Resolving Embryo Disputes: A Comparative International Human Rights Approach

Emma K. Diver[*]

[*] Emma Diver is a JD Candidate at the University of Iowa College of Law. She would like to thank the TLCP writers and editors, in particular Humaa Siddiqi and Emily Sample, for their invaluable assistance.

I. INTRODUCTION

In July of 2000, Natallie Evans and J., a British couple hoping to have children, began treatment at the Bath Assisted Conception Clinic.[1] In October of the following year, Evans was informed that both of her ovaries would need to be removed due to pre-cancerous tumors.[2] At this stage, Evans and J. made the decision to extract several of Evans' eggs for in vitro fertilization with J.'s sperm.[3] Evans asked if she could freeze some of her eggs unfertilized; however, she was informed that such a procedure was not performed at the Bath Assisted Conception Clinic.[4] Attempting to reassure his partner, J. promised Evans that, "they were not going to split up, that she did not need to consider the freezing of her eggs, that she should not be negative and that he wanted to be the father of her child."[5]

When the couple did split in 2002, J. wrote to the clinic to request that the embryos be destroyed.[6] Evans then commenced an action seeking use of the embryos to create a child.[7] Could J.'s reassurances be considered a contract? Is the fact that Evans lost her last chance to have biological children in reliance on J.'s assurances relevant? Can Evans' right to procreation, and her right to start a family be reconciled with J.'s right not to be forced into family and procreation? Is the right of a man not to be forced into parenthood equivalent to a woman's right not to carry an unwanted pregnancy? These are fundamental questions to people all over the world who rely on Assisted Reproductive Technology to have biological children. Balancing fundamental human rights in the face of advancing technology is a challenge for a variety of courts. The litigation that resulted from Evans' suit was finally resolved in 2007 after exhausting the appeal process through the courts in the United Kingdom and ultimately resulted in a decision by the European Court of Human Rights.[8]

A. Understanding In Vitro Fertilization

[1] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. ¶ 13 (2007).

[2] *Id.* ¶ 14.

[3] *Id.*

[4] *Id.*

[5] *Id.* ¶ 15.

[6] *Id.* ¶ 18.

[7] *Evans*, App. No. 6339/05, Eur. Ct. H.R. ¶ 19.

[8] *Id.*

Having children is an essential concern to people living in all corners of the world, and a simple fact of humanity's continued existence. There are, however, many people around the world for whom having children is impossible or dangerous without Assisted Reproductive Technology ("ART").[9] There are many causes of infertility, which may result in the need to use ART.[10] The most common form of ART is in vitro fertilization ("IVF").[11] IVF is a multi-step process, beginning with hormone treatment to stimulate the woman's ovaries to produce multiple eggs.[12] Next, eggs are extracted from the woman, usually through a process called transvaginal ultrasound aspiration.[13] Following successful capture of eggs, sperm is retrieved from a man, usually either the partner of the woman or a donor.[14] Subsequently, fertilization and growth for six days results in embryos[15] that may either be frozen and stored or implanted.[16] The creation of spare embryos that can be cryogenically frozen is important because the success rate of IVF implantation is around 40%.[17] Freezing spare embryos reduces the number of steps that must be taken in order to attempt subsequent implantations, thus reducing the effort and expense of IVF.

In addition to understanding the science of ART, understanding the process from a couple's perspective is important to understanding how legal issues develop and are resolved. IVF is often used only if other methods, such as fertility drugs, have been unsuccessful.[18] Couples undergoing IVF can often expect out-of-pocket expenses. In the United States, this can exceed thousands

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[9] *See Female Infertility*, HEALTH & HUM. SERVS., https://www.hhs.gov/opa/reproductive-health/fact-sheets/female-infertility/index.html (last visited Oct. 3, 2019) (citing that more than twelve to thirteen out of one hundred couples in the United States alone suffer from some form of infertility).

[10] *See In Vitro Fertilization (IVF)*, MAYOCLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 (last visited Oct. 3, 2019) (explaining the many reasons IVF may be used).

[11] Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2014*, 66(6) SURVEILLANCE SUMMARIES, 1 (Feb. 10, 2017) ("Approximately 99.0% of ART procedures performed are IVF.").

[12] *In Vitro Fertilization (IVF)*, *supra* note 10.

[13] *Id.*

[14] *Id.*

[15] Note that in legal cases, embryos are known alternatively as embryos or pre-embryos depending on the court. For the purposes of this Note, the term embryo is used, but pre-embryo may be substituted.

[16] *In Vitro Fertilization (IVF)*, *supra* note 10.

[17] *IVF Success Factors*, ATTAIN FERTILITY, https://attainfertility.com/understanding-fertility/ivf-101/ivf-success-factors/ (last visited Oct. 3, 2019).

[18] Rachel Gurevich, *What to Expect Along the Path to Conceiving with IVF*, VERYWELL FAMILY (last updated Aug. 28, 2019), https://www.verywellfamily.com/understanding-ivf-treatment-step-by-step-1960200.

of dollars.[19] The process usually begins with a doctor consultation.[20] Then, prior to the IVF process, parents are asked to sign a series of consent forms.[21] The forms likely contemplate disposition of unutilized embryos; however, the level of contemplation varies.[22] Parents then begin treatment that can last for years with mixed success.

B. Legal Issues

Having identified the practices of the assisted reproductive industry, it is important to consider what happens when parents, gamete providers (those providing either the ovum or the sperm), or clinicians no longer wish to implant the embryos and disagree about disposition. Should the embryos belong to one party for later use, be donated, held indefinitely in storage, or be destroyed? The questions posed by embryo disputes are complicated and wide-ranging because most address the unique life-potential characteristics of embryos. When faced with these questions, courts may conceivably employ a number of rights-based and legal frameworks to resolve such disputes. While most human rights documents are largely silent on the specific issue of reproductive rights, many contain rights that provide guidance on the legal concerns of embryo disputes.

In embryo disputes, some have argued under a personhood model that an embryo possesses a right to life that should be preserved. The right to life is one of the most fundamental human rights and forms the foundation of many human rights concerns and documents. This right is found in the Universal Declaration of Human Rights[23] ("UDHR"), the International Covenant on Civil and Political Rights[24] ("ICCPR"), and the European Convention on Human

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[19] *Id.* (citing a study that said the average couple spends just under $20,000 on IVF).

[20] *Id.*

[21] Forms may vary, but an example of the forms can be found at BOSTON IVF, https://www.bostonivf.com/content/editor/IVF-Consent.pdf.

[22] *Compare* Gurevich, *supra* note 18 (giving a choice between donation and non-donation without specifying circumstances), *with DIRECTIVE FOR DISPOSITION OF FROZEN EMBRYOS,* MEMPHIS FERTILITY LABORATORY, INC., http://www.fertilitymemphis.com/wp-content/uploads/2013/03/Embryo-Storage.pdf (specifying a period of time for storage and allowing for continued storage, donation to other couples, donation to research, or destruction at the expiration of the storage period).

[23] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] ("[E]veryone has the right to life, liberty and security of person.").

[24] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) [hereinafter ICCPR].

Rights[25] ("ECHR"). However, granting all the protections of personhood to embryos can have unintended consequences and is largely rejected by courts.

Alternatively, other courts have considered property rights as a framework for determining who should have "possession" of the embryos. Property rights and the protection of property rights have long been recognized as serving an important role in the functioning of society.[26] The role of property rights in embryo disputes comes up in multiple ways. When married couples separate, there is a question of whether embryos can be split as marital property. Additionally, there can be disputes between gamete providers and third parties that elicit the question of whether embryos are property and to whom they belong for the purpose of settling the dispute. However, understanding embryos through purely property concepts is often rejected as applied to human tissue that has the potential for life.[27] Additionally, the right to have a family encompasses many rights and to understand how courts resolve embryo disputes, practitioners must understand rights guaranteeing parents the autonomy to procreate and raise children. Rights related to having a family are recognized in many different contexts around the world. Under the UHDR, "[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."[28] The declaration recognizes that "[t]hey are entitled to equal rights as to marriage, during marriage and at its dissolution."[29] Balancing the right to have a family with the right not to have a family is at the heart of many embryo disputes.

In addition to fundamental human rights affecting embryo disputes, there are essential legal principles courts and lawmakers recognize that can be employed in this area of the law that have not been fully developed. First, courts in embryo disputes may attempt to give effect to the autonomy of the parties by honoring agreements between the parties prior to the dispute. Second, parties have an interest in knowing how their dispute will be resolved prior to creating embryos.

There are, however, constitutional limits on the ways that embryo disputes may be resolved in the United States. While most embryo disputes occur between private parties—either the gamete providers themselves or between the gamete providers and private third parties—the government is constrained in the way it may resolve the disputes. Legislatures cannot create laws that

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[25] Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S.

[26] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., 2005) ("The great and *chief end* therefore, of men uniting into commonwealths, and putting themselves under Government, *is preservation of their property*.").

[27] *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992); *see also infra* Section IIB.

[28] UDHR, *supra* note 23, art. 16 (1).

[29] *Id.*

would limit a person's constitutional rights, and courts cannot enforce orders that would violate a person's constitutional rights. [30] The two primary constitutional rights implicated in embryo disputes are religious freedom and privacy rights.

The First Amendment to the U.S. Constitution establishes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[31] Under this amendment, federal and state governments are limited in what laws they can make that would restrict the practice of religious beliefs,[32] or conversely, limited in what laws a state may pass that would approach establishing a specific religious belief over another.

Additionally, the Supreme Court has interpreted the U.S. Constitution as providing certain privacy protections through the Fourteenth Amendment.[33] Thus states may not take legislative or judicial action that would infringe on the identified privacy rights of individuals. For example, the Supreme Court began the work of privacy rights when it held that states cannot restrict access to contraceptives in *Griswold*.[34] Following that decision, the Supreme Court expanded privacy rights by holding that women have a right to terminate a pregnancy prior to viability of a fetus.[35] Such constitutional restrictions may limit the actions states could take to resolve embryo disputes, such as recognizing full personhood in an embryo.[36]

One of the first and most influential cases to decide an embryo dispute, *Davis v. Davis*, demonstrates courts in the United States grappling with how to decide these issues. *Davis* was decided in 1992 and concerned a husband and wife who had undergone IVF after the wife was no longer able to conceive naturally and an attempt at adoption had failed.[37] The IVF did not result in a successful pregnancy.[38] Eventually the couple divorced and the disposition of the remaining embryos came before the courts in their divorce proceedings.[39] The trial court in this case originally adopted the personhood model to determine that the embryos should be awarded to the party most likely to

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[30] *See* Marbury v. Madison, 5 U.S. 137 (1803).

[31] U.S. CONST. amend. I.

[32] *See generally* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[33] *See e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[34] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[35] *See generally Roe*, 410 U.S. 113.

[36] *See, e.g.*, *infra* Part II.A.2. (discussing whether a Louisiana statute that gave personhood to frozen embryos conflicted with the constitutional right to privacy).

[37] Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992).

[38] *Id.*

[39] *Id* at 590.

grant them life.[40] The intermediate court overturned this ruling, appearing to rely on a property model to find each party shared an interest in the embryos.[41] The Tennessee Supreme Court overturned this reasoning.[42] The court first addressed the question of a contract, finding that, although there was no contract in this case, a prior agreement should be binding.[43] In the absence of such an agreement, the court balanced the right not to procreate with the right to procreate in order to determine who should be awarded the embryos.[44]

This Note seeks to explore how courts both throughout the world and domestically balance the complex rights and interests of parties in order to explore the reasoning used to resolve embryo disputes. In Part II, this Note begins by exploring the broad human rights, such as the right to personhood and the right to life implicated in such disputes. Part III of this Note then explores other internationally recognized legal interests that are important to preserve in these disputes, including autonomy of parties and expectations. In Part IV, this Note examines the limitations and implications that the U.S. Constitution has on such disputes. Finally, Part V seeks to explore the way courts in the United States can develop a better legal framework for resolving embryo disputes by proposing ways that lawmakers and courts in the United States can better establish principles of resolution.

II. INTERNATIONAL HUMAN RIGHTS

Human rights agreements, such as the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") contain many important considerations that can provide some guidance on the legal concerns in embryo disputes. First, the possible right to life of the embryo prior to implantation has been debated in legal forums, however, international and domestic courts are hesitant to recognize such a right. Second, although courts may recognize a property right in an embryo, they tend to hesitate to read such a right too broadly. Finally, how courts approach the broad issue of the right to have a family has a large effect on how courts resolve embryo disputes.

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[40] *Id.* at 589 (describing how the trial court had awarded "custody" of the embryos to the mother using the reasoning that it was in the best interest of the child to be born).

[41] *Id.* at 595–96.

[42] *Id.*

[43] *Davis*, 842 S.W.2d at 597.

[44] *Id.*

A. Right to Life

One of the most fundamental rights a person can have—that forms the foundation to almost all human rights documents—is the right to life. This right is included in the UDHR, [45] the ICCPR,[46] and ECHR.[47] Some courts[48] and commentators[49] have argued that personhood of the embryo should be used to resolve disputes concerning the disposition of the embryos. However, both international and domestic courts generally agree that personhood does not apply to embryos existing outside of the body, and few in the legal community argue in favor of accepting the personhood model in relation to frozen embryos.[50]

1. Personhood in Irish Law

Even in countries with otherwise robust protections for the unborn, frozen embryos are generally not considered persons. For example, prior to May 2018, the Irish Constitution provided in Article 40.3.3 that "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother."[51] However, even during this period, Irish courts declined to interpret the constitution as providing that the right defined in Article 40.3.3 belongs to frozen embryos.[52]

In *Roche v. Roche*, a married Irish couple underwent IVF resulting in a successful birth and three frozen embryos.[53] After the marriage dissolved, the wife requested that the embryos be returned to her in order to prevent their destruction and preserve their right to life.[54] After a lower court determination that there was no binding agreement between the parties, the Supreme Court

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[45] UDHR, *supra* note 23, art. 3 ("Everyone has the right to life, liberty and the security of person.").

[46] ICCPR, *supra* note 24, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law.").

[47] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 25, art. 2.

[48] *See* Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992) (describing how the trial court had awarded "custody" of the pre-embryos to the mother by using the best interest of the child standard).

[49] *See generally* Erica Steinmiller-Perdomo, *Is Personhood the Answer to Resolve Frozen Pre-Embryo Disputes?*, 43 FLA. ST. U. L. REV. 315 (2015).

[50] *See* Daphne Barak-Erez, *IVF Battles: Legal Categories and Comparative Tales*, 28 DUKE J. COMP. & INT'L L. 247, 254 (2018) ("In fact, even those who promote the view that life begins with conception tend to be reluctant about making that argument with regard to frozen embryos.").

[51] Constitution of Ireland 1937 art. 40.3.3.

[52] Roche v. Roche [2010] IESC 10 [2010] 2 IR 321 (Ir.).

[53] *Id.*

[54] *Id.*

of Ireland undertook to determine whether the right to life preserved in the Irish Constitution applied to the frozen embryos.[55]

First, the court drew a line between pregnancy, concerning embryos in the womb, and embryos existing outside the womb.[56] The court then noted that Article 40.3.3 of the Constitution was not written to address situations where the embryo exists outside the womb.[57] The court wrote that the amendment "referred to a situation in which the unborn life and the equally valuable life of the mother were integrated or linked so that one might affect the other adversely."[58] In the case of embryos that have never been implanted in a womb, the relationship between the mother and the embryo is not interdependent and, therefore, is not addressed by the amendment, according to the Court.[59] The court also expressed concern that there were practical reasons not to extend such protection to frozen embryos.[60] The court cited "sound reasons to provide for spare embryos" that are not contemplated by the right to life amendment in the Constitution.[61]

Likewise, the European Court of Human Rights ("ECtHR") has declined to find a violation of the ECHR provision that "[e]veryone's right to life shall be protected by law"[62] where the law of a country requires destruction of frozen embryos.[63] In *Evans*, a UK case appealed to the ECtHR, the court considered the argument that frozen embryos receive protection under Article two of the ECHR protecting the right to life.[64] However, the court deferred to the country making the law and declined the opportunity to extend personhood to embryos.[65]

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[55] *Id.* at 321–22.

[56] *Id.* at 323.

[57] *Id.*

[58] Roche, 2 IR at 323.

[59] *Id.* ¶ 7.

[60] *Id.*

[61] *Id.*

[62] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 25, art. 2.

[63] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. (2007).

[64] *Id.*

[65] *Id.* ¶ 54 (upholding a prior decision in Vo v. France, (2005) 40 E.H.R.R. 12 (2006) which held "in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.").

2. United States and Personhood

In *Davis*, the deciding court overturned a trial court ruling that embryos were persons and therefore should be awarded to the party that would protect the embryo's interest in living.[66] The Court noted that granting personhood protection to embryos would be inconsistent with both tort and abortion laws.[67] Courts in various states have followed suit, refusing to extend personhood to an un-implanted embryo.

In the legislature, however, there are states that have considered or established laws that provide personhood for frozen embryos. In Louisiana, law provides that "[a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb."[68] However, such law is largely untested in court and may be vulnerable to attacks on the grounds that enforcing such a law violates of the fundamental constitutional right to privacy.[69]

Additionally, practical considerations which caused the Court in *Roche* to hesitate to apply a blanket ruling that frozen embryos have a right to life are relevant in the United States as well. Creating spare embryos is an important step in the IVF process.[70] A state rule that no embryos may be destroyed would likely lead to fewer embryos being created as couples and medical centers consider the implication of every embryo becoming a child. Therefore, this rule would be a financial and medical impediment to many couples undergoing IVF because the process of extracting and fertilizing ova would have to be repeated every time an implantation fails.

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[66] Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992) (describing how the trial court had awarded "custody" of the embryos to the mother using the reasoning that it was in the "best interest of the child").

[67] *Id.* at 595 ("This statutory scheme indicates that as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born.").

[68] LA. STAT. ANN. § 9:123 (1986).

[69] *See infra* Part IV A; *see also* Loeb v. Vergara, 326 F. Supp. 3d 295, 301 (E.D. LA. 2018) ("Vergara argues that it would be unconstitutional to apply the Louisiana laws regarding IVF created embryos to the [Uniform Child Custody Jurisdiction and Enforcement Act] to award custody to Loeb against her will because it would infringe on her rights regarding privacy and procreation.").

[70] *See supra* Part I; *see also* Roche v. Roche [2010] IESC 10 [2010] 2 IR 321, 323 (Ir.) (citing the importance of creating spare embryos as a reason to avoid applying a right to life solution to the complicated problem of embryo disputes).

B. Property Rights

Some commentators argue for understanding embryos through a property law lens.[71] Most courts, however, use property law only to provide a background understanding of how to resolve embryo disputes.[72] How the court employs property law in an embryo dispute often depends on the relationship between the parties to the dispute. At least one court has used a property framework to fully determine the result of an embryo dispute, however, it is not clear that it sets a precedent for future disputes. In the United States, property rights have been used to determine "ownership" in disputes between gamete providers and third parties. Thus, while understanding property rights is important to embryo disputes, it is not clear how large of a role they play.

1. Property Law Playing a Role in Canada

In general, courts around the world are reluctant to understand embryo disputes through a purely property law lens.[73] In *Evans*, for example, neither party made a property rights argument, therefore the court did not consider property framework.[74] One exception to the rule that most courts reject a strict property approach is the Canadian case *C.C. v. A.W.* This case addressed a dispute between parties who were friends before creating embryos.[75] In 1998, Mr. A.W. donated sperm to Ms. C.C. in order to allow her to become pregnant using IVF.[76] Eventually, C.C. was able to give birth to twins using the embryos created with A.W.'s sperm.[77] Problems then arose in the co-parenting of the twins.[78] In 2005, when C.C. asked for the release of the four remaining embryos, A.W. opposed the request, due in part to the difficulty of co-parenting.[79] Although sympathetic, the court stated that the sperm "was an 'unqualified' gift."[80] Thus, the remaining embryos were the property of C.C.

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[71] *See, e.g.*, Lynn M. Thomas, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY'S L.J. 255 (1997) (arguing that Texas should use the law of abandoned property to determine how to resolve the problem of increasing numbers of stored frozen embryos).

[72] Barak-Erez, *supra* note 50, at 254 ("courts frequently refer to frozen embryos as having property traits, rather than directly calling them property").

[73] *See id.*

[74] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. (2007).

[75] C.C. v. A.W. (2005), 50 Alta. L.R. 4th 61, ¶ 1 (Can. Alta. Q.B.).

[76] *Id.* ¶ 2.

[77] *Id.*

[78] *Id.* ¶¶ 3–18

[79] *Id.* ¶ 19.

[80] *C.C.*, 50 Alta. L.R. 4th at ¶ 21.

alone and A.W. "had no legal interest in them."[81] It remains to be determined whether this reasoning is limited to the unique facts of the case. Here, the embryos were created because one party wanted to be a parent.[82] Whether this reasoning would apply between parties in a relationship who were both interested in parenthood at the time of creation is an open question.

2. United States and Property Law

The debate about the property status of embryos has been present from the first embryo dispute cases.[83] Cases in the United States that involve disputes between gamete providers generally hold that embryos are property of special status, declining to divide them between parties in the way that a chattel is divided between married persons.[84]

Property rights also play a role in resolving disputes between gamete providers and third parties. In *York v. Jones*, a New Jersey couple attempted an IVF at a clinic in Virginia.[85] After a year without a successful pregnancy, the couple moved to California and requested that the one remaining embryo be transferred to a hospital in Los Angeles to make another attempt at a successful pregnancy.[86] When the clinic opposed the transfer, the court determined that the couple had a cause of action in detinue (a claim to recover a wrongfully detained possession).[87] Making this determination required that the court find that the plaintiff has a "property interest in the thing sought to be recovered."[88]

The court in *York* did not specify the nature of the property interest, and there is nothing in the court's language that conflicts with the characterization of embryos as property of a special character.[89] Courts who have examined this

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[81] *Id.*

[82] *Id.* ¶ 2.

[83] *See* Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992); York v. Jones, 717 F.Supp. 421, 425–27 (E.D. Va. 1989).

[84] *See, e.g.*, *In re* Marriage of Rooks, 429 P.3d 579, 591 (Colo. 2018) ("[W]e agree with courts that have categorized pre-embryos as marital property"); McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) ("[W]e hold the trial court did not err in classifying the frozen pre-embryos as marital property of a *special character*."); *Davis*, 842 S.W.2d at 596 (holding that frozen embryos "[D]eserve[] respect greater than that accorded to human tissue but not the respect accorded to actual persons").

[85] *York*, 717 F.Supp. at 423.

[86] *Id.* at 423–24.

[87] *Id.* at 422, 426–27.

[88] *Id.* at 427.

[89] *See id.*

issue have generally agreed that as between the gamete providers and third parties, the gamete providers have a greater property interest.[90]

C. Family Rights

Because the right to have a family encompasses many rights, practitioners in this area of law must understand rights guaranteeing parents the autonomy to procreate and raise children. The UDHR contemplates these rights in its declaration that men and women have the right to marry and found a family.[91] At least one court has used a family rights framework to resolve an embryo dispute. Similarly, courts in the United States wanting to recognize family rights have tried to balance conflicting rights.

1. The Right to A Family in Israeli Courts

The Israeli case *Nahmani v. Nahmani* [92] concerned a couple who underwent IVF after the wife had a hysterectomy.[93] The case went through multiple hearings before being decided in favor of the wife, who wished to implant the embryos.[94] The *Nahmani* court recognized that there were two critical rights or "interests" in opposition with one another: the right to be a parent, and the right not to be a parent.[95] There were two factors in particular that caused the court to weigh in favor of the wife.[96] First, the court concluded that parenthood was not forced; the husband gave consent when he assented to the fertilization of the embryo.[97] Additionally, the court noted that, for medical reasons, this was the only opportunity for the woman to become a parent.[98] Thus, the court ruled that, in this case, the interest of becoming a parent outweighed that of avoiding parenthood.[99]

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[90] *See, e.g.*, *Davis*, 842 S.W.2d at 597 ("As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject.") (citation omitted).

[91] UDHR, *supra* note 23, art. 16 (1).

[92] CFH 2401/95 Nahmani v. Nahmani 50(4) PD 661 (1996) (Isr.).

[93] *Id.* at 35. (A hysterectomy removes the uterus, making pregnancy without the use of ART impossible).

[94] *Id.* at 35–36.

[95] *Id.* at 38.

[96] *Id.* at 40.

[97] *Nahmani* 50(4) PD at 40.

[98] *Id.*

[99] *Id.*

The Israeli court distinguished this case from the related American case, *Davis v. Davis*, and noted that in *Davis*, the American court considered that the wife was not asking to use the embryos herself, but that they not be destroyed so that a third party may use them, in contrast with the wife in *Nahmani*.[100]

2. The Right to Procreation in the United States.

Courts in the United States have recognized specific rights and interests in raising a family. The U.S. Supreme Court has found that there is an affirmative right to procreation.[101] Elsewhere, the Supreme Court provided protections relating to the right to avoid procreation. For example, in *Griswold v. Connecticut*, the Supreme Court upheld the right of married persons to use contraception.[102] The *Griswold* Court recognized the protection of privacy in a marriage, and noting that in doing so, "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[103] Courts wishing to protect both a right to procreate and a right to not procreate employ a balancing test that weighs the rights of both parties and is tailored to the circumstances of the case.

The landmark *Davis* case was decided by balancing these rights. In *Davis*, the wife requested the authority to donate the embryos created during her marriage to a childless couple, while her husband asserted his right to have the embryos discarded.[104] The court noted that opposing fundamental rights were at issue—"the right to procreate and the right to avoid procreation."[105] Not only were these constitutional rights, but the court also affirmed that "[t]he entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to . . . establish a home and family relations."[106] The court noted that these rights belonged only to the gamete

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[100] *Id.* at 41 ("Even in *Davis v. Davis* the court decided in favour of the husband's position, only because at that state the wife was not asking for the fertilized genetic material herself, but for another woman.") (citation omitted).

[101] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

[102] Griswold v. Connecticut, 381 U.S. 479 (1965) (determining that a law outlawing the sale of contraception to married couples violated the privacy of the couple).

[103] *Id.* at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").

[104] Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

[105] *Id.* at 601.

[106] *Id.* at 599 (quoting Thiede v. Town of Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944)).

providers, and not to interested third parties.[107] Thus, the court determined that to resolve the dispute, it would need to balance the conflicting interests between husband and wife.[108]

Accordingly, the court resolved the conflict by weighing "the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."[109] Thus, the court determined that the husband had a strong interest in avoiding unwanted parenthood as a result of his individual circumstances.[110] His experiences included a childhood marked by the divorce of his parents and being raised primarily by his aunt, only rarely seeing his father.[111] The court considered Mr. Davis' testimony that he was particularly concerned that a child did not face the psychological effects of being raised without both parents.[112] Therefore, the court heavily weighed his interest in avoiding procreation.[113] The fact that his biological child might eventually be raised in a single-parent home was particularly troubling to Mr. Davis and caused the court to consider his interest especially strong.[114]

In contrast, the wife's interest in donating the embryos included the burden of knowing that she underwent difficult IVF procedures that could only be described as futile if the embryos were destroyed.[115] The wife did not have a particularly strong interest in parenthood, however, as she wished to donate the embryos.[116] Weighing the two opposing rights, the court found that the husband's interest outweighed that of the wife.[117] In doing so, the court noted that "[o]rdinarily, the party wishing to avoid procreation should prevail."[118]

Several other courts in the United States have followed the balancing test outlined in *Davis*. The Colorado Supreme Court stated that in the absence of an agreement between the parties, a balancing test may be employed to resolve

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[107] *Id.* at 602.

[108] *Id.* at 603.

[109] *Davis*, 842 S.W.2d at 603.

[110] *Id.* at 603–04 ("In light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents.").

[111] *Id.*

[112] *Id.* at 604.

[113] *Id.*

[114] *Davis*, 842 S.W.2d at 604.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

a dispute.[119] Similarly, in Pennsylvania, the court would have preferred an agreement be made before a dispute, but used a balancing test in the absence of such an agreement.[120]

III. OTHER LEGAL INTERESTS

Given the rich history of law and legal principles in countries around the world, seldom do lawmakers have to start from scratch when approaching an area of law not previously addressed in their jurisdiction. In addition to protecting the human rights of parties in disputes, lawmakers often consider legal norms and the interests of future parties to make law or determine the outcome of a case.

First, courts in embryo disputes often want to give effect to the autonomy of the parties by honoring agreements between the parties before the dispute. Few countries use reliance on a contract to settle disputes. In the United States, enforcing the autonomy of the parties is done through the contract model and the contemporaneous mutual assent models. The enforceability of agreements made prior to a dispute, however, is often unclear. Secondly, potential parents who may be considering creating embryos have an interest in knowing how their rights will be enforced in the event of a dispute. How courts protect the expectation interests of parties depends greatly on the jurisdiction. Generally, the United States does less to protect this interest of the parties. Using established legal principles to understand how to apply human rights to this developing area of the law can help courts resolve embryo disputes.

A. The Autonomy Principle

Giving effect to the decisions of parties is a useful tool for courts to employ when resolving any dispute.[121] This principle is embodied most clearly in the right to contract. Although there are limits on the right to contract,[122] such as

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[119] *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018) ("[W]e hold that a court should look first to any existing agreement expressing the spouses' intent . . . In the absence of such an agreement, a court should seek to balance the parties' interests when awarding the pre-embryos.").

[120] Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012) ("[B]ecause Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely Wife's only opportunity to achieve biological parenthood . . . we agree . . . that the balancing of the interests tips in Wife's favor.").

[121] *See* ICCPR, *supra* note 24, art. 1 ("All peoples have the right to self-determination.").

[122] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("[I]t was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right.") (citation omitted).

limits on illegal or unconscionable contracts, there is a rich history in the United States of recognizing a right to contract and economic freedom that may not be as dominant in the larger worldwide community.[123]

1. Autonomy in International Courts

Neither the UDHR nor the ICCPR recognizes a standalone right to contract. However, the ICCPR does recognize the right to "freely . . . pursue . . . economic . . . development."[124] Perhaps, for this reason, there has been a relative dearth of international cases decided on contract law grounds.[125] In *Evans*, the court analyzes laws in Council of Europe member states.[126] The court noted that in several countries either party was free to withdraw consent at any stage before embryo implantation.[127] In other countries, there are substantial limitations on a party's ability to revoke consent.[128] In *Evans*, the court cites Hungary, where a woman may proceed with implantation despite divorce; Austria and Estonia, where a man may not revoke consent after fertilization; Spain, where a man may only revoke consent if the couple is not separated; Italy and Germany, where neither party can revoke consent after fertilization; and Iceland where embryos are destroyed if the gamete providers separate.[129] None of the laws cited consider the primary focus to be the will of the parties involved. This strongly contrasts with the United States, where courts often look first to whether there was an agreement that might indicate the desires of the parties.

2. Autonomy in The United States

In the United States, contract law has had mixed success at solving the frozen embryo dilemma. The contract model aims at establishing an agreement that states the parties' preferences before dispute allows for parties to have a voice and to have autonomy in their choices before disputes reach a contentious point.

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[123] *See generally* John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U.L. REV. 4 (1999).

[124] ICCPR, *supra* note 24, art. 1.

[125] Barak-Erez, *supra* note 50 ("The contractual model is best exemplified by American case law.").

[126] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. § II(B)(1) (2007).

[127] *Id.* at ¶ 41 (citing Denmark, France, Greece, the Netherlands, Switzerland, Belgium, Finland, and Iceland).

[128] *Id.* at ¶ 42.

[129] *Id.*

Typically, before completing IVF, potential parents sign a contract with the clinic producing the embryo. This contract may specify what will happen to unused embryos in various events.[130] Such agreements are usually agreements with the clinic, although they may specify arrangements between the parents.[131] The court in *Davis* stated in dicta that a contract would be presumed enforceable had one existed between the parties prior to the creation of the embryos.[132] Other courts have resolved embryo disputes by relying on the contracts between opposing parties.[133]

However, courts have not universally found these contracts enforceable. In *A.Z. v. B.Z.*, the court found against enforcing a contract signed prior to the creation of the embryos and prior to any change in the family circumstances.[134] In *A.Z.*, a couple's successful IVF treatment resulted in twins.[135] However, following the successful birth of twins, the wife had another embryo implanted without informing her husband.[136] Shortly thereafter, the relationship strained and the couple divorced.[137] The court refused to enforce a consent form signed by the couple that stated that both parties agreed in the event of the couple become separated that the embryos would be returned to the wife.[138]

In doing so, the court noted the consent form appeared to be made primarily as an agreement between the couple and the clinic, not between husband and wife.[139] Additionally, the court questions whether the form represented the intentions of both parties, noting that the husband signed a blank form without the parties' intentions filled in.[140] Finally, the court concluded that it would not enforce a contract that forced one party to become

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[130] *See, e.g.*, Dahl v. Angle, 194 P.3d 834 (Or. App. 2008); Kass v. Kass, 696 N.E.2d 174, 176 (N.Y. 1998).

[131] *Compare Kass*, 696 N.E.2d at 177 (addressing an agreement with the clinic that specified that if there was no mutual agreement, the embryos would be donated), *with* A.Z. v. B.Z., 725 N.E.2d 1051, 1054 (Mass. 2000) (addressing an agreement with a clinic that specified the embryos would be returned to the wife in the event of a separation).

[132] Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) ("[A]n agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.").

[133] *See Kass*, 696 N.E.2d at 181 (holding that the informed consent of the parties that the pre-zygotes be donated for research would be upheld).

[134] *A.Z.*, 725 N.E.2d at 1051.

[135] *Id.* at 1053.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 1059.

[139] *A.Z.*, 725 N.E.2d at 1056.

[140] *Id.* at 1057.

a parent against his or her will, stating, "forced procreation is not an area amenable to judicial enforcement."[141] Courts faced with a contract that would force procreation have followed the *A.Z.* court in declining to enforce such contracts.[142]

According to critics of the contract model, it is more likely that the contract model fails to truly capture the desires of parties as those desires exist at the time of dispute after a material change.[143] The vast disparity between the person who signed a contract intending to become a parent and the person in a dispute who has no intention of becoming a parent makes courts reluctant to enforce such contracts.[144]

The contemporaneous mutual assent approach is an alternative to the contract theory aimed at protecting the autonomy of the parties, as well as the rights to procreate and not to procreate. This approach, as put forth by health law professor Carl Coleman, contends that following a contractual model with decisions made prior to contention inadequately protects the parties interests.[145] Under this approach, a party may change his or her mind with respect to a prior agreement and the prior agreement could no longer be enforced against that party.[146] Under this approach, embryos would remain frozen until the parties that created the embryo made an alternative decision by mutual consent.[147]

Courts adopting this approach seek to avoid the over-involvement of the court in a highly personal and private area of the lives of parties involved.[148] The contemporaneous mutual assent approach has been criticized, however, as giving the party wishing to withhold consent of any use of the embryos trump power over all other interests.[149] It also fails to provide predictability as any party may change his or her mind at any point.

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[141] *Id.* at 1058.

[142] *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) (stating that parties have the right to change their mind with regard to embryo disposition consent agreements).

[143] *See, e.g.*, Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71 (2014).

[144] *See id.* at 90–91.

[145] Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88 (1999).

[146] *Id.*

[147] *Id.* at 110.

[148] *See In re* Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003) (rejecting both the balancing and the contractual test, noting that "Public policy concerns similar to those that prompt courts to refrain from enforcement of contracts addressing reproductive choice demand even more strongly that we not substitute the courts as decision makers in this highly emotional and personal area.").

[149] *See* Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP & INT'L L. 75, 103 (2002) ("One party's holdout 'right' not to be a parent and to dispose of pre-

B. The Expectation Interest

There is a well-founded legal principle that citizens have an interest in reliance on knowledge of the law. The idea that parties can best protect themselves and their interests if the law is knowable is a justification for legal principles such as *stare decisis*[150] and the void-for-vagueness doctrine.[151] Knowing the law of a state or a nation can help parents plan how best to protect their rights. Therefore, it is important for parents to have some form of guidance as to what the law in their state will be and how that law will be enforced.

1. Expectation Interests in The U.K.

Most countries that allow for the creation of embryos outside of the womb have established national laws to address the issues of embryo disputes.[152] For example, in response to children being born via IVF, the U.K. government debated what policies and regulations should be adopted in response to this new area of technology.[153] Ultimately, the government passed a law that established clear guidelines for when embryos can be stored, under what circumstances they can be stored, and for how long they can be stored, as well as limiting the rights parties have to the embryos.[154] In the United Kingdom, parties undergoing IVF treatment are mandated by law to sign consent forms that make clear to parties what will happen to their frozen embryos in the event of a dispute.[155] Although the U.K. system gives less control to the parties creating the embryos and more control to the government, it arguably gives parties an opportunity to take action to protect the rights that are most important to them by taking action in response to what the law is, not what the law might be.

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embryos becomes a veto—and perhaps a bargaining chip in divorce—over the other party's 'right' to be a parent.").

[150] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 855–56 (1992) (refusing to overturn case law on stare decisis grounds, citing, inter alia, the reliance of individuals on the law as it stood).

[151] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (describing how the void-for-vagueness doctrine requires that legislatures provide "minimal guidelines" to give notice to citizenry of the law).

[152] *See* Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. (2007) (citing laws in European countries that establish clear rules for the disposition of embryos).

[153] *Id.* ¶¶ 29–30.

[154] *See* Human Fertilisation and Embryology Act 1990, c. 37 § 4(1) (UK).

[155] *Evans*, App. No. 6339/05 Eur. Ct. H.R. ¶ 16.

2. Expectation Interests in the United States

In the United States, there are few established guidelines for how a court may resolve a pre-embryo dispute. In states where the legislature has not established a governing law, and the courts have not resolved the issue and established precedent, there are many open questions for those considering ART. Whether a contract will be enforceable is a serious concern for potential parents; however, in states that have not determined the value of an embryo contract, there is an open question whether the contract will be enforced. Additionally, contracts have generally not been enforced in circumstances where doing so would force a party to become a parent against his or her will.[156] Thus, even in states where contracts are allowed to apply, it is not clear that they will be enforced when doing so would compel parenthood.

The balancing test pursues the most equitable outcome in the individual circumstances of the case and leaves the door open for extraordinary circumstances. However, the test employed by the *Davis* court gave little guidance to couples as to how their procreation rights would be protected. Just how traumatizing must one's childhood be before the court will weigh that party's rights heavier than the other party? What factors will tip the scales in the other direction? While this may become clearer with time as more cases are decided through the balancing test, knowing exactly which factors may tip a court to one side or another is a challenge. Not knowing how the court will weigh factors in a balancing test can be difficult for parties wanting to protect their rights before starting ART treatments.

IV. U.S. CONSTITUTIONAL RIGHTS

In addition to protecting the broad human rights that are recognized throughout the world, the United States has specific limits on government action that are contained within the Constitution. Government action in United States, thus, is limited and it is important to understand the specific limits the Constitution may place on how a state can resolve embryo disputes. Specifically, some of these limits may restrict states from resolving disputes in the way that other countries do. Governments in the United States may be limited from establishing laws such as those employed by other countries to solve embryo disputes.

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[156] *Compare* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (refusing to enforce a contract as against public policy where it would compel parenthood) *with* Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998) (enforcing a contract that would require the embryos to be destroyed); *see also Barak-Erez*, *supra* note 50, at 261 ("When courts have relied on a contractual model to resolve disputes over embryos, they have been reluctant to give priority to parties who want to proceed with the IVF process . . . .").

First, in addition to the broad protections of international human rights acts concerning the family, the Constitution establishes specific protections related to privacy that affect how courts and legislatures may resolve embryo disputes. Second, the U.S. Constitution provides explicit protections to religious belief, which may limit how federal or state governments are able to regulate embryo disposition.

A. Privacy Rights

In conjunction with the broad human and "inalienable" rights related to raising a family, the Supreme Court has interpreted the U.S. Constitution as providing certain privacy protections in the Fourteenth Amendment.[157] Thus states may not take action that would infringe on the privacy rights of individuals, as interpreted by the Supreme Court. For example, the Supreme Court decision that women have a privacy right to terminate a pregnancy prior to viability of a fetus may limit the states abilities to recognize full personhood in an embryo.[158]

One question that is not necessarily clear from the Supreme Court's ruling on abortion laws is whether, under *Roe v. Wade,* an individual has a constitutional right not to be a genetic parent. As Glenn Cohen, professor of law at Harvard Law School, explained, "we need to recognize three possible rights *not* to be a parent—a right not to be a gestational parent, a right not to be a genetic parent, and a right not to be a legal parent."[159] The decision in *Roe* implied that there are privacy rights not to be a gestational parent, as a woman should not be forced to carry a child to term in her own body in every circumstance.[160]

However, lawmakers in other countries have parsed these rights somewhat finely, where in some cases a man's right not to be a parent may be more limited than a woman's right to an abortion.[161] The courts in the United States may be limited from following courts in other countries, such as the *Nahmani* court, in limiting the right to not be a parent. Without a Supreme Court ruling on whether one has a right not to be a genetic parent, courts are free to award guardianship of embryos to a party who wishes to use them to create children. Should the Supreme Court rule, however, that one has a

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[157] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[158] *See, e.g.*, *supra* part II.A.2. (discussing whether a Louisiana statute that gave personhood to frozen embryos conflicted with the constitutional right to privacy).

[159] I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 (2008).

[160] *See Roe*, 410 U.S. at 153.

[161] *See, e.g.*, CFH 2401/95 Nahmani v. Nahmani 50(4) PD 661 (1996) (Isr.).

Constitutional right to not be a genetic parent without consent, it is harder to see how courts or legislatures could make a law that would allow such a party to be awarded guardianship.

B. Religious Freedom

The First Amendment's guarantee of religious freedom may also limit what laws states are free to create with respect to embryos. For example, state or federal lawmakers may wish to create a law that requires clinics to destroy all embryos that are not implanted and have been stored for a period longer than a set statutory time period. This would be similar to the law of the United Kingdom.[162] In the United Kingdom, embryos can only be frozen and stored for a period longer than ten years under limited circumstances and with the consent of both gamete providers.[163] After the expiration of the statutory period, such embryos must be destroyed.[164]

However, for religious reasons, clinics in the United States may oppose destruction of embryos on the basis of a religious belief in the sanctity of life. Note that many hospitals and medical centers are run by religious organizations, at least some of which limit the health care that will be provided by the facility.[165] The Free Exercise Clause itself may not bar government from making a generally applicable regulatory scheme,[166] however, any law that might conflict with the practice of religion would need to be carefully drafted to ensure that it did not conflict with the Establishment Clause.[167]

Additionally, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[168] Following RFRA, a federal government action that imposes a substantial burden on religious exercise must serve a compelling government interest and constitute the least restrictive means of serving that interest.[169]

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[162] *See* Human Fertilisation and Embryology Act 1990, c. 37 § 4(1) (UK).

[163] *Id.* § 14(1)(c).

[164] *Id.* § 14(4).

[165] *See, e.g.*, *New Report Reveals 1 in 6 U.S. Hospital Beds are in Catholic Facilities that Prohibit Essential Health Care for Women*, ACLU, (May 5, 2016) https://www.aclu.org/press-releases/new-report-reveals-1-6-us-hospital-beds-are-catholic-facilities-prohibit-essential (noting 14.5% of hospitals comply with Catholic Directives that prohibit a number of reproductive health care services).

[166] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the [s]tate is free to regulate.").

[167] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[168] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

[169] *Id.* § 2000bb.

For example, *Burwell v. Hobby Lobby* involved insurance mandates under the Affordable Care Act that included coverage for birth control.[170] The Supreme Court struck down rules that required corporations to provide contraception that conflicted with the religious position of the corporation on the basis of RFRA.[171] The Court concluded that for-profit businesses were persons for the purposes of RFRA.[172] Although RFRA was struck down as unconstitutional as it applies to state government action,[173] this restriction still applies to the federal government. [174] Thus, if a clinic opposes a particular federal regulation—such as one requiring the destruction of embryos—on religious grounds, the clinic could have a claim under RFRA.

Therefore, federal government action related to storage or destruction of embryos may be limited, as it conflicts with religious beliefs in order to ensure compliance with RFRA. Since both non-profits and corporations may claim that any violation of their religious beliefs is a violation of RFRA, virtually any medical center could claim an exemption from restrictive federal laws.

V. ANALYSIS AND PROPOSED SOLUTIONS

Of the many rights and interests examined in this Note, the United States compares poorly to other countries in the concern of protecting the interest of citizens to know the law that will apply to them.

By allowing states to form their own responses to embryo disputes, each state is able to best determine how to balance the rights and interests of their own citizens, as well as provide testing grounds for methods of resolving pre-embryo matters. However, the United States as a whole has done a comparatively poor job of protecting the interest that its citizens have in knowing their rights and knowing how these disputes will be decided in their respective states. States can provide more concrete guidance in many ways depending on their approach to resolving embryo disputes.

Under a contract model, parties have an opportunity to protect their interests before a problem arises, thus protecting the autonomy interests of the parties. However, courts are hesitant to enforce contracts that force procreation, especially where one party has not carefully considered the issue before signing the contract.[175] Legislatures wishing to protect the autonomy of

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[170] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014).

[171] *Id.* at 689–90.

[172] *Id.* at 707–08.

[173] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[174] *See Burwell*, 573 U.S. at 690.

[175] *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1055 (Mass. 2000).

parties by using a contract model may mandate mediation prior to signing a contract in order to invite a more informed decision, thereby protecting against courts who do not wish to enforce such contracts. This would, however, add to the expense and time of IVF. Alternatively, in the absence of such legislation, courts could consider the level of process and the seriousness with which parties entered into a contract.[176]

States using a balancing method have a focus on fairness at their core. However, courts or legislatures offering guidance as to what factors will cause a court to weigh one way or another would give couples a better opportunity to know how the issue will be resolved before the issue reaches the courts. In courts that have adopted the balancing test, different factors have been weighed, but the key factors are often the same.

The only courts that have favored a party wishing to use the embryos have done so when the party is using the embryos personally and has no other opportunity to have biological children.[177] While courts using a balancing test may desire to leave themselves options, where an equitable result can only be achieved by allowing use of the embryos, parties can benefit from having a clear understanding of what the most important factor will be. Providing a clear framework for how factors are balanced would make the law easier to understand. This would also give better guidance as to how to protect the interests of the parties before a problem arises, either through contract or mediation.

In states where no method has been endorsed by either the courts or the legislature, parties have little guidance ex-ante as to how their interests will be protected in the event of a dispute. Contracts are signed without knowing if they will be enforced, and parties enter complex arrangements without knowing how their rights will be protected. In order to allow parties to understand their rights and take steps to protect their interests, legislatures should make laws that respond to how these disputes will be resolved in their particular state.

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[176] This was done, for example in *A.Z. See id.* (noting that the contract appeared to be entered into without full contemplation by the husband).

[177] *Compare, e.g.*, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (ruling against a woman who desired the embryos be saved for use by another), *with* Reber v. Reiss, 42 A.3d 1131 (Pa. 2012) (finding that using the embryos represented the wife's only possible method of achieving pregnancy and applying a balancing test which awarded the embryos to her as a result); *see also* Barak-Erez, *supra* note 50 at 265 (describing cases where the court applied the balancing test where the woman had no other opportunity to have children: "these . . . cases are uniquely different from previous U.S. cases, which involved a party who wanted to implant embryos without the other's consent when that party already had children. This difference is reflected in their results").

VI. CONCLUSION

Looking at international norms related to human rights can give the United States guidance as to how best to protect the rights and interests of its citizens. In addition, it may allow the United States the ability to offer uniform authority on the issue. Embryo disputes raise many serious and complicated ethical and legal questions in places all over the world. The background of what rights and interests the courts and international bodies have protected over the years helps to provide a useful framework for how to address new and difficult questions.

In the complex area of embryo disputes, there are many competing rights and interests that lawmakers try to protect. In different countries around the world and different states in the United States, legislatures and courts tend to prioritize the rights and interests in a way specific to their particular State and their own citizens.

In the United States, protecting autonomy interests and respecting the constitutional rights to religious freedom and privacy share a greater role in how courts approach embryo disputes as compared to the larger worldwide community. Within that framework, however, it is possible to protect the interest that citizens have in understanding how the law will apply to them, while still protecting interests that any particular state wishes to prioritize.