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### A “Modern Family” Issue: Recategorizing Embryos in the 21st Century

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# A “Modern Family” Issue: Recategorizing Embryos in the 21st Century

*Hannah C. Catchings\**

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\* J.D./D.C.L., 2020. Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Associate Dean Andrea Carroll and Professor Olivier Moréteau for their invaluable guidance throughout the writing process. This Comment is dedicated to my mother, Cyndy Catchings, whom I cannot thank enough for her unwavering support and encouragement.

## INTRODUCTION

In 2015, *The New York Times* published a highly personal op-ed written by Nick Loeb,<sup>1</sup> a businessman and Tulane University alumnus.<sup>2</sup> Loeb began the op-ed by writing, “Last August, I filed a complaint . . . using pseudonyms, to protect two frozen embryos<sup>3</sup> I created with my former fiancée.”<sup>4</sup> Loeb said he wanted to keep the issue private, “but recently the story broke to the world.”<sup>5</sup> Loeb’s former fiancée is actress Sofia Vergara, who starred in the ABC series *Modern Family*.<sup>6</sup> In August of 2014, Loeb sued Vergara in California seeking possession of two frozen embryos that he and Vergara created through a second round of in vitro fertilization (IVF)<sup>7</sup> the previous year.<sup>8</sup> The couple contracted with a

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1. Nick Loeb, *Sofia Vergara’s Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES (Apr. 29, 2015), <https://www.nytimes.com/2015/04/30/opinion/sofiaveraras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html> [<https://perma.cc/8XXD-CUN8>]. Loeb recently made headlines for his role as a co-producer, co-writer, and co-director of a pro-life film titled *Roe v. Wade the Movie*, filmed in Louisiana in 2018. E.g., Mike Scott, *Roe v. Wade Movie to Film in Louisiana—But There’s a Twist*, TIMES-PICAYUNE (Jun. 11, 2018), [https://www.nola.com/movies/index.ssf/2018/06/roe\\_v\\_wade\\_movie\\_to\\_film\\_in\\_l\\_o.html](https://www.nola.com/movies/index.ssf/2018/06/roe_v_wade_movie_to_film_in_l_o.html) [<https://perma.cc/59GQ-RKWL>]; Charles Lussier, *As Roe v. Wade Films, Vastly Different Stories from Nick Loeb and LSU, Tulane About On-Campus Filming*, THE NEW ORLEANS ADVOCATE (Jul. 9, 2018), [https://www.theadvocate.com/new\\_orleans/news/education/article\\_07c2b3a2-83b8-11e8-b8f6-dbd8b71064ad.html](https://www.theadvocate.com/new_orleans/news/education/article_07c2b3a2-83b8-11e8-b8f6-dbd8b71064ad.html) [<https://perma.cc/RTA7-FURV>].

2. *Nick Loeb*, IMDB, <https://www.imdb.com/name/nm0005161/> [<https://perma.cc/PKE5-RTQR>] (last visited Nov. 10, 2018).

3. Unless otherwise stated, all uses of the word “embryo” in this Comment refer to a pre-implantation embryo.

4. Loeb, *supra* note 1.

5. *Id.*

6. *Id.*

7. In vitro fertilization, most commonly referred to as IVF, is a form of assisted reproduction that involves fertilizing an egg with sperm in a laboratory dish. *In Vitro Fertilization*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/in%20vitro%20fertilization> [<https://perma.cc/69FU-NK5B>] (last visited Nov. 3, 2018). See *infra* Part I.

8. *Human Embryo #4 HB-A v. Vergara*, No. 17-1498, 2017 U.S. Dist. LEXIS 136782, at \*5–7 (E.D. La. Aug. 25, 2017). Loeb and Vergara went through an earlier round of IVF in 2013, which also resulted in two viable embryos. *Id.* at \*2–3.

surrogate,<sup>9</sup> but on two separate attempts the embryos failed to implant successfully into the surrogate's uterus.<sup>10</sup>

Loeb and Vergara ended their relationship before they were able to find a new surrogate. They publicly announced their breakup in May of 2014, three months before Loeb filed suit against Vergara.<sup>11</sup> Loeb sought a court order that would allow him to use the two embryos without Vergara's consent<sup>12</sup> but dropped the suit in December of 2016.<sup>13</sup> The day before Loeb dropped the suit, he modified a Louisiana trust, which he created five days earlier, to benefit the couple's two frozen embryos "if they are born alive."<sup>14</sup> The day after Loeb dropped the California suit, he directed New Orleans resident James Charbonnet to file a similar suit in Louisiana.<sup>15</sup> Loeb, however, was not a plaintiff in the new suit.<sup>16</sup> Instead, Charbonnet brought the suit in his capacity as trustee of Loeb's newly created trust.<sup>17</sup>

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9. Louisiana law uses the term "gestational carrier." LA. REV. STAT. § 9:2718.1(4) (2020). Louisiana Revised Statutes § 9:2718.1(4) defines a gestational carrier as "a woman who agrees to engage in a process by which she attempts to carry and give birth to a child born as a result of an in utero transfer of a human embryo to which she makes no genetic contribution." LA. REV. STAT. § 9:2718.1(4) (2020).

10. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*4–7. Loeb recounted the experience in his op-ed, stating: "The first embryo we implanted didn't take. The second time, the surrogate miscarried, and I felt crushed." Loeb, *supra* note 1.

11. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*3–7.

12. *Id.* at \*7.

13. Wilborn P. Nobles III, *Sofia Vergara Embryo Case Could Have Broader Impacts on Reproductive Law*, TIMES-PICAYUNE (last updated Jan. 5, 2017), [https://www.nola.com/crime/index.ssf/2017/01/sofia\\_vergara\\_lawsuit\\_gretna\\_1.html](https://www.nola.com/crime/index.ssf/2017/01/sofia_vergara_lawsuit_gretna_1.html) [<https://perma.cc/DEF7-43DX>].

14. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*8. This addition is notable because article 1771 of the Louisiana Civil Code states that "[t]he obligee of a conditional obligation, pending fulfillment of the condition, may take all lawful measures to preserve his right." LA. CIV. CODE art. 1771 (2018); *but see* LA. CIV. CODE art. 1770 (2018).

15. Kaileen Gaul, *Sofia Vergara Says She has Proof that Her Ex-Fiancé Should Not Have Custody of Their Embryos or Be Allowed to Have a Surrogate Carry Them to Term*, DAILY MAIL (last updated July 14, 2017), <https://www.dailymail.co.uk/news/article-4693724/Sofia-Vergara-proof-ex-denied-custody-embryos.html> [<https://perma.cc/99GY-5H7M>].

16. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782.

17. Brandy Zadrozny, *Sofia Vergara Embryo Case Could Open Floodgates*, DAILY BEAST (Dec. 8, 2016), <https://www.thedailybeast.com/sofia-vergara-embryo-case-could-open-floodgates> [<https://perma.cc/4PSE-PEWR>]. *See also* *Human Embryo*, 2017 U.S. Dist. LEXIS 136782.

Louisiana's unique laws, which give embryos the right to sue and be sued,<sup>18</sup> allowed Loeb and Vergara's two frozen embryos to become plaintiffs in the suit.<sup>19</sup> Ultimately, the United States District Court for the Eastern District of Louisiana granted a motion to dismiss the case for lack of personal jurisdiction over Vergara.<sup>20</sup> Loeb moved to Louisiana in December of 2017, and in January of 2018, he filed another suit against Vergara, in which he alleged that the two embryos were living children and that the court should grant him full custody of both.<sup>21</sup> The two frozen embryos are also plaintiffs in the 2018 suit against Vergara.<sup>22</sup> Because the two embryos are frozen in California, where pre-implantation embryos<sup>23</sup> are considered property, it is theoretically possible that a Louisiana court, where pre-embryos are considered persons, could have jurisdiction over the embryos.<sup>24</sup> Loeb and the embryos' suit reveals an underlying chasm within Louisiana's human embryo statutes.<sup>25</sup> The language in Louisiana Revised Statutes §§ 9:121–133 presents a quagmire of legal fiction and creates an erroneous comparison of two entirely different entities.<sup>26</sup>

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18. LA. REV. STAT. § 9:124 (2018). Louisiana Revised Statutes §§ 9:121 and 9:123–24 classify human pre-implantation embryos as “juridical persons” that have legal capacity and the right to sue and be sued. LA. REV. STAT. § 9:121, 123–24 (2018).

19. *See* Loeb v. Vergara, 326 F. Supp. 3d 295, 299 (E.D. La. 2018).

20. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*20.

21. *Loeb*, 326 F. Supp. 3d at 300.

22. *Id.*

23. *See supra* note 3.

24. *Loeb*, 326 F. Supp. 3d at 300. Following remand by the Federal District Court for the Eastern District of Louisiana, Judge Kevin Conner, a Louisiana district court judge for the 25th Judicial District Court of Plaquemines Parish, dismissed Loeb's case. *See Nick Loeb's Embryo Case Against Sofia Vergara Dismissed in Louisiana*, PAGE SIX (Oct. 22, 2019), <https://pagesix.com/2019/10/22/nick-loeb-louisiana-case-against-sofia-vergara-dismissed/> [<https://perma.cc/M2AX-P5M4>]. Prior to the dismissal, Conner denied Loeb's motion to compel discovery, which pertained to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Loeb v. Vergara*, No. 64-217 (La. Dist. Ct. Sept. 10, 2019). In his denial, Conner reasoned in part that the Louisiana Legislature did not intend for the UCCJEA to apply to embryos. *See generally id.* Loeb subsequently appealed Conner's October 11 judgment, and as of February 16, 2020, Loeb's appeal remained pending. For argument's sake, this Comment continues to assume that Louisiana jurisdiction over the pre-implantation embryos is theoretically possible.

25. LA. REV. STAT. § 9:121 (2018); *see generally* *Loeb*, 326 F. Supp. 3d 295.

26. *See generally* LA. REV. STAT. §§ 9:121–33.

The Louisiana Civil Code categorizes all persons as either natural persons or juridical persons.<sup>27</sup> Currently, the Louisiana Legislature classifies pre-implantation embryos as juridical persons.<sup>28</sup> Classifying a pre-implantation embryo as a juridical person, however, is a one-size-fits-all approach in need of alterations. By defining pre-implantation embryos as juridical persons, Louisiana's human embryo statutes erroneously give pre-implantation embryos the right to sue,<sup>29</sup> raise custody issues that Louisiana's custody laws do not adequately address,<sup>30</sup> and pose a number of inconsistencies within the Civil Code.<sup>31</sup> Louisiana's human embryo statutes need revision. The Louisiana Legislature should amend the legal status of pre-implantation embryos to be a "unique category of being," rather than juridical persons or mere property, which is an alternative that other jurisdictions employ.<sup>32</sup>

Part I of this Comment discusses assisted reproductive technology,<sup>33</sup> the three main categories that states use when determining the legal status of pre-implantation embryos, and current Louisiana law regarding embryos.<sup>34</sup> Part II explores the problems that result from Louisiana's human embryo statutes, specifically focusing on pre-implantation embryos' capacity to sue,<sup>35</sup> custody laws that are ill-equipped to address embryo disputes,<sup>36</sup> and theoretical inconsistencies that the statutes create within the Civil Code.<sup>37</sup> Part III compares two potential solutions and advocates for the adoption of a middle-ground classification. This Comment concludes with a recommendation that the Louisiana Legislature change the laws defining human embryos as juridical persons<sup>38</sup>

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27. LA. CIV. CODE art. 24 (2018). Article 24 of the Civil Code defines a natural person as a human being and a juridical person "to which the law attributes personality, such as a corporation or a partnership." *Id.*

28. LA. REV. STAT. § 9:123.

29. *See generally* LA. REV. STAT. § 9:124.

30. *See* LA. CIV. CODE arts. 131–37.

31. *See, e.g.*, LA CIV. CODE arts. 26, 1474.

32. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (holding that the ex-husband's interest in not procreating was greater than ex-wife's interest in donating frozen pre-implantation embryos to another couple).

33. *See generally* *What Is Assisted Reproductive Technology?*, CDC, <https://www.cdc.gov/art/whatis.html> [<https://perma.cc/AE6T-XR7X>] (last reviewed Feb. 7, 2017).

34. LA. REV. STAT. §§ 9:121–33.

35. *Id.* at § 9:124.

36. *See* LA. CIV. CODE arts. 131–37.

37. *See, e.g.*, LA CIV. CODE arts. 26, 1474.

38. *See generally* LA. REV. STAT. § 9:123.

to instead articulate human embryos as “a unique category of being.”<sup>39</sup> It is important to note that this Comment does not answer or address the question of when life begins. Instead, it focuses on the practical consequences that result from Louisiana’s human embryo statutory scheme<sup>40</sup> and explores the language used to define the legal status of pre-implantation embryos.<sup>41</sup>

## I. REPRODUCTION 2.0: DEFINING ART AND THE IVF PROCESS

The developmental intricacies of Louisiana’s human embryo statutes require an understanding of the continuing advancements in assisted reproductive technology (ART).<sup>42</sup> ART refers to all fertility treatments that involve the “in vitro handling” of eggs, sperm, and embryos, specifically for reproduction purposes.<sup>43</sup> IVF is one type of fertility treatment that falls under the larger umbrella of ART.<sup>44</sup> IVF results in the fertilization of a woman’s ovum outside her uterus, independent of her body.<sup>45</sup> In fact, the

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39. This language comes from an article published in the Louisiana Bar Journal in 1985. The Louisiana Bar Association published the article, written by John B. Krentel, who, at the time, was a health care administrator finishing his last semester of law school. In his article, Krentel proposed the legal scheme that is now Louisiana Revised Statutes §§ 9:121–33. *See generally* John B. Krentel, “Ownership” of the Fertilized Ovum In Vitro: A Hypothetical Case in Louisiana, 32 LA. B.J. 284 (1985).

40. *See generally* LA. REV. STAT. §§ 9:121–33.

41. The Eastern District Court of Appeals of Missouri clarified this distinction in a 2016 case, stating

[I]t is important to initially note that this Court recognizes the sensitive nature of this case and the differing personal beliefs it evokes – ethical, religious, and philosophical – pertaining to scientific advancements in reproductive technology, procreational choice, and the age-old disputed question of when life begins. Those issues are not for this Court to decide . . . . Instead, we are only required to decide whether frozen pre-embryos have the *legal* status of children under our dissolution of marriage statutes.

McQueen v. Gadberry, 507 S.W.3d 127, 137–38 (Mo. Ct. App. 2016).

42. *See generally* *What Is Assisted Reproductive Technology?*, *supra* note 33.

43. Fernando Zegers-Hochschild, et al., *The International Glossary on Infertility and Fertility Care*, 108 FERTILITY & STERILITY 393, 401 (2017); *ART Success Rates*, CDC, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/7C22-NX44>] (last updated May 16, 2018).

44. *ART Success Rates*, *supra* note 43.

45. *See, e.g.*, Zegers-Hochschild, et al., *supra* note 43, at 401; *In Vitro Fertilization*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE,

term *in vitro* literally translates to “in glass,”<sup>46</sup> whereas the term *in vivo* translates to “in the living.”<sup>47</sup> The first successful birth using IVF, which is now the most commonly used type of ART,<sup>48</sup> occurred in Great Britain in 1978.<sup>49</sup>

#### *A. Up Close and Personal with Assisted Reproduction*

More than 40 years ago on July 25, 1978, John and Lesley Brown were delighted by the birth of their daughter, Louise Joy Brown,<sup>50</sup> the first baby ever born using IVF.<sup>51</sup> Now, four decades later, Louise lives in England, where she enjoys a normal life with her husband and two sons.<sup>52</sup> In 1981, three years after Louise’s birth, the first IVF baby was born in the United States.<sup>53</sup> IVF initially developed using the natural menstrual cycle; however, ovarian stimulation quickly became the norm.<sup>54</sup> In general, a woman begins the IVF process with medication for ovarian stimulation to grow multiple eggs at once.<sup>55</sup> The number of eggs that are grown and retrieved from a stimulation cycle varies, and not all eggs retrieved are used or viable.<sup>56</sup>

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<https://www.reproductivefacts.org/topics/topics-index/in-vitro-fertilization-ivf/> [<https://perma.cc/ZUN9-ALE7>] (last visited Oct. 6, 2018).

46. *In Vitro*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/in%20vitro> [<https://perma.cc/96GQ-RXW3>] (last visited Oct. 6, 2018).

47. *Id.*

48. *Assisted Reproductive Technologies*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, [https://www.sart.org/SART\\_Assisted\\_Reproductive\\_Technologies/](https://www.sart.org/SART_Assisted_Reproductive_Technologies/) [<https://perma.cc/P9XU-GWMH>] (last visited Sept. 30, 2018).

49. Craig Niederberger & Antonio Pellicer, *Introduction*, 110 FERTILITY & STERILITY 185, 188 (2018); Kevin U. Stephens, Sr., *Reproductive Capacity: What Does the Embryo Get?*, 24 S.U. L. REV. 263, 265 (1997).

50. Ciara Nugent, *What It Was Like to Grow Up as the World’s First ‘Test-Tube Baby,’* TIME (July 25, 2018), <http://time.com/5344145/louise-brown-test-tube-baby/> [<https://perma.cc/F2AS-3CJ2>].

51. Stephens, *supra* note 49, at 265. Louise’s younger sister, Natalie, born in 1982, was the 40th baby born using IVF. Nugent, *supra* note 50.

52. Nugent, *supra* note 50.

53. *Id.*

54. Bart C.J.M. Fauser & Basil C. Tarlatzis, *Progress in Ovarian Stimulation for IVF Over Time*, 110 FERTILITY & STERILITY 185, 263 (2018).

55. Zegers-Hochschild, et al., *supra* note 43, at 403; *ART: Step-by-Step Guide*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, [https://www.sart.org/ART\\_Step-by-Step\\_Guide/](https://www.sart.org/ART_Step-by-Step_Guide/) [<https://perma.cc/Z5BJ-H9BC>] (last visited Oct. 7, 2018).

56. *See generally* Fauser & Tarlatzis, *supra* note 54, at 263–66.



Since 1981, the use of ART has increased, and in the last decade alone, its use has doubled.<sup>57</sup> According to the Centers for Disease Control and Prevention (CDC), as of 2016, babies conceived by ART account for approximately 1.75% of all births in the United States.<sup>58</sup> That percentage is up from 1.5% in 2013,<sup>59</sup> and it equates to over 74,000 births.<sup>60</sup> By 1984, cryopreservation, a process that involves the use of extremely low temperature to preserve biological material like pre-embryos,<sup>61</sup> made it possible to freeze excess and unused embryos.<sup>62</sup> Estimates place the number of embryos currently stored in the United States somewhere between 700,000 and 1,000,000.<sup>63</sup> This number has increased from an estimate of over 600,000 stored embryos in 2016.<sup>64</sup> The increased use of ART has financial implications as well, with recent market research placing the value of the global IVF market at \$523.57 million in 2017.<sup>65</sup>

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57. *ART Success Rates*, *supra* note 43. IVF is one type of assisted reproductive technology (ART), whereas ART encompasses all fertility treatments involving eggs and embryos. *Id.*

58. *Id.*

59. Anna Stolley Persky, *Deep Freeze: Contentious Battles Between Couples over Preserved Embryos Raise Legal and Ethical Dilemmas*, 102 A.B.A. J. 46 (June 2016).

60. *More than 74 Thousand Babies Born from Assisted Reproductive Technology Cycles Done in 2018*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (Apr. 16, 2018), <https://www.sart.org/news-and-publications/news-and-research/press-releases-and-bulletins/more-than-74-thousand-babies-born-from-assisted-reproductive-technology-cycles-done-in-2018--record-90-of-babies-born-from-art-are-singletons/> [<https://perma.cc/37AZ-43GW>].

61. Zegers-Hochschild, et al., *supra* note 43, at 398. Cryopreservation can be done by either slow-freezing or vitrification. In the slow-freezing process, the temperature of a cell, or cells, is gradually lowered from room temperature to “extreme low temperature.” Vitrification, on the other hand, is an “ultra-rapid” procedure that prevents ice from forming in a cell. Zegers-Hochschild, et al., *supra* note 43, at 398, 405–06.

62. René Frydman, *Toward Single Embryo Transfer*, 110 FERTILITY & STERILITY 185, 204 (2018).

63. Mia De Graff, *The Baby that Was Conceived Just 18 Months After Its Mother: Woman, 26, Gives Birth to Baby Girl from a Donated Embryo that Was Frozen for 24 Years—the Longest Ever*, DAILY MAIL (last updated Dec. 19, 2017), <https://www.dailymail.co.uk/health/article-5195629/Woman-26-delivers-baby-frozen-embryo-24-YEARS.html> [<https://perma.cc/HH5Z-2VPE>].

64. Persky, *supra* note 59.

65. *Global In Vitro Fertilization Market Predicted to Grow USD 920.32 Million by 2024: Zion Market Research*, GLOBE NEWSWIRE (Sept. 4, 2014), <https://globenewswire.com/news-release/2018/09/04/1565032/0/en/Global-In-Vitro-Fertilization-Market-Predicted-to-Grow-USD-920-32-Million-by-2024-Zion>

Moreover, commentators often note the importance of understanding IVF within the societal context of its development.<sup>66</sup> According to the CDC, approximately 6.7% of married women in the United States, aged 15 to 44, are infertile.<sup>67</sup> In addition, around 7.3 million women of the same age group in the United States have used some type of infertility service.<sup>68</sup> Commensurate with the expanded use of ART is the diversification of individual goals and family planning needs.<sup>69</sup> Although the original idea of IVF was to enable married, heterosexual individuals suffering from infertility to have biological children of their own, its use has expanded significantly in the last 40 years.<sup>70</sup> As one commentator notes, “The success of in vitro fertilization . . . has made it possible to create families in ways not previously imagined.”<sup>71</sup> Today, the use of IVF extends beyond heterosexual couples<sup>72</sup> and makes assisted reproduction possible for same-

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-Market-Research.html [https://perma.cc/P8BS-HK63]. In addition, the global IVF market is expected to generate around \$920.32 million in revenue by 2024. *Id.*

66. Heather E. Ross & Guido Pennings, *Legal and Ethical Aspects of In Vitro Fertilization*, 110 FERTILITY & STERILITY 185, 300 (2018).

67. *Infertility*, NATIONAL CENTER FOR HEALTH STATISTICS, <https://www.cdc.gov/nchs/fastats/infertility.htm> [https://perma.cc/75YA-PFHL] (last updated July 15, 2016). Infertility is defined as a disease that prevents an individual from “clinical pregnancy after 12 months of regular, unprotected sexual intercourse” or because of “an impairment of a person’s capacity to reproduce.” Zegers-Hochschild, et al., *supra* note 43, at 406.

68. *Infertility*, *supra* note 67.

69. See, e.g., Ross & Pennings, *supra* note 66, at 299–301; Susan C. Klock, *In Vitro Fertilization and the Psychology of Reproduction: Opportunity and Hope*, 110 FERTILITY & STERILITY 185, 301–03 (2018).

70. Ross & Pennings, *supra* note 66, at 300. “In many circumstances, aspiring parents have encountered barriers—both natural and regulatory—preventing them from having children.” Taylor E. Brett, Comment, *The Modern Day Stork: Validating the Enforceability of Gestational Surrogacy Contracts in Louisiana*, 60 LOY. L. REV. 587, 592 (2014).

71. Ross & Pennings, *supra* note 66, at 299; see, e.g., Ariana Eunjung Cha, *Fertility Frontier: 44 Siblings and Counting*, WASH. POST (Sept. 12, 2018), [https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm\\_term=.68e65a2871a8](https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/?utm_term=.68e65a2871a8) [https://perma.cc/9SEY-3PSJ] (noting that a lack of regulation has resulted in huge genetic families who are seeking each other out).

72. As Bruce Wilder, former Chair of the ABA Section of Family Law’s Committee on the Law of Genetic and Reproduction Technology, notes, ART “has been made available to people who are physically unable to engage in coitus . . . people for whom gestation and childbirth pose unacceptable risks . . . [and] people who wish to avoid the risks of having children with genetically determined diseases.” Bruce Lord Wilder, *Current Status of Assisted Reproduction*

sex couples, older women, single women, and, through surrogacy, single men.<sup>73</sup> In addition to its increased accessibility to the average person, modern technological advancements have changed the way individuals use ART.<sup>74</sup> Cryopreservation, for example, allows individuals to freeze excess, unused pre-embryos, giving women additional attempts at successful implantation without having to go through the egg stimulation and removal process each time.<sup>75</sup> Although some patients might freeze eight embryos in the hopes of having one or two children,<sup>76</sup> others may have difficulty creating even one viable embryo.<sup>77</sup>

### *B. It Takes a Village: Regulating Assisted Reproductive Technology*

According to the American Society for Reproductive Medicine (ASRM), ART is one of the most highly regulated medical practices in the nation<sup>78</sup> that is subject to federal regulation, like the Fertility Clinic Success Rate and Certification Act,<sup>79</sup> as well as state regulation through

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*Technology 2005: An Overview and Glance at the Future*, 39 FAM. L. Q. 573, 573–74 (2005).

73. Ross & Pennings, *supra* note 66, at 300.

74. *Id.* at 300–01.

75. Henry D. Gabriel & Eunice B. Davis, Symposium, *An Interdisciplinary Examination of New Reproductive Technology: Legal Ethics in Reproductive Technology*, 45 LOY. L. REV. 221, 229 (1999).

76. See, e.g., *The Mom Who Did IVF—For Her Husband’s Infertility*, CUT (Sept. 13, 2018), <https://www.thecut.com/2018/09/the-mom-who-did-ivf-for-her-husbands-infertility-not-hers.html> [<https://perma.cc/X4AH-EURJ>] (discussing one couple’s experience with IVF, which included retrieval of 36 eggs from the wife after her first egg-stimulation cycle). The couple tried to fertilize 30 eggs with the husband’s sperm and six with donor sperm. The husband’s sperm successfully fertilized only one of the 30 eggs. Eventually, the couple was able to conceive using one of the six eggs fertilized by the donor’s sperm and had a son. The couple then went through the IVF process again for the birth of their daughter. From that egg-stimulation cycle, 40 eggs were retrieved. *Id.*

77. See generally Fauser & Tarlatzis, *supra* note 54, at 263–66.

78. *Practice Committee Documents*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, <https://www.asrm.org/news-and-publications/practice-committee-documents/?filterbycategoryid=323> [<https://perma.cc/W27T-A7VP>] (last visited Sept. 18, 2018).

79. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance – United States, 2015*, MORBIDITY & MORTALITY WEEKLY REPORT SURVEILLANCE SUMMARIES (Feb. 16, 2018), [https://www.cdc.gov/mmwr/volumes/67/ss/ss6703a1.htm?s\\_cid=ss6703a1\\_w](https://www.cdc.gov/mmwr/volumes/67/ss/ss6703a1.htm?s_cid=ss6703a1_w) [<https://perma.cc/KJC5-5PE7>]. Congress enacted the Fertility Clinic Success Rate and Certification Act (FCSRCA) in 1992. The

state medical boards that control physician licensing.<sup>80</sup> Not all share ASRM's view that ART is one of the most highly regulated areas of medical practice, however.<sup>81</sup> As one commentator notes, "there are valid concerns that ART is not sufficiently regulated in the United States, especially when compared with ART regulatory schemes in other developed nations."<sup>82</sup> Individuals with this view often point to the state-by-state nature of ART regulation in the U.S.<sup>83</sup> In addition to official government regulatory schemes, ART professional societies play a vital role in the oversight of assisted reproduction.<sup>84</sup> The ASRM, for example, issues various guidelines on topics surrounding ART.<sup>85</sup> ASRM also has an ethics committee that publishes opinions on difficult and controversial situations raised by the use of ART.<sup>86</sup>

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FCSRCA requires the CDC to collect data about the nation's fertility clinics, as well as all ART procedures performed in those clinics. *Id.*

80. *See generally Practice Committee Documents, supra* note 78.

81. *See, e.g.,* Ima E. Nsien, *Navigating the Federal Regulatory Structure of Assisted Reproduction Technology Clinics*, ABA HEALTH ESOURCE (Nov. 2017), [https://www.americanbar.org/groups/health\\_law/publications/aba\\_health\\_esource/2016-2017/november2017/reproduction/](https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2016-2017/november2017/reproduction/) [<https://perma.cc/Z6CN-WG23>].

82. *Id.*

83. *See generally id.*

84. *Practice Committee Documents, supra* note 78.

85. *See id.*

86. *See Ethics Committee Opinions*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, <https://www.asrm.org/news-and-publications/ethics-committee-documents/> [<https://perma.cc/3ML6-F64Y>] (last visited Sept. 18, 2018). For example, in 2013, the ASRM ethics committee issued an opinion on the disposition of abandoned embryos. The opinion, in part, states that it is "ethically acceptable" for ART programs and fertility clinics to consider frozen embryos abandoned when at least five years have passed "since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instructions from the couple exist concerning disposition." The opinion further states that no one should ever use abandoned embryos in research or donate them to another individual or couple. *Disposition of Abandoned Embryos: A Committee Opinion*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, 99 FERTILITY & STERILITY 1848 (2013), [https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disposition\\_of\\_abandoned\\_embryos-pdfmembers.pdf](https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disposition_of_abandoned_embryos-pdfmembers.pdf) [<https://perma.cc/L7GX-3M7Q>].

*C. Ice, Ice Baby: Exploring the Legal Status of the Pre-Implantation Embryo*

States autonomously determine the legal status afforded to pre-implantation embryos.<sup>87</sup> The Tenth Amendment of the U.S. Constitution grants police power to the states,<sup>88</sup> so the regulation of health and safety issues like the practice of medicine and medical board licensing fall “squarely within” authority traditionally reserved to the states.<sup>89</sup> The legal status of pre-implantation embryos often determines which approach a state will take when settling disputes involving embryos.<sup>90</sup> As one commentator writes, “Courts and counsel embroiled in this emerging area of law must deal with delicate issues of whether these types of cases encompass mere property and contractual rights, the rights of potential human beings, or a sensitive and certainly highly subjective middle ground category balancing the rights of the progenitors.”<sup>91</sup> In the case of *Davis v. Davis*, for example, the Tennessee Supreme Court noted that within the scientific testimony, there was a significant amount of discussion dedicated solely to using the “proper descriptive terminology” to refer to pre-implantation embryos in the case.<sup>92</sup> The Tennessee Supreme Court stated that although the scientific testimony seemed to be a simple matter of semantics, “semantical distinctions are significant in this context because *language defines legal status and can limit legal rights*.”<sup>93</sup> Given the state-by-state assignment of legal status to pre-implantation embryos, a human embryo in one state may be treated as a person, while in a different state the embryo may be treated as property.<sup>94</sup> States that have addressed the legal status of pre-implantation embryos, either legislatively or judicially, primarily fall into three categories: (1) states that label pre-

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87. See generally Nsien, *supra* note 81. Nsien notes that “[t]he state take[s] a piecemeal approach to regulating certain aspects of ART; for example, some states have enacted statutes—albeit far from uniform—related to insurance coverage of infertility treatments.” *Id.*

88. The Tenth Amendment to the U.S. Constitution is titled “Powers reserved to states or people” and states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

89. Nsien, *supra* note 81.

90. See generally Elizabeth A. Trainor, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5TH 253, at \*2a (2018).

91. *Id.*

92. *Davis v. Davis*, 842 S.W.2d 588, 592 (Tenn. 1992).

93. *Id.* (emphasis added).

94. See Persky, *supra* note 59.

embryos as property; (2) states that consider pre-embryos persons; and (3) states that fall somewhere in the middle.<sup>95</sup> Most states, however, have refrained from addressing whether pre-implantation embryos should be considered persons, property, or a category in between.<sup>96</sup>

### *1. Pre-Embryos as Property*

Several states, including Missouri, Washington, Oregon, and California, classify embryos as property.<sup>97</sup> California, for example, allows individuals going through fertility treatments to decide for themselves what they will do with any excess or unused embryos.<sup>98</sup> The California Legislature approaches embryo disposition from a contract law perspective and has enacted legislation requiring parties to provide written directives prior to treatment.<sup>99</sup> California added the written directives requirement to its Health and Safety Code in 2002 to make clear that health care providers are responsible for informing their patients of the options available for any unused embryos after treatment.<sup>100</sup> Options available to IVF patients in California include discarding the embryos, continuing to store the embryos, donation to another individual, or donation for scientific research.<sup>101</sup>

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95. *See generally id.*

96. Maura Dolan, *Embryo Battles Are Likely to Get a Precedent in San Francisco Couple's Case*, L.A. TIMES (Sept. 19, 2015), <http://www.latimes.com/local/california/la-me-embryo-20150920-story.html> [<https://perma.cc/3S82-M9SP>].

97. *See, e.g.,* McQueen v. Gadberry, 507 S.W.3d 127, 137–38 (Mo. Ct. App. 2016) (affirming a trial court decision that classified a divorced couple's two frozen pre-embryos as marital property of a special character); *In re Marriage of Guardado*, 2018 Wash. App. LEXIS 292 (Wash. App. 2018) (holding that the trial court did not err when it awarded parties joint ownership of their embryo); *Dahl v. Angle*, 194 P.3d 834 (Or. App. 2008) (upholding a trial court's decision that the embryos in question, as personal property subject to a contractual agreement, be destroyed).

98. CAL. HEALTH & SAFETY CODE § 125315 (2018).

99. *Id.* Prior to the IVF process, Loeb and Vergara signed a written directive. *Human Embryo #4 HB-A v. Vergara*, No. 17-1498, 2017 U.S. Dist. LEXIS 136782, at \*4–5 (E.D. La. Aug. 25, 2017).

100. 2002 Cal. Legis. Serv. Ch. 789 § 125115 (West).

101. The specific language added to California's Health and Safety Code in 2002 states that:

(a) A physician, surgeon, or other health care provider delivering fertility treatment shall provide his or her patient with timely, relevant, and appropriate information to allow the individual to make an informed and

New York also classifies embryos as property. The 2018 case *Finkelstein v. Finkelstein*,<sup>102</sup> a New York appellate court decision, “falls in line with the majority of appellate embryo disposition cases around the country where the parties’ unequivocal, written consent or agreement as to future disposition is respected.”<sup>103</sup> Nevertheless, the New York Legislature has attempted, unsuccessfully, to pass legislation regulating the disposition of cryopreserved embryos for several years.<sup>104</sup> The legislature’s most recent attempt was in 2017.<sup>105</sup> Similar to California’s law, the bill would have required individuals who use ART to provide written consent and directives regarding the disposition of embryos and gametes before the start of any procedure.<sup>106</sup>

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voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.

(b) Any individual to whom information is provided pursuant to subdivision (a) shall be presented with the option of storing any unused embryos, donating them to another individual, discarding the embryos, or donating the remaining embryos for research.

(c) Any individual who elects to donate embryos remaining after fertility treatments for research shall provide written consent.

2002 Cal. Legis. Serv. Ch. 789 § 125116(a)–(c) (West).

102. *Finkelstein v. Finkelstein*, 79 N.Y.S.3d 17 (1st Dep’t 2018).

103. Susan Crockin, *New York Appellate Court Upholds Couple’s Embryo Disposition Choice Permitting Withdrawal of Consent*, ASRM: LEGALLY SPEAKING (Aug. 5, 2018), <https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/embryo-disputes-in-both-u.s.-and-canada/> [<https://perma.cc/A4JE-FX4K>].

104. The New York Legislature introduced legislation in 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, and 2017. A.B. 7026, 225th Gen. Assemb., Reg. Sess. (N.Y. 2001); A.B. 1908, 226th Gen. Assemb., Reg. Sess. (N.Y. 2003); A.B. 1113, 228th Gen. Assemb., Reg. Sess. (N.Y. 2005); A.B. 2531, 230th Gen. Assemb., Reg. Sess. (N.Y. 2007); A.B. 2761, 232nd Gen. Assemb., Reg. Sess. (N.Y. 2009); A.B. 3218, 234th Gen. Assemb., Reg. Sess. (N.Y. 2011); S.B. 1474, 236th Gen. Assemb., Reg. Sess. (N.Y. 2013); S.B. 2708, 238th Gen. Assemb., Reg. Sess. (N.Y. 2015); and S.B. 5835, 240th Gen. Assemb., Reg. Sess. (N.Y. 2017).

105. S.B. 5835, 240th Gen. Assemb., Reg. Sess. (N.Y. 2017).

106. The actual language in the legislative history states:

Enormous strides have recently been made in the field of reproductive medicine which have assisted thousands of couples. However, there are several areas of this emerging science where legal and ethical questions proliferate. Currently there are few regulations regarding the use and disposition of cryopreserved embryos and gametes. This bill would directly deal with some of those concerns by requiring parties undergoing an in vitro procedure to provide both consent and advanced

## 2. *Pre-Embryos as Persons*

Arizona is the most recent state to pass “personhood legislation.”<sup>107</sup> Generally, “personhood legislation” refers to legislation that seeks to define life as “beginning at the moment an egg is fertilized.”<sup>108</sup> In April of 2018, the Arizona Legislature enacted Senate Bill 1393, which regulates the disposition of IVF human embryos.<sup>109</sup> The new law requires courts, upon the dissolution of a marriage, to give any pre-implantation embryos to the party who intends to develop the embryos to birth.<sup>110</sup> If both spouses intend to develop the embryos to birth, the court must award the embryos to the party who provided its gametes.<sup>111</sup> In a situation where both parties intend to develop the embryo to birth and both provided their gametes, courts must “resolve any dispute on disposition of the in vitro human embryos in a manner that provides the best chance for the in vitro human embryos to develop to birth.”<sup>112</sup> A number of other states, including Mississippi, Georgia, Oklahoma, South Carolina, and Virginia, have attempted to pass personhood legislation but have not succeeded.<sup>113</sup>

## 3. *The Middle Ground*

States that fall into the middle category do not grant pre-implantation embryos the same legal status as persons because of their potential for human life; however, middle category states also differentiate pre-implantation embryos from mere property.<sup>114</sup> As an example of a “middle

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written directives for the transfer, use and disposition of cryopreserved embryos or gametes prior to the procedure(s) being performed. One crucial concern that this bill deals with is the procedures governing the use, storage and transfer of gametes and embryos, and establishing a protocol to be followed in the event of a number of events including divorce, separation, death, or failure to pay storage fees.

S.B. 5835, Legis. Bill Hist. (N.Y. 2017).

107. See generally ARIZ. REV. STAT. § 25-318.03(A)(1) (2018); *Policies and Positions*, RESOLVE: NATIONAL INFERTILITY ASSOCIATION (last updated Apr. 2012), <https://resolve.org/about-us/policies-and-positions/> [https://perma.cc/282P-Y39E].

108. *Policies and Positions*, supra note 107.

109. S.B. 1393, 53d Leg., 2d Reg. Sess. (Ariz. 2018).

110. See ARIZ. REV. STAT. § 25-318.03(A)(1).

111. ARIZ. REV. STAT. § 25-318.03(A)(3).

112. ARIZ. REV. STAT. § 25-318.03(A)(2).

113. *Policies and Positions*, supra note 107.

114. The argument for an interim category, from an ethical or moral standpoint, is that a pre-implantation embryo “deserves respect greater than that



ground” state, Tennessee classifies pre-implantation embryos not as persons or property, but as “an interim category that entitles them to special respect because of their potential for human life.”<sup>115</sup> Tennessee was one of the earliest states to address embryo disposition.<sup>116</sup> In 1992, the Tennessee Supreme Court decided *Davis v. Davis*, a case of first impression<sup>117</sup> involving IVF. It held that an ex-husband’s interest in not procreating was greater than his ex-wife’s interest in donating frozen pre-embryos to another couple.<sup>118</sup> In its holding, the court in *Davis* stated that courts should first consider the “preferences of the progenitors” in embryo disposition cases.<sup>119</sup> In cases where the preferences of the progenitors are unknown or disputed, the court held that the “prior agreement concerning disposition should be carried out.”<sup>120</sup> If a prior agreement does not exist, courts should balance the interests of the parties involved.<sup>121</sup> The *Davis* court also stated that a party’s desire to avoid parenthood should outweigh the other party’s interest in procreating, as long as the other party had a “reasonable possibility of achieving parenthood” without the use of the pre-embryos in dispute.<sup>122</sup>

#### *D. Legal Status of Embryos in Louisiana*

In 1986, the Louisiana Legislature enacted Revised Statutes § 9:123, often referred to as the human embryo statute.<sup>123</sup> The statute gives legal capacity to pre-implantation embryos, specifically stating: “An in vitro

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accorded human tissue, but not the respect accorded persons.” John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 972 (1986). Under this intermediate category, commentators argue that “greater respect is due embryos than is accorded other human tissue because of their potential to become persons, and because of the symbolic meaning embryos may elicit.” *Id.*

115. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

116. *See id.*

117. A case of first impression “presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction.” *Case of First Impression*, BLACK’S LAW DICTIONARY (5th ed. 2016).

118. *Davis*, 842 S.W.2d at 597. *Davis v. Davis* involved a husband and wife who tried IVF but were ultimately unsuccessful. *Id.* at 589. After the couple divorced, the ex-husband wanted to avoid parenthood, but the ex-wife wanted to donate the pre-embryos to another couple for implantation. *Id.* at 603–04.

119. *Id.* at 604.

120. *Id.*

121. *Id.*

122. *Id.*

123. LA. REV. STAT. § 9:123 (2018); *see generally* Krentel, *supra* note 39.

fertilized human ovum exists as a juridical person until such time as the *in vitro* fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with the law.”<sup>124</sup> The human embryo statute originated from an article that the Louisiana Bar Association published in 1985,<sup>125</sup> which John B. Krentel, a health care administrator, wrote while finishing his last semester of law school.<sup>126</sup> The statutory scheme begins by defining the term “human embryo” as an *in vitro* fertilized egg that will, emphatically, develop *in utero* into an unborn child.<sup>127</sup> The statutory scheme also states that viable pre-embryos shall not be destroyed<sup>128</sup> and that all disputes involving pre-embryos must be resolved in the best interest of the embryo.<sup>129</sup>

In his article, Krentel seeks to distinguish *in vitro* embryos from *in vivo* embryos, stating that “the fertilized ovum *in utero* is actually akin to the property of the pregnant woman.”<sup>130</sup> Because a woman’s body does not yet contain pre-implantation embryos, Krentel argues that the law should not consider *in vitro* embryos as the woman’s property.<sup>131</sup> By defining pre-embryos as juridical persons, Krentel’s statutory language was intended to represent “a middle ground acknowledging the humanity of the embryo, but stopping short of granting it the full personhood of a ‘natural’ person.”<sup>132</sup> Krentel proposed the legal scheme based “on the constitutional principle that a state has the sovereign power to create juridical identities.”<sup>133</sup> The fact that a state has the power to create juridical identities, however, does not mean that classifying pre-implantation embryos as juridical persons is an appropriate use of that power. Even if Krentel’s human embryo statute and the surrounding legal framework was ever a workable solution, it does not work today.

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124. LA. REV. STAT. § 9:123.

125. See generally Krentel, *supra* note 39; see also June Carbone & Naomi Cahn, Symposium, *Families, Fundamentalism & the First Amendment: Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1038 (2010).

126. Krentel, *supra* note 39.

127. LA. REV. STAT. § 9:121.

128. LA. REV. STAT. § 9:129.

129. LA. REV. STAT. § 9:131.

130. Krentel, *supra* note 39, at 285.

131. Krentel, *supra* note 39, at 285.

132. Carbone & Cahn, *supra* note 125, at 1039.

133. Krentel, *supra* note 39, at 287.

## II. OUT WITH THE OLD: STATIC THINKING AND THE NEED FOR CHANGE

Over 30 years have passed since Krentel proposed the statutory language defining pre-implantation embryos as juridical persons.<sup>134</sup> The Louisiana Legislature enacted the human embryo statute in 1986 when IVF and the ability to freeze embryos were still in their infant stages.<sup>135</sup> In a footnote, Krentel noted that a woman who “refused” implantation could either freeze the embryo or have it “immediately implanted in a willing surrogate mother.”<sup>136</sup> Krentel followed up on his suggestion, noting that freezing the embryo “cannot be done at present in Louisiana due to a lack of appropriate facilities” and that “[t]he second option of a surrogate generates a host of legal, medical, and psychological issues that are complex and far-reaching.”<sup>137</sup> Through this statement, Krentel suggested to his readers that, even though he initially proposed it, his legal scheme for the human embryo was not practical.<sup>138</sup>

Now, after three decades of advancements in medical technology, Krentel’s statutory scheme is even less practical due to the numerous limitations that Louisiana’s laws place on assisted reproductive technologies like IVF and surrogacy.<sup>139</sup> These limitations significantly narrow the options for people who need reproductive assistance.<sup>140</sup> In his article, Krentel stated that, ethically speaking, “the human embryo is a unique category of being and ought to be treated as such.”<sup>141</sup> Treating human embryos as juridical persons, however, does not honor this sentiment. Instead, Louisiana Revised Statutes § 9:121 forces pre-

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134. See generally Krentel, *supra* note 39.

135. See Jacques Cohen, *How the Embryology Laboratory has Changed!*, 110 FERTILITY & STERILITY 189, 191 (2018).

136. Krentel, *supra* note 39, at 288 n.26.

137. *Id.*

138. See generally Krentel, *supra* note 39, at 288 n.26.

139. As one commentator notes, “Under the current state of the law in Louisiana, IVF patients who no longer wish to procreate using their cryopreserved embryos are prohibited from discarding them, but theoretically could legally implant the pre-embryos and then abort the more fully developed fetuses.” Sarah A. Weber, Comment, *Dismantling the Dictated Moral Code: Modifying Louisiana’s In Vitro Fertilization Statutes to Protect Patients’ Procreative Liberty*, 51 LOY. L. REV. 549, 550 (2005).

140. Louisiana laws governing surrogacy, for example, state that intended parents who engage a gestational surrogate must be married to each other and may only use their own genetic material to create a child. See LA. REV. STAT. § 9:2718.1(6) (2020).

141. Krentel, *supra* note 39, at 287.

implantation embryos into a legal framework in which they do not fit.<sup>142</sup> The attempt to force embryos into inappropriate and ill-equipped laws is one of the most problematic aspects of Louisiana's human embryo statute, as seen through an examination of the embryo's capacity to sue,<sup>143</sup> Louisiana's child custody laws,<sup>144</sup> and theoretical inconsistencies created within the Civil Code.

*A. Granting Embryos the Capacity to Sue: Louisiana Revised Statutes Section 9:124*

Granting pre-implantation embryos the capacity to sue and be sued raises significant constitutional concerns.<sup>145</sup> The required judicial standard to resolve disputes “in the best interest of the in vitro fertilized ovum” gives frozen embryos priority over any party, including gamete donors and intended parents.<sup>146</sup> Although Louisiana, as a state, may have a compelling interest in an embryo's potential for human life, this interest is not absolute. As the United States Supreme Court reiterated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided in 1992, all prior case law has “respected the private realm of family life which the state cannot enter.”<sup>147</sup> The *Casey* Court also noted that the right to “define

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142. See generally LA. REV. STAT. § 9:121; LA. CIV. CODE art. 26 (2018).

143. See generally LA. REV. STAT. § 9:124.

144. See generally LA. CIV. CODE arts. 131–37.

145. See U.S. CONST. amend. XIV.

146. LA. REV. STAT. § 9:131.

147. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Prince v. Mass.*, 321 U.S. 158, 166 (1944)). The quote from *Casey*, in full, states:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion in matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Our precedents “have respected the private realm of family life which the state cannot enter.” 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* at 851 (internal citations omitted).

one's own concept of existence" lies at the heart of liberty interests protected by the Fourteenth Amendment.<sup>148</sup> Given the constitutionally protected liberty interests of individuals who use ART, the Louisiana Legislature should not cast aside the rights of current natural persons in favor of potential natural persons.<sup>149</sup>

Another major problem that arises from granting pre-implantation embryos the capacity to sue or be sued is the resulting expansion of juridical personhood. Louisiana Revised Statutes § 9:124 gives pre-implantation embryos, as juridical persons, the right to sue and be sued.<sup>150</sup> Louisiana Civil Code article 24 defines a juridical person as "an entity to which the law attributes personality, such as a corporation or a partnership."<sup>151</sup> As juridical persons, pre-implantation embryos are given the same legal status as business entities like Costco and Wal-Mart.<sup>152</sup> Given the substantial benefits of limited liability, granting capacity to sue or be sued is easily understood within the context of a business entity; however, the same cannot be said about the pre-implantation embryo.<sup>153</sup> In reality, embryos themselves do not have the ability to sue. Instead, the capacity to sue is in the hands of the individual who owns or possesses the embryos, and that person can pursue her personal agenda because of the legal fiction that Louisiana Revised Statutes § 9:124 creates.<sup>154</sup>

Civil Code article 24 also notes that a juridical person's personality is "distinct from that of its members."<sup>155</sup> This language clarifies that, as an entity, a juridical person's patrimony<sup>156</sup> is "distinct and distinguishable"

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148. *Id.*

149. *See generally* LA. REV. STAT. § 9:131.

150. LA. REV. STAT. § 9:124. Specifically, the statute states, "As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained." *Id.*

151. LA. CIV. CODE art. 24.

152. A partnership, for example, is defined in the Civil Code as "a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." LA. CIV. CODE art. 2801.

153. *See* LA. REV. STAT. § 12:1-622(B).

154. *See* LA. REV. STAT. § 9:124.

155. LA. CIV. CODE art. 24.

156. "Patrimony" refers to rights and obligations that a person holds to which monetary value can be attached without offending society. According to civil law scholar A.N. Yiannopolous, "the word things is often used in a technical sense to designate the objects of patrimonial rights. Patrimonial rights may attach only to

from the patrimony of the juridical person's individual members.<sup>157</sup> Separate patrimonies make sense in the context of a business entity, but not for pre-implantation embryos. For example, an entity like Wal-Mart may have its own assets that belong to the business entity as a whole, whereas the CEO, as an individual, may have personal assets that are entirely separate. Even in situations in which a business consists of one person, if limited liability is involved, having different patrimonies makes sense.<sup>158</sup> A pre-implantation embryo, however, does not have one patrimony in its capacity as a juridical person and a separate patrimony in its capacity as an individual member of itself as a juridical person.

Use of the term juridical—or fictitious—persons traditionally referred to the concept of collective ownership.<sup>159</sup> Collective ownership differs from undivided co-ownership in several respects.<sup>160</sup> According to civilian scholar Marcel Planiol, collective ownership is a “special status of property” that “rests upon the grouping together of the persons to which it belongs.”<sup>161</sup> In contrast, undivided co-ownership allows “physical merging” of autonomous shares held by individual owners.<sup>162</sup> Individual, autonomous shares do not exist in collective ownership; rather, the thing that is collectively owned is subject to common usage or “a complete dedication of it to the general service.”<sup>163</sup> Thus, in its original form, juridical personhood was meant to distinguish between two different types of ownership—not two different kinds of persons.<sup>164</sup> As Planiol noted in his civil law treatise, juridical personhood, or the concept of fictitious personality, which historically developed as “something simple and indisputable,” has long been pushed to its extreme.<sup>165</sup>

Jurisdictional problems may also arise from the embryo's capacity to sue and be sued. Civil Code article 38 defines the domicile of natural persons—“the place of his habitual residence”—differently than the domicile of a juridical person, which is “either that state of its formation

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certain material objects and certain intangibles. In this sense, things are material objects or intangibles that are susceptible of appropriation.” 2 A.N. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE 28 (5th ed. 2015).

157. LA. CIV. CODE ANN. art. 24 cmt. d.

158. See REV. STAT. § 12:1-622.

159. See generally 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 775–806 (La. State L. Inst. trans., 1959) (12th ed. 1939).

160. See generally *id.* at 775–77.

161. *Id.* at 775.

162. *Id.*

163. *Id.*

164. *Id.* at 776–77.

165. *Id.* at 778.

or the state of its principal place of business.”<sup>166</sup> The domicile of children, or “unemancipated minors,” however, is that of “the parent or parents with whom the minor usually resides.”<sup>167</sup> In the *Vergara* case, for example, the two pre-embryos at issue were “formed” at a fertility clinic in California.<sup>168</sup> The frozen embryos remain stored at the California fertility clinic,<sup>169</sup> which could technically be considered the pre-embryos’ habitual residence,<sup>170</sup> but the pre-embryos have never resided with either Loeb, domiciled in Florida, or Vergara, domiciled in California.<sup>171</sup> Louisiana Revised Statutes § 9:126, regarding ownership of pre-embryos, seems to place some restrictions on jurisdiction, allowing a “court in the parish where [an] in vitro fertilized ovum is located” to appoint a curator for a pre-embryo’s protection.<sup>172</sup> Given the varied statutes and competing considerations, it is unclear whether a Louisiana court could exercise jurisdiction over an embryo not stored in the state; however, the *Loeb v. Vergara* case did acknowledge the possibility.<sup>173</sup>

#### *B. Pre-Embryos and Custody: Analyzing the Best Interest Standard*

The jurisdictional problems that may arise under a pre-embryo’s capacity to sue could also impact initial determinations of child custody.<sup>174</sup> *Loeb v. Vergara* provides an excellent example of jurisdictional problems that may arise when applying child custody rules to pre-implantation embryos.<sup>175</sup> Because Loeb and Vergara’s two embryos are frozen in California, a state that considers them property, the embryos have no home state as children. Consequently, it is theoretically possible that a Louisiana court could assert jurisdiction over the embryos for an initial custody determination because, as property located in California, the embryos have no home state as children.<sup>176</sup> Without a definitive home state, however, the

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166. LA. CIV. CODE art. 38 (2018).

167. *Id.* art. 41.

168. *Human Embryo #4 HB-A v. Vergara*, No. 17-1498, 2017 U.S. Dist. LEXIS 136782, at \*5 (E.D. La. Aug. 25, 2017).

169. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*5.

170. LA. CIV. CODE art. 38.

171. *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*2–3.

172. LA. REV. STAT. § 9:126 (2018).

173. *See generally* *Loeb v. Vergara*, 326 F. Supp. 3d 295, 300–02 (E.D. La. 2018); *but see supra* note 24.

174. *See generally* *Loeb*, 326 F. Supp. 3d at 300–02.

175. *Id.*

176. *Id.*

appropriate jurisdiction for an initial custody determination under the Uniform Child Custody Jurisdiction Enforcement Act is uncertain.<sup>177</sup>

Louisiana Revised Statutes § 9:131 requires all disputes involving pre-embryos to be resolved in the best interest of the embryo, but the statute does not provide any guidance regarding how embryos' best interests are decided.<sup>178</sup> The Louisiana Civil Code, on the other hand, includes seven articles addressing child custody, which are persuasive authority in the absence of more specific legislation.<sup>179</sup> Notably, the Louisiana Legislature adopted these articles in 1993,<sup>180</sup> seven years after the legislature enacted the statutory scheme for human embryos.<sup>181</sup> Similar to Louisiana Revised Statutes § 9:131, which requires that any dispute regarding a pre-implantation embryo be resolved in the best interest of the embryo,<sup>182</sup> Civil Code article 131 mandates that child custody awards be made in accordance with the "best interest of the child."<sup>183</sup> Additionally, Civil Code article 134 provides 14 factors for courts to consider when determining a child's best interest in custody cases.<sup>184</sup> Some of the factors include: (1) love and other emotional ties between each party and the child; (2) how long the child has lived in a particular environment; (3) the permanence of the child's existing or proposed custodial home; (4) the moral fitness, as well as the mental and physical health of each party; (5) the home, school, and community history of the child; and (6) the reasonable preference of the child, if of "sufficient age" to express her preference.<sup>185</sup> The factors listed in article 134 are illustrative rather than exclusive, and the ultimate weight given to each factor is "left to the

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177. There are three contexts that could potentially allow a Louisiana court to assert initial child custody jurisdiction over the two embryos, including situations where: (1) a court of another state does not have jurisdiction or a court in the child's home state declined to exercise jurisdiction, the child and at least one parent have a significant connection to Louisiana other than mere physical presence, and substantial evidence concerning the child's well-being is in Louisiana; (2) other courts with jurisdiction have declined to exercise jurisdiction because Louisiana is the more appropriate forum; or (3) no court of any other state would have jurisdiction under the specified criteria. *See id.*

178. *See generally* LA. REV. STAT. § 9:131 (2018).

179. *See* LA. CIV. CODE arts. 131–37 (2018).

180. *See generally id.* The legislature adopted the code articles on child custody in 1993, but they did not take effect until 1994.

181. *See generally* LA. REV. STAT. §§ 9:121–133.

182. LA. REV. STAT. § 9:131.

183. LA. CIV. CODE art. 131.

184. *Id.* art. 134.

185. *Id.*



discretion of the trial court.”<sup>186</sup> These factors largely become irrelevant when applied to pre-implantation embryos. For example, frozen embryos do not have a home, school, or community history.<sup>187</sup> Pre-implantation embryos have not developed emotional ties to their intended parents,<sup>188</sup> nor are they able to express any type of preference.<sup>189</sup> The factors considered in child custody determinations are heavily rooted in maintaining the status quo and focus on providing the child with a sense of stability. In the case of pre-embryos, however, there is no status quo to maintain.

As individuals who use IVF to conceive are limited in their options depending on the legal status granted to embryos in their state, any new solution enacted by the Louisiana Legislature should, at a minimum, allow individuals who have created embryos using their own genetic material to determine whether to implant the embryos, keep the embryos frozen in storage, donate the embryos for research or to someone else for implantation, or discard the embryos. The effort to move toward single embryo transfer intensifies the significance of pre-embryos’ questioned custody.<sup>190</sup> As commentators note, the creation of excess embryos is pragmatic and “an inevitable part of IVF.”<sup>191</sup> Krentel’s legal framework embodies a medical protocol that requires all fertilized eggs to be implanted in the mother’s womb.<sup>192</sup> In reality, however, the number of embryos implanted in the uterus at one time is subject to specific guidelines.<sup>193</sup> Medical technology has advanced significantly in the 40 years since the birth of the first IVF baby.<sup>194</sup> Initially, IVF had much lower pregnancy rates.<sup>195</sup> As a result, doctors transferred multiple embryos at once, attempting to increase the odds that at least one of the transferred embryos would implant and result in a live birth.<sup>196</sup> Today, ART pregnancy rates have increased, and this increase, combined with the fact that multiple gestation presents greater risks for mothers and children, has

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186. LA. CIV. CODE ANN. art. 134 cmt. b.

187. *See* LA. CIV. CODE art. 134(A)(10).

188. *See id.* art. 134(A)(2).

189. *See id.* art. 134(A)(11).

190. *See generally* Frydman, *supra* note 62, at 204–05.

191. Ross & Pennings, *supra* note 66, at 300.

192. Krentel, *supra* note 39, at 287.

193. Sarah E. Richards, *The Problem with America’s Twin Epidemic*, TIME (Apr. 16, 2014), <http://time.com/52142/the-problem-with-americas-twin-epidemic/> [<https://perma.cc/VC43-PGLT>].

194. Cohen, *supra* note 135, at 189–91.

195. Richards, *supra* note 193.

196. *Id.*

resulted in a bigger push for single embryo transfer.<sup>197</sup> Consequently, the cryopreservation of embryos is a crucial component of providing assisted reproduction that is both safe and affordable.<sup>198</sup>

### *C. Theoretical Inconsistencies in the Louisiana Civil Code*

The Louisiana Legislature chose to define pre-embryos not as natural persons, which the Civil Code defines as human beings, but as juridical persons.<sup>199</sup> When analogizing embryos to plant seeds, Krentel argued that it would be ludicrous if a “civilization of starving farmers . . . destroy[ed] all seeds because they are not yet plants,” just as it would be ludicrous to destroy “all embryos because they are not yet human beings.”<sup>200</sup> Although a pre-implantation embryo may be like a seed,<sup>201</sup> the problem with Krentel’s analogy is that the world’s population is not like a civilization of starving farmers.<sup>202</sup> Comparing frozen pre-implantation embryos to the seeds of a starving civilization implies that the continued existence of Louisiana’s population depends on assisted reproduction.<sup>203</sup>

Furthermore, no one is advocating that all embryos be destroyed.<sup>204</sup> To say that embryos are destroyed simply because they are not yet human beings is a gross oversimplification of IVF and ART procedures.<sup>205</sup> As one commentator notes, “the Louisiana Civil Code is more protective than the French Civil Code, as it permits no interference with the embryos once a physician has fertilized a human ovum in vitro and grants the embryo full recognition as a juridical person prior to implantation in the womb.”<sup>206</sup> Interestingly, however, Louisiana considers a human being that is born dead to have never existed.<sup>207</sup> Comment (d) to Civil Code article 26 states

197. *Id.*

198. Frydman, *supra* note 62, at 204–05.

199. LA. CIV. CODE art. 24 (2018). “According to the Romanist tradition, persons are divided into natural persons and juridical persons. A natural person is a human being. Only human beings may be natural persons.” LA. CIV. CODE art. 24 cmt. b (2018).

200. Krentel, *supra* note 39, at 287.

201. Krentel, *supra* note 39, at 287.

202. *Contra* Krentel, *supra* note 39, at 287.

203. *See generally* Krentel, *supra* note 39, at 287.

204. *Contra* Krentel, *supra* note 39, at 287.

205. *Contra* Krentel, *supra* note 39, at 287.

206. Jonathan F.X. O’Brien, Comment, *Cinderella’s Dilemma: Does the In Vitro Statute Fit? Cloning and Science in French and American Law*, 6 TUL. J. INT’L & COMP. L. 526, 542 (1998).

207. LA. CIV. CODE ANN. art. 25 cmt. b (2018).

that “[w]hen a child is born dead, the fiction of its personality from the moment of conception is wiped out.”<sup>208</sup>

As medical advancements in reproductive technology continue, society as a whole must rethink concepts and assertions that once seemed obvious.<sup>209</sup> The Louisiana Legislature, for example, must question the Civil Code’s reference to the moment of a child’s conception.<sup>210</sup> In 2017, the International Committee for Monitoring Assisted Reproductive Technologies, in partnership with ASRM and several additional ART professional societies around the world,<sup>211</sup> published a newly revised version of “The International Glossary on Infertility and Fertility Care.”<sup>212</sup> Noted within the glossary was the decision to remove the term “conception” altogether.<sup>213</sup> The glossary states that the term “conception,” as well as its derivatives, “are terms that cannot be described biologically during the process of reproduction” and noted that a consensus was reached that “efforts should be made to use scientifically recognized definitions such as fertilization, implantation, pregnancy and live birth.”<sup>214</sup> If the term “conception” no longer corresponds to a biologically recognizable stage, the Louisiana Legislature should consistently acknowledge when rights attach to both in vitro and in vivo embryos.<sup>215</sup>

Considering when rights attach to unborn children reveals another theoretical inconsistency that Louisiana’s human embryo statutes create within the Civil Code.<sup>216</sup> This inconsistency involves the capacity of an unborn child to receive donations, which is governed by article 1474.<sup>217</sup>

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208. *Id.* art. 26 cmt. d.

209. *See generally* Zegers-Hochschild, et al., *supra* note 43.

210. *See generally* LA. CIV. CODE art. 26; *see also* Zegers-Hochschild, et al., *supra* note 43.

211. In addition to the International Committee for Monitoring Assisted Reproductive Technologies and the American Society for Reproductive Medicine, participating professional societies included the European Society of Human Reproduction and Embryology, International Federation of Fertility Societies, March of Dimes, African Fertility Society, Groupe Inter-africain d’Etude de Recherche et d’Application sur la Fertilité, Asian Pacific Initiative on Reproduction, Middle East Fertility Society, Red Latinoamericana de Reproducción Asistida, and the International Federation of Gynecology and Obstetrics. Zegers-Hochschild, et al., *supra* note 43.

212. Zegers-Hochschild, et al., *supra* note 43.

213. Zegers-Hochschild, et al., *supra* note 43, at 395.

214. Zegers-Hochschild, et al., *supra* note 43, at 395.

215. *See generally* LA. CIV. CODE art. 26 (2018). *But see id.* art. 1474; LA. REV. STAT. §§ 9:123–24, 33 (2018).

216. *See generally* LA. CIV. CODE art. 1474.

217. *Id.* art. 1474.

To have capacity to receive donations, article 1474 requires that an unborn child be in utero.<sup>218</sup> In addition, article 1474 states that all donations to an unborn child, whether *inter vivos* or *mortis causa*, only have effect “if the child is born alive.”<sup>219</sup> Given the *in utero* restriction, it makes little sense to classify pre-implantation embryos as juridical persons with their own patrimonies. Moreover, embryo donation, like traditional adoption, does not officially occur until the child is born.<sup>220</sup> This birth requirement leaves a theoretical gap in the parental rights of donated embryos.<sup>221</sup> Louisiana requires the donors of the egg and sperm who “renounce, by notarial act, their parental rights for *in utero* implantation” to donate the pre-embryo for adoptive implantation, which inadvertently recognizes the existence of embryo donors’ parental rights.<sup>222</sup> Revised Statutes § 9:130, however, states that constructive fulfillment for adoption in Louisiana “shall occur when a married couple executes a notarial act of adoption” of a pre-embryo *and birth occurs*.<sup>223</sup>

From a policy perspective, Louisiana’s current statutory scheme does not address the present realities that spring from the use of IVF and ART. Consequently, the Louisiana Legislature must consider a new approach—a new categorization of the pre-implantation embryo. One consideration that may aid legislators with necessary statutory revisions is the hierarchy of interested parties.<sup>224</sup> Stakeholders’ interests in pre-implantation embryos vary markedly and help identify and weigh the rights in question.<sup>225</sup> In his article discussing the various parties and stakeholders interested in the oversight of ART, Dr. David Adamson, former Chair of the National Committee Overseeing ART, noted that the hierarchy of interest model “suggests that patients, their gametic material, and future children have the most interest in ART and its regulation, and their interests should be paramount when developing regulation and oversight.”<sup>226</sup> Adhering to a hierarchy of interest model assures the best

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218. *Id.* Specifically, article 1474 states that, “To be capable of receiving by donation *inter vivos*, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation *mortis causa*, an unborn child must be in utero at the time of the death of the testator.” *Id.*

219. *Id.*

220. LA. REV. STAT. § 9:130.

221. *See generally id.*

222. *See id.*

223. *Id.*

224. David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727, 742–43 (2005).

225. *Id.*

226. *Id.*

outcome for the parties who matter most—ART patients and their future children.<sup>227</sup>

Dr. Adamson's suggested hierarchy of interest identifies five main categories of stakeholders.<sup>228</sup> Second to actual ART patients and their potential future children are the interests of physicians, embryologists, and scientists.<sup>229</sup> The third category of interests to be considered are those of the ART professional societies, such as the ASRM, which develop guidelines and issue advisory opinions for the best practice standards for all involved in the ART process.<sup>230</sup> The hierarchy's fourth category of interests are governmental regulatory agencies like the CDC, the Federal Trade Commission, and the National Institutes of Health.<sup>231</sup> The fifth and final category includes society in general, as well as "other interested stakeholders," representing parties with the least interest in ART regulation.<sup>232</sup> This type of hierarchical consideration laid out by Dr. Adamson helps to clarify the desired objective of the law and provides a meaningful foundation on which lawmakers may base future amendments to Louisiana's current statutory scheme.

Labels mold and constrain thoughts, and because the labels given to embryos are determinative of legal status, the language used to define and describe pre-embryos is of extreme importance.<sup>233</sup> The word an individual ascribes to a person, property, or obligation conditions that individual's thinking.

### III. IN WITH THE NEW: EMBRYO CLASSIFICATION FOR THE 21ST CENTURY

Adopting an approach that defines embryos as neither persons nor property would alleviate some of the problems caused by their legal status as juridical persons, thereby significantly improving Louisiana law. Instead of forcing pre-embryos to fit into a category of persons or property,

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227. *See generally id.*

228. *Id.* at 743.

229. *Id.* Adamson states that physicians, embryologists, and scientists, as stakeholders occupying the second-highest category of interest, represent the importance of "protection of the patient-physician relationship, confidentiality, medico-legal protection, adequate compensation, minimal restrictions on research, research funding and other professional interests that enhance high quality ART services . . . ." *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See generally* Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992)

the Louisiana Legislature should adopt an approach that represents a true middle ground, and it should do so by using the type of interim category that the *Davis* court described.<sup>234</sup>

*A. Option One: “A Unique Category of Being”*<sup>235</sup>

Krentel based his statutory scheme around the idea that pre-implantation embryos are “a unique category of being,” and the law should treat them as such. This is not a blind assertion; rather, it is a recognition of the progressive nature of human knowledge. Consequently, the best solution is for the Louisiana Legislature to reclassify pre-implantation embryos as a “unique category of being” and adjust the legal status of the pre-embryos accordingly. Under this classification, the Louisiana Legislature could categorize embryos in the same type of middle ground category that states like Tennessee use.<sup>236</sup> In fact, classification as a unique category of being is substantially similar to the Tennessee Supreme Court’s approach in *Davis*, which states that a pre-embryo is not a person or property and, instead, that it occupies an “interim category” that is entitled to special respect because of its potential for human life.<sup>237</sup> More specifically, the new statutory language should read as follows: “Prior to in utero implantation, pre-embryos created using assisted reproductive technology shall be considered a unique category of being. As such, in the absence of a more specific article or statute, pre-implantation embryos shall be governed by Book II of the Louisiana Civil Code.”<sup>238</sup>

Broadly speaking, the Louisiana Civil Code classifies everything as either “persons”<sup>239</sup> or “things.”<sup>240</sup> Logically, it follows that if a pre-embryo is not a person, then it must be a thing.<sup>241</sup> Dr. Eric Reiter, a professor and researcher focused on historical and comparative law concepts, has analyzed problems associated with the binary nature of traditional civil

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234. See generally *id.*

235. Krentel, *supra* note 39, at 287. This language comes from John B. Krentel’s article, which was published in the Louisiana Bar Journal in 1985. In his article, Krentel proposed the legal scheme that is now Louisiana Revised Statutes §§ 9:121–33. See generally Krentel, *supra* note 39.

236. See generally *Davis*, 842 S.W.2d 588.

237. *Id.* at 597.

238. See generally LA. CIV. CODE Book II (2018) (titled “Things and the Different Modifications of Ownership”).

239. See generally LA. CIV. CODE Book I (2018) (titled “Of Persons”).

240. See generally Book II, *supra* note 238.

241. See generally *id.*

law taxonomy.<sup>242</sup> Reiter explains the categorization of persons, things, and obligations from three different perspectives: linear, circular, and triangular.<sup>243</sup> In his analysis, Reiter notes that legal classification is “largely driven by an understanding of the boundaries between categories as clear lines necessitating either/or choices.”<sup>244</sup> This traditional binary view does not allow any overlap.<sup>245</sup> If something is an obligation, it is neither a thing nor a person.<sup>246</sup> If something is a person, it is categorically incapable of being an obligation or a thing.<sup>247</sup> The linear view can be visualized as three boxes—persons, things, and obligations—organized in a straight line, which allows persons to interact with things and things to interface with obligations.<sup>248</sup> Although similar to the linear view, a circular visualization of the three categories creates an additional interaction between persons and obligations.<sup>249</sup> The problem with linear and circular models is that they ignore the “interrelations between all three categories.”<sup>250</sup> Rather than analyzing legal classifications from a linear or circular perspective, Reiter proposes a triangular model in which “classification takes place within the area enclosed by the triangle.”<sup>251</sup> Under Reiter’s triangular model, persons, things, and obligations each occupy one of the triangle’s corners, and the center represents the balanced mixture of the categories.<sup>252</sup> Applying Reiter’s model to the reclassification of embryos, one could assume that pre-embryos, as a unique category of being, fall somewhere near the center of the triangle.<sup>253</sup> Prior to in vitro fertilization, a human ovum may shift away from the center of the triangle, closer to the corner specifically dedicated to things.<sup>254</sup> After fertilization and successful implantation into a woman’s uterus, an embryo may shift closer to the classification of persons.<sup>255</sup> The

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242. See generally Eric H. Reiter, *Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat’s Monster*, 1 J. CIV. L. STUD. 189 (2008).

243. *Id.* at 199–201.

244. *Id.* at 199.

245. See generally *id.*

246. See *id.*

247. See *id.*

248. *Id.* at 199–200.

249. *Id.* at 200.

250. See *id.* at 201.

251. *Id.*

252. *Id.*

253. See generally *id.* at 198–203.

254. See generally *id.*

255. See generally *id.*

advantage of Reiter's triangular model lies in its ability to adapt to change without forcing preclusion.<sup>256</sup>

As a unique category of being, pre-implantation embryos should be governed by Book II of the Civil Code, "Things and the Different Modifications of Ownership,"<sup>257</sup> rather than Book I, "Of Persons."<sup>258</sup> The Louisiana Legislature could treat pre-implantation embryos as "incidents of human personality" that are not "susceptible of appropriation."<sup>259</sup> Treating pre-embryos as incidents of human personality would respect the potential for human life held by pre-embryos while also acknowledging that the primary rights in need of protection are those of the gamete providers. As A.N. Yiannopoulos explained, incidents of human personality refer to things like a person's name, likeness, and liberty, which "are not objects of property, but are incidents of a comprehensive 'right of personality' that is accorded an almost absolute protection without regard to rules of property law."<sup>260</sup> Categorizing pre-implantation embryos as a unique category of being would distinguish them from property while also removing their legal capacity as juridical persons. The classification of pre-embryos as unique category of being would be a better fit because "[a] living human body and its members or parts are generally regarded as incidents of one's own personality, and, therefore, not as objects of property rights."<sup>261</sup> This approach would more closely align pre-embryos with unborn children, which is particularly fitting because both have the potential for human life that is not yet realized.

As a unique category of being, a pre-implantation embryo would no longer have legal capacity as a juridical person to sue or be sued.<sup>262</sup> Although the unique being classification distinguishes pre-embryos from mere property, the analysis regarding capacity to sue remains the same under either approach, as both terminate the embryo's legal status as a juridical person. Applied to the dispute between Loeb and Vergara, both options would foreclose the possibility that a Louisiana court may have jurisdiction over the suit.<sup>263</sup> Because pre-implantation embryos would no longer be considered persons or have the capacity to sue, there would no

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256. *See id.* at 201–03.

257. *See generally* Book II, *supra* note 238.

258. *See generally* Book I, *supra* note 239.

259. YIANNOPOULOS, *supra* note 156, at 35.

260. *Id.* at 35–36.

261. *Id.* at 36.

262. *See generally* LA. REV. STAT. § 9:124 (2018).

263. *See generally* Human Embryo #4 HB-A v. Vergara, No. 17-1498, 2017 U.S. Dist. LEXIS 136782 (E.D. La. Aug. 25, 2017).



longer be an issue over custody of the embryos, and the court could dismiss the suit for lack of jurisdiction over Vergara.<sup>264</sup>

Additionally, the Louisiana Legislature should take proactive steps to safeguard the best interests of pre-implantation embryos. Although Louisiana's current statutory scheme purports to protect the best interest of embryos, it exists only as a reaction to embryos that individuals have already created.<sup>265</sup> Protecting the best interests of embryos would be better achieved through a proactive approach.<sup>266</sup> Switzerland, for example, uses a proactive approach, and its legislation focuses heavily on the potential psychological risks associated with ART, requiring that all users "be fully informed of all the medical, psychological, physical, juridical, . . . and financial aspects."<sup>267</sup> In Switzerland, individuals hoping to use ART must first receive counseling and "observe a four week period of reflection."<sup>268</sup> If procedures are unsuccessful for three cycles, Switzerland requires individuals to reaffirm their consent and observe another four-week period of reflection.<sup>269</sup> By using this framework, Switzerland seeks to ensure that individuals using ART "have no doubt of their desire to create a baby via medical assistance and will be less likely to have conflicting emotions at a later date."<sup>270</sup> Instead of focusing on laws that react to embryo disputes, this type of proactive approach would more effectively safeguard the best interests of pre-implantation embryos.

### *B. Option Two: Unique and Irreplaceable Property*

Alternatively, the Louisiana Legislature could define pre-embryos as "unique and irreplaceable property." One immediate problem with this approach is the link between property and ownership. The definition of ownership in the Civil Code, however, does not allow individuals to do anything they want with the property they own.<sup>271</sup> Article 477 states that an owner may "use, enjoy, and dispose of [the thing owned] *within the limits and under the conditions established by law.*"<sup>272</sup> The limiting

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264. See *Human Embryo*, 2017 U.S. Dist. LEXIS 136782, at \*18–20.

265. See generally LA. REV. STAT. § 9:131.

266. See generally Sandi Varnado, Comment, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 650–53 (2006).

267. *Id.* at 651–52.

268. *Id.* at 652.

269. *Id.*

270. *Id.*

271. See LA. CIV. CODE art. 477(A) (2018).

272. *Id.* (emphasis added).

language in article 477 already provides an avenue for the legislature to restrict the property rights an individual or couple may have in pre-embryos.<sup>273</sup> With the restrictions of article 477 in mind, the Louisiana Legislature could adopt a property approach classifying pre-implantation embryos as “unique and irreplaceable property.”<sup>274</sup>

Under this approach, the word “irreplaceable” refers to the combination of genetic material specific to whichever embryo that happens to be in dispute. “Unique” seeks to separate pre-embryos from other property that individuals consider irreplaceable. Together, the words “unique” and “irreplaceable” acknowledge the care that courts should use when resolving property disputes over pre-implantation embryos. The words “unique” and “irreplaceable” do not, however, change the embryos’ legal status from that of mere property. Instead, the words provide a surface-level distinction, allowing flexibility for all parties by not precluding or endorsing any specific group, religion, or moral philosophy. Instead, individuals may treat their embryos as property, persons, or something in between, and they may act according to that belief.

The meaning of this language is similar to the language that a Missouri appellate court used in the 2016 case *McQueen v. Gadberry*.<sup>275</sup> In *McQueen*, the court classified pre-implantation embryos as “marital property of a special character.”<sup>276</sup> The *McQueen* court stated that Missouri courts have previously only considered unborn children to mean every stage of biological development *in utero*.<sup>277</sup> The *McQueen* court also looked to the definition of property, “defined in relevant part as ‘[a]ny external thing over which the rights of . . . use . . . are exercised[.]’”<sup>278</sup> Because pre-implantation embryos are “outside of [the woman’s] uterus and cryogenically preserved and stored in an artificial environment,” the frozen embryos would be considered external things, thereby falling under the stated definition of property.<sup>279</sup>

By referring to pre-implantation embryos as irreplaceable property instead of marital property, the proposed language attempts to be more inclusive and indicates acceptance of all individuals undergoing fertility treatment regardless of their relationship statuses.<sup>280</sup> Specifically using the word “irreplaceable” would classify pre-implantation embryos as non-

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273. *Id.*

274. *See generally* LA. CIV. CODE art. 477.

275. *See McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

276. *See id.*

277. *Id.* at 141.

278. *Id.* at 148–49 (quoting BLACK’S LAW DICTIONARY 1232 (7th ed. 1999)).

279. *Id.*

280. *See generally id.*

fungibles.<sup>281</sup> Additionally, the words “unique” and “irreplaceable” distinguish pre-embryos from other forms of property. The *McQueen* court noted that pre-embryos “are unlike traditional forms of property or external things” for several reasons.<sup>282</sup> Pre-embryos, for example, “are comprised of a woman and man’s genetic material, are human tissue,” and have the potential for human life.<sup>283</sup>

One of the main problems with categorizing pre-implantation embryos as property is that the Louisiana Civil Code does not provide a specific definition of property. Consequently, property is defined by its common usage.<sup>284</sup> As noted by renowned civilian scholar A.N. Yiannopoulos, “*Property* is a word with high emotional overtones and so many meanings that it has defied attempts at accurate all-inclusive definition.”<sup>285</sup> Under its common usage, “property” is widely understood to refer to something that a person may own.<sup>286</sup> In the Civil Code, however, “property” also refers to the rights that a person possesses, including obligations and real rights.<sup>287</sup> According to Yiannopoulos, property law does not govern legal relations “of a predominantly moral character,” like marriage and filiation.<sup>288</sup> This, Yiannopoulos says, is because legal relations receive “adequate protection” elsewhere in the law.<sup>289</sup>

Another problem with this solution is that, much like classifying an embryo as a juridical person, the categorization of the pre-implantation embryo as property would also force embryos into a legal scheme that legislation and jurisprudence extensively define.<sup>290</sup> In addition, any

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281. “Fungibles are things that, according to law or the intention of the parties, are interchangeable; non-fungibles are things that are not interchangeable.” YIANNOPOULOS, *supra* note 156, at 55.

282. *McQueen*, 507 S.W.3d at 148–49.

283. *Id.*

284. Article 11 of the Louisiana Civil Code states that “words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter.” LA. CIV. CODE art. 11 (2018).

285. YIANNOPOULOS, *supra* note 156, at 1.

286. *See Property*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/> [<https://perma.cc/8N3C-KT3J>] (last visited Jan. 18, 2019).

287. “In the Louisiana Civil Code the word property is at times a translation of the French *propriété* and at times a translation of biens. In context, it may mean things, ownership, or patrimony.” YIANNOPOULOS, *supra* note 156, at 4.

288. YIANNOPOULOS, *supra* note 156, at 38.

289. YIANNOPOULOS, *supra* note 156, at 38.

290. *See generally* DIAN TOOLEY-KNOBLETT, JEANNE LOUISE CARRIERE, & JOHN RANDALL TRAHAN, YIANNOPOULOS’ CIVIL LAW PROPERTY COURSEBOOK (10th ed. 2014).

attempt to classify embryos as property in Louisiana is unlikely to succeed politically, which the legislature's recent codification of law surrounding surrogacy contracts shows.<sup>291</sup> In 2016, the Louisiana Legislature enacted legislation to regulate gestational carrier contracts, which former Governor Bobby Jindal vetoed twice.<sup>292</sup> The Louisiana Legislature later passed the surrogacy legislation<sup>293</sup> after Jindal left office.<sup>294</sup> As one commentator has noted, "Aside from the exploitation and commercialization concerns addressed in Governor Jindal's veto message [of Senate Bill 162], various religious organizations<sup>295</sup> played a major role in the Governor's decision to not pass the Bill."<sup>296</sup> In the surrogacy legislation, the legislature stated its desire to ensure that all children born using ART be both legally and biologically related to the intended parents.<sup>297</sup> Given Louisiana's political landscape, categorizing pre-implantation embryos as "a unique category of being" is likely a less controversial option than the "unique and irreplaceable property" classification, as well as a step in the right direction.

#### CONCLUSION

Louisiana's long-standing human embryo statutes, written more than 35 years ago, are out of date and in need of revision. Louisiana's current human embryo statutes do not sufficiently address the present-day realities of the ever-changing world of medical technology. Defining pre-implantation embryos as juridical persons ignores the purpose of assisted reproductive technology and the wide-ranging realities of the individuals

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291. See generally LA. REV. STAT. §§ 9:2718–2720.5 (2018).

292. Letter from Bobby Jindal, Governor, Louisiana, to Glenn Koepf, Secretary of the Senate, Louisiana (June 20, 2013); Letter from Bobby Jindal, Governor, Louisiana, to Alfred Speer, Clerk of the House of Representatives, Louisiana (May 30, 2014). Groups that opposed Senate Bill 162, which dealt with gestational surrogacy agreements and was proposed in the 2013 regular session, included Equality Louisiana, the Louisiana Family Forum, the Louisiana Conference of Catholic Bishops, the National Organization for Women, and the Center for Bioethics and Culture. Brett, *supra* note 70, at 616–20.

293. See generally LA. REV. STAT. §§ 9:2718–2720.5.

294. *Id.*

295. One of the religious organizations that opposed the bill, the Louisiana Conference of Catholic Bishops, stated that gestational surrogacy violated human dignity, threatened life, and altered the "sacred unit of family" by introducing a third party into the marriage dynamic. Brett, *supra* note 70, at 622–23.

296. Brett, *supra* note 70, at 622.

297. LA. REV. STAT. § 9:2718.

who use it. IVF is now 40-year-old technology,<sup>298</sup> and the Louisiana Legislature must acknowledge the reality of the way it is used. The language of the current statutory scheme forces pre-implantation embryos into entirely unrelated legal schemes and contexts that are already well-defined and specifically tailored around other issues. The Louisiana Legislature, in its revision, should enact legislation that pursues a middle ground approach in the categorization of pre-implantation embryos. Pre-implantation embryos should not retain the legal status of juridical persons or the capacity to sue. The Louisiana Legislature should change the laws defining human embryos as juridical persons<sup>299</sup> and instead classify them as “a unique category of being.”<sup>300</sup>

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298. Gianpiero D. Palermo et al., *The Story of ICSI*, 110 FERTILITY & STERILITY 185, 195 (2018).

299. See generally LA. REV. STAT. § 9:123.

300. See generally Krentel, *supra* note 39.