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## Resolving Disputes over Excess Frozen Embryos through the Confines of Property and Contract Law

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RESOLVING DISPUTES OVER EXCESS FROZEN  
EMBRYOS THROUGH THE CONFINES OF PROPERTY  
AND CONTRACT LAW

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New technology in the field of fertility has allowed for increased production of human embryos. Several conflicts occur given this increased number of cryogenically frozen embryos. One such conflict is what to do with left over frozen embryos when couples or individuals have decided that they have enough children or no longer want children. Another issue is what to do with the embryos when a couple disagrees as to whether they should be used. In trying to address these concerns, one must decide whether an embryo should be treated as property. If so, to whom does this property belong? If an embryo cannot be fit neatly into the domain of property and be apportioned through such channels, can the realm of contract law dictate the answer?

This Article addresses the conflicts that arise due to the increased number of cryogenically frozen embryos produced during in vitro fertilization (IVF). Part I discusses the IVF process, in general. While it recognizes the man's role in the process, it focuses primarily on the physical and emotional hardships that are placed on the woman. Part I also gives the backdrop of the case law in the area of embryo distribution. Part II introduces the idea that an embryo should be reduced to private property, through utilization of the labor and economic theories of property law. Additionally, an embryo's use, rather than its waste, promotes a more efficient society. The role that the legislature should play in the appropriation of embryonic property is also addressed. The dominion of property law suggests that the enforcement of contracts is eminent to communal survival. Part III discusses the current regulations in place as well as the lack of direction given by these regulations when a dispute arises as to the distribution of embryos. Part IV discusses how contracts with IVF clinics meet the standard elements of enforceability in contract law. This article also addresses the current criticisms and possible defenses against such enforcement. Part V synthesizes the findings of the previous articles written on this topic. The conclusion is that where a dispute arises concerning the use of embryos, the party seeking to use or implant the embryos should prevail unless a contract governing the dispute exists. Where an enforceable contract exists, that contract should govern the distribution.

## I. BACKGROUND

IVF allows for couples or individuals, experiencing fertility problems, to increase their chances of procreation. IVF is most often used when a pathologic fallopian tube is unable to transport eggs to the uterus, where implantation into the uterine wall and fertilization by the sperm must occur.<sup>1</sup> Women undergoing IVF are exposed to significant medical risks.<sup>2</sup> To minimize the exposure to these risks, doctors can retrieve and fertilize the eggs and then cryogenically freeze excess eggs for future use should the initial attempt be unsuccessful.<sup>3</sup> The freezing of fertilized eggs for future implantation attempts reduces the physiological manipulation of the woman's reproductive system. That is, she will be forced to hormonally prepare for egg retrieval to take place only once.<sup>4</sup> If the eggs are fertilized and developed normally, then the embryos are transferred to the woman's uterus. Typically, multiple embryos are transferred to increase the likelihood of pregnancy. If more than four eggs develop into embryos, the donor may have the option of cryopreserving the remaining embryos for thawing and replacement in a later IVF cycle.<sup>5</sup>

Three pivotal cases have marked the issues, progression, and struggling ideologies associated with litigation over the excess frozen embryos. The first was *York v. Jones*, heard in the Eastern District of Virginia in 1989.<sup>6</sup> This case involved a custody dispute between a couple participating in the IVF program, the Yorks, and the IVF clinic, the Jones Institute.<sup>7</sup> After four failed attempts at achieving pregnancy, the Yorks subsequently moved to another state and sought to have the remaining embryos transferred to an IVF clinic in that state.<sup>8</sup> The Jones Institute refused to

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<sup>1</sup>Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 306-07 (1993).

<sup>2</sup>Donna A. Katz, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL'Y & L. 623, 629 (1998) ("including ovarian hyperstimulation syndrome, bleeding, infection, cysts, anesthesia-related complications, and possibly an increased risk of thromboembolism, stroke myocardial infarction and ovarian cancer, as well as difficult pregnancies and deliveries," citing Peter J. Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL., POL'Y & L. 1215, 1226 (1997)).

<sup>3</sup>*Id.* (citing Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 550 (1996)).

<sup>4</sup>*Id.* at 629-30 (citing Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 550 (1996) and Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Disposition of Frozen Embryos?* 27 CONN. L. REV. 1377, 1380 (1995)).

<sup>5</sup>*In Vitro Fertilization (IVF)*, Microsoft Encarta Online Encyclopedia (2003), at [http://encarta.msn.com/encyclopedia\\_761577126/in\\_vitro\\_fertilization.html](http://encarta.msn.com/encyclopedia_761577126/in_vitro_fertilization.html) (last visited Nov. 21, 2003); Wash. State Dept of Health, *Information Summary and Recommendations*, at <http://www.doh.wa.gov/hsqa/sunrise/2000/infertility.doc> (last visited Nov. 21, 2003).

<sup>6</sup>*York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

<sup>7</sup>*Id.* at 422.

<sup>8</sup>*Id.* at 423-24.

relinquish custody of the embryos.<sup>9</sup> The court held that an agreement signed by the Yorks created a bailor-bailee relationship with the Jones institute, stating that “all that is needed is the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment[.]”<sup>10</sup> The holding reflects this court’s view that embryos are property, and when an IVF clinic takes possession of the embryos, the clinic may refuse to allow the couple’s embryos to be transferred elsewhere for implantation.<sup>11</sup>

The next piece of jurisprudence was set in place in 1992 by the Tennessee Supreme Court in *Davis v. Davis*.<sup>12</sup> This case involved a dispute between a divorced couple over the disposition of seven frozen embryos in an IVF clinic.<sup>13</sup> Mr. and Mrs. Davis had experienced five ectopic pregnancies and seven failed IVF attempts costing over \$35,000.<sup>14</sup> When adoption failed, the Davis’ had their seven excess eggs frozen for future implantation attempts.<sup>15</sup> Before implantation could be performed, Mr. Davis filed for divorce. The only contested issue in the divorce was the disposition of the frozen embryos.<sup>16</sup> Mrs. Davis originally wished to have the embryos implanted into her own body but subsequently decided that she wished to have them donated to an infertile couple.<sup>17</sup> Mr. Davis opposed the implantation of the embryos into Mrs. Davis given that he did not wish to father any more children and, especially any child that would not live with both biological parents.<sup>18</sup> Additionally, Mr. Davis did not wish to donate the embryos to an infertile couple due to his inability to control the psychological trauma that child may suffer with that couple if they should, for example, divorce.<sup>19</sup> The Tennessee Supreme Court concluded that a more compelling interest lies in that of the party wishing to avoid procreation, assuming that the party wishing to become a parent had other reasonable means to do so (other than the embryos in question).<sup>20</sup> Citing the American Fertility Society guidelines, that the court stated, the embryos “are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>21</sup> The absence of a preliminary agreement, case or statutory law, and the fact that Mrs. Davis did not

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<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 425 (internal citation omitted).

<sup>11</sup>York, 717 F. Supp. at 425.

<sup>12</sup>*Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>13</sup>*Id.* at 589.

<sup>14</sup>*Id.* at 591.

<sup>15</sup>*Id.* at 592.

<sup>16</sup>*Id.*

<sup>17</sup>*Davis*, 842 S.W.2d at 589-90.

<sup>18</sup>*Id.* at 604.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 597.

want the embryos for implantation into her own body allowed for Mr. Davis' privacy interest to compel a verdict in his favor.

Six years later, the New York Court of Appeals ruled on a similar case. Unlike the *Davis* case, in *Kass v. Kass*, at the time of the divorce proceedings the donor mother, Mrs. Kass, sought to implant the embryos into her own body.<sup>22</sup> This presented what would seem to be a stronger case for implantation.<sup>23</sup> After ten failed attempts at IVF, costing more than \$75,000, the Kass' decided to have the five excess eggs from their final attempt frozen.<sup>24</sup> As in the *Davis* case, the donor father, Mr. Kass, objected to the implantation, raising his privacy interest through arguing the "burdens of unwanted fatherhood."<sup>25</sup> This case is distinguishable from the *Davis* case, though, given that the Kass' previously entered into a contract with the IVF clinic allowing the IVF clinic to use the embryos for biological research or discard them as the clinic sees fit, should the couple disagree as to the embryos disposition.<sup>26</sup> After stating that the embryos were not "persons" within the meaning of the constitution, the highest court in New York held that the intent of the parties was expressed clearly and unambiguously in the contract with the IVF clinic and as such should be presumed valid and binding.<sup>27</sup> The court applied practical principles of contract law to decide the case but added in a footnote that such a contract may be precluded due to substantially changed circumstances or void as to public policy.<sup>28</sup>

In synthesizing these cases, it seems that where there is an absence of case law or statutory guidance, courts will look to whether the embryo is property.<sup>29</sup> If it is determined that the embryo is property, then it will be disposed of as such.<sup>30</sup> If it is not property, instead something entitled to special respect, then the interest of the parties are to be weighed when making the decision.<sup>31</sup> Where there exists a contract clearly stating the parties' intent as to the disposition of the embryos should a dispute arise, that contract seems to govern regardless of whether embryos are property.<sup>32</sup> But can an entity, which may not be property, with the potential for human life fit neatly into the confines of contract law or should such contracts be governed by a special set of principles?

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<sup>22</sup>*Kass v. Kass*, 696 N.E.2d 174-75 (N.Y. 1998).

<sup>23</sup>Luigi Brandimarte, *Sperm Plus Egg Equals One "Boiled" Debate: Kass v. Kass and The Fate of the Frozen Pre-Zygotes*, 17 N.Y.L. Sch. J. Hum. Rts. 767 (2000).

<sup>24</sup>*Kass*, 696 N.E.2d at 175-77.

<sup>25</sup>*Id.* at 175.

<sup>26</sup>*Id.* at 177.

<sup>27</sup>*Id.* at 179.

<sup>28</sup>*Id.* at 175, 179-82.

<sup>29</sup>*See* York, 717 F. Supp. at 421.

<sup>30</sup>*Id.*

<sup>31</sup>*See supra* notes 12-21.

<sup>32</sup>*See* *Davis*, 842 S.W.2d at 588.

## II. EMBRYONIC MATERIAL AS PROPERTY

What is property? Property rights evolved from a somewhat unitary concept, of material objects controlled by individuals, to the concept of an infinitely divisible bundle of rights — to minerals, air, light, access, water, expected returns, occupancy, exclusive use, etc., rights which are subject to multiple ownership and to numerous mixes of public...and individual claims.<sup>33</sup>

Various theories govern allocation of property. To exemplify how embryos would be viewed if they were merely property, one may examine embryos in light of both the labor and economic theories of property. It was from these two theories that much of today's property rights were born.<sup>34</sup>

A. *Labor/ Lockean Theory Of Property*

The labor theory of property embodies the idea that everyone is entitled to the fruits of his or her labor.<sup>35</sup> This philosophy is coined the Lockean theory, after the works of John Locke. Locke believed that one's own person was their primary possession and that the labor exerted

by an individual is an extension of the person and thus is the exclusive right of that person. Thus, by mixing one's 'labor' with a good ... one 'adds value' to the good and one thus acquires ownership in that good. As a result, an individual has a justified interest in a good when he has added value to that good by exerting labor.<sup>36</sup>

In the process of IVF, a woman's body labors through manipulation of her reproductive system in the hormonal preparation for egg retrieval, consumes prescription fertility medication, endures the process of egg retrieval, endures the process of egg implantation, and deals with psychological stress.<sup>37</sup> The psychological stress may very well be brought about by aspirations of a successful attempt as well as the knowledge of the risks to women associated with IVF.<sup>38</sup>

The risks associated with the medication the woman must consume prior to and after egg retrieval include bruising and soreness with any injectable medications as well as ovarian hyperstimulation syndrome which "can lead to dehydration, large amounts of fluid accumulation in the abdominal and lung cavities, blood clotting

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<sup>33</sup>Donald A. Krueckeberg, *The difficult character of property: to whom do things belong?*, J. AM. PLAN. ASS'N, June 22, 1995, at 61.

<sup>34</sup>JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY 15-17, 136, 763-765, 774-775 (Aspen Publishers 4th ed. 1998).

<sup>35</sup>*Id.* at 15.

<sup>36</sup>Joan E. Schaffner, *Patent Preemption Unlocked*, 1995 WIS. L. REV. 1081, 1087 (1995) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT ¶ 27, and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 289 (1993)).

<sup>37</sup>Katz, *supra* note 2, at 629.

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

disorders, and kidney damage.”<sup>39</sup> Soft data also supports a possible link to ovarian cancer.<sup>40</sup>

The transvaginal egg retrieval process is an ultrasound-guided procedure in which “a long, thin needle is passed through the vagina into the ovary. Although women are under sedation or local anesthesia, this procedure can cause mild to moderate discomfort . . . Structures near the ovaries, such as the bladder, bowel, or blood vessels, could possibly be injured and require further surgery.”<sup>41</sup> Additionally, bleeding from the ovary and infections are possible.<sup>42</sup>

Egg retrieval may also be accomplished through a laparoscopic procedure, where a small incision in the abdomen is made.<sup>43</sup> The risks, here, include “major injury to the bladder, bowel, uterus, blood vessels, or other pelvic structures . . . If injury occurs, further surgery may be required.”<sup>44</sup> Infections and anesthesia complications are also possible.<sup>45</sup>

Risks to the woman’s body are also present in the embryo transfer procedure.<sup>46</sup> “The transfer of embryos may cause mild irritation to the cervix or uterus.”<sup>47</sup> The implantation of more than one embryo increases the chances of pregnancy but also increases the likelihood that the risks associated with egg transfer will occur.<sup>48</sup>

While it cannot be argued that the male counterpart does not also experience the psychological hardship and the “emotional rollercoaster” involved in failed IVF attempts, a man does not face the same risks nor endure the bodily labor as that of the woman.<sup>49</sup> “Because the process of egg donation is much more physically invasive than sperm donation, egg donation requires the assistance of a physician, while sperm donation is easily accomplished without any physician assistance.”<sup>50</sup> The fact that Locke placed such a high value on ownership of one’s body and one’s bodily labor, suggests that application of a Lockean theory would dictate awarding women with a property right in the remaining embryos.

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<sup>39</sup>AM. SOC’Y FOR REPROD. MED., FACT SHEET, RISKS OF IN VITRO FERTILIZATION (IVF) (1996), at <http://www.asrm.org/Patients/Factsheets/RisksIVF-Fact.pdf> (last visited Nov. 21, 2003) [hereinafter FACT SHEET].

<sup>40</sup>*Id.*

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

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

<sup>43</sup>*Id.*

<sup>44</sup>FACT SHEET, *supra* note 39.

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

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>[http://www.sbivf.com/science/art\\_serv\\_embryo.htm](http://www.sbivf.com/science/art_serv_embryo.htm)

<sup>49</sup>Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men*, 9 TEX. J. WOMEN & L. 53, 94 n.127 (1999).

<sup>50</sup>*Id.*

Locke also identifies two important conditions designed to protect the “liberty” interest of the public which must be satisfied and which impose limitations on what can justly be reduced to private property – the “enough and as good condition” and the ‘non-waste’ condition. The “enough and as good” condition protects against over-consumption .... The “non-waste” condition requires that one [is] only appropriate that which one can effectively use without any spoiling .... The result is that an individual who has exerted labor and added value to a good still may not be justified in claiming a property interest if it will result in waste or violate the enough and as good condition.<sup>51</sup>

Therefore, the primary principle in Locke’s theory is that one who has added the most value to a good or property through bodily labor lay the best claim to that property, but only to the extent that that person’s appropriation of the property does not result in waste.<sup>52</sup>

Locke’s principle theory that adding one’s labor to property is what gives that person the right to possession. The rationale is that the person who adds value to property should be so rewarded with ownership. Therefore, an argument could be made that the party who exerts the most bodily labor should not be the determining factor, but instead, award ownership to the party that adds the most value. The male IVF participant may then argue that his sperm donation is just as crucial to bringing the embryo to life as the bodily labor the woman endures, and thus, it adds the same amount of value. The IVF clinic may also argue that without its labor, the embryo could not exist. The answer lies in the conditions set forth in Locke’s theory. The underlying maxims in the “enough and as good” and “non-waste” conditions place a limitation on the party asserting a property right that will allow for the property to “spoil” or go unused.<sup>53</sup>

Two possible scenarios highlight Locke’s view. Where the donating woman, the donating man, and the IVF clinic are competing for the embryos, all with the intention of putting them to use, Locke would award the embryos to the woman. Locke’s primary principle is that property should be awarded first and foremost to the party that expends the most bodily labor. Between the woman, the man, and the IVF clinic, the woman expends more of her person, through mixing more of her labor, to produce the embryo.

An exception lies in Locke’s primary principle where the person exerting the most labor does not choose to utilize the resource, allowing it to “spoil.”<sup>54</sup> Thus, where the woman does not wish to attempt to give life to the embryo but the man does, the woman’s labor will be preempted and the embryo will be awarded to the party seeking the embryo’s use and has added the most value. The argument that the man has added equal value will be used to preempt the woman’s argument of supreme bodily labor, where the woman does not seek the use of the embryo.

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<sup>51</sup>Schaffner, *supra* note 36, at 1088 (citing Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1547 (1993), Locke, *supra* note 36, ¶¶ 27, 31, and Hughes, *supra* note 36, 296-98).

<sup>52</sup>See *supra* note 35, at 15 and note 36, at 1087-88.

<sup>53</sup>See *supra* note 51.

<sup>54</sup>Schaffner, *supra* note 36, at 1088.

Therefore, according to Lockean theory, the primary concern in awarding property rights, is who exerted the most labor.<sup>55</sup> Then one will look to who will allow for utilization of the embryo.<sup>56</sup> Where the person mixing his/her own labor will allow for the embryo to spoil, property rights will be awarded to another individual who added value to the embryo and will allow for the embryo to be used.<sup>57</sup> In the *Davis* case, a woman wanted to use the embryos and the man did not. Under the Lockean theory, the woman would be said to have a stronger property interest in the embryos because she exerted the most bodily labor, and she wanted to implant the embryos.

Donors seeking to avoid the implantation of the embryos argue that another exception should exist to Locke's theory of supreme bodily labor.<sup>58</sup> This exception lies in the donor privacy interest in the avoidance of unwanted parenthood.<sup>59</sup> In the *Davis* case, such an argument was made by Mr. Davis and accepted by the court.<sup>60</sup>

The attractiveness of a Lockean moral philosophy approach is that it provides the Court with a principled basis for deciding privacy cases, a basis which would temper the Court's past desire to recognize individual rights to the exclusion of other societal concerns ... Under the Lockean liberal tradition, an individual's natural law duty to preserve both the life of, and capacity for rational liberty in, his fellow man limit that individual's natural rights.<sup>61</sup>

Therefore, it has been determined that where one mixes his/her own labor with a resource, adds value to it, and intends to utilize the resource without allowing for it to spoil, he/she should be awarded ownership.<sup>62</sup> The next question is whether a competing interest, like privacy, would preempt such ownership. When analyzing the nature of a privacy interest asserted, one must look to whether the act from which the individual seeks defense is one that "truly affects the individual's capacity for rational deliberation and self-direction. [In the instant situation, if the use of the embryos would truly affect the donor seeking to avoid parenthood's individual capacity for rational deliberation and self-direction.] If the asserted privacy interest does directly involve the individual's rational liberty it should be classified as 'fundamental.'"<sup>63</sup> Where the privacy interest sought to be protected is "fundamental," any claim seeking to override that privacy interest must overcome a test of "strict scrutiny."<sup>64</sup> It "must [be] show[n] that the capacity for rational

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<sup>55</sup>See *supra* notes 35-36.

<sup>56</sup>See *supra* note 51.

<sup>57</sup>See *supra* notes 35-36, 51.

<sup>58</sup>See *supra* notes 19-20, 25.

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

<sup>60</sup>See *supra* note 18.

<sup>61</sup>Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 742 (1990).

<sup>62</sup>See *supra* notes 35-36, 51.

<sup>63</sup>Koehlinger, *supra* note 61, at 742-43.

<sup>64</sup>*Id.* at 743.

deliberation and self-direction in others is significantly restricted or inhibited by the unregulated exercise of the asserted privacy interest.”<sup>65</sup> Where a privacy interest did not involve an individual’s capacity for rational liberty, it would not be fundamental and would only be subject to a test of “rational basis.”<sup>66</sup> In a “rational basis” review, “any rational purpose for the regulation would usually be sufficient.”<sup>67</sup>

Unquestionably, becoming a parent, especially when parenthood is unwanted, interferes with one’s rational liberty. In some states, a sperm donor can avoid parental responsibility by following certain statutory procedures.<sup>68</sup> However, the vast majority of states fail to shield a sperm donor from the responsibilities associated with full parenthood, where the woman seeking implantation is unmarried and the sperm donor is identifiable.<sup>69</sup> As one judge put it, “[W]oe be it to the bio-dad who presumes to avoid his responsibility to support his child when no other presumed father asserts paternity.”<sup>70</sup> Additionally, the psychological ramifications of knowing that you have a biological child out in the world may also be quite burdensome on some men. Given this interference with one’s rational liberty, granting a woman the right to implant an embryo in her body where the man no longer wishes to complete IVF questions a “fundamental” privacy interest of the man. Therefore, one must decide whether a woman’s desire to implant the embryo survives a “strict scrutiny” test.<sup>71</sup>

There are times where factors, such as the likelihood of the party asserting use of the embryos being able to achieve parenthood through other reasonable means, come into play. According to the Lockean theory, a party seeking to use the embryos must show that rational deliberation and self-direction in others is significantly restricted or inhibited by the non-implantation of the embryos.<sup>72</sup> It is obvious that the failure to implant the embryos will inhibit the deliberation and ability to self-direct for the potential life that may result from each embryo. The problem is that if the embryo is property and not a human life, the effects to that potential life cannot be accounted for in Locke’s quantitative method of balancing privacy versus the overall good. What can be accounted for are the effects that discarding the embryo will have on those who are living. Just as parenthood affects the party who does not wish for it, parenthood even more so affects the party who plans to be in the child’s life. The ability to force parenthood on someone is juxtaposed with the ability to deny someone the ability to become a parent. Thus, in situations where a party has no other reasonable means to become a parent, the privacy interest of the party arguing non-use of the embryos is outweighed by the party seeking use of the embryos,

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

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>Judge Robert D. Monarch, *In re Marriage of Buzzanca: Trial Court Analysis*, 26 W. ST. U. L. REV. 1 (1999) (citing Cal. Fam. Code § 7613 (West 1994)).

<sup>69</sup>MAUREEN H. MONKS, ET AL., CH. 1 REPRESENTING NONTRADITIONAL FAMILIES (Massachusetts Continuing Legal Education, Inc. 2001).

<sup>70</sup>Monarch, *supra* note 68, at 7.

<sup>71</sup>*See supra* note 63-64.

<sup>72</sup>*See supra* notes 64-65.

especially in the case of multiple embryos being implanted into different women. In this case, capacity for rational deliberation and self-direction is significantly restricted.

However, where the women have other reasonable means of achieving parenthood, a different outcome may be warranted. Although the tribulations endured by Mrs. Davis and Mrs. Kass prior to the freezing of the embryos seem to dictate another line of reasoning,<sup>73</sup> courts may decide that it is not unreasonable to have the party go through these procedures again.<sup>74</sup> Little to no significance is given to monetary or psychological costs.<sup>75</sup> Although treating the embryo as property may forbid the analysis of how the choices will affect the potential life of an embryo, one can look to the effects on those already living. In this examination, one may look as to how the community at large would suffer from the lack of that life coming to be. The problem revolves around how one would measure the benefits that potential life could bring to society. Just as easily as one could argue the possibility of that embryo resulting in a future president, medical researcher, or any other productive citizen, the same could be argued that the embryo may result in a serial killer, deviant, or other non-productive member of society. The tie-breaker to this struggle lies in how Locke reveres morality. In the current application of Locke's theory of persons, "[t]hese are the feelings we call on when arguing for housing for the homeless, health care for the poor, and inoculations and education for poor children. Such arguments are at bottom about the distribution of property, and are decided to a significant extent by how you define property."<sup>76</sup> To Locke, a property interest will only be recognized where, with a person's own bodily labor, one adds value to that property.<sup>77</sup> "Value is measured by the usefulness of the product to society."<sup>78</sup> Labor "which produces something useful—adds value to society—deserves to be rewarded."<sup>79</sup> Therefore, what Locke values is that which is useful where a discarded embryo cannot be. The public goal is to encourage productivity, to promote work.<sup>80</sup> The ideology of a community working to form its members into productive citizens fits much more easily into that framework, than to discard potential members and hypothesizing that they may not have been productive members anyhow.

Additionally, a court following a Lockean moral philosophy reasoned that "right[s] ... might in some instances be limited ... in order to preserve the 'safety, health, morals and general welfare of the public.'"<sup>81</sup> Creation of life would seem to be a public moral.

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<sup>73</sup>See *supra* notes 14-15, 24.

<sup>74</sup>See *supra* note 12.

<sup>75</sup>*Id.*

<sup>76</sup>Krueckeberg, *supra* note 33.

<sup>77</sup>See *supra* notes 35-36.

<sup>78</sup>Schaffner, *supra* note 36, at 1087.

<sup>79</sup>*Id.* at 1088.

<sup>80</sup>DUKEMINIER & KRIER, *supra* note 34.

<sup>81</sup>Koehlinger, *supra* note 61, at 737 (citing *Lochner v. New York*, 198 U.S. 45, 53 (1905)).

Under this ... approach, society's compelling interest in promoting the rational liberty of all will ensure that minority interests that do not unduly burden the capacities for rational deliberation and self-direction in others will be given at least as much, if not more, protection .... Thus, by rethinking the modern privacy cases under this Lockean moral philosophy approach, courts can achieve results that are more consistent, analytically sound and well-supported by a coherent moral philosophy.<sup>82</sup>

Upon determination of how property rights should be allocated and which exceptions should be accounted for, one must determine how the government should inform the public and enforce these rights. Locke's view on legislation is that it must be with limitation.<sup>83</sup> That is, "because the proper end of civil society is the common good and the common good entails 'the mutual Preservation of their Lives, Liberties, and Estates,' there naturally emerge several important limits to the power of the legislature."<sup>84</sup> Locke contended that the legislature must not arbitrarily regulate the means by which an individual can achieve rational liberty and determined that the best approach to resolving the constitutionality of state regulation is to ensure that it does not interfere with an individual's "asserted right to contract."<sup>85</sup>

Thus, Locke has laid down a hierarchy of property principles and those principles should be embodied in the laws set forth by the legislature.<sup>86</sup> The legislature should not enact regulations in regard to property that are not harmonious with that hierarchy of principles.<sup>87</sup> All of which may be preempted by an individual's right to contract.<sup>88</sup> While Locke seems weary of state or federal regulation of an individual's means, he does seem adamant in his belief in the right to contract. In *Lochner v. New York*, the United States Supreme Court found that:

The individual's 'personal liberty' is equivalent to his ability to "enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family." ... [T]he [c]ourt recognized as fundamental "the rights of individuals ... to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."<sup>89</sup>

Allocation of a property interest to an individual who mixes his labor and adds value to a resource, and the limitation of that individual's ability to exert control over that resource by disallowing the right to contract, undermines the entire ideology of the

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<sup>82</sup>*Id.* at 743.

<sup>83</sup>*Id.* at 739.

<sup>84</sup>*Id.* (citing LOCKE, *supra* note 36, bk. II §§ 123, 142.)

<sup>85</sup>*Id.* at 739-40.

<sup>86</sup>*See supra* notes 35-36, 51.

<sup>87</sup>Koehlinger, *supra* note 61, at 739.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 740 (citing *Lochner v. New York*, 198 U.S. 45, 56 (1905)).

labor theory.<sup>90</sup> Such a practice would discourage labor and, thus, diverge from every principle taught by Locke and embodied in property laws of today.<sup>91</sup>

*B. Economic Theory Of Property*

Opponents to Locke's labor theory believe that in some facets, the ideology is limited.<sup>92</sup> The limitation is demonstrated through the progression of property theorists. Beginning with Locke, property rights theorists assumed that property law began in a state of nature in which all goods were dedicated to the commons or belonged equally to everyone.<sup>93</sup> However, at some point, parts of the commons became sufficiently scarce and it became economically beneficial to reduce portions of the commons to private property.<sup>94</sup> The incentive of private ownership maximizes productivity because not only will people take better care of property that they own compared with property shared with the community, but it prevents overconsumption of communal property.<sup>95</sup> Thus, property rights evolve "in response to changing economic conditions. When a resource becomes more valuable due to changing technology or some other 'exogenous' shock, property rights over it are specified with greater precision. When the gains from granting and administering rights come to exceed the costs, the rights will be granted."<sup>96</sup> Therefore, opponents to Locke's views are of the opinion that property should not be apportioned to those who mix their labor with the resource. Rather, property should be apportioned in accordance with economic efficiency and, the theory of law and economics.<sup>97</sup>

Judge Richard A. Posner, a proponent of theories of law and economics, warns that efficient distribution of property rights requires universality, exclusivity, and transferability.<sup>98</sup> Universality requires that all property be privately owned and valued, allowing an exception for property considered to be an unlimited resource that is not devalued by the use of others.<sup>99</sup> Whether an embryo is an unlimited resource is debatable. There is an unlimited supply of eggs and an unlimited supply

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<sup>90</sup>See *supra* notes 35-36, 51.

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

<sup>92</sup>See *infra* notes 93-97.

<sup>93</sup>Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 *ECOLOGY L.Q.* 123, 134 (2001).

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

<sup>95</sup>J. Miles Hanisee, *View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 *PEPP. L. REV.* 127, 146 (1993).

<sup>96</sup>Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 *VAND. L. REV.* 1857, 1867 (2000).

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

<sup>98</sup>David L. Rosendorf, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 *U. MIAMI L. REV.* 701, 705 (1990) (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3-4, 7-8, 10 (3d ed. 1988)).

<sup>99</sup>*Id.*

of sperm but a limited resource of money. Additional factors go into the creation of an embryo. First, there is the willingness of women to donate eggs and men to donate sperm. Next, there is the fact that each embryo is unique, having its own separate DNA. The same is said about snowflakes, but one would hardly argue that they are a limited resource.

In the case of an embryo when that embryo is used by someone else or discarded, it diminishes another's capacity for use. When looked at in the situations presented in the *York*, *Kass*, and *Davis* cases, one can see that an embryo is a limited resource.<sup>100</sup> For example, Mr. and Mrs. Davis were only able to create seven embryos.<sup>101</sup> Mrs. Davis sought the right to only seven embryos, and there was no immediate prospect that any more embryos from Mrs. Davis' egg and Mr. Davis' sperm would be forthcoming.<sup>102</sup> Therefore, if embryos are limited in supply, an efficient property system would require that they be subject to private ownership.<sup>103</sup>

To meet the requirement of exclusivity, one must have the ability to prevent others from using one's property.<sup>104</sup> Therefore, if an embryo is property, the next important element is whose property it is. If it is determined that the embryo is the property of the party seeking to discard it, then that party would be entitled to prevent its use. In contrast, if the party seeking to use the embryo is deemed to have the superior property interest, that party may exclude the other party from having any authority over the embryo. Further inquiry into economic efficiency will determine who would acquire ownership of the embryo, if that embryo is considered property.

Transferability is the idea that the value of property is maximized through a capitalist market of free exchange.<sup>105</sup> Whether such a notion is applicable to an embryo must be considered in relation to whether an embryo is property and, evaluated along the guidelines of other pieces of property. Free exchange not only implies allowing the market to determine the worth of a resource but also allowing that resource to be free from legislative and judicial interference.<sup>106</sup>

In the realm of economic theory, property rights should be allocated to shape behavior in a manner that maximizes productivity.<sup>107</sup>

Proceeding on the basic assumption that man is a rational maximizer of his own self-interest, Posner derives certain fundamental concepts: (1) that there is an inverse relation between the price charged and the quantity demanded of a good; (2) that the cost of a good is the price that the resources consumed in making and selling it would command in their next-best use; and (3) that resources will gravitate toward their most valuable uses if voluntary exchange is permitted. These basic economic

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<sup>100</sup>See *supra* notes 6-32.

<sup>101</sup>See *supra* note 12.

<sup>102</sup>See *supra* notes 12-21.

<sup>103</sup>See *supra* note 99.

<sup>104</sup>Rosendorf, *supra* note 98, at 705.

<sup>105</sup>*Id.*

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

<sup>107</sup>See *supra* notes 93-98.

principles lead to the conclusion that the value of a thing is determined by the exchanges people will engage in to buy or sell it. Essentially, what this means is that in a free-market system, all goods will be put to their best uses because those people who derive the most value from them will give the most to obtain them.<sup>108</sup>

Posner is known for applying economic theory outside of its traditional domain. Posner employed his first fundamental concept, more commonly referred to as the law of supply and demand, in the arena of the adoption market.<sup>109</sup> He argues that regulatory interference in the adoption market has created a shortage of babies and allowed for the existence of a black market for babies.<sup>110</sup> Such regulation has additionally allowed for a surplus of unadopted children remaining in foster homes at the public's expense.<sup>111</sup> Posner argues that the most prohibitive regulation is the price at which adoption agencies may contract with the birth parents, which prevents the adoption market from functioning at equilibrium.<sup>112</sup> As such, birth parents who place less value in their offspring would be more inclined to place their child up for adoption while adoptive parents, who would arguably place a higher value on a child's life, would have the opportunity to adopt.<sup>113</sup> Such an argument not only illustrates the law of supply and demand but also takes into account the child's welfare.

It may be inferred that a significant number of couples seeking to adopt children are infertile, as exemplified by the tribulations of Mrs. Davis.<sup>114</sup> It also may be asserted that parties prohibited by courts to use the frozen embryos may consider the adoption market, or even the black market for adoption, as the next reasonable alternative. Such an occurrence would add to the demand for babies while increasing the shortage, which pulls the adoption market further away from equilibrium. Due to the expense of the IVF process, it is also a logical assumption that the majority of couples utilizing IVF procedures are white couples.<sup>115</sup> Allowing these embryos to become white babies would decrease the shortage of white babies and allow for the price of adoption to more closely resemble equilibrium. Therefore, it would seem that, because an embryo has the value of potential life, application of Posner's first fundamental concept would weigh in favor of the party seeking to use the embryo.

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<sup>108</sup>Rosendorf, *supra* note 98, at 704-05.

<sup>109</sup>Francesco Parisi & Ben W.F. Depoorter, *Continuing Tributes to the Honorable Richard A. Posner Private Choices and Public Law: Richard A. Posner's Contributions to Family Law and Policy*, 17 J. CONTEMP. HEALTH L. & POL'Y 403 (2001).

<sup>110</sup>*Id.* at 410.

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

<sup>112</sup>*Id.* at 410-11.

<sup>113</sup>*Id.* at 411.

<sup>114</sup>*Davis*, 842 S.W.2d at 591-92.

<sup>115</sup>*See supra* note 5.

Embodied in Posner's second fundamental concept dealing with a property's "next-best use" is the idea of "opportunity cost."<sup>116</sup> That is, by utilizing an element of property in one way, other uses of the property must be forgone.<sup>117</sup> A cost that is born by those other than the actors, such as opportunity cost, is an externality.<sup>118</sup> Optimal use of property requires minimization of costs;<sup>119</sup> thus, utilization of property can only be economically efficient where the costs are outweighed by the benefits.

The opportunity cost in utilizing the embryo in the manner proposed by the party seeking non-use is extremely high. First, it could possibly deny the party seeking to use the embryo parenthood. This is where the "other reasonable means" of achieving parenthood rationale may find root in economic theory. Second, the opportunity forgone is that of potential life, which includes all the accomplishments of life and how that life may have affected many other lives. It is this second argument that would be most persuasive to Posner.<sup>120</sup>

Economic theory warns that, whenever the effects generated by private agreements fall on third parties who have not participated in the [decision of how the property is utilized] the allocation of resources may diverge from the ideal equilibrium ... [and economic efficiency] will not be met if an exchange has made someone better off while making others worse off.<sup>121</sup>

Additionally, Posner believes that "[i]n a world of scarce resources, waste should be regarded as immoral."<sup>122</sup>

One may question how Posner, being a strong advocate of personal autonomy, would evaluate the opportunity cost of the party seeking nonuse of the embryos.<sup>123</sup> Use of the embryos would cause this person a failure to exercise their right to privacy and may force him to bear the burden of unwanted parenthood. Posner believes that, "[i]f the cost of vindicating or exercising rights exceeds their marginal returns, the claim will not be exercised."<sup>124</sup> That is, if the cost of preventing life of the embryo outweighs the benefit the donor would receive by avoiding parenthood, the privacy interest is preempted. Even though Posner is an advocate of personal autonomy, he recognizes the need for its sacrifice where exercising such autonomy poses too great a cost.

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<sup>116</sup>Rosendorf, *supra* note 98, at 704-05.

<sup>117</sup>Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 402 (1991).

<sup>118</sup>William D. Soileau, *Past is Present: Urban Real Property Rights and Housing Reform in the People's Republic of China*, 3 PAC. RIM L. & POL'Y J. 299, 306 (1995).

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

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

<sup>121</sup>Parisi & Depoorter, *supra* note 109, at 417-18.

<sup>122</sup>York, *supra* note 117, at 403.

<sup>123</sup>Rosendorf, *supra* note 98, at 704-05.

<sup>124</sup>Saileau, *supra* note 118, at 306.

Posner's third fundamental concept of economic theory is that in the ideal market place, resources or property will gravitate toward their most valuable use.<sup>125</sup> In a situation where one party seeks the embryo for implantation and the other party wishes for the embryo to be discarded, the embryo's most valuable use is implantation. A discarded embryo can serve no purpose and therefore has no use. However, in the situation where one party seeks to use the embryo for implantation and the other wishes to allow the IVF clinic to appropriate the embryo for biological research, the answer is not as clear. One could argue that an embryo's most valuable use is its potential for life. Yet, another may argue that the maximum use of an embryo is met through its sacrifice for research, which results in a larger abundance of potential life for others.

According to Posner, the value of a resource or element of property is measured by "the exchanges people will engage in to buy or sell it."<sup>126</sup> The question, then, is whether an IVF clinic would pay more to obtain the embryo for research or whether a party seeking its use would pay more to have the embryo implanted. Could one assume that Posner would advocate that the embryo goes to the highest bidder?

To answer that question one must look back to the root of economic theory. The basis for economic theory derived from the utilitarian approach to property.<sup>127</sup> While utilitarianism still favors maximum productivity, it views property as a means to an end, and its purpose is to maximize the happiness of all citizens by allocating and promoting the general welfare of society.<sup>128</sup> Therefore, the issue is whether it is in the best interest of society to allow that embryo life or use it for research in the hopes that it will allow for others to live. A utilitarian would choose the means that brings about the greatest benefit to society as a whole.<sup>129</sup> The

dichotomy within the self is one that needs to [be] decided between choices of 'consequential' or 'deontologic nature'... [For example imagine] being faced with the option of torturing a child in order to save the rest of the world of all harm. The consequential component of our moral thinking cares about the number of people that will be injured under each decision. By contrast, the 'deontologic' component refers to the component that will have nothing to do with hurting the child.<sup>130</sup>

The economic approach to property law grew out of dissatisfaction with the ephemeral concept of human happiness and the difficulty of how it could be measured.<sup>131</sup>

Given that Posner is a true economist, unhappy with impractical measure of human happiness or society welfare, it is likely that Posner would award the embryo to the party who would pay more for it. As noted previously, Posner believes that

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<sup>125</sup>Rosendorf, *supra* note 98, at 704.

<sup>126</sup>*Id.* at 704-05.

<sup>127</sup>*Id.* at 703.

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

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

<sup>130</sup>Parisi & Depoorter, *supra* note 109, at 420.

<sup>131</sup>Rosendorf, *supra* note 98, at 703.

the person who would value a resource more is the person willing to pay more for it.<sup>132</sup> Therefore, if an embryo is property, the wealth maximization principle should apply. Whether Posner believes that an embryo is property plays an important role, which is illuminated by his views on abortion.<sup>133</sup> Further investigation into Posner's approach to abortion shows that while economics may pinpoint

family and gender legal issues and provide some answers, abortion is one of those social dilemmas that cannot be solved through economic analysis. There is a simple libertarian solution to abortion only if one does not consider the fetus's utility. Without considering the interest of the fetus, the mother should be entitled to abort, subject to the father's permission if an implicit or explicit contract makes the fetus a joint asset. However, if the fetus is a member of society whose welfare counts, such a contract has third party effects and may not be presumed to be wealth maximizing. Likewise, if one recognizes the sanctity of life and the limits of any social policy in the face of such supreme value, no insight can be derived from economic analysis or libertarian ideologies. Since the decision to believe in the supreme value of life from the time of conception and the decision to include the utility of the fetus in the social welfare calculation is a moral one, libertarians and economists have nothing to say on the matter of abortion.<sup>134</sup>

Therefore, only then, if an embryo is property can economic theory be applied.

According to Posner, economic theory dictates that if an embryo is property, then it should not be discarded.<sup>135</sup> In application of all three of his fundamental principles the party seeking to use the embryo should prevail.<sup>136</sup> The only question arises when the dispute ensues between the parties and a contract exists dictating that in such a dispute, the embryos should be used by the fertility clinics for biological research. To determine the proper outcome one must look to Posner's disposition on contract law.

Just as adoption principles were used to clarify the fundamental concepts of the economic theory, so can Posner's position on enforceability of surrogacy contracts be used to evaluate enforcement of contracts concerning frozen embryos.<sup>137</sup> According to Posner, parties will not enter into a contract unless they believe that it will be mutually beneficial.<sup>138</sup> Efficiency is the core principle in the economic approach to contracts because efficiency maximizes wealth, and in the economic world, wealth is how one measures happiness.<sup>139</sup> Posner believes that freedom of

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<sup>132</sup>*Id.* at 704-05.

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

<sup>134</sup>Parisi & Depoorter, *supra* note 109, at 416.

<sup>135</sup>Rosendorf, *supra* note 98, at 705.

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

<sup>137</sup>*See infra* notes 136-140.

<sup>138</sup>Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women of a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 150 (1997).

<sup>139</sup>York, *supra* note 117, at 403.

contract must be held above all else, even in cases where “ex post facto screening of fairness and social desirability becomes necessary for the protection of the contracting parties and society at large,”<sup>140</sup> such as is argued in the case of surrogacy contracts. When contracts are subject to legislative or judicial interference an added element of uncertainty exists.<sup>141</sup> Uncertainty is contrary to the wealth maximizing principle because it lowers the value of a resource due to the fact that the purchasing party would have to be compensated for such uncertainty.<sup>142</sup> Therefore, enforce those contracts that offend social desirability because, just as in the case of any other contract, it is in the best interest of the parties to make contracts enforceable.<sup>143</sup>

Opponents to enforceability of surrogate contracts argue that Posner’s theory is flawed in three areas.<sup>144</sup> First, where Posner states that parties enter contracts for a mutual benefit because people are “rational maximizers” of their own wealth, opponents argue that surrogate mothers cannot fully appreciate how it will feel to give up their child before that situation actually occurs.<sup>145</sup> Therefore, surrogate mothers are not in a position to make an informed decision that maximizes their wealth because they underestimate the negative effect that giving up their child will have on them.<sup>146</sup> This argument may be likened to infertile couples who contract away their rights to the embryos before a dispute arises as to their use.<sup>147</sup> Parties realize that multiple eggs will be harvested, but they may underestimate the amount of attempts it will take for a successful IVF procedure.<sup>148</sup> Besides underestimating the probability that they may actually need every embryo created and given that the contract is signed prior to the procedure, they may also underestimate the despair they would feel in undergoing the procedure again with another sperm donor.<sup>149</sup> One especially may underestimate the possibility of a dispute even arising.<sup>150</sup>

The second flaw, opponents argue, of Posner’s theory is that he believes that the majority of surrogate mothers are women who have already had children and have a level of maturity that allows for an informed decision.<sup>151</sup> Posner cites empirical data that seems to show that it is doubtful that surrogate mothers are poor and desperate women driven to rent their bodies as a last option at survival.<sup>152</sup> Instead, their

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<sup>140</sup>Parisi & Depoorter, *supra* note 109, at 426.

<sup>141</sup>*Id.* at 412-13.

<sup>142</sup>*Id.* at 413.

<sup>143</sup>*Id.* at 413-14.

<sup>144</sup>York, *supra* note 117, at 404.

<sup>145</sup>*Id.* at 404-05.

<sup>146</sup>*Id.* at 405.

<sup>147</sup>*Id.*

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

<sup>149</sup>York, *supra* note 117, at 405.

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>Parisi & Depoorter, *supra* note 109, at 414.

motivation is empathy for the father's infertile wife.<sup>153</sup> Opponents argue that the level of a woman's maturity and the fact that she has children is comparable to that of an individual blind at birth who cannot truly appreciate what it is to see.<sup>154</sup> Nothing can prepare a woman for giving up a child except actually doing it, therefore, neither maturity, having other children, nor publicity of surrogacy cases gone sour can truly make surrogate mothers fully informed.<sup>155</sup> Again, in comparing this situation to that of embryos, the parties cannot truly appreciate the desperation they will feel in the need to use those embryos until the time comes when the embryos are needed.<sup>156</sup>

Third, opponents believe that Posner's prediction that non-enforcement of surrogacy contracts will vastly disadvantage contract law in general is overstated.<sup>157</sup> Instead, adversaries say, surrogates are a unique class of people entitled to special protection given the fact that they are not in a position to make a fully informed decision when entering into the contract.<sup>158</sup> Surely then, infertile couples can be seen as a unique class in need of that same protection. Infertile couples are uninformed as to the desperation one party may feel in the inability to use the frozen embryos.

Although such criticisms exist, Posner, like Locke, holds above all else the right to contract.<sup>159</sup> Posner, like Locke although for different reasons, advocates the use of the embryo.<sup>160</sup> Both theorists also recognize that an exception should be recognized where the parties have previously contracted upon the matter in dispute.<sup>161</sup> Both Posner and Locke hold one's fundamental right to contract so high they advocate that such a contract should preempt the fundamental tenants of their respective school of thought.<sup>162</sup> Additionally, Posner would advocate the use of contracts to avoid litigation.<sup>163</sup> The cost of litigation is an external cost and as such economists seek to elude litigation whenever possible.<sup>164</sup>

Another aspect upon which Posner and Locke agree is that of governmental interference in the form of promulgating regulation.<sup>165</sup> While Posner does not look favorably on judicial and legislative intervention, he believes that the regulations that

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<sup>153</sup>*Id.* at 413.

<sup>154</sup>York, *supra* note 117, at 405.

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

<sup>156</sup>Parisi & Depoorter, *supra* note 109, at 414.

<sup>157</sup>York, *supra* note 117, at 405.

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

<sup>159</sup>*See supra* notes 19, 138-143.

<sup>160</sup>*See supra* notes 51, 133.

<sup>161</sup>*See supra* notes 19, 138-143.

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

<sup>163</sup>*See supra* notes 163-64.

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

<sup>165</sup>*See supra* notes 83-85, 118.

exist should be defined in a clear manner.<sup>166</sup> A clear indication of what is expected of people will decrease information cost and external costs of litigation.<sup>167</sup> For those same reasons, rights and regulations should be public, predictable, easily discoverable, and more stable than less.<sup>168</sup> Posner suggests “generally applicable laws, regulations and regulatory procedures, which aid in the discovery of rights boundaries and the equitable enforcement of rights and duties as defined.”<sup>169</sup> Institutions of the state should be held responsible and “should have [the] sufficient powers, duties, liabilities, and resources ... necessary to facilitate the neutral validation and enforcement of property rights and duties at the least possible cost.”<sup>170</sup> Public actors should also be held responsible for enforcing these generally applicable laws in a faithful manner.<sup>171</sup>

### III. CURRENT REGULATION OF EMBRYONIC MATERIALS

#### A. Statements By Expert Agencies

IVF, in general, is minimally regulated at the federal level.<sup>172</sup> In fact, the IVF industry operated without any federal regulation for many years.<sup>173</sup> However, in 1992, Congress enacted the Fertility Clinic Success Rate and Certification Act.<sup>174</sup> This act called for the Centers for Disease Control and Prevention to develop a model certification procedure for IVF clinics and laboratories that could be adopted by each state, as well as compile IVF pregnancy success statistics to be annually reported.<sup>175</sup> The purpose for such enactment, besides reporting pregnancy success rates, was to universalize consistent IVF procedures in hopes of assuring quality and adequate recordkeeping at each certified IVF clinic and laboratory.<sup>176</sup> This legislation may fail to fulfill its objectives because “clinic certification and reporting are voluntary under the Act, with the only penalty for noncompliance being public identification as a program that has failed to do so.”<sup>177</sup>

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<sup>166</sup>Soileau, *supra* note 118, at 307.

<sup>167</sup>*Id.*

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

<sup>169</sup>*Id.* at 308.

<sup>170</sup>*Id.*

<sup>171</sup>Soileau, *supra* note 118, at 308.

<sup>172</sup>Peter E. Malo, *Deciding Custody of Frozen Embryos: Many Eggs Are Frozen But Who is Chosen?*, 3 DEPAUL J. HEALTH CARE L. 307, 311 (2000).

<sup>173</sup>Keith A. Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265 (1977).

<sup>174</sup>42 U.S.C. §§ 201, 263(a)(1) – 263(a)(7) (Supp. 1996).

<sup>175</sup>Malo, *supra* note 172, at 311.

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

<sup>177</sup>*Id.* at 311-312.

After deeming the IVF procedure ethically acceptable in 1986, the Ethics Committee of the American Fertility Society distributed ethical guidelines for IVF.<sup>178</sup> While these guidelines did not formally comment on the moral classifications of embryos, the Committee stated that an embryo “deserves greater respect than accorded other human tissue, since it has the potential to become a human person, it is not accorded the respect of an actual human being.”<sup>179</sup> This was the notion followed by the *Davis* court.<sup>180</sup> Even though the embryos were equated greater deference than mere property, Mr. Davis’ privacy interest coupled with Mrs. Davis’ ability to achieve motherhood by other reasonable means allowed for a ruling in favor of Mr. Davis.<sup>181</sup>

[T]his human potential limits ‘the circumstances in which a[n] ... embryo may be discarded or used in research and the statute makes clear that embryos should not be treated as a person because of a lack of features of personhood, individual development, and the possibility of never reaching the full biological potential. Therefore, while ... embryos are entitled to ‘profound respect,’ such respect does not entitle the embryo to full moral and legal rights accorded to full persons.’<sup>182</sup>

Additionally, these guidelines call for the commissioning couple to sign a blanket consent form that covers the various steps involved in IVF. The commissioning couple also has sole discretion in deciding the disposition of the embryos as long as such disposition is within the medical and ethical standards set forth in the guidelines themselves.<sup>183</sup> “Similar to the [Fertility Clinic Success Rate and Certification] Act, compliance with the American Fertility Society’s guidelines is purely voluntary.”<sup>184</sup>

The Committee on Medicolegal Problems and the Council on Ethical and Judicial Affairs of the American Medical Association addressed the ethical and legal issues involved in the freezing of excess embryos in the IVF process. This report made three recommendations:

- (1) Primary authority for frozen ... embryos rests with the two gamete providers, and they must agree to any disposition of the ... embryos;
- (2) Agreements by the gamete providers for the future disposition of their...embryos should generally be enforceable. However, either gamete

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<sup>178</sup>*Id.* at 312.

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

<sup>180</sup>*Davis*, 842 S.W.2d at 597.

<sup>181</sup>*Id.* at 604.

<sup>182</sup>Malo, *supra* note 172, at 312-13 (citing Ethics Comm. of the Am. Fertility Soc’y, *Ethical Consideration of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY iii (1986), 77S, 29S-30S).

<sup>183</sup>Barbara Gregoratos, *Issues in Procreational Autonomy Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977 (1986).

<sup>184</sup>Malo, *supra* note 172, at 312-13 (citing *Ethics Comm. of the Am. Fertility Soc’y, Ethical Consideration of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY iii (1986), 77S, 29S-30S).

provider should be able to show that changed circumstances make enforcement of the agreement unreasonable. The gamete providers should not be required to enter into an agreement that will govern the future disposition of their ... embryos; (3) Frozen ... embryos may be used by the gamete providers, donated for use by other parties, or donated for research. The frozen ... embryo may also be allowed to thaw and deteriorate.<sup>185</sup>

In a letter to the editor of the Journal of the American Medical Association, an individual voiced the concerns of the medical community.<sup>186</sup> The letter predicted that allowing the donation of embryos to other parties would result in the commodification of children.<sup>187</sup> The author argued that the donation of embryos would cause the resulting child emotional harm due to the inability to identify with the non-biological parents and the lack of information concerning family background, inherited diseases, and overall knowledge of medical and genetic heritage.<sup>188</sup> Additionally, the recommendations given by the Journal "were criticized for failing to 'offer a convincing moral and legal rationale for giving gamete providers absolute discretion over the fate of frozen embryos' and suggested that such a rationale be developed."<sup>189</sup>

The Board of Trustees replied to these criticisms by standing its ground on its recommendation to donate embryos, stating that such donation is not commercially motivated but motivated by altruistic sentiments.<sup>190</sup> Additionally, the Board stated that the emotional development of a resulting child is at best speculative and that "it is difficult to conclude that [he/she] would have been better off not being born."<sup>191</sup> The Board did concede that embryos should under no circumstances be sold.<sup>192</sup>

Posner argues that economic efficiency calls for rules to be easily discoverable and adequately and informatively defined.<sup>193</sup> Additionally, Posner pronounces that institutions of the state be vested with the power to sufficiently enforce the

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<sup>185</sup>Virginia Godoy, *Where is Biotechnology Taking the Law? An Overview of Assisted Reproductive Technology, Research on Frozen Embryos and Human Cloning*, 19 J. JUV. L. 357, 363 (1998) (citing Frozen Pre-Embryos (Board of Trustees Report) JAMA, May 9, 1990, at 2484, available at 1990 WL 3305235).

<sup>186</sup>*Id.* at 364.

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>*Id.* (citing Jonathan Lewin, Frozen Pre-Embryos (Letter to the Editor), JAMA, Nov. 11, 1990, at 2382, available at 1990 WL 3305880).

<sup>190</sup>Godoy, 19 J. JUV. L. at 363 (citing Raymond C. Grandon, et al., Frozen Pre-Embryos (Reply to the letter to the Editor), JAMA, Nov. 11, 1990, at 2382, available at 1990 WL 3305880).

<sup>191</sup>Virginia Godoy, *Where is Biotechnology Taking the Law? An Overview of Assisted Reproductive Technology, Research on Frozen Embryos and Human Cloning*, 19 J. JUV. L. 357.

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

<sup>193</sup>Soileau, *supra* note 118, at 307.

distribution of rights.<sup>194</sup> Locke and Posner further contend that if regulation is needed, it must not be arbitrary.<sup>195</sup> The regulations set forth by these administrative agencies do not meet the requirements set forth by Locke and Posner. The first criticism is that they are voluntary, which cannot only be considered arbitrary, but does very little to guide state legislators or the courts, increasing external information and judicial costs.<sup>196</sup> These regulations anticipate arguments of a lack of informed consent by requiring the reporting of results and statistics as well as having the commissioning couple sign consent forms, but do not rise to the extent of quashing the argument.<sup>197</sup> Additionally, the Ethics Committee of the American Fertility Society blurs the line between property and non-property by creating a separate quasi-property category for the embryo.<sup>198</sup> However, the regulation fails to dictate to the state legislatures or the courts what guidelines should be applied to this new class of property. Finally, while it seems that the institution of contract law would supply the only means for universality in the treatment of embryos, the Committee on Medicolegal Problems and the Council on Ethical and Judicial Affairs of the American Medical Association states that couples do not have to contract as to the disposition of the embryos in the case of a dispute.<sup>199</sup>

Current state statutes reflect some of the ideologies set forth by the foregoing expert agencies.<sup>200</sup> Some states choose to categorize an embryo as a person and therefore apply moral guidelines to its treatment.<sup>201</sup> These statutes address the physical and psychological welfare of the resulting child, while at times ignoring regulation of the IVF procedure itself. Other states dictate that an embryo is property, yet in some instances fail to apply property rationales to its treatment.<sup>202</sup> Still, other states refuse to label the embryo as either property or non-property, leaving that burden on the court.<sup>203</sup> The classification as to property or non property is further skirted through reverence to contract law.

#### B. Current State Statutes

Due to the lack of federal regulation, states retain the power to enact and adopt their own legislation concerning IVF procedures. These statutes vary vastly from one another and act to prohibit universal and consecutive outcomes between states.<sup>204</sup> Given that many of the states do not give proper direction to the court, they do little

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<sup>194</sup>*Id.* at 308.

<sup>195</sup>*See supra* notes 83-85, 118.

<sup>196</sup>*See supra* notes 177, 184.

<sup>197</sup>*See supra* notes 175-76, 183.

<sup>198</sup>*See supra* notes 179, 182.

<sup>199</sup>Godoy, *supra* note 185.

<sup>200</sup>*See infra* notes 201-232.

<sup>201</sup>*Id.*

<sup>202</sup>*Id.*

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

<sup>204</sup>*Id.*

to reduce information and judicial costs as well as prohibit universal and consecutive outcomes within a state.

The most restrictive statute is the law in Louisiana.<sup>205</sup> Louisiana law regards an embryo as a "person" and, therefore, prohibits it from being purposely destroyed.<sup>206</sup> Under the statute all embryos must be transferred to a uterus.<sup>207</sup> If the commissioning couple, by notarial act, gives up their right to implantation, then their embryos must be made available for adoptive implantation.<sup>208</sup> While in a state of cryopreservation, an embryo is "not property of the physician, IVF clinic, or the gamete donors. The embryo can sue or be sued, but the state does not award inheritance rights unless the embryo develops into a child born in a live birth."<sup>209</sup> Additionally, the commissioning couple's rights are preserved only where they disclose their identity; where no such disclosure is made, the treating physician is deemed to be the temporary guardian over the frozen embryo(s).<sup>210</sup>

In contrast, a Virginia statute considers embryos to be the property of the donor or commissioning couple.<sup>211</sup> With respect to the commissioning couple, the IVF clinic has the legal rights and duties of a bailee.<sup>212</sup> While the Virginia statute is more consumer-oriented because it calls for IVF clinics to disclose to the couple the likelihood of procedural success,<sup>213</sup> it does not provide for the disposition of the embryos if the couples disagree.

An Illinois statute bans the sale of a fetus as well as experimentation upon a fetus.<sup>214</sup> The statute further defines an unborn child as "any individual of the human species from fertilization until birth."<sup>215</sup> Additionally, while the Illinois statute allows for the harvesting and implantation involved in the IVF procedure, it provides ambiguous language as to the disposal of remaining embryos.<sup>216</sup> Therefore, the courts are left with the decision as to whether the word "fetus" is synonymous with "embryo."<sup>217</sup>

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<sup>205</sup>Malo, *supra* note 172, at 313.

<sup>206</sup>*Id.*

<sup>207</sup>*Id.* at 314.

<sup>208</sup>*Id.*

<sup>209</sup>*Id.* at 313.

<sup>210</sup>Godoy, *supra* note 185.

<sup>211</sup>Malo, *supra* note 172, at 314.

<sup>212</sup>*Id.*

<sup>213</sup>Mary Ann Davis Moriarty, *Addressing In Vitro Fertilization and the Problem of Multiple Gestations*, 18 ST. LOUIS U. PUB. L. REV. 503, 513 (1999).

<sup>214</sup>Malo, *supra* note 172, at 315.

<sup>215</sup>*Id.* (citing 720 ILCS 5/9-1.2(3)(b) (West 1993)).

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

Pennsylvania enacted IVF legislation as a part of its abortion statute.<sup>218</sup> The statute calls for quarterly reports to be filed by IVF clinics and made available to the public.<sup>219</sup> The information in these reports shall include: the location and personnel of the clinic, the number of eggs fertilized, the number of embryos destroyed or discarded, and the number of women implanted through IVF at each clinic.<sup>220</sup> While this statute holds IVF clinics more accountable to the public, it provides little guidance as to whether an embryo is property, if so who's property, and what should be done in the case of a dispute between the commissioning parties. Additionally, the statute does not adequately put the public on notice of the success rate of IVF procedures.<sup>221</sup> Nor does it inform participating couples as to the risks associated with the procedure or the complications that arise due to decisions concerning excess embryos.

A New Hampshire statute requires that a couple wishing to participate in IVF be medically evaluated and deemed medically acceptable.<sup>222</sup> Additionally, the statute requires that the couple be examined by a psychiatrist, psychologist, pastoral counselor or social worker licensed to practice in the state of New Hampshire.<sup>223</sup> The purpose of the psychiatric evaluation is said to ensure the couple's ability to give the potential child love, affection, and guidance.<sup>224</sup> Records of the findings and conclusions are kept by those performing the evaluation.<sup>225</sup> The commissioning couple must waive their rights against disclosure of confidential information and communications between doctor or counselor-type professionals by causing a copy of the findings and conclusion to be filed with the court.<sup>226</sup> Additionally, a licensed child placement agency or the department of Health and Human Services must conduct a home study and monitor the potential IVF couple.<sup>227</sup> The purpose of the home study is to assess the potential IVF couple's ability to provide shelter, food, clothing, medical care, and other basic necessities to the child.<sup>228</sup> While the New Hampshire statute is most intrusive into the potential IVF couple's privacy for the overall welfare of the child, the statute fails to regulate the IVF procedure itself.<sup>229</sup>

Under Florida law, a couple participating in an IVF procedure must enter into a written agreement with their treating physician providing for the disposition of

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<sup>218</sup>Moriarty, *supra* note 213, at 513.

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

<sup>220</sup>*Id.*

<sup>221</sup>*Id.*

<sup>222</sup>*Id.* at 513-14.

<sup>223</sup>Moriarty, *supra* note 213.

<sup>224</sup>Mary Ann Davis Moriarty, *Addressing In Vitro Fertilization and the Problem of Multiple Gestations*, 18 ST. LOUIS U. PUB. L. REV. 503, 514.

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

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

<sup>227</sup>*Id.*

<sup>228</sup>*Id.*

<sup>229</sup>Moriarty, 18 St. Louis U. Pub. L. Rev. at 514.

frozen embryos upon divorce, death of a spouse, or any other unforeseen events.<sup>230</sup> Although a written agreement is required under the Florida statute, the statute also regulates cases where no written agreement exists.<sup>231</sup> In the absence of a written agreement, the statute grants the commissioning couple joint decision-making authority.<sup>232</sup> However, the statute fails to address the situation, such as divorce, in which the couple disagrees as to the disposition of frozen embryos, and where no written agreement is in existence.

#### IV. OUTCOME DETERMINATION THROUGH CONTRACT LAW

In order to ensure consistent outcomes, the Florida statute suggest that the legislature be compelled to dictate that IVF clinics enter into contracts with the commissioning parents addressing the disposition of embryos. This argument is harmonious with the teachings of both Locke and Posner.<sup>233</sup> The rationale is that these contracts should govern in events such as divorce, the death of a party, or when a party simply changes his/her mind. In actuality, the enforceability of such contracts is being challenged through the doctrine of changed circumstances, the special principles applied to adhesion contracts, and the idea that such contracts should be void as against public policy.<sup>234</sup>

For a contract to be enforceable: (1) one party must make an "offer" to the other, (2) which must then be "accepted" by the other party, and (3) that offer and acceptance must be supported by an exchange of "consideration."<sup>235</sup> An offer involves a proposal to enter into an agreement. It is a promise made by one party to the other of what he/she will do in exchange for a promise or act by the other party.<sup>236</sup> An offer takes place when one party communicates to the other a willingness to enter into an agreement in such a way that justifies the other party in concluding that an enforceable agreement will result if they accept.<sup>237</sup>

An IVF clinic offers to perform the IVF procedure to the commissioning couple for payment and for acceptance to the terms and conditions placed on that offer. The condition placed on that offer is the disposition of the frozen embryos should the couple disagree as to their use.

Acceptance to an offer occurs when the offeree, by words or conduct, demonstrates "unconditional assent to the terms of the offer ... Acceptance may be reasonably implied by words or conduct."<sup>238</sup> The commissioning couple accepts the

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<sup>230</sup>Malo, *supra* note 172, at 313.

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

<sup>232</sup>*Id.*

<sup>233</sup>*See supra* notes 19, 136-141.

<sup>234</sup>*See infra* notes 290-94.

<sup>235</sup>William A. Waddell, Matthew Horan, Stanley Rauls, Seven Rowell, *Proposed Arkansas Model Contract Jury Instructions [Unofficial Preliminary Draft for Comments]*, 20 U. ARK. LITTLE ROCK L.J. 1 (1997).

<sup>236</sup>*Id.*

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

<sup>238</sup>*Id.* at 11.

offer made by the IVF clinic by signing the contract. The terms that the couple accepts encompass the clause dictating the fate of the embryos in case the couple disagrees as to their use.

Consideration is present when the promise or performance represents a bargained-for exchange.<sup>239</sup> “A promise or performance is bargained-for if it is sought by one party in exchange for his promise. Consideration can consist of a promise, an act, or a promise not to do something that a party has a legal right to do.”<sup>240</sup> Consideration can be demonstrated through “a benefit to the other party making the promise to which he is not already lawfully entitled, or any detriment to the other, that he was not already lawfully bound to suffer.”<sup>241</sup>

The consideration in a contract between the commissioning couple is the bargained-for exchange of a promise of payment for services. That is, the couple seeks the promise by the IVF clinic to perform the IVF procedure and pays a fee for that promise.

Given that a contract between a commissioning couple can theoretically meet all the elements of an enforceable contract, it seems as though requiring IVF clinics to execute such contracts before allowing a couple to participate in IVF procedures would be the most administratively effective method. However, such contracts may not be enforceable where a defense exists against their enforcement. Commentators suggest that one possible defense is the doctrine of changed circumstances.<sup>242</sup>

Nonperformance of a contract may be excused for changed circumstances as expressed in §§ 261-272 of the Restatement (Second) of Contracts.<sup>243</sup> For a subsequent event to be deemed a changed circumstance for the purpose of performance excusal, “the party seeking relief must establish that both parties assumed at the time of contracting that the changed circumstances would not occur and the changed circumstances made performance as agreed impracticable.”<sup>244</sup> If performance as agreed upon would be impracticable, then the duty to perform is discharged.<sup>245</sup> Therefore, the defense of changed circumstance requires impracticability and lack of foreseeability.<sup>246</sup> Impracticability is best explained through a commercial context.<sup>247</sup> “Under this interpretation, the promisor was excused for nonperformance when, due to changed circumstances, the performance still could be performed, but only at excessive and unreasonable cost.”<sup>248</sup> Is, then,

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

<sup>240</sup>Waddell & Horan, *supra* note 235, at 11.

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

<sup>242</sup>Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 WIS. L. REV. 795, 800 (2001).

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

<sup>244</sup>*Id.*

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

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

<sup>247</sup>P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213 (1995).

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

the cost of the forgone use of the embryos excessive and unreasonable? Does the party's ability to achieve parenthood by other reasonable means affect the answer?

In addition to impracticability, in the arena of changed circumstance, courts tend to look at whether the subsequent events were foreseeable by the parties.<sup>249</sup> Therefore, even if performance of the contract is impracticable, a party's performance may not be excused where the subsequent event or changed circumstance could have been foreseen or anticipated by the parties.<sup>250</sup> Here, parties in favor of allowing the doctrine of changed circumstance in contracts between IVF clinic and commissioning couples propose that while a party may be charged with the ability to foresee the possibility of certain subsequent events, the couple could not foresee the feelings associated with those events.<sup>251</sup> As described earlier in the surrogate setting, a mother cannot know what it is to give up a child until she has done so.<sup>252</sup> The same argument could be made that a woman cannot know her desperation to use the embryos until she is faced with the fact of having them destroyed.

One argument is premised on the fact that the doctrine of changed circumstances will apply to any clause restricting the distribution of embryos because of the great amount of time that passes.<sup>253</sup> This notion involves the inability to predict how one may feel when the disagreement arises and the clause governing the disposition of the embryo is triggered.<sup>254</sup> "Furthermore, it would be inequitable to bind the parties to a reproductive decision made at a time when their needs and interests may have been completely different."<sup>255</sup> These needs and interests may have changed drastically during the passage of years between the commissioning couple's decision to undergo IVF, having excess embryos frozen, and their subsequent decision over the use of those embryos.<sup>256</sup> Even the *Kass* court recognized these difficulties due to the uncertainty inherent in the IVF procedure.<sup>257</sup> "The court listed '[d]ivorce; death, disappearance or incapacity of one or both partners; aging; [and] the birth of other children' as being among some of the obvious changes in circumstances that might take place over time."<sup>258</sup> For example, as we have seen in prior case discussion, during a divorce one party may strongly feel that he/she does not want offspring to result from the failed marriage.<sup>259</sup> Should that party still be bound to a clause in the

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<sup>249</sup>Speidel, *supra* note 243.

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

<sup>251</sup>John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990).

<sup>252</sup>York, *supra* note 117, at 405.

<sup>253</sup>Robertson, *supra* note 252, at 407.

<sup>254</sup>Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 519 (1999).

<sup>255</sup>*Id.*

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

<sup>257</sup>*Id.*

<sup>258</sup>*Id.* (citing *Kass*, 696 N.E. 2d at 180).

<sup>259</sup>Robertson, *supra* note 252, at 411.

IVF contract that states that the excess frozen embryos shall be rewarded to the party who intends them to be implanted? What results in the situation where the parties contracted to have the embryos discarded and, facing divorce, one party believes that implantation of those embryos is the only possibility of becoming a parent?<sup>260</sup> “In either case, the claim of unfairness due to changed circumstance injects legal uncertainty into the situation.”<sup>261</sup> Recently, scholars have also addressed the issue of changed circumstance in IVF contracts in situations where the woman has undergone premature menopause since the embryos had been frozen or for a number of reasons she could not safely repeat the egg retrieval process.<sup>262</sup>

Opponents to the doctrine of changed circumstance in the IVF setting argue that one should not be relieved of their contractual agreement, despite the change in circumstances, unless she did not knowingly or freely enter into that agreement.<sup>263</sup> Additionally, these scholars argue the strength of the privacy interest for that party wishing to avoid unwanted parenthood, and advocate that it is unfair to place such a burden on a person especially when that person believed that their privacy interest was protected by the IVF contract.<sup>264</sup> In making the

agreement the parties had the opportunity jointly to determine their reproductive futures. Holding them to the agreement recognizes their procreative liberty, gives the couple and the IVF program clear guidance, and also provides courts with an efficient means of resolving such disputes. The issue in such cases should be whether in fact there was a validly made agreement that covers the issue at hand, and not whether such agreements should be enforced despite a party’s change of mind or circumstance.<sup>265</sup>

Additionally, scholars argue that the problems of foreseeability and changed circumstances arising in the disposition of embryos are not different from those that arise in a wide gamma of other agreements, which are held to be binding despite a subsequent event that makes enforcement of the contract undesirable for one party.<sup>266</sup>

In response, proponents contend that the application of the doctrine of changed circumstances to prevent the enforcement of IVF contracts, in certain circumstances, is good policy.<sup>267</sup> “[I]t would be inconsistent to acknowledge all of the difficulties in making this type of contract only to allow it to be enforced in all circumstances.”<sup>268</sup> While such commentators concede that IVF contracts should not be disregarded for

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<sup>260</sup>*Id.*

<sup>261</sup>*Id.*

<sup>262</sup>*Id.* at 414.

<sup>263</sup>*Id.*

<sup>264</sup>Robertson, *supra* note 252, at 414.

<sup>265</sup>John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 414 (1990).

<sup>266</sup>Haut, *supra* note 255, at 522.

<sup>267</sup>*Id.*

<sup>268</sup>*Id.*

mere change of mind, proponents believe that where the events were unforeseeable, or the enforcement would be unconscionable, a party's non-performance should be excused due to the speculative nature inherent in such contracts.<sup>269</sup>

Where the doctrine of changed circumstance is granted to excuse performance of a contract, the performance promised is completely discharged rather than reformed or adjusted by the court.<sup>270</sup> Once performance is discharged, the remedies for the promise "include compensation for work done and restitution only to the extent that he has conferred a benefit on the other party by way of part performance or reliance."<sup>271</sup> Reliance beyond the scope of restitution is likely to be unrecoverable. The remedy provided in the doctrine of changed circumstance seems to be applicable to the disposition of frozen embryos while other contract remedies do not, because of the inability to conform the embryos to other traditional contract remedies.

Other scholars contend that such contracts may be unenforceable due to the fact that they are contracts of adhesion. In such a setting they may be unconscionable.<sup>272</sup> Unconscionability, "in certain situations, could be considered something that is not only unexpected but also hard on the complaining party."<sup>273</sup> Unconscionability can arise in contracts of adhesion.<sup>274</sup>

"An adhesion contract is a standardized form contract offered to consumers of goods and services on essentially a take-it-or-leave-it basis, without affording the consumer a realistic opportunity to bargain."<sup>275</sup> The vast majority of consumer transactions in this country involve contracts of adhesion.<sup>276</sup> Under a contract of adhesion, a consumer cannot obtain the desired service or product without accepting the terms of the form contract.<sup>277</sup> This is especially apparent in the IVF setting, where the couple does not have a chance to decide the disposition. Instead, the IVF contract contains a boilerplate provision stating that the embryos will be donated to the IVF clinic, in case dispute arises. In most instances, a couple cannot obtain the IVF procedure without consenting to the IVF clinic's terms for embryo distribution.<sup>278</sup> Thus, it is easy to see how IVF contracts can be viewed as contracts of adhesion. The question remains as to whether these adhesion contracts rise to the level of unconscionability.

Unequal bargaining power may exist between the commissioning couple and the IVF clinic considering that couples are often in a fragile emotional state at the time

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

<sup>270</sup>Speidel, *supra* note 243, at 801.

<sup>271</sup>*Id.*

<sup>272</sup>Haut, *supra* note 255, at 520.

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

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

<sup>275</sup>Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 *CARDOZO L. REV.* 319, 321 (1999).

<sup>276</sup>*Id.*

<sup>277</sup>*Id.*

<sup>278</sup>*See supra* note 5.

of contacting the IVF clinic because of their failed attempts at achieving offspring.<sup>279</sup> Additionally, commissioning couples do not possess the same level of expertise as the IVF clinics and the couples are limited in choosing another clinic because of geographical constraints and the limited number of IVF clinics in existence.<sup>280</sup> These inequalities give further evidence that contracts between IVF clinics and the commissioning couples are contracts of adhesion.<sup>281</sup> Given that IVF clinics are private institutions, they have the power to determine their institutional policies on the disposition of embryos and, therefore, have monopoly power over the choices a couple can have concerning embryo disposition.<sup>282</sup> Therefore, a clinic opposed to a certain method of embryo distribution has no obligation to make that method available to the couple.<sup>283</sup>

Although the terms of an adhesion contract may not be unconscionable, enforcement of the contract may be unconscionable due to the circumstances of the parties.<sup>284</sup> While unconscionability is difficult to define, a suggested definition is that a provision is unconscionable if it is such that “no fair-minded person would impose on another and that no competent person would freely and knowingly submit to.”<sup>285</sup> This could lead to a claim that no fair-minded person would give away embryos that she intended to implant or that no-fair minded person would impose unwanted parenthood on themselves or someone else.<sup>286</sup>

Historically, adhesion contracts “were developed in response to economic factors. During the early rise of capitalism, most exchanges took place at arms length. But, as the economy evolved ... such contracts of adhesion became prevalent due to their efficient and utilitarian function.”<sup>287</sup> Under these circumstances, it is no surprise, then, that Posner would oppose the idea of finding IVF contracts unconscionable solely because they are contracts of adhesion. Not only is Posner a proponent of contract enforcement, but he is also a champion of economic efficiency.<sup>288</sup>

Additionally, some commentators argue that contracts for the disposition of embryos should be likened to that of surrogacy contracts.<sup>289</sup> Surrogacy contracts,

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<sup>279</sup>Christi D. Ahnen, *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?—An Analysis of Davis v. Davis, York v. Jones, and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1354 (1991).

<sup>280</sup>*Id.*

<sup>281</sup>*Id.*

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

<sup>283</sup>*Id.*

<sup>284</sup>Haut, *supra* note 255, at 520.

<sup>285</sup>*Id.* (citing MONROE H. FREEDMAN & WENDY M. ROCOVIN, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERS: PART ONE* 63 (1997)).

<sup>286</sup>*See* Haut, *supra* note 255, at 521.

<sup>287</sup>Goodman, *supra* note 276, at 321-22.

<sup>288</sup>*See supra* notes 98, 138-141.

<sup>289</sup>Parisi & Depoorter, *supra* note 109.

where the surrogate is being paid for actually giving the baby up for adoption rather than for the gestational services involved in carrying the child, are void as against public policy.<sup>290</sup> This can be likened to the disposition of frozen embryos through an argument founded by Posner's adversaries. That is, a woman lacks the ability to truly consent to giving up her child or her embryo because she cannot appreciate the emotional trauma that may ensue until actually completing the action.<sup>291</sup> The flaw of this argument is that surrogacy agreements lack enforceability because the bargained for exchange is compensation for giving up a child rather than the labor associated with the gestational services.<sup>292</sup> Such a situation arises where payment is made conditional upon giving up the child.<sup>293</sup> Therefore, the argument of Posner's adversaries becomes applicable only where a state labels an embryo as a person cloaked with all rights given to persons in the Constitution.

#### V. CONCLUSION

The end result is a slippery slope among the classifications of an embryo as property, person, or a special category of quasi-property rights. If an embryo is property, then it should be disposed of according to property guidelines. These property guidelines are laid out in the theories of Locke and Posner.<sup>294</sup> Both Locke and Posner suggest that an embryo should be treated as property because reducing a resource to private ownership allows for a proper reward and, thus, motivation for labor as well as economic efficiency.<sup>295</sup> Great deference should be given to these theorists because their teachings gave birth to property law.<sup>296</sup> History dictates that where such schools of thought are not followed the results are misappropriation of resources and communal failure.<sup>297</sup> Therefore, where a dispute arises as to the distribution of an embryo and no contract governs such a dispute, that embryo should be treated as property and awarded to the party seeking its use. Resources are more highly regarded when reduced to private property.<sup>298</sup> Additionally, the use of that property, rather than its waste, not only maximizes happiness through allowing that property to become valued, but promotes a more economic efficient society by not allowing for the resource to spoil and, thus, accrue no economic benefit.<sup>299</sup>

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<sup>290</sup>Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135, 151 (1992).

<sup>291</sup>*Id.*

<sup>292</sup>*Id.*

<sup>293</sup>*Id.*

<sup>294</sup>*See supra* notes 33-171.

<sup>295</sup>*Id.*

<sup>296</sup>DUKEMINIER & KRIER, *supra* note 34, at 15-17, 136, 763-65, 774-75.

<sup>297</sup>*Id.*

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

<sup>299</sup>*See supra* notes 51, 98.

Both Locke and Posner hold contract law in the highest regard.<sup>300</sup> While it is fulfilling and economically sound to be rewarded individual ownership over an entity with which one has mixed his/her own labor, it is equally important to protect one's freedom to contract. Contract law is as basic to communal survival as property distribution.<sup>301</sup> While contracts with IVF clinics have inherent complications, these trouble areas do not rise to the level of concern associated with surrogacy contracts.<sup>302</sup> Surrogacy contracts are void as against public policy and unconscionable solely when they embody an agreement that in essence is payment for a child (deemed a person by law) rather than for gestational services.<sup>303</sup> Additionally, adhesion contracts are a product of their economic efficiency and enforced in a wide range of situations everyday.<sup>304</sup> Rights that evolve due to the need for economic efficiency are the basis of the law and economic theory.<sup>305</sup> Thus, contracts between commissioning couples and IVF clinics cannot be void solely on the basis that they are contracts of adhesion. In the name of economic efficiency and maximization of happiness of society as a whole, contracts between IVF clinics and commissioning couples must be enforced where they meet the enforceability requirements laid down by contract law.

Although Posner and Locke do not revere federal regulation,<sup>306</sup> it seems to be the only solution to reach the preferred end of contract formation prior to engaging in the IVF process. Whether or not an embryo is property, its ultimate fate can be decided through contract without reverence to its social standing. Thus, it is up to the federal government to enact legislation that requires all states to create statutes requiring IVF clinics to enter into a contractual agreement with the commissioning couple concerning the disposition of embryos upon a disagreement as to their use. This legislation should be specific and give proper direction to IVF clinics and the courts to minimize external administrative costs. These statutes should also be sensitive to and anticipate the previous attacks on the enforceability of such contracts. For example, IVF clinics could be compelled to allow for the commissioning couple to be informed of all of their options and be allowed to freely choose the means of distribution with which they are most comfortable. That is, an IVF clinic should be restricted from limiting these options or only allowing for one option such as that the embryos be donated to the clinic for research. Additionally, the subject of embryo disposition should be written in a bold or conspicuous type or be a separate agreement from that of the general IVF contract. The commissioning couple should be separately advised on this matter and informed of all the consequences of their decision. A mandatory waiting period between this counseling session and execution of the contract should be compelled through such statutes. Following

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<sup>300</sup>See *supra* notes 85, 138-43.

<sup>301</sup>*Id.*

<sup>302</sup>See *supra* notes 290-92.

<sup>303</sup>*Id.*

<sup>304</sup>Goodman, *supra* note 276, at 321.

<sup>305</sup>See *supra* notes 93-97.

<sup>306</sup>See *supra* notes 83-85.

these recommendations would diminish arguments enforceability and improve the bargaining ability and the quality of the informed consent of the commissioning couple.

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