Notes

The Modern Legal Status of Frozen Embryos

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With the help of modern technology, people today have more flexibility than ever before in the realm of family planning and conceiving children. An increasing amount of couples are opting to go through in vitro fertilization to create and then freeze embryos for use at a later date. However, problems arise when these people no longer want to have children together.

Our courts are still grappling with the issue of what happens to these embryos in the event of separation, and various theories of the legal status of an embryo have emerged in response, to try to shed light on the complex arguments for each side. This Note argues that the unique class occupied by the frozen embryo—that of not quite person and not quite property—should be embraced. This Note further proposes a new statutory scheme that would provide courts with a straightforward framework to guide their analysis in separation or divorce proceedings.

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INTRODUCTION

Modern technology has advanced family planning in a multitude of fashions, giving people more opportunities to conceive children than ever before.[1] However, the law is still catching up with conflicts that may arise as a result of such practices.[2] The predominant method of assisted reproductive technology ("ART") used today is in vitro fertilization ("IVF").[3] Couples[4] are more frequently opting to freeze embryos they create together through IVF.[5] This practice affords families the opportunity to have children when fertility may be an issue or at a later date for the sake of convenience.[6] However, the situation becomes quite complicated when the people who jointly created the embryos decide that they no longer want to be together,

1. Remah Moustafa Kamel, *Assisted Reproductive Technology After the Birth of Louise Brown*, 14 J. REPROD. INFERTILITY 96, 104 (2013).

2. *See* Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html.

3. *See Clinic Summary Report*, SOC'Y FOR ASSISTED REPROD. TECH., https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Jan. 25, 2017).

4. For the purposes of this Note, any reference to "couples" will refer to heterosexual couples using their own genetic material to mutually create embryos.

5. Lewin, *supra* note 2.

6. In the aggregate, American women are having children later in life than ever before. Jen Christensen, *Record Number of Women Using IVF to Get Pregnant*, CNN (last updated Feb. 18, 2014, 2:36 PM), http://www.cnn.com/2014/02/17/health/record-ivf-use/.

and thus, no longer want to have children together.[7] Consequently, there are two primary issues that individuals and courts face: (1) what happens to the embryos in the event of separation; and (2) what legal status should these embryos be given in order to decide the former question.[8]

Anti-abortion and related interest groups have recently claimed a stake in the debate over legal status, taking a stand in support of embryos having personhood.[9] They argue that embryos should be considered living beings in the eyes of the law and, consequently, that the embryos' best interests should be taken into consideration in the event that the providers of the genetic material want to separate or divorce.[10] The anti-abortion groups analogize this theory to the "best interests" test that is used to determine what a child's best interests are in the event of a divorce between parents.[11] Anti-abortionists argue that the embryo's "best interest" is its interest in being born. In the event of separation, the embryo, as a legal person, should be brought to life at all costs.[12] Louisiana has adopted a similar position and enacted legislation that provides for the treatment of embryos as "juridical persons."[13]

This Note argues that the personhood framework that anti-abortion groups have adopted is flawed for several reasons. First, embryos should not be considered full legal persons in the eyes of the law because they exist in a unique space of being not quite person, but not fully property. Therefore, courts should not apply the "best interests" test to embryos in the same manner that it is applied to children. Similarly, statutes that treat embryos as people[14] fail to recognize an individual's right not to procreate. This Note alternatively proposes that state legislatures adopt a statutory scheme that mandates couples to agree on the disposition of embryos in the event of separation *before* undergoing IVF procedures. Furthermore, this Note discusses the recent California Superior Court

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7. Again, this Note will largely deal with heteronormative gender roles where the "custody of frozen embryos following [separation] is often more important to women than to men," with women typically wanting to keep the embryos. Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1063 (1996).

8. *See* Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 233–34 (2013).

9. Tamar Lewin, *Anti-Abortion Groups Join Battles over Frozen Embryos*, N.Y. TIMES (Jan. 19, 2016), http://www.nytimes.com/2016/01/20/us/anti-abortion-groups-join-battles-over-frozen-embryos.html; *see, e.g.*, *About the Thomas More Society*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/about/ (last visited Jan. 25, 2017).

10. Lewin, *supra* note 9.

11. *Id.*; *see* 3 CHERYL ROSEN WESTON, FAMILY LAW LITIGATION GUIDE WITH FORMS: DISCOVERY, EVIDENCE, TRIAL PRACTICE § 35.04 (LexisNexis 2016) (describing more thoroughly the "best interest" test).

12. Lewin, *supra* note 9.

13. LA. STAT. ANN. § 9:124 (1997). "A juridical person is a legal entity created by the law which is not a natural person . . . . It is a legal entity having a distinct identity and legal rights and obligations under the law." *Juridical Person Law and Legal Definition*, U.S.LEGAL.COM, https://definitions.uslegal.com/j/juridical-person/ (last visited Jan. 25, 2017).

14. *See, e.g.*, LA. STAT. ANN. § 9:130 (1997).

decision in *Findley v. Lee*[15] which demonstrates how courts can make clear, straightforward decisions in the midst of emotional circumstances by implementing a contract framework of analysis.[16] With proper scrutiny, the embryo's uniquely flexible legal status can be accepted without making a definitive, polarizing categorization.

I. Background Information

A. The Prevalence of Assisted Reproduction Technology

The use of IVF and, more broadly, ART has grown exponentially since the first successful IVF birth in the late 1970s[17] and the first successful IVF birth in America in 1981.[18] According to preliminary 2014 data from the Center for Disease Control and Prevention, approximately 1.6% of all infants born in the United States are conceived through some form of ART, whether through IVF or otherwise.[19] The use of ART in general has doubled over the past decade alone, with estimates ranging from one million to over four million cryopreserved (frozen) embryos currently held in storage facilities across the country.[20]

IVF in particular is the most prevalent and well-known form of ART today.[21] The term IVF literally translates to "in glass" fertilization, signifying the process by which human sperm and egg are combined outside of the body in a petri dish.[22] After approximately forty hours, the eggs are examined for signs that they have been fertilized by the sperm, creating embryos.[23] If the donors wish to attempt to conceive at that time, the embryos with the greatest chance of development are transferred directly back into the woman's uterus, bypassing their usual journey through the fallopian tubes.[24] If there are any remaining embryos, they are then typically cryopreserved in liquid nitrogen at a very low

15. *See generally* Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016) (exemplifying a court making a decision involving a great deal of emotional complexity).

16. Still, California law leaves something to be desired. *See infra* Part III.C.

17. Louise Brown, the first successful child born via IVF, was born on July 25, 1978, in the United Kingdom. Kamel, *supra* note 1, at 96.

18. *Id.* at 97–98.

19. *ART Success Rates*, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/art/reports/index.html (last visited Jan. 25, 2017). Some other forms of ART include gamete intrafallopian transfer ("GIFT"), zygote intrafallopian transfer ("ZIFT"), and gestational surrogacy. Ctrs. for Disease Control & Prevention, Assisted Reproductive Technology Fertility Clinic Success Rates Report 2013 529–31 (2015).

20. *See ART Success Rates*, *supra* note 19; Dave Snow et al., Letter to the Editor, *Contesting Estimates of Cryopreserved Embryos in the United States*, 33 Nature Biotechnology 909, 909 (2015).

21. *See Clinic Summary Report*, *supra* note 3.

22. *Q05: What Is In Vitro Fertilization?*, Am. Soc'y for Reprod. Med., https://www.asrm.org/detail.aspx?id=3022 (last visited Jan. 25, 2017).

23. *Id.*

24. *Id.*

temperature in order to keep them viable until the couple is ready to thaw and implant them.[25]

Two recent disputes highlight the currently dizzying landscape of embryo-custody litigation. In *McQueen-Gadberry v. Gadberry*, the Eastern District of Missouri Court of Appeals affirmed the trial court's ruling and defined a couple's frozen embryos as "marital property of a special character,"[26] jointly awarding the embryos to both parties.[27] The mother, who wished to use the embryos to become pregnant again against the father's wishes, had appealed the decision below, arguing that the trial court erred by ignoring a Missouri statute that defines life as beginning at conception.[28] Missouri Right to Life, an anti-abortion interest group who supported the appeal, filed an amicus brief in her defense.[29] The appellate court has since rejected the mother's arguments.[30] Similarly, *Modern Family* star Sofia Vergara and her ex-fiancé Nick Loeb are in a contentious battle over frozen embryos that started in Los Angeles and has now made its way to New Orleans.[31] Loeb has dropped his original suit against Vergara to fight for custody of the embryos—an interesting reversal of usual gender roles in itself—and those embryos, named Emma and Isabella, are now suing Vergara for "their immediate transfer to a uterus so that they can develop and be born."[32]

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25. *Cryopreservation and Storage*, AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/Topics/Cryopreservation_and_Storage/ (last visited Jan. 25, 2017); *Frozen Embryo Transfer, FET Cycles After IFV*, ADVANCED FERTILITY CTR. OF CHI., http://www.advancedfertility.com/cryotank.htm (last visited Jan. 25, 2017).

26. McQueen-Gadberry v. Gadberry, No. ED103138, slip op. at 27 (E.D. Mo. Nov. 15, 2016).

27. *Id.* at 40. The frozen embryos were subject to the divorced spouses' "joint control," and any use of the embryos required authorization from both. *Id.*

28. *Id.* at 10.

29. *Id.*; Brief for Missouri Right to Life et al. as Amici Curiae Supporting Appellant, M*cQueen-Gadberry*, No. ED103138, (MO App.); Joel Currier, *Divorced St. Louis County Couple's Fight over Frozen Embryos Heard in Appeals Court Here*, ST. LOUIS POST-DISPATCH (June 1, 2016), http://www.stltoday.com/news/local/crime-and-courts/divorced-st-louis-county-couple-s-fight-over-frozen-embryos/article_7938bdeo-1eb8-5462-8dea-2ac3f2a0cf50.html.

30. Susan L. Crockin, *Missouri Court of Appeals Rejects Wife's Claim to IVF Pre-Implantation Embryos as Children*, REPRODUCTIVEFACTS.ORG (Dec. 16, 2016), http://reproductivefacts.org/Legally_Speaking_MO_Court_of_Appeals_Rejects_Wifes_Claim_to_IVF_Pre-Implantation_Embryos_as_Children/.

31. Wilborn P. Nobles III, *Sofia Vergara Sued on Behalf of Her Own Frozen Embryos in Jefferson Parish Court*, TIMES-PICAYUNE (NEW ORLEANS) (last updated Dec. 19, 2016, 2:52 PM), http://www.nola.com/crime/index.ssf/2016/12/sofia_vergara_lawsuit_gretna.html.

32. Brandy Zadrozny, *Sofia Vergara Embryo Case Could Open Floodgates*, DAILY BEAST (Dec. 8, 2016, 3:29 AM), http://www.thedailybeast.com/articles/2017/02/07/trump-s-lies-boost-politifact-s-fundraising-big-league.html.

B. Possible Guiding Authorities

Currently no federal statutes guide courts when deciding what happens to embryos if they are frozen for later use.[33] Before the advances of modern technology and IVF, no guidance was required because the term "embryo" referred only to the embryo inside a woman's body. Today, the technology exists to store frozen embryos indefinitely, and families must decide what to do with unwanted or excess embryos: keep them for future use, thaw and discard them, donate them to research, or donate them to other families.[34] An already difficult decision for a couple becomes further complicated when couples separate and have competing interests. Due to a dearth of federal guidance, individual states are left to piece together their own solutions through analysis of a multitude of legislative and judicial approaches.[35]

As previously mentioned, an embryo in Louisiana is considered a "juridical person."[36] As a person, the embryo cannot be destroyed regardless of the wishes of either of the IVF parents.[37] Because the parents do not own and cannot destroy the embryo if they no longer want it, their only option is to renounce their "parental rights for in utero implantation" to another couple.[38] The receiving couple must be married, as well as willing and able to receive the embryo for implantation.[39]

In contrast, Florida law provides for the disposition of embryos if the couple and their physician "enter into a written agreement that provides for the disposition of the commissioning couple's . . . preembryos in the event of a divorce . . . or any other unforeseen circumstance."[40] However, the statute also provides for the disposition of embryos in the absence of a written agreement.[41] In this case, decisionmaking authority "shall reside jointly with the commissioning couple," meaning that the couple must agree on whatever course of action they choose to take.[42] The statute does not provide guidance as to who decides or what happens in the case of disagreement, however.

In California, Health and Safety Code section 125315 (formerly section 125116) governs the choice of embryo disposition.[43] Prior to

33. Statement of Decision, *supra* note 15, at *1.
34. Lewin, *supra* note 2.
35. Statement of Decision, *supra* note 15, at *1.
36. La. Stat. Ann. § 9:123–9:125 (1997).
37. *Id.* § 9:129.
38. *Id.* § 9:130.
39. *Id.*
40. Fla. Stat. § 742.17 (2016).
41. *Id.*
42. *Id.*
43. Cal. Health & Safety Code § 125315 (West 2016).

undergoing ART, patients must complete advanced written directives regarding embryo disposition.[44] As with any advance directive that allows the patient to plan provisions for healthcare decisions, this form allows couples to specify what will happen to the embryos in the case of certain life events, including separation or divorce.[45] California law also states that failure of a physician to provide patients with proper information regarding fertility treatment and the disposition of their embryos constitutes "unprofessional conduct."[46]

Massachusetts law similarly requires physicians to provide patients with "timely, relevant and appropriate information" so that patients can make "informed and voluntary choice[s] regarding the disposition of any pre-implantation embryos . . . ."[47] More specifically, patients are given an informational pamphlet detailing the IVF procedure and an informed consent form, which must be completed and signed before a physician begins treatment.[48]

C. Embryos: People, Property, or Neither?

Inherent to the discussion of what happens to embryos in the event of separation is the question of what embryos are characterized as under the law. In terms of categorical characterizations, there are two main schools of thought: embryos as people and embryos as property. However, the polarizing effect of these two labels has encouraged the development of a third category of not quite person, but not fully property, that exists in a unique space in between the two.[49]

The root of the traditional personhood argument is often attributed to the Christian and Roman Catholic religions.[50] In 1875, Pope Pius IX officially adopted the view that life begins at conception, which is still accepted and purported as the Catholic viewpoint today.[51] While the exact timeframe of when Christian theology adopted the concept of embryonic personhood has been debated—as well as whether Christian morality still calls for an absolute protection of life—religion has become

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44. *Id.*

45. The options given are "(A) Made available to the female partner. (B) Donation for research purposes. (C) Thawed with no further action taken. (D) Donation to another couple or individual. (E) Other disposition that is clearly stated." *Id.*; *see Put It in Writing*, Am. Hosp. Ass'n, http://www.aha.org/advocacy-issues/initiatives/piiw/index.shtml (last visited Jan. 25, 2017).

46. Health & Safety § 125315.

47. Mass. Gen. Laws Ann. ch. 111L, § 4 (West 2016).

48. *Id.*

49. *See generally* Radhika Rao, *Property, Privacy and Other Legal Constructions of Human Embryos*, *in* The 'Healthy' Embryo: Social, Biomedical, Legal and Philosophical Perspectives (Jeff Nisker et al. eds., 2010) (discussing this third category of sorts).

50. *See* G. R. Dunstan, *The Moral Status of the Human Embryo: A Tradition Recalled*, 10 J. Med. Ethics 38, 38–39 (1984).

51. Maggie Davis, *Maryland "Embryo Adoption": Religious Entanglement in the Maryland Stem Cell Research Act of 2006*, 17 U. Pa. J.L. & Soc. Change 291, 306–07 (2014).

"the cornerstone of the Evangelical Conservatives' opposition to a number of reproductive rights."[52]

Some states, such as the previously discussed states of Missouri and Louisiana, have adopted legislation in accordance with the personhood theory.[53] In *Webster v. Reproductive Health Services*, the Supreme Court upheld the constitutionality of a Missouri statute, which states, "unborn children have protectable interests in life, health, and well-being."[54] In doing so, the Court emphasized that states should not be limited in making "value judgment[s]" and that each state retains autonomy to make such determinations to govern their citizens.[55] Many interest groups, such as anti-abortionists, have also come out in defense of personhood.[56] According to Thomas Olp of the Thomas More Society, the argument is simple: "[E]mbryos are living beings, so the legal standard has to be what's in their best interest."[57] For an embryo, this means the fundamental interest in being brought to life.[58]

The "best interests" test comes from child custody law, where a majority of jurisdictions require that a litigant "show that the custody arrangement sought is in the best interest of the child."[59] The Uniform Marriage and Divorce Act (which has been adopted by numerous states) among other state statutes has set forth the following as criteria to be considered in determining what exactly the "best interests" of a child are:

> (1) the wishes of the child's parent or parents as to custody;
>
> (2) the wishes of the child as to his or her custodian;
>
> (3) the interaction and relationship of the child with the parent(s), siblings, and other persons who may significantly affect the child's best interests;
>
> (4) the child's adjustment to home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.[60]

These criteria recognize that children have certain physical and emotional needs as well as their own personal preferences.

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52. *Id.* at 306 (describing the evolution of religion as the "cornerstone" of the opposition to reproductive rights). *See generally* Dunstan, *supra* note 50 (arguing that the absolute right to life of the human embryo does not exist and is merely a novelty in Western Christian tradition).

53. MO. REV. STAT. § 1.205 (2016); LA. STAT. ANN. § 9:124 (1997).

54. Webster v. Reprod. Health Servs., 492 U.S. 490, 490 (1989).

55. *Id.* at 510 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

56. *See, e.g.*, *Who We Are*, AM. RIGHT TO LIFE, http://americanrtl.org/about/ (last visited Jan. 25, 2017) (describing a religious pro-life advocacy group that describes themselves as being "On the Personhood Wing of the Pro-life Movement"); *About the Thomas More Society*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/about/ (last visited Jan. 25, 2017) (describing a public interest law firm that litigates "cutting edge cases" on issues such as pro-life rights, free expression of religion, and the "sacred union of [marriage between] one man and one woman").

57. Lewin, *supra* note 9.

58. *Id.*

59. WESTON, *supra* note 11, § 35.04.

60. *Id.*

The argument for treating embryos as property starkly contrasts the argument for embryonic personhood. No longer is the embryo considered a vessel of life with its own inherent rights, but instead as a physical object that one takes ownership and control over.[61] According to John Locke's natural rights theory of property, "every man has a property in his own person."[62] Flowing from this argument, Locke also considers one's labor an extension of one's person.[63] Therefore, when man "removes out of the state something that nature hath provided and left it in" and "mixe[s] his labour with and joins to it something that is his own . . . [he] makes it his property."[64] While this theory is not completely applicable to embryos,[65] it would limit the property interests of others besides the progenitors of the embryo.[66]

The District Court for the Eastern District of Virginia adopted a version of this property framework in *York v. Jones*.[67] In *York,* the Jones Institute for Reproductive Medicine refused to release the frozen embryos created by Steven and Risa York, which the married couple sought to remove and bring to a facility for implantation in their new home state of California.[68] Conducting a contract-based analysis, the Court held that the Cryopreservation Agreement signed by the couple and the IVF clinic created a bailor-bailee relationship.[69] Thus, once the purpose of the bailment—to undergo IVF with the clinic and become pregnant—was terminated when the wife failed to get pregnant, the clinic bailee was obligated to return the frozen embryo property to the bailor couple.[70]

Because the legal identity of the embryo is a complex issue, many are opposed to strictly categorizing embryos as either people or property. University of California, Hastings College of the Law professor Radhika Rao presents an alternative solution that straddles this dichotomy.[71] She presents the embryo as a subject of conflicting rights, whose status is dependent on a number of factors surrounding the embryo's unique

61. The fact that embryos are physically tangible "things" makes it easier to conceptualize them as property compared to intangible intellectual property. Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 174 (2005).

62. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 22 (1690).

63. *Id.*

64. *Id.*

65. One potential counterargument may be that living children would then be considered property.

66. Berg, *supra* note 61, at 183.

67. York v. Jones, 717 F. Supp. 421, 425 (1989).

68. *Id.* at 423–24.

69. *Id.* at 425. In a bailor-bailee relationship, the bailee is obligated to return the property in question to the bailor once the purpose of the bailment has ceased. *Bailment*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/bailment (last visited Feb. 6, 2017).

70. *York*, 717 F. Supp. at 425.

71. *See generally* Rao, *supra* note 49, at 32 (proposing this new third category that straddles the property versus personhood dichotomy).

situation.[72] As neither purely property nor person, embryos exist in a unique realm where legal status depends on the constitutional rights of others involved in the situation.[73] While the common perception is that an individual's constitutional right to reproductive autonomy (and thus to embryos) depends on the embryo's legal status, Rao argues for a more contextually balanced approach.[74]

In the case of frozen embryos, the obvious conflict is that between the rights to procreate, typically asserted by the mother who wants to use the embryos, and not to procreate, typically asserted by the father who no longer wants to have children.[75] The Supreme Court has established that the Fourteenth Amendment includes the right to procreate,[76] holding in *Meyer v. Nebraska* that the liberties protected by the Fourteenth Amendment include the right to "bring up children."[77] In *Skinner v. Oklahoma*, the Court similarly held that the Equal Protection Clause of the Fourteenth Amendment includes marriage and procreation as basic civil rights that are necessary for the human race to survive.[78] However, the right *not* to procreate is not as straightforward when viewed in the context of an embryo dispute.[79] For example, Harvard Law School professor Glenn Cohen views this right not to procreate as a "bundle of sticks" containing the separate but related rights not to be a genetic, legal, or gestational parent.[80]

Some courts have established that the solution to this conflict of rights is to implement a balancing test that weighs the interests of each genetic parent involved. For example, in *Davis v. Davis*, originally a divorce action, the couple was able to agree upon all dissolution terms except for what to do with the leftover frozen embryos they possessed from a previous IVF attempt that was unsuccessful.[81] The Davises did not have a prior agreement in place in the event of separation or divorce.[82] After an analysis of both the mother's and the father's competing interests, the court ruled in favor of the father, holding that his interest in not becoming a parent outweighed the mother's interests in donating the embryos rather than trying to achieve parenthood herself.[83]

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72. *Id.*
73. *Id.*
74. *Id.*
75. Colker, *supra* note 7, at 1063.
76. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
77. *Meyer*, 262 U.S. at 399.
78. *Skinner*, 316 U.S. at 541.
79. That is, as opposed to the right not to procreate within the abortion context, which was established by *Roe v. Wade*, 410 U.S. 113, 154 (1973).
80. *See generally* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008) (challenging the assumed existence of a constitutional right to procreate).
81. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).
82. *Id.* at 590.
83. *Id.* at 604.

II. Analysis

A. Embryos as People

The argument for embryos having personhood, which is promulgated predominantly by anti-abortion groups, is flawed. In its perennial decision *Roe v. Wade*, the Supreme Court upheld the right of a woman to an abortion by ruling that the government cannot intervene on behalf of a fetus until the viability stage of pregnancy.[84] The Court established viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," which usually comes around the twenty-four to twenty-eight week mark.[85] Even at that point, the state must have a compelling interest to intervene in order to respect the woman's right to privacy.[86] Although the right to personal privacy is not explicitly mentioned anywhere in the Constitution, the Court in *Roe* relied on their previous opinion in *Griswold v. Connecticut* in order to establish that right.[87] In *Griswold*, the Court created various zones of privacy using the commonly referred to "penumbras" of the Bill of Rights, which are "formed by emanations from those guarantees that help give them life and substance."[88] These penumbras include, for example, the First Amendment's right to free speech and assembly, the Third Amendment's guarantee against quartering soldiers in times of peace, the Fourth Amendment's right against unreasonable search and seizure, and the Fifth Amendment's guarantee against the taking of private property for public use.[89]

Because the embryo is created so far in advance of the viability of the fetus and all three trimesters of pregnancy, the argument for allowing the government to intervene on behalf of the embryo's rights based on personhood is consequently much weaker.[90] The personhood argument fails to recognize the biological distinctions between the various stages of pregnancy from conception to birth.[91] One may be hard-pressed to imagine a situation in which a state's interests are so great as to take precedence over a woman's right to privacy given the analysis in *Roe*, where the Court also established in dicta that the fetus is generally not considered a person before live birth occurs.[92]

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84. *Roe*, 410 U.S. at 163–65.
85. *Id.* at 160.
86. *Id.*
87. *Id.* at 152.
88. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
89. *Id.*
90. Locke, *supra* note 62, at 21.
91. Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 Ga. L. Rev. 625, 658 (1991).
92. *Roe*, 410 U.S. at 161–62.

Some may argue that the state interest language from *Roe* is inapplicable to frozen embryos because it is taken out of its original context of pregnancy and abortion.[93] Moritz College of Law professor Ruth Colker makes this argument, stating that *Roe* only implicates the right of a pregnant woman not to be pregnant.[94] However, embryos today can exist both within a pregnant woman and outside of the woman's body, meaning that a woman's bodily autonomy is no longer necessarily affected in the same way that it was in *Roe*. Because the man and woman now make equal physical contributions to creating a new life[95]—as opposed to a natural pregnancy where the woman bears more of the burden—the rights afforded to pregnant women by the Court in *Roe* should be expanded to include both individuals contributing their genetic material to create the embryos. Instead of the right to privacy in relation to terminating pregnancy, these IVF donors would have the right to privacy of their genetic material.

If an embryo is not a person, it follows that it cannot possess any personal interests for the court to take under consideration. Consequently, the "best interests" analysis applied during child custody disputes should not, and cannot, be applied to embryos. One of the main factors in determining a child's "best interest" is "the mental and physical health of all individuals involved."[96] Even if embryos had "personhood," they do not yet have any cognitive capabilities, and thus cannot be mentally well or unwell. Similarly, the consideration of "the child's adjustment to home, school, and community" is irrelevant when considering an embryo.[97] An analysis of the "best interest" criteria validates the assertion that the test was developed to be used for living, breathing children, not the mass of cells we call embryos.

Individuals should not be forced into becoming genetic parents and should have the right *not* to procreate. The precedence for the right not to become a genetic parent can be found in sperm donors and deceased genetic parents.[98] With sperm donors, the donor agrees to donate his sperm and accept non-parenthood by agreeing to relinquish any parental rights.[99] In the case of a deceased genetic parent, the parent's genetic

93. The original context of *Roe* dealt with embryos within the body as opposed to outside of it. *See generally id.*

94. Colker, *supra* note 7, at 1067–68.

95. Ruth Colker would disagree. Her argument is that women still have more to lose in the context of frozen embryos because a woman's egg supply and fertility decrease over time, while a man's sperm does not. *Id.* at 1063.

96. WESTON, *supra* note 11, § 35.04.

97. *Id.*

98. Yehezkel Margalit, *To Be or Not to Be (a Parent)?—Not Precisely the Question: The Frozen Embryo Dispute*, 18 CARDOZO J.L. & GENDER 355, 375–77 (2012).

99. *Id.* at 375.

material should not be used if the individual did not affirmatively express the intent to become a parent after death.[100]

Looking to relevant state law, as previously discussed, Louisiana denies IVF parents the right not to become a genetic parent by statutorily giving embryos the status of a "juridical person."[101] These parents do not have the options of thawing and discarding the embryos or donating them to research, because they are forced to place their embryos up for "embryo adoption."[102] Not only does this statute deny genetic parents decisionmaking control over their embryos, but it also infringes on their procreative liberty.[103] This lack of procreative freedom may deter people who are considering IVF or some other form of ART from conceiving. The restrictive nature of naming an embryo a "juridical person" may also deter ART facilities from offering procedures such as IVF for fear of violating the embryo's rights, further restricting potential IVF parents from undergoing the procedure.[104]

B. Embryos as Property

By looking at the embryo objectively as property, courts can easily circumvent the complicated legal, philosophical, and moral arguments that derail the analysis when applied to the question of what should happen to the embryos in the event of separation. Treating the embryo as property allows courts to apply contract law in a more clear and straightforward manner. This approach is particularly useful in highly emotional situations, such as separation or divorce.

However, courts are often reluctant to definitively rule that embryos constitute property, even if their subsequent holdings go on to implicitly treat them as such.[105] This is likely due to the fact that despite how hard courts may try to remove the emotional factors from logical analysis in the context of embryos, determining the fate of a potential human life can still be a sensitive subject for all parties involved.[106] While frozen embryos may not be living and breathing humans in the same sense that we are, they do represent the potential for future life created by two individuals. Assigning such a detached label to a very personal matter can create an unnecessary polarization between parties with differing theories on the legal status of the frozen embryos.

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100. *Id.* at 376.

101. La. Stat. Ann. § 9:124 (1997).

102. Susan L. Crocklin, *"What Is an Embryo?": A Legal Perspective*, 36 Conn. L. Rev. 1177, 1182 (2004).

103. *Id.*

104. Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 Loy. L. Rev. 549, 568 (2005).

105. Rao, *supra* note 71, at 38.

106. *See* Statement of Decision, *supra* note 15, at *4.

C. Embryos as Neither

Considering the plethora of contexts in which disputes over embryos can arise, the argument for the embryo's unique status as a subject of rights[107] presents a compelling case. This position takes the various rights of both parties into account and has the potential to lead to the fairest results by weighing all of these rights against each other. In theory, putting embryos in a category of their own would remedy the problems that arise from the personhood and property categorizations. Indeed, the California Superior Court took such a position in *Findley*, holding that it was unnecessary to categorize the embryos in question as either "life" or "property."[108] Instead, the court stated that the IVF parents deserved "something more nuanced," so the court deemed the embryos *sui generis*, or in a class of their own, unlike anything else.[109]

However, categorizing embryos as *sui generis* still requires courts to conduct a balancing test to determine outcomes on a case-by-case basis. Both sides will present valid and compelling arguments as to their theories on what should happen to the embryos, and, without the bright-line delineations of personhood and property to guide them, courts are left in a state of flux. Consequently, there is a high likelihood that court decisions will be decided arbitrarily and unpredictably, thus making it difficult for parties to comprehend. Indeed, some courts have implicitly treated frozen embryos as a type of property while refusing to put an actual label on them.[110] This is why the legislature should step in to provide guidance and help remedy the problem before it reaches the court system.

III. Proposal

A. Prior Agreement to Embryo Disposition

This Note proposes that the legislature adopt a statutory scheme with the following requirements:

107. *See* Rao, *supra* note 49.
108. Statement of Decision, *supra* note 15, at *44.
109. *Id.*
110. Rao, *supra* note 71, at 38.

> (1) Physicians must present patients with detailed information regarding the procedures they wish to undertake;
>
> (2) physicians must present patients with an advance written directive or other form obtaining the patients' informed consent, including options for the disposition of embryos in the case of separation or divorce;
>
> (3) physicians must receive the patients' signed[111] form indicating their wishes with respect to embryo disposition in addition to their acknowledgement that they understand the procedures they are about to undergo before commencing with any treatment; and
>
> (4) if a physician fails to properly execute any of the above provisions, he or she shall be found negligent or similarly responsible for their unprofessional conduct. Likewise, refusal to come to a prior agreement is proper grounds for the physician to refuse to provide ART treatment altogether.

This proposal not only requires the couples' informed consent,[112] but also requires that they actively come to an agreement regarding the disposition of embryos in the case of divorce or separation before undergoing treatment. The legislature need not mandate that the embryos automatically be discarded or donated if the genetic parents no longer wish to have children together. Instead, they must recognize that the two parties are "entirely equivalent gamete-providers," and "however far the protection of procreational autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone . . . ."[113] As the providers of genetic material, the patients should "retain decision-making authority as to their disposition."[114] If the patients cannot or choose not to provide their chosen method of embryo disposition, that is then an indicator that they do not have enough information to make an informed choice or have not given enough thought to the possibility of separation. Therefore, the couple is not adequately prepared to make the decision to undergo such treatment, and the physician cannot ethically provide it for them.[115]

The importance of having such a specific procedure in place is demonstrated by the previously introduced case of actress Sofia Vergara and her former fiancé, Nick Loeb. While the couple did have an agreement prior to the procedure that stated that any embryos created via IVF could only be brought to term with both genetic parents' consent, the agreement did not specify what would happen to the embryos in the event

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111. Preferably in the presence of a witness or notary, as is required of advance health care directives and durable powers of attorney in California. *See* CAL. PROB. CODE §§ 4307, 4673–4675 (West 2016).

112. CODE OF MED. ETHICS, ch. 2 (Am. Med. Ass'n 2016), https://www.ama-assn.org/about-us/code-medical-ethics ("Opinions on Consent, Communication & Decision Making").

113. Davis v. Davis, 842 S.W.2d 588, 601–02 (1992).

114. *Id.* at 597.

115. *Informed Consent*, STAN. ENCYCLOPEDIA OF PHIL., (Sept. 20, 2011) http://plato.stanford.edu/entries/informed-consent/.

that the two separated.[116] Loeb argued in Los Angeles that without this specification the contract is void, and he should be awarded the frozen embryos to implant in a surrogate.[117] Because most couples do not want to consider the possibility of divorce or separation, they often do not entertain the idea of including that possibility in their agreements. Without clear law providing guidance on the matter of divorce in the context of frozen embryos, Loeb's prior arguments carry some persuasive value.

An advance written agreement by the parties can and should be treated as a contract. With a valid agreement in hand, courts can circumvent the personhood versus property debate and move directly toward resolving the dispute through a contract law analysis. While this approach rejects both frozen embryos as person and property and on its face appears to steer toward the "neither/other" category, the nature of a contract seems to be more characteristic of the property argument. In effect, recognizing each party's right to their own genetic material and treating the agreement as a contract suggests that this material is property that should be governed by the rules of contract law. However, the fact that frozen embryos contain the potential for human life renders them unique and more than just a tangible object of property one can own and barter with.[118] The frozen embryo's label is ultimately not of great significance, as long as all parties can come to concrete decisions regarding potential separation. Therefore, courts must be able to accept that frozen embryos are unique, but that this "unique," possibly quasi-property category is fluid.

B. How Current State Laws Compare

Anatomizing the state jurisprudence discussed previously, only California and Massachusetts are on the path to implementing the standards proposed in this Note. California requires physicians to "provide [their] patient[s] with timely, relevant, and appropriate information to allow . . . informed and voluntary choice[s] regarding the disposition of any human embryos remaining following the fertility treatment"; categorizes the failure to do so as "unprofessional conduct"; and further requires physicians to "provide a form . . . that sets forth advanced written directives regarding the disposition of embryos."[119] The statute requires the provider to present patients with options regarding disposition, however, it does not *require* the provider to obtain a definite answer from patients with respect to their wishes for embryo disposition. Affirmative written consent is required only

116. Nick Loeb, *Sofía Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. Times (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html?_r=0.

117. *Id.*

118. *See Davis*, 842 S.W.2d at 588.

119. Cal. Health & Safety Code § 125315 (West 2016).

when an individual chooses to donate any remaining embryos to research.[120] While some readings of the statute may conclude that obtaining the written directive is implied, this loophole provides a persuasive argument indicating otherwise.

Massachusetts law, specifically Chapter 111L, section 4 on "Informed Choice in the Public Health Law" closes this loophole. Part (a) provides for the information and informed consent that physicians must present to patients, and part (b) mandates that the physician receive "a complete and fully executed informed consent form from the patient" before providing any sort of treatment.[121] The only provision proposed in this Note that is missing from Massachusetts's law is the requirement that a physician be held professionally responsible for their inaction.

C. Analysis of *Findley v. Lee* and California Law

In the California Superior Court case previously introduced, *Findley v. Lee*, a husband Stephen Findley and wife Mimi Lee signed an agreement with the University of California, San Francisco ("UCSF") that dictated that their frozen embryos would be thawed and discarded in the event of separation or divorce.[122] When the two subsequently divorced, Lee fought to retain the embryos because they were her "biological children ready to come to life," and her last chance to have genetic children of her own.[123] Lee, in her mid-forties, asserted that she had decided to put her career ambitions first, and had consequently not found anyone she was willing to have children with until she entered her relationship with Findley.[124] These circumstances, coupled with the fact that Lee was diagnosed with cancer, she argued, motivated the couple to undergo the process to create and cryopreserve embryos at UCSF while they were still married.[125]

However, Findley no longer wanted to have children with Lee after they divorced, voicing "valid concerns regarding a future parenting relationship with Lee both from a financial and practical perspective."[126] He pointed to the agreement they had signed with UCSF, arguing that they were bound to it and that the embryos should be thawed and discarded, as they had originally agreed upon.[127] Lee argued that she had believed she was signing a nonbinding medical consent form at the time, which she

120. *Id.* § 125315(c).

121. Mass. Gen. Laws Ann. ch. 111L, § 4 (West 2016).

122. Statement of Decision, *supra* note 15, at *14–15.

123. Amy Robach et al., *California Woman at Center of Frozen Embryos Legal Battle Speaks out*, ABC News (Aug. 6, 2015, 2:12 PM), http://abcnews.go.com/US/california-woman-center-frozen-embryos-legal-battle-speaks/story?id=32913352.

124. Statement of Decision, *supra* note 15, at *7.

125. *Id.* at *5.

126. *Id.* at *37. These included the practical aspect of co-parenting with his ex-wife as well as the financial concern of being extorted for child support among other concerns. *Id.* at *36.

127. *Id.* at *22.

understood to be unilaterally revocable, and thus unenforceable.[128] She further urged the court to adopt a balancing test to weigh her right to procreate against Findley's right not to.[129]

The evidence presented at trial showed that both Findley and Lee had knowingly and voluntarily signed the agreement with UCSF.[130] Accordingly, the court treated it as a "valid and enforceable" binding contract.[131] Because of Lee's educational and professional background,[132] the court rejected her contention that she did not intend to enter a binding contract when she signed the agreement.[133] The court also declined to find that the rights to procreate and not to procreate were protected in this case, because both Lee and Findley partially waived their rights in the agreement.[134] The court ordered that the embryos be thawed and discarded per the written agreement, in accordance with Findley's request.[135]

While the court sided with Findley in regards to the disposition of the frozen embryos, the court declined to categorize them as property as he had requested.[136] Instead, the court held that the matter at hand did not require the court to make a determination of embryos as "life" or "property."[137] On one hand, the court stated that California and U.S. Supreme Court precedent has precluded a finding of embryos as having personhood.[138] On the other, the opposite categorization of property "ignores the very reason couples undergo the emotionally and financially draining process of IVF: to have a child."[139] Although Lee continually referred to the embryos as "*her* babies," she did not assert that embryos had human life.[140] Instead, she argued for the balancing test that would usually have followed from the court's initial finding that the embryos enjoyed a unique legal status, as was implemented in *Davis*.[141] The court declined to implement the balancing test in deciding this case, however, because of the signed, written agreement, which the court held was enforceable. Because of the enforceable agreement, the court could proceed with a contract analysis, making it unnecessary to categorize the

128. *Id.* at *9.
129. *Id.* at *3.
130. *Id.* at *2.
131. *Id.* at *3.
132. Lee was Harvard-educated, trained in neurological surgery and anesthesiology, and had experience working in fertility clinics. *Id.* at *3.
133. *Id.*
134. *Id.* at *35–36, Exhibit A, at 7–8.
135. *Id.* at *16.
136. *Id.* at *40.
137. *Id.* at *43.
138. *Id.*
139. *Id.* at *44.
140. *Id.* at *36; Robach et al., *supra* note 123.
141. Statement of Decision, *supra* note 15, at *33.

embryos beyond *sui generis*.[142] Ironically, the court also found that if the agreement had not been enforceable, the balancing test that the court would have used would have tipped in favor of Findley anyway, not Lee.[143]

In *Findley*, the California Superior Court gave the embryo a unique legal status rather than firmly categorizing it as person or property.[144] In spite of this, the court misstates the law in regards to California Health and Safety Code section 125315. In its decision, the court states, "California, unlike other states, sanctions a physician by statutorily finding that it is malpractice *per se* if the advance written directives required in the statute are not secured by the physician *before* the IVF procedure is performed."[145] However, the statute reads in relevant part as follows: "Any individual to whom information is provided pursuant to subdivision (a) *shall be presented with the option* of storing any unused embryos, donating them to another individual, discarding the embryos, or donating the remaining embryos for research."[146] Here, the requirement is only that patients be presented with certain options, not that explicit choices must be made. Section 125315 also states, "*[w]hen providing* fertility treatment, a physician . . . shall provide a form to the male and female partner . . . that sets forth advanced written directives regarding the disposition of embryos."[147] The statute does not require that this must happen before the procedure is performed.

While this small detail was not of consequence in *Findley* because the parties did have an agreement that indicated their preferences for embryo disposition, one could imagine a situation arising in the future where a couple does not specify an embryo disposition plan, but the physician proceeds with the treatment despite failing to secure an agreement. If the couple were to later separate, the same dispute over the future of the embryos may arise. Even though this hypothetical situation manifested because of the physician's failure, no provision of the statute suggests any consequences for failing to secure an agreement from the couple. Part (a) of the California statute only deems the failure to provide patients with information regarding the actual fertility treatment as "unprofessional conduct."[148] This is the reason that obtaining informed consent as well as an agreement on the disposition of embryos prior to freezing are especially essential to potential legislative

142. *Id.* at *44.
143. *Id.* at *33.
144. *Id.* at *44.
145. *Id.* at *19.
146. CAL. HEALTH & SAFETY CODE § 125315 (West 2016) (emphasis added).
147. *See id.*
148. *Id.*

changes, in addition to punitive provisions for physicians who fail to obtain such consent and written agreement.[149]

CONCLUSION

With new technology comes new law. In the case of frozen embryos, the law is continually evolving on a state-by-state basis. The traditionally conservative personhood argument that anti-abortion groups have recently adopted incorrectly gives embryos the same rights and interests as living, breathing children. The property argument is logical on its face, but does not match the emotional nature of these proceedings. While a compelling argument has been made for categorizing embryos as neither people nor property, but instead as a unique situational class in between, this status does not help inform courts on how to decide future cases.

In order to simplify the discussion and to move away from the emphasis on labeling embryos as any specific legal entity, state legislatures should adopt a new statutory scheme altogether. Such a scheme is necessary to align existing family law with ART procedures and provide straightforward rules for courts to follow, sidestepping the danger that judges will reach inconsistent decisions based on personal value judgments. This Note advises that new legislation should require couples to come to an agreement on the disposition of embryos in the case of separation *before* they can begin any IVF procedures. Such laws would allow courts to honor the parties' intentions manifested in their agreement and to apply the clear foundational principles of contract law in the event of a dispute regarding terms or intent. Most importantly, parties would be granted autonomy in planning for the future in the event of separation or divorce.

149. *See supra* Part III.A.