2002

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Recommended Citation
Christina C. Lawrence, Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Preembryos, 52 Case W. Res. L. Rev. 721 (2002)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol52/iss3/4

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NOTES

PROCREATIVE LIBERTY AND THE PREEMBRYO PROBLEM:

DEVELOPING A MEDICAL AND LEGAL FRAMEWORK TO SETTLE THE DISPOSITION OF FROZEN PREEMBRYOS

INTRODUCTION

The first child conceived through in vitro fertilization ("IVF") was born in 1978. Since that first birth, the prevalence of IVF has grown significantly, with 65,000 patients treated at over 300 United States clinics in one year alone.1 IVF is a treatment for infertility in which ova harvested from a woman are combined with sperm in a culture dish.2 If fertilization is successful, then the resulting preembryo3 grows in culture for a few days before it is transferred to the woman's uterus with the hope that the preembryo will implant in the uterine lining and result in a successful pregnancy and birth.4

Egg donors are typically administered ovulation-stimulating hormones at the beginning of IVF to increase the number of ova available for harvesting, from one or two to as many as several dozen.5 Even if all of these eggs are fertilized, they cannot be implanted in

3 Fertilization initially creates a zygote. When this zygote divides and reaches between two to eight cells it becomes a preembryo. The preembryo does not become an embryo until it is implanted in the uterus and divides to become more than 16 cells. John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 441-43 (1990). Many commentators, however, use the term "embryo" interchangeably with "preembryo."
4 See Gunning & English, supra note 2, at 2.
one cycle of IVF because of the health risks a high order multiple pregnancy presents to the developing fetuses and the woman carrying them. Cryopreservation allows these surplus preembryos to be preserved in liquid nitrogen for future use instead of being destroyed immediately. While cryopreservation facilitates IVF by reducing the number of times a woman has to undergo egg retrieval and allowing a woman to have a genetic child even after egg production ceases, it creates some difficult legal and ethical issues. Cryopreservation allows storage of the preembryos for up to twenty years in some cases, creating a large time gap between the actual disposition of the preembryos and the initial IVF procedure. During this gap, a couple who agreed at the initiation of the procedure when and how to use the surplus preembryos may face subsequent circumstances, such as divorce, that leave them at odds over the disposition of their frozen preembryos.

The courts must then decide whether a frozen preembryo should be implanted, making the opposing spouse an unwilling parent, or destroyed, denying the other spouse a chance at genetic parenthood. This dilemma has arisen several times over the past decade, and will likely continue to arise given the widespread use of IVF. State courts in Tennessee, Massachusetts, New Jersey, New York, and Washington have all declined to compel implantation against the wishes of an unwilling spouse. However, the courts have used diverse and inconsistent reasoning in reaching these decisions. Each decision also seemed to imply that compelled implantation could be possible in certain circumstances. The current state of uncertainty and inconsistency in the law makes it difficult for a couple contemplating IVF to definitively understand their rights with respect to stored preembryos in the event of a divorce.

7 See N.Y. STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 81 (1998). The task force described the multi-step protocol for preembryo preservation. The first step in the process is the protection of preembryos “from the formation of damaging ice crystals by replacing the cells’ watery interior with a cryoprotectant solution.” Id. Next the preembryos are loaded into straws containing a small amount of liquid nitrogen. Computers then regulate the very slow freezing of this liquid nitrogen. The straws containing the frozen preembryos are finally stored in a large canister of liquid nitrogen. The storage straws can be removed from the canister when a couple is ready to implant the preembryo. Once removed from storage, the preembryos are “gradually warmed” and cultured in preparation for an implantation attempt. Id.
8 See id. at 81-82. See also Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, 84 MBBN. L. REV. 55, 59 (1999) (providing a general history of embryo cryopreservation).
This Note will first present the legal history of preembryo disputes between divorcing couples with an overview of the five state court decisions addressing this issue. Next, this Note will critique the two approaches used by the courts in deciding these cases. This critique of the balancing test and prior disposition approach will establish that these frameworks of analysis leave no room for an individual desiring implantation to overcome the opposition of the other gamete donor. This Note will finally propose that the legislature adopt a uniform standard for informed consent with the goals of (1) limiting disputes by fully informing infertility patients of their legal rights and responsibilities before they begin treatment, and (2) protecting the interests of individuals with a strong desire for genetic parenthood by allowing them to choose treatment options giving one person sole discretion over the implantation of preembryos. The detailed consent and storage regulations of European countries will serve as guidelines in developing this uniform standard of consent.

I. BACKGROUND

The first widely publicized case involving a divorced couple with conflicting desires about preserved preembryos arose in Tennessee. The couple in Davis v. Davis created and stored nine preembryos while the marriage was still intact. Shortly after a failed attempt at implantation, the wife asked for control of the preembryos during divorce proceedings initiated by the husband. At that time she wanted to implant the preembryos in her own uterus and carry a pregnancy to term. The husband opposed the implantation of the preembryos, as he did not want to have a genetic child outside of marriage. The trial court awarded the preembryos to the wife, classifying the preembryos as children and finding that it would be in their best interest to be implanted and brought to term.

The husband appealed the decision. The court of appeals found that the trial court had incorrectly classified the preembryos as children and reclassified them as property. The court found that the husband and the wife held a joint interest in the preembryos just as they would have in any other marital property. The court also analyzed the problem from a constitutional angle, "finding that Junior
Davis has a ‘constitutionally protected right not to beget a child where no pregnancy has taken place’ and ‘there is no compelling state interest to justify ordering implantation against the will of either party.”

Mary Sue Davis appealed the decision to the Supreme Court of Tennessee. By then, both she and her ex-husband had remarried. She no longer wanted to implant the preembryos herself, but wanted to donate them to a childless couple. Junior Davis continued to oppose the implantation of the preembryos.

The Tennessee Supreme Court rejected the classification of the preembryos as people or property and instead adopted the view of the American Fertility Society that the preembryos “occupy an interim category that entitles them to special respect because of their potential for human life.” The court stated that a prior disposition agreement should be the “starting point” in resolving these disputes. The Davis couple, however, had not signed such an agreement; therefore, the court ultimately decided the case by balancing the husband’s right to avoid procreation with the wife’s right to procreate. The court found in favor of the husband, holding that “the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the preembryos in question.” The court emphasized that its holding did not “contemplate the creation of an automatic veto” for the party wishing to avoid procreation, but rather that an argument in favor of the person desiring procreation should be considered if there were no other alternatives to using the preembryos to achieve pregnancy. This decision leaves open the possibility of a ruling in favor of a person who has become infertile since the original treatment and desires to use, rather than donate, the preembryos.

The same issue arose five years later in New York. In Kass v. Kass, the couple had signed a disposition agreement at the beginning of the infertility treatment stipulating that the “frozen prezygotes [would] not be released from storage for any purpose without the written consent of both [parties].” The form also donated the

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18 Id.
19 Id. at 590.
20 Id.
21 Id.
22 Id. at 597.
23 See id. (stating that “an agreement regarding disposition of any untransferred preembryos... should be presumed valid and... enforced as between the progenitors”).
24 Id. at 604.
25 Id.
27 Id. at 176.
preembryos for research studies if the couple "no longer wish[ed] to initiate a pregnancy or [were] unable to make a decision regarding the disposition of [the] stored" preembryos. During divorce proceedings, the wife requested that the court disregard the agreement and award her sole custody of the preembryos. The husband, opposing the removal of the preembryos from storage and any further attempts at pregnancy, asked for specific performance of the prior disposition agreement.

The trial court awarded the preembryos to the wife. The court reasoned that "a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus . . ." The appellate division reversed, holding that a woman does not have the same exclusive authority over fertilized eggs that she has over a nonviable fetus and that prior disposition agreements should determine the outcome of preembryo disputes.

The New York Court of Appeals affirmed the appellate division's decision that the dispute be resolved based on the prior consent agreement, stating that "[a]greements between . . . gamete donors should generally be presumed valid and binding, and enforced in any dispute between them." Although the appellate division unanimously agreed that a prior disposition agreement should control the disposition of surplus preembryos, that court split on whether the prior disposition agreement in this case unambiguously conveyed the parties' intentions. The court of appeals addressed this issue by analyzing the agreement using established contract principles and ultimately found that "the informed consents signed by the parties un-equivocally manifest[ed] their mutual intention that . . . the prezygotes be donated for research to the IVF program."

The Massachusetts Supreme Judicial Court, in A.Z. v. B.Z., was the first court to depart from the widely held view that the creation and enforcement of prior disposition agreements was the best solution to the frozen embryo dilemma. A.Z. is also distinguishable from

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28 Id.
29 See id. at 177.
30 See id.
31 Id.
32 Id.
33 Id. at 180.
34 Id. at 177.
35 Id. at 181.
36 725 N.E.2d 1051 (Mass. 2000).
37 But cf. FLA. STAT. ANN. § 742.17 (West 1997) (requiring a couple and the treating physician to make a written agreement providing for the disposition of embryos in the event of
Kass and Davis because the wife successfully gave birth to twin daughters conceived through IVF. The wife had already attempted another implantation without her husband’s knowledge when the husband initiated divorce proceedings. The husband filed a motion for a permanent injunction prohibiting his wife from using any more preembryos without his consent. The probate court ruled in favor of the husband on equitable grounds, declining to enforce consent agreements giving the wife sole control in the event of a divorce.

The wife appealed the probate court decision and the case was transferred to the Massachusetts Supreme Judicial Court, which first determined that the consent forms were unenforceable for not representing the “true intention of the husband” because the wife had altered the consent forms after he signed them. The court further determined that the consent forms were unenforceable because they provided for the disposition of the preembryos in the event of separation rather than divorce, two distinct legal events in Massachusetts. The court finally held that any agreement, even an unambiguous one, compelling one party to involuntarily become a parent was against public policy and unenforceable.

A New Jersey appellate court looked to Massachusetts for guidance when faced with a similar issue shortly after A.Z. v. B.Z. was decided. In J.B. v. M.B., the wife’s desire to have the preembryos death, divorce, or an unforeseen circumstance); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1980) (stating that “advance directives . . . both minimize misunderstandings and maximize procreative liberty . . . .”); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (“An agreement regarding disposition of any untransferred preembryos in the event of . . . divorce . . . should be presumed valid and . . . enforced . . . .”).

38 See A.Z. v. B.Z., 725 N.E.2d at 1053.
39 Id.
40 Id.
41 Id. at 1053-54. The fertility clinic required a consent form to be signed with each egg retrieval cycle. The couple had signed a total of seven consent forms, each one granting the embryos to the wife should the couple become “separated.” The majority of consent forms signed by the husband were blank. The wife altered the consent forms, adding the provision giving her control in the event of a divorce after her husband had already signed. Id.

42 See id. at 1055 (concluding that “no agreement should be enforced in equity when intervening events have changed the circumstances such that the [original] agreement . . . did not contemplate the actual basis now facing the parties”). The court found that the divorce and birth of the twins were the events that had changed circumstances so significantly that enforcing the prior disposition agreement would be inequitable. Id. at 1054-55.

43 Id. at 1051.
44 Id. at 1057.
45 Id.
46 Id. at 1059. The court found that the unenforceability of certain adoption and marriage contracts demonstrated a legislative intent not to use the law to compel individuals into “intimate family relationships.” Id. The court put this prior consent agreement in the same category with the unenforceable marriage and adoption contracts because, if enforced, it would compel parenthood, an “intimate family relationship.” Id.

destroyed conflicted with the husband’s desire to preserve the preembryos for donation or for his own use in a future relationship. This couple had signed an agreement relinquishing control of the preembryos to the IVF center in the event of a divorce unless the court specified otherwise. The New Jersey court followed Massachusetts’ lead, disregarding the prior consent agreement and deciding the case by weighing the wife’s right to avoid procreation against the husband’s right to procreate. The court gave more weight to the wife’s right not to procreate than to the husband’s right to procreate. Because the husband was still fertile, he could fulfill his right to procreate without using the frozen preembryos. In addition to looking to Massachusetts for guidance, the court also looked to the Baby M surrogacy case as support for its holding that binding contracts that create familial relationships are against public policy and should not be enforced.

On appeal, the Supreme Court of New Jersey affirmed the appellate court decision giving the wife the right to prevent implantation of the preembryos. The higher court, however, took a more favorable view toward prior disposition agreements than the lower court. The court found that “agreements entered into at the time in vitro fertilization is begun . . . [should be enforced] subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.” In the event that one of the parties reconsiders the position outlined in the agreement, the court advocated the Davis balancing test, evaluating the interests of both parties with “the party choosing not to become a biological parent . . . ordinarily [to] prevail.”

To date, the Washington state court is the only court to address the right of a spouse with no genetic ties to a preembryo to have it implanted. In Litowitz v. Litowitz, IVF created preembryos from eggs donated by another donor and sperm donated by the husband. During divorce proceedings, the wife asked the court to grant her

48 Id. at 615.
49 Id. at 616.
50 Id. at 619.
51 Id.
52 Id.
53 See generally In re Baby M, 537 A.2d 1227 (N.J. 1988) (refusing to enforce a surrogate contract terminating the birth mother’s parental rights and characterizing commercial surrogacy as baby selling).
54 See J.B., 751 A.2d at 619 (holding “that a contract to procreate is contrary to New Jersey public policy and is unenforceable”).
55 Id. at 719.
56 Id.
"custody" of the preembryos so that she could have them implanted. The husband wanted to donate the preembryos to another couple. The trial court awarded the preembryos to the husband. The trial court accompanied the award of the preembryos to the husband with "orders to use his absolute best effort for adoption to a two-person family."

The Washington Court of Appeals affirmed the grant of the preembryos to the husband, but found that the trial court had improperly used the best interest of the child analysis. The appeals court instead reached its decision by using the Davis balancing test, weighing the husband's right not to procreate against the wife's right to procreate. The court found that the wife had no right to procreate using the preembryos because she had not contributed any genetic material. The court declined to recognize any procreative rights for the egg donor with respect to the preembryos, finding that her interest in the eggs expired when they were fertilized.

II. DISCUSSION

A. Enforcement of Prior Disposition Agreements

The developing trend of disfavoring prior disposition agreements, started by the A.Z. court in Massachusetts and then followed by a New Jersey court in J.B., represents a significant advance from the position taken by the Kass and Davis courts. The accepted moral view of the preembryo as an entity to "be treated with special respect ... [as] a genetically unique, living human entity that might become a person" is more appropriately governed by an analysis closely related to family law, rather than contract law. Family decisions such as the decision to marry or relinquish a child are "deeply personal deci-

58 Id. at 1088.
59 Id.
60 Id. at 1086-87.
61 Id. at 1087 (stating that the court's decision had "very little to do with property, very little to do with constitutional rights, [and] everything to do with the benefit of the child"). The order for the husband to place the preembryos up for adoption combined with the court's statement about the "benefit of the child" indicate that the trial court classified the preembryos as children in making its decision.
62 Id. at 1088.
63 Id. at 1092.
64 Id.
65 Id. at 1093.
66 Ethics Committee, American Fertility Society, The Moral and Legal Status of the Preembryo, 46 FERTILITY AND STERILITY 29S, 30S (Supp. 1 1986). This "special respect" view is the most widely held view of preembryos and was first adopted by the Davis court. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992). See also Kass v. Kass, 235 N.E.2d, 174, 182 (N.Y. 1998) (characterizing frozen embryos as "special property . . . accord[ing] special respect").
sions that are central to most people’s identity and sense of self.”

The law respects the importance of these decisions by treating them as inalienable rights “that cannot be relinquished irrevocably until a disposition decision actually is carried out.”

Binding a couple to a prior disposition agreement has its roots in contract law. The primary advantage of treating the disposition of preembryos as a contract dispute is that it binds individuals to previous obligations, even if their priorities or values change. This advantage, while maximizing the efficiency of commercial transactions, is ill-suited to govern the disposition of human tissue with the potential to develop into a child. The potential of the embryo requires that couples be allowed to make contemporaneous decisions about the fate of the embryo that reflect their current values.

Proponents of using prior disposition agreements to govern preembryo disputes argue that they maximize the procreative liberty of the couple by allowing them, rather than the court, to retain control over the disposition of the preembryos. This argument is flawed because it characterizes the right to privacy and procreative liberty as the right of the couple rather than the right of two separate individuals. Although the Supreme Court acknowledged that there was a zone of privacy in the marital home in *Griswold v. Connecticut*, subsequent Supreme Court decisions extended the right of privacy to individuals. The correct frame of reference in determining which solu-

67 Coleman, supra note 8, at 95.
68 Id. at 57-58.
70 See id. at 72. See also George J. Annas, *Ulysses and the Fate of Frozen Embryos—Reproduction, Research or Destruction?*, 343 New Eng. J. Med. 373, 375-76 (2000) (arguing that couples should determine the disposition of embryos only after they decide they no longer want the embryos).
71 See Kass, 696 N.E.2d at 180 (stating that "advance directives . . . maximize procreative liberty by reserving to the progenitors the authority to make . . . [a] private decision . . . "); Davis, 842 S.W.2d at 597 (stating that enforcing prior disposition agreements will allow gamete donors to retain decision-making authority over the disposition of the preembryos). See also John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 Ohio St. B. J. 407, 415 (1990) (stating that prior disposition agreements are ideal because they maximize “the gamete providers” procreative liberty by giving them control over future disposition of embryos produced . . . by IVF treatment . . . [rather than allowing] decisions . . . [to] be made by others in ways which might insufficiently value the reproductive concerns of the persons involved”); Satpathi, supra note 69, at 72 (advocating prior disposition agreements as maximizing privacy and autonomy).
72 381 U.S. 479, 486 (1964) (stating that the idea of the police searching the marital bedroom was "repulsive to the notions of privacy surrounding the marriage relationship").
73 See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted gov-
tion maximizes privacy is that of two separate individuals rather than a single couple. 74

In *Griswold*, the Supreme Court struck down a Connecticut law making it a crime for a married couple to use, or for a physician to distribute, contraception. In reaching its decision, the Court found that marriage was "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 75 The Court ultimately found the law unconstitutional because there was no way to enforce the law without invading the marital zone of privacy.76 The *Griswold* decision included a married couple's right to make procreative decisions within the right to privacy. Classification of this right as a "fundamental constitutional guarantee" mandated that a married couple be free from any government action that might "sweep unnecessarily broadly and thereby invade the area of protected freedoms." 77

The *Kass* court echoed the principle that a married couple should be free from government intrusion in making procreative decisions, observing that "[t]o the extent possible, it should be the progenitors—not the State and not the courts—who . . . make this deeply personal life choice." 78 *Griswold*, however, addressed only the right to privacy of the married couple as a unit. Most preembryo disputes occur during divorce, when the marital unit is being dissolved. As demonstrated by the conflicting interests in the preembryo disputes, a divorcing couple no longer makes procreative decisions as a unit, but rather each spouse has his or her own distinct interests.

The Supreme Court addressed an unmarried individual's right to privacy in *Eisenstadt v. Baird*. 80 The Court struck down a Massachusetts statute that prohibited single individuals from obtaining contraceptives to prevent a pregnancy. 81 The statute did allow single individuals to obtain contraceptives for disease prevention and married couples to obtain contraceptives for any purpose. 82 The court found

74 See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (1994) (stating that, although procreative liberty is "often expressed or realized in the context of a couple, it is first and foremost an individual interest").
75 *Griswold*, 381 U.S. at 485.
76 Id. at 485-86 (asking if the state "would . . . allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" and finding "[t]he very idea . . . repulsive to the notions of privacy surrounding the marital relationship").
77 Id. at 485.
78 Id. (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).
79 *Kass*, 696 N.E.2d at 180 (holding to enforce a disposition agreement donating embryos to research against the former wife's wishes to retain them).
80 405 U.S. 438 (1972).
81 Id. at 441.
82 Id. at 442.
that the statute violated the Equal Protection Clause of the Fourteenth Amendment because there was no "ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons." The Court also clarified that the right to privacy was the right of "two individuals each with a separate intellectual and emotional makeup," rather than the right of a marital "entity with a mind and heart of its own." Under this definition of the right to privacy, a prior disposition agreement does not actually maximize procreative liberty because it reflects a decision made by the couple functioning as a unit rather than the wishes of two separate individuals with distinctive rights and desires.

The Supreme Court reiterated the concept of an individual right to privacy five years after Eisenstadt in Planned Parenthood of Central Missouri v. Danforth. The statute at issue was a Missouri statute requiring a woman to obtain the written consent of her spouse to receive a first trimester abortion. The Court rejected the appellee's argument that "any major change in family status is a decision to be made jointly by the marriage partners." The Court instead found the statute unconstitutional because it allowed the husband to infringe on his wife's right to privacy. The Court acknowledged that its decision effectively gave the wife veto power over her husband, but justified the disparity of power based on the "direct" and "immediate" effect of pregnancy on a woman's body.

A man wishing to avoid implantation of preembryos is not faced with the same "direct" and "immediate" effect as a woman seeking to terminate a pregnancy. His right to avoid parenthood, however, is in conflict with his wife's desire to become a parent, just as a pregnant woman's right to privacy may be in conflict with her husband's desire for her to continue the pregnancy. However, the Danforth decision further illustrates the idea that a married couple is not compelled to make procreative decisions as a single unit. The Court weighed each individual's rights and burdens separately and then reached a decision.

83 Id. at 447.
84 Id. at 453.
86 Id. at 67-68.
87 Id. at 68. The appellee's argument in Danforth was the same argument made by the Kass and Davis courts in support of prior disposition agreements. See Kass v. Kass, 696 N.E.2d. 174, 180 (N.Y. 1998) ("Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty..."); Davis v. Davis, 842 S.W.2d. 588, 597 (Tenn. 1992) ("[T]he progenitors, having provided the gametic material giving rise to the preembryos, [should] retain decision-making authority as to their disposition."). These arguments focus on the progenitors' joint decision-making authority, but do not consider the rights of the gamete donors as individuals.
88 Danforth, 428 U.S. at 69.
89 Id. at 71.
based on the wife’s individual right to privacy. A court faced with a preembryo dispute should not enforce a prior disposition agreement in an attempt to maximize a couple’s right to privacy because the couple as a unit no longer has a right to privacy. In deciding a preembryo dispute, a court should follow the guidelines set by Danforth and settle the dispute by considering each individual’s rights and burdens separately. Automatically enforcing a prior disposition agreement does not give the court the opportunity to weigh each spouse’s rights and burdens individually.

A prior disposition agreement maximizes privacy and autonomy only as long as the couple agrees on the options outlined in the agreement. Once the couple disagrees, their individual rights and desires are in conflict with one another. In finding a solution, the court should weigh the burdens and benefits to each party and devise a solution that minimizes the burdens for each person. Such a solution may include enforcing the original agreement, but this enforcement should not be automatic if it might infringe on the procreative rights of the opposing party by compelling involuntary parenthood. To mandate procreation is more of an invasion of privacy than a court invalidating a prior disposition agreement.

In Roe v. Wade, the Supreme Court characterized compelled parenthood as an invasion of the right to privacy articulated in Eisenstadt and Griswold. The Texas law at issue made it a crime for a woman to receive an abortion unless the purpose of the abortion was to save her life. The Court decided that the state’s interest in regulating abortion did not begin until the second trimester, with the “abortion decision and its effectuation ... left to the medical judgment of the pregnant woman’s attending physician” during the first trimester. In reaching its decision the Court considered the psychological and emotional detriment imposed on a woman by compelled parenthood.

90 See id. at 69-70 (recognizing a husband’s interest in a wife’s pregnancy, but ultimately finding that he could not have the unilateral authority to prevent his wife’s pregnancy where the state lacked that authority).
91 See Davis, 842 S.W.2d at 603 (“Resolving disputes over conflicting interests of constitutional import is a task familiar to the courts. One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”).
92 410 U.S. 113 (1973).
93 See id. at 153.
94 Id. at 113.
95 Id. at 164.
96 Id. at 152 (“Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted
Roe specifically considered pregnant women, but the detriment described by the Court could apply to any person who is unwillingly compelled to become a parent, including a man or a woman whose genetic child is borne by a surrogate. The Court spoke of psychological harm, distress caused by an unwanted child, and the mental and physical toll of child care. Those detriments are not specific to pregnancy and do not actually take effect until after the child is born. Any unwilling parent, whether pregnant or not, could feel distress at the thought of an unwanted child, or be emotionally and physically taxed by caring for a child.

This analogy between unwanted pregnancy and forced implantation is imperfect because pregnancy uniquely affects a woman’s bodily integrity. A man or a woman whose genetic child is carried by a surrogate does not initially invest the same physical resources in parenthood as a pregnant woman. The Roe opinion, however, focused on the emotional and psychological ramifications of unwanted parenthood, ramifications not necessarily specific to pregnancy. Enforcing a prior disposition agreement compelling a person to become a parent would violate privacy in the same way that the Texas statute in Roe did. Both actions invade the right of privacy by forcing an individual to become an unwilling parent and experience “psychological harm,” mental and physical taxation by child care, and a “distressful life and future.”

The Supreme Court affirmed Roe’s central holding, which recognized a woman’s right to an abortion before fetal viability without undue interference from the State, in Planned Parenthood v. Casey. The Court characterized the choice to avoid procreation as “the most intimate and personal [of] choices . . . central to personal dignity and autonomy . . . [and] to the liberty protected by the Fourteenth
Amendment." This liberty encompasses more than a pregnant woman’s right to have an abortion. The Court was not only concerned with the physical burdens unique to pregnancy, but also with the autonomy to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Self-definition of personhood and the “meaning of the universe” implicate intellectual and emotional freedom as well physical freedom. Preembryo implantation against the wishes of a gamete donor would restrict intellectual and emotional freedom by compelling those gamete donors to define a “concept of existence” including genetic parenthood without giving them the opportunity to create a definition of “personhood” which does not include any type of parenthood. This limiting of intellectual and emotional freedom infringes on the procreative liberty “central to personal dignity and autonomy” protected first in Roe and then reaffirmed in Casey.

Finally, advance disposition agreements will not minimize costs or disputes if one party no longer wishes to abide by the agreement. There were prior agreements in Kass and A.Z., but those agreements did not prevent disputes at the trial and appellate level. Prior disposition agreements will minimize disputes only when both parties agree to be bound by the contract, in which case the agreement is not even necessary. Reluctance to litigate might prevent some couples from contesting a signed disposition agreement even if one spouse has departed from his or her original position. Although the disposition agreement would have averted a dispute in this case, it would also have minimized procreative liberty by committing the dissenting spouse to a disposition that does not reflect that spouse’s current wishes or life situation.

The maximization-of-autonomy argument also assumes that the couple’s true wishes are expressed in the prior consent agreement. This may not be true if a disposition agreement must be made as a condition of undergoing the fertility treatment. A couple may be unsure of their desires for surplus preembryos, but feel pressured to commit to some decision to get the treatment they so desperately desire. This pressure is eliminated if the couple is not forced to make a decision about the disposition of the embryos until it is actually time

101 Id. at 851.
102 Id.
103 Id.
104 Id.
105 Id.
106 See Coleman, supra note 8, at 104 (criticizing mandatory disposition agreements as “put[ting] pressure on patients to commit to something, even if they are unsure of what their preferences in the future are likely to be”) (emphasis in original).
to do so. The contemporaneous decision will better reflect the current values and wishes than a prior disposition agreement.\textsuperscript{107}

The policy goal of ensuring that current values govern family relationships is evident in the court’s refusal to enforce contracts never to divorce, marry, or terminate parental rights before birth.\textsuperscript{108} This philosophy is reflected in \textit{Straub v. B.M.T.},\textsuperscript{109} where the Indiana Supreme Court refused to enforce a preconception agreement relieving a father of all financial duty to any children conceived with the child’s mother. The court found that society’s interest in securing the support and education for children outweighed the individual’s autonomy to contract.\textsuperscript{110} This case falls right into line with the well-established principle that contracts should not be enforced in light of significantly changed conditions, in this case the birth of an actual child.\textsuperscript{111}

A divorce or the birth of a child may be a significant enough change to invalidate a prior disposition agreement. As a result of difficult childhood experiences, the husband in \textit{Davis} had a “vehement” objection to parenthood outside of marriage.\textsuperscript{112} For him, there was such a substantial difference between marriage and divorce that he was unwilling to father a child with a woman to whom he was not married. To enforce a prior disposition agreement signed during the marriage after a divorce would be to disregard the significance of divorce to the \textit{Davis} husband and those who share his feelings. Such a disregard would violate the equitable principle of not enforcing contracts when intervening events have significantly changed circumstances surrounding initial contract formation.\textsuperscript{113}

Each couple in \textit{A.Z.}, \textit{J.B.}, and \textit{Litowitz} had conceived a child at the time of divorce.\textsuperscript{114} Parenthood requires a substantial commitment to provide “nurturing . . . and financial support to offspring.”\textsuperscript{115} A person might have to actually experience the birth of one child to determine that he or she is not able to commit the financial and emo-

\textsuperscript{107} See id. at 96 (stating that “[m]aking the right to control these decisions inalienable ensures that, as a person’s identity changes over time, she will not be forced to live with the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become”).
\textsuperscript{109} 645 N.E.2d 597 (Ind. 1994).
\textsuperscript{110} Id. at 852.
\textsuperscript{112} Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
\textsuperscript{113} See \textit{A.Z.}, 725 N.E.2d at 1055.
\textsuperscript{115} \textit{ROBERTSON, supra} note 74, at 27.
ational resources necessary for an additional child. A childless individual may sign a prior disposition agreement mandating the implantation of surplus preembryos without fully understanding the resources necessary to rear multiple children. If a gamete donor changes his or her position after the birth of one child, a court should respect the effect of parenthood on the gamete donor and refuse to enforce any agreement that could make him or her an unwilling parent.\textsuperscript{116}

Not only would enforcement of a contract mandating implantation and reproduction violate public policy, but the enforcement of a contract mandating the destruction of the preembryos or their use in research would violate public policy as well.\textsuperscript{117} In \textit{Kass}, the New York Court of Appeals upheld a previous agreement allowing any leftover embryos to be used for research.\textsuperscript{118} The \textit{Kass} mandate that tissue be donated to research because of consent given at a much earlier time and under different circumstances goes against the guidelines for embryo research established by the National Institutes of Health ("NIH").\textsuperscript{119} NIH guidelines for embryo research propose that "there . . . be a clear separation between the decision to create embryos for infertility treatment and the decision to donate early human embryos . . . for research purposes."\textsuperscript{120} The guidelines further suggest that couples should be approached about donation only at the time of deciding the disposition of the excess embryos.\textsuperscript{121} These requirements would preclude the use of prior disposition agreements signed at the inception of IVF. Such agreements not only mingle the infertility treatment and research decisions, but also ask a couple to make a decision about the excess embryos long before the actual disposition. Approaching the couple only at the time when the excess embryos are

\begin{footnotesize}
\item[116] The law's respect for the profound effect of parenthood is also reflected by laws that give genetic mothers a waiting period after the birth of the baby to revoke consent to the adoption. \textit{See} A.Z., 725 N.E.2d at 1058.

\item[117] \textit{See generally} Annas, supra note 70, at 375-76 (discussing guidelines adopted by the biomedical research community for embryo research and applying those guidelines to \textit{Kass}).


\item[119] \textit{See} Annas, supra note 70, at 375 (stating that "NIH guidelines . . . prohibit enforcing advance contracts").

\item[120] \textit{Id.} (quoting \text{NATIONAL INSTITUTES OF HEALTH, DRAFT NATIONAL INSTITUTES OF HEALTH GUIDELINES FOR RESEARCH INVOLVING HUMAN PLURIPOTENT STEM CELLS, at http://www.nih.gov/news/stemcell/draftguidelines.htm (last visited Sept. 23, 2000)). NIH has withdrawn the guidelines for research involving human stem cells derived from human embryos in deference to the guidelines established by President George W. Bush. The President's guidelines allow federal funds to "be used [only] on stem cell lines that were derived with the informed consent of the donors." \textit{Fact Sheet, The White House, Office of the Press Secretary, Embryonic Stem Cell Research (Aug. 9, 2001), available at http://www.whitehouse.gov/news/releases/2001/08/print/20010809-1.html (last visited Mar. 8, 2002). Although less detailed, the current guidelines mandate that both donors consent to research in the same way as did the prior NIH guidelines. \textit{See id.}

\item[121] \textit{Id.}
\end{footnotesize}
to be donated continues the theme of allowing individuals the right to make contemporaneous decisions about family matters. The judiciary should defer to the NIH guidelines because that institution has more experience and knowledge about research studies involving human tissue.

The inalienable rights approach to preembryo conflicts would allow couples to determine the fate of their stored preembryos immediately before the proposed action was taken rather than being bound by a prior disposition agreement. This approach is superior to the contract approach because it (1) gives the embryos the "special respect" mandated by their moral status, (2) maximizes individual procreative liberty, (3) allows the expression of the individual's current values, and (4) falls in line with the informed consent guidelines widely accepted by the medical community.

B. Balancing Test

In the absence of a prior disposition agreement, either because the parties failed to create one (as in Davis and Litowitz) or because the court refused to enforce the agreement (as in A.Z. and J.B.), courts have balanced the right to procreate of one spouse against the right of the opposing spouse to avoid procreation. Each court found that the opposing spouse's right to avoid procreation outweighed the right to procreate of the spouse desiring implantation. This balancing test is based on the premise, first articulated in Davis, that the

122 Id. at 375.
123 Davis v. Davis, 842 S.W.2d 588, 602 (Tenn. 1992) ("One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions. In this case, the issue centers on the two aspects of procreational autonomy—the right to procreate and the right to avoid procreation.").
124 Litowitz v. Litowitz, 10 P.3d 1086, 1089 (Wash. Ct. App. 2000) (citing the balancing test used by the Davis court and concluding that the husband has the right not to procreate while the wife does not have the right to procreate because she did not contribute any genetic material to the embryos).
125 A.Z. v. B.Z., 725 N.E.2d 1051, 1055 (Mass. 2000) (quoting the trial judge as “determining that the ‘best solution’ was to balance the wife’s interest in procreation against the husband’s interest in avoiding procreation.”).
126 J.B. v. M.B., 751 A.2d 613, 618 (N.J. Super. Ct. App. Div. 2000), aff'd as modified 783 A.2d 707 (N.J. 2001) ("In the present case, the wife’s right not to become a parent ... conflicts with the husband’s right to procreate. ... Recognition and enforcement of the wife’s right would not seriously impair the husband’s right to procreate.").
127 See A.Z., 725 N.E.2d at 1055 (“[T]he husband’s interest in avoiding procreation outweighed the wife’s interest in having additional children ...”); J.B., 751 A.2d at 619 (arguing that “[e]nforcement of the ... contract to create a child would impair the wife’s constitutional right not to procreate, whereas permitting destruction of the embryos would not effectively impair the husband’s reproductive rights”); Davis, 842 S.W.2d at 604 (finding that “Mary Sue Davis’ interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood”); Litowitz, 10 P.3d at 1092 (stating that the husband’s right not to procreate compelled an award of the preembryos to him).
right to avoid procreation is "equivalent" to the right to procreate by having preembryos implanted.\textsuperscript{128}

The premise of the balancing test, however, is flawed. The spouses in these cases do not have equivalent interests. The fundamental right to procreate does not include the right to have the preembryos implanted, while the fundamental right to avoid procreation does include the right to oppose implantation. The inequality of the spouses' interests makes it nearly impossible for the spouse desiring implantation to prevail. Evidence of this inequality is apparent in the failure of any United States court to ultimately award the preembryos to the spouse who wants them implanted. The right to procreation as defined by the Supreme Court is a negative right, meaning that the state is not compelled to take any positive action to ensure fertility for infertile individuals.\textsuperscript{129}

The Supreme Court's protection of reproductive autonomy in \textit{Skinner v Oklahoma}\textsuperscript{130} emanated from the protection of parental rights in \textit{Meyer v. Nebraska}\textsuperscript{131} and \textit{Pierce v. Society of Sisters.}\textsuperscript{132} The statute at issue in \textit{Meyer} was a Nebraska law that prohibited "teach[ing] any subject to any person in any language than \textit{sic} the English language."\textsuperscript{133} The Court included "the right of the individual to . . . marry, establish a home and bring up children" in the liberties guaranteed by the Fourteenth Amendment.\textsuperscript{134} The Court found the Nebraska law unconstitutional because it improperly infringed on parents' right to "bring up" their children as they saw fit.\textsuperscript{135}

In \textit{Pierce}, the Court examined an Oregon law that compelled all children to attend public school rather than private or religious schools.\textsuperscript{136} The Court invalidated the law because it "unreasonably interfered with the liberty of parents . . . to direct the upbringing and education of children."\textsuperscript{137}

Having established the right to rear children free from unreasonable state interference in \textit{Meyer} and \textit{Pierce}, the Court directly addressed the right to procreate in \textit{Skinner}. The Oklahoma statute before the Court allowed the sterilization of any person convicted twice

\begin{itemize}
\item\textsuperscript{128} \textit{Davis}, 842 S.W.2d at 601.
\item\textsuperscript{129} See, e.g., \textit{ROBERTSON}, supra note 74, at 29 (stating that "the right to reproduce is a negative right against public or private interference, not a positive right to the services or resources needed to reproduce").
\item\textsuperscript{130} 316 U.S. 535 (1942).
\item\textsuperscript{131} 262 U.S. 390 (1923).
\item\textsuperscript{132} 268 U.S. 510 (1928).
\item\textsuperscript{133} \textit{Meyer}, 262 U.S. at 396.
\item\textsuperscript{134} Id.
\item\textsuperscript{135} Id. at 402.
\item\textsuperscript{136} \textit{Pierce}, 268 U.S. at 530.
\item\textsuperscript{137} Id. at 534-35.
\end{itemize}
or more of felonies involving moral turpitude. Criminals convicted of felonies not involving "moral turpitude," such as embezzlement, were not subject to sterilization. The Supreme Court characterized the legislation as "involv[ing] one of the basic civil rights of man." The Court went on to state that "[m]arriage and procreation are fundamental to the very existence and survival of the race." Having classified the right to procreate as a fundamental right, the Court subjected the law to strict scrutiny. Oklahoma did not have a compelling interest for inequitably applying the law to habitual "chicken stealers" and sparing habitual embezzlers, when both had repeatedly committed felonies.

The common issue in *Meyer* and *Skinner* was an affirmative act by the state to interfere with procreation and child rearing. In *Meyer* that action was constraining educational choices; in *Skinner* the action was sterilization. The right to procreate, as defined by those cases, includes an individual's right to rear children free from direct state interference. In contrast, a spouse desiring implantation is not faced with any direct state action restricting the right to procreate. The spouse desiring implantation is actually seeking an affirmative action on the part of the state in the form of a court order awarding him or her the preembryos to make implantation possible. The right to procreate does not include the right to such an affirmative action; therefore, the right to have preembryos implanted should not be included within the fundamental right to procreate.

*Roe, Griswold,* and *Eisenstadt* are similar to *Skinner* and *Meyer* in that each of these cases involved a direct act by the state inhibiting procreative liberty. In *Griswold* and *Eisenstadt,* the affirmative action was an anti-contraception law; in *Roe* the affirmative action was an anti-abortion law. The Supreme Court stayed in line with the precedent set by *Meyer* and *Skinner* by prohibiting direct state action infringing on the right to avoid procreation. The spouse opposing im-

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138 Id. at 535.
139 Id. at 541.
140 Id.
141 Id.
142 Id.
143 Id. (stating that "[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination"). The Court, unfortunately, did not always carefully scrutinize laws restricting procreative liberty, as illustrated by its approval of a similar Virginia statute in *Buck v. Bell,* 274 U.S. 200 (1927). That statute permitted the involuntary sterilization of "feeble-minded" individuals committed to state institutions. Id. at 205. The Court classified the statute as constitutional based on the state's legitimate interest in not perpetuating "feeble-minded" citizens, and the law applied equally to similarly situated individuals, i.e., all "feeble-minded" citizens committed to state institutions. Id. at 207. *Buck,* however, was decided primarily on the basis of unfounded, unscientific eugenic presumptions, rather than constitutional principles.
plantation in the preembryo disputes is similarly situated to the petitioners in Roe, Griswold, and Eisenstadt. His or her right to avoid procreation would remain intact as long as the state did not take any affirmative action to interfere. The right to avoid procreation by refusing implantation is included in the fundamental right to privacy.

The Court explicitly classified the right to procreate as a negative right in Harris v. McRae. There, the Court considered whether the Hyde Amendment violated the Due Process Clause of the Fifth Amendment by prohibiting federal funds from paying for any abortion not obtained in cases of rape or incest, or to save the life of the mother. The Court rejected the argument that the restriction of federal funds for abortion “impinge[d] on the ‘liberty’ protected by the Due Process Clause as recognized in Roe v. Wade.” Roe protected a woman from “unduly burdensome interference” with her fundamental right to avoid procreation, but it did not create “an affirmative constitutional obligation” for the state to remove all obstacles “necessary to realize . . . that freedom.” The Court explained that “although the government may not place obstacles in the path of . . . an exercise of . . . [procreative liberty], it need not remove those not of its own creation.”

In Harris, the Court classified indigency as an obstacle to the exercise of procreative freedom, but it did not view the obstacle as having been created by the government. Although a woman may have the fundamental right to obtain an abortion, she will be prevented from doing so if she does not have enough money to pay for the abortion. Because indigency is “not [the product] of governmental restrictions,” the state has no obligation to remove that obstacle by funding an abortion. An infertile person seeking genetic parenthood is in the same situation as an indigent woman seeking an abortion. In this case infertility, rather than indigency, is the obstacle to

144 448 U.S. 297 (1980). See also DeShaney v. Winnebago County Dep’t. of Soc. Servs., 489 U.S. 189 (1989) (classifying the fundamental rights guaranteed under the Fourteenth Amendment as negative rights, meaning that the state is not obligated to take any affirmative action to help an individual realize those rights). The Court found that the Wisconsin Department of Social Service’s failure to remove a child from his abusive father was not a violation of the Fourteenth Amendment. The Court found that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property . . . .” Id. at 196. The reasoning in DeShaney and McRae suggests that an infertile person has no right to receive “governmental aid” to facilitate procreation.

145 Harris, 448 U.S. at 302.
146 Id. at 312.
147 Id. at 314.
148 Id. at 318.
149 Id. at 316.
150 Id.
151 Id.
the exercise of a fundamental procreative right. Like indigency, infertility is not the product of a government restriction. Therefore, just as the state had no obligation to remove the indigency barrier to abortion, it has no obligation to remove the infertility barrier to genetic parenthood. The spouse seeking implantation is in fact asking the court to remove a barrier to genetic parenthood that was not created by any state action when he or she seeks a court order to obtain custody of the preembryos. Because the state has no affirmative obligation to help an infertile person “realize all the advantages” of the right to procreate, an individual’s right to procreate is not infringed upon when the court declines to award “custody” of the preembryos for implantation.

Under a balancing analysis, the interests of the spouse opposing implantation will always outweigh the interests of the spouse desiring implantation, even if the preembryos are the desiring spouse’s last chance at genetic parenthood. The right to refuse implantation is properly included within the fundamental right to avoid procreation while the right to have the preembryos implanted is not included within the fundamental right to procreate. One commentator has suggested that even if the right to procreate is not a legal right, it should be respected as a moral right because of the “centrality of reproduction to personal identity, meaning, and dignity.”

A moral right, not protected by the Constitution, will never outweigh a constitutionally protected fundamental right. The state has no obligation to facilitate reproduction for infertile individuals by awarding them custody of preembryos to allow implantation. The state does have the obligation not to infringe on the right to avoid procreation, which would remain intact as long as the state takes no affirmative action. The spouse opposing implantation does not need a court order awarding him or her “custody” of the preembryos to express his or her right to avoid procreation. Both spouses will stay secure in the right to avoid procreation as long as the preembryos remain frozen in storage, where they already were before any court proceedings were initiated.

The best solution to this dilemma is for the court to abandon “the pretense of ‘balancing’ other interests” and identify “the constitutional liberty from coerced parenthood . . . as the sole basis for deciding these cases,” as the Massachusetts and New Jersey courts ultimately did. Using freedom from forced parenthood as the sole basis for deciding preembryo cases adequately protects the right to avoid

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152 ROBERTSON, supra note 74, at 30.
154 Id.
procreation by (1) preventing the enforcement of any disposition agreement allowing implantation against the wishes of a gamete donor, and (2) preventing an infertile individual’s right to procreate from ever outweighing the right to avoid procreation in a balancing test analysis.

III. Proposed Solution

When faced with a preembryo dispute, courts should first ask gamete donors to reach a joint decision about the disposition of the stored preembryos. If the couple cannot reach an agreement, the preembryos should remain in storage until they are no longer viable or until the couple is able to reach a joint decision. Requiring the couple to make a joint contemporaneous decision incorporates the inalienable rights approach used in other areas of family law. Such an approach respects the potential of the preembryos to become children and make the gamete donors parents. This solution also protects the fundamental right to avoid procreation by not allowing the preembryos to be implanted against the wishes of a gamete donor in any circumstances.

This solution alone is inadequate, however, because it disregards the “centrality” of genetic reproduction to the “personal identity, meaning, and dignity” of an individual who sincerely desires to experience genetic parenthood.\(^{155}\) The person desiring implantation does not have a judicial remedy because the right to assistance in procreation is a moral, rather than a legal, right.\(^{156}\) The legislature and the medical community are therefore better suited than the judiciary to protect the interests of the spouse who desires implantation.\(^{157}\) Congress should direct the states to require all couples with preembryos stored in certified clinics to receive uniform counseling before undergoing IVF and preembryo storage. The counseling information should (1) inform patients that they will be required to reach a joint contemporaneous decision about the disposition of their stored

\(^{155}\) ROBERTSON, supra note 74, at 30.

\(^{156}\) See id. The lack of a judicial remedy is also evident in the refusal of five courts faced with five unique circumstances to award “custody” of the preembryos to the spouse desiring implantation.

\(^{157}\) See, e.g., ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGY 598 (1993) (explaining that “from the Commission’s ethical perspective, these rules are a matter for society, through its legislators, to decide—not for the courts to decide through an adversarial process”). If the right to procreate is indeed “widely accepted as a basic, human right,” then the law should reflect that widely held belief. ROBERTSON, supra note 74, at 29. The judiciary does not have the constitutional basis to facilitate a person in expressing this right once it is already in conflict with another’s right to avoid procreation. The task then falls to the legislature to reflect society’s “widely held belief” and take preventative measures to protect an individual’s interest in genetic procreation before a conflict ever occurs.
preembryos, and (2) educate them about treatment options that only implicate the procreative rights of one gamete donor. The goal of this counseling would be to prevent disputes and protect the rights of those who feel strongly about genetic parenthood.

Because of the scarcity of United States law specifically regulating assisted reproductive technology, Congress should look to the detailed regulations of Europe and Canada for guidance in creating a uniform model of informed consent for infertility patients.

Fertility clinics in the United States are essentially free from uniform government regulation.\(^{158}\) State and federal laws directly regulating assisted reproductive technology are scarce.\(^{159}\) The sole federal regulation, the Fertility Clinic Success Rate and Certification Act,\(^{160}\) requires all assisted reproductive technology programs to “annually report to the Secretary [of Health and Human Services] through the Centers for Disease Control (1) pregnancy success rates ... and (2) the identity of each embryo laboratory ... used by ... [the] program and whether the laboratory is certified ... or has applied for such certification.”\(^{161}\) The Centers for Disease Control (“CDC”) then publishes the success rates, the identity of all embryo laboratories, and whether those laboratories have met the certification requirements.\(^{162}\) The Fertility Act also requires the CDC to “develop a model program for the certification of embryo laboratories” outlining uniform scientific protocols and record keeping provisions.\(^{163}\) The Secretary of Health and Human Services then presents this model program to the governor, legislature, and public health officials of each state with encouragement to adopt and enforce the certification program.\(^{164}\) Both

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\(^{158}\) See Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger, 34 Hous. L. Rev. 609, 651 (1997) ("At most, physicians are asked to report their practices and outcomes to state agencies or obtain written authorization from patients before proceeding with treatment.").


\(^{164}\) 42 U.S.C. § 263a-2(b) (1994).
state adoption of the model program and certification are voluntary, meaning that an uncertified fertility clinic may still operate.\textsuperscript{165}

This scarcity of regulation shifts the focus from preventing preembryo conflicts to resolving them once they have already occurred. Litigation is currently the chief remedy for individuals with conflicting interests about their stored preembryos. The primary disadvantages to this approach are its inability to prevent disputes and the inadequate protection it provides for those with a strong desire for genetic parenthood. Legislation clearly outlining a couple’s rights and requiring that they be informed of those rights before treatment would address both these deficiencies. This advance notice would allow infertility patients and physicians to design treatment plans with the goals of minimizing disputes and protecting the moral right of each gamete donor to become a genetic parent.

Congress could accomplish the goal of advance notice by incorporating a uniform counseling requirement into the model certification program presented to the states under the Fertility Act. This counseling information would outline the gamete donors’ legal rights to implant, destroy, or donate any frozen preembryos. Learning that no United States court has yet compelled implantation against the wishes of a gamete donor would put individuals on notice to make alternative arrangements if they have strong feelings about becoming a genetic parent. For example, a man who feels strongly about becoming a genetic father might decide to have some sperm frozen along with the preembryos so that he alone has control over his last chance at fatherhood. While the man’s wife would have the power to prevent the implantation of their shared preembryos, she would have no control over her husband’s preserved sperm. A woman in the same situation might decide to have some of her eggs fertilized with anonymous donor sperm so that she could have the resulting preembryos implanted even if her husband later departed from his original position.\textsuperscript{166} Informing patients about the legal effect of their medical de-

\textsuperscript{166} A woman could not store unfertilized ova because the technology for preserving them is not yet sufficiently developed. See N.Y. STATE TASK FORCE, supra note 7, at 83. The New York State Task Force also predicted that “ovum preservation, combined with the standard practice of semen freezing, might . . . replace embryo cryopreservation.” Id. The technology for preserving unfertilized ova recently has been improving, however, with pregnancies resulting from stored ova, although at a lower success rate than those derived from stored preembryos. See G. Coticchio et al., Cryopreservation of Human Oocytes, 4 HUMAN FERTIL. 152 (2001). Until the technology for ovum preservation is perfected, the next best alternative is for a woman to retain sole control over a preembryo by having her ova fertilized with anonymous donor sperm. See, e.g., Litowitz v. Litowitz, 10 P.3d 1086, 1092 (Wash. Ct. App. 2000) (finding that the wife had no right to the preembryos because she did not contribute any gametes, but that the husband as the sole progenitor has a right to control the disposition of the preembryos and that
cisions would allow them the opportunity to at least consider alternative treatment options, even if they ultimately choose not to exercise any of those options. Inclusion of the legal ramifications of preembryo storage in a mandatory counseling session would also mesh well with established principles of informed consent to medical treatment.167

Canada, Austria, Sweden, Germany, Denmark, Norway, the Netherlands, and the United Kingdom all have detailed fertility clinic licensing regulations with specific provisions for informed consent and preembryo storage. The regulations adopted by these countries should serve as guidelines for developing similar storage and consent requirements in the United States. The United Kingdom has the most detailed licensing requirements, outlined in the Human Fertilisation and Embryology Act of 1990 (“Embryology Act”).168 The Embryology Act created a separate statutory licensing authority, the Human Fertilisation and Embryology Authority (“HUFEA”).169 HUFEA has the responsibility to review fertility clinics for compliance with the Embryology Act and then issue licenses to the clinics that have fulfilled those requirements.170 This is a mandatory license required for any clinic to create an in vitro embryo, store the embryo, use gametes, or implant an embryo.171

The Embryology Act preempts disputes about the disposition of stored embryos by requiring the written consent of both gamete donors to keep the embryos in storage.172 Therefore the partner who opposes implantation could simply withdraw consent to keeping the embryos in storage. Once removed from storage, the embryo would no longer be viable or available for implantation. The Embryology Act has detailed requirements for the scope of the consent to the embryo storage. The consent to storage must (1) specify the maximum amount of time the embryos may remain in storage, and (2) the fate of

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167 See Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (“True consent ... is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”). Such options and knowledge should include legal information along with medical information because it is the law that will provide a remedy when a problem arises from the medical treatment.


169 See id. at 116 (referencing §§ 11-22 of the Embryology Act).

170 See id. at 117 (referencing § 2(1) of the Embryology Act).

171 See id.

172 See id. at 126 (referencing schedule 3, paragraph 1 of the Embryology Act).
the embryos in the event of the incapacity of the person who gave the initial consent for their storage. The Netherlands has a similar licensing framework. The 1989 IVF Planning Decree defines the framework for licensing IVF centers. All Dutch fertility centers engaging in IVF and embryo transfer must have a license. The licensing requirements include a minimum success rate and adherence to medical protocols outlined by the Planning Decree. The pending Fertilization Techniques Act and updated Planning Decree will incorporate guidelines for the informed consent and embryo storage recommended by the Health Council’s IVF Committee. The IVF Committee recommended that “cryopreservation . . . be allowed as part of IVF treatment under strict conditions, [relating to] informed consent of the people whose embryos are concerned.” The Committee suggested that the couple’s separate permission for cryopreservation be obtained, and then only after they had been informed about “the possibility of freezing and storing, its safety, their joint decision-making power, the (maximum) storage period, and the options for use of the embryos if these are no longer required for their own use.” The Committee also recommended that each center be required to provide a counseling brochure with uniform information as a condition for a license.

Canada has not yet enacted a law licensing fertility clinics, but the Assisted Reproductive Technologies Commission recommended that the legislature create a National Reproductive Technology Commission, analogous to the English HUFEA, to regulate the licensing and regulation of fertility treatments. This Canadian proposal echoed the Dutch and British advocacy of uniform consent, recommending that this licensing board create standard consent agreements for all clinics. It was in line with the British and Dutch approach by concluding that (1) both gamete donors should have joint authority, and (2) their disposition desires should be settled before the preembryos are created.

173 See id. at 127 (referencing paragraph 8(2) of the Embryology Act).
175 See id.
177 Id. at 104 (quoting Netherlands Report, supra note 176, at 61).
178 Id. at 112.
179 ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, supra note 157, at 167.
180 See id. at 598 (suggesting that the National Reproductive Technologies Commission (“NRTC”) “develop standardized consent forms listing the decisions required from donors”).
The United Kingdom, Canada, and the Netherlands all mandate or recommend that fertility patients receive uniform information when consenting to embryo storage. The rationale behind these uniform consent requirements is to make it "unnecessary for the courts to sort out disagreements with respect to [preembryos] . . . by establish[ing] clear rules." The United States Congress should direct states to adopt this goal of clarity for the prevention of disputes as well. Once a preembryo dispute ends up in court, the spouse desiring implantation has almost no legal remedy. An overall reduction in the number of preembryo disputes combined with clear and advance notice of legal rights, would give some protection to the gamete donors desiring implantation. Clear and advance notice of the consequences of preembryo storage would allow both gamete donors to protect their interests in genetic parenthood by using the alternatives discussed previously.

To achieve this clear and advance notice, the United States Congress should recommend that states adopt uniform consent and counseling requirements similar to those recommended or in place in the United Kingdom, the Netherlands, and Canada. All assisted reproductive technology programs with preembryos stored in laboratories certified under the Fertility Act should be required to inform patients that joint agreement will be required for any disposition, including destruction, research, donation, or implantation. The certification requirements should also direct physicians to educate IVF patients that no court has yet awarded "custody" of the preembryos to someone who wants to implant them against the wishes of the other gamete donor. Finally, the uniform counseling material should outline treatment options that implicate only the rights of one gamete donor and direct the patients to discuss the feasibility of those options with the treating physician. This counseling requirement would respect physician autonomy, as such information would supplement and not replace the information a physician would normally share with her patients.

Including the legal risks of a medical treatment and options minimizing those risks falls right in line with the principle of informed consent that patients should be able to "evaluate knowledge-

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181 See DEREK MORGAN & ROBERT G. LEE, BLACKSTONE'S GUIDE TO THE HUMAN FERTILISATION & EMBRYOLOGY ACT OF 1990: ABORTION & EMBRYO RESEARCH, THE NEW LAW 222 (1991) (stating that "consent to the storage of . . . [the] embryo must specify the maximum period of storage, and . . . the conditions subject to which the . . . embryos may remain in storage") (quoting The Embryology Act Schedule 3 2.2(a)-(b)); ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, supra note 157, at 598. Braake, supra note 174, at 112 (quoting the Committee as recommending that brochures covering a uniform list of issues be made available to all couples who undergo infertility treatment).
182 ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, supra note 157, at 598.
bly the options available and the risks attendant upon each.\textsuperscript{183} A court decision refusing to award the preembryos to someone who wishes to implant them would prevent a patient from exercising a medical option. This refusal could be classified as a risk substantially affecting treatment because it has the potential actually to alter the course of the infertility treatment. To truly make an informed knowledgeable decision, a patient should be presented with all risks, both legal and medical, with the potential to alter the original treatment plan.

The existing Fertility Act is an appropriate vehicle to effect a uniform consent requirement because the federal guideline recognizes the national impact of the infertility industry, while state implementation of those guidelines respects state power to regulate health care. The national impact of the fertility industry is exemplified by the "multistate infertility chains [that] have . . . begun to spring up."\textsuperscript{184} Statistics from the CDC also indicate that the majority of fertility clinics are located on the East Coast near large urban centers.\textsuperscript{185} This geographic concentration makes it likely that an infertile couple would travel from a rural, less populated state to receive treatment at an urban fertility clinic. This interstate travel coupled with the presence of multistate chains illustrates the national effects of an infertility clinic in a single state. Federal recommendations would acknowledge these national effects and ensure that gamete donors have equal access to the information necessary to make an informed choice about preembryo storage.

Some general criticisms of federal regulation of fertility clinics are that (1) fertility clinics are too "diverse" and "diffuse" for a single federal agency to monitor, and (2) that such regulation intrudes on the tradition of self-regulation by physicians.\textsuperscript{186} Although the CDC monitors the success rates and identity of the certified laboratories, individual state agencies would retain the burden of actually monitor-


\textsuperscript{186} See Daar, supra note 158, at 656 (describing the United States fertility industry as "diverse and diffuse, with centers populating nearly every state," and predicting that "[a]ny regulatory scheme that . . . placed the burden of investigation and compliance with a single federal agency, would probably fail for lack of manpower, resources, and a coordinated vision"); \textit{Id.} at 658 (describing self-regulation of reproductive medicine as long-standing). \textit{See also} JOHN YEH \& MOLLY ULINE YEH, LEGAL ASPECTS OF INFERTILITY 16 (1991) (stating that "professional medical associations regulate the practice of infertility by recommending guidelines for practice").
ing the laboratories for compliance with the certification requirements. Multiple state agencies would better reflect the diversity of fertility clinics and improve monitoring. Incorporating a uniform counseling requirement into the existing Fertility Act also respects the tradition of self-regulation in the medical community. Historically, reform in the medical community has been accomplished by "providing incentives to those who control the industry to act in a responsible manner." Compliance with the Fertility Act is voluntary, leaving the ultimate decision to physicians. The incentive for physicians to comply with the Fertility Act is having the laboratories classified as certified to the public. Requiring uniform counseling information under the Fertility Act implements change based on an incentive rather than a mandatory requirement; it therefore follows the traditional means of effecting reform in the medical community.

The Fertility Act has also been criticized for being a "voluntary system" with "no teeth." Federal endorsement of uniform counseling information would still limit disputes and protect the moral right to genetic procreation even if states choose not to adopt the guidelines. One commentator suggested that "[t]he advantages of federal involvement [in regulating the fertility industry] include a centralized forum for discussing reproductive techniques which would draw national attention in a way that debates within state legislatures would fail to do." Including counseling provisions within the federal guidelines would provide individual physicians and self-regulatory groups like the American Fertility Society with additional information about the legal consequences of preembryo preservation and storage. The dialogue and debate accompanying the modification of the federal recommendations could lead physicians to incorporate the recommended information into counseling sessions even if the state did not require them to do so. This enhanced awareness of the legal consequences of preembryo storage would result in minimization of disputes by creating better-educated physicians and patients able to make truly informed treatment decisions.

The legislature could also attempt to curtail preembryo disputes by standardizing storage time along with consent requirements. The primary benefit of cryopreservation, extended viability for the preembryo, also contributes substantially to the disputes between divorcing couples. It is during this time of extended viability that the birth of a

187 Daar, supra note 158, at 657.
188 Joan Szabo, Embryology Labs May See Stiffer Regulations, MED. LAB. OBSERVER, November 1, 1999, at 18.
child or subsequent remarriage occurs, thus creating circumstances so changed that one partner no longer wishes to have any of the preembryos implanted. Adopting the Canadian and European approach of limiting the storage time for preembryos may be a remedy for this problem.

The Canadian Royal Commission was the most liberal in its approach, recommending that eggs not be stored for more than five years. Austria, Sweden, and Denmark all prohibit embryos from being stored for more than one year and from being donated. Germany is the most restrictive by prohibiting the fertilization of more eggs than can be implanted in one cycle. The limitation in storage time could curtail disputes by limiting the time available to gamete donors to depart from the original position of desiring implantation. The primary problem with this approach is that it minimizes the medical benefits that come along with cryopreservation. Cryopreservation facilitates IVF by reducing the number of times a woman has to undergo egg retrieval and allowing a woman to have a genetic child even after egg production ceases. The number of egg retrieval cycles may not be minimized when storage time is limited to one year. A woman who desires several children would have to undergo a new cycle of retrieval with each pregnancy attempt because only one pregnancy per year is possible. If the preembryos are stored until they lose viability, a woman may be able to achieve several pregnancies from one round of IVF. The one-year limit on storage time would also prevent some women from having a genetic child after egg production ceases. If a woman’s egg production ceased more than one year after the original storage, then she would not be able to use the stored preembryos for implantation or undergo any subsequent cycles of egg retrieval.

Finally, limiting the length of storage time to one year does not guarantee that no disputes will arise during that time. In Davis, for example, the last eggs were fertilized less than ninety days before the husband filed for divorce. A one-year limitation clearly would not have prevented the dispute in Davis. The benefit of limiting storage time, minimizing the time available for changed circumstances and disputes, is not significant or certain enough to outweigh the medical

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190 See ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, supra note 157, at 602.
192 See id. at 306.
193 See Coleman, supra note 8, at 60.
194 Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).
consequences of limiting storage time. Congress, therefore, should not incorporate a uniform limit for storage time into the Fertility Act. Such a decision is best left for individual patients and physicians to determine.

CONCLUSION

As the use of IVF and other assisted reproductive technologies rapidly increases, legal disputes implicating the rights to procreate and to avoid procreation will continue to grow at the same pace. This trend is evident in the pattern of state court decisions addressing preembryo disputes. In the year 2000, there were more preembryo disputes decided than had been decided during the preceding eight years. The recent increase in these disputes necessitates the development of a legal framework that respects the moral status of the preembryos while still considering the procreative rights of both gamete donors. The inalienable rights approach respects the moral status of the preembryos by placing their disposition in the same category as other decisions that create intimate family relationships. The refusal to allow implantation of a preembryo against the wishes of a gamete donor in any circumstance respects that the right to avoid procreation is a constitutionally protected fundamental right. The incorporation of uniform counseling requirements into existing legislation would allow gamete donors to adequately protect their interests in genetic procreation and acknowledge that society considers the right to assistance in genetic procreation an important moral right. These three approaches taken together provide a framework for deciding preembryo disputes in a manner that respects the moral status of the preembryo and protects individual procreative liberty.

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† I would like to thank Professor Jonathan L. Entin and Professor Jessica Berg for their comments and assistance.