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Frozen Embryos: What Are They and How Should the Law Treat Them

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FROZEN EMBRYOS: WHAT ARE THEY AND HOW SHOULD THE LAW TREAT THEM

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I. INTRODUCTION

Any highly advanced and innovative technology tends to present the legal system with a myriad of problems. This is especially true in the case of frozen embryos because the focus of the technology deals with creating life. Moral and ethical implications cloud the issues surrounding frozen embryos causing great controversy. Whether such technology should continue to be used is beyond the scope of this note.¹ This note is

¹ See Wurmbrand, *Frozen Embryos: Moral, Social, & Legal Implications*, 59 S.CAL.L.REV. 1079 (1986), for a general discussion of whether this technology should continue, and see Clapp, *State Prohibition of Fetal Experimentation and the Fundamental Right of Privacy*, 88 COLUM.L.REV. 1073 (1988), and Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 1988 JURIMETRICS J. 285 (1988) [hereinafter Robertson I], for how much control the state may exercise over in vitro fertilization programs.

concerned with the question currently facing the courts: once an embryo is frozen, what should become of it in a dispute over what should happen to it, and who has the right to make that decision? In addressing this question, this note will first establish the process through which frozen embryos are created, and the resulting dilemma of definitional problems among the medical and legal professions. Next the article will survey the current state of the law to discover how prenatal beings have been treated traditionally, how this should affect frozen embryo disposition, and how trends are developing in the law. The article will next lay out the moral and ethical concerns in the decision over how to deal with frozen embryos. Finally, the article will address the possibility of treating the frozen embryos as either life or property, and the ramifications of such a decision. It will also analyze the dispute over frozen embryos as one of a conflict between separate constitutional reproductive rights. It will conclude by examining the possibility of creating a separate body of law, free from traditional constraints.

II. THE IN VITRO FERTILIZATION PROCESS

Unless in vitro fertilization is banned it is unlikely that the procedure will be abandoned.² The in vitro fertilization process begins by giving fertilization drugs to the woman in order for her to produce an increased amount of eggs.³ The more eggs produced, the better the chance for fertilization and successful implantation.⁴ A laparoscopy is performed to retrieve the eggs from the woman's uterus.⁵ These eggs are then fertil-

² The decline in adoption possibilities due to such factors as the increased availability of contraceptives and abortions is one reason for the increased interest in in vitro fertilization. See Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L.REV. 465, 466-67 (1983) (listing other factors tending to reduce the possibility of adoption). In vitro fertilization also creates real hope for infertile couples to produce offspring that are genetically related to both parents. In rarer cases in vitro fertilization may create offspring that are genetically related to only one or neither parent. This is accomplished by using in vitro fertilization in combination with sperm from a donor, or an egg from a donor. To further remove the process from the "adopting" parents, artificial gametes may be used in conjunction with a surrogate to gestate the egg fertilized in vitro.

³ Robertson I, *supra* note 1, at 287.

⁴ However, increasing the number of successfully fertilized eggs also presents dilemmas. The infertile couple must now decide between implanting all fertilized eggs, thereby risking multiple pregnancies, or freezing the remaining fertilized embryos for future use. If freezing is chosen the potential future complications are numerous: one spouse may die; a divorce may occur; or the couple may have reached their optimum number of children but not utilized all of the frozen embryos. This article will address who should direct the fate of these embryos.

⁵ A laparoscopy is an operation to remove mature eggs from the female. During the operation a thin tube is inserted through the abdominal wall to observe the ovaries. If satisfied that the eggs are mature, the doctor will remove the eggs from the ovaries by way of vacuum through this thin tube. Gregoratos, *Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977, 980 and n.26 (1986).

ized.⁶ After the fertilized egg has matured to the point where it can be implanted, it will either be implanted or frozen for future use.⁷ The process is mainly used where the female has problems transmitting her eggs through her fallopian tubes to her uterus where implantation must occur after fertilization.⁸

III. DEFINITIONAL PROBLEMS SURROUNDING THE PRODUCTS OF IN VITRO FERTILIZATION

The advent of in vitro fertilization has revealed the early forms of human creation to the human eye and human manipulation. Stages, which could never before have been supervised by medical professionals, are now open for inspection. The terminology developing around the early pre-implantation stage is diverse. As Professor Robertson has stated, "we are still searching for a language to describe the entity created by extracorporeal fertilization and the activities then done to it."⁹ Essential to this discussion is a basic list of definitions. These definitions, although having specific meanings, will often be used loosely because of overlaps in stages and disagreements over terms. For the purposes of this paper the following definitions will be utilized. Technically freezing embryos is done through a process called cryopreservation.¹⁰ A gamete¹¹ will be used to refer either to an egg or a sperm cell. A conceptus, in this article, will be used to refer to the immediate joining of the egg and sperm cell, before cleavage takes place.¹² The term conceptus may be used interchangeably with "fertilized egg" or even pre-embryo at its earliest stages. A zygote¹³

⁶ To fertilize, each egg is placed in a separate petri dish containing a special medium, to which the sperm is then added. After fertilization, the conceptus (the product of the union of egg and sperm) is then transferred to a dish containing a different solution of blood and nutrients in order to help the conceptus develop normally. *Id.* at 980-81.

⁷ When the conceptus begins to divide into two, four, and eight cells it is commonly called a zygote or fertilized egg. It is during this two to eight cell stage that the zygote is transferred to the female's uterus or frozen. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 968 (1986) [hereinafter Robertson II]. See also *infra* note 45.

⁸ In vitro fertilization may also be used to overcome a couple's infertility problem due to a man's low sperm count. In vitro fertilization will aid the couple because the sperm will not have to travel as far to meet the egg when placed together in a petri dish. Robertson II, *supra* note 7, at 944.

⁹ Robertson II, *supra* note 7, at 952.

¹⁰ Cryopreservation is usually performed with liquid nitrogen. Wurmbrand, *supra* note 1, at 1083.

¹¹ A gamete is "a germ cell possessing the haploid number of chromosomes, especially a mature sperm or egg capable of participating in fertilization." AMERICAN HERITAGE DICTIONARY 546 (2nd college ed. 1982).

¹² Some authors use the term conceptus to refer to the product of a union between the egg and sperm up until the time of birth.

¹³ A zygote is either "1. The cell formed by the union of two gametes. [or] 2. The organism that develops from a zygote as characterized by its genetic constitution and subsequent development." AMERICAN HERITAGE DICTIONARY 1408 (2nd college ed. 1982).

is the formation of the conceptus after cleavage.¹⁴ Some courts talk in terms of a cryopreserved zygote or a pre-zygote instead of a frozen embryo.¹⁵ However, the term over which the most controversy has taken place is pre-embryo. It has been defined as: "[t]he human entity existing before the passage of fourteen days of development, prior to attachment to the uterine wall and the development of the primitive streak. The term is used by some to distinguish a difference between a zygote in its early stages and an embryo in its later stages."¹⁶ An embryo on the other hand strictly means the developing human after implantation in the uterus until eight weeks.¹⁷ However, the term is often commonly used to refer to any stage before that of fetus. An embryo is thought to develop into a fetus after the eighth week.¹⁸ Between fetuses, there is a further distinction between viable and unviable fetuses. Viability is the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."¹⁹

¹⁴ Cleavage is the "[p]rocess of dividing, as of the fertilized egg into successive multiples of cells, from the single cell; line formed by a groove between two parts." *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641, at 8), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642) (citing from Dictionary of Medical Terms for the Nonmedical Person (2d. ed. 1989)).

¹⁵ See *infra* notes 64-68 and accompanying text.

¹⁶ *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641, at 10), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642). The Committee defines a pre-embryo as "a product of gametic union from fertilization to the appearance of the embryonic axis. The preembryonic stage is considered to last until 14 days after fertilization." *Id.* at *17. Note, however, that not all scientists concur in the use of this term. Dr. Jerome Lejeune does not believe in the term pre-embryo. He asserts, "[t]here is no need for a subclass of the embryo to be called a preembryo, because there is nothing before the embryo; before an embryo there is only a sperm and an egg; when the egg is fertilized by the sperm the entity becomes a zygote; and when the zygote divides it is an embryo." *Id.* at *14-15.

¹⁷ Even commentators who go to great lengths to differentiate between pre-embryos and embryos often interchange the two terms. See *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641, at 21-22), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642) (the court notes that Dr. King and Professor Robertson both refer to zygotes of the two to eight celled stage as embryos, even though they have professed to adopt the term pre-embryo).

¹⁸ Over the confusion between fetus and embryo, Gregoratos has stated: "Technically, the terms 'embryo' and 'fetus' refer to different gestational stages in the development of the unborn conceptus, the embryo being an earlier stage that lasts until the end of the eighth week. The law does not distinguish on this basis, however, and uses the term 'fetus' to refer to all stages of development. Instead, the law differentiates at the point of viability and live birth." Gregoratos, *supra* note 5, at 987.

¹⁹ *Roe v. Wade*, 410 U.S. 113, 160 (1973). *Roe* also states that viability generally begins at about the twenty-eighth week, but may begin as early as the twenty-fourth week.

Various organizations and courts have adopted different characterizations of the above definitions in discussing issues involving reproduction. Understanding these definitions is essential to understanding the reasoning of various scholars and judges. The viable fetus is the most advanced of the above types of pre-life, and should therefore be afforded a greater number of rights than lesser forms of pre-life. It follows then that not all rights enjoyed by a viable fetus will be attributed to lesser forms of pre-life such as an embryo, and also that if a viable fetus does not enjoy a certain right, there is no basis upon which a lesser developed form of pre-life can enjoy such a right. With this in mind, the current status of the unborn will now be discussed.

IV. STATUS OF AN EMBRYO

A survey of present law in the United States is necessary to assess the rights of the unborn. The issue of whether an unborn is entitled to any rights, and if so what they are, has appeared in several different areas of law. Although these areas of law are not always consistent in outcome, this analysis will help in developing a basis for further determining how disputes over frozen embryos should be resolved.

In the area of tort law, statutes generally dictate that a fetus, at least an unviable one,²⁰ may not sustain an action for wrongful death unless first born alive.²¹ Such statutes are derived from the common law rule that unviable fetuses are unable to sustain actions for wrongful death because they are not yet persons in existence.²² An embryo is not as advanced as a fetus, let alone a viable fetus. Therefore, a frozen embryo should not have the right to object to being disposed of or of "dying a passive death". Further, because a frozen embryo of two to eight cells does not constitute a viable fetus, the state should not be able to intervene on the embryo's behalf and object to disposal on the grounds that it would be a wrongful death.²³

Another question in the torts area of rights of an unborn fetus, is whether a fetus can maintain an action for injuries occurring before birth. Every jurisdiction now allows a fetus to bring such an action, provided

²⁰ See Andrews, *The Legal Status of the Embryo*, 32 LOY. L.REV. 357, 368 (1986) (agreeing that a pre-viable conceptus may not maintain an action for wrongful death generally). But see Gregoratos, *supra* note 5, at 989 (a viable fetus may be able to recover for wrongful death in some jurisdictions).

²¹ "The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 55, at 368 (5th ed. 1984) [hereinafter PROSSER & KEETON].

²² Prosser explains this theory by saying "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action." *Id.* § 55, at 367.

²³ Compare to abortion principles discussed *infra* notes 32-35, 114-119 & accompanying text.

that the fetus is born alive.²⁴ However, there is still some dispute as to whether the fetus has to be viable at the time of injury in order to recover after being born alive. In most cases in which recovery has occurred the fetus has been viable.²⁵ This would appear to give a fetus limited rights, dependent upon live birth. Therefore, under this type of limited right, an embryo should not be able to maintain an action against parents or physician for wrongful disposal because the embryo will never be born alive, a pre-requisite to maintaining this type of action. Secondly, at the time of the alleged "harm" the frozen embryo is not viable.

In the area of criminal law, an action for homicide will not lie for the killing of an unborn fetus. The rationale behind this policy decision has its roots in common law. Common law defines homicide as "the killing of one human being by another."²⁶ From this definition courts reasoned that there could be no homicide without the killing of another human being. An unborn child was not a human being within the meaning of such definition because an unborn child was not considered a person or a reasonable creature in being before its birth. This, therefore, precluded a conviction for killing an unborn fetus. Modern jurisprudence has addressed this problem by having the states adopt various statutes to determine who is a person for purposes of homicide. Most state statutes follow the common law rule by requiring that the fetus be born alive in order to constitute a person.²⁷

²⁴ See *supra* note 21.

²⁵ PROSSER & KEETON, *supra* note 21, § 55, at 368. See, e.g., *Bonbrest v. Kotz*, 65 F.Supp 138 (D.D.C. 1946) (first case allowing recovery to child who had been injured as a viable fetus). However, there is a growing trend to allow an action for prenatal injuries occurring before viability, as long as there is a live birth. The general reason for this, as one court has stated, is that "[w]hether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress." *Andrews, supra* note 20, at 381 (citing *Smith v. Brennan*, 31 N.J. 353, 367, 157 A.2d 497, 504(1960)).

²⁶ Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444, 446 (1971).

²⁷ See, e.g., TENN. CODE ANN. § 39-2-201 (1982) (repealed 1989) (Tennessee requires that the victim be a "reasonable creature in being.") In construing the Tennessee statute, the court in *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923), held that in order to sustain a conviction for murder, the child must be born alive. Annotation, *supra* note 26, at 450. The new version of Tennessee's murder statute is § 39-13-201 which now defines the standard as the "unlawful killing of another person." See also *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987) (unviable fetus is not a person within the meaning of the manslaughter statute); *State v. Anonymous*, 40 Conn. Supp. 498, 516 A.2d 156 (1986) (unborn viable fetus is not a human being within the meaning of murder statute); *State v. Soto*, 378 N.W.2d 625 (Minn. 1985) (an eight and one-half month old fetus is not a human being for purposes of vehicular manslaughter statute). But see *People v. Apodaca*, 76 Cal. App.3d 479, 142 Cal. Rptr. 830 (1978) (defendant found guilty of murder for killing a fetus of 22-24 weeks).

In the area of descent and distribution, an unborn fetus may not inherit property unless it is born alive.²⁸

In the area of constitutional law, the Supreme Court has refused to interpret the Fourteenth Amendment, containing the word "person", to encompass the unborn.²⁹ The Court in *Webster v. Reproductive Health Services*³⁰ did not disturb this aspect of the holding.³¹

The only type of rights constitutional law has afforded fetuses is that a viable fetus may be protected by the state.³² Previously in *Roe v. Wade*,³³ the Court made this distinction by the trimester approach stating that

²⁸ The rights of the unborn actually attach at conception; however, they are not perfected until live birth. Gregoratos, *supra* note 5, at 988. See also UNIF. PROBATE CODE § 2-108, 8 U.L.A. 66 (1983) ("Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.").

Since frozen embryos may be brought to life years after the death of a gamete provider, special laws will have to be promulgated in order to address a frozen embryo's rights to inheritance, because the estate cannot be tied up upon a contingency of the embryo being born. Louisiana is the first state to address this issue. Although the statute does not fully address the issue it does provide as follows:

§ 133. Inheritance rights

Inheritance rights will not flow to the in vitro fertilized ovum as a juridical person, unless the in vitro fertilized ovum develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law. As a juridical person, the embryo or child born as a result of in vitro fertilization and in vitro fertilized ovum donation to another couple does not retain its inheritance rights from the in vitro fertilization patients.

LA. REV. STAT. ANN. § 9:133 (West Supp. 1989).

²⁹ *Roe v. Wade*, 410 U.S. 113, 158 (1973). The Court also failed to answer the related question of when life begins, saying:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. at 159.

³⁰ *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989).

³¹ The court in *Webster* did not disturb this analysis because it refused to rule on the constitutionality of a preamble to the Missouri statute which stated that life began at conception. The Court stated, "It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. . . . We therefore need not pass on the constitutionality of the Act's preamble." *Id.* at 3050.

³² See *supra* note 3. One reason advanced why, in the constitutional context, the court refuses to grant embryos rights, is the competing stronger interests of the parents. This is why the mother's aborting of a fetus is not murder whereas another third party's action to harm the embryo would be actionable. Andrews argues that "because of the strong constitutional protection for autonomy in procreative decisions, the law gives the progenitors greater discretion in their action toward the embryo, when those actions are part of reproductive decisions, than it gives to other persons in their actions toward the embryo." Andrews, *supra* note 20, at 368.

³³ 410 U.S. 113.

the state had no right to protect the fetus in the first trimester, a limited right to protect the mother's health in the second trimester (but not the fetus), and a full right to protect the fetus in the third trimester. The Court's rationale for protecting the fetus in the third trimester is based on the conclusion that the fetus typically becomes viable at the beginning of the third trimester. Although *Webster* has done away with the trimester analysis,³⁴ the Court upholds the state's application of viability as the point at which the state may step in and assert a legitimate interest in protecting the fetus. The Court does hint that perhaps in the future it will uphold the state's right to assert an interest in the fetus before viability.³⁵ However, since the Court declined to set any definite lines in this area, especially by declining to rule on the issue of whether life begins at conception, the rights of a fetus are not substantially improved, let alone the rights of a lesser developed form of pre-life such as the pre-embryo.

One commentator, Gary Gertler, has offered an alternative approach to determining when the state should be allowed to protect "pre-life" as life.³⁶ He sets the determination, not at viability, but rather at brain birth, which he defines as that point when "a fetus reaches that stage of development when recognizable neocortical activity begins."³⁷ His theory is that the only distinction between human life and other forms of life is our higher intelligence.³⁸ He asserts that neocortical brain activity is an easier standard to use in determining when "life" begins than viability. This is because science has advanced far enough that determination of neocortical brain activity will not keep changing with advanced technology whereas the viability standard continues to change as technology creates better methods to sustain life outside of the mother's womb.³⁹ Further, he asserts that since brain death is an accepted approach to when death occurs, so too brain birth should be accepted as the point at which a being becomes a person.⁴⁰ In arguing for the adoption of brain birth as the standard of personhood, Gertler states:

³⁴ "We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' [Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 105 S. Ct. 1005, 1015, 83 L.Ed.2d 1016(1985)] We think the Roe trimester framework falls into that category." *Webster v. Reproductive Health Services*, 429 U.S. at 3056.

³⁵ "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.* at 3057.

³⁶ Note, *Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status*, 59 S. CAL. L.REV. 1061 (1986) (authored by Gary B. Gertler) [hereinafter Note, *Brain Birth*].

³⁷ *Id.* at 1062.

³⁸ *Id.* at 1061.

³⁹ *Id.* at 1070 ("One very important advantage of the brain birth standard, at least from a legal standpoint, is that neocortical brain activity provides a static and unchanging standard over time.")

⁴⁰ *Id.* at 1071.

Since the inception of neocortical brain activity, or brain birth, is the beginning of cognitive capability, it is the point at which personhood protection should begin. Brain birth is not merely an index, sign, or litmus test of being human; it is a more basic trait that should be recognized as conferring personhood on whomever possess it. All and only those beings having neocortical brain activity have the right to basic human rights . . . ⁴¹

Because the Court in *Webster* acknowledged the problems in using the viability standard, it is conceivable that the Court may soon be looking for an alternative method for determining "personhood" under the 14th Amendment and when life should be said to begin for purposes of protection and rights.

Since the various areas of law have not afforded fetuses any concrete rights to maintain actions unless live birth occurs, or in the case of constitutional law, any right to be protected under the Constitution unless live birth is probable, it is doubtful that pre-embryos or frozen embryos should be afforded any right to be born. This is especially true considering that even at the best clinics there is less than a ten percent chance of creating a live birth baby from a frozen embryo.⁴² This relatively small likelihood of creating a "person" does not encourage bestowing any rights upon frozen embryos. Even if the standard of viability for determining when life begins is changed to a new standard such as brain birth,⁴³ a four- to eight-celled zygote would not be afforded protection as a person. Only a drastic change stating that life begins at conception would confer "personhood" status upon a frozen four- to eight-celled embryo.

V. DEALING WITH MORAL AND ETHICAL BELIEFS

Before addressing such questions as whether frozen embryos constitute life, one must acknowledge one controlling principal of our government—the separation of church and state.⁴⁴ Various religions need not agree on the morality of laws, they must only abide by those the legislature has deemed worthy of passing. The laws then act like a floor of morality, beneath which no citizen may fall without being punished by the law.

⁴¹ *Id.* at 1069.

⁴² Robertson states: "The chance that any single transferred embryo will implant is said to be one in ten, which means an even lower chance that it will come to term, since there is usually a 25 to 35% wastage or spontaneous abortion of implanted embryos." Robertson II, *supra* note 7, at 970 n.100.

⁴³ See Note, *Brain Birth*, *supra* note 36, at 1062.

⁴⁴ See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). The court noted, "In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.'" *Id.* at 16. The Court then concluded that the "wall must be kept high and impregnable." *Id.* at 18.

However, if one's morals dictate a more stringent attitude toward a particular subject, the law allows that person to impose a higher standard on himself. Depending on one's moral and religious upbringing, the answer to whether these frozen embryos are life will fluctuate, and very little that is stated in this article will change one's mind.

Some people, feeling that these embryos are human life, will not be swayed by constitutional arguments that the mother and father have procreational rights to build or not build a family as they see fit just as any other coitally reproductive couple would be able to choose.⁴⁵ They would state that this 4-8 celled zygote⁴⁶ is as much a human being as anyone else and must be protected by the state at all costs. This author would remind such proponents that not all human life is protected at all costs. There are instances in which the legislatures weigh and balance all competing interests, and sometimes conclude that life at all costs is not the answer. The closest example is presented by the previously discussed competing interests in abortion. The embryo is only protected after viability. Until such a time as viability, the mother's interest in privacy outweighs the state's interest in protecting potential life.⁴⁷ Another less obvious choice not to protect life at all costs is war. War is undertaken in the name of national security but still creates death. The policy of the United States holds it proper, if the government so chooses, to send men to foreign countries to die for a cause they may not personally believe in or to kill others in a military raid to prove a political point. This is not protecting life at all costs. Yet another choice of death over life is capital punishment. These are living, breathing human beings, not zygotes, whose lives the legislature has deemed unworthy of saving at all costs.⁴⁸ One must realize that laws balance the interest of the individual against the interest of the whole. The Constitution of the United States has delegated the power to balance these interests to the legislature. The legislature in carrying out its function will focus on the will of the people, but only to the extent that it is for the good of the people as a whole. The

⁴⁵ See *infra* Part IX for a discussion of constitutional reproductive rights.

⁴⁶ A fertilized egg goes through cell divisions. Two to eight cell divisions is the optimum number before the eggs are frozen or transplanted, otherwise the embryo is developmentally too young to freeze, or after the eight cell stage is too advanced to develop normally after being thawed. Wurmbrand, *supra* note 1, at 1083.

⁴⁷ *Roe v. Wade* established that viability was the point at which the mother's interest in privacy became subservient to the state's interest in protecting the life of a fetus. *Webster v. Reproductive Health Services* has since validated a statute which attempts to determine viability at an earlier time than the third trimester, which is usually thought of as beginning viability. *Webster* did not overrule the point of viability as being the point at which state protection should begin, but it did question the sensibility of such a standard. See *infra* notes 33-34 & accompanying text.

⁴⁸ The author has no intention of condemning any of the foregoing practices but rather is pointing out that even if the zygote is life, the issue is not simple and there must still be a policy decision which must be made by the legislature.

legislature cannot cater to, and will not consider, factions which threaten the democratic process. Further, courts will ensure that all legislation is in accord with the Constitution.⁴⁹

VI. THE ROLE OF THE LEGISLATURE AND THE COURTS IN DISPUTES OVER FROZEN EMBRYOS

Recognizing that there is no "right" answer to whether these zygotes are life, it appears that the legislature, not the legal system, is the proper forum within which to resolve this difficult issue. However, because the legislature currently refuses to address such a problem,⁵⁰ and there is nowhere for disillusioned parties to turn except the courts, our legal system must attempt to come to grips with these legal issues.

VII. EMBRYOS AS PROPERTY

At least one group of medical scholars considers frozen embryos as a form of property. In creating an Ethical Statement on In Vitro Fertilization, the American Fertility Society explicitly stated: "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items. . . ."⁵¹

The governmental commission in England, the Warnock Committee, did not explicitly dub frozen embryos as "property" but rather said that "the couple who stored the embryo should have the use and disposal rights."⁵²

If the frozen embryo is indeed property, as these two organizations suggest, the type of property and the rights attached thereto must be examined.

⁴⁹ Courts also will not be swayed by religious factions such as Right to Life groups which insist it is unchristian to allow in vitro fertilization. Andrews has expressed such a view by stating "[n]or is the fact that some people might be offended by in vitro fertilization, or might have religious objections, sufficient to restrict couples' use of the technique. Moral approbation is not a sufficient reason to prohibit exercises of a fundamental constitutional right." Andrews, *supra* note 20, at 364.

⁵⁰ The only state which has statutorily begun to address the issue of the status of a frozen embryo is Louisiana. However, this statute, treating embryos as life, poses serious constitutional problems. See *infra* note 79 and accompanying text. Other states have addressed frozen embryos in regard to regulating research upon them. See *infra* note 78.

⁵¹ Gregoratos, *supra* note 5, at 991 (quoting the American Fertility Society, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY 12 (1984)).

⁵² Defendant's Brief at 4, Davis v. Davis, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (LEXIS, States library, Tenn. file) (citing DEPARTMENT OF HEALTH AND SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILIZATION AND EMBRYOLOGY (1984) (also known as Warnock Committee Report)).

A. Marital Property

An embryo is not acquired by gift, inheritance or purchase, but rather created by the effort of both spouses during marriage.⁵³ The Uniform Marital Property Act⁵⁴ provides that all property acquired during marriage other than by gift, inheritance, or other exceptions⁵⁵ is marital property. Most states have adopted the idea of marital property.⁵⁶ In this system there is a presumption that anything acquired during the marriage is marital property, but that this presumption may be rebutted by offering evidence that the specific property at issue falls into one of the named exceptions.⁵⁷

Frozen embryos do not appear to fit into one of the categories exempting them from classification as marital property. However, because frozen embryos are such a new and technologically advanced concept, intertwined with the question of life, a deeper analysis than simply whether they are covered by an "exception" is needed.

A male's sperm is unquestionably his own personal property. Likewise, a female's egg is her own personal property. Both sperm and egg could be said to contain the potential for life, provided that they unite with the proper opposite gamete, but none would question an individual's right to dispose of his or her own gamete. Because the sperm and egg have united to become one, the resulting concepti cannot be said to be the personal property of either the male or the female, but rather the marital property of both.

The doctrine of commingling, borrowed from community property and used in marital property cases, can be applied here. The doctrine states that "separate property becomes marital property if inextricably mingled with marital property or with the separate property of the other spouse."⁵⁸

⁵³ Although a frozen embryo can theoretically be created by those who are not spouses, outside the confines of marriage, this article will not address such situations because laboratories thus far refuse to attempt in vitro fertilization except for the purpose of aiding infertile married couples reproduce. Most laboratories do accept and use donor gametes, but for the exclusive purpose of providing married couples with a chance at procreation.

⁵⁴ UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 97 (1987).

⁵⁵ Common Exceptions: property acquired by gift, bequest, devise or inheritance; property acquired in exchange for property acquired by gift, bequest, devise or inheritance; property which is excluded from marital property by a valid agreement of the parties; and in some of the states property acquired by either spouse after a judgment of legal separation. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.2, at 595 (1988).

⁵⁶ Those states which have not adopted the idea of marital property, but instead rely on a system of community property are governed by basically the same principles of distribution. *Id.* § 15.2, at 596.

⁵⁷ *Id.* § 15.2, at 596. See also *Zillert v. Zillert*, 395 A.2d 1152 (Me. 1978) (property will be treated as marital property unless evidence to the contrary is produced).

⁵⁸ H. CLARK, *supra* note 55, § 15.2, at 596 n.10.

Therefore it can be argued that when the egg and sperm unite, they are no less the property of the gamete owners, but rather since they are inseparable without resorting to destruction, they become marital property instead of personal property.

The problem with treating frozen embryos as marital property comes into existence when the marital property is to be distributed. Many states have equitable distribution statutes which authorize the court to divide the property and set up guidelines.⁵⁹ These statutes provide for the division to be "equitable, or just, or reasonable" but often times leave the precise manner to the discretion of the courts. The Uniform Marriage and Divorce Act⁶⁰ lists several factors judges should consider in making an equitable distribution of the property. However, many of these guidelines deal with monetary value and economic circumstances.⁶¹ Clearly, these types of guidelines are inapplicable to resolving a dispute over such property as a frozen embryo.⁶²

If the frozen embryos are to be treated as property, the court or legislature must develop some sort of guidelines for distributing this type of property. The possibility of distributing on the basis of intended use, and the problems this type of guideline could create will be discussed *infra*.⁶³

B. Case Law Favoring Treating Embryos as Property

The only American case to decide that frozen embryos are a type of property is *York v. Jones*.⁶⁴ Although this case involved a dispute over a frozen embryo, called a pre-zygote in the case, it was not in the context of a divorce. Rather, the progenitors of the cryopreserved human pre-zygote brought an action against the Jones Institute conducting the in vitro fertilization program and storing the pre-zygote to obtain possession

⁵⁹ *Id.* § 15.1, at 590 and § 15.3, at 600.

⁶⁰ UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 147 (1987).

⁶¹ Factors to consider under the Uniform Marriage and Divorce Act in the distribution of property: "the contribution of each spouse to the acquisition of the marital property, including his contribution as a homemaker; the value of their separate property; the duration of the marriage; and the economic circumstances of each spouse when the division is to become effective." H. CLARK, *supra* note 55, § 15.3, at 601. Furthermore, it has been stated "In order to make a just and equitable division of the property between spouses, the trial court must nearly always place a monetary value upon that property. Failure to do so is generally a ground for reversal." *Id.* § 15.4, at 604.

⁶² Even cherished personal property is reduced to being appraised upon divorce. An appraiser will consider such factors as original cost, price, quality, uniqueness, availability, taste, times, and geographic area. Jersin, *Putting a Value on Personal Property*, 2 FAM. ADVOC. 14 (1979). These factors also seem to fall short of providing guidelines to deal with the dispute in ownership of frozen embryos.

⁶³ Some judges may make their decision based upon moral factors such as whether the spouse desires to use the frozen embryo to create life or for destruction. See *infra* notes 95-98 and accompanying text. See also *infra* text following note 125 for discussion of presumption in favor of procreation.

⁶⁴ 717 F.Supp 421 (E.D.Va. 1989).

of their cryopreserved human pre-zygote. The couple wanted to transfer the pre-zygote to another institute. The Jones Institute refused to consent to an inter-institutional transfer of the pre-zygote. The judge looked upon the relationship between the couple and the institute as a bailor/bailee relationship⁶⁵, and further referred to the contract⁶⁶ between the couple and the institute which consistently referred to the pre-zygote as the property of the couple. The contract even went so far as to state "that in the event of a divorce, the legal ownership of the pre-zygote 'must be determined in a property settlement' by a court of competent jurisdiction."⁶⁷ The judge determined that the pre-zygotes were in fact property by holding that an action in detinue did lie.⁶⁸

Although the judge in this case did not face the question of whether one spouse has a greater property interest in the pre-zygote than another, this case is judicial precedent for the view that frozen embryos are to be treated as property for the resolution of disputes.

Another case which may be said to imply that the frozen embryos are property is *Del Zio v. Presbyterian Hospital Medical Center*.⁶⁹ In this case

⁶⁵ A bailor/bailee relationship implies the finding that the pre-zygote was property. Only property is exchanged in a bailor/bailee relationship. "Life" would be designated by a temporary custody or guardianship relationship.

⁶⁶ Contracts many times can define the legal relationships between parties and the law that should be applied in a particular situation. Therefore many institutes containing an in vitro fertilization program require the participants to sign a contract before entering the in vitro fertilization program. The court in York supplied pertinent excerpts of the contract in the opinion as follows:

We may withdraw our consent and discontinue participation at any time without prejudice and we understand our pre-zygotes will be stored only as long as we are active IVF patients at the Howard and Georgeanna Jones Institute For Reproductive Medicine or until the end of our normal reproductive years. We have the principle responsibility to decide the disposition of our pre-zygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both. In the event of divorce, we understand *legal ownership of any stored pre-zygotes must be determined in a property settlement* and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development.

York v. Jones, 717 F.Supp at 424 (emphasis added).

⁶⁷ *Id.*

⁶⁸ According to Blacks Law Dictionary "detinue" is defined as "[a] form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully, but retains it without right, together with damages for the detention." BLACK'S LAW DICTIONARY 405 (5th ed. 1979). Further "chattel" is defined as "[a]n article of personal property. . . it may refer to animate as well as inanimate property." *Id.* at 215. By holding that the couple had an action in detinue, the judge was in effect ruling that the pre-zygotes were the personal chattel of the couple.

⁶⁹ No. 74-3558, slip. op. (S.D.N.Y. Nov. 14, 1978) (The author being unable to obtain a copy used a summary of the case contained in Andrews, *Legal Status of the Embryo*, 32 LOY. L.R. 357, 367-8 (1986)).

a couple had entered into an in vitro fertilization program. A fertilized embryo was created, but the hospital, before implanting the fertilized embryo into the woman, destroyed it. The couple sued alleging conversion and intentional infliction of emotional distress. Both issues went to the jury, but only the allegation of intentional infliction of emotional distress was upheld. However, it is reasoned that "since an embryo could not be converted unless it constituted 'property', and the definition of 'property' would seem to be an issue of law, the court's willingness to instruct the jury on conversion implies a finding that the embryo was 'property'."⁷⁰ Similarly, since no criminal action was brought alleging murder, it is doubtful that the embryos were thought to be life.

A third case, *Moore v. Regents of the University of California*,⁷¹ although not dealing directly with frozen embryos, has an enormous impact on their treatment as property.⁷² This case involves a man who, suffering from cancer, had his spleen removed upon his doctor's recommendation. The doctors at the hospital discovered that Moore's cells were unique and could be used to develop pharmaceutical products to fight certain infections, diseases and cancer. Without Moore's knowledge or consent the doctors continued to work with Moore's cells and eventually patented the products and procedures to make those products developed from Moore's cells. The market value of the products created from Moore's cells is estimated to be approximately 3 billion dollars by 1990.⁷³ Moore, upon discovery of such facts, filed a lawsuit claiming among other causes of action, that of conversion.⁷⁴ In upholding the Plaintiff's cause of action for conversion the court necessarily found that the Plaintiff's cells and

⁷⁰ Defendant and Counter-Plaintiff's Brief at 3, *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642). *But see* Andrews, *supra* note 20, at 367-68 stating that the court held that an in vitro fertilization embryo is not the property of the gamete providers because the jury rejected such a claim.

⁷¹ 202 Cal.App.3d 1405, 249 Cal. Rptr. 494 (1988).

⁷² The landmark case—*Moore vs. the Regents of the University of California*—reaches far beyond the primary issue: whether Seattle businessman, John Moore, has property rights to his spleen. The decision may expand patients' rights, add a dimension to the controversy over the use of fetal tissue in research, provide a further piece of the puzzle in the ownership of eggs and sperm, and even put a new wrinkle in the abortion issue.

Ferrell, *Human Tissue at Issue*, Cleveland Plain Dealer, Jan. 28, 1990, at 1-G, col. 1. Later in the article, Lori Andrews, a research fellow at the American Bar Foundation in Chicago, reiterates the same sentiment, "if the California Supreme Court determines that Moore has property rights to his spleen, the ruling will affect abortion, fetal tissue, frozen embryos, eggs and sperm 'in the sense of recognizing that patients control what is done to their bodies.'" *Id.* at 4-G, col. 2.

⁷³ *Moore v. Regents of the Univ. of Cal.*, 202 Cal.App.3d at 1409, 249 Cal. Rptr. at 498 (1988).

⁷⁴ Moore also alleged the following causes of action: lack of informed consent; breach of fiduciary duty; fraud and deceit; unjust enrichment; quasi-contract; breach of implied covenant of good faith and fair dealing; intentional infliction of emotional distress; negligent misrepresentation; interference with prospective advantageous economic relationships; slander of title; accounting; and declaratory relief. *Id.*

other bodily tissue were his property. In reasoning the court quoted Am. Jur. stating:

As a matter of legal definition, "property" refers not to a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition. In other words, [in] its strict legal sense "property" signifies that dominion or indefinite right of user, control, and disposition which one may lawfully exercise over particular things or objects; thus "property" is nothing more than a collection of rights.⁷⁵

The court then concluded "the essence of a property interest—the ultimate right of control—therefore exists with regard to one's own human body."⁷⁶

The same type reasoning may be applied to frozen embryos. The genetic material which creates an embryo is no less the property of the owners than the cells in Moore which made possible the creation of "Cell-line", a product from Moore's tissue. That the genetic tissue may be used for a good cause, such as creating life, does not change the fact that the tissue belongs to its owner and is subject to his right of control. If he refuses to use his genetic tissue to create a living human being, this is his prerogative. The fact that an admirable purpose is forfeited is of no consequence. The *Moore* court, when faced with a similar proposition that valuable research and products to sustain life would be lost if the plaintiff were to have the power to control his own body tissue, stated "we concede that, if informed, a patient might refuse to participate in a research program. We would give the patient that right."⁷⁷

VIII. FROZEN EMBRYOS AS HUMAN LIFE

Many states have statutes to deal with the subject of research on human embryos.⁷⁸ These statutes do not, however, address the problems of what

⁷⁵ *Id.* at 1415, 249 Cal. Rptr. at 504. (citing 63A Am.Jur.2d, *Property*, § 1.)

⁷⁶ *Id.* at 1417, 249 Cal. Rptr. at 506.

⁷⁷ *Id.* at 1420, 249 Cal. Rptr. at 508.

⁷⁸ Twenty-five states now have fetal research laws. They are:

ARIZ. REV. STAT. ANN. § 36-2302 (1986); ARK. STAT. ANN. §§ 82-436 to-441 (Supp. 1985); CAL. HEALTH & SAFETY CODE § 25956 (West 1984); FLA. STAT. ANN. § 390.001(6),(7) (West 1986); ILL. ANN. STAT. ch. 38, paras. 81-32, 32.1 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-1-58.5-6 (Burns 1985)) KY. REV. STAT. ANN. § 436.026 (Bobbs-Merrill 1985); LA. REV. STAT. ANN. §§ 14:87.2, 40:1299.35.13 (West 1986 & Supp. 1986); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); MASS. ANN. LAWS ch. 112, § 12J (Law. Co-op. 1985); MICH. COMP. LAWS ANN. § 333.2685-.2692 (West 1980); MINN. STAT. ANN. § 145.421-.422 (West Supp. 1986); MO. ANN. STAT. § 188.037 (Vernon 1983); MONT. CODE ANN. § 50-20-108(3) (1985); NEB. REV. STAT. § 28-342 to -346 (1979); N.M. STAT. ANN. § 24-9A-1 to -9A-7 (1986); N.D. CENT. CODE § 14-02.2-01 to -02 (1981); OHIO REV. CODE ANN. § 2919.14 (Baldwin 1982); OKLA. STAT. ANN. tit. 63, § 1-735 (West 1984); 18 PA. CONS. STAT. ANN. § 3216 (Purdon 1983); R.I. GEN. LAWS § 11-54-1 (Supp. 1985); S.D. CODIFIED LAWS ANN. § 34-23A-17 (1986); TENN. CODE ANN. § 39-4-208 (1982); UTAH CODE ANN. § 76-7-310 (1978); WYO. STAT. § 35-6-115 (1977).

Andrews, *supra* note 20, at 396-397.

exactly frozen embryos are. Neither do they deal with the status or disposition of frozen embryos. The only American state which has created a statute to deal with the status of human pre-embryos is Louisiana.⁷⁹ The Louisiana legislature has declared their intention that the embryo be treated as a person,⁸⁰ not property.⁸¹ By bestowing upon them the status of life/personhood, the legislature has precluded the embryos from being disposed of lest the act of murder occur.⁸² Additionally, by bestowing life

⁷⁹ LA. REV. STAT. ANN. § 9:121-133 (West Supp. 1989). It should be noted that such a statute, although passed, may be deemed unconstitutional. As of yet the constitutionality of the statute has not been addressed by any court. However, one commentator has taken the view that the statute is unconstitutional. "Because of its potential interference with a couples' right to privacy to make procreative decisions, the new Louisiana law is constitutionally infirm." Andrews, *supra* note 20, at 409.

⁸⁰ Section 123. Capacity

An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.

LA. REV. STAT. ANN. § 9:123 (West Supp. 1989) (emphasis added).

⁸¹ Section 126. Ownership

An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum. If the in vitro fertilization patients express their identity, then their rights as parents as provided under the Louisiana Civil Code will be preserved. If the in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A court in the parish where the in vitro fertilized ovum is located may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who caused in vitro fertilization to be performed, to protect the in vitro fertilized human ovum's rights.

LA. REV. STAT. ANN. § 9:126 (West Supp. 1989) (emphasis added). *See also Id.* at § 9:130(emphasis added):

Section 130. Duties of donors

An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration. If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.

⁸² Section 129. Destruction

A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the action of any other such person. An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical [sic] person.

Id. § 9:129 (emphasis added).

status upon the embryos, any dispute over them must be governed by custody law doctrines—"the best interest of the 'child' doctrine."⁸³ Also, due to their status as life, the Louisiana legislature accords frozen embryos rights, such as the right to maintain an action in court.⁸⁴

Treating embryos as life may cause greater problems than imagined. For instance, once binding precedent has been set decreeing that frozen embryos are life, a couple, both of whom wish to let the embryos thaw without implantation, may be enjoined from such action. If the embryos are treated as life, the state may have a legitimate interest in preserving their life. The state may require that all embryos be implanted, either in the egg donor or in a surrogate.⁸⁵ Further, if the number of unwanted embryos rose to a level beyond that for which the government could find surrogates, could the state force the gamete owners to bring the embryo to life?⁸⁶ Finally, could the state ban any further attempts at in vitro fertilization for couples wishing to create their own genetic offspring, who

⁸³ Section 131. Judicial standard

In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.

Id. § 9:131.

⁸⁴ Section 124. Legal Status

As a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained.

Id. § 9:131.

⁸⁵ Andrews, *supra* note 20, at 402 (professing position that a person should not be forced to donate the embryos to another couple). Robertson, a leading commentator has expressed the same sentiment:

Even if the state or IVF programs have the constitutional authority to insist on transfer or donation of all embryos, the wisdom and desirability of mandatory embryo donation policies can be questioned. Given the powerful meanings aroused by biological offspring, creating biological offspring against a person's wishes should require a very strong justification. Since the rights of embryos are not violated by discard, imposing unwanted biological offspring on a person seems a heavy price to pay for a symbolic statement of commitment to human life generally.

Robertson II, *supra* note 7, at 981.

⁸⁶ This would be a futile attempt to save potential life because the gestator of the embryo may well decide to have an abortion following implantation of the embryo. Further, the government cannot force a person to act in a certain manner. Even where a contract for personal services has been signed, a court of law cannot force a person to perform the personal services he or she has contracted to perform, but may merely enjoin the performance of such services for anyone else. See *e.g.*, *Lumley v. Wagner*, 1 DeG.M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852) (an opera singer who broke her contract to sing at one opera house was enjoined from singing at another until her contract was fulfilled).

are otherwise coitally unable?⁸⁷ These are but a few of the questions which will ensue if the frozen embryos are to constitute life.

Assuming the frozen embryos are treated as life, the dispute in ownership between spouses would most likely be treated as a custody issue. However, this too creates problems, because the unborn have not been recognized by the Supreme Court as persons.⁸⁸ Inherent qualities of a child in a custody dispute are: 1) that the child be a person, and 2) that the child be alive. Custody, in regard to children, means that the parent and child live together and the parent has the right and obligation to supervise and care for the child. Reciprocally, the child also has duties to the parents such as the duty of respect.⁸⁹ This type of definition presupposes that the child is alive.

Another problem with the custody approach is that if the court awards custody to one of the spouses, does this spouse have an affirmative duty

⁸⁷ A state statute banning in vitro fertilization would be subject to strict scrutiny because it would affect the fundamental right to procreate. In order to uphold such a statute the state must demonstrate that the statute furthers a compelling interest in the least restrictive manner possible. *Andrews, supra* note 20, at 361. The state may profess a compelling interest in protecting embryos because it believes the embryos to be life. Louisiana has created a statute based on such an interest. However, this type interest may not be considered compelling because the Supreme Court has not recognized the pre-viable fetus as life. *See supra* note 79 for a discussion of the Louisiana statute.

The court will examine a professed compelling interest very carefully before invalidating a fundamental right. In *Carey v. Population Services International*, the compelling interest advanced in prohibiting the sale of contraceptives to a minor was that of protecting the health of minors by deterring sexual activity. The court struck this down saying "[w]e again confirm the principle that when a state, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion. . . that the burden is connected to such a policy." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 696 (1977).

However, before the court would apply strict scrutiny to the statute banning in vitro fertilization the court would first have to decide whether the right to reproduce includes the right to reproduce non-coitally. The equal protection clause of the Fourteenth Amendment would most likely induce courts to decide that the right to reproduce applies to both fertile and infertile couples. This being so, the court would have to protect the means (in vitro fertilization) an infertile couple would have to use to exercise their right to reproduce. If the court were to decide otherwise, it would be guilty of discrimination against infertile couples. The court has shown its abhorrence of discrimination in the case of *Skinner v. Oklahoma*: "[t]he guaranty of 'equal protection of the laws is a pledge of the protection of equal laws'. . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." 316 U.S. 535, 541 (1942) (quoting *Yick W. Hopkins*, 118 U.S. 356, 369 (1886)).

⁸⁸ Annotation, *Supreme Court's Views as to Meaning of Term "Person" As Used in Statutory or Constitutional Provision*, 56 L.Ed.2d 895, 906-907 (1979) (noting that *Roe v. Wade* failed to find the unborn a person by looking at the historically freer approaches to abortion and that "none of the contexts in which the term [person] is used in the Constitution indicates that it has any possible prenatal application.")

⁸⁹ H. CLARK, *supra* note 55, § 19.2, at 789 (1988).

to bring the frozen embryo to life, despite any change in plans or circumstances?⁹⁰ This would seem to conflict directly with the right to have an abortion.⁹¹ Surely if one cannot stop a pregnant woman from aborting her child, one cannot force a woman to become pregnant. However, if there is no affirmative duty to bring the embryo to term, would parties on both sides be encouraged to deceive the court as to their true intentions by always asserting their desire to bring the frozen embryo to life?

In deciding custody issues, the courts most frequently adopt the doctrine of "the best interests of the child".⁹² Because this standard is vague, judges take many factors into account when deciding the best interests of the child. The Uniform Marriage and Divorce Act⁹³ lists some relevant factors such as: "the wishes of the child's parents, the wishes of the child, the relationship of the child with his parents and with his siblings, the child's adjustment to home, school and community, and the mental and physical health of all individuals involved."⁹⁴

Clearly these factors do not apply to frozen embryos which are not developed enough to have brain activity, let alone wishes or relationships with others.

Despite this, the Tennessee trial court in *Davis v. Davis*,⁹⁵ did rule that embryos are life and disputes over embryos are governed by custody law. The lawsuit arose in the context of a divorce case. The Davises were involved in an in vitro fertilization program. They had attempted several implantations of frozen embryos, all failing. At the point of divorce the couple had seven fertilized embryos in cryogenic storage. The wife wanted control of the embryos in order to further attempt to create a child. The husband wished to avoid becoming a parent because of the divorce and therefore also sought control over the frozen embryos. The court first concluded that the embryos were life from the moment of conception, and then applied the rule of *parens patriae*,⁹⁶ which is really the "best interests

⁹⁰ See Plaintiff's Brief in *Davis v. Davis* arguing that the standard of awarding the embryo to the spouse who professes the intention of bringing the embryo to life is unfair because there is no affirmative duty on the spouse to carry out the intention. "Second, while Plaintiff concedes the Defendant's sincere desire and intention, at present, to attempt to bring two children into being by use of embryos, this Court naturally cannot force her to do so. Accordingly, a judgment in favor of the Defendant in this cause would merely grant her the option to use one or more [of] the pre-embryos. At a later date she would remain free either to abandon her intention or, after implantation, to abort any fetus developed." Plaintiff's Brief at 6, *Davis v. Davis*, (No. E-14496) (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641).

⁹¹ See *infra* notes 114-119 and accompanying text for abortion discussion.

⁹² H. CLARK, *supra* note 55, § 19.4, at 797 (1988).

⁹³ UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 147 (1987).

⁹⁴ H. CLARK, *supra* note 55, § 19.4, at 798 (1988).

⁹⁵ No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642).

⁹⁶ *Id.* at 34.

of the child" rule. The court reasoned that it was in the best interests of the frozen embryos to be born, therefore allowing the parent purporting this same interest to obtain temporary custody of the children.⁹⁷ The court concluded:

[I]t is to the manifest best interest of the children, in vitro, that they be made available for implantation to assure their opportunity for live birth; implantation is their sole and only hope for survival. The court respectfully finds and concludes that it further serves the best interest of these children for Mrs. Davis to be permitted the opportunity to bring these children to term through implantation.⁹⁸

IX. REPRODUCTIVE RIGHTS

A. Basis and Development of the Constitutional Right to Make Decisions Concerning One's Own Reproductive Process

The right to make one's own decision about highly personal matters such as contraception, abortion, marriage and parenting is derived from the implied right of privacy. Although not fully developed with definite parameters, this right to privacy is firmly embedded in case law.⁹⁹ The right of privacy in the United States is not explicitly enumerated in the Constitution. It has developed through case law applying various principles of the Constitution. The right of privacy has come to encompass basic decisions concerning the family unit such as procreation and its reciprocal, the right not to create life.¹⁰⁰

⁹⁷ *Id.* at 36. The court said that after the embryos are born, another custody hearing would be in order to determine the permanent rights of the respective parties. This implies that fathers in this situation are under some type of duty to embryos once they are born and cannot escape the responsibilities of fatherhood, even though they have tried to prevent this occurrence.

⁹⁸ *Id.*

⁹⁹ While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified governmental interference are personal decisions "relating to: marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. 453-454, *id.*, at 460, 463-465 (White, J. concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, [262 U.S. 390, 399 (1923)]." *Roe v. Wade*, *supra*, at 152-153. See also *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-640 (1974).

Carey v. Population Services International, 431 U.S. 678, 685 (1977).

¹⁰⁰ The fundamental right to procreate or to refrain from procreation can be said to derive from each other because the court in defining the fundamental right to procreate used the phrase "*whether to bear or beget a child.*" *Eisenstadt*, 405 U.S. at 453 (emphasis added). This phrase gives birth to both rights. Other fundamental constitutional rights include reciprocals such as the right to travel (which includes the right not to travel) and the right to marry (which includes the right not to marry). See Final Supplemental Amicus Curai Brief at 3, *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. Sept. 21, 1989) (1989 Tenn. App. LEXIS 641), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642).

An early case which began to stake out the grounds of liberty and the personal rights protected by the Constitution, *Meyer v. Nebraska*,¹⁰¹ stated that liberty encompassed "the right of the individual . . . to marry, establish a home and bring up children. . . ."¹⁰² Although this case did not involve sexual reproductive questions, it did involve the right of a parent to control the upbringing of his child.¹⁰³

One of the first cases in the area of reproductive rights was *Skinner v. Oklahoma*.¹⁰⁴ The *Skinner* Court held a state statute unconstitutional which mandated that certain habitual criminals be subject to sterilization. The Court stated that the right to decide whether one should procreate is inherently a personal decision that cannot be superseded by the state.¹⁰⁵

From these two decisions, *Meyer* and *Skinner*, the Court has created "a right to reproduce".¹⁰⁶ Indeed, in *Maier v. Roe*, the Court stated that *Skinner* recognized the "right of procreation".¹⁰⁷

In *Griswold v. Connecticut*,¹⁰⁸ the Court realized that there are different zones of privacy within the broad right itself and then dealt specifically with the right to privacy in the marriage relationship. In *Griswold*, a doctor aided married couples in obtaining contraceptives in violation of a state statute prohibiting the use of contraceptives. Justice Goldberg, in his concurring opinion, explained the reason for holding the state statute unconstitutional:

The rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. . . . The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so.¹⁰⁹

¹⁰¹ 262 U.S. 390 (1923).

¹⁰² *Id.* at 399.

¹⁰³ In *Meyer v. Nebraska*, the issue was whether the state had the right to prohibit children under the level of eighth grade from learning foreign languages. The state tried to advance the theory that its interest in having the children forbidden from learning foreign languages was to promote and ensure that English would become their mother tongue. The court rejected this argument saying that an individual has certain rights which must be respected, among these being the right to acquire useful knowledge. Knowledge of a foreign language cannot be considered harmful, therefore the state has no right to regulate it. If the statute were allowed to stand it would deprive a teacher of her basic liberty to teach and parents their liberty to instruct their own children. The Court reasoned that such basic liberties are well within the meaning of the Constitution although not specifically written within. *Id.* at 401.

¹⁰⁴ 316 U.S. 535 (1942).

¹⁰⁵ Although the Court grounded its decision in the equal protection clause of the Fourteenth Amendment, the Court was highly affected by the fact that the legislation involved depriving a man of his basic liberty. See *id.* at 541.

¹⁰⁶ Clapp, *supra* note 1, at 1081, and 1081 n. 61 (noting Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983) takes the view that the right to procreate is strongly implied).

¹⁰⁷ *Maier v. Roe*, 432 U.S. 464, 472 n. 7 (1977).

¹⁰⁸ 381 U.S. 479 (1965).

¹⁰⁹ *Id.* at 495-496 (Goldberg, J., concurring).

In *Eisenstadt v. Baird*¹¹⁰ the Court again dealt with the issue of contraception.¹¹¹ The Court said that although *Griswold* was based on marital privacy,

the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹¹²

Eisenstadt, although decided on equal protection grounds, is often used as a basis for extending the right of privacy beyond the marital relationship. The right of privacy is an individual right. It encompasses the right to procreate and the right to not procreate.

Extending *Eisenstadt's* concept that the right is individual, *Carey v. Population Services International*¹¹³ held that this right of the individual to decide its own sexual questions, such as whether to use contraceptives, also applied to minors. It is evident that single or married, young or old, each individual has the right to make decisions about his or her own reproductive choices.

*Roe v. Wade*¹¹⁴ takes this personal right to decide whether to bear or beget children, and insulates it from interference from the state, even after conception has occurred. The Court recognized that there were competing interests at stake. The woman's right to privacy was pitted against the state's interest in protecting life. The court concluded that in the second trimester the state had a limited right to protect the mother's life, but not until the third trimester did the state have a compelling right to protect the life of the fetus. Therefore the state had no right to interfere with a woman's privacy decision during the first trimester, and only a very limited right to interfere during the second trimester. The Court emphasized a woman's right to privacy and autonomy in her own body.

In *Planned Parenthood of Central Missouri v. Danforth*¹¹⁵ the Court further displays its position that the right of privacy in reproductive matters is an individual right. It holds that the right to have an abortion cannot be infringed upon, even by a spouse. In striking down the provision

¹¹⁰ 405 U.S. 438 (1972).

¹¹¹ This case was quite similar to *Griswold* in that it sought to prevent contraceptive use, but this time the statute was construed so as to allow married persons to use contraceptives, but to prohibit single people, thus not invading the marital right of privacy. The Court struck down this attempt by the legislature to interfere with the private lives of individuals. It is no business of the government whether contraceptives are used to limit family size or merely to enable individuals to freely enjoy their sexual encounters free from fear of disease.

¹¹² *Id.* at 453.

¹¹³ 431 U.S. 678 (1977).

¹¹⁴ 410 U.S. 113 (1973).

¹¹⁵ 428 U.S. 52 (1976).

of the statute requiring spousal consent to an abortion the Court stated, "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy'."¹¹⁶ The Court cites to *Eisenstadt*¹¹⁷ professing that the right to privacy is an individual right.¹¹⁸ In deciding that the female's individual right to terminate pregnancy prevailed over the father's individual right to procreate, the Court seemed again affected by the woman's autonomy in her body. The Court stated, "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."¹¹⁹

If the embryo is not life with assertable rights, then the focus over a dispute in embryo ownership may take the form of a conflict between the rights of the parents. If the dispute involves one spouse wanting to procreate and the other spouse wishing to avoid procreation, the issue ultimately becomes one of whether there should be a presumption in favor of creating life or allowing non-existence. If the embryo is life, some independent rights may be advanced on its behalf which interfere with the autonomy of parental rights, and any conflict there between. Having laid the basic framework from which these two competing fundamental rights stem, this article will now explore the strengths and weaknesses of each as applied to frozen embryos.

B. Right to Procreate

A litigant may say the right to decide what to do with a frozen embryo is akin to the decision to procreate. The right to procreate has never been seriously questioned in the United States.¹²⁰ Most people procreate without ever thinking that they have exercised a fundamental right. This is because their right has not been challenged by the legislatures.¹²¹ Indeed, the right to procreate is mentioned mostly in dicta, when discussing an individual's freedom to use contraceptives or carry out an abortion—both measures aimed at avoiding procreation. However, whether in dicta or not, "the Supreme Court . . . has recognized a married couple's right to procreate in language broad enough to encompass coital, and most non-coital, forms of reproduction."¹²² The argument advanced for favoring the

¹¹⁶ *Id.* at 69.

¹¹⁷ 405 U.S. 438 (1972).

¹¹⁸ See *supra* note 112 and accompanying text. See also *Danforth*, 428 U.S. at 70 n.11.

¹¹⁹ *Danforth*, 428 U.S. at 71.

¹²⁰ *Robertson I*, *supra* note 1, at 290.

¹²¹ *Robertson II*, *supra* note 7, at 958 ("Although laws regulating fornication, cohabitation, and adultery have limited the freedom of unmarried persons to reproduce, laws limiting coital reproduction by a married couple have been notably absent.")

¹²² *Id.* See also *Andrews*, *supra* note 20, at 359. *Andrews* has expressed a similar view that precedent dictates that the ability to create children coitally protects also the decision to produce children noncoitally (relying on case of *Surrogate Parenting Association v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986)).

right of procreation over the right to avoid procreation would be that as long as the embryo is already created, neither the state nor a spouse should be able to forbid the party from using the embryo to create life.

However, this argument is somewhat faulty. Although there is authority to say the decision to procreate is individual and protected from governmental interference,¹²³ there is no precedent which dictates whether the right to procreate should be stronger than the right to refrain from bearing a child.

*Planned Parenthood of Central Missouri v. Danforth*¹²⁴ does not purport to decide which constitutional right is superior, therefore it should not control the question of whether a woman's decision over a frozen embryo is insulated from spousal or governmental intrusion. *Danforth* can only be used to deny a husband the right to interfere with his wife's decision to abort a child in utero. *Danforth* does not stand for the proposition that the termination of life (or right to refrain from bearing a child) is the superior right. Neither does *Danforth* purport that the woman has the exclusive control over decisions concerning partially developed embryos. Because *Danforth's* analysis rests on the autonomy of the woman's body, *Danforth's* holding is inapplicable as applied to in vitro fertilization.¹²⁵

One may argue that one reason for favoring the right to procreation over the right to avoid procreation is that once the gametes have united to form a conceptus, the spouse wishing to avoid procreation has waived his or her rights and cannot now complain. He or she has consented to the conception.

However the issue of consent and waiver is for the courts to decide. It may be that consent to participate in an in vitro program is not the same as consent to have a child at any time thereafter. Courts may look upon a person's surrendering of his or her gametes for use in in vitro fertilization as conditional consent.¹²⁶ One reason for concluding consent is conditional is that many in vitro clinics make the participants sign contracts stating that no frozen embryos will be released from storage except upon written consent of both spouses.¹²⁷ This implies that separate consent is needed to bring an embryo to life.

However, this argument that the right to procreate is superior to the right to avoid procreation does not take into account who is the better

¹²³ See *supra* notes 112-114 and accompanying text. See also Clapp, *supra* note 1, at 1081-82.

¹²⁴ 428 U.S. 52 (1976).

¹²⁵ *Contra* Final Supplemental Brief of Amicus Curiae at 3, Davis v. Davis, No. E-14496 (5th Dist. Tenn. filed Sept. 21, 1989) (1989 Tenn. App. LEXIS 641), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642).

¹²⁶ Compare to the issue of consent in *Moore v. Regents of the University of California*, 202 Cal.App.3d 1230, 249 Cal.Rptr. 494 (1988), discussed *supra* p.16. There the court concluded that a patient consenting to surgery for the removal of an organ does not necessarily consent to the organ and its tissue being used by surgeons for tests or research.

¹²⁷ See excerpts from a typical in vitro fertilization clinic's contract between itself and the gamete providers, *supra* note 66.

spouse to award the embryo to if both parties would like to bring the embryo to life. Where both parties wish to use the frozen embryo for life, the dispute is more akin to a future custody battle. This is because the gamete donors remain the same, and only the gestational parents change.

C. Right to Avoid Procreation

1. Right to Use Contraceptives

Professor John A. Robertson has stated, "Freedom to have sex without reproduction does not guarantee freedom to have reproduction without sex."¹²⁸ So too, the fundamental right to use contraceptives does not guarantee the right to use in vitro fertilization as a form of contraception. The courts must decide whether the right to use contraceptives is broad enough to include the right to use in vitro fertilization as a method of contraception. Litigants may say the right to decide what to do with a frozen embryo is akin to the decision involving use of contraceptives for the purpose of deciding whether to bear or beget a child. One could argue that freezing embryos from in vitro fertilization is similar to a type of contraceptive in that it allows couples to plan and time when they would have a child. The court has no business directing that the frozen embryos be used to create life, because this is a decision for the married couple, and, further, for each individual to decide. A man or woman is entitled to use contraceptives to avoid the responsibility of becoming a parent before he or she is personally ready. No one may preclude the person from so using a contraceptive, not even one's marital partner or one's parents.¹²⁹ Therefore the court may not take the affirmative action of ordering the frozen embryos to be brought to life because this would be the equivalent of stripping the individual who wishes to avoid parental responsibility of his fundamental right to use a contraceptive.¹³⁰ The court cannot thrust the responsibility of becoming a parent on an individual who wants to avoid parenthood.¹³¹

The weak link to the argument is that the court may say the individual has waived his or her constitutional right to use a contraceptive and refrain from begetting a child by allowing the egg and the sperm to

¹²⁸ Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984) (citing Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 406 (1983)).

¹²⁹ *Carey v. Population Servs.*, 431 U.S. 678 (1977).

¹³⁰ It would also be akin to stripping a person of his fundamental right to have an abortion. See *infra* notes 133-141 & accompanying text.

¹³¹ *Contra* Robertson II, *supra* note 7, at 979 stating:

Although the biological link at issue involves procreation, something more than the procreative label is necessary to establish a right. Whether an unwanted but unidentified biological link is sufficient to ground a right will depend upon the social and psychological significance which individuals and society place on the existence of lineal descendants when anonymity and no rearing obligations exist.

unite.¹³² The purpose of contraceptives is to prevent conception from occurring. The court may say that once conception has occurred the question of a right to contraceptives is null and void. The court may say it is not infringing on a constitutional right at all, merely allowing an already created conception to develop into life if it was to order the frozen embryos be used for implantation.

2. Right to an Abortion

A litigant may also promulgate the argument that the right to decide what to do with a frozen embryo is akin to the right to an abortion. That although conception has occurred, there is a right to terminate pregnancy.¹³³ Although the right to an abortion is limited, the right to terminate before viability, as long as the health of the mother is in no way affected, is absolute. An embryo frozen for use in in vitro fertilization is always frozen at the 4-8 cell stage.¹³⁴ This is definitely before viability. The health of the mother is also not a concern considering the embryo is outside the woman's body. In this light the decision not to bring the frozen embryos to life should be protected under the abortion theory.¹³⁵

It must now be determined whether a man has the same rights to elect an "abortion" of the embryo as a woman would to have an abortion. The rights and interests of each party must be weighed as done by the Courts in *Roe* and *Danforth*. In *Danforth*, it appears the only reason the woman's decision to abort superseded the man's was that it was the woman's body which was involved.¹³⁶ With in vitro fertilization, no such reason exists. Therefore we are back to the question of superseding rights—should there be a presumption in favor of procreation or should there be a presumption that one is free from being forced to procreate against his or her own will.¹³⁷

However, the right to abortion can be distinguished in many ways from the right to decide what to do with a frozen embryo.¹³⁸ First, the right to

¹³² See *supra* notes 126-127 and accompanying text (consent and waiver argument).

¹³³ On the right to terminate pregnancy see Clapp, *supra* note 1, at 1082-85.

¹³⁴ See *supra* note 7.

¹³⁵ But see *supra* note 114 and accompanying text (problem of state's right to protect life). This determination hinges on a determination of whether the embryo is life, as discussed *supra* Part VIII.

¹³⁶ It should be noted that even where a woman has the right to an abortion she does not have the right to order the fetus destroyed if it emerges alive from the abortion, despite the fact that such a genetic link might cause great mental anguish. *Robertson II*, *supra* note 7, at 979 n.133 (discussing *Commonwealth v. Edelin*, 371 Mass. 497, 359 N.E.2d 159 (1976)). This situation, however, can be distinguished from that of a frozen embryo, because a fetus born alive acquires the rights of personhood which a frozen embryo cannot.

¹³⁷ See *supra* Part IX.A.

¹³⁸ One's views about abortion should not automatically be transferred to the dilemma of how to treat a frozen embryo. This is because the developmental stage of a frozen embryo is significantly less than a fetus. *Robertson II*, *supra* note 7, at 974.

an abortion solely belongs to the woman. The court may not choose to extend this right to the man in the context of in vitro fertilization.¹³⁹ Further, the court may take away the woman's right to have an abortion in the case of in vitro fertilization because autonomy of the woman's body is no longer an issue.¹⁴⁰ Finally, the court may say that the right to an abortion does exist in the context of in vitro fertilization, and that the man's right is equal to the woman's.

Roe was decided on the superiority of rights between the woman and the state. The Court had to weigh and balance the rights of each during the entire pregnancy. During the first trimester the state has an interest in protecting the fetus; this interest is not, at this point in time, superior to the right of the woman to decide whether she wants the embryo to develop inside of her. The state's interest does not become compelling until the fetus is viable.¹⁴¹ A 4-8 celled frozen embryo can never be said to be viable, but the state's interest may still be superior because it does not have to be weighed against the woman's privacy to her body. The decision the court will have to face is whether the state's interest in protecting the embryo as a person is superior to either the woman's or the man's decision that they do not want parenthood thrust upon them.

*D. Case Law Using Constitutional Reproductive Rights
as a Basis for Deciding Disputes Relating to Frozen Embryos*

The only court to address a frozen embryo dispute at a constitutional rights level is *Davis v. Davis*.¹⁴² In *Davis* the appellate court reversed the trial court's decision which treated the embryos as life and which applied custody to the dispute over the embryos. Instead, the appellate court based its decision upon constitutional law principles stating:

Awarding the fertilized ova to [the former wife] for implantation against [the former husband's] will, in our view, constitutes impermissible state action in violation of [the former husband's] constitutionally protected right not to beget a child where no pregnancy has taken place.¹⁴³

¹³⁹ If this is so, the woman could be the sole decider of whether a genetic link would occur. For she could either have the child, or if she wished to avoid a genetic link, she could circumvent any laws forbidding the destruction of a frozen embryo by implanting the embryo and then having it aborted.

¹⁴⁰ This would mean there is no constitutional right to avoid genetic links, be the avoider man or woman, unless the court finds a separate constitutional ground to protect decisions avoiding procreation.

¹⁴¹ *Webster* challenges the trimester analysis, but upholds viability as a competent method of determining personhood and the state's ability to assert protection of life.

¹⁴² No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642).

¹⁴³ *Id.* at 5 - 6.

The court, after finding that the former husband had a constitutional right to refrain from begetting a child, looked to see whether the state had a compelling interest which would justify the state's interference with the former husband's constitutional right. After examining Tennessee's legislative acts, the policies evidenced in those acts and case law, the court concluded that there was no compelling state interest to justify interfering with the constitutional right of whether to bear or beget a child.

The court seemed to imply that the interest in preserving life is the only state interest that would justify interference with the constitutional right of whether to bear or beget a child. It did this by first observing that "'Life' begins in contemplation of the law as soon as an infant is able to stir in the mother's womb."¹⁴⁴ The court then proceeded to assess the state's policy towards fetuses in the womb. It looked to the Tennessee wrongful death statute which does not allow an action for wrongful death unless the fetus is first born alive. It therefore concluded that fetuses are not entitled to the same protection as persons. To bolster this point and further point out that embryos (and thereby the state because the state has a right to protect the life) are accorded more rights as they develop into persons the court then looked to Tennessee's abortion statutes, which utilize the trimester approach.¹⁴⁵

Concluding that frozen embryos have not attained the legal status of a person, and therefore the state does not have an interest in protecting them equivalent to that of protecting life, the court determined that the state did not have a compelling interest to justify interference with the constitutional right of whether to bear or beget a child. In so holding the court stated:

On the facts of this case, it would be repugnant and offensive to constitutional principles to order [the former wife] to implant these fertilized ova against her will. It would be equally repugnant to order [the former husband] to bear the psychological, if not the legal, consequences of paternity against his will.¹⁴⁶

The court then granted both the former husband and wife joint control over the frozen embryos, decreeing that each shall have an equal voice over their disposition.

Although this court's decision seems to imply that frozen embryos are not yet life, it unfortunately did not decide which constitutional right should control — the right to bear or the right not to bear children. It appears that the right to not bear children prevails in this case because in order for any action to be taken with the embryos, both Davises must

¹⁴⁴ *Id.* at 7 (quoting William Blackstone, *Commentaries on the Laws of England*, vol. 1, p. 125).

¹⁴⁵ TENN. CODE ANN. § 39-15-201.

¹⁴⁶ *Davis*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642, at 7-8).

agree. By not agreeing to any action, the frozen embryos remain frozen in storage thereby allowing Mr. Davis to actually exercise his constitutional right not to have children. By not facing this controversy between the two constitutional rights head on, the court has invited more cases of this type to be brought before the courts.

However, since this court did imply that the frozen embryos are not yet life, it would seem that the state does not have an assertable interest with respect to the embryos. Therefore, this decision may preclude any state legislation mandating that the embryos be brought to life or awarded to one who would bring them to life.

E. Summary of Fundamental Constitutional Right Argument

The courts will have to decide if the claim to reproductive autonomy is superior to the state's interest in protecting life. Once again the court will have to face the issue of when life begins. Because a 4-8 celled embryo is at the most thirty-six hours old, and cannot further develop unless implanted into a woman's uterus, the court cannot find the embryo viable. However, since *Webster* did allude to the fact it might accept or create another standard for measuring when life begins, the door is not closed. However, unless the court is willing to hold that life begins at conception, it is unlikely that a frozen embryo will be found to constitute life which the state can protect.

As long as the embryo is found not to constitute life, the Supreme Court will next have to answer whether the right to procreate or the right not to procreate is stronger. The sitting Court leans toward conservatism, and therefore would not be likely to expand the area of personal fundamental rights relating to contraceptions and abortions. Indeed, the *Roe* decision was recently cut back by *Webster*, indicating such a sentiment. Additionally, in the complex situation presented, the Court will most likely reach for the simplest means of deciding the issue. In the conflict between rights, this may be the scapegoat of waiver or consent.

X. SHOULD A NEW AND DISTINCT BODY OF LAW BE CREATED TO GOVERN TECHNOLOGICALLY ADVANCED FORMS OF REPRODUCTION?

Present statutory and case law is inadequate in providing a framework for governing new reproductive technologies. Far fetched analogies and ad hoc lower court decisions leave the state of the law in turmoil over disputes arising from such new technology.¹⁴⁷ The problems of artificial insemination, surrogate mothering and in vitro fertilization are not apt to disappear on their own. Indeed, the more time that passes, the more perfected the techniques become, the more attractive the option of utilizing them becomes to individuals.

¹⁴⁷ Robertson II, *supra* note 7, at 952 n. 48 ("The legal environment is marked by an absence of direct regulation and uncertainty about the extent to which laws devised for other purposes will apply.")

Many states have adopted statutes governing artificial insemination, but these are largely inadequate and only tip the iceberg in beginning to resolve disputes over new technologically advanced reproductive methods. The law in this area should be free to advance without the restraints of traditional doctrines. As the saying goes "you can't put a square peg in a round hole," so too you cannot fit new technologically advanced methods of reproduction into the simple legal framework governing coital reproduction.¹⁴⁸

The problems with creating a new framework of laws in this area are numerous. One question is who should devise and who should have considerable input into the new framework - doctors, lawyers, infertile couples, religious groups? Also, who should fund such an operation? Should it be a uniform act, able to be accepted or rejected by all the states?

XI. CONCLUSION

The subject of new reproductive technologies must soon be addressed by the legislatures. Because the question is so emotionally charged, the legislature appears to be the proper forum. There are basically three common avenues from which commentators choose. First, an act could take the position that the embryos are not property but life which must be protected from destruction. The opposite conclusion could be that the embryos are property over which parties may dispute. The third option, or middle ground, may be that the embryos are neither life nor property, but because they offer the potential to become life, they should be treated with respect and afforded limited rights.

This author proposes that the middle ground is a form of avoiding the ultimate question. Affording embryos respect does not solve disputes, but begs the question of "how much respect should they be afforded?" Because the world presently has too many homeless and unwanted children, a statute should not impose the burden of bringing all frozen embryos to life. This is too much respect for potential life that ignores the realities of the world.

Secondly, because the frozen embryo has not developed an embryonic axis or any other distinctive characteristics, there is no reason to treat

¹⁴⁸ R.D. Hash argues that *Danforth*, reasoning that a spouse has no rights to interfere with his wife's decision to seek or not seek an abortion, should apply to in vitro fertilization. Hash states "[t]here is no question the state and the spouse would have no authority if this was a purely natural reproductive process. Why under these facts should it be treated any differently?" Final Supplemental Brief of Amicus Curiae at 5, *Davis v. Davis*, No. E-14496 (5th Dist. Tenn. filed Sept. 21, 1989) (1989 Tenn. App. LEXIS 641), *rev'd*, No. 180 (Tenn. App. Sept. 13, 1990) (1990 Tenn. App. LEXIS 642). Because the facts, especially that the embryo is outside the mother's womb, are different, the same type of legal framework should not apply.

this embryo as human life. A statute should allow owners of such organisms to decide their fate. Further, if a dispute between owners is involved, because no human life has developed, the presumption in favor of letting the organism expire should prevail over the other gamete provider's wishes to bring the embryo to life. Because the gamete provider who wishes to create life may always try again, either with one's own gametes or those from donor's, new technology has afforded the gamete provider that luxury. Because this option is possible, the gamete provider desiring to sever all genetic links to his or her person should be entitled to such a right.

A uniform act should be promulgated and submitted to each of the separate states for adoption. The act should go beyond the mere problems faced today and decide fundamental issues which will provide the basis to solve tomorrow's problems. By doing this a more stable and predictable body of law will develop, enabling the legal profession to meet the dilemmas new technology proposes.

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