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EMBRYO ADOPTION: THE LEGAL AND MORAL CHALLENGES

KARIN A. MOORE*

In the twenty-first century, infertile couples have a significant number of options to pursue in order to achieve a successful pregnancy. Reproductive therapies and artificial reproductive technology (ART) give numerous couples the opportunity to bear children where generations ago they would have been without hope. However this new hope has brought with it new and challenging moral dilemmas concerning embryonic life and the womb.

This paper discusses the advent, consequences and controversy of one of those moral dilemmas: embryo adoption. With an estimated 400,000 human embryos cryogenically preserved around the United States,¹ and the stockpile of embryos growing at a current rate of 18.8% annually,² interested individuals and groups of all different motivations have weighed in on the proper method for disposing of these embryos. Supporters of embryonic stem cell research desire that the embryos be donated for scientific experimentation. Among opponents of embryonic stem cell research who believe the embryo deserves protection as a human person, many call for these embryos to be rescued and placed where they belong: in a mother’s womb through a process they call “embryo adoption.” Yet, not all who believe the embryo deserves the protection of a human person agree that embryo adoption is a prudent course of action. Instead, several advocate allowing the embryos to naturally perish and instead fight the battle against the creation of excess embryos. Both these factions consider the embryo a human life worthy of protection. The question dividing them is: when life has been created in an unnatural way, how does the pro-life community respond to the unique problems that result?

Part I discusses the evolution of the reproductive technology that has created the very high number of embryos frozen in storage; Part II looks at the use of embryo adoption to try to deal with a current perceived problem; Part III looks at the current law surrounding embryo adoption; and Part IV

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looks at the moral debate in pro-life communities regarding the procedure.

I. THE RELEVANT HISTORY OF REPRODUCTIVE TECHNOLOGY

Prior development of alternative forms of reproduction started the trend of looking outside the bedroom for help in conceiving a child. The first use of third party genetic material to conceive a child came through artificial insemination ("AI"). AI is a process where sperm from a third party is injected into a fertile woman resulting in a pregnancy.

AI has reportedly been used since the nineteenth century; however, it was not regularly used until the middle of the 20th century. AI originally only took place in vivo. In 1971 the world’s first pregnancy originating from an externally fertilized egg, a process commonly referred to as “in vitro fertilization” (“IVF”), was reported at the Monash University Medical Centre in Melbourne, Australia. That particular pregnancy did not survive to birth, but in 1978 researchers in England generated a live birth using the techniques developed by the Melbourne researchers. The first successful use of IVF in the United States came in 1981, and the process has steadily gained popular approval ever since.

Assisted reproductive technology ("ART") defines all procedures that involve the direct retrieval of eggs, or oocytes, from the ovary. IVF, the most common form of ART, is the fertilization of the egg with sperm in a laboratory. Since 1981, more than 114,000 babies have been born as a

5. Id.
6. Id.
10. Id. at n.24 ("Within ten years of the first birth of the first IVF baby, more than 140 IVF programs existed in the United States and more than 5000 IVF births had taken place worldwide").
12. Id.
result of IVF.\footnote{13}

In IVF, patients undergo extensive hormonal therapy designed to produce more eggs than a woman’s normal cycle would produce.\footnote{14} First, a drug is administered which shuts down the patient’s ovaries.\footnote{15} The woman is then given injections of hyper ovulation drugs for a ten-day period, after which her eggs are retrieved by a process called ultrasound guided vaginal retrieval.\footnote{16} The patient is sedated while medical professionals watch the ovaries by ultrasound and insert a thin needle into the ovaries to suction out the eggs.\footnote{17} Typically five to fifteen eggs are collected.\footnote{18} Unfertilized eggs are rarely frozen because they do not preserve well.\footnote{19} Eggs stored before fertilization have much lower fertilization and survival rates than similarly stored embryos.\footnote{20}

Immediately after harvesting, the eggs are fertilized by adding roughly 100,000 motile sperm to each egg.\footnote{21} If the sperm will not fertilize the eggs naturally, the doctor has the option to manually inject the sperm by intracytoplasmic sperm injection ("ICSI").\footnote{22} In this procedure the physician punctures the egg directly under a microscope and injects one sperm in the egg.\footnote{23} After fertilization the embryos remain in the culture and continue to develop until they have divided to the four to six cell stage.\footnote{24} This development can take anywhere from one to six days after which a set number of embryos are transferred to the uterus using a small catheter placed through the cervix.\footnote{25}

Generally, clinics only transfer four to eight embryos into the woman’s uterus to try to minimize the possibility of multiple pregnancies.\footnote{26} Embryos that are not immediately transferred are cryo-preserved for future use if pregnancy does not occur.\footnote{27} Single fetus pregnancies are preferred to

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\begin{itemize}
  \item \footnote{13}{Jill R. Gorny, Note, The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for their Disposition?, 37 \textsc{Suffolk U. L. Rev.} 459 (2004).}
  \item \footnote{14}{Sherif Awadalla M.D., \textit{In Vitro Fertilization}, http://www.fertilitynetwork.com/articles/articles-ivf.htm (last visited March 19, 2007); Annapolen, \textit{supra} note 8, at 8.}
  \item \footnote{15}{Awadalla, \textit{supra} note 14.}
  \item \footnote{16}{Id.}
  \item \footnote{17}{Id.; Andrea L. Bonnicksen, \textit{In Vitro Fertilization} 147–51 (Columbia Univ. Press 1989).}
  \item \footnote{18}{Awadalla, \textit{supra} note 14.}
  \item \footnote{19}{Redman, \textit{supra} note 11, at 586.}
  \item \footnote{20}{Id.}
  \item \footnote{21}{Id. at 585; Awadalla, \textit{supra} note 14.}
  \item \footnote{22}{Id.}
  \item \footnote{23}{Id.}
  \item \footnote{24}{Id.}
  \item \footnote{26}{Redman, \textit{supra} note 11, at 585.}
  \item \footnote{27}{Though IVF in the United States is generally unregulated, Great Britain has laws mandating only 3 embryos may be transferred per IVF cycle. \textit{Id.} at 586.}
\end{itemize}
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multifetal pregnancies because multifetal pregnancies significantly increase the health risks to both the mother and the fetuses.  

The health risks complicated by multifetal pregnancies include severe gestational hypertension ("GH"). GH complicates six to twenty-two percent of all pregnancies and is the third leading cause of maternal death worldwide. In the United States, five to eight percent of pregnancies suffer from the ailment annually. GH accounts for eighteen percent of maternal deaths in the United States, and twenty percent of all preterm births. Women carrying multiples are much more likely to suffer from GH than women carrying a single fetus. Fifteen percent of women carrying twins and thirty percent of women carrying triplets suffer from GH. Multiple fetuses also increase the risk of needing a caesarean delivery which can cause complications for the mother such as heavy bleeding, infection, blood clots, and a much longer recovery time than a vaginal delivery.

Multiple-birth infants also carry greater risks than singletons. Risks include preterm delivery, low birth rate, congenital malformations, fetal and infant death, long-term morbidity and disability among survivors. Preterm delivery can be detrimental to infant survival. Babies have been known to survive after twenty-four weeks, but the risk of death or permanent disability for the babies is very high because their organs are not fully developed before they leave the womb. As a result, the risk of cerebral palsy is about eight times higher for twins and forty-seven times higher for triplets than for singleton births. Thirty to fifty percent of twin deliveries are preterm and seventy-five to one hundred percent of triplet deliveries are preterm. Not surprisingly, over fifty percent of twins and seventy-five percent of triplets are low birth weight. Low birth weight babies have a higher risk of cardiovascular disease, diabetes, abnormal blood clotting,
excessive fat, or obstructive lung disease later in life. Most couples who have had to turn to IVF have already had complications carrying a child to term. Multifetal pregnancies endanger the mother, and the survival of children.

Hormonal therapy and egg retrieval is very costly. Costs range from $6,000-$7,000 per cycle. Before embryos were frozen for preservation, in vitro clinics transferred a relatively large number of embryos hoping one would result in a successful pregnancy. Sometimes multiple eggs implanted, meaning the patient would either have to contend with attempting to carry multiple children to term or choose to selectively abort one or more of the fetuses. If pregnancy did not result, the patient would have to participate in another round of hormonal therapy to try again. Advents in cryo-preservation has changed the use of IVF.

Because of the huge emotional, physical, and financial costs associated with IVF, patients and clinics now fertilize more eggs than they would be able to implant in a patient and freeze excess embryos in case a successful pregnancy does not result. Cryopreservation is the process by which embryos are frozen for storage. In cryopreservation, the embryo is cooled using liquid nitrogen and dehydrated, treated with cryoprotectant, and stored in a frozen state. When it is time to transfer the embryo, it is thawed and rinsed of the chemical protectant before transfer.

Cryopreserved embryos first resulted in viable pregnancies in 1983, and live births in 1984. Initially, doctors questioned whether embryos could survive in a frozen state beyond two years, however, the consensus now is that indefinite storage is possible. Cryopreservation may decrease an embryo’s viability, but live births have occurred from embryos that have been cryopreserved for ten years.

Sometimes numerous cycles are needed to become pregnant and carry a baby to term, justifying the need for freezing embryos. Cryopreservation

42. Id.
43. Awadalla, supra note 14.
44. Id.
45. In selective abortion, one or more of the fetuses are terminated during an early stage of pregnancy. Generally this is performed when a woman becomes pregnant with triplets or more. Redman, supra note 11, at 586 n.31.
46. The first experimentation with cryopreserving embryos came in 1981, and has been developing ever since. See Clifton Perry & L. Kristen Schneider, Cryopreserved Embryos: Who Shall Decide Their Fate?, 13 J. LEGAL MED. 463, 463 (1992).
47. Redman, supra note 11, at 586.
49. Katz, supra note 9, at 184.
50. Id.
51. Kindregan, supra note 48, at 171 n.5.
52. Id. Live births occur only about 20 percent of the time when frozen embryos are transferred to the womb.
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eliminates the need to transfer all fertilized embryos at once, thus avoiding an increased chance of multiple pregnancies. The doctor’s goal in implantation is to successfully implant one fetus, and although there are still occurrences of women with large numbers of multiples as a result of IVF, cryopreserving embryos has allowed clinics to decrease the number of embryos they implant at a given time.

When IVF results in the birth of a child, there are generally three remaining options for disposing of frozen embryos: the embryos may be donated for research, allowed to die, or donated to an infertile couple. Donation for research generally entails destroying the embryo and extracting its stem cells for experimentation. Allowing the embryo to die generally entails allowing the embryo to thaw without seeking to implant it in a womb, or destruction by some other method that does not seek to extract genetic material for research. Embryo donation or embryo adoption allows the embryo to be inserted in the womb of a woman other than the genetic donor in the hopes that the embryo will implant and grow into a healthy child.

According to a 2003 study, there are 400,000 embryos frozen in fertility clinics around the United States. Eighty-seven percent of the 400,000 have been set aside for “future family building” by patients. Only three percent have been earmarked for medical research, and only two percent have been set aside for donation to other couples. The problem is determining how many within the eighty-seven percent are reserved for couples actively involved in treatment, and how many are frozen indefinitely because of indecision or abandonment.

The American Society for Reproductive Medicine advises its fertility clinics that they may destroy embryos if they have attempted to contact the patients without success for five years. However, many physicians are reluctant to destroy frozen embryos without parental permission because of the finality of the act and possible liability.

53. Id.
54. Id. at 172; Annapolen, supra note 8, at 10.
55. Annapolen, supra note 8, at 10.
57. Id.; see infra § II.
59. Weiss, supra note 58.
60. Id.
II. WHAT IS EMBRYO ADOPTION AND HOW IS IT USED?

Embryo adoption is a process where frozen embryos are donated to infertile couples for implantation.62 The adopted frozen embryo is implanted in a genetically unrelated woman.63 Once the child is born, the donee couple raises the child as their own.64 Embryo adoption has a number of unique benefits for those participating in the process. Embryo adoption is considerably less expensive than regular IVF.65 IVF procedures typically cost between $7,000 and $20,00066 while embryo adoption costs about $3,000.67 It is also less expensive than adopting a healthy infant.

Traditional domestic adoption generally costs between $10,000 and $30,000, and international adoptions can cost twice that amount.68 Embryo adoption also permits an otherwise infertile couple to experience pregnancy, monitor prenatal care, and potentially, get to know the child’s genetic parents.

The use of the term “adoption” to describe this transaction has caused a considerable amount of discussion. Abortion proponents find the term problematic because it affords the embryo a legal status they seek to challenge.69 It connotes some status of personhood to the in vitro embryo that, if taken to its logical conclusion, would undermine the ethical premises of in vivo abortions. As the use of the word “adoption” has mainly been perpetuated by pro-life supporters,70 no doubt they intended to cause a questioning of the human status of the embryo by their choice of words. But those currently servicing embryo adoptions would also suggest the service they provide is unique enough to warrant the term.71

Though IVF clinics claim they have been performing this service through embryo donation for several years, Nightlight Christian Adoptions was the first to mix embryo donation with traditional adoption procedures.72 Up until Nightlight entered the embryo adoption scene, embryo donation in
the IVF clinic setting had been treated as a medical procedure rather than a legal transaction of rights.73 Nightlight Christian Adoptions set up the Snowflakes Program specifically to try to deal with the growing number of frozen embryos by emulating traditional adoption practices, and matching donors of surplus frozen embryos with recipients who are unable to have children.74

The Snowflakes program was created in response to two developments: Britain’s decision in 1996 to destroy any unclaimed frozen embryos over five years of age, and the growing number of cryopreserved embryos in the United States.75 The Snowflake program is unequivocally Christian and pro-life in their view of the status of the embryo. The name ‘Snowflakes’ is intended to be an analogy to the fact that every snowflake is unique, beautiful, and a creation of God.76 The leader of Nightlight has stated the number one goal of Snowflakes is “to put the question of whether the embryo lives or dies back in the hands of God.”77

The formal arrangements made through the Snowflake program allow the donating parents to screen for adopting couples who they would feel comfortable having rear their child. The program screens prospective parents in the same way that an adoption agency screens a prospective adoptive couple.78 The adopting families participate in a home study, and are required to reveal medical, psychological, and other background information.79 The agency also provides counseling and education on common problems arising from adoption such as integrating the child into the home.80 Snowflakes also encourages open adoption and recommends that genetic and adoptive parents know one another.81

Currently, Snowflakes adoption agreement treats the embryos as property,82 but the contract also includes adoption language terminating parental rights, and transferring parental responsibility.83 For example, the contract states that any baby resulting from an embryo transfer will bear the surname of the adoptive family and have inheritance rights solely through the adoptive family.84

76. Ghost Mothers, supra note 4, at 191.
77. Id.
78. Id. at 192.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Snowflake, supra note 9, at 192.
Though the program has received substantial press coverage in the last five years, it has remained relatively small in its scope. The possibility of achieving pregnancy and live birth through embryo adoption is still relatively small. Snowflakes’ research suggests a fifty percent success rate in thawing and thirty percent success rate in implantation of frozen embryos. Their general practice is to transfer six embryos to the adopting family for implantation based on the statistical probability that half of the six embryos will survive thawing. The subsequent implantation rate of thirty percent would suggest that potentially one child would be born from the transfer of those three embryos. Because the program can be quite expensive, has low success rates, and raises ethical dilemmas surrounding IVF, it has been difficult to sell the program to potential parents. Snowflake’s director has characterized the program’s growth potential as “mind-numbing,” indicating that she could imagine “between 12,600 and 35,000 children could be placed for adoption and born.” As of October 2006, Snowflakes’ website reports that it has matched 289 genetic families with 192 adopting families with 116 babies born, and 19 adopting families currently expecting at least 25 babies.

III. GOVERNMENT INVOLVEMENT

The firestorm of controversy over embryo adoption came to the fore in the 107th Congress when, amidst heated debates about stem cell research, Congress appropriated nearly one million dollars in federal funds to promote embryo adoption. The debate over stem cell research allowed a federal forum for organizations seeking to have embryos viewed as human beings with legal rights. While supporters of stem cell research brought a litany of individuals suffering from debilitating diseases before the committee, those opposed to stem cell research presented children who were adopted as embryos, implanted and carried to term.

One couple testified before the committee while holding their twin boys in their arms. The father testified that the boys “were once among the ‘excess’ frozen embryos scientists now seek for research.” He asked the panel, “which one of my children would you kill? Would you take Luke,
the giggler? Or would you take the big guy, Mark?" The hearings gave the process of embryo adoption, and the Snowflakes program specifically, heightened national exposure.

During a speech regarding federal funding for embryonic stem cell research, President Bush stated: "like a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being," a metaphorical reference that is also used by Nightlight on its website. The President also referenced the work of Snowflake during this speech, noting that some of the frozen embryos that were implanted in an "adoptive" mother were born and are currently healthy children. In addition to this reference by the President, Congress authorized $1,000,000 to advertise embryo adoption.

Some have proposed alternative legislative solutions such as suggesting that the law require research facilities to release abandoned embryos for implantation; however, those suggestions have yet to make a significant impact on the political debate. Neither state legislatures, nor the Congress seem to want to address this very divisive political issue.

**IV. CURRENT LAW REGARDING EMBRYO ADOPTION**

Although other countries have tackled the issue, no jurisdiction in the United States has issued laws regulating the proper disposition of excess embryos. Currently, most embryos are handled as property under contract law. The major exception is Louisiana, which has declared that an embryo created in vitro is a juridical person. Although courts are now beginning to grapple with how to define embryos for the purposes of disputes between progenitors, there has not been a broad consensus regarding how frozen embryos should be defined and treated under the law.

Currently, there are no states with laws specifically addressing the

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94. *Id.*
95. Address to the Nation on Stem Cell Research From Crawford, Texas August 9, 2001, 37 WEEKLY COMP. PRES. DOC. 32 (Aug. 9, 2001).
96. *Id.*
100. Kindregan, *supra* note 48, at 175.
unique considerations of embryo adoption. There are a few states that have laws regarding embryo donation. The laws generally require that the donation of the embryos from one family to another be memorialized by written agreement. Pertinent state laws on this issue are detailed below.

**CALIFORNIA**

California civil code requires doctors to inform IVF patients of embryo disposition options, including donating embryos to another couple, discarding the embryos, or donating the embryos for research. Clinics may not initiate a change in the condition of an embryo without written consent. In addition, California law makes it a criminal offense to implant another’s embryos without the consent of the provider and the recipients.

California’s criminal law against implanting another woman’s embryos without permission arose from a series of civil and criminal court cases involving three physicians at the University of California Irvine’s Center for Reproductive Health. Without their patients’ knowledge or consent, the physicians at University of Irvine Center took eggs and embryos from hundreds of patients, and implanted them in other patients. All three doctors were criminally charged with insurance fraud and false income tax return filings. Two of the doctors fled the country; the third was convicted and served time in jail. As a result of the incident, the university settled hundreds of separate patient lawsuits brought against it for research misconduct and misappropriation of gametes, embryos and funds by physicians. The scandal led the California Assembly to pass the nation’s first law making it a crime to steal human eggs and embryos.

**COLORADO**

Colorado law gives a progenitor rights to withdraw consent after a
decision has been made regarding the disposition of embryos. Consent may be withdrawn at any time before the placement of the embryo.

**CONNECTICUT**

Connecticut statutes require fertility centers to provide patients with options for embryo disposition, including the option to donate embryos for research and the option to donate the embryo to another couple for implantation.

**LOUISIANA**

Louisiana law defines the embryo as a juridical person who cannot be owned and is subject to the protection of state law. Beyond that declaration, Louisiana also requires any disputes concerning the embryo be resolved in the best interest of the embryo. The state imposes a duty for the safekeeping of the embryo on the facility that caused the fertilization of the embryo, and makes the doctor temporary guardian of the embryo until it is implanted in the womb. Louisiana law also prohibits the intentional destruction of a viable embryo, requiring the consent of both parents before any embryos may be donated for adoption, and prohibits compensation to the donating parent.

**OKLAHOMA**

Oklahoma law defines an unborn child as the “unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth.” The statute specifically uses the word embryo in its definition of unborn child. A legal embryo donation requires the written consent of both the donating and recipient couples, and that the doctor performing the transfer file the consent forms with a court within the jurisdiction.

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116. *Id.*
119. *Id.* at §9:131.
120. *Id.* at §9:127.
121. *Id.* at §9:126.
122. *Id.* at §9:129.
123. *Id.* at §9:130.
124. *Id.* at §9:122.
126. *Id.*
TEXAS

Texas requires the donation of embryos to be in writing.\textsuperscript{128} If the embryo results in a child, then the child is presumed to be that of the recipient husband and wife.\textsuperscript{129}

FLORIDA

Florida Statutes mandate an irrebuttable presumption that a child conceived by embryo donation and born within wedlock is the child of the gestating mother and her husband, provided that both parties consented in writing to the use of the donated embryos.\textsuperscript{130}

Florida law provides that embryo donation signifies the relinquishment of all maternal/paternal rights and obligations for any children resulting from the donation.\textsuperscript{131} In Florida, reasonable compensation is allowed for embryo donation, but couples may not knowingly advertise for the sale or purchase of embryos.\textsuperscript{132}

THE STATE OF THE LAW

Laws governing embryo adoption are sparse. Many embryo adoption agencies use the same procedures and similar forms used at traditional adoption agencies; however, current adoption laws were not designed to accommodate this sort of adoption procedure. Many state statutes specifically invalidate consent to adoption given by the biological parents if it is given prior to childbirth. For example, a Massachusetts statute requires parental consent to adoption to be in writing, and the consent is not valid until four days after the child’s birth.\textsuperscript{133} Under the Uniform Adoption Act, which has been adopted in many states, valid surrender and consent to adoption can be given only after the child’s birth.\textsuperscript{134}

If state legislatures do not begin accommodating this new area of adoption, the courts will eventually be faced with writing policy on the issue out of whole cloth. Currently, many courts are already dealing with the issue of disputed embryo disposition without the aid of controlling legislation. Disputes most often arise when couples split up after embryos have already been created.

When a divorcing or separating couple battle over control of the embryos that they have jointly created, courts must weigh protected

\textsuperscript{128} TEX. FAM. CODE ANN. §160.305 (Vernon 2004).
\textsuperscript{129} Id.
\textsuperscript{131} Id. at §§742.14, 873.05.
\textsuperscript{132} Id.
\textsuperscript{133} Kindregan, supra note 48, at 175.
\textsuperscript{134} Id.
interests held by each party. The most common case involves a wife wanting to achieve pregnancy while the husband wants to avoid having the embryo implanted. The courts are faced with determining the meaning of procreation where the process was initiated extra corporeally and there is no child in utero.

The consent of both parties is generally required in order to donate genetic material for the creation of an embryo, and the consent of both parties is required to legally permit an alternative use for an embryo. Therefore, problems arise when genetic donors differ in their moral position regarding embryos. One party may view the embryo as a human person in need of moral respect, and therefore argue for implantation in the womb of the donor or a third party adoptee. The other donor may not share the beliefs about the human status of the embryo, and, therefore, be willing to destroy the embryo for research. When these parties do not agree on the proper use of an embryo, they sometimes look to the courts for resolution.

**APPLICABLE CASE LAW**

The first appellate case in the U.S. involving unused embryos was *Davis v. Davis* out of Tennessee. Initially, the wife wanted to keep the embryos for implantation, but during the course of the litigation she remarried and hoped to donate the embryos to someone else. Mr. Davis was adamantly opposed to the proposition and instead wanted to have the embryos destroyed. The Davis’ did not execute a written agreement at the outset of fertility treatment, and Tennessee law did not speak on the subject.

The Tennessee Supreme Court tried to locate a middle position as to the legal status of the embryos. They deemed the embryos as deserving of greater respect than ordinary human tissue because of their biological potential, but that greater respect did not necessarily mean that embryo should be protected.

In *Davis*, the court viewed the dispute as a conflict over whether the parties will become parents. They did not discuss any inherent rights of the embryo. Finding a right to avoid procreation, the court determined that the husband’s interest in avoiding unwanted fatherhood outweighed the wife’s interest in preserving the life of the embryos by donating the embryos to another couple.

When an agreement has been signed prior to the creation of embryos

135. See id.
137. *Id.* at 590.
138. *Id.* at 596.
139. *Id.* at 598.
140. *Id.*; Annapolen, *supra* note 8, at 15.
directing the method of disposition, some courts have enforced the prior agreement, while some have not. In *Kass v. Kass*, the highest court in the State of New York weighed contradictory consent agreements under general contract law.\(^{141}\) While both parties agreed the embryos should not be destroyed, they did not agree on how to divide them.\(^{142}\) Though one of the consent provisions suggested the embryos should be treated as property and divided in the regular divorce settlement, the court ignored the contract between the parties and instead ordered the embryos to be destroyed and donated for research.\(^{143}\)

In *A.Z. v. B.Z.*, the Massachusetts Supreme Court protected a party’s right to change its mind about procreation.\(^{144}\) The court stated that even in an unambiguous agreement where the parties agreed not to destroy the embryos, they would not enforce an agreement that would compel one donor to become a parent against his or her will.\(^{145}\)

In *J.B. v. M.B.*, the New Jersey Supreme Court heard a case in which a husband’s religious convictions regarding the preservation of the embryos led him to seek the right to have the embryos implanted in a surrogate.\(^{146}\) The husband challenged the wife’s view that use or donation of the embryos would violate her right not to procreate.\(^{147}\) The husband argued that his former wife’s bodily integrity would not be implicated since the baby would be carried by a surrogate.\(^{148}\) The couple had not entered into a prior agreement.\(^{149}\) The court held that the husband’s right to procreate was not lost since he was able to father additional children, but the wife’s right to control procreative decisions would be lost through implantation since any child born would be her biological child, a result which “could have life-long emotional and psychological repercussions.”\(^{150}\) In this decision, the court did not consider any possible “life-long emotional and psychological repercussions” that the husband may have had based on the destruction of entities he believed to be his children.

Other than the fact that each of these decisions was decided against the interest of the life of the embryo, there was no consistency in how the courts determined the disposition of embryos. In fact, in *Kass v. Kass* the embryos were ordered to be destroyed for research when neither of the


\(^{142}\) *Id.*

\(^{143}\) *Id.* at 177.


\(^{145}\) *Id.* at 1057–58.


\(^{147}\) *Id.*

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 709.

\(^{150}\) *Id.* at 717.
parents had ever signed a consent form authorizing that option. If the general temper of the courts toward the personhood of the human embryo in these cases is indicative of the judicial temper toward the issue as a whole, supporters of embryo adoption should be wary about any legal action that may ensue in the absence of legislation. Without legislation to the contrary, courts have been very quick to dismiss any claim to personhood inherent in the embryo, and this trend could severely undermine the overall goals of embryo adoption.

Currently, Louisiana is the only state that has comprehensive law protecting an embryo and the process of embryo adoption. Without a more comprehensive system of laws focusing on the unique position of embryo adoption, there will surely be litigation in the future. Supporters of the process should be fighting within various state legislatures throughout the nation to get favorable laws passed to protect embryo donors, adopting parents, and the embryo itself. Otherwise, they should probably expect the courts to continue their current trend of destroying the human embryo in any case where the parties do not agree to the specifics of its disposition.

V. THE MORAL CONUNDRUM OF EMBRYO ADOPTION

Among those who consider the embryo a living human being at the earliest stages of life, there is a sharp debate regarding the moral efficacy of embryo adoption. Different parties come to the table with very different ethical considerations.

The Catholic Church has long been opposed to in vitro fertilization. It has condemned in vitro fertilization even between husband and wife because the church finds it in opposition to the dignity of procreation and the conjugal union. The Catholic Church believes life should only be created in the womb within the confines of the normal sexual union of a husband and wife.

Other Christian denominations generally do not have the same moral opposition to artificial reproductive technology. While believing the

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152. See supra § III.
154. Id.
155. Id.
156. See generally, The Southern Baptist Convention, Sanctity of Human Life Fact Sheet—Jan 05 http://www.alliancenet.org/CC/article0,,PTID314166%7CCHID600678%7CCIID1912352,00.html (last visited Mar. 21, 2007) (The Southern Baptist Convention does not provide a moral position on the use of IVF, nor does it discuss the possible evils of the practice); Paul T. Jersild, *Procreation Ethics Series: In Vitro Fertilization*, JOURNAL OF LUTHERAN ETHICS,
current practice of harvesting excessive numbers of embryos through IVF is objectionable, most Christian leaders do not have a moral problem with the egg being fertilized outside the womb. And the nature of protestant and evangelical denominations is that few put together the comprehensive moral position pieces that the Vatican often promulgates. To date, even the Catholic Church has not put out an official statement directly discussing embryo adoption.

For members of the pro-life community, whether to endorse embryo adoption is fraught with moral concern. There is general agreement that a cryogenically preserved embryo is a human life, but the agreement stops when the discussion turns to what we as a society should do with that life. Because the moral discussion for and against embryo adoption has taken place in its most robust form among Catholic theologians, this section will largely focus on their arguments.

MORAL OPPOSITION

All the Catholic theologians involved in the debate over embryo adoption start with the same premise that an embryo is a human life. They acquiesce to the church’s teaching that “[t]echniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple, are gravely immoral. These techniques infringe the child’s right to be born of a father and mother known to him and bound to each other by marriage.” It is through this provision of the catechism that in vitro fertilization is uniformly prohibited. All the Catholic theologians in this debate also take Donum Vitae to be enlightening when considering this issue.


159. Id.

MORAL CONCERNS FOR THOSE ADOPTING

The most compelling moral objection for those who are pro-life has been voiced by Bishop Elio Sgreccia, vice president of the Pontifical Academy for Life. Bishop Sgreccia has stated, "The idea of a systematic organization of prenatal adoption of the frozen embryos would, in fact, end up by legitimizing the practice which is substantially at the root of the whole problem." In order to implant cryopreserved embryos in an adoptive mother, the mother must utilize the services of a clinic that performs in vitro fertilization. To implant an adopted embryo the mother would have to financially support a clinic that creates the very problem they are trying to fight against. It would seem to be counterproductive.

Taking a different approach, Monsignor William Smith, a professor of moral theology at St. Joseph’s Seminary, is one of the most vocal opponents of embryo adoption due to what he believes Donum Vitae teaches about the embryo created in vitro. Donum Vitae states embryos, “which are not transferred into the body of the mother and are called ‘spare’ are exposed to an absurd fate, with no possibility of their being offered safe means of survival which can be licitly pursued.” Smith argues the position of Donum Vitae is unequivocal in this case. Smith argues the position of Donum Vitae is unequivocal in this case. There are no licit means that can be pursued in this case that would redeem the embryo from the sinful way in which it was conceived. Smith appeals to Donum Vitae’s teaching on the moral relevance of the bond uniting the procreative and unitive meanings of the conjugal act. Retrieving frozen embryos does not produce procreation of the kind Donum Vitae calls for, and therefore Smith concludes it cannot be morally licit.

Mary Geach, an English philosopher, wife, and mother, has also voiced concern of the practice. Geach argues a woman may not morally undertake the process of adopting someone else’s embryo because a woman should only allow herself to become pregnant through normal marital relations. Geach claims that if a woman makes her womb available to the child of strangers and allows herself to be made pregnant by means of a technical act of impregnation, she shares in the evil of in vitro fertilization and

161. Id.
164. Id.
165. Id.
166. Id.
unchaste acts. A woman undergoing such a procedure does so because she ruins reproductive integrity. What is meant to be the result of a marital act, a pregnancy, is now merely the result of a technical procedure.

Unchaste bodily acts, she argues, are objectionable because in committing them one does something that is enough like a marital act to carry some of its significance but is nonetheless not marital. Geach argues that it is wrong to isolate the spiritual component of the marital act, the giving of the body to the impregnator, dissociating oneself from the parents of the child, and substituting for the relation with the father a mere arrangement with a technician.

**MORAL EQUIVOCATION**

Another argument suggests embryo adoption would undermine the fight against cryopreserved embryo creation by creating moral cover for those thinking about participating in IVF. A couple named Jim and Susanne were profiled in *Christianity Today* regarding their decision about whether or not to put their embryos up for adoption. Jim and Susanne, self-proclaimed Christians, believed their embryos to be little human beings, and sought to have them implanted in Christian families so they could grow up in the faith. The article later quotes a recipient of fertilized embryos as saying, “[t]o have someone say, ‘They are from us, but they are for you,’ is the most awesome thing.”

Interestingly, the article did not discuss whether Jim and Susanne had considered the moral implications of their decision before they created the extra frozen embryos. If Jim and Susanne believed them to be little human beings, logically it would seem they should never have participated in IVF in the first place. When the act of embryo adoption is characterized as a wonderful gift to an infertile couple instead of making the best possible situation out of an irresponsible moral choice, it undermines the goal of stopping frozen embryos from being created in the first place. If those considering making embryos through IVF believe that in freezing excess embryos they may be able to put them up for adoption and bring joy to another infertile couple, it provides moral cover for that act. Instead of

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
174. *Id.*
175. *Id.* at 33.
176. *Id.*
remaining the unequivocal evil that results from creating and freezing excess embryos, potential parents can talk themselves out of the moral difficulties by judging that any excess embryos can be a blessing to another. It is likely that the practice of embryo adoption will make irresponsible in vitro activity more likely. Chances are slim that people will feel the appropriate moral distress given the assurance that their embryos may be adopted.

Those opposing embryo adoption believe the problem must be attacked going forward, and that those lives already hanging in the frozen abyss must be allowed to die for the greater good of an unequivocal stand against the practice of IVF. Certainly they believe these embryos are children. However, the moral evils they find inherent in the system of embryo adoption keep them from supporting it despite its noble intentions.

MORAL SUPPORT

The process of embryo adoption was created precisely to counteract the moral evil the founders of Snowflake found in the killing of human embryos. If the consensus is that these embryos are human life, how can the pro-life community not do everything in its power to try to save them? Several Catholic philosophers and theologians have supported embryo adoption because of this proposition, while arguing through Donum Vitae and the Catechism for the practice. They conclude that it is permissible for a willing woman to give an embryo the only chance it has at being born into the world. Some even argue this act would be permissible for a single woman if she gave the baby up for more traditional adoption after birth.

Moral Philosopher Germain Grisez challenges Msgr. Smith for what he believes is an out of context reading of the passage Msgr. Smith claims expressly forbids embryo adoption. The sentence that states there is no possibility of frozen embryos being offered “a safe means of survival which can be licitly pursued” appears in the section of Donum Vitae dealing with using embryos as subjects of experimental research. Because this warning appeared in an unrelated section, Grisez argues the sentence Smith refers to “should not be understood as referring to the action of a rescuer who has in no way participated in the wrongs that have brought the embryonic persons

177. MacKinnon, supra note 160.
178. Nightlight, supra note 74
179. May, supra note 167, at 100.
180. Id.
181. Id. at 104.
183. May, supra note 167, at 97.
to be and left them in their absurd fate, but to the options available to those wrongly involved in IVF."\(^{184}\)

Challenging Smith’s other assertion regarding *Donum Vitae*’s position that the procreation of the human person be the fruit of the conjugal act, Geoffrey Surtees of the John Paul II Institute argues that rescuing frozen embryos does not challenge the proper conclusion of *Donum Vitae*.\(^{185}\) Those seeking to adopt are not depriving the created person of their proper origin through an act of procreative love; the donor couple has done this.\(^{186}\) The donor couple has acted contrary to *Donum Vitae*, those seeking to save the child’s life have not.\(^{187}\)

Challenging Geach’s argument that a woman allowing herself to become pregnant in this manner is acting unchastely, Catholic Medical Ethicist Dr. Helen Watt argues that whereas intercourse should always precede in vivo conception, there is no moral requirement that intercourse precede uterine pregnancy.\(^{188}\) Much like Surtees criticisms of Smith, Watt’s criticisms of Geach distinguish a perversion of the marital act from the choice to rescue a child already conceived.\(^{189}\) More than just offering critiques, these authors also provide independent justification for the moral good of embryo adoption.

Grisez, Surtees and Watt all argue embryo adoption is an entirely licit and moral act that cannot be compared to the acts of surrogacy, IVF, or other means of ART that are repudiated by the church. Adoption is an action that involves a child that is already conceived but rejected. Surtees states, “[t]hough the embryo’s first adoptive ‘home’ . . . would be the womb of his new mother, I can see no reason why such a ‘home’ should not be made available.”\(^{190}\) However, where Surtees draws the line at married couples adopting human embryos, Grisez goes further and states that given the right circumstances, even a single woman adopting an embryo might be a moral good.\(^{191}\)

For Grisez, any woman offering herself for the purpose of saving the baby’s life is participating in a moral good, and the means are not necessarily inherently evil.\(^{192}\) If someone transferred an embryo to a

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184. Grisez, supra note 182, at 241 n.186.
185. May supra note 167, at 98.
186. Id.
187. Id.
189. Id.
191. May supra note 167, at 104.
192. Id.
woman's womb without her consent, abortion would be wrong and it would be the woman's duty to nurture the child until birth. The only thing intrinsically wrong about the act would be the transfer from the freezer to the womb. But, Grisez argues, rather than being morally wrong, that transfer protects life. Since the new person already exists, it doesn't violate the transmission of life. Additionally, it has nothing to do with the good of marriage because it is not a sexual act, and the relationship between the pregnant woman and the baby is neither marital nor a perverse alternative to the marital relationship. Whereas in IVF embryo transfer would be a moral evil, here it is a moral good because you are rescuing a vulnerable person.

Supporters of embryo adoption focus on the humanity of the embryo and speak on its behalf asking for it to be given a chance at life. Recognizing the personhood of each of the 400,000 embryos currently preserved in the United States, supporters advocate for women willing to give these children a chance at life in the womb, and families to nurture them beyond. The embryos are recognized as a child in need of rescuing and therefore should be adopted and not destroyed.

VI. CONCLUSION

American society is grappling with the consequences of using technology without proper moral consideration. The consequences in this case are hundreds of thousands of cryopreserved embryos suspended in time. Embryo adoption is the pro-life community's attempt to counteract a growing disrespect for life by infusing a sense of humanity into the human embryo.

Even if this situation were not morally contestable, given their underlying goal, supporters of embryo adoption need to be working to pass legislation that will legitimize the practice of embryo adoption in the courts. Though disputed cases have not yet touched on this area, disputed embryos between donating parties have consistently been destroyed when one party objects to previously consented use. The current case law would suggest there is no respect for the life of the embryo in today's courts. Thus far, individual autonomy and inconvenience have overridden the interest in fetal life. Pro-life advocates look to tackle a monumental problem when they take on the fate of cryopreserved embryos. It remains to be seen whether their desired result will materialize.

193. Id.
194. Id. at 105.
195. Id.