The Frozen Embryo: Scholarly Theories, Case Law, and State Proposals

Shirley D. Howell
The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation

Shirley Human Darby Howell\textsuperscript{a1}

Introduction

Fertility experts have been able to create human embryos outside the body since the 1970’s. Yet today both moral and legal questions persist regarding the use of In Vitro Fertilization (IVF). Seemingly, the use of IVF to assist infertile individuals and couples to procreate would be regarded almost uniformly positively. The procedure, however, has produced serious unintended consequences that continue to trouble theologians, physicians, and the courts. The ongoing legal debate centers on two principal questions: First, whether a frozen embryo should be regarded as a person, property, or something else; and, second, how to resolve disputes between gamete donors concerning disposition of surplus frozen embryos.

State legislators have taken widely divergent, often constitutionally suspect, positions on both questions. Some state legislatures have avoided potential political repercussions by refusing to address these troubling questions and, instead, have foisted them upon the courts.

Because of the largely unresolved issues surrounding frozen embryos, preeminent legal scholars have written extensively in an effort to provide guidance to decision makers. The theories range from simple contract to complex constitutional analyses. In this Article, I will present the strong points and deficiencies of each of these theories. After an analysis of these theories, I will propose model legislation that would provide gamete donors with human dignity and legal certainty.

\textsuperscript{a1} The author is professor at Faulkner University’s Thomas Goode Jones School of Law. Professor Howell teaches Children’s Rights, Family Law, and Race, Poverty and the Death Penalty. Professor Howell wishes to thank her Research Assistant, Samuel White, for his extraordinary contributions to this article. Mr. White edited the article extensively while carefully preserving both my position and tone. I am deeply grateful to Mr. White. This work was made possible by a generous research grant from the Thomas Goode Jones School of Law.
Section I of this Article discusses the in vitro fertilization process, including the unintended consequences and who is responsible for those consequences. Section II explores the controversy over the proper legal status of the frozen embryo. Section III presents scholarly approaches to dispute resolution that include the Robertson Contract Theory, the Coleman Contemporaneous Consent Approach, the Feminist Position, and the Supreme Court’s jurisprudence on the Right to Procreate and the Right to Not Procreate. Section IV focuses upon Israel’s controversial Nahmani case, in which Israel’s divided Supreme Court embraced a solution to embryo disputes. In Section V, I propose legislation to enhance the dignity of gamete donors and to resolve the issue of the disposition of abandoned embryos.

Section I

A. The In Vitro Fertilization Process

With the birth in 1978 of the first baby conceived outside a woman’s body,¹ science gave childless couples around the world renewed hope for parenthood.² For the first time, fertility experts could combine an ovum and sperm in a petri dish and create an embryo or preembryo

---

that might become a “test tube” baby. Physicians labeled the revolutionary procedure *in vitro fertilization* (IVF).

To initiate an IVF procedure, a physician will administer hormonal treatments to the female gamete donor in order to stimulate her ovaries to produce an abnormally large number of eggs. During the patient’s next ovulation cycle, the physician will use one of two possible methods to harvest the eggs. The physician may remove the eggs by making two or three small incisions in the patient’s abdomen and extracting them by laparoscopy, or, alternatively, perform a vaginal aspiration procedure using a suctioning needle. Neither method is foolproof or without its risks to the health of the patient. Because the patient faces both significant pain and physical risk during each egg extraction, most elect to have more eggs extracted than they are likely to implant.

When the physician has harvested the eggs, she will attempt to fertilize them with the semen the patient has selected. If fertilization occurs, the physician will implant two or three

---

3 Cf. Perry, *supra* note 1; See, Olivia Lin, *Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization Outside Contractual Autonomy*, 54 DUKE L.J. 485, 489 (2004) (explaining that while the word “preembryo” may be awkward, the description is correct because the collection of cells has not undergone sufficient differentiation to form what is considered an embryo).

4 Perry, *supra* note 1, at 463.

5 Perry, *supra* note 1, at 467.

6 Id.

7 Id.


10 Perry, *supra* note 1, at 467.
embryos in the first IVF cycle.\textsuperscript{11} Any surplus embryos will be frozen for possible implantation later.\textsuperscript{12}

B.

Unintended Consequences

The IFV procedure has successfully enabled thousands of infertile heterosexual couples, gay couples, and single individuals to become parents. The IVF process, however, has not been without its unintended consequences. There are now over 500,000 frozen embryos stored in fertility clinics in the United States alone.\textsuperscript{13} Some fertility clinics have so many embryos that they pay commercial storage firms to warehouse them permanently.\textsuperscript{14}

C.

Who Is Responsible?

Three easily distinguishable groups of gamete donors are responsible for the accumulation of this astounding number of frozen embryos. The first is by far the most poignant. These gamete donors develop an intense familial affection for their frozen embryos, thinking of them as frozen children.\textsuperscript{15} Fertility clinicians report that some of these donors stop by to “check on” their embryos occasionally.\textsuperscript{16} One such donor, who can neither implant her surplus embryos nor bear to destroy them, states, “[m]aybe when I die, they’ll just bury my

\begin{flushleft}
\textsuperscript{11} \textit{Id.} at 468.
\textsuperscript{12} \textit{Id.}
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} Perry, \textit{supra} note 1, at 494.
\end{flushleft}
embryos with me.” These donors pay storage fees indefinitely while they continue to search for moral answers to their dilemma.

A second group of gamete donors who contributes to the proliferation of stored frozen embryos are those who divorce without having a clear plan for either distribution or destruction of their frozen embryos. In many of these cases, one party wants either to implant the embryos or to donate them to another infertile couple for implantation. The other party, no longer wanting a child, wants to destroy the frozen embryos. These donors must leave their embryos in storage until they either reach a meeting of the minds or a court decides the fate of the embryos.

The third and most problematic group abandon their frozen embryos, leaving them in storage. While no formal studies have yet been conducted to determine how many embryos have been abandoned, anecdotal evidence suggests that countless thousands of embryos will never be claimed. One physician reports that he, alone, has “tons” of embryos that have been abandoned.

Section II

The Legal Status of the Frozen Embryo:

Person, Property, or an “Entity” Deserving Special Respect

---

18 *Id.*
19 *C.f.* Davis v. Davis, 842 S.W.2d. 588, 591-92. (Tenn. 1992).
20 *E.g.* *id.* at 589.
21 *E.g.* *id.*
22 *E.g.* *id.* at 592.
24 *Id.*
25 *Id.*
Bioethicists, legal commentators, religious philosophers, and judges all wrestle with how best to decide issues pertaining to frozen embryos. Each group approaches the analysis from a different perspective. Legal commentators, as might be expected, begin the analysis by attempting to assign a legal status to frozen embryos. Jurists and legal scholars thus far have concluded that frozen embryos must fall into one of three categories: (1) human life at its earliest early stage; (2) property; or (3) an entity occupying an interim status.

A.

The Frozen Embryo as Early Life

1. Proponents of the Position

Professors Robert P. George and Christopher Tollefsen argue in their book, *Embryo: A Defense of Human Life*, that the frozen embryo is nothing less than human life, albeit at its earliest stage. According to George and Tollefsen, “A human embryo is not something different in kind from a human being, like a rock, or a potato, or a rhinoceros. A human embryo is a whole living member of the species Homo sapiens in the earliest stage of his or her natural development.” George and Tollefsen seek to make their point with a story of the actions of

---

27 Id. at 2117.
29 Robert P. George is a member of the President’s Council on Bioethics and is a Professor of Jurisprudence and also Director of the James Madison Program in American Ideals and Institutions at Princeton University. He is the author of Making Men Moral, In Defense of Natural Law, and The Clash of Orthodoxies.
30 Christopher Tollefsen is an Associate Professor in the Department of Philosophy at the University of South Carolina, and is Director of U.S.C’s Graduate Program in Philosophy.
32 Id. at 50.
first responders during Hurricane Katrina. According to George and Tollefsen, first responders evacuating a flooded New Orleans hospital retrieved a tank of nitrous oxide that contained over 1,400 frozen embryos. Subsequently, a child, aptly named Noah, was born as a result of the implantation of one of the rescued frozen embryos. They contend that but for the humane actions of the police, “the toll of Katrina would have been fourteen hundred human beings higher than it already was . . .”

The views of George and Tollefsen largely mirror those of the Roman Catholic Church. The Vatican’s 1987 Instruction on Respect for Human Life in Its Origins and on the Dignity of Procreation articulates the Church’s position that the embryo is fully human. The IVF regulations of Italy reflect the Vatican’s position. Italian law permits the harvesting of no more than three eggs per IVF cycle. The three eggs must be implanted in the mother.

Thus far, only two American states, both having large Catholic populations, have adopted the moral position that a frozen embryo is fully human. Both Louisiana and New Mexico have severely restricted the use of IVF procedures. Louisiana’s pertinent IVF statutes

---

33 Id. at 1-2.
34 Id.
35 Id.
36 Id. (emphasis added).
39 George, supra note 31, at 216.
40 Id.
41 See www.adherent.com/largecom/com_romcath.html (last visited August 25, 2011) (listing New Mexico and Louisiana among the top ten states for Catholic church membership. Mora County, New Mexico has a 94.86% Catholic population, and St. James County, Louisiana is 84.18% Catholic).
provide that an in vitro fertilized human ovum is both a “juridical person”\textsuperscript{43} and a “biological human being.”\textsuperscript{44} New Mexico implicitly grants a human embryo the status of human being by mandating that all in vitro fertilized ova be implanted in a human female recipient.\textsuperscript{45}

2. Legal Impediments to the Enforceability of “Embryos as Early Life” Position

Louisiana’s and New Mexico’s statutes require that human embryos either be implanted or stored until they are adopted.\textsuperscript{46} At first blush the statute seems to be a feasible means to treat frozen embryos as human life. Upon closer analysis, however, the statutes present insurmountable constitutional and practical problems.

\textit{Roe v. Wade} and its progeny hold that a woman has a privacy interest in her own bodily integrity that includes the right to abort her non-viable fetus.\textsuperscript{47} Consequently, if an IVF female gamete donor subsequently refuses implantation, the state cannot compel her to go forward with the procedure. If a woman reluctantly consented to implantation, she could still abort the fetus; thereby frustrating the purpose of the Louisiana and New Mexico statutes.\textsuperscript{48}

The Louisiana statute provides that gamete donors may renounce their parental rights “by notarial act” so that the embryos can be placed for adoption.\textsuperscript{49} What the Louisiana legislature failed to contemplate is the possibility that (1) the gamete donors will abandon the embryo(s); or, (2) that no one will adopt the embryo(s). On a practical level, either situation may result in fertility clinics having to store countless embryos permanently. Predictably, fertility clinics will

\textsuperscript{48} \textit{See} \textit{Planned Parenthood of Se. Penn. v. Casey}, 505 U.S. 833, 873 (1992) (noting that a woman has a right to a previability abortion).
pass on these “legislative” costs to infertile patients, causing the already expensive procedure to become even more expensive.

Professor Diane K. Yang points out that several forms of popular contraceptives prevent pregnancy by preventing embryos that have formed inside a woman’s body from attaching to the uterus.\textsuperscript{50} These embryos flush naturally from the woman’s system during her menstrual cycle.\textsuperscript{51} “Such [natural] occurrences are not contemplated as a loss of life, but rather a loss of genetic cells.”\textsuperscript{52} If, with society’s approval, a woman can use a contraceptive to prevent embryos within her body from progressing into a pregnancy, it is illogical to say she must treat the same embryos as protected human life when they are frozen in nitrous oxide. The Louisiana and New Mexico statutes create this bizarre conundrum.

Somewhat remarkably, neither the Louisiana nor the New Mexico statutes have been challenged. Both are constitutionally weak and unenforceable as a practical matter. Respected scholars who contend for treating frozen embryos as human beings are also openly and unapologetically opposed to abortion on religious and moral grounds. Nonetheless, while Roe is the settled law of the land, their attempts to classify frozen embryos as human life are unworkable.

B.

Frozen Embryos as Property

To treat the frozen embryo as mere property is to view it as chattel, a movable piece of personal property. The owners of this embryonic property would enjoy the same rights in it as they would in a sofa, automobile, or beach chair. The owners could sell the embryos, throw

\textsuperscript{50} Yang, supra note 28, at 595-96.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
them away, or trade them for something else. A third party could convert the embryos and become liable for the fair market value of the embryo.

The court in the *York v. Jones* case applied the property approach.\(^53\) Through an IVF procedure, one egg was harvested from Mrs. York for future implantation.\(^54\) When the Yorks moved to California, they requested that the clinic transfer the embryo to California.\(^55\) The clinic refused, and the Yorks sued.\(^56\) The district court held that the clinic acted as bailee of the *property* and was under a legal duty to return it to the rightful owners.\(^57\)

Kathleen R. Guzman, in *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, makes the argument that while one might appropriately consider the frozen embryo as mere property, doing so leads to unnecessarily awkward, formal results:\(^58\)

If the embryo is property, however, the legal owners lay their claim through a combination of labor and occupation theories -- those who first expend capital or effort to produce the good have rights paramount to all others claiming an interest therein. Issues would focus not on the embryo but on others' status thereto -- who has paramount rights relative to whom. The question involves possession and title issues such as bailments, equitable division of property, and concurrent ownership. The embryo's genetic contributors, the institution in which it was stored, or its intended recipients could assert control over the property and could own either or both legal and equitable title to the embryo depending on the theory of ownership proffered. The owner could then convey

---


\(^{54}\) *Id.* at 424.

\(^{55}\) *Id.*

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 425.

the property through donative transfer or sale regulated by basic gift, contract, and code principles. By contrast, if the embryo is a person, the attempted transfer would analogize to slavery or the chattelization of human life. In short, if a person, the embryo can own property. If property, the embryo can be owned.\(^{59}\)

C.

The Frozen Embryo as an Entity Deserving Respect

The majority of commentators and courts subscribe to, or at least pay lip service to, a conceptual middle ground between viewing the frozen embryo as human and viewing the frozen embryo as mere property.\(^{60}\) Most contend that the frozen embryo is an entity “entitle[d] . . . to special respect . . . ” because it represents potential life.\(^{61}\) It is worrisomely difficult, however, to detect what form this respect is supposed to take.

One might suppose that since a frozen embryo is an entity deserving of respect that every court would decide disputes over frozen embryos in favor of the party wanting to implant the embryo. On the contrary, courts have sided with the party who favored destroying the embryos in every case decided in the United States thus far.\(^{62}\) Most courts have opined that the gamete donor who does not wish to implant should ordinarily prevail in a dispute with the other gamete donor.\(^{63}\)

One can only wonder if the oft used term “entity deserving special respect” should be shortened simply to “entity.” Professor Angela Upchurch pointedly questions the intellectual

\(^{59}\) Id.

\(^{60}\) Id.; See also Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

\(^{61}\) Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); See also Upchurch, supra note 22, at 2122.

\(^{62}\) Upchurch, supra note 26, at 2128.

\(^{63}\) Id.
honesty of referring to frozen embryos as an entity deserving of “special respect” at all.\textsuperscript{64} She posits that a far more accurate assessment would be to call them an entity deserving of “special resistance,” since courts routinely decide in favor of their destruction.\textsuperscript{65} Nonetheless, the term persists, if as nothing more than an ear-tickler for Americans who are unwilling to designate frozen embryos as property.

Section III
Scholarly Theories of Dispute Resolution

Preeminent legal scholars disagree sharply over the proper approach for deciding disputes between gamete donors over the fate of their unused frozen embryos. Professor John Robertson contends that gamete donors who voluntarily and advisedly enter into a contract prior to IFV regarding the disposition of unused embryos should be able to rely upon the enforcement of the agreement.\textsuperscript{66} Professor Carl H. Coleman maintains that contracts concerning family relationships violate public policy and are unenforceable upon a change of mind by either party.\textsuperscript{67}

Other legal scholars dismiss arguments based on contract principles and predicate their arguments on constitutional theories. Kimberly Berg cites Supreme Court cases relating to contraception and abortion that she maintains create a constitutional right not to procreate.\textsuperscript{68} Professor Glenn Cohen argues that contraception and abortion cases do not necessarily apply to

\textsuperscript{64} Id. at 2133.
\textsuperscript{65} Id.
\textsuperscript{66} Yang, supra note 28, at 597-98.
\textsuperscript{67} Id. at 598-99.
\textsuperscript{68} Kimberly Berg, Special Respect: For Embryos and Progenitors, 74 GEO. WASH. L. REV. 506, 528 (2006).
disputes over frozen embryos.\textsuperscript{69} He also contends that if a right not to procreate exists, the right can be “unbundled” into three distinct subsections of parenthood: the right not to be a gestational parent; the right not to be a genetic parent; and the right not to be a legal parent.\textsuperscript{70} Cohen asserts that to compel a person to become a genetic parent under some circumstances is constitutionally permissible.\textsuperscript{71}

Professor Judith F. Daar argues that the constitutional right to procreate should be viewed as superior to any right not to procreate when one gamete donor wants to implant the frozen embryos and the other wants to destroy them.\textsuperscript{72} Daar further cites Supreme Court reproductive jurisdiction to support an award of embryos to the party who wants to donate the embryos to a childless couple so long as the unwilling partner is not burdened with legal responsibility towards the child.\textsuperscript{73}

Feminist scholars, including Daar, advocate that the female gamete donor should have exclusive control over her frozen embryos for the same period of time that a pregnant woman would have the right to choose an abortion.\textsuperscript{74} These scholars view the female’s interest in the embryos as superior to that of the male because of the greater physical investment that the IVF procedure requires of the female.\textsuperscript{75}

In subsections A-E below, I set out the salient points of each theory.

A.

\textsuperscript{70} \textit{Id.} at 1139–40.
\textsuperscript{71} \textit{See id.} at 1155.
\textsuperscript{73} \textit{Id.} at 460.
\textsuperscript{74} \textit{See id.} at 466-69.
\textsuperscript{75} \textit{Id.} at 460-62.
The Robertson Contract Theory

In his article, *Precommitment Strategies for Disposition of Frozen Embryos*, Professor John Robertson takes a classic contract approach to resolving disputes between gamete donors.\(^6\) Robertson maintains that parties who “knowingly, intelligently, and voluntarily” enter into a contract concerning the ultimate disposition of their surplus embryos must be bound by their agreements.\(^7\)

One of Robertson’s most persuasive arguments for a contract model centers upon the concept of reliance.\(^8\) To illustrate his point, suppose that Tom and Mary must resort to IFV to have genetic children.\(^9\) They agree prior to undertaking IFV that any embryos they did not choose to implant would be donated to an infertile couple for implantation.\(^10\) As a result of successful IFV treatment, Tom and Mary have one daughter.\(^11\) Their marriage failed thereafter and the parties petitioned for divorce.\(^12\) In her petition, Mary seeks to have the remaining frozen embryos awarded solely to her.\(^13\) If the court awards the five surplus embryos to Mary, she will destroy them because she does not want her daughter to have siblings that she will never know.\(^14\) Tom insists that the prior agreement to donate the embryos should control.\(^15\)

\(^{77}\) Id. at 1024-25.
\(^{78}\) Robertson, *supra* note 76, at 1001.
\(^{79}\) See generally J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001) (giving an example of a case similar to the hypothetical case).
\(^{80}\) See generally id. at 710 (giving an example of a case similar to the hypothetical case).
\(^{81}\) See generally id. (giving an example of a case similar to the hypothetical case).
\(^{82}\) See generally id. (giving an example of a case similar to the hypothetical case).
\(^{83}\) See generally id. (giving an example of a case similar to the hypothetical case).
\(^{84}\) See generally J.B. v. M.B., 783 A.2d at 710 (giving an example of a case similar to the hypothetical case).
\(^{85}\) See generally id. at 710-11 (giving an example of a case similar to the hypothetical case).
Robertson would argue that Tom’s reliance upon his agreement must be vindicated for a number of valid reasons. Tom’s willingness to undertake IVF may have been integrally intertwined with Mary’s promise that surplus embryos would be donated to a childless couple.86 Tom might not have been willing to proceed with IFV but for the agreement.87 He may have had religious objections to the destruction of their embryos.88 He may also have sought to protect against having further children with Mary if they divorced.89 If Tom’s contract is not enforced, all of his expectations will be nullified.90 Robertson further argues that if courts will not enforce agreements such as that between Tom and Mary, parties entering into the IFV process can have no certainty about their reproductive future.91

Robertson also argues that the best way for infertile couples to have procreative autonomy is to permit them to enter binding contracts prior to beginning IFV treatments.92 If such contracts are enforced, the parties, themselves, have directed their future as parents.93 If such contracts are not enforced, decisions about the procreative future of gamete donors will be made by strangers, specifically the courts.94

Professor Robertson acknowledges the emotional sensitivity of the issues surrounding the fate of surplus embryos.95 Robertson discusses at some length the reasons why a person might

86 Robertson, supra note 76, at 1031.
87 Id.
88 Id. at 1024 n.159.
89 Cf. id. at 1031 (noting at the time of fertilization, a husband may wish the embryos be destroyed if the couple separates).
90 Cf. id. (explaining that a party may be less likely to participate in IVF if their pre-IVF contracts are subject to later review).
91 Robertson, supra note 76, at 1031.
92 Id. at 1039-40.
93 Id. at 1038-39.
94 Id. at 1039-40.
95 Id. at 1019 to 1021.
have a change of mind. Ultimately, however, Robertson concludes that contract enforcement is the only method that vindicates the reliance interests of both parties and eliminates, in so far as possible, the intervention of the court system into the highly personal issue of procreative liberty. If a dispute arises between gamete donors who have executed a pre-IVF contract and a Robertson contract model is imposed, the only justiciable issue will be the interpretation of the contract.

Professor Robertson’s contract model has garnered the approval of the medical community and many courts. An overview of cases supporting Robertson’s contract theory is set out below:

1. Davis v. Davis

Mary Sue Davis and Junior Davis undertook IVF during their marriage. When they subsequently filed for divorce, they disagreed over the disposition of their remaining frozen embryos. Mr. and Mrs. Davis had made no written agreement prior to the IVF procedure concerning disposition of their embryos should they file for divorce.

The Tennessee Supreme Court’s analysis contained an important reference to pre-IVF contractual agreements:

We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be

---

96 Id. at 1016-25.
97 Id. at 1041-44.
99 Davis, 842 S.W.2d at 591.
100 Id. at 592.
101 Id. at 590.
presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.\textsuperscript{102}


In March 1990 the Kasses began the IVF process.\textsuperscript{103} After 2 unsuccessful pregnancies, the Kasses executed an informed consent form that was provided by the hospital.\textsuperscript{104} A short time later the Kasses separated and subsequently disagreed on the disposition of the remaining embryos.\textsuperscript{105} In deciding custody of the embryos, the court stated the following regarding IVF agreements:

Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.\textsuperscript{106}

\textsuperscript{102} Id. at 598 (emphasis added).
\textsuperscript{104} Id. at 351-52.
\textsuperscript{105} Id. at 353.
3. J.B. v. M.B

Before undertaking in vitro fertilization in March 1995, the Cooper Center gave J.B. and M.B. [a] consent form with an attached agreement for their signatures. The agreement stated,

in relevant part:

I, J.B. (patient), and M.B. (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF Program under the following circumstances:

1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues . . . .

After going through IVF, the couple gave birth to a daughter. Soon after, the couple divorced and were unable to agree on the disposition of the embryos. In deciding the fate of the embryos, the Supreme Court of New Jersey stated:

We find no need for a remand to determine the parties' intentions at the time of the in vitro fertilization process. Assuming that it would be possible to enter into a valid agreement at that time irrevocably deciding the disposition of preembryos in circumstances such as we have here, a formal, unambiguous memorialization of the parties' intentions would be required to confirm their joint determination. The parties do not contest the lack of such a writing. We hold, therefore, that J.B. and M.B. never entered into a separate binding contract providing for the disposition of the cryopreserved preembryos now in the possession of the Cooper Center.

---

108 Id. at 710.
109 Id.
110 Id. at 714.
Roberts’ model of pre-IVF contracts, however, is not what the courts have been encountering.\textsuperscript{111} The contracts have been consistently been no more than Informed Consent documents provided to the gamete donors by the fertility clinics.\textsuperscript{112}

A number of courts have enforced the terms of the fertility clinic’s “Informed Consent” documents as though they also created a binding agreement between the gamete donors.\textsuperscript{113} A close analysis of the informed consent scenario, however, casts serious doubt upon the propriety of such an assumption. First, the clinic drafts all the documents and presents every couple the same forms for their signature.\textsuperscript{114} These documents typically contain between 12 to 20 pages of \textit{single-spaced} material relating both to the nature and risks involved in the IVF procedure and the disposition of unused pre-embryos.\textsuperscript{115} The parties must either choose from the clinic’s list of dispositional elections or write in their own more specific choices.\textsuperscript{116} Fertility clinics require the patient and her partner to indicate their preferences for disposal of unused embryos as a precondition of the \textit{clinic} going forward with IVF.\textsuperscript{117}

Since the clinic initiates the contract process, logic dictates that they do so to protect themselves in the event of a dispute with the potential gamete donors. The gamete donors enter the contract in order to obtain IFV services and to protect themselves from disputes with the clinic. It is beyond cavil that the \textit{clinic} and the gamete donors create a classic bilateral contract. There is, however, no language in the informed consent documents in which the gamete donors

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Kass}, 673 N.Y.S.2d at 356; \textit{Davis}, 842 S.W.2d at 597.
\textsuperscript{114} \textit{Kass}, 673 N.Y.S.2d at 352-53.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} Since the gamete donors are free to add their own terms regarding disposition of surplus preembryos, the contracts are not contracts of adhesion subject to attack as unconscionable.
make express promises to each other regarding future disposition of preembryos. To the contrary, the typical informed consent document expressly provides that the clinic will obey a court order with respect to disposition of the preembryos if the couple raises the issue in litigation with each other. By way of a somewhat crude analogy, I argue that the informed consent agreement, insofar as it concerns the storage of future preembryos, creates little more than a bailment for hire between the clinic and the gamete donors. For the gamete donors to create a binding express contract with each other, they must make express promises to each other.

The 1998 Kass case from New York illustrates some of the problems inherent in enforcing a fertility clinic’s forms in disputes between husband and wife. The Kasses executed several lengthy informed consent documents with the clinic that provided, inter alia:

1. We consent to the retrieval of as many eggs as medically determined by our IFV physician. If more eggs are retrieved than can be transferred during this IFV cycle, we direct the IFV Program to take the following action . . .

[2.] We understand that our frozen pre-zygotes . . . will not be released from storage . . . without the written consent of both of us, consistent with the policies of the IFV Program and applicable law.

[3.] In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding our stored . . . pre-zygotes, we now indicate our desire for disposition of our pre-zygotes and direct the IFV Program [that] [o]ur frozen pre-zygotes may be

---

118 Cf. Kass, 673 N.Y.S.2d at 352-53 (giving an example of an agreement one couple had with the IVF clinic, with no language making an agreement between the couple).
119 Id.
121 Id. at 352.
122 Id. at 352.
examined by the IFV Program . . . for approved research investigation as determined by the IFV Program.\textsuperscript{123}

[4.] In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.\textsuperscript{124}

The couple was unsuccessful in their initial IFV attempts at conception.\textsuperscript{125} The Kass marriage subsequently failed and the parties instituted divorce proceedings.\textsuperscript{126} The wife petitioned the court to award her the frozen preembryos for future implantation, relying upon provision (4) above.\textsuperscript{127} (Evidence suggested that implantation of the preembryos would represent the wife’s last chance to become a genetic parent, though the wife did not expressly raise the and the court did not consider it.) The husband argued that the preembryos should be donated for research, relying upon provision (3) above.\textsuperscript{128} The trial court disregarded both contract claims and awarded the embryos to the wife, reasoning that the wife should have exclusive decisional rights over a non-viable fetus under \textit{Roe v. Wade} and its progeny.\textsuperscript{129} The Appellate Division dismissed the trial court’s reliance upon \textit{Roe} and reversed, finding the informed consent enforceable between the husband and wife.\textsuperscript{130} The New York Court of Appeals affirmed the Appellate Division, concluding that “[a]greements between . . . gamete donors . . . should generally be presumed valid and binding and enforced in any dispute between

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 352-53 (emphasis added).
\item \textsuperscript{124} \textit{Id.} at 352.
\item \textsuperscript{125} \textit{Kass}, 673 N.Y.S.2d at 351-52.
\item \textsuperscript{126} \textit{Id.} at 353.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 599.
\end{itemize}
them.”131 The court ignored the fact that the informed consent document contained no provision creating a contract between the husband and wife, perhaps on the theory that the couple had waived the issue by failing to raise it.132 In a tortured parsing of facts, the court found that the 22 page, single-spaced form unambiguously expressed the intent of the parties despite the conflict between provisions (3) and (4).133 The Court awarded the preembryos to the husband, who would thereafter donate them to the clinic for scientific research.134

In the 2001 New Jersey case of J.B. v. M.B., based upon provisions contained in a fertility clinic’s informed consent documents that were substantially similar to those in Kass,135 one might have predicted a result like the one in Kass. However, the Supreme Court of New Jersey refused to enforce the terms contained in the informed consent documents and established a very different rule.136

The parties in J.B. v. M.B. had signed the clinic’s consent forms, indicating that upon dissolution of their marriage any surplus frozen pre-embryos would become the property of the clinic unless a court made an alternate disposition.137 The New Jersey Court found that the form did not manifest “a clear intent by J.B. and M.B. regarding the disposition of the pre-embryos.”138 The Court then set out what it called “the better rule.”139 The Court held that unambiguous dispositional agreements would be enforced, “subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored

133 Id. at 567-69.
134 Id. at 569.
136 J.B. v. M.B., 783 A.2d at 719.
137 Id. at 713.
138 Id.
139 Id. at 719.
preembryos.”140 I discuss the public policy concerns underlying New Jersey’s rule in Part B below. For now, it suffices to say that such a rule would appear to render dispositional agreements entered at the time of IVF completely illusory under ordinary principles of contract. For purposes of illustration, suppose that John and Mary, both contract attorneys, voluntarily and in good faith drafted and executed a contract separate from the informed consent documents providing that in the event of their divorce that any surplus preembryos would be destroyed. Under the New Jersey rule, either party could subsequently change his or her mind and render their contract void at will.141

While a strict contract theory validates the right of competent adults to make advance decisions concerning their reproductive lives, it leaves something to be desired when one party to the contract loses his or her last chance to become a genetic parent if the preembryos are not implanted. This scenario is discussed in Section C below.

B.

The Coleman Contemporaneous Consent Approach

Professor Carl Coleman rejects the idea of advance directives for the disposal of surplus embryos, calling the process “dehumanize[ing].”142 His philosophy is summed up as follows: The contractual approach to questions surrounding the disposition of frozen embryos embodies a conception of family relationships that society should be particularly reluctant to embrace. It is one thing for couples to assume the role of arms-length negotiators when deciding about the division of property in the event of a divorce. A couple beginning infertility treatments, however, is embarking on the creation of a

140 Id. at 719
141 J.B. v. M.B., 783 A.2d at 719.
142 Coleman, supra note 98, at 106.
family. Decisions about having children should be made in the spirit of trust and mutual cooperation, not as part of a negotiated deal backed by the force of law. Requiring partners to contract with each other about their future reproductive plans dehumanizes [it] like a business transaction rather than an expression of love. As Alexander Capron has argued, “[c]ontracts are a fine way to make binding agreements about disposition of property, but they are much less appropriate when deciding about personal relationships, especially ones like joint parenthood that would be purely hypothetical at the time a couple undergoing IVF would sign the contract.”

Coleman’s solution to the vexing problems that occur when couples ultimately disagree about the use or destruction of their embryos is what he terms a default position: the embryos would remain frozen until such time, if ever, that the parties reach a mutual decision. He maintains that parties cannot predict with any certainty how they will feel once they have created embryos. Much of his argument on this point is an appeal to human experience and intuition. He suggests that a person who undergoes successful IVF and has a genetic child may experience a parental feeling towards the embryos despite an earlier decision to donate them or otherwise dispose of them. Under Coleman’s theory, the regretful gamete donor could always change his mind.

If Coleman’s model were accepted policy, the courts would not have had to decide the Kass or J.B. cases, or any other case. Whether parties had a prior agreement would be irrelevant

144 Id. at 126.
145 Id. at 102.
146 Id. at 100-102.
147 Id. at 100-101.
148 Id. at 126.
and the outcome certain: The embryos would remain frozen. In Professor Coleman’s reasoning the constitutional right of one party to procreate could never outweigh the constitutional right of the other not to procreate. Such cases would always end in a constitutional stalemate; therefore, cases involving disputes over the disposition of embryos could only be solved by continuing to freeze them.

Professor Coleman counters Professor Robertson’s contention that parties can best control their reproductive lives by making advance directives with his argument that contemporaneous mutual agreement theory provides absolute certainty of the outcome and eliminates interference by the courts. Coleman dispenses with Robertson’s reliance argument with the simple statement that no one could reasonably rely on an advance directive under his theory.

Coleman anticipated the contention that his theory is paternalistic in so far as it denies consenting adults the right to contract in advance of IVF for the use or disposal of any frozen preembryos. He responds by arguing that paternalism works to protect parties from the consequences of their actions and that society accepts limited paternalism in a variety of contexts, including mandatory seatbelt laws and laws that restrict use of non-tested drugs. His greater point, however, is that his theory is not paternalistic because it acts on behalf of a larger societal cause; “promoting family relationships based on trust, or in the interest of showing

\[149\] Id.
\[150\] Id. at 84-85.
\[151\] Compare Coleman, supra note 98, at 84-85 (explaining that even if the partner who wishes to reproduce cannot do so by other means, appropriating the genetic material of someone who objects is not a constitutional right), and Coleman, supra note 98, at 126 (noting that when no mutual decision can be made, all genetic material should be frozen indefinitely).
\[152\] Coleman, supra note 98, at 124-25.
\[153\] Id. at 125.
\[154\] Id. at 121.
\[155\] Id. at 121-22.
respect for the strength of genetic ties . . .”156 Coleman bases his public policy argument upon the theory that some rights are so “central to identity” that they cannot be waived by advance directive.157 Coleman cites two particularly striking examples in support of his theory: contracts to marry and contracts to have an abortion or to refrain from having one.158 Coleman argues that these rights relate to “deeply personal decisions that are central to most people’s identity and sense of self.”159 Courts will not enforce a contract to marry if one party changes his mind, and a court will not enforce a woman’s promise to have an abortion or refrain from having one if the woman changed her mind because of the “pervasive, far-teaching, lifelong consequences…”160 Coleman contends that a decision concerning disposition of surplus embryos has consequences as pervasive and far-reaching as marriage or decisions concerning abortion and, therefore, should enjoy the same constitutional protections against improvident decisions.161

While case law and anecdotal evidence supports Professor Coleman’s belief that some people cannot envision the changes in their views that undergoing IVF will cause, others clearly undergo no such change.162 They undergo successful or unsuccessful IVF and feel no particular attachment to their remaining frozen embryos. The parties either agree to destroy the frozen embryos, or they abandon them.

C.

The Feminist Position

156 Id. at 121.
157 Id. at 96.
158 Id. at 92-93.
159 Id. at 95.
160 Id. at 92-93, 96 (quoting Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 739 (1989)).
161 Id. at 96-97.
162 By negative inference, while cases surrounding IVF disputes involve persons who have changed their decisions that were stated in advanced directives, numerous couples do not change their decision recorded in the advanced directives, and therefore have no reason to litigate.
Professor Judith Daar contends that the female gamete donor should hold the absolute right to implant or destroy any frozen embryos during the same time frame that a pregnant woman would have an absolute right over her fetus, citing *Roe* and its progeny as support.  

Daar extrapolates from *Roe* the proposition that a woman’s right procreative autonomy should be equally protected whether she conceives by coitus or by IVF.  

Daar argues further that just as a man loses his right not to procreate when coital conception occurs, he loses that right as well when he voluntarily contributes sperm for in vitro fertilization.  

Other feminist commentators such as Ruth Colker point out that the male gamete donor experiences no pain or risk of physical injury during the IVF process while the female must undergo both.  

Both Daar and Colker conclude that because of the unequal investment of the male and female in the process, the courts should award frozen embryos to the female who seeks to use them to become a genetic parent.

Professor Daar recognizes, however, that the male donor in IVF procedures faces a possible consequence that men who engage in sexual intercourse for procreation do not. If a man fathers a child by sexual intercourse, his responsibility will attach within a relatively short period.  

If a man participates in IVF, he faces the possibility that the female gamete donor will delay implanting the embryo for an unspecified period. Thus, the male donor who is no longer interested in procreating with the female donor could remain in financial and emotional limbo.

---

163 Daar, *supra* note 72, at 466-67.
164 *Id.* at 466.
165 *Id.* at 468.
167 Daar, *supra* note 72, at 466-77; Colker, *supra* note 214, at 1075, 1079.
168 *Id.*
169 Daar, *supra* note 72, at 467.
170 *Id.*
indefinitely. Daar solves the inequity by proposing that the female be allowed a “medically reasonable” time in which to implant the embryos. Daar suggests a forty week period for implantation that would roughly approximate the natural gestation period. If the first round of implantation results in a pregnancy, she will exhaust the forty week period and cannot subsequently use any remaining embryos. If the first attempt is not successful, she will still be within the forty week period and can try again. In any event, the male gamete donor will know within forty weeks if a pregnancy has begun.

Opponents of the feminist “sweat equity” position, argue that Roe and its progeny logically cannot be extended beyond actual pregnancy because the cases cite the physical autonomy and privacy of the mother as the constitutionally protected interests, not her right to have a genetic child by any means whatever. Since decisions involving frozen embryos do not implicate the female’s physical autonomy or her privacy interests, opponents argue that the female is entitled to no greater consideration than the male. While this argument is beyond dispute as far as it goes, feminist commentators argue that it misses the point. For feminists the crucial distinction is not between discrimination based upon gender, but rather they argue that the law discriminates against women who must undergo IVF to have a genetic child, while granting protected status to women who conceive through intercourse.

171 See id.
172 Id. at 468.
173 Id.
174 Id.
175 Id.
176 Id.
178 Id. at 1399-1401.
179 Daar, supra note 72, at 465.
D.
The Right to Procreate

In the 1923 case of *Meyer v. Nebraska* the Supreme Court recognized the “right of the individual to . . . marry, establish a home and bring up children.” In 1942, the Court addressed the right to procreate apart from the right to marry in *Skinner v. Oklahoma*. *Skinner* addressed the constitutionality of an Oklahoma statute that allowed the sterilization of individuals convicted twice of crimes involving moral turpitude. The Court struck down Oklahoma’s statute, opining procreation to be “one of the basic civil rights of man.”

The 1980 decision in *Harris v. McRae*, however, concluded that the right to procreate is solely a negative one. In the opinion set out in *Harris*, the Court upheld the right to procreate as decided in *Meyer* and *Skinner*, but held that a state has no affirmative duty to aid an individual in realizing his procreative liberty. In *Harris*, the Court drew a sharp distinction between affirmative wrongful state action that interferes with procreative liberty and any duty of the state to smooth an individual’s path to procreation. For example, a state statute prohibiting an individual from having more than two children would constitute an unconstitutional interference with procreative liberty. On the other hand, if an individual can only conceive a child through IVF but has insufficient funds to obtain the treatment, the state has no affirmative duty to provide

---

182 Id. at 536.
183 Id. at 541, 543.
184 Harris v. McRae, 488 U.S. 297, 316-17 (1980).
185 Id. at 317-18.
186 Id. at 315-16.
187 See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (noting that decisions relating to procreation are fundamental, and thus subject to equal protection).
Thus, in private disputes between gamete donors regarding the implantation or destruction of their surplus preembryos, the state has played no part in creating the obstacle to the procreative liberty of either.

Since Constitutional case law provides no enhanced status to the party in a divorce who wants to implant the frozen preembryos, however, the state is free to engage its own discretion in creating statutory provisions to govern such disputes. A state might statutorily create a preference for a solution that allows for the preembryo to be implanted by one of the donors or donated for implantation by an infertile couple. The state might also create a legal preference for the party who opposes implantation, the option most courts have adopted.

E.

The Right Not to Procreate

The right not to procreate has been derived from case law involving both contraception and abortion. The first of the contraception cases reached the Supreme Court in 1965. In *Griswold v. Connecticut*, the Court reviewed Connecticut’s statute that criminalized the act of disseminating information about contraceptives. The Court concluded that the statute invaded a zone of privacy within marriage that was “older than the Bill of Rights” itself. Since the purpose of obtaining and using contraceptives is to avoid procreation, *Griswold* provided the beginning of an argument that at least married couples possess both a right to procreate and a right not to procreate.

---

188 See JOHN ROBERTSON, CHILDREN OF CHOICE 104 (1994) (citing examples of affirmative rights as the state’s duty to provide effective assistance of counsel to indigent defendants and to provide pre-termination hearings before terminating welfare benefits).
189 See, E.g., Davis, 842 S.W.2d at 591.
191 Id. at 480.
192 Id. at 485-86.
In 1972, the Supreme Court entertained arguments in *Eisenstadt v. Baird* that unmarried individuals should also possess the privacy right to use contraception and avoid procreation.\(^{193}\) Having found a privacy right in “sacred precincts of marital bedrooms” seven years earlier,\(^{194}\) the Court concluded in *Baird* that all consenting adults possessed the same right to avoid procreation.\(^{195}\) To the consternation of many parents, the Court extended the right to obtain contraceptives to minors in the 1977 decision *Carey v. Population Services International*.\(^{196}\)

It is clear from the progression of *Griswold, Eisenstadt*, and *Carey* that the Court has found an incontrovertible right for any individual to avoid procreation by the use of contraceptives.\(^{197}\) Once conception has occurred, however, the right not to procreate is no longer universally guaranteed since the mother, alone, is thereafter vested with the right to decide whether the pregnancy will go to term or be terminated.\(^{198}\)

The abortion cases began in 1973 with the still-controversial Supreme Court decision in *Roe v. Wade*.\(^{199}\) For the first time the Court found an absolute right in the mother to terminate a pregnancy during the first trimester.\(^{200}\) The Court found a right of privacy that was explained as follows:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad

---


\(^{194}\) *Griswold*, 381 U.S. at 485-86.

\(^{195}\) *Baird*, 405 U.S. at 453.


\(^{200}\) *Id.* at 154, 163.
enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.\textsuperscript{201}

The Court’s language indicates three primary interests of women in not procreating against their will.\textsuperscript{202} The first and arguably the most significant is a woman’s interest in protecting her own health and bodily integrity free of undue burdens by the state.\textsuperscript{203} Second, the Court cites a woman’s interest in the value of her reputation in her community, which in \textit{Roe} stood to be damaged by an unwed pregnancy.\textsuperscript{204} Third, the Court recognized a woman’s liberty interest in her own psychological wellbeing.\textsuperscript{205} And fourth, the Court seemed to consider the detriment to other family members, including the child, when a woman is forced to bear a child against her will.\textsuperscript{206} In \textit{Roe’s} progeny the Court reversed its decision somewhat but only in so far as to change its trimester timeline.

\textsuperscript{201} Id. at 153.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Roe v. Wade, 410 U.S. at 153.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court rejected the trimester scheme in Roe in favor of the mother’s absolute right to obtain an abortion before viability.\textsuperscript{207} Casey also addressed the constitutionality of Pennsylvania’s statute requiring a woman to notify her husband of her intent to obtain an abortion.\textsuperscript{208} While acknowledging the father’s “deep and proper concern and interest . . . in his wife’s pregnancy”\textsuperscript{209} as set out in Planned Parenthood of Central Missouri v. Danforth,\textsuperscript{210} the Court held that such a notification statute impermissibly invaded the mother’s privacy.\textsuperscript{211} When the husband and wife disagree about the propriety of the wife having an abortion, the balance weighs in favor of the wife since she is more directly affected by the decision.\textsuperscript{212} The import of Casey is unmistakable. The father does not share the mother’s constitutional right not to procreate after conception.\textsuperscript{213} The father cannot override the mother’s right to abort, nor can he prevent her from taking the pregnancy to term because he no longer wants to have a child with her.\textsuperscript{214} Whatever psychological or financial hardship the wife’s decision may cause the husband if she proceeds to carry the pregnancy to term is not sufficiently weighty to permit the husband to thwart the mother’s decision.\textsuperscript{215}

One may reasonably argue, however, that decision-making regarding the fate of a frozen embryo is distinguishable from those issues of maternal privacy set out in Roe. The difference in these cases is the female gamete donor’s bodily integrity is not implicated because she is not

\begin{itemize}
  \item \textsuperscript{207} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).
  \item \textsuperscript{208} \textit{Id.} at 887.
  \item \textsuperscript{209} \textit{Id.} at 895 (citing Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69 (1976)).
  \item \textsuperscript{210} Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976).
  \item \textsuperscript{211} \textit{Casey}, 505 U.S. at 897-98.
  \item \textsuperscript{212} \textit{Id.} at 896-98.
  \item \textsuperscript{213} \textit{Id.} at 898.
  \item \textsuperscript{214} \textit{Id.}
  \item \textsuperscript{215} \textit{Id.}
\end{itemize}
pregnant. So long as the embryos remain frozen, there is no *Roe* mandate that would require
deferece to the preferences of the mother. The male gamete donor’s financial and emotional
interests in not becoming a father “can in reason and all fairness be the object of state protection
that overrides the rights of the woman.” The majority of courts have held that the right not to
procreate will inevitably trump the other party’s right to procreate.

Professor Glenn Cohen argues that the right not to procreate is one that can be
“unbundled.” He breaks parenthood into three categories: gestational parenthood, genetic
parenthood and legal parenthood. Gestational parenthood is unique to the female. Genetic
parenthood, characterized by the biological link between parent and child, is shared equally by
the male and female progenitors. Cohen defines legal parenthood in terms of legal
responsibilities such as the duty to support minor children.

The right of the female gamete donor to refuse to implant an embryo is absolute. A
female’s liberty interest in bodily integrity cannot be abridged by forcing her to gestate her
unwanted frozen embryos. Cohen contends that the female’s personal gestational right not to
become pregnant is the only constitutionally protected right not to procreate. In Cohen’s view,
her right not to become pregnant does not equate with a right not to become a genetic parent
against her will. To illustrate Cohen’s point, we may suppose that John and Mary have
undergone IVF and have three surplus frozen embryos. John remains eager for genetic

---

216 *Casey*, 505 U.S. at 870.
2001).
219 *Id.* at 1139.
220 *Id.*
221 *See id.* at 1139-40.
222 *Id.* at 1140 n.7.
223 *Id.* at 1154.
224 *Id.* at 1148.
parenthood that seeks legal control over the embryos so that a surrogate can gestate them. Mary seeks legal control over the embryos in order to destroy them. Cohen’s concept of parenthood would allow for John to enjoy genetic and legal parenthood so long as Mary is excused from the duties of legal parenthood.\(^{225}\) Under this scheme, Mary’s absolute right not to become a gestational parent against her will is vindicated, while John’s right to procreate is also vindicated.\(^{226}\) If the roles were reversed, Mary could enjoy the opportunity for gestational, genetic and legal parenthood.\(^{227}\) While John would become a genetic parent against his will, he would not be a legal parent and would owe no duty to the offspring.\(^{228}\)

Professor Cohen gives short shrift to the notion that one’s sensitivities against having a genetic child that one is not willing to parent is a sufficiently important interest to invoke constitutional protection.\(^{229}\) Professor Angela Upchurch also debunks the idea that unwanted genetic parenthood is “a sufficiently compelling basis” on which to decide embryo disputes.\(^{230}\) She points out that if mere knowledge that one has a genetic child were sufficiently important to influence the trajectory of one’s life, there would be no need for every state to have child support enforcement statutes.\(^{231}\)

In his final analysis, Cohen’s theory centers around the question of whether the right to not be a genetic parent can be waived.\(^{232}\) To support his argument that the right can be waived, Professor Cohen draws similarities to waivable constitutional rights including a criminal defendant’s right to a jury trial, and a civil party’s right to settle rather than adjudicate a

\(^{225}\) *Id.* at 1167.
\(^{226}\) *See id.*
\(^{227}\) *See id.*
\(^{228}\) *See id.*
\(^{229}\) *Id.* at 1165-66.
\(^{230}\) Upchurch, *supra* note 26, at 2145.
\(^{231}\) *Id.* at 2146.
\(^{232}\) *Id.* at 1185-86.
constitUTIONAL CLAIr.233 He notes that if waivers are reviewed by a court, the court should use the lower civil standard “where waiver is ‘judged according to contract law principles.’”234

One may argue, as Professor Cohen suggests,235 that mere participation in IVF is in fact a waiver of the right not to be a genetic parent. If a court was to determine that to be the case, there would be no need for a waiver agreement signed by the parties. On the other hand, if a waiver agreement was required, then a document unlike the ones currently used by IVF clinicians would need to be created.236

IV.

Nahmani: Israel’s Solution237

After several years without children, Ruth and Daniel Nahmani decided to undergo IVF.238 Because Ruth Nahami was unable to carry a child, the couple contracted with a surrogate in California to bear their child.239 After IFV, but before the surrogacy arrangement could be executed, Daniel Nahmani left his wife to live with another woman and fathered a child within the new relationship.240 Although Ruth Nahmani refused to divorce her husband, she wanted to go forward with the implantation of the frozen embryos.241 Daniel no longer wanted to have a child with Ruth and preferred that the embryos be destroyed.242 When Ruth sought

233 Id. at 1187.
235 Id. at 1194.
236 See id. at 1194-95.
238 Id. at 1.
239 Id.
240 Id.
241 Id.
242 CA 2401/95 Nahmani v. Nahmani IsrLR 1, 1.
release of the embryos from the hospital and was refused, she filed suit.\textsuperscript{243} At the time of the hearing, Ruth was no longer capable of producing ova, and implantation of the embryos by a surrogate was Ruth’s last chance to become a genetic parent.\textsuperscript{244}

The Nahmani case was the first of its kind to reach Israel’s Supreme Court.\textsuperscript{245} Israel had neither statutes nor case law to direct the Court in its decision.\textsuperscript{246} In an eight to four split, the Court chose “a solution that is consistent with both the law and the fundamental principles” of Israel’s legal system.\textsuperscript{247} The majority reached a decision it saw as being in conformity with “the values and norms” of Israeli society.\textsuperscript{248}

The Court began its analysis with the right to procreate, stating:

It would appear that no one disputes the status and fundamental importance of parenthood in the life of the individual and in society. These have been basic principles of human culture throughout history. Human society exists by virtue of procreation.

Realizing the natural instinct to be fruitful and multiple is a religious commandment of the Torah.\textsuperscript{249}

The Court further mentioned with apparent favor for the constitutional right of procreation that exists in the United States.\textsuperscript{250} The Court also took judicial notice of American case law that has been construed to create a right not to procreate.\textsuperscript{251} When faced with whether

\begin{itemize}
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id. at 8.
\item \textsuperscript{245} See id. at 10
\item \textsuperscript{246} Id.
\item \textsuperscript{247} CA 2401/95 Nahmani v. Nahmani IsrLR 1, 2-3, 8.
\item \textsuperscript{248} Id. at 8.
\item \textsuperscript{249} Id. at 11 (citation omitted).
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id. at 7.
\end{itemize}
to vindicate Ruth’s right to procreate or Daniel’s right not to become a genetic parent, the majority concluded that the contradictory concepts were not coextensive in Nahmani:

“…the choice of parenthood is not just a decision concerning a way of life; it has much greater significance for human existence. It expresses a basic existential need. Moreover, the decision to become a parent also has an element of self-realization, particularly in modern society, which emphasizes self-realization as a value. But the right to parenthood does not derive only from self-realization. The right to life is an independent basic right, and it is not a derivative of the autonomy of the will; the same is true of the right to parenthood. From this perspective, the symmetry created by the judgment between the right to parenthood and a decision (legitimate, in itself) not to be a parent (as an expression of personal freedom) is undermined . . .”

The Court then looked beyond its initial judgment of the asymmetry of the respective right to procreate and the right not to procreate to seek justice in the case at bar. The court pointed out that Nahmani was not a case of “forced parenthood” since before beginning IVF, Daniel had freely given his consent to parenthood. In reliance upon Daniel’s consent to parenthood, Ruth underwent “complex, invasive and painful procedures in order to extract the ova, in the knowledge that this was almost certainly her last opportunity to bring a child of her own into the world.” The Nahmani Court resolved the dispute on an estoppel theory. Daniel, having induced detrimental loss to Ruth in the forms of monetary investment, time, physical pain and risk, was held estopped from withdrawing his consent to implanting the

---

253 Id. at 41 (citing Professor Barak, Judicial Legislation, 13 Mishpatim, 25, 71 (1983)).
254 Id. at 40.
255 Id. at 42.
256 Id. at 44-45.
embryos. The Court also considered whether the rule would apply equally when if it were the husband who wished to use a surrogate to implant the embryos. The Court rejected arguments that the wife should have exclusive control over the embryos during the period in which she could lawfully obtain an abortion, concluding that the situations were inapposite. The Court found that even though the wife made a greater physical investment in the IVF procedure because of the pain and risk she undertook, the husband’s reliance interest in having a child is coextensive with that of the wife’s.

V.

Analysis

Contract vs. Contemporaneous Agreement Models

Professor Robertson’s contract model is persuasive in that it validates the right of consenting adults to secure future benefits by the execution of prior agreements. The contract model also has the advantage of vindicating the reliance interests of both parties as they were stated prior to the IVF procedure. Still, because the subject matter of such agreements is especially sensitive and the male and female are arguably in a confidential relationship, the contract should be subject to some of the same safeguards that control in premarital agreements. The Uniform Premarital Agreement Act requires that premarital agreements be in writing and signed by both parties. The same requirement should be imposed upon Pre-IVF agreements. Further, in order to assure that the parties understand that they will be bound by their agreement in the event of divorce or the death of a party, the Pre-IVF agreement should be a self-contained

257 CA 2401/95 Nahmani v. Nahmani IsrLR 1, 45.
258 Id. at 49.
259 Id. at 46-48.
260 Id. at 48-50.
261 This would not be true if one party is using genetic material from an anonymous donor.
document clearly denominated “Pre-IVF Agreement” and executed solely between the male and female gamete donors. Enacting a Pre-IVF statute governing such agreements would set forth a clear public policy in favor of pre-dispositional agreements and would serve to place parties on notice of the effect of such agreements.

The UPAA does not specifically mandate that the parties consult with an attorney with respect to the terms of the agreement; however, some states require that the agreement be presented in a timely manner so that the signatories have an adequate opportunity to obtain independent advice. Imposing such a requirement in the IVF context would assure in so far as possible that the parties have had an opportunity to make careful, considered decisions before committing to a course of fertility treatments.

When a fertility clinic requires that patients sign an informed consent document, the document should be required to contain the following or similar conspicuous language:

Your signature herein indicates only that you have been advised of all known risks of the IVF procedure and have consented to the procedure. Should you desire to decide in advance what shall be done with any unused embryos in the event of a divorce or upon the death of either of you, you should consult with an attorney and have your agreement reduced to writing. Your consent to the procedure does not constitute an agreement concerning your interests in any frozen embryos in the event of a divorce or the death of either party.

263 See id., Comment.
When parties execute a Pre-IVF agreement, the agreement should be presumed valid, and the burden of proof should fall upon the party seeking to invalidate the agreement. Again by analogy to the UPAA, Pre-IVF agreements should be subject to the following provisions:

(a) A Pre-IVF agreement is not enforceable if the party against enforcement is sought to prove that:

(1) That party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed.  

The term “unconscionable” should be defined narrowly to mean the agreement was obtained by duress or fraud. A party’s emotional need to have a genetic child, standing alone, would not constitute duress.

Professor Coleman’s contemporaneous agreement theory is generous in its attempts to allow for human frailty within the context of genetic relationships. Indeed, few adults can look back on all their decisions made within the family without regret. Still, agreements between family members should not be illegal simply because the potential for regret is great in such circumstances.

Professor Coleman contends that one’s ability to divorce indicates a public policy in favor of not binding individuals to contracts that impinge upon one’s sense of selfhood. I disagree. States do not invalidate the marriage contract by granting a divorce. The states grant divorce, not because the parties’ marriage was void for impinging upon selfhood, but because it was a valid contract. Divorce is the remedy for breach of the marriage contract. In the event of divorce, the state will enforce legally recognized duties of post-marital spousal support and child support, despite the “changed feelings” of the parties. If the parties had executed a premarital

---

266 Coleman, supra note 98, at 95-96.
agreement in accordance with state law, the state will enforce its terms in spite of the regret that one party may experience.

I propose that any Pre-IVF contract should be presumed valid, subject to proof of fraud, duress, or unconscionable conduct. Thus, if the parties agreed that their surplus embryos would be destroyed, the agreement would be enforced as written. Employing the same reasoning, if the parties agreed that one party should have exclusive control over the embryos, the agreement should be enforced so long as the agreement conforms to the Pre-IVF statute I propose above. If the parties agreed that surplus embryos should be donated for implantation by an infertile couple, the states should vindicate that intention as well.

The next concern that I must address is the situation that confronts the courts when there is no enforceable written agreement concerning the disposition of surplus frozen embryos. Scholars have proposed four solutions to this issue that I have set out above: to privilege the right to procreate; to privilege the right not to procreate; to privilege the right of the female gamete donor to exclusive rights over the frozen embryos as set out in Roe and its progeny; or, to privilege the party who wants to procreate, if but only if, he or she proves that implantation is his/her last realistic chance to have a genetic offspring. (These bitter and heartbreaking choices are the very ones that the courts could avoid if parties were both permitted and encouraged to enter into considered agreement that would control in such situations. Ironically, Professor Coleman’s laudable desire to “humanize” the process is best advanced by executing the very contracts he discourages).

I am inclined, largely in view of the persuasive force of Professor Robertson’s reliance theory and Professor Cohen’s “unbundling” argument, to conclude that in the absence of an agreement, the best course is to presume that the party who wants to use the genetic material for
procreation should be preferred. I agree with Israel’s Supreme Court majority opinion that adopting a policy of privileging the party who wants to implant the embryos does not force procreation upon anyone. *Both* parties made an intentional, voluntary investment of time, genetic material, and financial resources in their effort to have a biological child. I do not find it credible that anyone would undertake such an intimate and heartfelt endeavor with the understanding that the other partner could unilaterally change his or her mind after the fact and have the embryos destroyed at will. On the contrary, I conclude that in the absence of an agreement to the contrary, both parties relied upon the good faith of the other in going forward with the conception process. I disagree with Professor Cohen, however, in so far as he seems to suggest that a genetic parent should be excused from financial responsibility for a child he or she does not want.

The last issue I must address is what should be done with frozen embryos that have been abandoned altogether. In this situation, I think only two solutions are workable. In Model I, the IVF statute would provide that the fertility clinic can dispose (destroy) of abandoned frozen embryos after a statutorily set period. In Model II, the fertility clinic would be required to notify a designated state agency that the embryos are available for adoption. Either model would serve to relieve fertility clinics of any ongoing responsibility for storing the abandoned genetic material.

Whether a state enacts Model I or Model II, the state should provide the gamete donors with procedural safeguards similar to those afforded to the parties in an adoption proceeding. In Model I states, the IVF statutes would require the fertility clinic to sent notice by certified mail to the gamete donors’ last known address advising them of the entity’s intent to dispose of the embryos. The notice should advise the gamete donors of the time, place, and method of disposal.
In the event that there is no response within 30 days, the statute would require notice by publication of the proposed disposal of the embryos. Should the donors again fail to respond, the statute would provide that the fertility clinic may then file a verified petition for leave to destroy the embryos.

In Model II states, the process of giving notice to gamete donors should parallel that required in adoption proceedings. If the donors do not respond to notice, the statute should provide that the fertility clinic provide the designated state agency with the health histories of the gamete donors and notice that the embryos are available for adoption. In fairness to the fertility clinic, the IVF statute must provide that embryos not adopted within a set period may be disposed of under the same procedure employed in Model I.

Model I, it would seem, has little to recommend itself except expediency. The state treats the abandoned frozen embryo as mere property under Model. Model II, however, treats the frozen embryo as an entity “deserving of special respect.” The state provides a “life option” for the embryo and provides infertile persons with an opportunity to have children. Critics of Model II might argue that infertile individuals already have ample opportunities to adopt children, older children who may have physical or emotional disabilities. I do not disagree with this contention; however, too many infertile couples either feel inadequate to the task or they simply do not choose it. There is no logic to support the notion that denying other means of adoption would foster additional adoptions of older or impaired children.

CONCLUSION

As IVF becomes ever more popular, the need for clear embryo disposition procedures becomes even more necessary. By adopting clear methods of resolving disputes and handling
abandoned embryos, both patients and IVF professionals will be able navigate the IVF process with one less burden.