

*Adoptable Property?:  
The Problem of Frozen Embryos  
and Ill-Adapted Adoption Laws*

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**I. Introduction**

To satisfy a dispute, King Solomon famously ordered that an infant whose maternity was claimed by two different women be split in two.<sup>1</sup> The apparent principle of justice is a simple one: when evidence of rightful ownership is lacking, the property shall be divided equally between the two claimants.<sup>2</sup> This proved difficult, however, when the “property” to be divided was an infant.

In 2016, about three thousand years after King Solomon’s reign,<sup>3</sup> the application of the principles of justice and equity are no less complicated. We now have intellectual-property disputes, issues of digital content, the division of legal and equitable title, and the confused-law-student’s nightmare—the rule against perpetuities.<sup>4</sup> But what happens when even contemporary principles fail to resolve such disputes? How does one “split the baby” in the modern world? While there are certainly a litany of unresolved issues in American jurisprudence, one issue lies at the intersection of reproductive law, property law, contract law, and general issues of equity: the adoptability of frozen embryos.

The primary question is whether a frozen embryo should be adoptable by a donee-parent for the purpose of implanting that embryo and bringing a child to term. When a couple undergoes *in vitro* fertilization (“IVF”), a process by which eggs are fertilized outside of the

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<sup>1</sup> See 1 King 3:16-28.

<sup>2</sup> Of course, the true principle illustrated by the biblical narrative was King Solomon’s wisdom. He intended to fetter out the false mother, with no intention of actually splitting the baby. *Id.*

<sup>3</sup> Matt Stefon, *Solomon: King of Israel*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/biography/Solomon>, (noting that “some scholars claim to have discovered artifacts that corroborate the biblical account of [Solomon’s] reign in the early 10th century”) (last visited May 5, 2016).

<sup>4</sup> For some good examples of modern legal issues, see *Law and Contemporary Problems*, DUKE LAW, available at [http://scholarship.law.duke.edu/lcp/all\\_issues.html](http://scholarship.law.duke.edu/lcp/all_issues.html) (last visited May 5, 2016).

female reproductive system, there are frequently excess embryos created.<sup>5</sup> Because the first attempt at implantation of the fertilized egg often fails, the process leads to more embryos than would normally be implanted—usually about seven embryos in total.<sup>6</sup> As a result of this process playing out repeatedly over time, there are currently about 600,000 cryogenically frozen embryos that are theoretically ready for implantation.<sup>7</sup> Providing infertile couples the opportunity to adopt those hundreds of thousands of embryos would address two problems simultaneously: the disposition of excess embryos, and the struggle of infertility for adopting couples.<sup>8</sup>

These embryos, however, raise unique legal problems. State law considers them to be property that, while distributed in the event of a divorce,<sup>9</sup> cannot be purchased by prospective parents.<sup>10</sup> An embryo can be implanted and may come to term, but the family to whom the baby may be born cannot adopt that embryo upon implantation.<sup>11</sup> The embryo may be implanted, but it is unclear when that fetus becomes an adoptable person under state law.<sup>12</sup> Each of these issues must be resolved before a comprehensive law regarding embryo adoption could be enacted. To that end, this paper will examine the law regarding frozen embryos and the currently existing “twilight zone” surrounding their donation, implantation, and adoption.<sup>13</sup>

But these legal quandaries are not the most pressing issues—and certainly they are not the most *human* issues inherent in the problem. There is a great uncertainty in the minds of parents-to-be seeking the implantation of an embryo. In a real sense, the recipient-woman

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<sup>5</sup> See *infra* Section II.B.

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

<sup>7</sup> *Embryo Adoption*, OFFICE OF POPULATION AFFAIRS, <http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption> (last visited May 5, 2016).

<sup>8</sup> *Embryo Adoption & Donation: An Act of Love*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryoadooption.org>.

<sup>9</sup> See *infra* Section II.C.

<sup>10</sup> See *infra* notes 163-54 and accompanying text.

<sup>11</sup> See MICH. COMP. LAWS § 710.26(1)(e) (requiring the adoptee’s birth certificate to make adoption legal).

<sup>12</sup> See *infra* Section II.C.

<sup>13</sup> See *infra* Parts II-III.

endeavors to biologically implant a piece of “property” into her body over which she holds a set of insufficient legal rights. Because the transfer of embryos is accomplished according to contract law, a woman who receives an implanted embryo is subject to the range of claims that accompanies any transfer by contract.<sup>14</sup> The basis of *Roe v. Wade*<sup>15</sup> and its progeny rests on the notion that a woman has autonomy over her body. Traditionally, this rationale has been used to substantiate the so-called right to an abortion. But surely the converse should be true; if a woman has a right to abort a fetus, she has the corresponding right to adopt and develop an embryo *as a person*, not just as “property.”<sup>16</sup>

Each of these complications will be discussed in more detail below. And, ultimately, after an examination of the relevant areas of law on this important topic, this paper proposes a practical, yet unavoidably controversial solution to the issue: the granting of full adoption rights to parents after the successful implantation of an embryo in the donee-mother.

## **II. Background**

Put most simply, this paper advocates for recognition of adoption rights for the recipients of donated embryos. Before moving further in that advocacy, though, a few notes will be helpful. First, the author uses the term “embryo adoption” to refer to the process by which embryos are transferred to grantees, but this is actually a misnomer—one cannot legally adopt an embryo, as will be explained below.<sup>17</sup> Second, because the problems surrounding embryos are nearly limitless, this paper will not analyze: the authority for implantation (*i.e.*, who chooses whether a woman may use certain embryos for implantation), stem-cell research, the ethics of IVF, the

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<sup>14</sup> For a list of remedies available under most contracts, *see* Restatement (Second) of Contracts § 345 (1981).

<sup>15</sup> 410 U.S. 113 (1973).

<sup>16</sup> *See infra* Subsection III.C.

<sup>17</sup> That is, embryo adoption doesn’t actually exist; the process is, instead, a donative transfer. Because this paper advocates for embryo adoption, and because the term is shorter than “the donative transfer by which the donor transfers to the donee,” the author uses “embryo adoption” throughout. *See infra* Section II.C.

ethics of embryo disposal, or how courts should resolve divorce disputes surrounding frozen embryos.<sup>18</sup>

Finally, a note on terminology: throughout the literature and judicial opinions on frozen embryos, frozen embryos are referred to as pre-zygotes,<sup>19</sup> pre-embryos,<sup>20</sup> blastocysts,<sup>21</sup> and embryos. This paper will consistently use the term “embryo” to refer to the result of the IVF process. Whether the cells have been allowed to divide for three days, five days, or seven days is largely irrelevant simply because any dispute concerning the embryo is based in the same basic issue: the frozen material, assumed ready for implantation, is the result of two biologically distinct human beings, and it is not yet implanted.<sup>22</sup>

#### A. The Core of a Complex Issue

At the center of the issue of embryo adoption is the divide between the biological parents and the birth parents.<sup>23</sup> As an imperfect analogy, frozen embryos that are donated and implanted are akin to the division of legal and equitable title of property in a trust<sup>24</sup>—except in the case of an embryo, it is a division between the biological parents and the donee-mother through whom the embryo is implanted, gestated, and birthed.<sup>25</sup> This distinction is what creates this complex

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<sup>18</sup> Though some of these topics help to advance the conversation, they are not directly related to embryo adoption. An analysis that tries to cover some or most of those topics would surely become overly difficult to manage.

<sup>19</sup> See *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998).

<sup>20</sup> Madeleine Schwartz, *Who Owns Pre-Embryos?*, *The New Yorker* (Apr. 28, 2015), available at <http://www.newyorker.com/tech/elements/who-owns-pre-embryos>.

<sup>21</sup> Richard Sherbahn, *IVF, In Vitro Fertilization with Blastocyst Culture and Day 5 Transfer*, *Adv. Fert. Cnt. of Chicago*, <http://www.advancedfertility.com/blastocyst.htm> (last visited Mar. 30, 2015).

<sup>22</sup> See Schwartz, *supra* note 20.

<sup>23</sup> Therese O’Neill, *Inside the rise of embryo adoption*, *THE WEEK* (Oct. 17, 2014), <http://theweek.com/articles/443081/inside-rise-embryo-adoption>.

<sup>24</sup> Restatement (Third) of Trusts § 2, cmt. d (2003) (“Although trust beneficiaries have equitable title, a trustee’s title to trust property may be either legal or equitable.”)

<sup>25</sup> *Id.* (writing, “The Overlake Clinic keeps costs low by offering mainly medical procedures, which go for around \$7,000, not counting diagnostics, travel fees, and medications. But here’s the catch: Although the Kershners were able to look at anonymous profiles of donors, there is no other contact between adoptive parents and biological ones.”)

issue at the intersection of biology and the law.<sup>26</sup> It is an issue of biology because IVF and frozen embryos are part of a system that takes the combined DNA from two human beings and artificially implants it into another woman's uterus.<sup>27</sup> Yet, it is an issue of law because parties to the biological process do not always agree, and they look to the courts to resolve their conflict.<sup>28</sup> The law attempts to provide certainty so that courts may settle those disputes consistently and fairly, but the biology at issue does not readily conform to our legal system.<sup>29</sup> And no court has the power to change the biological function of DNA—courts must simply address the realities of nature, applying the law as straightforwardly as possible.<sup>30</sup>

This is particularly apparent in the disposition of frozen embryos and, as a parallel, in issues surrounding surrogacy.<sup>31</sup> Gestational surrogacy corresponds to the issues inherent in embryo adoption<sup>32</sup> because it is a process by which a female, who is *not* intending to raise the child, accepts an embryo into her uterus for the purpose of bringing that child to term. She then gives birth to the child, relinquishing to the biological parents any parental rights.<sup>33</sup> In gestational surrogacy, a couple provides both the sperm and the egg, which is fertilized through IVF, and the surrogate provides the suitable uterine environment for gestation.<sup>34</sup>

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<sup>26</sup> See generally *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

<sup>27</sup> See *infra* Section II.B [IVF Process].

<sup>28</sup> See generally *J.R.*, 261 F. Supp. 2d at 1268.

<sup>29</sup> *Id.*

<sup>30</sup> See *infra* Section II.C.

<sup>31</sup> *Id.*

<sup>32</sup> There is another widely-known case out of New Jersey, *Matter of Baby M.*, where the New Jersey Supreme Court held that the surrogate mother, and *not* the mother named in the surrogacy contract, was the legal parent. *Matter of Baby M.*, 109 N.J. 396, 411, 537 A.2d 1227, 1234 (1988). This paper does not focus on that case because, unlike cases of embryo adoption, *Matter of Baby M.* involved a situation in which the biological father artificially inseminated the *surrogate*, instead of creating an embryo using the adoptive mother's ovum and the adoptive father's sperm. That is, the child was biologically one-half the surrogate, instead of being one hundred percent biologically the adoptive parent's child. *Id.*

<sup>33</sup> See MICH. COMP. LAWS § 722.854.

<sup>34</sup> *Id.*

Foreseeably, surrogacy presents complications. According to most family-law jurisprudence, a birth mother is presumed the legal mother of any child born to her.<sup>35</sup> In *J.R. v. Utah*, for example, two biological parents underwent IVF to create embryos that would be implanted into a surrogate mother.<sup>36</sup> The surrogate mother gestated the child and gave birth, but the state refused to list the child's biological parents as mother and father on the birth certificate, due to a statutory presumption to name the birth mother as the legal mother.<sup>37</sup> The court in *J.R.* did ultimately hold that the biological parents were, in fact, entitled to be listed as the mother and father based on the constitutionally protected right of procreation, among other things.<sup>38</sup>

But problems remain, as the prospect of embryo adoption compounds the complications inherent in surrogacy. The IVF process, explained below, creates a set of embryos to be implanted into a woman's uterus.<sup>39</sup> Because excess embryos are created, couples seek to *adopt* those embryos as their own and implant them into the donee-mother's uterus.<sup>40</sup> In a simple situation, the biological donors give the embryo to the donees, the donee-mother implants the embryo, and the baby gestates.<sup>41</sup> In one sense, it is the converse of *J.R. v. Utah*.<sup>42</sup> Instead of a biological donor using a surrogate and *maintaining* parental rights, the biological donor

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<sup>35</sup> This issue is addressed at length in *J.R. v. Utah*: "Pregnancy and childbirth have physiological and psychological impacts upon the person experiencing the pregnancy and giving birth to the child, whatever the genetic particulars may be. Life is process, and this extraordinary process of human childbirth implicates the fundamental procreative rights of the birth mother as well as those of the mother and father whose best efforts at procreation have furnished the embryo. *See, e.g., A.H.W. v. G.H.B.*, 339 N.J.Super. 495, 772 A.2d 948, 952-54 (2000); Alayna Ohs, Note, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 *Hastings Const. L.Q.* 339, 355-61 (2002) (gestational surrogacy implicates fundamental procreative rights of surrogate mother)." 261 F. Supp. 2d 1268, 1287-88 (D. Utah 2002).

<sup>36</sup> *Id.* at 1270.

<sup>37</sup> *Id.* at 1271.

<sup>38</sup> *Id.* at 1293.

<sup>39</sup> *See* Section II.B.

<sup>40</sup> *See Frequent Questions: Adopting Parents*, Embryo Adoption Awareness Cntr., <http://www.embryoadooption.org/faqs/adopting.cfm> (last visited Apr. 2, 2016).

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

<sup>42</sup> *See generally* *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

relinquishes parental rights, the donee-mother births the baby, and the donee-parents assume the parental rights of the child.<sup>43</sup>

Yet, as the court indicated in *J.R.*, there are a slew of competing rights in the IVF context.<sup>44</sup> The state has an interest in maintaining family bonds, the donee-parents have an interest in their connection with a baby born to them, and the biological parents have an interest in children of their joint DNA.<sup>45</sup> Problematically, caring parents are currently left without a solution to these competing rights.<sup>46</sup> It is time, then, for state law to provide adoption rights to donee-parents at the point of successful embryo implantation, thereby resolving the web of legal issues inherent in the process.<sup>47</sup>

## B. The IVF Process

As the name implies, *in vitro* fertilization occurs *in vitro*, meaning “in an artificial environment rather inside a living body.”<sup>48</sup> In IVF, that artificial environment is most often a test tube and a petri dish.<sup>49</sup> The process begins by stimulating egg growth through a hormone regimen given to the donor-mother.<sup>50</sup> Instead of releasing just one egg per month, the hormones ensure that the donor-mother will release several eggs.<sup>51</sup> Then, through an outpatient procedure,

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<sup>43</sup> *Id.*; see *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

<sup>44</sup> *J.R.*, 261 F. Supp. 2d at 1290-91.

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

<sup>46</sup> See *Frequent Questions*, *supra* note 40. (noting, “The most significant legal issue associated with embryo donation and adoption relates to, 1.) the unsettled nature of embryo adoption law, and 2.) the contractual agreements used to legally bind donor and recipient couples.”)

<sup>47</sup> See *infra* Part III.

<sup>48</sup> *In vitro*, Black's Law Dictionary (10th ed. 2014).

<sup>49</sup> See Nivin Todd, *Infertility and In Vitro Fertilization*, WedMD.com, <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization> (last visited Mar. 30, 2016).

<sup>50</sup> *In vitro fertilization*, U.S. NAT. LIB. OF MED., <https://www.nlm.nih.gov/medlineplus/ency/article/007279.htm>

<sup>51</sup> *Id.*



eggs are harvested from the donor-mother and sperm is collected from the donor-father.<sup>52</sup> The sperm is then mixed with the eggs *in vitro*, and the sperm fertilizes<sup>53</sup> the egg.<sup>54</sup>

This whole process is performed within three to five days after the initial retrieval of the egg.<sup>55</sup> After the egg begins to divide *in vitro*, several fertilized eggs, now embryos, are implanted into the hopeful mother's uterus.<sup>56</sup> Because IVF is most often done in cases of apparent infertility, the implantation of more than one egg helps to increase the chances of a successful pregnancy.<sup>57</sup> After about six days, the embryo forms a physical attachment with the wall of the uterus.<sup>58</sup> In fact, at that point, "a vascular connection to the mother is formed," such that the embryo and the mother are biologically intertwined.<sup>59</sup> As discussed below, this is a critical point—and it highlights the major issue.<sup>60</sup> If embryo is a donated one, the donee-mother has become biologically intertwined with the embryo, yet, until birth, holds no parental rights over the child now gestating *in utero*.<sup>61</sup> Of course, not every implantation is successful, regardless of whether it occurs in the donor- or donee-mother's uterus.<sup>62</sup> So, after the IVF process is complete, there are often excess embryos that are cryogenically frozen for later use in the event that the

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<sup>52</sup> *Id.*

<sup>53</sup> As a precaution, many facilities perform intracytoplasmic sperm injection to ensure the fertilization of several eggs. In this process, a syringe and pipette system is used to inject sperm directly into individual eggs, which are then allowed to divide into the first stages of an embryo. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Embryo Implantation After IVF*, ADV. FERT. CNT. OF CHICAGO, <http://www.advancedfertility.com/implantation.htm> (last visited May 6, 2016).

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

<sup>60</sup> *See supra* Section III.C.

<sup>61</sup> *See infra* Section II.B.

<sup>62</sup> *See IVF Success Rates: In Vitro Fertilization Statistics*, ADV. FERT. CNT. OF CHICAGO, <http://www.advancedfertility.com/ivf-success-rates.htm> (last visited May 6, 2016).

initial implantation fails.<sup>63</sup> It is precisely those excess embryos that have led to such problems in the areas of prenuptial agreements, divorce, medical research, and, most recently, adoption.

### C. Current Law Regarding Embryo Adoption

The complexity of this issue is compounded by the lack of federal jurisdiction over most family-law matters.<sup>64</sup> Adoption and the corresponding legal processes are mostly adjudicated at the state level, meaning any overly broad statements will be, at best, partially inaccurate.<sup>65</sup> With that in mind, I will use Michigan as my example state, with the law of several other states applied to the analysis. Michigan sides with the majority of states in its adoption-law jurisprudence, making it a representative example-state.<sup>66</sup>

Although Michigan adoption law is well developed, there is little Michigan law regarding embryos or embryo adoption.<sup>67</sup> The only relevant statutory provision is a section of the Michigan Constitution governing the use of human stem cells for research.<sup>68</sup> Due to this void, this analysis considers other relevant sources: tangential Michigan case law; Michigan legislation that may affect embryo adoption; and the statutory and case law of other states that may serve to influence Michigan jurisprudence. Although Michigan courts have not specifically addressed “embryo adoption,” couples often donate the excess embryos resulting from the IVF process to fertility clinics, and courts have adjudicated disputes arising from those donations.<sup>69</sup>

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<sup>63</sup> Becky A. Ray, *Embryo Adoptions: Thawing Inactive Legislatures With A Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 427.

<sup>64</sup> See DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 950.

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

<sup>66</sup> See 50 *State Statutory Surveys: Family Law, Adoption*, CENGAGE LEARNING, available at <https://a.next.westlaw.com/Link/Document/Blob/I9c5aa5255b5411de9b8c850332338889.pdf>.

<sup>67</sup> *Embryo Recipients: Legal Issues*, THE FERTILITY CENTER, <http://www.fertilitycentermi.com/treatment-options/embryo-recipients/> (last visited Mar. 30, 2016).

<sup>68</sup> MICH. CONST. art. I, § 27.

<sup>69</sup> *Stratford v. Stratford*, No. 300925, 2012 Mich. App. Lexis 605, at \*6 (Mich. Ct. App. Feb. 16, 2012) (holding that both husband and wife have an interest in the excess embryos).

### 1. *How Embryos are Currently “Transferred”*

Although the cases are quite complex, courts historically do not prohibit the donation of excess embryos, though they do hesitate to compel such a donation.<sup>70</sup> Rather, it is the donee’s *acceptance* of the embryo that poses the greatest legal problem because the embryo holds a status somewhere between “property” and “person.”<sup>71</sup> A frozen embryo maintains such a confused status because of its unique properties.<sup>72</sup> It has the potential to be implanted and to grow into a baby that will be born. In its frozen state, however, it can be donated, destroyed, forgotten, or even be subject to prenuptial agreements.<sup>73</sup> The analysis therefore begins with how courts have ruled in conflicts of which frozen embryos were the subject.

#### a. Three Approaches to Embryo Disposition

There are three generally accepted theories on embryo disposition: the contract approach, the contemporaneous-mutual-consent approach, and the balancing approach.<sup>74</sup> The Appellate Court of Illinois, in *Szafranski v. Dunston*, elaborated on each, beginning with the contract approach: “Under [the contract] approach, courts will enforce contracts governing the disposition of pre-embryos which were entered into at the time of *in vitro* fertilization, so long as they do not violate public policy.”<sup>75</sup> The benefit of this approach, like other contract-based transactions, is the certainty that it provides without court intervention.<sup>76</sup> The disadvantage to being bound by contract, however, is the societal harm that could arise from such a transaction.<sup>77</sup> That is the

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<sup>70</sup> See *Stratford*, No. 300925, 2012 Mich. App. Lexis 605, at \*2 (issue arising because trial court was unwilling to compel donation, instead using permissive “may” in its order).

<sup>71</sup> See *infra* Section II.D.

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

<sup>73</sup> See *Stratford*, No. 300925, 2012 Mich. App. Lexis 605, at \*1.

<sup>74</sup> *Szafranski v. Dunston*, 993 N.E.2d 502, 506-14 (Ill. App. Ct. 2013).

<sup>75</sup> *Szafranski*, 993 N.E.2d at 506.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

couple has essentially bound itself to a contract that governs a fundamentally personal area: conceiving and giving birth to children.

The second available approach is “contemporaneous mutual consent.” This approach dictates:

[N]o embryo should be used by either partner, *donated to another patient*, used in research, or destroyed *without the [contemporaneous] mutual consent* of the couple that created the embryo . . . . [A]dvance instructions would not be treated as binding contracts. If either partner has a change of mind about disposition decisions made in advance, that person's current objection would take precedence over the prior consent . . . . When the couple is unable to agree to any disposition decision, *the most appropriate solution is to keep the embryos where they are—in frozen storage*. Unlike the other possible disposition decisions—use by one partner, donation to another patient, donation to research, or destruction—keeping the embryos frozen is not final and irrevocable. By preserving the status quo, it makes it possible for the partners to reach an agreement at a later time.<sup>78</sup>

The ostensible objective of the contemporaneous-mutual-consent approach is to recognize and adapt to the changing circumstances that impact the decisions of would-be parents.<sup>79</sup> In a strictly enforced contract, a divorcing couple could be bound to dispose of embryos in violation of the donor-mother or donor-father’s deeply held desire to maintain the potential for life.<sup>80</sup> The mutual-consent approach, however, avoids binding that couple to a decision they may later regret; it allows the couple to revise its decision based on changed circumstances. The contract approach, on the other hand, creates certainty unavailable through mutual consent.<sup>81</sup>

Finally, some courts have recognized a balancing approach in embryo disposition. Under this theory, “courts enforce contracts between the parties, at least to a point, then balance their interests in the absence of an agreement.”<sup>82</sup> This approach would seem to strike a balance between strict contract and mutual consent, allowing the court to intervene where the couple

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<sup>78</sup> *Id.* at 510-511 (emphasis added).

<sup>79</sup> *See id.*

<sup>80</sup> *See infra* note 94 and accompanying text.

<sup>81</sup> *Szafrański*, 993 N.E.2d at 506.

<sup>82</sup> *Id.* at 512.

cannot agree and the contract violates public policy.<sup>83</sup> As the court in *Szafranski* noted, however, this approach fails to provide the benefits of either theory.<sup>84</sup> It erodes the certainty of enforcing a clear contract while also failing to recognize the changing mutual desire of the parties.<sup>85</sup> That is, the couple is left with neither the contract nor the ability to make the decision by consent—the court makes the decision for them.<sup>86</sup> Ultimately, then, the *Szafranski* court accepted the most popular view: disposition by contract.<sup>87</sup>

b. The Majority Standard for Disposition

Many of the courts that have considered embryo disposition have honored the contract executed by the couple prior to IVF. For example, as in *Szafranski*, the court in *Kass v. Kass* held that the couple's prior decision, which had been recorded in a contract with a fertility clinic, should control.<sup>88</sup> The married couple in *Kass* was unable to get pregnant and underwent IVF, signing a packet of consent forms and contracts at the IVF clinic.<sup>89</sup> The mother's eggs were extracted and fertilized, resulting in nine embryos.<sup>90</sup> Only three weeks later, though, the couple was preparing to divorce.<sup>91</sup> The woman, contrary to the consent forms signed at the IVF clinic, sought to implant the embryos post-divorce, while the man sought the donation of the embryos for research.<sup>92</sup>

Ultimately, the highest court in New York, relying on other state-court decisions, upheld the pre-IVF agreement in recognition of its expression of the parties' desires at the time of

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<sup>83</sup> *See id.*

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

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 515.

<sup>88</sup> *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998)

<sup>89</sup> *Id.* at 559-60.

<sup>90</sup> *Id.* at 560.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

execution.<sup>93</sup> The court held that “[a]dvance agreements as to disposition [of embryos] would have little purpose if they were enforceable *only* in the event the [divorcing] parties continued to agree. To the extent possible, it should be the progenitor . . . who by their *prior directive* makes this deeply personal life choice.”<sup>94</sup> The clear implication of *Kass* is that reliance on the contract should be the controlling principle.<sup>95</sup> Or, put another way, it seems that the court’s primary concern is recognizing that feelings *do* change post-contract, and that the very purpose of the contract is to bind the parties even if they do not “continue[] to agree.”<sup>96</sup> In that sense, the court is interested in predictability, a concept that will form the core of the analysis below.<sup>97</sup>

## 2. Adoption Law

Many embryo-donation programs use the term “embryo adoption” to describe the process by which donees receive frozen embryos from donors.<sup>98</sup> “Embryo adoption” implies that the embryo is being legally adopted by the donee, but this really does not comport with adoption law in most states,<sup>99</sup> including Michigan.<sup>100</sup> Even if the embryo were considered a legal person,<sup>101</sup> it may not be “adopted” because an adoptive parent may not adopt unborn children.<sup>102</sup> As in *Szafranski* and *Kass*, then, embryo disposition occurs through contracts instead of through the adoption process.<sup>103</sup>

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<sup>93</sup> *Id.* at 567.

<sup>94</sup> *Kass*, 91 N.Y.2d at 566 (emphasis added).

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

<sup>96</sup> *Id.*

<sup>97</sup> See Part III.

<sup>98</sup> *Embryo Adoption & Donation: An Act of Love*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryoadooption.org>.

<sup>99</sup> See 50 *State Statutory Surveys*, *supra* note 66.

<sup>100</sup> See MICH. COMP. LAWS § 710.21 (beginning of Michigan adoption code).

<sup>101</sup> As discussed below, making every embryo a legal person is nearly impossible in the face of *Roe* and its progeny.

<sup>102</sup> MICH. COMP. LAWS § 710.26(1)(e) (requiring the adoptee’s birth certificate to make adoption legal).

<sup>103</sup> See Subsection II.B.1.a,b.

In fact, even “embryo adoption agencies,” such as Hands Across the Water (“HATW”) in Ann Arbor, Michigan, are compelled to utilize contracts for embryo donation and acceptance.<sup>104</sup> According to HATW, “[t]he adoption agreement and relinquishment forms *are legal contracts* between you and your genetic family. *As there are no laws regarding adoption of embryos*, we have created the contract to match the current position of the courts that the *embryos are property*.”<sup>105</sup> HATW thus makes clear that it is not truly engaged in *adoption*.<sup>106</sup> Another program in California operates in a similar way, providing a contractual relationship between the parties.<sup>107</sup> The probate court is not involved, and the embryo is transferred to the donee through a traditional donative transfer.<sup>108</sup>

Though the difference between transfer by contract and transfer by adoption may seem semantic, it is actually profoundly important. In many states, Michigan included, adoption affords the child (and parent) with certain legal rights, including designating the child as presumptive heir of the parent, giving the child the parents’ family name, and disclosing the child’s health and medical records.<sup>109</sup> The Michigan Department of Human Services (“DHS”) provides a synopsis of the adoption process whereby such rights are afforded: First, the prospective parent submits a petition to the court to adopt a specific child.<sup>110</sup> The petition must be filed with a document supporting adoption, such as a court order or consent of the biological

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<sup>104</sup> *The Steps of an Embryo Adoption: Contract Phase*, HANDS ACROSS THE WATER, <http://www.hatw.org/adoption/embryo-adoption/65-the-steps-of-an-embryo-adoption#5-contract-phase> (last visited July 17, 2014).

<sup>105</sup> *Embryo Adoption FAQ’s: What Are the Legal Issues with Embryo Adoption?*, HANDS ACROSS THE WATER, <http://www.hatw.org/adoption/embryo-adoption/frequently-asked-questions-embryo-adoption#10-what-are-the-legal-issues-with-embryo-adoption> (last visited Mar. 30, 2015) (emphasis added).

<sup>106</sup> *Id.*

<sup>107</sup> *See Snowflakes Embryo Adoption and Donation – Snowflake Babies!*, Nightlight Christian Adoptions, <https://www.nightlight.org/snowflakes-embryo-donation-adoption> (last visited Mar. 30, 2016).

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

<sup>109</sup> *Adoption a Child in Michigan*, MI DHS, p. 3, available at [https://www.michigan.gov/documents/dhs/DHS-PUB-0823\\_221566\\_7.pdf](https://www.michigan.gov/documents/dhs/DHS-PUB-0823_221566_7.pdf) (last visited May 5, 2016).

<sup>110</sup> *Id.* at 2

parent.<sup>111</sup> Then, the court orders an investigation into the prospective parent to ensure that the adoptee is protected through the adoption.<sup>112</sup> Finally, as DHS writes:

Following receipt of a completed report of investigation and satisfied that the *adoptee's best interests are served*, the court will issue an order *terminating the rights of the parent*, [or other temporary guardian]. The court makes the adoptee a ward of the court, orders placement in adoption, and assigns a child-placing agency, DHS or an agent of the court to supervise/monitor the adoptive placement.<sup>113</sup>

After a six-month probationary period, if the court is satisfied that the placement is in the “adoptee’s best interest,” it enters a final order of adoption.<sup>114</sup> At that point, the adoptee is the legal child of the adoptive parent.<sup>115</sup> Notably, however, the termination of the rights of the biological parent occurs only *after* the finalization of the adoption.<sup>116</sup> And, again, that process cannot begin until the birth of the child.<sup>117</sup> This is significant, because it means that the donee-mother has implanted a child in her uterus over which she has absolutely no parental rights, even if the biological parents have donated the frozen embryo.

### *3. Other States’ Law on Embryo Adoption*

Unlike Michigan, a minority of states have passed legislation to regulate embryo donation and adoption. Louisiana has taken the most proactive approach in defining embryos.<sup>118</sup> By statute, “[a]n in vitro fertilized human ovum as a juridical person is recognized as a separate entity apart from the medical facility or clinic where it is housed or stored.”<sup>119</sup> The statute then regulates that “juridical person” by providing guidance for inheritance, destruction of the

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<sup>111</sup> *Id.* at 3.

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

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

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

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

<sup>116</sup> *Id.*

<sup>117</sup> MICH. COMP. LAWS § 710.26(1)(e) (requiring the adoptee’s birth certificate to make adoption legal).

<sup>118</sup> La. Rev. Stat. § 9:125 (1986).

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



embryo, and the responsibilities of the physician.<sup>120</sup> Most notably, the Louisiana law makes the *physician* the temporary guardian of the juridical person until implantation can occur in the adoptive parent.<sup>121</sup> No other state legislation appears to provide such guardianship for frozen embryos.

Also, in 2010, Georgia passed the “Option of Adoption Act” for the purpose of encouraging the adoption of embryos.<sup>122</sup> This statute specifies that:

A legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient intended parent prior to embryo transfer. A written contract shall be entered into between each legal embryo custodian and each recipient intended parent prior to embryo transfer for the legal transfer of rights to an embryo and to any child that may result from the embryo transfer. The contract shall be signed by each legal embryo custodian for such embryo and by each recipient intended parent.<sup>123</sup>

Regrettably, although Georgia’s proactivity may be applauded, it calls for transfer by contract instead of adoption.<sup>124</sup> But, again, not every state has enacted legislation to address the issue in a similar way, or in any way at all. In most states, embryos have been given neither a legal status, nor the legal right to be adopted.<sup>125</sup>

#### D. The Effect of Roe v. Wade and its Progeny on Embryo Adoption

Importantly, on the first page of the Michigan DHS adoption guide discussed above,<sup>126</sup> there is a set of definitions.<sup>127</sup> DHS defines “adoptee” as the “child or adult to be adopted.”<sup>128</sup> In

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

<sup>121</sup> *Id.* § 9:126 (Text: “If the in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur.”).

<sup>122</sup> Ga. Code. Ann. § 19-8-41 (2010).

<sup>123</sup> *Id.* § 19-8-41(a).

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

<sup>125</sup> *See supra* Section II.C.2.

<sup>126</sup> *See supra* notes 109-09 and accompanying text.

<sup>127</sup> *Id.* at 1.

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

the context of embryo adoption, defining “adoptee” as a “child or adult” is particularly problematic in light of *Roe v. Wade* and its progeny.<sup>129</sup>

### I. *Roe v. Wade* and *Casey v. Planned Parenthood*

The subject of embryo adoption would be, in one sense, much simpler if every embryo were deemed a natural legal person. Any natural legal person may be adopted with the proper elements of consent and court involvement, so the issue would essentially go away.<sup>130</sup> The jurisprudence surrounding abortion, though, quite clearly forecloses that possibility.<sup>131</sup>

*Roe v. Wade* and *Casey v. Planned Parenthood* set the legal landscape for the abortion debate in the United States.<sup>132</sup> As the Court said in *Roe*, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>133</sup> The Court in *Planned Parenthood v. Casey*, placing significant limits on *Roe*, went on to hold that “the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that *may become a child*.”<sup>134</sup> One will note that the State’s interest is not in the life of the fetus as a *then-existing* child, but rather in the potential for the embryo or fetus to *become* a child.<sup>135</sup> Put another way, the State has a “profound interest in *potential* life” that is present as a fetus in the mother’s womb.<sup>136</sup> The competing rights outlined in *Casey* and in *Roe*, of course, are the

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<sup>129</sup> *Roe v. Wade*, 410 U.S. 113, 158 (1973).

<sup>130</sup> See *supra* note 110.

<sup>131</sup> It should be noted, though, that the conversation surrounding abortion is still a very active one. A wide array of legal players has been at work supporting, fighting, refining, and defining those opinions ever since they handed down. See, e.g., Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 Const. Comment. 311 (2005); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15 (1993); Linda J. Wharton et. al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317 (2006).

<sup>132</sup> See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

<sup>133</sup> *Roe*, 410 U.S. 113, 158 (1973).

<sup>134</sup> *Casey*, 505 U.S. at 846 (1992) (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *Casey*, 505 U.S. 833, 878 (1992).

mother’s “long recognized rights of privacy and bodily integrity.”<sup>137</sup> In the context of the abortion debate, then, the two rights are at odds with one another.<sup>138</sup> The State has a legitimate claim in the potential life of the child, and the mother has a legitimate claim in the right to control her own body—up to and including terminating the potential life.<sup>139</sup> So, the impasse remains: the State’s interest lives in the mother’s body, and biology does not readily resolve that legal conundrum.<sup>140</sup> Fortunately, as explained below, embryo adoption allows those two competing rights to be congruent and complementary.<sup>141</sup>

## 2. Precedent for Embryos as Legal Persons

Though the Supreme Court has granted the right to an abortion, thereby foreclosing the argument that every embryo is a natural legal person,<sup>142</sup> the law is not completely consistent in that principle. For example, in a majority of states, it is unlawful to kill an unborn child unless a doctor, at the request of the mother, performs the termination.<sup>143</sup> In fact, the Michigan Court of Appeals found that a defendant may assert “defense of a third person” where the defendant was protecting an unborn baby, holding:

[I]n this state, the defense should also extend to the protection of a fetus, *viable or nonviable*, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998. This act punishes individuals who harm or kill fetuses or embryos under various circumstances. [The law] sets forth penalties for harming a fetus or embryo during an intentional assault against a pregnant woman . . . M.C.L. § 750.90b punishes an individual for harming or killing a fetus or embryo during an intentional assault against a pregnant woman without regard to the individual’s intent or recklessness concerning the fetus or embryo. . . . The plain language of these

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<sup>137</sup> *Id.* at 926.

<sup>138</sup> *Id.* at 878, 926.

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

<sup>140</sup> *See supra* note 30.

<sup>141</sup> *See supra* Section III.C.

<sup>142</sup> *Roe*, 410 U.S. 113, 158 (1973).

<sup>143</sup> *See MCL 750.90a et seq.*; *see also Fetal Homicide Laws*, NAT. CONF. OF STATE LEGIS., <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>, for a comprehensive list (last visited May 6, 2016).

provisions shows the Legislature's conclusion *that fetuses are worthy of protection as living entities as a matter of public policy.*<sup>144</sup>

Considering *Roe*'s holding that an unborn child is not a legal person, it is noteworthy that fetuses are “worthy of protection as living entities.”<sup>145</sup> So not only can an assailant be charged with the murder of an unborn fetus, but a defendant can assert that the fetus, viable or nonviable, is a *person worth defending.*<sup>146</sup>

#### E. Current Literature Regarding Embryo Adoption

Given the complicated legal nature of frozen embryos, it is only appropriate that the journal literature has attempted to untangle the issue. Commentators have discussed the benefits of embryo donation,<sup>147</sup> with some advocating for a uniform law to govern actual embryo adoptions.<sup>148</sup> That is, not only would the child be adopted post-birth, but each individual embryo would be adopted by the donee, presumably meaning that an adoptive parent would be adopting between four and seven individual embryos in a given transaction.<sup>149</sup> Others have examined the issues arising from the contractual agreements that bind couples during IVF, particularly in the divorce context.<sup>150</sup>

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<sup>144</sup> *People v. Kurr*, 253 Mich. App. 317, 321-22 (2002) (emphasis added).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Kathryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 Wis. Women's L.J. 179, 184 (2003).

<sup>148</sup> Becky A. Ray, *Embryo Adoptions: Thawing Inactive Legislatures With A Proposed Uniform Law*, 28 S. Ill. U. L. J. 423, 449 (2004) (arguing, “The donating parents relinquish all rights, obligations, and interests with respect to the *adopted embryos*, including parental and inheritance rights, provided both consent in writing to the adoption. Provided the intended mother, and her spouse if she is married, both consent in writing to adopt the embryos and have them implanted, any resulting child will be the same as a naturally conceived child would be for that mother and her husband, for all legal intents and purposes.” (emphasis added)).

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

<sup>150</sup> See generally Marisa G. Zizzi, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 Widener L.J. 391 (2012); Maria C. Gonzalez, *Frozen Embryos, Divorce, and Needed Legislation: On the Horizon or Has It Arrived?*, Fla. B.J., Apr. 2009; John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 Ohio St. L.J. 407 (1990).

These theories and suggestions, along with the solution proposed by this paper, are discussed in detail in Part III.

### **III. The Need for Embryo Adoption**

Much can be and has been said about frozen embryos. And clearly couples, whether for infertility or other personal reasons, could benefit from embryo adoption.<sup>151</sup> But no analysis to the author's knowledge has provided a solution that bridges the gap between the *Roe/Casey* jurisprudence and the desire for would-be parents to successfully adopt frozen embryos from donors. Authors seem to take one of two positions: 1) embryos should pass strictly by contract<sup>152</sup> or 2) embryos, in their frozen form, should be adoptable.<sup>153</sup>

Both of these approaches, however, fail to consider several core issues. First, embryos passing by contract cannot be adopted prior to implantation.<sup>154</sup> Because state law precludes the adoption of unborn children, the parents who implant the embryos are essentially implanting an organism with no legal status into the mother's body, with no assurance of adoptability.<sup>155</sup> Even if the donors are willing to relinquish all rights, parental rights cannot vest with the adoptive parents until birth.<sup>156</sup> Secondly, it seems untenable to ask parents to "adopt" four to seven embryos in one moment, knowing that the couple is likely to implant only one or two of those now-adopted embryos.<sup>157</sup> Given the current web of state laws, case law, literature, and public policy surrounding the issue, what is the solution?

The most appropriate solution is to create a legal right of adoptability at the point of successful implantation. This provides a middle ground between full embryonic personhood and

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<sup>151</sup> See Part I.

<sup>152</sup> See Zizzi, *supra* note 150, at 412-13.

<sup>153</sup> See Ray, *supra* note 148, at 449.

<sup>154</sup> See MICH. COMP. LAWS § 710.26(1)(e) (requiring the adoptee's birth certificate to make adoption legal).

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

<sup>156</sup> *Id.*

<sup>157</sup> See *supra* Section II.B (describing the IVF process).

the “twilight zone” wherein a mother who implants an embryo is hosting a fetus, but cannot exercise parental rights over the child until birth.

#### A. Why Adoption-at-Implantation is Better than Contract

Because the IVF process involves the creation of several embryos,<sup>158</sup> there will usually be the potential for disposing of at least some embryos by contract.<sup>159</sup> According to a sample agreement posted on an embryo adoption website, the donors will “transfer any and all ownership and *parental* rights of the embryos”<sup>160</sup> to the donees. This phrase indicates the special legal status of embryos. Whereas property traditionally carries no “parental” rights, the embryo’s special legal status requires (or at least suggests) that parental rights may *develop* from the implantation of the organism.<sup>161</sup>

But there are problems with transferring such unique material by contract. The fundamental problem is that, to create a binding contract, the parties must exchange valuable consideration.<sup>162</sup> In a traditional contract, consideration would take the form of money or goods. Under Michigan law, however, it is unlawful to sell embryos for stem-cell research,<sup>163</sup> and courts would likely find the sale of embryo for implantation unlawful, as well.<sup>164</sup> It is also a felony, under Michigan law, to exchange valuable consideration in connection with an adoption.<sup>165</sup> Essentially, then, an effort to draft a binding agreement for embryo adoption forms a paradox. If the party sells the embryo as property, it violates the state constitution.<sup>166</sup> But, if the parties

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

<sup>159</sup> *See supra* note 75.

<sup>160</sup> *Embryo Donation Agreement – Sample 1*, MIRACLES WAITING, <http://www.miracleswaiting.org/agreemsample1.html> (last visited July 17, 2014) (emphasis added).

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

<sup>162</sup> Restatement (Second) of Contracts §§ 1, 71 (1981).

<sup>163</sup> *See* MICH. CONST. art. 1 §27.

<sup>164</sup> *See* MICH. COMP. LAWS § 710.54 (prohibiting the exchange of consideration for adoption).

<sup>165</sup> MICH. COMP. LAWS § 710.54 (making adoption for valuable consideration a felony).

<sup>166</sup> *See* MICH. CONST. art. 1 §27.

exchange valuable consideration to adopt the embryo, they have committed a felony.<sup>167</sup> Thus, to be binding, the contract must provide for a donation while not constituting a “sale.”

To solve this problem, the donee and donor could execute a contract containing an exchange of conditional promises.<sup>168</sup> According to the Michigan Court of Appeals, “Courts will not ordinarily inquire into the adequacy of consideration and rescission of the contract for inadequacy of consideration will not be ordered unless the inadequacy was so gross as to shock the conscience . . . . It is well-settled that a conditional promise may form adequate consideration.”<sup>169</sup> But even under this relaxed standard for consideration, it is unclear what promises the donor and donee would exchange. Certainly the donor promises to relinquish rights to the donee, but what conditional promise does the donor seek in exchange? The donor could promise to voluntarily transfer the frozen embryo to the donee, so long as the donee promises to provide visitation rights to the donor. Given the nature of IVF and the purpose of the adoption, though, it seems unlikely that continued visitation would be in the interest of either donor or donee in most cases.<sup>170</sup> Further, even if a contract for the donation of the embryo were legally enforceable, it fails to provide the donee-parents any parental rights over the child until birth.<sup>171</sup>

## B. Which Disposition Theory Should Control?

As discussed in Part II, courts have used three methods of disposition: contract, contemporaneous mutual consent, and balancing.<sup>172</sup> Although these theories are particularly relevant to the context of divorce, for which courts must resolve a dispute between two parties,

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<sup>167</sup> MICH. COMP. LAWS § 710.54 (making adoption for valuable consideration a felony).

<sup>168</sup> See generally Restatement (Second) of Contracts § 336 Intro. Note (1981) (noting, “Where performances are to be exchanged under an exchange of promises, a failure of performance by one party may have the same effect as the non-occurrence of a condition”).

<sup>169</sup> *Moffitt v. Sutherland*, 378 N.W.2d 491, 497 (Mich. Ct. App. 1985) (citations omitted).

<sup>170</sup> See *FAQs: Adopting Parents: Legally, what is the relationship between the adoptive parents and any child born following embryo donation?*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryoadooption.org/faqs>.

<sup>171</sup> MICH. COMP. LAWS § 710.54 (making adoption for valuable consideration a felony).

<sup>172</sup> See *supra* Section II.B.

they become even more important to embryo adoption.<sup>173</sup> Before the court in *Szafranski* were two parties who underwent IVF, only to end their relationship a month later.<sup>174</sup> Post-separation, the male donor sought to enjoin the female donor from implanting the embryos, alleging that it would compel him to be a father.<sup>175</sup> The court ultimately endorsed that the contractual approach,<sup>176</sup> but the case illustrates a serious problem in contracting for the implantation of an embryo. If the couple had decided to donate the embryos, one of the donors could have had a similar change of heart after *implantation* in a donee-mother. Certainly, a court would attempt to weigh the policy consideration of allowing the donor to have control over an implanted embryo. But is nevertheless true that the donee-parents have no legal parental rights over the child and could be subject to a claim against the embryo under either the contemporaneous-mutual-consent or balancing approach.<sup>177</sup>

Under the contractual approach, the court would be less likely to honor any breach of the original disposition contract.<sup>178</sup> Under a contemporaneous-mutual-consent standard, however, the will of the donors would play an important, and perhaps dangerous, role. Again, under this theory, “no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo.”<sup>179</sup> More importantly, no prior agreements control.<sup>180</sup> Presumably, this would be limited to implantation into the donor-mother, but the court is not clear about that.<sup>181</sup> It even establishes

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<sup>173</sup> See *Szafranski v. Dunston*, 993 N.E.2d 502, 506-14 (Ill. App. Ct. 2013).

<sup>174</sup> *Id.* at 504.

<sup>175</sup> *Id.* at 505.

<sup>176</sup> *Id.* at 518.

<sup>177</sup> See *id.* at 506-14.

<sup>178</sup> *Id.* at 506.

<sup>179</sup> *Id.* at 510.

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

<sup>181</sup> See generally *Szafranski*, 993 N.E.2d at 502-514.



that the mutual consent extends to “donat[ion] to another patient.”<sup>182</sup> If such consent is required before the embryo may be utilized, then it is plausible that the consent could be revoked after donation, *even* where that donation led to implantation in another woman. That is, the donor-couple could conceivably “mutually consent” to revoke the donation of the embryo under a claim of biological parentage.<sup>183</sup>

The best solution to such a complicated issue is simply to make the adoption legally binding at the point of implantation. Initially, the embryo should be donated by contract, as it is currently.<sup>184</sup> But at the point of implantation, the best method of eliminating complication is adoption, particularly because it provides rights to both the parents and child.<sup>185</sup> Even if the biological-parent donors change their minds, the harm would be reduced; the frozen embryo could be simply returned to them prior to implantation. But if the biological-parent donors do fully relinquish their rights, then, at the point of implantation, the donee-parents could legally adopt the child and exercise parental rights over the child—just as any naturally conceiving parents would.

Most importantly, any system of mutual consent or balancing should be abandoned in favor of predictability for the donee-parents.<sup>186</sup> The parent would be protected from any attempts at revocation from the donors, and the child would be legally tied to the donee-parents.<sup>187</sup> Further, though not a legal issue, one should not ignore the more abstract question of the status of an embryo/fetus who has been transferred by contract, implanted, and yet is not adoptable by

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<sup>182</sup> *See id* at 510.

<sup>183</sup> *See generally* J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002) for an examination of biological versus surrogate parentage.

<sup>184</sup> *Embryo Adoption & Donation: An Act of Love*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryoadooption.org>.

<sup>185</sup> *See supra* note 109 and accompanying text.

<sup>186</sup> Both systems are inherently unpredictable, as the court is left deciding how to handle the frozen embryos. *See Szafranski v. Dunston*, 993 N.E.2d 502, 506-14 (Ill. App. Ct. 2013).

<sup>187</sup> *See* text accompanying notes 182-83.

the implanted mother.<sup>188</sup> Does that mother have the right to choose the tests that the fetus undergoes? Or the right to authorize an *in utero* surgical procedure on the child? Such an undefined state-of-being for a fetus attached to a woman's body should provide enough catalyst to allow for adoption-at-implantation.

### C. The Compatibility of Adoption-at-Implantation with *Roe* and *Casey*

As discussed above, the principle concern of *Roe*, *Casey*, and other abortion cases centers on the competing rights of the government and the mother.<sup>189</sup> In recognizing adoption-at-implantation, however, courts would respect each of these competing rights.<sup>190</sup> Though at first it may appear that adoption-at-implantation inherently provides the embryo with personhood, the exception could be carved out to sufficiently distinguish between an adoptable embryo and a full legal person.<sup>191</sup> Because an implanted embryo grows just as any other fetus would, the rights at issue in *Roe* and *Casey* are still at play.<sup>192</sup> The government has an interest in protecting the life of the potential person, and the mother has control over her own body, which, according to the Court, includes the right to abortion.<sup>193</sup> Adoption-at-implantation would not affect those competing rights—the government could still seek to protect the fetus and the mother could control her body, regardless of whether the fetus growing inside of her is biologically her own.<sup>194</sup> In fact, the rights of donee-parents seeking adoption are *congruent* with the government's interest to the extent that the donee-parents seek to give life to the frozen embryo, and the

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<sup>188</sup> See *supra* Section II.C.

<sup>189</sup> See *supra* Section II.D (discussing *Roe* and its progeny).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

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

<sup>193</sup> See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 878 (1992).

<sup>194</sup> *Id.*

government seeks to protect that same life.<sup>195</sup> So the rights established in *Roe* are not only preserved, they are bolstered by adoption-at-implantation.

Even assuming that adopting an implanted embryo pushes the fetus too far into legal personhood, making the implanted fetus the child of the donee-mother is perfectly consistent with natural birth. To the author's knowledge, not even the most pro-*Roe* advocate would contend that an abortion-eligible fetus is not the *legal child* of its parents while in the womb, if in fact the mother carrying the child is the biological parent. Laws prohibiting the killing of a fetus against the mother's consent recognize that very fact; the child is a protectable person, even if the mother's bodily autonomy competes with the State's interest in that potential life.<sup>196</sup> So, again, adoption-at-implantation actually makes the State's interest and the mother's interest compatible and even extends the mother's choice in the matter. Unlike in the abortion context, the mother presumably underwent a consensual procedure to have the embryo artificially implanted, and she therefore shares the State's interest in that potential life.<sup>197</sup>

Further, recognizing adoption-at-implantation is consistent with a medically recognized successful IVF procedure. During IVF, the fertilized embryo is inserted directly into the donee-mother uterus.<sup>198</sup> And, as described above, the embryo forms "a vascular connection" with the mother at the point of implantation.<sup>199</sup> Implantation is not simply another stage in the process—rather, it is the biologically defined fusing of mother and embryo.<sup>200</sup> Because the vascular connection is a scientifically recognized point of physical connection, the law should also recognize that point as a legitimate bright line for adoptability. In fact, shortly after the point of

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

<sup>196</sup> *See supra* Subsection II.D.2.

<sup>197</sup> *See supra* Section II. D (discussing *Roe* and its progeny).

<sup>198</sup> *In Vitro Fertilization, IVF - the Process and Procedures: How Does IVF Improve Fertility?*, ADV. FERT. CNT. OF CHICAGO, <http://www.advancedfertility.com> (last visited Apr. 2, 2016).

<sup>199</sup> *Embryo Implantation After IVF*, ADV. FERT. CNT. OF CHICAGO, <http://www.advancedfertility.com/implantation.htm> (last visited Apr. 2, 2016).

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

implantation, the embryo begins to feed from the mother's nutrients through the umbilical cord and developing placenta.<sup>201</sup> There is therefore simply no reason for the law to refuse to recognize parental rights where biology recognizes such an intimate, physical connection between mother and child *in utero*.

Unfortunately, as with any pregnancy, bringing a healthy baby to term is not guaranteed.<sup>202</sup> Studies estimate between 750,000 and one million miscarriages and stillbirths occur each year.<sup>203</sup> But whether the child will be born should not be a factor in deciding when the donee-parents are legally allowed to adopt a child growing inside of an adoptive mother. It would violate basic rights for the government to claim that parents of fetal children do not have parental rights over that child.<sup>204</sup> As the Supreme Court held in *Stanley v. Illinois*, "The rights to conceive and to raise one's children have been deemed 'essential.'"<sup>205</sup> It should be no different for a child conceived *in vitro* and, by the adoptive parents' consent, implanted into the donee-mother's uterus.<sup>206</sup> Except in cases of surrogacy,<sup>207</sup> which is another complex topic left for another paper, the interests of a naturally conceiving biological mother and an IVF-conceiving adoptive mother are the same: they seek a parental bond with the child, both now and in the future.<sup>208</sup> With no legally justifiable reason to keep the donee-parents from adopting the child, then, the law should allow for adoption of the embryo at the point of implantation.

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<sup>201</sup> *Prenatal Form and Function – The Making of an Earth Suit*, The Endowment for Human Development, [http://www.ehd.org/dev\\_article\\_unit2.php](http://www.ehd.org/dev_article_unit2.php) (last visited May 6, 2015).

<sup>202</sup> Maggie Gordon, *Why don't we talk about miscarriages?*, Houston Chron. (Apr. 1, 2016), <http://www.houstonchronicle.com/life/article/Why-don-t-we-talk-about-miscarriages-7223341.php>

<sup>203</sup> *Id.*

<sup>204</sup> See *Stanley v. Illinois*, 405 U.S. 645 (1972)

<sup>205</sup> *Stanley*, 405 U.S. at 651.

<sup>206</sup> See *supra* Section II.B for a discussion of this process.

<sup>207</sup> See MICH. COMP. LAWS 722.852 *et seq.* for the Michigan statute on surrogacy.

<sup>208</sup> *Frequent Questions: Adopting Parents: Who adopts frozen human embryos?*, EMBRYO ADOPTION AWARENESS CENTER, <http://www.embryoadooption.org/faqs> (noting "Adoptive mothers [of embryos] are able to experience the joys (and challenges!) of pregnancy and labor. They also have the peace of mind of knowing their children received the appropriate prenatal care and were not exposed to alcohol or drugs during pregnancy.")

#### D. Responding to Other Viewpoints on Embryo Adoption

As mentioned above, there are several competing views surrounding embryo adoption.<sup>209</sup>

One of the most prolifically discussed is the contract view.

##### *1. The Contract Approach*

Contracts are often at the core of divorce disputes, and courts are tasked with interpreting pre-divorce contracts more often than embryo-adoption contracts.<sup>210</sup> The academic literature has also treated the issue at length, with many advocating for embryos to be addressed more strictly by contract.<sup>211</sup> For example, one commentator argues that states should “require the donors and the clinic to sign an advanced dispositional agreement regarding the disposition of the donors’ frozen embryos.”<sup>212</sup> But, again, this concept will not work as applied to embryo adoption.<sup>213</sup>

First, as noted above, it is unclear that a contract between a donor and a donee would be binding in the context of embryo adoption.<sup>214</sup> Although the parties can exchange conditional promises, there seems to be nothing that the donee could promise without running afoul of public policy.<sup>215</sup> Second, even though the donor could relinquish all rights, the donee could not bind herself to implanting an embryo in her uterus. Not only does this violate reproductive choice,<sup>216</sup> it is also against the law in several states to contract for surrogacy<sup>217</sup>

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<sup>209</sup> See *supra* Section II.E.

<sup>210</sup> See *Szafranski v. Dunston*, 993 N.E.2d 502, 506-14 (Ill. App. Ct. 2013).

<sup>211</sup> See *supra* note 150.

<sup>212</sup> *Zizi*, *supra* note 150, at 413.

<sup>213</sup> See *supra* Section III.A.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> The landmark case for privacy rights as applied to choice to use contraceptives was *Griswold v. Connecticut*, holding that a state law against contraceptives violates the constitutional right to privacy. “Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”

*Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>217</sup> See Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, NY Times (Sept. 17, 2014), [http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?\\_r=0](http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?_r=0).

In Michigan, for example, a surrogacy contract governs “the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.”<sup>218</sup> The broad scope of that definition would include embryo donation; after all, an implanted embryo is “not genetically related to that female,” and the female intends to gestate the child.<sup>219</sup> Further, even in the most common-sense view, enforcing a contract based on the conditional promise of implantation would be impossible. No court would compel a woman to implant an embryo into her uterus on the grounds of specific performance of a contract.

Instead, state law should simply allow the contract to control the transfer, and adoption law to control the gestation period after implantation. The contract should be premised on the donor promising to relinquish control and the donee promising to release all claims of liability against the donor.<sup>220</sup> Then, at the point of implantation, adoption law should provide the donee-parents with the right to adopt the growing embryo.<sup>221</sup> This avoids a public-policy issue while still vesting the new parents with immediate parental rights.<sup>222</sup>

## 2. *The Adoption-at-Transfer Approach*

Another commentator advocates for adoption at the point of transfer to the donee. She argues for a model statute requiring:

The donating parents shall be afforded the opportunity to select the intended parents to adopt their excess embryos . . . . The donating parents relinquish all rights, obligations, and interests with respect to the adopted embryos, including parental and inheritance rights, provided both consent in writing to the adoption. Provided the intended mother, and her spouse if she is married, *both consent in writing to adopt the embryos and have them implanted*, any resulting child will be the same as a naturally conceived child would be for that mother and her husband, for all legal intents and purposes.<sup>223</sup>

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<sup>218</sup> MICH. COMP. LAWS § 722.853(d).

<sup>219</sup> *Id.*

<sup>220</sup> *See supra* Section III.A.

<sup>221</sup> *See supra* Section II.C.2 for a discussion of current adoption law.

<sup>222</sup> *Id.*

<sup>223</sup> Becky A. Ray, *Embryo Adoptions: Thawing Inactive Legislatures With A Proposed Uniform Law*, 28 S. Ill. U. L. J. 423, 449 (2004)

In this framework, the embryos are *all* adopted at the time of transfer, and the donee-parents must agree to “have them implanted.”<sup>224</sup> But, again, such an agreement violates black-letter law in some states and runs contrary to public policy.<sup>225</sup> What exactly would be a court’s task in enforcing such provision? Asking the bailiff to accompany the party in breach to a hospital to be implanted with an embryo? Surely that is not a workable solution. Further, a provision transferring all embryos immediately vests the donee-parents with several adopted children.<sup>226</sup> The IVF procedure typically creates six to seven embryos, and the excess would all be adopted by the donees at the time of transfer.<sup>227</sup> Though such a model statute satisfies the goal of embryo-adoption reform, it does not provide a reasonable means to do so.

#### **IV. Conclusion**

Throughout this paper, the focus has been the core of the problem: the parental-rights “twilight zone” that exists after the implantation of a donated embryo.<sup>228</sup> Courts, such as those in *J.R.* and *Szafranski* have been left to consider complex biological issues.<sup>229</sup> In *J.R.*, the court had to determine parental rights as between the biological parents and the surrogate mother.<sup>230</sup> In *Szafranski*, the court addressed a pre-IVF disposition agreement contested by a hopeful mother post-separation.<sup>231</sup> In both cases, however, the court was left trying to fit a square peg in a round hole. There simply is no perfectly equitable way to resolve the complications of a woman hosting, in her own uterus, the biological child of another couple. With technology rapidly

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

<sup>225</sup> MICH. COMP. LAWS § 722.853 *et seq.*; Utah Code Ann. § 76–7–204 (1999).

<sup>226</sup> Ray, *supra* note 223, at 449.

<sup>227</sup> *See supra* Section II.B.

<sup>228</sup> *See supra* Part II.

<sup>229</sup> *See supra* Section II.B-C.

<sup>230</sup> *See J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

<sup>231</sup> *See Szafranski v. Dunston*, 993 N.E.2d 502, 506-14 (Ill. App. Ct. 2013).

advancing, though, it is imperative that state legislatures catch up.<sup>232</sup> As observed earlier, only a few states have enacted legislation to address embryo adoption,<sup>233</sup> but courts have been compelled to decide the disposition of embryos nonetheless.<sup>234</sup>

It is only a matter of time until the issues of legal parenthood in *J.R.* and of embryo disposition in *Szafranski* collide in the context of embryo adoption.<sup>235</sup> As in *J.R.*, embryo adoption involves the implantation of the DNA of two persons into a third party.<sup>236</sup> By design, that third party becomes the adoptive mother.<sup>237</sup> But even the literature on embryo adoption recognizes that donors of frozen embryos experience a psychological barrier to “giving up” their embryos for adoption.<sup>238</sup> The Embryo Adoption Awareness Center says,

Typically, placing or donating parents tend to use the term 'donation', while receiving or adopting couples tend to use the term 'adoption'. The basis for this is largely psychological. *Donation is used in the sense of 'giving a gift' and offers an emotional separation from the embryos that the phrase 'placing for adoption' does not.*<sup>239</sup>

Given the psychological difficulty that donors have in relinquishing rights to embryos that are biologically theirs, it is foreseeable that a donor-couple would seek custody over a child successfully born to a donee-mother.<sup>240</sup> In fact, in the United Kingdom, one such case has already been litigated.<sup>241</sup> A same-sex couple contracted for the birth of a child by a surrogate

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<sup>232</sup> Rebecca Buckwalter-Poza, *The Frozen Children: The Rise—and Complications—of Embryo Adoption in the U.S.*, <http://www.psmag.com/politics-and-law/frozen-children-rise-complications-embryo-adoption-u-s-80754> (May 5, 2014) (arguing, “The full promise of embryo adoption cannot be realized until the law catches up to technology to protect the rights of parents in this brave new variation on adoption.”).

<sup>233</sup> See *supra* Subsection II.C.3.

<sup>234</sup> See *supra* notes 230-231 and accompanying text.

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

<sup>236</sup> *J.R. v. Utah*, 261 F. Supp. 2d 1268, 271 (D. Utah 2002).

<sup>237</sup> See EMBRYO ADOPTION AWARENESS CNTR. *supra* note 208.

<sup>238</sup> See *id.* at 5. *How is embryo adoption different from embryo donation?*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Damien Gayle, *High court orders surrogate mother to hand baby to gay couple*, THE GUARDIAN (May 6, 2015), <http://www.theguardian.com/law/2015/may/06/high-court-orders-surrogate-mother-baby-gay-couple>.



who subsequently refused to relinquish parental rights to the couple.<sup>242</sup> The mother cited her duties as a breastfeeding mother, the intimacy that she had with the child, and her belief that the men would be unfit parents.<sup>243</sup>

The converse of such a situation seems reasonably imminent. Instead of the surrogate claiming custody, a biological parent, in spite of a written contract, may claim that the adoptive parents are unfit.<sup>244</sup> And such a claim could proceed under the current post-birth adoption system precisely because unborn children cannot be adopted. As a result of that prohibition on pre-birth adoption, there is no legal framework to protect the donee-parents from such a claim from the donors.<sup>245</sup>

This potential for the multiplication of complications seen in past litigation places a spotlight on the need for reform. Absent the swift adoption of a workable system, donees are ultimately left with pre-birth parental disputes, unenforceable contracts, uncertainty in the courts, and a “twilight zone” of parental rights as the child gestates in the donees uterus.<sup>246</sup> Adoption-at-implantation is the only system to remediate these complications and provide hopeful parents of adopted embryos the peace of mind that they deserve.

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

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

<sup>244</sup> *See id.*

<sup>245</sup> *See supra* Section II.C.

<sup>246</sup> *See* Part I.