1947.

201. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 760 (1982) (right to maintain parent-child relationship); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (right to marry).

202. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989).

203. *See id.* at 784 (arguing that protecting a private sphere of individual decision-making promotes "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state").

self. This is particularly true when the decision will lead to the birth of a child. When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast, imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies. For some people, the mandatory destruction of an embryo can have equally profound consequences, particularly for those who believe that embryos are persons. If forced destruction is experienced as the loss of a child, it can lead to life-altering feelings of mourning, guilt, and regret.

If reproductive decisions are central to individual identity, the premise of the contractual approach to the disposition of frozen embryos—that enforcing the couple's prior consent respects the partners' right to control the embryos' fate—overlooks the underlying reason the couple's consent is required in the first place. If the right to control disposition decisions is protected because of the consequences to the partner whose objections are ignored, respecting the partners' stake in the decision should mean deferring to their views at the time those consequences will actually occur. In the example above, where the wife has undergone a fundamental transformation in values since the original agreement was made, it is the person the wife has become—the one who objects to the donation of the embryos—who will have to live as the involuntary parent of genetic offspring whom she will never know. If her right to control her reproductive capacity includes the right to avoid having the identity of "parent" imposed on her against her will, it is her current objection to donation, not her prior consent, that matters the most.

2. Predicting the Impact of Life-Altering Events

Before entering into any contract, the parties must consider how possible future events may affect their feelings about adhering to the contract's terms. For example, if the market price of a particular product drops dramatically, will the buyer still be willing to pay the higher contract price? If the price rises, how will the seller feel about adhering to the original terms? The parties must assess the likely course of future events as well as the severity of the consequences if their original predictions prove wrong. In the ordinary contractual situation, it is assumed that the parties are capable of making these assessments themselves. If their predictions are incorrect, the

parties must nonetheless live with the consequences unless they can establish that circumstances have changed so dramatically that, had the unforeseen developments been known at the time the contract was made, both parties would have agreed to substantially different terms.[204]

When a person makes a decision about an important individual right, however, we care more about the quality of the predictions on which the decision is based. For example, decisions to relinquish constitutional rights must be "knowing" and "intelligent,"[205] a standard that does not apply to decisions to buy a piece of property or sell a car.[206] Because of the difficulty of "predict[ing] and project[ing] a response to profound [human] experiences that have not yet unfolded,"[207] it may simply be impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised. This is particularly true in decisions about intensely emotional matters, where people act more on the basis of feeling and instinct than rational deliberation.[208] Making the right to decide about these matters inalienable—in other words, allowing people to change their minds until a decision actually will be carried out—ensures that decisions will be based on a greater appreciation of the relevant facts.[209]

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204. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981); *see also* Angel v. Murray, 322 A.2d 630, 636 (R.I. 1974).

205. Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). *See generally* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981).

206. Similarly, the law requires decisions about medical treatment to be "informed," a standard that does not apply to ordinary commercial deals. *See generally* THOMAS L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 142-56 (4th ed. 1994) (discussing the principle of informed consent).

207. SURROGATE PARENTING, *supra* note 192, at 125.

208. Anthony Kronman argues that in situations "likely to be influenced by strong and potentially distorting passions," individuals may be incapable of exercising "moral imagination," defined as "the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effect on one's character." Kronman, *supra* note 180, at 790, 796. Individuals who are incapable of exercising moral imagination will not recognize that their current choices "may one day seem antithetical to [their] deepest interests." *Id.* at 794. For this reason, the law often limits the enforceability of promises made in these circumstances by imposing mandatory cooling-off periods, such as rules requiring waiting periods before finalizing a marriage or divorce. *See id.*

209. Protecting individuals from commitments based on uninformed pre-

For many critics of surrogate parenting arrangements, it is this difficulty of predicting the impact of life-altering future experiences that makes enforcing a woman's agreement to serve as a surrogate mother particularly unfair.[210] In the *Baby M.* case, for example, the court concluded that any attempt to relinquish parental rights before the experience of pregnancy and childbirth is necessarily "uninformed" because the woman cannot "know[] the strength of her bond with her child."[211] "[I]n areas of profound human feeling," one critic of surrogate parenting contracts writes, "you cannot promise because you cannot know, and pretending otherwise would result in far more misery than allowing people to cut their losses."[212]

Some supporters of the contractual approach to the disposition of frozen embryos acknowledge these concerns as applied to preconception agreements to relinquish a child for adoption[213] but argue that they do not apply to decisions about the disposition of frozen embryos. John Robertson, for example,

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dictions about future events is not the same as invalidating contracts because of changed circumstances. The point is not that circumstances may change in ways unforeseen by the parties at the time the contract was made. Rather, it is that recognizing what *might* happen in the future does not mean that one can appreciate how those circumstances would *feel* if the situation actually occurs. Thus, the *A.Z.* court's reliance on the doctrine of changed circumstances was misplaced. *See* A.Z. v. B.Z., No. 15-008-96, at 23-25 (Suffolk County Prob. Ct., Mar. 25, 1996). In *A.Z.*, the couple clearly contemplated that they might someday have children, divorce, and then dispute the disposition of their remaining frozen embryos; in fact, that is why they entered into the disposition agreement in the first place. *See id.* at 24. The point is not that they did not contemplate the possibility of divorce; it is that they could not have appreciated how they might feel about their embryos if a divorce actually occurred.

210. *See, e.g.*, Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 16 LAW MED. & HEALTH CARE 7, 13 (1988) ("Understandably, the gestational mother's feelings may change once she has nurtured the fetus, given birth to a human being whom she recognizes as part of herself and then holds, cares for, and comes to love.").

211. *In re* Baby M., 537 A.2d. 1227, 1248 (N.J. 1988).

212. Katha Pollitt, *The Strange Case of Baby M*, THE NATION, May 23, 1987, at 685.

213. *See, e.g.*, Robertson, *Prior Agreements, supra* note 99, at 421. Robertson states:

> Childbirth is such a major change in circumstances that one should not reasonably be held to foresee how one arguably would feel about child rearing until after birth has occurred. Having undergone the physical rigors and bonding of pregnancy and childbirth, women may have very different views about child rearing than when they made a preconception agreement to relinquish the child for adoption. Accordingly, they should be free to disavow the relinquishment terms of their prior contract.

*Id.*

contends that the right to change one's mind about a preconception promise to relinquish a child is grounded in "the inability to foresee how one would feel after gestation and childbirth."[214] Because "neither party will have undergone pregnancy or similar burdens with frozen embryos," he maintains, concerns about predicting one's reaction to "the gestational and parturitive experience" do not apply.[215]

Robertson's argument, however, underestimates the potential impact of infertility and its treatment on an individual's feelings about the use of embryos created with her gametes. A person entering an IVF program for the first time, particularly a person who has never had children, may find it difficult to imagine what having genetic offspring will mean to her in the future. Some people experiencing infertility may have gone to great lengths to deny their feelings about the strength of genetic relationships, especially if they are considering adoption in addition to IVF.[216] In some cases, their empathy with other people experiencing infertility may lead them to agree to donate any excess frozen embryos to other patients, a decision they may regret profoundly once they understand what it means to have genetically-related children of their own. In addition to changed feelings about the meaning of having genetic offspring, persons who have become parents may worry about the impact of donation on their existing children, who may be burdened with the knowledge of having genetic siblings whom they will never know.

Indeed, in cases where infertility treatment is successful, the right to change one's mind about prior disposition decisions stems from precisely the same concern that underlies the unenforceability of preconception agreements to relinquish a child for adoption—the difficulty of predicting one's reaction to pregnancy and childbirth. The fact that an IVF patient will not become pregnant with the specific embryos that are the subject of the disposition agreement makes little difference. When an individual creates a cohort of embryos, using some to become

214. *Id.*

215. *Id.* at 422.

216. One survey found that over half of couples undergoing infertility treatment had considered or were actively pursuing adoption. *See* SPR Assocs. Inc., *An Evaluation of Canadian Fertility Clinics: The Patient's Perspective*, *in* ROYAL COMM'N ON NEW REPROD. TECHS., 10 RESEARCH STUDIES OF THE ROYAL COMMISSION ON REPRODUCTIVE TECHNOLOGIES 123, 177-78 (1993).

pregnant and freezing the rest, her experience of pregnancy and childbirth is likely to influence her feelings about all of the embryos, not simply the few that are actually transferred to her womb. It is the experience of becoming a parent that is significant; this experience has implications not only for the individual's relationship with any existing children but also for her feelings about having children in the future or using her embryos in any other way. Moreover, becoming a parent can have as strong an impact on men as it does on women. It is not simply the physical experience of gestation and childbirth that matters; it is the experience of having genetically-related offspring of one's own.

That is not to say that the difficulty of predicting the impact of infertility treatment on one's feelings about the disposition of frozen embryos is limited to patients whose treatment is successful. The intense emotions that accompany infertility treatment—"an emotional roller coaster,"[217] in the words of one commentator—make predictions about the impact of unsuccessful treatment equally problematic. Part of the problem is that most patients enter into IVF with an overly optimistic sense of their likelihood of success.[218] Thus, patients may make advance disposition decisions on the assumption that they will have had children of their own before any of the decisions will ever be carried out. The consequences of these decisions may feel quite different if treatment does not succeed. Donating embryos to another person—in effect, allowing another person to have the children the patient has been unable to have herself—may be particularly difficult to accept. Destroying the embryos also may feel different than originally anticipated, as it may symbolize the end to the patient's hopes for having ge-

217. BONNICKSEN, *supra* note 57, at 58. The emotional consequences of unsuccessful treatment are particularly profound. *See* Mark D. Litt et al., *Coping and Cognitive Factors in Adaptation to In Vitro Fertilization Failure*, 15 J. BEHAV. MED. 171, 178 (1992) (finding that women who fail to become pregnant in an IVF cycle often develop many symptoms of clinical depression, including disturbed eating and sleeping habits and an inability to return to work or engage in usual social activities).

218. *See* SPR Assocs. Inc., *supra* note 216, at 577 (finding that over half of patients surveyed indicated that they were confident or very confident that they would have a baby as a result of their treatment, even though 93 percent of the patients had been told their likelihood of having a baby was 25 percent or less); P. Slade et al., *A Prospective, Longitudinal Study of Emotions and Relationships in In-Vitro Fertilization Treatment*, 12 HUM. REPROD. 183, 189 (1997) (finding that patients often overestimate their chances of success).

netically-related children of her own.[219] Likewise, patients who have had a particularly bad experience with infertility treatment may come to regret their decision to authorize the use of their embryos in scientific research, particularly research on IVF, as they may object to promoting a medical solution to infertility instead of adoption or other approaches.

The difficulty of predicting one's future feelings about cryopreserved embryos is compounded by the fact that disposition decisions may not be implemented for decades after the embryos are created. There is simply not enough societal experience with the practice of embryo cryopreservation to presume that most people's decisions about the disposition of their frozen embryos will remain stable over such long periods of time. In the absence of such experience, the law should err on the side of greater flexibility, given the profoundly emotional nature of the issues.

3. Pressure and Coercion

The concept of inalienability also is used as a response to situations where pressure, coercion, or other illegitimate influences may lead people to relinquish rights they would actually prefer to keep. In these situations, giving people the right to change their minds protects them from being bound to promises that were extracted unfairly. The approach serves as a prophylactic rule: it ensures that promises motivated by illegitimate factors will not be enforced, even though doing so means that those promises that are voluntary will be unenforceable as well.[220]

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219. *See* BONNICKSEN, *supra* note 57, at 62 ("The embryo is a powerful symbol of hope and, to some couples, the embryo may be the closest thing to biological parenthood they have experienced.").

220. Anthony Kronman argues that, in some situations, absolute prohibitions may be the only way to avoid coercion. *See* Kronman, *supra* note 180, at 777. Kronman states:

> If we assume that in most cases a person would not contract into slavery unless he were illegitimately compelled to do so, but that such compulsion is difficult to detect and cannot easily be brought under existing rules regarding duress and unconscionability, a flat prohibition against such agreements may be the only administratively feasible way of preventing illicit coercion.

*Id.* This argument also has been used to support prohibitions on physician-assisted suicide. *See, e.g.*, Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on* Roe, Casey, *and the Right to Die*, 44 AM. U. L. REV. 803, 836-48 (1995).

Protection against pressure and coercion helps explain the inalienability of a pregnant woman's promise to relinquish a child for adoption. Allowing a woman to change her mind about giving up her child for adoption "recognizes that circumstances may propel some women to make a decision before or immediately after the birth of a child that does not reflect their true wishes and the depth of the bond they feel to the child."[221] For example, in *Sullivan v. Mooney*,[222] in which the court invalidated a teenage mother's prebirth agreement to relinquish her child for adoption, the mother was told before she gave up the child that she would be likely to harm the child if she kept it and that if she got married, "no boy is going to want to take that baby."[223]

Concerns about pressure and coercion also explain why the doctrine of inalienability is sometimes applied in the context of housing and consumer transactions. For example, a tenant may not relinquish her right to insist that her landlord comply with the implied warranty of habitability.[224] A consumer may not relinquish the contractual obligation to perform an agreement in good faith,[225] nor may she sign away the right to reconsider certain purchases if a legally-mandated "cooling-off" period applies to the transaction.[226] If the law permitted renters and consumers to disclaim warranties of minimal quality, it is likely that they would do so in many cases—not because they are unconcerned about substandard housing or defective goods, but because relinquishing these warranties would be a nonnegotiable requirement imposed by landlords and sellers. Refusing to enforce decisions to relinquish these rights is an efficient way to protect renters and consumers in a situation in which their bargaining power is relatively weak.[227]

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221. Alexander M. Capron & Margaret J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW MED. & HEALTH CARE 34, 35 (1988).

222. 407 So. 2d 559 (Ala. 1981).

223. *Id.* at 560.

224. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

225. *See* U.C.C. § 1-203 (1999) (imposing obligation of good faith); *see id.* § 1-102(3) (providing that obligation of good faith "may not be disclaimed by agreement").

226. *See, e.g.*, 16 C.F.R. § 429 (1999) (requiring three-day cooling off period for door-to-door consumer sales).

227. Anthony Kronman characterizes such prophylactic rules as "an efficiency-enhancing adjunct to the fraud remedy a disappointed tenant would have were the warranty freely disclaimable." Kronman, *supra* note 180, at 766.

In the context of decisions about the disposition of frozen embryos, there is an inherently coercive aspect of a rule that makes signing an advance agreement a condition of undergoing treatment with IVF. In essence, the contractual approach turns the couple's most personal decisions about how their reproductive capacity will be used into a nonnegotiable clause in a contract of adhesion.[228] While it is unlikely that a physician would condition treatment on a patient's consent to a particular disposition option ("Agree to let me use your excess embryos in my research projects or I won't treat you"), the fact that patients are required to make binding disposition decisions or forgo treatment entirely puts pressure on patients to commit to *something*, even if they are unsure of what their preferences in the future are likely to be.[229]

It also is significant that this pressure to commit to future reproductive decisions is limited to individuals who are unable to reproduce without IVF. Fertile couples are free to change their minds about decisions to have, or not to have, additional children, or to donate their reproductive material to other persons or to scientific research. Making the right to decide about the disposition of one's frozen embryos inalienable extends this same protection to persons whose reproductive options depend on the availability of IVF.

4. Societal Values

Finally, inalienable rights reflect and promote important societal values. The law's unwillingness to enforce promises affecting the marital relationship or a pregnant woman's promise to sever her relationship with her child after birth promotes societal conceptions about the nature of family relationships and the strength of genetic ties. In the context of adoption and surrogate parenting agreements, the rejection of a contractual approach also reflects concerns about the commodification of children and the reproductive process. Requiring couples to enter

228. *See* Diamond, *supra* note 8, at 94 ("IVF contracts, like insurance contracts, may be viewed as contracts of adhesion, wherein the gamete donors may be forced to accept the unfavorable contract terms the IVF facility offers, or be left with the alternative of having no IVF treatment at all."). The term "contract of adhesion" refers to take-it-or-leave-it standard form contracts "under which the only alternative to complete adherence is outright rejection." E. ALLAN FARNSWORTH, CONTRACTS § 4.26, at 295 (2d ed. 1982).

229. Or they may decide not to pursue treatment at all. *See* BONNICKSEN, *supra* note 57, at 41 ("The agreements have been known to overwhelm and turn away couples wary about IVF in the first place.").

into binding contracts about the disposition of their frozen embryos would undermine these important societal goals.

Among the most important values that inalienability protects are those related to the nature of family relationships. Family relationships, unlike marketplace transactions, are expected to be based on commitments whose force is rooted in affection and a sense of mutual responsibility, not the threat of legal liability.[230] Indeed, that family members will generally honor their promises to one another without legal compulsion is part of what makes family relationships so valuable to most people.[231] Thus, people tend not to turn to the law to enforce intrafamilial promises;[232] when they do, courts are usually reluctant to get involved.[233] The marriage vows themselves are not treated like binding contracts; couples may end their marriage despite an advance agreement to remain together for life.[234]

While there has been a trend in recent years toward treating the marital relationship more like a contract,[235] courts still do not treat agreements between married couples like ordinary commercial deals. For example, while couples contemplating marriage may dictate the disposition of property after divorce through prenuptial agreements, courts may decline to enforce the agreement if it is not substantively fair.[236] Moreo-

230. *See* Moskowitz, *supra* note 8, at A25 ("[C]ontracts are commercial tools, at odds with the unconditional, binding qualities many individuals value about family relationships."). *But cf.* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (criticizing the sharp distinction between the "altruism" of the family and the "individualism" of the market).

231. *See* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 557 (1999) ("[T]he performance is valuable, in large measure, because it is motivated, or appears to be motivated, by love rather than self-interest.").

232. *See id.* ("[F]amily members do not look to the law because doing so would destroy the family relationship.").

233. *See* Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 40 (1992) (noting the reluctance of courts to enforce family promises).

234. *See* Scott & Scott, *supra* note 186, at 1230 ("Under the no-fault regime, the law does not enforce the explicit promises of the marriage partners (the wedding vows); nor does it enforce promises about conduct during the marriage.").

235. *See generally* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982).

236. *See, e.g.*, Button v. Button, 388 N.W.2d 546, 551-52 (Wis. 1986) (holding that a premarital agreement may be set aside if enforcing it would be un-

ver, despite the legality of such agreements, many people still look at contracts between married couples with considerable disfavor. As Carl Schneider has observed, "the whole contractual approach will seem to many families (and possibly should seem to the law) inimical to good family relations."[237]

The contractual approach to questions surrounding the disposition of frozen embryos embodies a conception of family relationships that society should be particularly reluctant to embrace. It is one thing for couples to assume the role of arms-length negotiators when deciding about the division of property in the event of divorce. A couple beginning infertility treatment, however, is embarking on the creation of a family. Decisions about having children should be made in the spirit of trust and mutual cooperation, not as part of a negotiated deal backed by the force of law. Requiring partners to contract with each other about their future reproductive plans dehumanizes the process by treating it like a business transaction rather than an expression of love. As Alexander Capron has argued, "[c]ontracts are a fine way to make binding agreements about the disposition of property, but they are much less appropriate when deciding about personal relationships, especially ones like joint parenthood that would be purely hypothetical at the time that a couple undergoing IVF would sign the contract."[238]

Inalienability also reflects societal judgments about the strength of connections based on genetic bonds.[239] The right to change one's mind about relinquishing a child for adoption, for example, "manifests society's traditional respect for biological

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fair, even if the agreement appeared fair at the time it was made). States that have adopted the Uniform Premarital Agreement Act, however, will enforce prenuptial agreements according to general principles of contract law, except for provisions affecting children. *See* UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1973).

237. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1832 (1985); *see also* Shultz, *supra* note 235, at 242 ("Contract involves careful planning of future rights and obligations; many think of marriage as an unpredictable unfolding subject to the trial and complexity of constantly changing circumstances, and partaking of the joy of human spontaneity.").

238. Capron, *supra* note 8, at 33.

239. Some commentators, however, maintain that society's strong respect for genetic relationships has negative racial undertones. *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 244 (1995) ("New reproductive technologies are so popular in American culture not simply because of the value placed on the genetic tie, but because of the value placed on the *white* genetic tie.").

ties."[240] By making it more difficult to give up a child, inalienability is consistent with other legal rules that discourage the termination of parental rights.[241] These rules are based on society's respect for the rights of biological parents,[242] as well as an interest in encouraging parents to assume responsibility for the children they produce.[243]

Making decisions about the disposition of one's frozen embryos inalienable would serve similar goals. Allowing people to change their minds about disposition decisions would show respect for the bonds people feel toward their genetic progeny, both existing offspring and the possibility of future offspring that frozen embryos represent. By tipping the scales in favor of those who choose not to allow the use of their embryos by someone else, an inalienable rights approach also would promote the value of parental responsibility. In a world where too many people abdicate their obligations to care for their children,[244] a person who is unwilling to become a parent without raising the child herself should be supported in her decision. That a person could be absolved of the legal and financial obligations of biological parenthood is not an adequate response. For some people, it may be impossible to have genetic offspring and remain indifferent to their predicament. Such people should be commended for their sense of responsibility, not forced to suppress their feelings of parental responsibility because of a prior agreement they no longer support.

Finally, the law's reluctance to enforce contracts related to the parent-child relationship reflects aversion to the commodification of children and the reproductive process. Concerns about the commodification of children are most often applied to practices, like baby selling or commercial surrogate parenting

240. Capron & Radin, *supra* note 221, at 35.

241. An individual's parental rights may not be terminated involuntarily without clear and convincing evidence of unfitness. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1981).

242. The Supreme Court has held that biological fathers have a limited constitutional right to establish a relationship with their offspring, *see* Lehr v. Robertson, 463 U.S. 248, 267-68 (1983), as long as the child's mother is not married to another man, *see* Michael H. v. Gerald D., 491 U.S. 110, 129-30 (1989).

243. Biological parents have a legal obligation to support their minor children. *See, e.g.*, N.Y. FAMILY COURT ACT § 513 (McKinney 1999).

244. *See, e.g.*, Allen M. Parkman, *The Government's Role in the Support of Children*, 11 B.Y.U. J. PUB. L. 55, 55-56 (1997) (noting that "[m]ore than half of all children potentially eligible for child support receive nothing from their biological fathers").

arrangements, that directly threaten to create a market in children or "reproductive services."[245] Such practices are wrong because they treat children as products whose value is based on their cost and perceived quality, rather than as individuals with their own intrinsic worth.[246] Yet, it is not the exchange of money per se that creates the risk of commodification but the application of the rules of marketplace transactions to fundamental decisions about a child's fate. The idea that "a deal's a deal," when applied to decisions about the custody of a child, treats the parent-child relationship like an ownership interest in property rather than a human connection between two living beings.

Even though most people agree that embryos do not have the moral status of children,[247] there is a broad consensus that the commodification of embryos is nonetheless wrong.[248] Part of the problem is that "the line between selling babies and selling embryos is not sharp and distinct."[249] If it is wrong to put a price on the value of a child, the same should be true for putting a price on the genetic material that will lead to the child's birth.[250] In addition, treating embryos like market commodities undermines the dignity of the reproductive process by turning the act of procreation into the manufacture of a product, rather than the expression of a commitment between

245. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-36 (1987).

246. *See id.* at 1885 ("In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people.").

247. *See supra* notes 58-59 and accompanying text.

248. *See supra* notes 63-65 and accompanying text.

249. Ruth Macklin, *What Is Wrong with Commodification?*, *in* NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION 106, 115 (Cynthia B. Cohen ed., 1996).

250. For these reasons, many states have laws prohibiting the purchase and sale of sperm and eggs. *See, e.g.*, FLA. STAT. ANN. § 742.14 (1998); N.Y. PUB. HEALTH LAW § 4364(5) (McKinney Supp. 1999). Direct payments for gametes also are discouraged by most ethicists and professional organizations. *See, e.g.*, American Fertility Society, *supra* note 70, at 4S. However, payment for the time, inconvenience, or other expenses associated with donation is generally considered acceptable. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 254-58. This rationale has been used to justify increasingly high payments to egg donors. *See* Gina Kolata, *$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, at A10 (reporting one couple's offer of $50,000 for eggs from a tall young woman with high SAT scores).

two human beings.[251] Finally, the commodification of embryos is wrong for the same reason the commodification of organs or other bodily products is not accepted in our society:[252] it treats the human body itself as a market commodity, which has dangerous implications for the way that all persons are viewed.[253] The danger that treating decisions about the disposition of embryos as binding contracts would contribute to the perception of embryos as commodities is another reason to reject the contractual approach.

## V. THE INALIENABLE RIGHTS APPROACH IN PRACTICE

Drawing on a proposal developed by the New York State Task Force on Life and the Law, this Part explains how an inalienable right to mutual consent would work in practice. The approach set forth below is grounded in respect for the individual's right to make contemporaneous decisions about the use of his or her reproductive capacity, as well as concern for IVF programs' need for clear and easily administered rules. Depending on the circumstances of a particular jurisdiction, the approach could be adopted through legislation, administrative regulations, or judicial decision.[254]

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251. *See* Annas et al., *supra* note 61, at 1331 ("[A]s a society we do not want to see embryos treated as products or as mere objects, for fear that we will cheapen the value of parenting, risk commercializing procreation, and trivialize the act of procreation."); *cf.* SURROGATE PARENTING, *supra* note 192, at 121 (arguing that the characterization of gestation as a "service" does damage to "the values and meanings associated with human reproduction" which "are derived from the relationship between the mother and father of a child and the child's creation as an expression of their mutual love").

252. *See* 42 U.S.C.A. § 274e (West 1998) (listing body parts that may not be sold). *See generally* Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 294-301 (1995) (outlining arguments against developing a market in organs).

253. *See* Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 PUB. INTEREST 65, 83 (1992) ("[I]f we come to think about ourselves like pork bellies, pork bellies we will become."). Other concerns about developing a market in organs include the risk that poor people will be exploited, the potential impact on the quality of organs obtained, and fears of "a devastating effect on an important altruistic institution in our society." Anderson, *supra* note 252, at 299.

254. Legislation or regulations would be required in states like New York and Tennessee, where judicial decisions already have endorsed the contractual approach. *See supra* notes 72-94 and accompanying text. The New York State Task Force on Life and the Law recommended a regulatory approach to these issues. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 313-26. Other issues regarding the storage and disposition of frozen gametes and embryos are

### A. GENERAL PRINCIPLES

The starting point for the approach proposed in this section is the principle of mutual consent set forth in Part III. According to that principle, no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the mutual consent of the couple that created the embryo. An objection by either partner must be honored, even if that person consented to the decision in question in the past.

Even though advance disposition agreements would not be binding under an inalienable rights approach, the process of leaving advance instructions would still play an important role. Having advance instructions on file would ensure that if both partners die or lose contact with the storage facility, the facility would know how the couple would have wanted the embryos to be disposed.[255] In addition, the process of leaving advance instructions will force the couple to consider carefully the implications of creating multiple embryos, including the possibility that they may create more embryos than they ever will use.

The essence of the inalienable rights approach to disposition decisions is that advance instructions would not be treated as binding contracts. If either partner has a change of mind about disposition decisions made in advance, that person's current objection would take precedence over the prior consent. If

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already addressed through regulations in New York State. *See id.* at 412.

255. When a couple loses contact with the facility and has not left an advance agreement, the embryos may be considered "abandoned." The American Society for Reproductive Medicine (ASRM) has concluded:

> [I]t is ethically acceptable for a program to consider embryos to have been abandoned if more than five years have passed since contact with a couple, diligent efforts have been made by telephone and registered mail to contact the couple . . . and no written instruction from the couple exists concerning disposition.

Ethics Committee of the American Society for Reproductive Medicine, *supra* note 109, at 1S. According to the ASRM, abandoned embryos may be discarded, but they should not be used for research or donated to other couples. *See id.* The first reported case involving abandoned embryos involved the Rioses, an American couple who died in an airplane crash after leaving two embryos frozen in an Australian facility. In response to concerns about the fate of the embryos, the State of Victoria enacted legislation providing that the Rios' embryos should be implanted in a surrogate and then placed for adoption. *See* George P. Smith, II, *Australia's Frozen "Orphan" Embryos: A Medical, Legal, and Ethical Dilemma*, 24 J. FAM. L. 27, 38 (1985-1986). Subsequently, a committee formed by the Victorian government recommended that embryos abandoned with no advance instructions should be discarded. *See id.* at 37.

one of the partners rescinds an advance disposition decision and the other does not, the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out.[256]

The fact that individuals are entitled to change their minds about disposition decisions does not mean that storage facilities would have an obligation to ascertain whether instructions set forth in advance planning documents continue to reflect the partners' views. The process of leaving advance instructions would serve little purpose if storage facilities could not rely on them without confirming their continued validity. The burden, therefore, should be on the person who changes her mind to notify the storage facility that she has rescinded her prior decision. Unless the facility receives such notice, it should be entitled to rely on disposition decisions expressed in advance.[257] As part of the process of obtaining informed consent to embryo cryopreservation, storage facilities should inform individuals of their obligation to notify the facility of any change of mind.

The critical issue, of course, is determining what should happen to the embryos when the partners no longer agree to a disposition decision made in advance. Ideally, the partners will be able to agree to a second-choice disposition decision, thereby avoiding an irreconcilable conflict. For example, if they previously agreed to donate their excess embryos to another patient and one partner has changed her mind because she does not want to become a parent, the couple may agree that the embryos should be destroyed. In some cases, however, the couple

256. For practical purposes, the right to change one's mind about disposition decisions ends once a disposition decision is actually implemented. The destruction of an embryo obviously cannot be undone, nor can the use of an embryo by another patient. In some cases, however, carrying out a disposition decision may involve more than a single, discrete event. For example, if a couple agrees to donate nine embryos to another patient, and only four are used in the recipient's initial cycle, what is the status of the remaining five? The New York State Task Force on Life and the Law proposed that, in such situations, the process of donating the remaining five embryos would not be complete, and the partners would retain the right to revoke their consent. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 324-25. The donation would not be irrevocable until a specific patient has begun the process of hormonal preparation in reliance on the availability of the couple's embryos. *See id.* at 325.

257. In some cases, it might be reasonable to place a minimal notice requirement on storage facilities. For example, if one partner seeks to use the embryos in the absence of the other partner, it might make sense for facilities to send the partner who is not present a registered letter at his or her last known address.

may not be able to agree to any disposition decision. One partner, for example, may have agreed to donate the embryos to another patient because he objects to the destruction of embryos on moral grounds and believes that the embryos are persons and deserve a chance to be brought to term, whereas the other partner may be insistent that the embryos be destroyed.

When the couple is unable to agree to any disposition decision, the most appropriate solution is to keep the embryos where they are—in frozen storage. Unlike the other possible disposition decisions—use by one partner, donation to another patient, donation to research, or destruction—keeping the embryos frozen is not final and irrevocable. By preserving the status quo, it makes it possible for the partners to reach an agreement at a later time. Moreover, while some people may find the indefinite storage of frozen embryos unsettling, continued cryopreservation does not violate either partner's right to decide whether the embryos will actually be used.

In practice, the embryos will be kept frozen indefinitely only if at least one of the partners is opposed to the destruction of human embryos. Otherwise, in the absence of mutual consent to the use or donation of the embryos, the most likely result is that the couple will agree to have the embryos destroyed. Given that the default rule of continued storage benefits the partner who opposes destruction, it seems appropriate for that partner to shoulder the burden of paying for storage. The right to insist on the continued storage of the embryos should be dependent on a willingness to pay the associated costs.

The fact that either partner may insist on the continued storage of the embryos does not create an obligation for any storage facility to become a long-term repository for frozen embryos. In this sense, the right to preserve the embryos indefinitely is analogous to the right to obtain an abortion: it is a right to choose this option free from state interference, not a right to compel the services of any particular provider.[258] Thus, facilities should be free to set limits on the time they will store frozen embryos, provided those limits are made clear to the couple at the time the embryo is initially stored. When the limits expire, the partner who wishes to keep the embryos fro-

258. *Cf.* N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1999) (authorizing health care providers to refuse to perform or assist in abortions).

zen indefinitely would have the option of transferring them to another facility.[259]

### B. When One Partner Dies, Disappears, or Loses Decision-Making Capacity

When one of the parties is no longer able to indicate an opinion about the disposition of the embryos, whether because of death, disappearance, or loss of decision-making capacity, the law should respect the most recent expression of that person's wishes. For example, if both partners agreed to donate their excess embryos to another patient and one of the partners dies, the surviving partner could carry out the previous agreement as long as there is no evidence that the deceased partner changed his mind after the agreement was made. However, if the decedent made it clear that he did not want the embryos to be used, the surviving partner should not have the right to donate the embryos simply because the decedent is no longer available to express his objection directly.

It might be argued that once a person dies, her interest in controlling the fate of the embryos is no longer entitled to legal protection, especially when the decedent's previously-expressed wishes conflict with those of the surviving partner.[260] However, the right to control the use of one's embryos after death is at least as important as the right to direct the posthumous disposition of one's property, which society has historically recognized through the enforcement of wills.[261] As the New York State Task Force on Life and the Law observed, "[t]hese rights are important not because deceased persons have independent interests deserving of legal protection, but because living people benefit from the knowledge that their instructions will be respected after they die."[262]

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259. *See supra* note 51 and accompanying text.

260. *See* Robertson, *supra* note 58, at 1047 ("Because the survivor's current reproductive interests could reasonably be deemed more important than the right to control posthumous reproduction, a state might wish to allow the survivor's reproductive choice to control, despite her prior agreement with the deceased.").

261. *See* Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 943 (1997) ("[I]t would be ironic indeed if the law were to protect pre-mortem wishes regarding the disposition of property, but ignore pre-mortem wishes concerning a matter as central to a person's identity as the desire not to create another human being.").

262. NEW YORK STATE TASK FORCE, *supra* note 3, at 321; *cf.* Nancy K. Rhoden, *The Limits of Legal Objectivity*, 68 N.C. L. REV. 845, 864 (1990)

At the same time, there may be exceptional cases where the surviving partner has a compelling reason to depart from the deceased partner's previously-expressed disposition instructions. For example, the Task Force on Life and the Law posited a case where one of the partners and all of the couple's children are killed in an accident. In such circumstances, the surviving partner may feel that the deceased partner, if alive to state his views, would agree that his original decision to destroy the remaining embryos should no longer be followed so that the surviving partner could have the opportunity to start a new family. To deal with these exceptional cases, the Task Force proposed that courts have the authority to override the decedent's prior instructions upon a showing of extraordinary circumstances.[263] Such an approach, which is analogous to the contractual doctrine of changed circumstances,[264] would avoid making the surviving partner a captive of the decedent's last known views.

### C. EMBRYOS CREATED WITH DONOR SPERM AND/OR DONOR EGGS

The approach proposed in this article, as well as the cases and commentary outlined in Part II, are intended to deal with the typical IVF scenario, in which a couple creates embryos by fertilizing the female partner's eggs with the male partner's sperm. In some cases, however, couples may create embryos by combining one partner's gametes with those of a donor.[265] Couples may use donor gametes for a variety of reasons, including medical conditions that make it difficult or impossible for one of the partners to provide gametes,[266] concerns about transmitting genetic conditions or HIV,[267] or, in the case of donor eggs, the

("[L]iving persons can have rights of future performance, and that breaches of duties to perform after death count as wrongs to the right-holder, thought of as she was when alive.").

263. NEW YORK STATE TASK FORCE, *supra* note 3, at 321.

264. *See supra* note 204 and accompanying text.

265. For a discussion of the sources of donor gametes, see NEW YORK STATE TASK FORCE, *supra* note 3, at 235-45.

266. Donor sperm may be used as a response to "several types of male infertility, including an irreversible lack of sperm or extremely low sperm count, severely impaired sperm shape and motility, inability to ejaculate, or obstruction of the reproductive tract." NEW YORK STATE TASK FORCE, *supra* note 3, at 74. Donor eggs are offered to women who lack functioning ovaries or women who have not achieved pregnancy through IVF. *See id.* at 77.

267. *See id.* at 74, 77.

woman's advanced age.[268] Less frequently, a couple will create embryos with both donor sperm and donor eggs, i.e., without any genetic material from the partners themselves. This may occur when a couple plans to use donor eggs and the male partner's sperm, but the man is unable to provide a usable sperm sample at the time the eggs are scheduled to be fertilized.[269] Alternatively, couples in which both partners are unable to produce gametes may deliberately seek to create embryos with donor sperm and donor eggs in order to have more control over their child's genetic characteristics than they would if they used an embryo left over from another couple's infertility treatment or if they adopted an existing child.[270]

When couples create an embryo with either donor sperm or donor eggs, only one of the partners will be the genetic parent of any child who results from the implantation of the embryos. When both donor sperm and donor eggs are used, neither partner will be a genetic parent. Because an individual who lacks a genetic connection to an embryo has a lesser stake in how the embryo is disposed, the resolution of disputes over the disposition of embryos created with donor sperm and/or eggs requires a different set of rules than those that apply to disputes over embryos created with both partners' gametes.

This does not mean that the principle of mutual consent set forth in Part III has no applicability to embryos created with donor sperm and/or eggs. If the couple that created the embryos is married, there are strong reasons for giving both partners equivalent decision-making rights. Even if one or both of the partners will not be the *genetic* parent of a child who results from the implantation of the embryo, both partners are potential *legal* parents if the embryos are implanted in the woman and a child is born.[271] Because the use of the embryos

268. *See id.* at 77.

269. Some men are unable to produce semen samples on demand, particularly in a medical setting. *See* Janet L. Blenner, *Stress and Mediators: Patients' Perceptions of Infertility Treatment*, NURSING RES., Mar.-Apr. 1992, at 92, 94-95.

270. *See* Gina Kolata, *Clinics Selling Embryos Made for "Adoption"*, N.Y. TIMES, Nov. 23, 1997, at A1.

271. In some states, the law expressly provides that a woman who gives birth to a child is the child's mother, even if the child was conceived with another woman's egg. *See* FLA. STAT. ANN. § 742.14 (West 1998); N.D. CENT. CODE § 14-18-04 (1997); OKLA. STAT. ANN. tit. 10, § 555 (1998); TEX. FAM. CODE ANN. § 151.102 (West 1996); VA. CODE ANN. § 20-156 (Michie. 1998 & Supp. 1999); *see also* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2, 9B U.L.A. 191 (1988) (providing that a woman who gives birth to a

implicates both partners' potential parental rights and responsibilities, they both should have a say in how the embryos are used.

However, if the couple divorces or was never married to begin with, the interests of the partner whose gametes were not used are much weaker. If the embryos were created with donor sperm and are used by the woman after the couple divorces, the man will not be considered the legal father of any child who results.[272] Likewise, if the embryos were created with the man's sperm and donor eggs, the woman would not have any rights or responsibilities if the embryos are used by the man with another wife or partner.[273] In such circumstances, the partner whose gametes were used to create the embryos should have exclusive decision-making authority over disposition decisions, as that partner is the only one whose right to choose whether or not to become a parent is at stake.[274]

When embryos are created with donor sperm or eggs and one partner dies, disappears, or loses decision-making capacity, the other partner's right to control disposition decisions should depend on which partner's gametes were used to create the embryo. If the remaining partner has no genetic connection to the embryo, the final disposition decision expressed by the absent partner should generally control. If, by contrast, it was the surviving partner whose gametes were used, that person

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child is the child's mother except when the woman is acting as a surrogate in a state where surrogate parenting contracts are legally enforceable). If the woman is married, her husband will probably be considered the child's father based on the common law presumption of legitimacy. *See, e.g.*, State *ex rel.* H. v. P., 457 N.Y.S.2d 488, 490 (App. Div. 1982) (describing the presumption of legitimacy as "one of the strongest and most persuasive known to the law") (quoting *In re* Findlay, 170 N.E. 471, 472 (N.Y. 1930)).

272. There would be no grounds for declaring paternity because the man would lack both a biological connection to the child and a marital relationship to the child's mother.

273. In such cases, the woman would lack either a genetic or gestational relationship to the child.

274. Of course, there is another person who has a stake in how the embryos are used in these situations—the gamete donor. However, giving gamete donors the right to control decisions about the disposition of embryos created with their gametes would be impractical, as most donors have no way of knowing what happens to their gametes after the donation is complete. *See* NEW YORK STATE TASK FORCE, *supra* note 3, at 286 (arguing that donors should not have a right to learn whether the donation resulted in a pregnancy or live birth). Moreover, it would be difficult to give donors this knowledge without compromising the confidentiality of the donor process, something that both donors and recipients might be unwilling to accept. *See id.* at 363-67 (discussing donor confidentiality).

should have full decision-making authority over the use of any remaining embryos.

The creation of embryos with both donor sperm and donor eggs raises different issues. During marriage, it seems appropriate to require the couple's mutual consent to disposition decisions for the same reason mutual consent should be required when embryos are created with donor sperm or donor eggs—both partners' rights and responsibilities as legal parents are at stake. However, if the couple divorces or never was married, neither partner has a significant stake in the disposition of the embryos, given the absence of either a genetic connection to the embryos or legal responsibility for any child who results. Without any reason to favor either partner over the other, there is considerable room for flexibility in the development of legal rules. The New York State Task Force on Life and the Law recommended that either partner should have the right to use the embryos to have a child, regardless of an objection by the other partner.[275] However, if neither partner wishes to use the embryos, a partner who seeks continued storage should prevail over one who wishes to donate or destroy the embryos, as donation or destruction would deny the partner who wishes to maintain the embryos the right to use them for him or herself in the future. Another approach might be to divide the embryos equally, allowing each partner to do whatever he or she wants without regard to the other's views, or to give all of the embryos to the partner with the predominant factor of infertility.

## VI. RESPONSE TO OBJECTIONS

Several objections are likely to be raised in response to this inalienable rights approach to disposition decisions. First, it might be argued that the ability to make commitments about future events is itself an important freedom, which is undermined by recognizing a right to change one's mind. Second, denying couples the right to make binding agreements about the disposition of their frozen embryos, it might be claimed, can be justified only by the paternalistic premise that individuals need to be protected from the consequences of their own choices. Third, allowing either partner to change her mind might be criticized for insufficiently valuing the interests of the partner who has acted in reliance on a disposition decision agreed to in advance. Fourth, supporters of the contractual approach may

275. *See id.* at 323-24.

ask why advance disposition agreements should not be enforced when other advance planning devices, such as living wills, have such widespread support. Finally, those who support the contractual approach to disposition decisions are likely to challenge the practicality of a rule that allows disposition agreements to be rescinded at will.

### A. THE RIGHT TO MAKE COMMITMENTS

One possible argument against the inalienable rights approach to disposition decisions is that it disregards the individual's interest in making binding commitments about future events. Although "freedom of contract" is no longer recognized as a constitutional right,[276] the ability to enter into binding agreements is nonetheless thought to be an important part of individual liberty. As Thomas Schelling argues, "[f]ull freedom entails the freedom to bind oneself, to incur obligation, to reduce one's range of choice."[277]

The right to make binding decisions is regarded as important for at least three reasons. First, in some cases, individuals may want to make enforceable commitments to protect their long-term interests against a possible short-term lapse of judgment or "weakness of will."[278] The classic example of this is Ulysses' request to be tied to the mast of his ship so that he could hear the song of the Sirens without being tempted from staying his course.[279]

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276. *See* West Coast Hotel v. Parrish Co., 300 U.S. 379, 391-400 (1937) (upholding minimum wage legislation and marking an end to the Supreme Court's protection of freedom of contract).

277. Thomas C. Schelling, CHOICE & CONSEQUENCE 98 (1984); *see also* CHARLES FRIED, CONTRACT AS PROMISE 13 (1981). Fried states:

> In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make non-optional a course of conduct that would otherwise be optional for me.

*Id.*

278. E. ALLEN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 10 (1998).

279. *See* HOMER, THE ODYSSEY 210-11 (Robert Fitzgerald trans., Anchor Books ed., 1963). More recently, some commentators have proposed statutes authorizing individuals with certain mental illnesses to enter into agreements authorizing their physicians to ignore subsequent disease-induced refusals of psychiatric medications. *See, e.g.*, Roberto Cuca, Note, *Ulysses in Minnesota: First Steps Toward a Self-Binding Psychiatric Advance Directives Statute*, 78 CORNELL L. REV. 1152, 1163-65 (1993). These commentators argue that, during periods of lucidity, persons with mental illness have a right to protect

The second, and perhaps more common, reason is that the ability to commit oneself to a future course of action allows people to influence others to do the same. If promises could be made and broken at will, agreements in which one party promises to do something in exchange for a promise by the other would be worthless. Individuals could not borrow money or buy on credit, for example, if they could simply change their minds about their promise to repay.[280] As Charles Fried has argued, "[i]f it is my purpose, my will that others be able to count on me in the pursuit of their endeavor, it is essential that I be able to deliver myself into their hands more firmly than where they simply predict my future course."[281]

Third, in some cases people may want to make binding commitments so that they can have greater certainty about what the future will bring. Certainty about the future can facilitate the process of making plans. In addition, for some people, predictability—and the sense of security that accompanies it—is an important value in its own right.

None of these reasons for respecting individual commitments, however, undermines the inalienability argument as applied to decisions about the disposition of frozen embryos. First, people do not sign advance disposition agreements because they want to protect their long-term interests against a future "weakness of will."[282] Few couples have such strong beliefs in the importance of donating their embryos to other patients, for example, that they enter into disposition agreements to protect themselves from an uncontrollable desire to use the embryos another way. If anything, decisions made before the embryos are created are less likely than future decisions to reflect the couple's long-term interests; before treatment begins the couple has little way of knowing how they will feel about the embryos once they exist.[283]

It also is unlikely that the ability to commit to future disposition decisions will be necessary for one partner to convince the other to undergo IVF. Most people seek infertility treat-

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their long-term interests against harmful choices they may make in the future. *See id.* at 1185 (arguing that allowing patients to provide binding advance consent to psychiatric treatment "increases the patient's control of her own life and reduces the cost of her illness to both herself and society").

280. *See* FARNSWORTH, *supra* note 278, at 14.

281. FRIED, *supra* note 277, at 13.

282. FARNSWORTH, *supra* note 278, at 10.

283. *See supra* notes 213-19 and accompanying text.

ment because they want to have children, not as consideration for their partner's agreement to dispose of their excess embryos in a particular way. Indeed, most couples are probably not even aware that they may have to make decisions about their frozen embryos in the future until the IVF program brings the issue to their attention. Even if some people would not undergo IVF without the ability to insist on a particular disposition decision—for example, a woman who says that she will not undergo ovarian stimulation without a guarantee that she can use all of the resulting embryos, even if she and her husband divorce—such situations should not be regarded as the norm. In the commercial context, it is reasonable to assume that the legal enforceability of commitments is necessary to encourage cooperative activity between persons whose relationship is based primarily on economic self-interest. For couples about to have a child, however, the presumption should be that the relationship is guided by trust and a willingness to accommodate each other's changing views.

Finally, while some people may want to enter into binding disposition agreements because they hope to have greater certainty about what the future will bring, the desire for certainty should not take precedence over every other interest at stake. In most other areas of reproduction and family life, certainty is not a value the law generally protects. If people can change their minds about whether to get married, to stay married, to have children through coital reproduction, or to give up their children for adoption,[284] there is no reason to give greater priority to certainty in the context of IVF.

### B. PATERNALISM

A second objection to the inalienable rights approach is that it rests on the paternalistic assumption that people need to be protected from the consequences of their own choices. This argument is often raised against laws that deny enforcement to surrogate parenting contracts. Lori Andrews, for example, claims that "[i]t would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing women for so long."[285] Inalienability, in this view, infantalizes

284. *See supra* notes 185-90 and accompanying text.

285. Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, *in* THE ETHICS OF REPRODUCTIVE TECHNOLOGY 205, 211 (Kenneth D. Alpern

those who seek to relinquish a right by denying that they are capable of taking their long-term interests into account.

At one level, the objection based on paternalism simply misses the point of the inalienability approach. Paternalism involves limitations on an individual's autonomy for the benefit of the person whose autonomy is constrained.[286] To the extent that inalienability is designed to advance broader societal interests—for example, the interest in promoting family relationships based on trust, or the interest in showing respect for the strength of genetic ties—the paternalism argument is irrelevant because the goal is not to protect the rights of the individuals in any particular case.[287]

More importantly, the characterization of inalienability as paternalistic does not, in itself, undermine the argument for allowing people to change their minds. Although it is often assumed that paternalistic interventions have no place in a free society, the fact is that we accept paternalism in a variety of contexts, from mandatory seatbelt and helmet laws[288] to laws limiting access to unproven drugs.[289] Such interventions can be

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ed., 1992).

286. *See* David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 522 (1988) ("At the core of every definition, . . . and surely indispensable to the concept [of paternalism], is the notion that for an action of *A* to be paternalist with respect to *B* (an individual or group), it must be taken in order to benefit *B*."); ANTHONY KRONMAN & RICHARD POSNER, THE ECONOMICS OF CONTRACT LAW 254 (1979) (arguing that a restriction on consent is paternalistic "if the sole justification for imposing it is to promote or protect the individual's own welfare (or happiness or good)").

287. *Cf.* Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 496 (1996) (arguing that limitations on individual choice are not paternalistic if their goal is not to protect the individual "from disregarding his or her own interests" but instead is to "increas[e] systemic efficiency or societal respect for human dignity"). Many laws that interfere with individual choices can be justified by such nonpaternalistic goals. *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985) (defending prohibitions on slavery on the ground that they promote the societal interest in "avoid[ing] the creation or perpetuation of hierarchy in which some perennially dominate others").

288. *See generally* Ross D. Petty, *The Impact of the Sport of Bicycle Riding on Safety Law*, 35 AM. BUS. L.J. 185, 207-08 & n.118 (1998) (mandatory bicycle helmet laws); David A. Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U. L. REV. 867, 868-89 (1986) (mandatory seat belt laws).

289. *See generally* United States v. Rutherford, 442 U.S. 544 (1979) (upholding federal limitations on interstate shipment and sale of Laetrile). Duncan Kennedy argues that paternalistic justifications underlie a broad range of laws, including statutes protecting investors, insurers, consumers,

justified when there are substantial reasons to believe that individuals will make decisions without taking their long-term interests into account.[290] As discussed above, this is likely to be the case when individuals embark on infertility treatment, given the difficulty of predicting how one will feel about any frozen embryos that remain once treatment is complete.[291] Recognizing the difficulty of making such predictions does not imply that infertility patients are somehow less capable than other people to know their own selves. The inability to predict one's future reaction to profoundly emotional experiences is a common and understandable fact of life. Rather than representing a weakness, this inability affirms "a positive and dynamic part of our humanness"—the "capacity for growth and an openness to experience in our relationships with others."[292]

Finally, the paternalism challenge to inalienability ignores the fact that the contractual approach is subject to a similar charge. Enforcing prior disposition agreements over a person's contemporaneous objection is itself paternalistic because it overrides the person's current wishes in order to protect the interests of the person she was when the agreement was made. In essence, the contractual approach asks the law to enforce a system of "self-paternalism," in which individuals' current wishes are disregarded to protect the wishes of the persons they were in the past.[293]

It might be argued that enforcing a person's prior decisions cannot constitute paternalism because the decision that is enforced was originally the person's own. As argued above, however, this argument makes sense only if one assumes that an

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and tenants and common-law principles of contract and tort. *See* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 590-95, 624-38 (1982).

290. *See* Kennedy, *supra* note 289, at 634-35 (discussing cases where "the courts refuse to enforce an agreement because one party has made a mistake about his true interests that threatens to impoverish him"); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1141-42 (1986) (arguing that limitations on private preferences can be justified when they seek to overcome barriers to individuals' ability to promote their long-term interests).

291. *See supra* Part IV.B.2.

292. SURROGATE PARENTING, *supra* note 192, at 125.

293. *See* Note, *Rumpelstiltskin Revisited*, *supra* note 196, at 1945 (arguing that the debate about inalienable rights "must abandon anti-paternalism, because the structure of rights requires the imposition of undesired goals on either present or future selves").

individual's prior decision remains "hers" even if it is antithetical to her current wishes, values, and beliefs.[294] Indeed, it is arguable that judicial enforcement of self-paternalism actually imposes more of a burden than other forms of paternalism because, in addition to having her authority to make particular decisions taken away, the individual may feel remorse or guilt for the prior decision that is being enforced.[295]

### C. RELIANCE

A third possible objection to allowing individuals to change their minds about decisions concerning the disposition of frozen embryos is that such an approach ignores the interests of the partner who has acted in reliance on a disposition decision agreed to in advance. For example, a woman might argue that she would not have undergone ovarian stimulation and egg retrieval if she knew that she would not be able to use all of the embryos created because of her husband's objection at a later date. Alternatively, she might claim that, had she known of her partner's objection to the use of the remaining frozen embryos earlier, she would have undergone an additional IVF cycle at that time using donor sperm. If she is no longer able to produce eggs, her reliance on the availability of the remaining frozen embryos may leave her without any opportunity to have genetically-related offspring of her own.

The problem with the reliance argument, however, is that the law protects reliance only if it is "reasonable" to rely on a commitment in a particular case.[296] If it were clear that decisions about the future disposition of frozen embryos were not enforceable, it would no longer be reasonable to rely on the en-

294. *See supra* note 179 and accompanying text. Drawing on the writings of John Stuart Mill, Rebecca Dresser asks "whether the self is so unitary that we may dispense with the concerns raised by true paternalistic intervention merely because actual consent was given at one time." Rebecca S. Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777, 792 (1982) (discussing appropriateness of enforcing advance consent to psychiatric treatment over the patient's contemporaneous objection); *see also* DONALD VANDEVEER, PATERNALISTIC INTERVENTION 49-58 (1986) (arguing that actions are paternalistic if they conflict with the subject's preferences at the time of the action, although concluding that prior consent can justify paternalism in some cases).

295. *See* Kronman, *supra* note 180, at 782 (arguing that, in some cases, denying individuals the right to change their mind may "weaken[] a person's confidence in his ability to make lasting commitments and guard the things he cares for, and this, in turns, strikes at his self-respect").

296. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

forceability of disposition decisions made in advance. To ensure that people do not mistakenly rely on advance disposition agreements, IVF programs could be required to notify couples of their right to change their minds about disposition decisions as part of the process of obtaining informed consent to IVF.

The reliance argument also implies that the interests of the partner who wants the original agreement enforced are equivalent to, and perhaps greater than, those of the partner who has subsequently changed her mind. As discussed in Part III, however, using, donating, or destroying an embryo over the objection of one of the partners will impose greater burdens on that person than keeping the embryo frozen will impose on the partner whose preferred disposition option is not carried out.[297]

In fact, in light of the centrality of inalienable rights to those who hold them, it is usually the case that the rights-holder's interest in changing her mind will outweigh the claims of those who may be frustrated if a promise to relinquish an inalienable right is not kept. For example, the interests of a birth mother in retaining a relationship with a child she has carried in her womb will generally outweigh those of prospective adoptive parents in establishing a relationship with a child to whom they have no pre-existing bond. Because the party seeking to change her mind has more at stake, appeals to the reliance interests of the party who seeks to enforce the original agreement are less persuasive.

### D. ANALOGY TO ADVANCE DIRECTIVES

Supporters of the contractual approach to decisions about the disposition of frozen embryos compare the approach to other situations in which the law encourages people to plan in advance. John Robertson, for example, argues that advance disposition agreements are comparable to living wills and organ donor cards.[298]

The analogy to living wills and other advance directives, however, misses an important point. Advance directives enable individuals to direct the course of their medical treatment after they lose the capacity to make decisions directly. Their purpose is not to limit the individual's ability to change her mind in the future but to ensure that her wishes will be respected if she no

297. *See supra* Part III.

298. *See* Robertson, *Prior Agreements*, *supra* note 99, at 415 n.28.

longer has the capacity to assert those wishes herself.[299] In fact, many statutes authorizing advance directives expressly protect the individual's right to rescind the directive as long as she retains decision-making capacity.[300] Because the contractual approach to decisions about the disposition of frozen embryos is designed to limit the individual's future decision-making authority, not to protect her wishes in the event she is no longer able to assert them herself, the analogy to advance directives does not apply.

Moreover, some commentators—including John Robertson—have argued that, even after a loss of decision-making capacity, treatment decisions expressed in an advance directive should not necessarily be applied. In an article co-authored with Rebecca Dresser, Robertson emphasizes that enforcing an individual's prior directives about medical treatment may insufficiently protect the current interests of the incapacitated patient. "Because interests change over time and the person executing the directive may not be assessing the situation from the perspective of the future incompetent patient," Dresser and Robertson argue, the assumption that enforcing the advance directive will promote the patient's interests may not always be correct.[301] If it is inappropriate to enforce an advance directive over the objection of a patient who lacks decision-making capacity, it is even less appropriate to enforce a prior disposition decision over the objection of a person whose mental capacity is not in doubt.

### E. PRACTICALITY

One of the principal arguments raised in support of the contractual approach is that enforcing advance disposition agreements is the only way to provide the "certainty needed for

299. *See generally* Annas, *supra* note 102, at 1210-13 (explaining how advance directives have evolved and may be implemented).

300. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2985(1)(a) (McKinney 1993) ("A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy.").

301. Rebecca S. Dresser & John A. Robertson, *Quality of Life and Non-Treatment Decisions for Incompetent Patients: A Critique of the Orthodox Approach*, 17 LAW MED. & HEALTH 234, 236-38 (1989); *see also* Rebecca Dresser, *Dworkin on Dementia: Elegant Theory, Questionable Policy*, HASTINGS CENTER REP., Nov.-Dec. 1995, at 32, 34 (1995) (criticizing the position that an individual's prior directives should take precedence over her current interests).

effective operation of IVF programs."[302] The assumption seems to be that allowing either partner to rescind an advance disposition agreement would invite disagreement and, as a result, litigation. Without the advance disposition agreement to fall back on, the fear is that there will be no way to determine how the embryos should be disposed.

Actually, as Part V shows, an inalienable rights approach to disposition decisions can provide equally certain rules for practitioners, patients, and the courts. Unless the facility receives actual notice of an objection by one of the partners, it could rely on the couple's disposition decisions expressed in advance. If one of the partners has changed her mind and the couple cannot agree to a second-best disposition option, the default rule is clear: the embryos simply remain in frozen storage until an agreement is reached, the embryos are no longer viable, or the facility's agreed-upon storage limit expires.

If anything, the approach proposed here would be simpler to administer than one that relies on advance disposition agreements. Unlike the contractual approach, there would be no need to resolve disputes over the validity or interpretation of the couple's prior agreement.

## CONCLUSION

As the use of ARTs becomes more prevalent, disputes over the disposition of frozen embryos will inevitably arise. Although it may be tempting to apply familiar principles of contract law to such situations, courts and legislators should be wary of that approach. As argued above, a central aspect of procreative liberty is the right to make contemporaneous choices about how one's reproductive capacity will be used. The contractual approach to decisions about the disposition of frozen embryos violates that principle and undermines important societal values about reproduction, family relationships, and the strength of genetic ties.

In place of the contractual approach, the law should require the couple's mutual consent before any affirmative disposition of a frozen embryo is enforced. While such consent could be provided before the embryos are created, both partners should retain the right to change their minds until a disposition decision is actually carried out. This inalienable rights approach will protect the couple's interest in making contempo-

302. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

raneous reproductive decisions and promote the important societal interests at stake. Furthermore, it will provide clear and easily-administered rules for practitioners, patients, and the courts.