

Spring 1998

## "PRENATAL ADOPTION": THE VATICAN'S PROPOSAL TO THE IN VITRO FERTILIZATION DISPOSITION DILEMMA

Janette M. Puskar

Follow this and additional works at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights](https://digitalcommons.nyls.edu/journal_of_human_rights)



Part of the [Law Commons](#)

---

### Recommended Citation

Puskar, Janette M. (1998) ""PRENATAL ADOPTION": THE VATICAN'S PROPOSAL TO THE IN VITRO FERTILIZATION DISPOSITION DILEMMA," *NYLS Journal of Human Rights*: Vol. 14 : Iss. 3 , Article 7. Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights/vol14/iss3/7](https://digitalcommons.nyls.edu/journal_of_human_rights/vol14/iss3/7)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

## "PRENATAL ADOPTION": THE VATICAN'S PROPOSAL TO THE *IN VITRO* FERTILIZATION DISPOSITION DILEMMA

The inability to bear and rear a child is one of the greatest hardships that an individual can experience. "Infertility often implicates the most fundamental feelings about self and one's relation to the natural order, and may leave persons feeling handicapped or defective in an area central to personal identity and fulfillment."<sup>1</sup> For some infertile couples who cannot naturally conceive offspring, *in vitro* fertilization ("IVF")<sup>2</sup> is the answer.<sup>3</sup> With the advancement of modern technology, the process of freezing the fertilized eggs, or cryopreservation,<sup>4</sup> gives the infertile couple a better chance of becoming pregnant.<sup>5</sup> Although this cryopreservation process gives couples better chances in the IVF process, it also brings along with it troubling medical, ethical, and legal issues.<sup>6</sup>

The world's first IVF baby, Louise Brown, was born on July 25,

---

<sup>1</sup> John A. Robertson, *Embryos, Families, And Procreative Liberty: The Legal Structure Of The New Reproduction*, 59 S. CAL. L. REV. 939, 942 (1968).

<sup>2</sup> *Id.* at 944. The process of *in vitro* fertilization involves a sophisticated treatment where mature eggs are obtained through a surgical procedure and fertilized outside of the body. *Id.* After fertilization occurs, they are placed back into the woman's uterus. *Id.*

<sup>3</sup> See generally *id.* See also *infra* notes 33-45 and accompanying text.

<sup>4</sup> See Clifton Perry and L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 468 (1992). Cryopreservation is the freezing of the fertilized eggs in order to preserve them. *Id.* See also *infra* notes 46-65 and accompanying text.

<sup>5</sup> Grobstein, Flower & Mendeloff, *Special Report Frozen Embryos: Policy Issues 1985*, 312 NEW ENG. J. OF MED. 1584, 1584-85 (1985) (stating that with the cryopreservation process there is no need for repeated IVF surgical procedures).

<sup>6</sup> See Knoppers & LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 4 AM. J. L. & MED. 329 (1991). "More than a decade after the birth of Louise Brown and after 12,000 other births by *in vitro* fertilization, over 100 reports of special commissions worldwide exist on the ethical and legal issues." *Id.* See generally G. Smith II, *Australia's Frozen "Orphan" Embryos: A Medical, Legal, and Ethical Dilemma*, 24 J. FAM. L. 27 (1985-86) (discussing some of the issues raised by IVF and cryopreservation).

1978 in Great Britain.<sup>7</sup> In December 1981, the first IVF baby was born in the United States.<sup>8</sup> The IVF process spread remarkably,<sup>9</sup> despite the procedure's expense,<sup>10</sup> stressfulness,<sup>11</sup> and low success rates.<sup>12</sup> It has been nineteen years since the advent of the IVF process, and over those years, legal problems have arisen.<sup>13</sup> The most controversial issue pertaining to IVF concerns the disposition of the frozen embryo<sup>14</sup> and that it is not going

---

<sup>7</sup> Robertson, *supra* note 1, at 463-64. Drs. Edwards and Steptoe were the first to achieve the birth of an IVF baby. *Id.*; see also L. BROWN & J. BROWN, *OUR MIRACLE CHILD CALLED LOUISE, A PARENT'S STORY* (1979) (describing their perspective of being the parents of the first IVF baby).

<sup>8</sup> Bill E. Davidoff, *Frozen Embryos: A Need For Thawing In The Legislative Process*, 47 SMU L. REV. 131 (1993); Denise Grady, *How to Coax New Life Advances in Reproductive Techniques Give Couples Hope for Children Once Considered Impossible to Conceive*, TIME, Sept. 18, 1996, at 36 (stating that since the birth of the first U.S. IVF baby, there have been 26,000 more births in the U.S.).

<sup>9</sup> See Kathryn Dore Perkins, *More Infertile Couples Placing Hope In Clinics*, SACRAMENTO BEE, Jan. 1, 1996, at A1. "A decade ago there were 30 clinics in this country performing what had become known as 'assisted reproduction.' Today there are 300 with annual revenues of \$2 billion." *Id.*

<sup>10</sup> Robertson, *supra* note 1, at 940-41; see *Health Report*, TIME, August 8, 1994, at 20. The average cost per test-tube baby is between \$67,000 and \$114,000. *Id.* For a couple who is over the age of 40, the cost averages up to \$800,000. *Id.*

<sup>11</sup> See Larry Thompson, *Fertility with Less Fuss*, TIME, Nov. 14, 1994, at 79. The process can be stressful where the hormone injections can "produce pain, bloating and sharp mood swings." *Id.* The woman also "undergoes tedious blood tests and ultrasound examinations." *Id.*

<sup>12</sup> See Grady, *supra* note 8, at 36. Of the 400,000 couples who tried IVF, only 18 percent produced children. *Id.*; see also David Levrant et al., *Pregnancy Potential of Human Oocytes - The Effect of Cryopreservation*, 323 NEW ENG. J. MED. 1153, 1153 (1990). Even with considerable improvements in laboratory procedures, methods of egg retrieval, and techniques of ovarian stimulation, the highest success rate for pregnancy is no more than 25 percent. *Id.*

<sup>13</sup> See, e.g., *Kass v. Kass*, 663 N.Y.S.2d 581 (App. Div. 1997) (involving a dispute over the disposition of frozen embryos of a divorced couple where the wife wanted to have embryos implanted in her uterus and the husband wanted them to be turned over to the clinic for embryo research); see also *infra* notes 103-162 and accompanying text.

<sup>14</sup> James Walsh, *A Bitter Embryo Imbroglio Amid Dramatic Protests and Universal Unease, Britain Begins Destroying 3,300 Human Embryos*, TIME, Aug. 12 1996, at 10. An embryo contains anywhere from one to eight cells, and "measures no more than a fifth of a millimeter across, about the size of a period ending this sentence." *Id.*

to be used in the original way intended.<sup>15</sup> This dilemma occurs because the cryopreservation process allows the embryo to survive outside of the womb in a frozen state.<sup>16</sup> This controversial issue arises in situations such as death, divorce, or a dispute between a couple concerning the disposition of the frozen embryo.<sup>17</sup> Since the IVF process made its debut in 1978, courts have decided issues related to IVF in cases such as *Del Zios v. Columbia Presbyterian Medical Center*,<sup>18</sup> *York v. Jones*,<sup>19</sup> *Davis v. Davis*,<sup>20</sup> and *Kass v. Kass*.<sup>21</sup> As with case law, statutory authority is also sparse. To date, only six states have passed legislation relating to IVF and the disposition of the embryo,<sup>22</sup> thereby leaving the fate of the frozen embryo open and undecided.<sup>23</sup>

---

<sup>15</sup> Perry & Schneider, *supra* note 4, at 463-64; *see also* Gina Kolata, *Medicine's Troubling Bonus: Surplus of Human Embryos*, N.Y. TIMES, Mar. 16, 1997, at 1.

<sup>16</sup> Jennifer P. Brown, Comment, "Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Pre-embryo Discard Violate the Constitutional Right to Privacy, 28 U.S.F. L. Rev. 183, 184 (1993).

<sup>17</sup> Davidoff, *supra* note 8, at 132 (explaining that such situations raise complex problems regarding the disposition because the embryo can survive outside of the womb); *see also* Kolata, *supra* note 15, at 1.

<sup>18</sup> No. 74-3558, slip op. (S.D.N.Y. Nov. 14, 1978) (involving a claim of intentional infliction of emotional distress and tortious conversion of property where a doctor destroyed a couple's frozen embryo without their permission); *see infra* notes 109-119 and accompanying text.

<sup>19</sup> 717 F. Supp. 421 (E.D. Va. 1989) (involving a suit against an IVF clinic where the clinic refused to release a couple's frozen embryo); *see infra* notes 120-134 and accompanying text.

<sup>20</sup> 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993) (involving a dispute over the disposition of frozen embryos of a divorced couple). *see infra* notes 135-153 and accompanying text.

<sup>21</sup> 663 N.Y.S.2d 581 (App. Div. 1997) (involving a dispute over the disposition of frozen embryos of a divorced couple where the wife wanted to have the embryos implanted in her uterus, and the husband did not); *see infra* notes 141-178 and accompanying text.

<sup>22</sup> *See* LA. REV. STAT. ANN. §§ 9:123-133 (West 1993); FLA. ST. ANN. § 742.17 (West 1993); 18 PA. CONS. STAT. ANN. § 3216 (c) (1989); KY. REV. STAT. ANN. § 311.715 (Baldwin 1995); KAN. STAT. ANN. § 65-6702 (1992).

<sup>23</sup> *See* Michael D. Lemonick, *Sorry, Your Time Is Up A Controversial British Law Targets 3,000 Human Embryo For Disposal*, TIME, Aug. 12, 1996, at 41 (stating that the U.S. does not have a national policy, and that "clinics are generally responsible for setting

Other countries, such as Great Britain, have addressed this dilemma by instituting a law mandating the destruction of any frozen embryos that have been in a cryopreserved state for over five years.<sup>24</sup> Appalled by this mass destruction, the Vatican responded by suggesting "that married women volunteer to bring the embryos to term in 'prenatal adoption.'"<sup>25</sup> This idea is neither new nor bizarre, as some IVF clinics require couples either to implant the frozen embryo in the natural mother, or donate it for implantation in another woman.<sup>26</sup> For example, Louisiana law requires the mandatory donation of the unused frozen embryo.<sup>27</sup> However, it has yet to be seen whether such a proposal is allowed under the United States Constitution.

This Note discusses the Vatican's proposal of "prenatal adoption," and whether such a law would be constitutional. Part I of this Note briefly describes the scientific procedures of the IVF and cryopreservation processes.<sup>28</sup> Part II gives an overview of the legal status of the frozen embryo, the statutes, and the case law related to IVF.<sup>29</sup> Part III explores the Vatican's proposal of "prenatal adoption" and the other options surrounding frozen embryo disposition.<sup>30</sup> Part IV analyzes the constitutionally protected right to privacy.<sup>31</sup> Finally, Part V concludes that if the right to privacy analysis is the proper analysis, a statute mandating the "prenatal adoption" of the unwanted frozen embryo would not infringe

---

their own guidelines.").

<sup>24</sup> Human Fertilisation and Embryology Act, 1990, ch. 37, § 14 (Eng.); see also Paul Raeburn, *A Delicate Issue Frozen In Time*, BUS. WK., July 22, 1996, at 42. "The destruction is mandated by a British law that says frozen embryos must be discarded after five years, a countdown that began when the law took effect on Aug. 1, 1991." *Id.*

<sup>25</sup> Carrie Dowling, *Vatican Suggests "Adoption" of Frozen Embryos*, USA TODAY, July 24, 1996 at 1A; see also *infra* notes 179-210 and accompanying text.

<sup>26</sup> See generally Kim Schaefer, *In-Vitro Fertilization, Frozen Embryos, And The Right To Privacy--Are Mandatory Donation Laws Constitutional?*, 22 PAC. L.J. 87 (1990) (discussing the constitutionality of a mandatory donation law).

<sup>27</sup> See LA. REV. STAT. ANN. § 9:130 (West 1993).

<sup>28</sup> See discussion *infra* Part I.

<sup>29</sup> See discussion *infra* Part II.

<sup>30</sup> See discussion *infra* Part III.

<sup>31</sup> See discussion *infra* Part IV.

on one's right to privacy.<sup>32</sup>

## I. THE SCIENTIFIC PROCEDURES OF THE *IN VITRO* FERTILIZATION AND CRYOPRESERVATION PROCESSES

### A. *The In Vitro Fertilization Process*

The IVF process gives an infertile couple the opportunity to produce a child who is biologically their own.<sup>33</sup> After a couple has met certain requirements provided by the IVF clinic,<sup>34</sup> the woman is placed on fertility drugs which induce ovulation and increase the number of eggs produced.<sup>35</sup> This process increases the probability of pregnancy because it allows the physician to implant several embryos at one time.<sup>36</sup> The physician then surgically removes the eggs from the woman's ovary through a procedure called laparoscopy.<sup>37</sup> In the next step of this process,

---

<sup>32</sup> See discussion *infra* Part V.

<sup>33</sup> Davidoff, *supra* note 8, at 133.

<sup>34</sup> See *id.* (explaining that a couple's infertility must result "from tubal factors, mucus abnormalities, immunity to spermatozoa, or male dysfunctions" and the couple must also undergo a screening process determining their suitability for the program).

<sup>35</sup> *Id.* at 134. This process is sometimes also called "superovulation." *Id.*

<sup>36</sup> Schaefer, *supra* note 26, at 90. See also Robert M.L. Winston and Alan H. Handyside, *New Challenges In Human In Vitro Fertilization*, SCI., May 14, 1993, at 932. The success rates increase when more than one embryo is transferred simultaneously. *Id.* "Pregnancy resulted from thirteen percent (184 out of 436) of transfers when three or fewer embryos were transferred, twenty-five percent (284 out of 944) with four, and twenty-six percent (229 out of 871) with five or six embryos." *Id.*; Peter J. Neumann et al., *The Cost of a Successful Delivery with In Vitro Fertilization*, 331 NEW ENG. J. MED. 239, 240 (1994) (reporting that "because of the methods of ovarian stimulation used and the practice of implanting multiple embryos in a woman's uterus to improve the chance of pregnancy, increases the incidence of multiple births.").

<sup>37</sup> Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 326 (1986). Laparoscopy involves inserting an instrument through the naval to view the eggs, and then using another instrument to withdraw the fluid containing the eggs from the ovary. *Id.* See also Neumann, *supra* note 34, at 240 (reporting that successful egg retrieval occurs in only about 86 percent of cycles).

the eggs are taken to the laboratory and combined with the male's sperm and placed in an incubator for twelve hours.<sup>38</sup> After fertilization occurs, the woman takes hormones that prepare her body for the fertilized embryo.<sup>39</sup> Finally, the physician places the embryos into the woman's uterus when they have reached the four-to-eight cell stage.<sup>40</sup> At this point, pregnancy takes place in the usual manner.<sup>41</sup> The statistics report that some programs have a ninety percent success rate for egg retrieval, fertilization, and "embryonic cleavage."<sup>42</sup> From this process, pregnancy results at a rate of twenty to twenty-five percent,<sup>43</sup> and two-thirds of the pregnancies result in live births.<sup>44</sup> Although these chances may seem slim, it is worth the risk to a couple who may never otherwise be parents.<sup>45</sup>

### B. The Cryopreservation Process

In early 1981, doctors announced a development where the IVF embryo could be frozen.<sup>46</sup> Cryopreservation is a process that involves freezing the embryo so it can be preserved and implanted at a later date.<sup>47</sup> The embryo is usually frozen at the two-to-eight cell stage.<sup>48</sup> The embryo culture is first packaged with cryoprotectants.<sup>49</sup> The embryo is then placed

---

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Perry & Schneider, *supra* note 4, at 468.

<sup>41</sup> Robertson, *supra* note 1, at 949.

<sup>42</sup> *Id.* at 940.

<sup>43</sup> Perry & Schneider, *supra* note 4, at 468; *see also* Levran et al., *supra* note 12, at 1153 (reporting that the highest success rate for pregnancy is not more than 25 percent).

<sup>44</sup> Robertson, *supra* note 1, at 940.

<sup>45</sup> *Id.*

<sup>46</sup> Perry & Schneider, *supra* note 4, at 463.

<sup>47</sup> Davidoff, *supra* note 8, at 134; *see also* Perry & Schneider, *supra* note 4, at 468 (explaining that the cryopreservation process "suspends mitosis or germ cell division"); Levran, *supra* note 12, at 1153 (debating whether the chances of a successful pregnancy increase with cryopreservation since some embryos may be damaged during the freezing process).

<sup>48</sup> Perry & Schneider, *supra* note 4, at 468.

<sup>49</sup> Davidoff, *supra* note 8, at 134 n. 33 (stating that cryoprotectants replace cellular water which protect the embryo from the effects of freezing).

in a container for freezing and stored in liquid nitrogen at approximately minus 196° Celsius.<sup>50</sup> When the woman is ready for implantation, the frozen embryo is thawed by reversing the process.<sup>51</sup> The physician then implants the embryo using the normal IVF process.<sup>52</sup>

Before the advent of cryopreservation, there was a problem with IVF because for health and safety reasons, only three to four embryos could be implanted at one time.<sup>53</sup> As a result, there was an excess of fertilized embryos, and an ethical dilemma arose as to their disposition.<sup>54</sup> Cryopreservation allows for the freezing and storing of the excess embryos, so they can be implanted at a later date.<sup>55</sup> Thus, the freezing process reduces the number of times the woman must endure the entire IVF process.<sup>56</sup> Another advantage is cost.<sup>57</sup> It is significantly less expensive to implant cryogenically preserved embryos, than to repeat the entire IVF process several times.<sup>58</sup> The most important advantage of the cryopreservation process is that it allows the woman to "optimize the timing of embryo transfer in subsequent cycles."<sup>59</sup> Although this freezing

---

<sup>50</sup> Schaefer, *supra* note 26, at 91.

<sup>51</sup> Davidoff, *supra* note 8, at 134.

<sup>52</sup> Schaefer, *supra* note 26, at 91.

<sup>53</sup> Davidoff, *supra* note 8, at 135.

<sup>54</sup> *Id.*; see also JOHN YEH & MOLLY ULIN YEH, LEGAL ASPECTS OF INFERTILITY 80 (1991) (stating that the surplus are problematic, and that the only solutions were to destroy them, implant them all in the woman, donate them to another woman, or use them for medical research).

<sup>55</sup> YEH & YEH, *supra* note 54, at 84.

<sup>56</sup> *Id.*; see also Davidoff, *supra* note 8, at 135 (explaining that if the initial process fails to produce a pregnancy, the woman need not go through the entire IVF process again if the excess embryos are frozen for future use).

<sup>57</sup> Perry & Schneider, *supra* note 4, at 468.

<sup>58</sup> *Id.*; see also Neumann, *supra* note 36, at 241. The average cost per cycle is \$8,000, and the marginal cost per cycle is \$66,667 per delivery. *Id.* The marginal costs could rise to as much as \$114,286 per delivery for couples attempting six cycles. *Id.*

<sup>59</sup> YEH & YEH, *supra* note 54, at 84; see also Perry & Schneider, *supra* note 4, at 468. Cryopreservation allows embryo implantation to be postponed until "after the deleterious effects of the ovarian-stimulating hormone have abated." *Id.* The capacity of the uterine lining is temporarily reduced by the hormones, and cannot accept the fertilized embryo. *Id.*



process is more efficient and easier on the woman,<sup>60</sup> it also preserves the ethical problems in the disposition of the unneeded embryos.<sup>61</sup>

In 1984, the Ethics Committee of the American Fertility Society addressed some of the ethical issues pertaining to IVF, and in 1986 they reported their findings.<sup>62</sup> The Ethics Committee report stated that "IVF is ethically acceptable."<sup>63</sup> The Ethics Committee also noted that the embryo should be given "special respect," that is, more than is given to human tissue, but less than is given to human beings.<sup>64</sup> Along with the Ethics Committee's report, the American Fertility Society issued guidelines "for establishing minimum training and experience levels for IVF personnel, given the 'irreplacability of human embryos.'"<sup>65</sup>

## II. THE LEGAL STATUS OF THE FROZEN EMBRYO

What rights, if any, does the frozen embryo possess? Should the frozen embryo be considered property, human life, or should it be given special respect as something in between? Although these questions have made their way into the courtroom,<sup>66</sup> the answers do not seem clear.<sup>67</sup> Although the amount of case law concerning the frozen embryo is sparse, it indicates where the issue of frozen embryo disposition may lead us, and whether a state could mandate "prenatal adoption" of the frozen embryo.

In order to determine whether mandatory "prenatal adoption" of

---

<sup>60</sup> Davidoff, *supra* note 8, at 135.

<sup>61</sup> Perry & Schneider, *supra* note 4, at 464 (stating that cryopreservation "merely lengthens the period of time during which a dispositional decision must be made by someone").

<sup>62</sup> Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 309 (1993).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also *infra* notes 84-89 and accompanying text for a more detailed discussion of the "special respect" theory.

<sup>65</sup> Feliciano, *supra* note 62, at 310.

<sup>66</sup> See *infra* notes 105-173 and accompanying text discussing the judicial decisions pertaining to IVF.

<sup>67</sup> See Walsh, *supra* note 14, at 10. "IVF is still so young a technique that legislatures and courts have not caught up with ethical quandaries arising from it." *Id.*

the frozen embryo is constitutional, it is essential to determine the legal status of the frozen embryo.<sup>68</sup> There are three theories regarding the status of the frozen embryo:<sup>69</sup> 1) the theory that the frozen embryo is property,<sup>70</sup> 2) the theory that the frozen embryo is a person,<sup>71</sup> and 3) the theory that the frozen embryo deserves special respect.<sup>72</sup> Furthermore, some states have incorporated IVF into their statutes,<sup>73</sup> laying the groundwork for the frozen embryo's legal status.<sup>74</sup>

*A. Is the Frozen Embryo Property, Human Life, or Something in Between?*

Many people argue that the frozen embryo are property because it is simply "corporeal human tissue."<sup>75</sup> This theory derives from the fact that the fertilized embryo is "a collection of six to eight cells which have no substantive human qualities."<sup>76</sup> Those who criticize this theory argue that viewing the frozen fertilized embryo as property ignores the tremendous value placed on human life.<sup>77</sup>

Others argue that the frozen embryo constitutes human life and is biologically alive.<sup>78</sup> This position is supported by scientific proof that: 1)

---

<sup>68</sup> See Davidoff, *supra* note 8, at 137.

<sup>69</sup> *Id.*

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

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

<sup>72</sup> *Id.*

<sup>73</sup> See e.g., LA. REV. STAT. ANN. §§ 9:123-133 (West 1993); FLA. ST. ANN. § 742.17 (West 1993); 18 PA. CONS. STAT. ANN. § 3216 (c) (1989); KY. REV. STAT. ANN. § 311.715 (Baldwin 1995); KAN. STAT. ANN. § 65-6702 (1992).

<sup>74</sup> See e.g., LA. REV. STAT. ANN. §§ 9:123-133 (West 1993).

<sup>75</sup> Davidoff, *supra* note 8, at 138.

<sup>76</sup> Schaefer, *supra* note 26, at 95 (arguing that before *Roe v. Wade*, "most states made abortion a lesser crime than homicide, lending support to the belief that the embryo is not human"); see *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion as a constitutional right).

<sup>77</sup> Schaefer, *supra* note 26, at 96.

<sup>78</sup> *Id.* at 94. Some recognize these embryos as alive because they are made up of living cells, which is one of the "fundamental units of life." *Id.*; see also Kolata, *supra* note 15, at 1. Robert Prosser, an embryologist at Columbia-Presbyterian Medical Center stated that "[w]e treat

embryos contain the unique genes to "become complete human beings;"<sup>79</sup> 2) embryos will continue to develop as human life,<sup>80</sup> 3) embryos metabolize, respond to their environment, and respire,<sup>81</sup> and 4) embryos are deliberately created.<sup>82</sup> Supporters of this theory believe that the frozen embryo should be given the status of a human, including all of the rights a human being possesses.<sup>83</sup>

The third theory--the special respect theory--<sup>84</sup> takes an intermediate view between the property theory and the human-life theory.<sup>85</sup> The frozen embryo is not given the full status afforded to a human being, but is not considered mere property either.<sup>86</sup> According to this theory, the embryo is given greater respect than human tissue because of its potential for life.<sup>87</sup> Proponents of this theory respect the embryo as a "symbol of human life."<sup>88</sup> The American Fertility Society has adopted this position.<sup>89</sup>

#### *B. State Legislation Regarding In Vitro Fertilization and the Frozen Embryo*

There has been much commentary as to the need for legislation

---

them [frozen embryos] as though they were viable developing babies." *Id.*

<sup>79</sup> Schaefer, *supra* note 26, at 94.

<sup>80</sup> *Id.*

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

<sup>82</sup> See Davidoff, *supra* note 8, at 137 (stating that because the embryo is created deliberately, the doctrine of *Roe v. Wade* does not apply); see also David G. Dickman, Comment, *Social Values in a Brave New World: Toward a Public Policy Regarding Embryo Statutes and In-Vitro Fertilization*, 29 ST. LOUIS U.L.J. 817, 830 (1985).

<sup>83</sup> See Davidoff, *supra* note 8, at 137.

<sup>84</sup> *Id.* at 139.

<sup>85</sup> Robertson, *supra* note 1, at 972.

<sup>86</sup> Schaefer, *supra* note 26, at 96.

<sup>87</sup> *Id.* (stating that the embryo has great symbolic value); see also Davidoff, *supra* note 8, at 139 (stating the embryo is given special respect because it has great symbolic meaning, it may never realize its biological potential).

<sup>88</sup> Robertson, *supra* note 1, at 972.

<sup>89</sup> Davidoff, *supra* note 8, at 139.

regarding IVF and the human embryo.<sup>90</sup> However, few states have adopted legislation relating to IVF.<sup>91</sup> Of those states that have adopted legislation regarding IVF, the extent to which each state regulates varies.<sup>92</sup>

### 1. Pennsylvania

In Pennsylvania, the statute regarding IVF is extremely vague.<sup>93</sup> It does not allow any kind of fetal experimentation on an unborn or live child.<sup>94</sup> However, the statute also adds that this section is not to be construed as condoning or prohibiting IVF.<sup>95</sup>

### 2. Florida

The Florida statute regarding IVF pronounces the law pertaining to IVF disposition agreements.<sup>96</sup> It provides that a couple shall enter into a written agreement for the disposition of embryos "in the event of a divorce, death of a spouse, or any other unforeseen circumstance."<sup>97</sup> In the absence of a written agreement, ownership and decision-making control remain with the "commissioning couple."<sup>98</sup>

---

<sup>90</sup> See generally *id.* (arguing that there is a need for federal legislation and regulation of IVF).

<sup>91</sup> See e.g., LA. REV. STAT. ANN. §§ 123-133 (West 1993); FLA. ST. ANN. § 742.17 (West 1993); 18 PA. CONS. STAT. ANN. § 3216 (c) (1989); KY. REV. STAT. ANN. § 311.715 (Baldwin 1995); KAN. STAT. ANN. § 65-6702 (1992).

<sup>92</sup> Compare PA. CONS. STAT. ANN. § 3216 (c) (1989) (stating that nothing in the section either condones or prohibits *in vitro* fertilization and embryo transfer), with LA. REV. STAT. ANN. §§ 9:126 (West 1993) (giving the embryo biological human being status).

<sup>93</sup> 18 PA. CONS. STAT. ANN. § 3216 (1989).

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

<sup>95</sup> *Id.* at § 3216 (c) (1989).

<sup>96</sup> FLA. STAT. ANN. § 742.17 (West 1993).

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

<sup>98</sup> *Id.* The statute also provides that if a child is born from an embryo where the gamete providers have died before the transfer, that child shall not have a claim against the decedent's estate unless provided for by the decedent's will. *Id.* From this, one could conclude that the Florida legislature had embryo donation in mind.

### 3. Kentucky

According to the Kentucky statute, public medical facilities may be used for research of IVF or the actual process itself, only where the "procedures do not result in the intentional destruction of a human embryo."<sup>99</sup> However, it also states that the section should not be construed as allowing public funds to pay for IVF procedures.<sup>100</sup>

### 4. Kansas

Kansas' statute pronounces that the "disposition of the product of *in vitro* fertilization prior to implantation" is lawful and that the state shall not prohibit such disposition.<sup>101</sup>

### 5. California

In California it is unlawful for anyone to knowingly use embryos for any purpose other than indicated by the embryo providers. Further, the statute forbids implantation of an embryo into a recipient who is not the embryo provider, without the signed written consent of the embryo providers. Violations of this statute are punishable by imprisonment for three to five years, or by a fine of up to \$50,000.

### 6. Louisiana

In the State of Louisiana, a human embryo is given the status of a biological human being.<sup>102</sup> Another section of the statute provides that one

---

<sup>99</sup> See KY. REV. STAT. ANN. § 311.715 (Baldwin 1995).

<sup>100</sup> *Id.* (stating that "public funds' means any money of the Commonwealth of Kentucky, any department, agency or instrumentality thereof, or any money of any county, city, agency or instrumentality thereof or any money of any other political subdivisions of the Commonwealth, agency or instrumentality thereof.").

<sup>101</sup> KAN. STAT. ANN. § 65-6702 (1992).

<sup>102</sup> LA. REV. STAT. ANN. § 9:123 (West 1993).

cannot intentionally destroy an embryo.<sup>103</sup> Finally, the statute also states that any embryo not used in the original way intended will be transferred to another woman who will adopt the embryo.<sup>104</sup>

*C. The Frozen Embryo Makes Its Way to the Courts*

With all of the ethical and legal problems accompanying the frozen embryo, it is not surprising that courts have made decisions concerning disposition disputes.<sup>105</sup> However, it is surprising that only a small number of cases have arisen in the eighteen years since IVF has been around.

*1. Del Zios v. Columbia Presbyterian Medical Center.*<sup>106</sup>

This was the first unreported case involving the frozen embryo.<sup>107</sup> The plaintiffs, Dr. and Mrs. Del Zios, were experiencing fertility problems due to Mrs. Del Zios's medical problems with her fallopian tubes.<sup>108</sup> In 1973, the couple sought fertility treatment at the Columbia Presbyterian Medical Center, where Dr. Sweeney suggested that Mrs. Del Zios could become pregnant through IVF.<sup>109</sup> Dr. Sweeney performed the IVF procedure on Mrs. Del Zios, which produced an embryo.<sup>110</sup>

The Del Zioses filed suit when Dr. Vande Wiele, the chairman of the department of gynecology and obstetrics, deliberately destroyed the Del Zios's embryo by placing it in a freezer.<sup>111</sup> Dr. Wiele felt that the procedure would constitute "an unwarranted practice which posed danger

---

<sup>103</sup> LA. REV. STAT. ANN. § 9:129 (West 1993).

<sup>104</sup> LA. REV. STAT. ANN. § 9:130 (West 1993).

<sup>105</sup> See generally Knoppers & LeBris, *supra* note 6, at 329.

<sup>106</sup> No. 74-3588, slip op. (S.D.N.Y. Nov. 14, 1978), reprinted in MICHAEL H. SHAPIRO & ROY G. SPECE JR., CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 522 (1981).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 522-23.

<sup>111</sup> SHAPIRO & SPECE JR., *supra* note 109, at 523.

to any human life resulting from such experimentation.<sup>112</sup> He also felt that Dr. Sweeney should have obtained the permission from the board before he performed this procedure.<sup>113</sup> The Del Zioses sued for intentional infliction of emotional distress and tortious conversion of their property.<sup>114</sup>

At trial, the jury rejected the conversion claim, but returned a verdict for \$50,000 for intentional infliction of emotional distress.<sup>115</sup> The court also stated that the doctor was wrong to destroy the embryo "without giving Mrs. Del Zios's physician any prior notice, or an opportunity to remove the test tube to some other location."<sup>116</sup>

## 2. *York v. Jones*.<sup>117</sup>

The dispute in *York* concerned one frozen fertilized embryo that the plaintiffs, Mr. and Mrs. York, sought to have released and transferred from an IVF clinic in Norfolk, Virginia to another clinic in Los Angeles, California.<sup>118</sup> The Yorks, who lived in New Jersey at the time, underwent several IVF processes.<sup>119</sup> However, at some point during the IVF processes, the Yorks moved to California<sup>120</sup> and decided to have their last remaining frozen embryo<sup>121</sup> transferred from the Norfolk clinic to the Los Angeles clinic.<sup>122</sup> When the Yorks notified the Norfolk clinic of their intentions, the clinic refused to transfer the remaining embryo.<sup>123</sup> The

---

<sup>112</sup> *Id.* at 524.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 526.

<sup>115</sup> *Id.* The opinion does not explain what element of conversion the jury found lacking. *Id.*

<sup>116</sup> SHAPIRO & SPECE JR., *supra* note 109, at 523.

<sup>117</sup> 717 F. Supp. 421 (E.D. Va. 1989).

<sup>118</sup> *Id.* at 422.

<sup>119</sup> *Id.* at 423.

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

<sup>121</sup> *Id.* at 424. During the last IVF process that Mrs. York underwent, six eggs were removed from Mrs. York and then fertilized. *Id.* Five of the six embryos were implanted in Mrs. York, and the sixth embryo was cryogenically preserved. *Id.*

<sup>122</sup> 717 F. Supp. at 424.

<sup>123</sup> *Id.*

Yorks filed suit, and the clinic responded by making a motion to dismiss for failure to state a claim upon which relief could be granted.<sup>124</sup>

The court implicitly adopted the "embryo as property theory"<sup>125</sup> by noting that a bailor-bailee relationship was created.<sup>126</sup> The cryopreservation agreement between the Yorks and the clinic created a bailment because the clinic had legal possession of the embryo and had the duty to account for it.<sup>127</sup> The court stated that when the purposes of the bailment relationship have terminated, "there is an absolute obligation to return the subject matter of the bailment to the bailor."<sup>128</sup> The court found that the agreement between the parties recognized the York's property rights and limited the clinic's rights as bailee.<sup>129</sup> The court denied the clinic's motion to dismiss,<sup>130</sup> and eventually, the case settled.<sup>131</sup>

### 3. *Davis v. Davis*.<sup>132</sup>

This case made its way up to the Supreme Court of Tennessee, where the court decided the fate of seven frozen embryos.<sup>133</sup> A divorced couple, Mary Sue Davis and Junior Davis, were arguing over the disposition of their cryogenically preserved embryos resulting from IVF procedures.<sup>134</sup> Mrs. Davis wanted to donate the remaining frozen embryos to another infertile couple, while Mr. Davis wanted them to be

---

<sup>124</sup> *Id.* at 423.

<sup>125</sup> *Id.* at 425. The court makes no analysis as to whether the frozen embryo is property or not, but just assumes that it is. The court seems to infer this from the language of the cryopreservation agreement between the parties.

<sup>126</sup> *Id.* The court states that for a bailment "all that is needed is the element of lawful possession . . . and duty to account for the thing as property of another." *Id.*

<sup>127</sup> 717 F. Supp. at 425.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 427.

<sup>130</sup> *Id.* at 429.

<sup>131</sup> Davidoff, *supra* note 8, at 147.

<sup>132</sup> 842 S.W.2d 588 (Tenn. 1992).

<sup>133</sup> *Id.* at 589.

<sup>134</sup> *Id.* The couple agreed as to the dissolution of marital property, except for the seven frozen embryos. *Id.*



destroyed.<sup>135</sup>

The trial court held that the frozen embryos were "human beings" and awarded "custody" to Mrs. Davis so that she could have them implanted.<sup>136</sup> The Court of Appeals reversed the trial court's finding and concluded that Mr. Davis had a "constitutionally protected right not to beget a child where no pregnancy has taken place" and that "there is no compelling state interest to justify ordering implantation against the will of either party."<sup>137</sup>

The Supreme Court of Tennessee stated that although the Davises had an interest in the nature of ownership and disposition of the embryos, the interest was not a true property interest.<sup>138</sup> The court concluded that frozen fertilized embryos deserve "special respect because of their potential for human life."<sup>139</sup> The court also noted that the essential issue was whether the parties would become parents.<sup>140</sup> The court concluded that the answer to this dilemma "turns on the parties' exercise of their constitutional right to privacy."<sup>141</sup> The court discussed the cases where the Supreme Court held that the right to procreate was "one of the basic civil rights of man."<sup>142</sup> The court also noted that "the right of procreational autonomy is composed of two rights of equal significance--the right to

---

<sup>135</sup> *Id.* at 590. Originally, when the case began, Mrs. Davis wanted the frozen embryos to be implanted in her, and Mr. Davis wanted the embryos to remain in their frozen state until he figured out "whether or not he wanted to become a parent outside the bounds of marriage." *Id.* at 589. However, by the time this case made its way to the Supreme Court of Tennessee, both parties had remarried, and changed their positions. *Id.* at 590.

<sup>136</sup> *Id.* at 589.

<sup>137</sup> 842 S.W.2d at 598. The court of appeals remanded the case to the trial court for entry of an order giving both parties "joint control . . . and equal voice over their disposition" because both parties shared an interest in their frozen embryos. *Id.*

<sup>138</sup> *Id.* at 597.

<sup>139</sup> *Id.* The court rejected the theory that frozen embryos are either "property" or "persons." *Id.* at 594-95. See also *supra* notes 75-89 and accompanying text.

<sup>140</sup> *Id.* at 598. The court states that asking the question of whether the embryos are property or not is helpful in determining the enforceability of disposition agreements. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> 842 S.W.2d at 600 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541).

procreate and the right to avoid procreation."<sup>143</sup>

The court held that in disputes concerning the disposition of a frozen embryo, a court should look first at "preferences of the progenitors,"<sup>144</sup> and if there is a dispute, then a court should look at the prior agreement pertaining to the disposition of the embryo.<sup>145</sup> If, in a case such as this one, there is no prior agreement, the court stated that it must resolve the dispute over "constitutional imports"<sup>146</sup> and weigh the interests of both parties.<sup>147</sup> The court noted that "the party wishing to avoid procreation should prevail" if the other party has other reasonable means of procreating.<sup>148</sup> If that party has no reasonable means of procreating, then the court will consider their argument for using the frozen embryo.<sup>149</sup> In this case, Mrs. Davis wanted to donate her embryos to another couple, and the court held that in such a case, "the objecting party obviously has the greater interest and should prevail."<sup>150</sup>

#### 4. *Kass v. Kass*.<sup>151</sup>

The dispute in *Kass* involved the issue of the disposition of five frozen fertilized embryos.<sup>152</sup> The parties in this case--now divorced--were arguing over the disposition of the five frozen embryos.<sup>153</sup> When the

---

<sup>143</sup> *Id.* at 601 (noting that there are limitations to both rights).

<sup>144</sup> *Id.* at 604.

<sup>145</sup> *Id.* at 592. This was not the case here. The Davises did not sign any prior disposition agreements, or any consent forms. *Id.* at 592 n.9. Apparently, the IVF clinic was moving its location, and there was no time to postpone the procedure until the appropriate forms were located. *Id.*

<sup>146</sup> *Id.* at 603. "[T]he issue here centers on the aspects of procreational autonomy--the right to procreate and the rights to avoid procreation." *Id.*

<sup>147</sup> 842 S.W.2d at 604.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Here, Mr. Davis objected to the donation of the frozen embryos, so the court ruled that the Knoxville Fertility Clinic could destroy them. *Id.* at 605.

<sup>151</sup> 663 N.Y.S.2d 581 (App. Div. 1997)

<sup>152</sup> *Id.* at 584.

<sup>153</sup> *Id.*

Kasses underwent IVF treatments, they signed an informed consent document<sup>154</sup> which provided in pertinent part:

In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to:

\* \* \* \* \*

(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.<sup>155</sup>

During the divorce proceedings, the parties executed a document which set forth their understanding of what was previously agreed to in the informed consent document as to the disposition of the remaining frozen embryos.<sup>156</sup> However, Mrs. Kass had a change of heart and wanted to have the embryos implanted in her uterus.<sup>157</sup> Mr. Kass wanted to have them turned over for embryo research, as provided for in the informed consent document.<sup>158</sup>

The trial court awarded Mrs. Kass the five embryos for implantation.<sup>159</sup> The trial court first reasoned that embryos enjoy the status of something between human life and property.<sup>160</sup> The court stated that, just as *in vivo* fertilization, a father's right ends at the moment of

<sup>154</sup> *Id.* at 583.

<sup>155</sup> *Id.* at 584.

<sup>156</sup> 663 N.Y.S.2d at 584. The parties executed a document written by Mrs. Kass for an uncontested divorce. *Id.*

<sup>157</sup> *Id.* at 584-85. Within less than a month, Mrs. Kass filed the present matrimonial action seeking, *inter alia*, "sole custody of the frozen fertilized eggs now being held at Mather Memorial Hospital." *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 585.

<sup>160</sup> 663 N.Y.S.2d at 585.

fertilization.<sup>161</sup> The court concluded that the issue of embryo disposition is a matter exclusively within the mother's discretion.<sup>162</sup> The court further found that the informed consent document agreed to by the parties was not dispositive and agreed that in the event of a divorce, a court would determine the issue of disposition.<sup>163</sup> Therefore, the trial court held that Mrs. Kass was to determine the fate of the five frozen embryos.<sup>164</sup>

The Appellate Division reversed and held that the informed consent document and the uncontested divorce instrument clearly stated the parties' intent that in the event of a divorce, any remaining embryos were to be donated for scientific research.<sup>165</sup> The court first criticized the lower court's analysis and stated that it had committed a "fundamental error."<sup>166</sup> The court stated that the Supreme Court was wrong to "[equate] a prospective mother's decision whether to undergo implantation of pre-zygotes which are the product of her participation in an IVF procedure with a pregnant woman's right to exercise exclusive control over the fate of her non-viable fetus."<sup>167</sup>

Rather, the court found that the first inquiry should be whether the parties had made an "expression of mutual intent which governs the disposition of the pre-zygotes under the circumstances in which the parties find themselves."<sup>168</sup> The court relied on the decision in *Davis v. Davis*,<sup>169</sup> where the Supreme Court of Tennessee stated that a critical factor in

---

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

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> 663 N.Y.S.2d at 590.

<sup>166</sup> *Id.* at 585.

<sup>167</sup> *Id.* The court noted that "[a] woman's established right to exercise virtually exclusive control over her own body is not implicated in the IVF scenario until such time as implantation actually occurs, for it is only then that her bodily integrity is at issue. Prior to implantation, that interest is not a relevant and appropriate consideration, and a court must pursue other analytical avenues in determining whether implantation over the objection of one of the parties should be permitted or precluded." *Id.* at 586.

<sup>168</sup> *Id.* at 586.

<sup>169</sup> *Id.* at 587; See 842 S.W.2d 588 (Tenn. 1992). For a more detailed discussion of *Davis v. Davis* see *supra* notes 133-150 and accompanying text.

determining the disposition of frozen embryos is whether there was a prior written agreement.<sup>170</sup> The *Kass* court found that because the Kassess executed the informed consent document, which was clear and unambiguous, the embryos would have to be disposed of as provided for in that agreement.<sup>171</sup> The court also noted that Mrs. Kass did not meet the evidentiary standards to permit the balancing test, as used in *Davis v. Davis*, which balances the parties' interests in using the embryos.<sup>172</sup>

The court concluded that "the decision to attempt to have children through IVF procedures and the determination of the fate of cryopreserved pre-zygotes resulting therefrom are intensely personal and essentially private matters which are appropriately resolved by the prospective parents rather than the courts."<sup>173</sup> The court determined that if the parties had entered into a prior agreement indicating their mutual intent regarding the disposition of any unused frozen embryos, then a court must not interfere.<sup>174</sup> Therefore, because the Kassess had executed the informed consent document indicating that in the event of any unforeseen circumstances, the court held that the *Kass* embryos be retained by the IVF Program for scientific research.<sup>175</sup>

### III. THE VATICAN'S PLAN FOR THE "PRENATAL ADOPTION" OF THE FROZEN EMBRYO

On July 24, 1996, the Vatican announced that married women

---

<sup>170</sup> 663 N.Y.S.2d at 587.

<sup>171</sup> *Id.* at 588.

<sup>172</sup> *Id.* at 590. "Although the plaintiff submitted 170 pages of exhibits, including her complete medical records, . . . the record is 'insufficient to permit a fair balancing of the salient considerations.'" *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 663 N.Y.S.2d at 590. It should be noted that there is a motion to stay the order of the Appellate Division pending the appeal granted to the Court of Appeals. See *Kass v. Kass*, Mo. No. 1343 (N.Y. Nov. 20, 1997).

should volunteer and bring unwanted frozen embryos to term.<sup>176</sup> The event that prompted such a plea was the destruction of thousands of frozen embryos in fertilization clinics in England.<sup>177</sup> A British law has mandated the destruction of embryos after being in a frozen state for five years.<sup>178</sup> The law took effect on August 1, 1991, and on August 1, 1996, the five-year time limit had passed and British clinics had to prepare for the destruction.<sup>179</sup> Some sought injunctive relief to save their tiny embryos from such peril.<sup>180</sup> A doctor at the Bourn Hall Clinic in Cambridge stated that he had received a fax from a couple requesting that their embryos be stored for the extended five years, however, their letter was 24 hours too late.<sup>181</sup> Their embryos had already been destroyed.<sup>182</sup>

Outraged at this destruction,<sup>183</sup> Rev. Maurizio Faggioni stated in

---

<sup>176</sup> Dowling, *supra* note 25, at 1A.

<sup>177</sup> *See id.* *See also* Walsh, *supra* note 14, at 10. In Britain, there were approximately 9,000 fertilized embryos frozen between 1985 and 1991. "Britain was probably ripe for such a debate, given that the country pioneered IVF and resorts to the procedure today at a per capita rate that is among the world's highest." *Id.*

<sup>178</sup> Human Fertilisation [sic] and Embryology Act, 1990, ch. 37, § 14 (Eng.). *See also* Raeburn, *supra* note 24, at 42. *See also* *Court Blocks Destruction of Frozen Embryo*, *Austin American-Statesman*, Aug. 4, 1996, at A12. The British law also provides that the five-year-old embryos will be destroyed unless a couple jointly instructs for the embryos to be stored for another five years, or they donate them to research or another woman. *Id.* *See* Walsh, *supra* note 14, at 10. Of these 9,000 embryos, the clinics were able to reach the "parents" of 6,000 of the embryos, leaving a little over 3,000 "potential infants . . . in a limbo where the law dictated that they must be destroyed." *Id.* Clinics tried to reach these "parents" through many efforts, including sending up to three registered letters. *Id.*

<sup>179</sup> *See* Walsh, *supra* note 14, at 10. Clinicians thawed out approximately 3,300 frozen embryo cultures, they added "drops of saline solution or alcohol to assure their destruction," and then incinerated them with other biological waste. *Id.*

<sup>180</sup> Jojo Moyes, *A World of Anguish in an Inch of Glass*, Independent (London), at 1. If both the "mother" and the "father" consent, then the embryos can be stored for an extended period of time. *Id.* One woman had to get a "last-minute injunction" because her estranged husband refused to sign the consent form. *Id.*

<sup>181</sup> *Id.*

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

<sup>183</sup> Walsh, *supra* note 14, at 10. The Church is not the only one upset by this destruction, "many people everywhere are very uneasy with the idea of dictated destruction of human life, however primitive and miniature." *Id.* People across Europe offered to "adopt" the

L'Osservatore Romano, the Catholic Church's official newspaper in the Vatican, that destroying embryos would be "prenatal slaughter,"<sup>184</sup> where "tens of thousands of innocent lives will be legally cut short."<sup>185</sup> The Vatican sees its proposal as similar to giving a home to an orphan, where this would be treated as a "prenatal adoption."<sup>186</sup>

The Catholic Church does not condone IVF.<sup>187</sup> The Vatican, in a document defining the moral standards of the Catholic Church,<sup>188</sup> condemned the IVF process.<sup>189</sup> The Church opposes these advances because they interfere with the natural transmission of life.<sup>190</sup> The document states that "human procreation can rightfully occur only through

frozen embryos. Lemonick, *supra* note 23, at 41.

<sup>184</sup> Dowling, *supra* note 25, at 1A. The Vatican's announcement was on July 23, 1996, 10 days before the five year period was up. *Id.* The Vatican was hoping to save 6,000 frozen embryos from being destroyed. *Id.* See also Walsh, *supra* note 14, at 10. Pro-life demonstrators assembled for a candlelight vigil outside Westminster Cathedral in London the night before the destruction took place. *Id.* See also Lemonick, *supra* note 23, at 41 (stating that memorial services were held afterwards).

<sup>185</sup> Dowling, *supra* note 25, at 1A.

<sup>186</sup> *Id.* There is assumed to be much controversy over this proposal. David Olive, professor of obstetrics and gynecology at Yale, stated, "[t]he idea that you produced an embryo that will be given to someone else will not be acceptable to many. For some couples, it's an extraordinary emotional issue." *Id.* But see Kolata, *supra* note 15, at 32. One doctor stated that "nearly all [couples] who did not want to keep their embryos wanted to donate them to other couples." *Id.* Lemonick, *supra* note 23, at 41. "Childless couples bitterly lamented that they would gladly have taken the embryos for themselves." *Id.* See also Moyes, *supra* note 180, at 1. "Mrs. A donated her 'spare' embryos . . . [a]s a result of the donation, yesterday morning Mrs. B was confirmed pregnant." *Id.*

<sup>187</sup> Robertson, *supra* note 1, at 971.

<sup>188</sup> Russell Chandler, *Vatican Condemns Human Artificial Reproduction*, L.A. Times, Mar. 10, 1987, at 1. The forty page document is entitled, "Instruction on Respect for Human Life in Its Origins and on the Dignity of Procreation." *Id.*

<sup>189</sup> *Id.* The Church also condemns other technological advances such as, artificial insemination, embryo and sperm banks, and surrogate parenthood. *Id.* See also Walsh, *supra* note 14, at 10 (stating that the Church "absolutely denounces research using embryos.").

<sup>190</sup> Chandler, *supra* note 188, at 1. See also Pope Decries "Culture of Death", The Christian Century, Apr. 12, 1995, at 384. The Pope asserted that "[t]echniques of artificial reproduction such as *in vitro* fertilization, which would seem to at the service of life . . . actually open the door to new threats against life and are morally unacceptable, since they separate procreation from the fully human context of the conjugal act." *Id.*

the sex act performed by married partners." <sup>191</sup> "A married couple is not automatically entitled to a child; rather, a child is 'a gift of God,' the paper says. Thus, a married couple should not resort to what the Church calls 'morally illicit' methods such as surrogate motherhood or test tube conception."<sup>192</sup> Although the Catholic Church does not condone IVF, it holds the position that embryos constitute human life.<sup>193</sup> The Church considers the embryo to be a human being from the moment of conception and therefore supports the idea that the embryos deserve the protection accorded to all human beings.<sup>194</sup>

Because the Vatican views the embryo as human life,<sup>195</sup> it seems logical that it would go as far as suggesting "prenatal adoption." This idea of donating an unwanted frozen embryo to an infertile couple is not a new one.<sup>196</sup> The State of Louisiana requires it.<sup>197</sup> Also, there are many IVF clinics in the United States that provide embryo donation as a dispositional option.<sup>198</sup> For example, University Hospital in Iowa City, Iowa is now offering an embryo adoption program.<sup>199</sup> Since the fall of 1996, infertile married couples have been able to receive embryos from couples who no longer need them.<sup>200</sup> The director of the clinic stated that infertile couples know how hard it is to have a child, and that they want to help other

---

<sup>191</sup> Chandler, *supra* note 188, at 1. Thus, ruling out IVF. *Id.*

<sup>192</sup> *Id.* Also the document states that what is "technically possible is not for that very reason morally admissible." *Id.*

<sup>193</sup> Roberts, *supra* note 1, at 971.

<sup>194</sup> Chandler, *supra* note 188, at 1.

<sup>195</sup> *Id.*

<sup>196</sup> See generally Schaefer, *supra* note 26. See also LA. REV. STAT. ANN. § 9:130 (West 1993).

<sup>197</sup> See LA. REV. STAT. ANN. § 9:130 (West 1993).

<sup>198</sup> See Walsh, *supra* note 14, at 10 (stating that clinics set their own policies). See also Charles Bullard, *Embryo Adoption Program Offers Hope - And a Thicket of Questions*, Des Moines Reg., Sept. 1, 1996, at 1.

<sup>199</sup> Bullard, *supra* note 198, at 1. The program is the first of its kind in the state. *Id.*

<sup>200</sup> *Id.*



couples.<sup>201</sup> Although some have criticized this program, the clinic hopes that most people see that the embryos will be utilized for good.<sup>202</sup>

However, this is not the only choice of disposition given to a couple.<sup>203</sup> Other choices include indefinite frozen storage,<sup>204</sup> donation to embryo research,<sup>205</sup> and simple destruction.<sup>206</sup> Usually the patient executes a disposition contract before the IVF process begins.<sup>207</sup>

#### IV. THE CONSTITUTIONAL RIGHT TO PRIVACY

If a state passed a law mandating the donation of frozen embryos,<sup>208</sup> would it violate an individual's constitutional rights? Some argue that in order to determine the constitutionality of mandatory "prenatal adoption," the statutes would have to be analyzed in light of the

---

<sup>201</sup> *Id.* (stating that it would "add an important service for people who otherwise would be considering adoption").

<sup>202</sup> *Id.* It is conceded that although this program is not perfect, it is cautious and will give use for the over supply of frozen embryos. *Id.*

<sup>203</sup> See Walsh, *supra* note 14, at 10. Many couples have different views concerning the disposition of the frozen embryo, where one "infertile would-be-parent" stated, "[t]hese lives are in suspension in an icy tomb. In this messy ethical problem, I've concluded that the rights of the individual who's been brought into existence are paramount over and above those of parents, doctors or scientists." *Id.*

<sup>204</sup> Davidoff, *supra* note 8, at 149.

<sup>205</sup> *Id.* See also June Coleman, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 Pac. L.J. 1331, 1333-34 (1996). It is argued that embryo research "may lead to better *in vitro* fertilization techniques, cures for fatal diseases, prevention of congenital defects, or allow parents to make reproductive decisions regarding abortion." *Id.*

<sup>206</sup> Davidoff, *supra* note 8, at 149.

<sup>207</sup> *Id.* Disposition agreements are defined as "contacts between the IVF patients, doctors, and clinics that provide for the disposition of any *in vitro* embryos in the event of specified contingencies." *Id.* at 148.

<sup>208</sup> See LA. REV. STAT. ANN. § 9:130 (West 1993). Louisiana has already done this, however no controversy concerning this statute has arisen yet.

Supreme Court decisions involving the right to privacy.<sup>209</sup>

The Due Process Clause of the Fourteenth Amendment of the Constitution states that no person shall be deprived of "life, liberty, or property, without due process of law . . ." <sup>210</sup> Over the years, the Supreme Court has expanded the idea of liberty to include certain rights.<sup>211</sup> In *Meyer v. Nebraska*,<sup>212</sup> the Court found a liberty interest in the right to "contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>213</sup> Twenty years later, the Court affirmed the right to procreate.<sup>214</sup> It further expanded the concept of liberty to include the right to privacy in the marital relationship.<sup>215</sup> Later on, the Court incorporated the right to privacy in unmarried relationships.<sup>216</sup> The "zones of privacy" have come to establish a constitutional right to privacy, which the Court held to protect the right to procreate,<sup>217</sup> to use contraception,<sup>218</sup> to have an

---

<sup>209</sup> See Schaefer, *supra* note 26, at 98 (stating that whether one would have a fundamental right to decide the disposition of their embryo is determined by the right to privacy).

<sup>210</sup> U.S. CONST. AMEND. XIV, § 1.

<sup>211</sup> See *infra* notes 222-262 and accompanying text giving detailed discussions of the Court expanding the notion of "liberty."

<sup>212</sup> 262 U.S. 390 (1923).

<sup>213</sup> *Id.* at 399.

<sup>214</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (holding that an Oklahoma statute that sterilized criminals convicted two or more times for crimes "amounting to felonies involving moral turpitude" violated the Fourteenth Amendment and the "right to have offspring").

<sup>215</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy which is within the penumbra of specific guarantees in the Bill of Rights).

<sup>216</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons was unconstitutional and violated the Equal Protection Clause).

<sup>217</sup> *Skinner v. Oklahoma*, 316 U.S. at 535.

<sup>218</sup> *Griswold v. Connecticut*, 381 U.S. at 479.

abortion,<sup>219</sup> to define one's own family structure,<sup>220</sup> and to marry.<sup>221</sup> It is important to analyze and understand these rights in order to ascertain whether a state could pass a law requiring "prenatal adoption" of unwanted frozen embryos.

*A. The Right to Procreate*

The Supreme Court first enunciated the fundamental right to procreate in *Skinner v. Oklahoma*.<sup>222</sup> In *Skinner*, the Court invalidated an Oklahoma statute which provided for involuntary sterilization of persons convicted three times of felonies showing "moral turpitude," but which did not apply to "white-collar" crimes, such as embezzlement.<sup>223</sup> Although this case was decided on equal protection grounds, it was motivated by substantive due process concerns.<sup>224</sup> The Court objected to the discrimination between the two types of crimes,<sup>225</sup> but emphasized that it strictly scrutinized the discrimination because "[m]arriage and procreation are fundamental to the very existence and survival of the race."<sup>226</sup>

---

<sup>219</sup> *Roe v. Wade*, 410 U.S. 113 (holding that there is a fundamental right to have an abortion).

<sup>220</sup> *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that it is unconstitutional to force one to live in a defined and narrow family structure).

<sup>221</sup> *See Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a Virginia statute which prohibited interracial marriages infringed on the fundamental right to marry); *See also Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that a Wisconsin statute exceeded the bounds of permissible state regulation of marriage, and therefore infringed on the fundamental right to marry).

<sup>222</sup> *Skinner*, 316 U.S. at 541.

<sup>223</sup> *Id.* at 536-37. The statute provided that "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of the Act." *Id.*

<sup>224</sup> *Id.* at 541.

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

<sup>226</sup> *Id.*

*B. The Right Not to Procreate**1. The Right to Contraception*

In *Griswold v. Connecticut*,<sup>227</sup> the Supreme Court struck down a statute that forbade the use of contraceptives.<sup>228</sup> The Court found that several of the Bill of Rights' guarantees protects privacy interests and created a "penumbra" or "zone of privacy."<sup>229</sup> The Court found that the use of contraceptives fell into this "zone of privacy."<sup>230</sup> The Court questioned, "Would we allow the police to search the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives?"<sup>231</sup> The Court concluded that "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>232</sup>

The Court expanded its meaning of *Griswold* in *Eisenstadt v. Baird*.<sup>233</sup> The statute in *Eisenstadt* stated that only registered physicians and pharmacies could distribute contraceptives, and only to married persons.<sup>234</sup> The Court held that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>235</sup> Therefore, it seems that no person may be prohibited from using contraception or otherwise be subjected to undue interference with decisions on procreation.

---

<sup>227</sup> 381 U.S. 479.

<sup>228</sup> *Id.* at 480. The statute also forbids any one from aiding or counseling another in the use of contraceptives. *Id.*

<sup>229</sup> *Id.* at 484 (stating that the right of association is contained in the penumbra of the First Amendment, the Fourth Amendment's ban on unreasonable searches also has a penumbra that protects privacy interests, as do the Third, Fifth, and Ninth Amendments).

<sup>230</sup> *Id.* at 485.

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

<sup>232</sup> *Griswold*, 381 U.S. 479 at 485-86. The Court stated that they are dealing with a right of privacy "older than the Bill of Rights." *Id.*

<sup>233</sup> 405 U.S. 438 (1972).

<sup>234</sup> *Id.* at 439.

<sup>235</sup> *Id.* at 453.

## 2. *The Right to an Abortion*

In the landmark case of *Roe v. Wade*,<sup>236</sup> the Supreme Court held that a woman's right to privacy is a "fundamental right" under the Fourteenth Amendment.<sup>237</sup> The Court pointed to *Griswold* as well as to other cases where the Court found a right to privacy.<sup>238</sup> The Court found that this right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>239</sup> The Court laid out a trimester framework where it prescribed a different rule for each.<sup>240</sup> During the first trimester, a state may not ban, or even closely regulate, abortions.<sup>241</sup> During the second trimester, a state may protect its interest in the mother's health by regulating the abortion procedure in ways "reasonably related" to her health.<sup>242</sup> At the beginning of the third trimester, the fetus becomes viable, and a state may therefore regulate, or even proscribe, abortion.<sup>243</sup>

However, in a recent decision, *Planned Parenthood v. Casey*, the Court partially overturned *Roe*.<sup>244</sup> Although the Court did not explicitly overrule *Roe*, some important aspects of that decision were overturned, giving a state more leeway to regulate the abortion process.<sup>245</sup> In this case, a Pennsylvania statute placed significant regulations on abortion, such as a twenty-four hour waiting period before an abortion could be performed and a requirement that women notify their husbands of their intention to have an abortion.<sup>246</sup> The Court first reaffirmed the central holding of

---

<sup>236</sup> 410 U.S. 113.

<sup>237</sup> *Id.* at 153.

<sup>238</sup> See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing freedom in education and child-rearing).

<sup>239</sup> *Roe*, 410 U.S. at 153.

<sup>240</sup> *Id.* at 162-63.

<sup>241</sup> *Id.* at 164.

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

<sup>243</sup> *Id.* at 164-65.

<sup>244</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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

<sup>246</sup> *Id.* at 844.

*Roe*,<sup>247</sup> as to each of its three parts: 1) a woman has a right to an "abortion before viability and to obtain it without undue interference from the state;"<sup>248</sup> 2) a state has the power to restrict abortions after fetal viability, "if the law contains exceptions for pregnancies endangering a woman's life or health;"<sup>249</sup> and 3) a state has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."<sup>250</sup> The Court agreed "that the Constitution places limits on a State's rights to interfere with a person's most basic decisions about family and parenthood."<sup>251</sup> The Court also noted that both contraception and abortion "involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."<sup>252</sup>

The Court overturned two aspects of *Roe*. First, the Court did not agree that the trimester approach was a necessary method of safeguarding a woman's right to choose whether or not to exercise her right to an abortion.<sup>253</sup> The Court stated that the problem with the trimester approach was that it "undervalues the State's interest in potential life," because it completely ignores that interest during the first two trimesters.<sup>254</sup> The Court replaced the trimester framework with a new "undue burden" standard.<sup>255</sup> The Court stated, "Only where state regulation imposes an undue burden on a woman's ability to make [the decision to abort] does the power of the State reach into the heart of liberty protected by the Due Process Clause."<sup>256</sup> Second, the Court rejected *Roe's* view that the right

---

<sup>247</sup> *Id.* at 846.

<sup>248</sup> *Id.*

<sup>249</sup> *Planned Parenthood*, 505 U.S. at 846.

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

<sup>251</sup> *Id.* at 849.

<sup>252</sup> *Id.* at 853.

<sup>253</sup> *Id.* at 872.

<sup>254</sup> *Planned Parenthood*, 505 U.S. at 873. The Court also noted that another basic flaw of the trimester framework is that it also "misconceives the nature of the pregnant woman's interest." *Id.* at 875.

<sup>255</sup> *Id.* at 876-77.

<sup>256</sup> *Id.*

to an abortion is a "fundamental right," and that every pre-viability restriction on abortion must withstand "strict scrutiny."<sup>257</sup> The Court further stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>258</sup>

From these decisions, one can see a right to privacy concerning marriage and family relations. The burdens of an unwanted pregnancy and childrearing are deemed so substantial that any person--married or single--may choose to use contraception to avoid pregnancy, or have an abortion if pregnancy does result.<sup>259</sup> Because of the fundamental nature of the right to privacy, a state must show a compelling state interest in order to interfere with these rights.<sup>260</sup> However, it is important to note that the Court implicitly rejected the notion that one has a "fundamental right to an abortion."<sup>261</sup> Although the Court did not explicitly discuss this issue of "fundamental right," it can be assumed that abortion is no longer a "fundamental right," and a state's restrictions do not have to survive the

---

<sup>257</sup> *Id.* The "undue burden" standard implicitly overrules the strict scrutiny standard that is given to fundamental rights.

<sup>258</sup> *Id.* at 851.

<sup>259</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (holding that banning the right to use contraceptives violates the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (holding that it is unconstitutional to deny distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (holding that there is a fundamental right to an abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (holding that a state regulation is unconstitutional only where it imposes an "undue burden").

<sup>260</sup> See *supra* notes 208-262 and accompanying text.

<sup>261</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court did not apply strict scrutiny to the Pennsylvania statute, but rather the "undue burden" test. *Id.*

strict scrutiny standard.<sup>262</sup>

#### V. IS THE "PRENATAL ADOPTION" OF FROZEN EMBRYO CONSTITUTIONAL?

It can be said that those couples who have gone through the IVF process have exercised their right to procreate.<sup>263</sup> But, it appears that because their embryo is frozen, their right to procreate has been "frozen" as well. However, a problem arises when there is an excess of fertilized embryos that the couple does not intend to use.<sup>264</sup> If a state should pass a law mandating "prenatal adoption" of the unwanted embryos,<sup>265</sup> how would a court determine such a statute's constitutionality? Would a court use the Supreme Court decisions concerning the right to privacy as a framework?<sup>266</sup> Or is it possible that no constitutional rights are being infringed upon at all, and thus, such a statute is constitutional?

##### A. *The Right to Privacy to Use Contraception Analysis*

The Court decided in *Griswold* and *Eisenstadt* that within the right to privacy there is a right to use contraceptives, allowing a couple to decide whether to procreate.<sup>267</sup> In terms of IVF, when a couple decides not to use their embryo, they are essentially deciding not to procreate. A couple who decides to use contraceptives is very similar to a couple who

---

<sup>262</sup> See *id.*

<sup>263</sup> See Robertson, *supra* note 1, at 956 (arguing that the freedom to procreate through the means of IVF should be recognized because that may be the only way for the person to reproduce).

<sup>264</sup> Perry & Schneider, *supra* note 15, at 463-64.

<sup>265</sup> See LA. REV. STAT. ANN. § 9:130 (West 1993). Although one state, Louisiana, has already adopted such a law, no case concerning the statute has arisen.

<sup>266</sup> See *supra* notes 191-241 and accompanying text.

<sup>267</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1971). See also *supra* notes 227-235 and accompanying text analyzing the Court's decisions.



decides to destroy their embryo.<sup>268</sup> For example, a woman who uses post-fertilization birth control, such as an IUD (intra-uterine device), is similar to a woman who decides to destroy her frozen embryo.<sup>269</sup> In both situations, it is destroyed before implantation.<sup>270</sup> Therefore, although from this analysis it seems that a state may not be able to prohibit a couple's choice to destroy their embryo, it is not clear where a statute mandating "prenatal adoption" would stand.<sup>271</sup>

Even though there is a right to use contraceptives, several distinctions should be noted in terms of IVF.<sup>272</sup> When a couple participates in an IVF program, they embark on a long, thought-out decision to try to procreate.<sup>273</sup> Also, contraception is a means to prevent fertilization.<sup>274</sup> With IVF, however, fertilization has occurred, and the embryo is outside of a woman's body.<sup>275</sup> Furthermore, the decision whether or not to have a child is less private in the context of IVF than in the context of contraceptives.<sup>276</sup> IVF is considered less private because the procedures are performed in IVF clinics and under a physician's care.<sup>277</sup> In the situation where a couple decides to use contraceptives, this decision is usually made in private and without a physician's input.<sup>278</sup> In the case

---

<sup>268</sup> Schaefer, *supra* note 26, at 109.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Brown, *supra* note 16, at 232 (arguing that "[t]he decision not to implant a pre-embryo is based on the same premise as the decision to use contraceptives: a desire not to bear or beget a child.").

<sup>272</sup> Schaefer, *supra* note 26, at 110 (arguing that the right to privacy protecting the use of contraceptives may not extend to IVF).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 109.

<sup>275</sup> *Id.* at 110.

<sup>276</sup> *Id.* See also *Griswold v. Connecticut*, 381 U.S. at 485-86 (stating that the decision to use contraceptives occurs in the "sacred precincts of marital bedrooms").

<sup>277</sup> Schaefer, *supra* note 26, at 110. Once the egg and sperm have been retrieved from the donors, the fertilization procedure occurs outside of the body. *Id.*

<sup>278</sup> See *Griswold v. Connecticut*, 381 U.S. at 485-86. The Court stated "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.*

of IVF, a couple must consult physicians and discuss success rates, cost and numerous medical and ethical concerns.<sup>279</sup> Because of these differences, it does not seem that one can use the right to use contraception analysis to determine whether or not a state could constitutionally pass a statute concerning the "prenatal adoption" of the frozen embryo.

*B. The Right to Privacy to an Abortion Analysis*

Because there is a significant difference between a fetus and an embryo, in terms of physiological development and location, there is a significant difference between an abortion and "prenatal adoption."<sup>280</sup> In *Kass v. Kass*, the New York Appellate Division criticized the lower court for ". . . equating a prospective mother's decision" with a pregnant woman's right to an abortion.<sup>281</sup> The court stated that a woman's right "over her own body is not implicated in the IVF scenario until such time as implantation actually occurs, for it is only then that her bodily integrity is at issue."<sup>282</sup> Such an analysis would be improper because mandatory donation does not force unwanted gestation or child rearing on a woman.<sup>283</sup> The embryo is in a frozen state in a clinic, and not inside a woman's body.<sup>284</sup> The woman who provided the egg will not be forced to bear or rear this potential offspring.<sup>285</sup>

It is argued that what is at stake is the "possibility of an anonymous hereditary tie,"<sup>286</sup> which would be the only burden placed on

---

<sup>279</sup> Schaefer, *supra* note 26, at 110.

<sup>280</sup> Robertson, *supra* note 1, at 971.

<sup>281</sup> 663 N.Y.S.2d at 585.

<sup>282</sup> *Id.*

<sup>283</sup> Robertson, *supra* note 1, at 978-79 (stating that "the Supreme Court's birth control and abortion precedents are not directly on point, since the procreation sought to be avoided in those cases involved unwanted gestation or [child] rearing.").

<sup>284</sup> *Id.* at 979.

<sup>285</sup> *See id.* It is presumed that "[t]he couple will . . . never see, hear from nor indeed, even know whether a biological descendant was ever born." *Id.*

<sup>286</sup> Robertson, *supra* note 1, at 979.

the donating couple.<sup>287</sup> Some argue that this psychological burden could vary.<sup>288</sup> Some may find it troubling to know that there may be a child biologically theirs that is being raised by someone else.<sup>289</sup> Others may feel guilty and want to contact the child,<sup>290</sup> and others may not be affected by this at all.<sup>291</sup>

If the courts use the Supreme Court's analysis from *Casey*, the constitutionality of a "prenatal adoption" statute depends on whether such a statute places an "undue burden" on the donating couple.<sup>292</sup> Because it is no longer necessary that the state's interests be compelling,<sup>293</sup> it is only necessary that the state places no "undue burden" on the donating couple.<sup>294</sup> The only burden that would be placed on the couple is of a psychological nature and not physical like in *Roe* and *Casey*.<sup>295</sup> Because of this, a court may not see a "psychological burden" as an "undue burden,"<sup>296</sup> and find that the state's interest in potential life outweighs any

---

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

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* See also Schaefer, *supra* note 26, at 105. It is argued that even though the woman does not physically bear the child, and emotional attachment to the child nonetheless develops. *Id.* Also it is stated that one would not say that "a man has no emotional attachment to his biological children just because he did not physically bear those children. Similarly, it would be unrealistic to argue that, because the woman did not physically bear the child, and the couple did not experience the pregnancy, no emotional attachment to that child could exist." *Id.* at 106.

<sup>290</sup> Robertson, *supra* note 1, at 979. It is also stated that some donating couples fear that the child will try to make contact with them in the future in order to form a relationship or for financial gain. *Id.* at 980.

<sup>291</sup> *Id.* at 980. Some may not feel a negative impact at all and "may even be a source of satisfaction once established." *Id.* It is also stated that some people may feel proud or satisfied "that they have genetic heirs about in the world," because "they have replicated more of their genes than have others." *Id.* at 980 n.138.

<sup>292</sup> See *Planned Parenthood v. Casey*, 505 U.S. at 876-77.

<sup>293</sup> *Id.* The Court did not apply the strict scrutiny standard, but rather the "undue burden" standard. *Id.* This standard overrules the strict scrutiny standard that was applied in *Roe v. Wade*. *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Robertson, *supra* note 1, at 979.

<sup>296</sup> See *supra* notes 244-258 and accompanying text giving a detailed discussion of the Supreme Court's "undue burden" standard.

psychological burden placed on the donating couple.<sup>297</sup>

Whether it is proper to analyze a mandatory donation statute with the right to privacy or not is unclear due to the sparse amount of IVF legislation and judicial guidance. However, if analyzed under the right to privacy, such a statute would be constitutional because it would not interfere with a couple's right to bear or beget a child, nor place any undue burdens on them.

## VI. CONCLUSION

For most, the birth of a child is a very joyous occasion. Unfortunately for various reasons some cannot experience it. Advances have been made, and through technology, infertile couples are now able to experience the joys of parenthood.<sup>298</sup> IVF is a process where eggs and sperm are retrieved and placed in a petri dish so fertilization occurs.<sup>299</sup> Cryopreservation involves the freezing of the embryo so it can be preserved and implanted at a later date.<sup>300</sup> IVF and cryopreservation give couples a better chance in producing a child.<sup>301</sup> However, there are many legal and ethical problems that come along with these technological advances.<sup>302</sup>

There are several theories as to what the frozen embryo constitutes.<sup>303</sup> There is the theory that the frozen embryo is property because it is simple human tissue.<sup>304</sup> Another theory is that it constitutes human life because of scientific proof that the embryo is biologically

---

<sup>297</sup> Robertson, *supra* note 1, at 980 (noting that it is possible that the Supreme Court would find it within the state's power to implement law that would provide for mandatory donation of frozen embryos).

<sup>298</sup> *Id.* at 944.

<sup>299</sup> Davidoff, *supra* note 8, at 133.

<sup>300</sup> *Id.* at 134.

<sup>301</sup> Grobstein, Flower & Mendeloff, *supra* note 5, at 1584.

<sup>302</sup> Knoppers & LeBris, *supra* note 6, at 329.

<sup>303</sup> Davidoff, *supra* note 8, at 137.

<sup>304</sup> *Id.*

alive.<sup>305</sup> The third theory is the special respect theory where the embryo is not given the full status afforded to human beings, but are not considered mere property either.<sup>306</sup>

To date, only six states have adopted legislation regarding IVF.<sup>307</sup> The amount of case law concerning IVF is also sparse.<sup>308</sup> The cases show that the disposition of the frozen embryo creates a huge legal and ethical problem not only for the couples involved, but for the courts as well.<sup>309</sup> It is up for the courts to decide who owns the frozen embryo, the couple or the clinic;<sup>310</sup> in the event of a divorce who gets the frozen embryo, the woman where she wants to donate it, or the man who wants to destroy it,<sup>311</sup> or in such a case where the woman wants to have the embryo implanted, and the man does not want to be a father.<sup>312</sup> These delicate and personal issues will be difficult for any court to decide.

In July, 1996, the Vatican announced a proposal where married women should volunteer and bring unwanted frozen embryos to term.<sup>313</sup> Horrified by the fact that many embryos are unused and destroyed, the Vatican considers such destruction to be a "prenatal slaughter."<sup>314</sup> If such a proposal were implemented, the unwanted frozen embryo resulting from IVF would be donated, and another willing couple would "prenatally adopt" it.<sup>315</sup>

If a state should pass such a statute, there would be a question as

---

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

<sup>306</sup> *Id.*

<sup>307</sup> See e.g., LA. REV. STAT. ANN. §§ 9:123-133 (West 1993); FLA. ST. ANN. § 742.17 (West 1993); 18 PA. CONS. STAT. ANN. § 3216 (c) (1989); KY. REV. STAT. ANN. § 311.715 (Baldwin 1995); KAN. STAT. ANN. § 65-6702 (1992).

<sup>308</sup> See e.g., No. 74-3558, slip. op. (S.D.N.Y. Nov. 14, 1978); 717 F. Supp. 421 (E.D. Va. 1989); 842 S.W.2d 588 (Tenn. 1992); 663 N.Y.S.2d 581 (App. Div. 1997).

<sup>309</sup> See generally No. 74-3558, slip. op. (S.D.N.Y. Nov. 14, 1978); 717 F. Supp. 421 (E.D. Va. 1989); 842 S.W.2d 588 (Tenn. 1992); 663 N.Y.S.2d 581 (App. Div. 1997).

<sup>310</sup> See 717 F. Supp. 421 (E.D. Va. 1989).

<sup>311</sup> See 842 S.W.2d 588 (Tenn. 1992).

<sup>312</sup> See 663 N.Y.S.2d 581 (App. Div. 1997).

<sup>313</sup> Dowling, *supra* note 25, at 1A.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

to its constitutionality. A court could analyze whether or not it infringed upon the right to privacy under the Fourteenth Amendment to the Constitution. The Supreme Court has determined that within the right to privacy there is a fundamental right to procreate.<sup>316</sup> Furthermore, there is also the right not to procreate through the means of contraceptives<sup>317</sup> and abortion.<sup>318</sup> Some argue that the constitutionality of a statute that provides for the "prenatal adoption" of the frozen embryo involves analyzing it in terms of the right to privacy.<sup>319</sup> While others argue that such an analysis would be improper.<sup>320</sup> However, if such an analysis is used, it appears that a statute mandating the "prenatal adoption" of the unwanted frozen embryo does not infringe on one's right to procreate, and places no "undue burden" on the donating couple, and is thus constitutional.

*Janette M. Puskar*

---

<sup>316</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that there is a fundamental right to procreate).

<sup>317</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a right to privacy to use contraceptives).

<sup>318</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (holding that there is a fundamental right to an abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that a state regulation is unconstitutional only where it imposes an "undue burden").

<sup>319</sup> *Robertson*, *supra* note 1, at 978.

<sup>320</sup> *See Kass v. Kass*, 663 N.Y.S.2d at 585-86.

