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EMBRYO FUNDAMENTALISM

June Carbone and Naomi Cahn*

The battle for the future of assisted reproduction technologies (ART) has been joined. The tacit compromise underlying assisted reproduction—no laws are passed that even tangentially sanction embryo destruction and no laws are passed that intrude on the profitability of fertility treatments—may be coming to an end. As use of ART has increased, so have calls for supervision and oversight. In the wake of "Octomom" Nadya Suleman's use of in vitro fertilization (IVF) to give birth to octuplets, the calls to regulate assisted reproduction have become even more pressing in 2009.[1] President Obama's 2009 reversal of the Bush policy on stem cell research has increased the importance of federal oversight of embryo donations at the same time that those opposed to embryo destruction have stepped up efforts to preserve the thousands of unused IVF embryos for reproductive purposes.[2] At the same time, religious communities ambivalent about ART have increased the calls to reform ART practices to bring them more in line with religious teachings and spiritually informed notions of human dignity.[3]

In this paper, we focus on what may become a new flash point in the effort to craft normative understandings about assisted reproduction. That flash point is the treatment of the hundreds of thousands of extra embryos created through in vitro fertilization (IVF).[4] IVF involves extracting eggs from women undergoing fertility treatment (or sometimes from intended donors), fertilization of the eggs in a laboratory, and implantation of the resulting embryos in the intended mother or a gestational surrogate. Because the process of extracting human eggs is invasive, painful, and

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[1] *See* Naomi R. Cahn & Jennifer M. Collins, *Eight is Enough*, 103 NW. U. L. REV. COLLOQUY 501 (2009), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2009/22/LRColl2009n22Cahn&Collins.pdf (discussing the responses to the Suleman case by state legislators, the media, and others).

[2] *See* Sheryl Gay Stolberg, *Obama Lifts Bush's Strict Limits on Stem Cell Research*, N.Y. TIMES, Mar. 9, 2009, at A18.

[3] See discussion *infra* notes 115–21 and accompanying text.

[4] *See* Virginia Linn, *Pressure On to Limit Eggs in IVF Process*, PITTSBURGH POST-GAZETTE, July 31, 2005, at A1, *available at* http://www.post-gazette.com/pg/05212/546513.stm.

expensive, doctors extract as many eggs as they can in each attempt.[5] To increase success rates, doctors fertilize all of the eggs, allow them to develop for several days, and then select the healthiest (generally the most mobile) for implantation.[6] To manage the risk of birth defects, and the potential impact of multiple births on both mother and child, doctors prefer to limit the number of embryos implanted at one time. So state-of-the-art IVF today routinely produces extra embryos that may never be used.[7] Patients generally freeze the embryos that are not implanted so that they will be available to produce additional children or for additional attempts if the first effort does not succeed.[8] A large number of patients, however, ultimately choose not to use their frozen embryos, creating an issue about ultimate disposition.[9] The possible choices often offered are to thaw and discard the embryos, donate them for research, or donate them for reproductive purposes.[10] Each of the three options would take place more readily, however, if the law were to clarify the legal status of embryos, the mechanisms by which their progenitors could discard or transfer them to others, and the obligations of third parties involved in the process. And therein lies the rub.

The status of embryos, which involves profound religious and philosophical differences and which has become the subject of entrenched political differences over the course of the abortion fight, lies at the heart of these developments. On one side of the debate is what we term "embryo fundamentalism," that is, the insistence that embryos are unique human beings from the moment of conception, and should be respected as such.[11] On the other side of the debate are those who would define the status of embryos in terms of the differing values their progenitors confer on them.[12]

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[5] *See* Nicholas Wade, *Clinics Hold More Embryos Than Had Been Thought*, N.Y. TIMES, May 9, 2003, at A24. For an overview of what the in vitro fertilization process entails, see Reproductive Fertility Center, IVF Patient Overview, http://www.reproductivefertilitycenter.com/rfc/index.php?option=com_content&view=article&id=69&Itemid=71 (last visited Apr. 17, 2010). For further discussion of embryo issues, see NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION (2009); Cahn & Collins, *supra* note 1, at 502–03 (discussing recent proposals to regulate the IVF industry).

[6] In high risk cases, the doctors may conduct preimplantation genetic diagnosis (PGD) to screen the embryos for disease or other characteristics. *See* Fertility LifeLines, Assisted Reproductive Technologies: Preimplantation Genetic Diagnosis, http://www.fertilitylifelines.com/fertilitytreatments/pgd.jsp (last visited Apr. 17, 2010). Some parents elect to use ART to select an embryo that carries the parents' disorder. *See* Jaime King, *Duty to the Unborn: A Response to Smolensky*, 60 HASTINGS L.J. 377, 379–80 (2008).

[7] *See infra* notes 56–60 and accompanying text.

[8] *See id.*

[9] *See id.*

[10] *See* Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KPLCTV, Mar. 27, 2009, http://www.kplctv.com/Global/story.asp?S=10081861; Anne Drapkin Lyerly et al., *Fertility Patients' Views About Frozen Embryo Disposition: Results of a Multi-Institutional U.S. Survey*, 93 FERTILITY & STERILITY 499 (2010).

[11] See *infra* notes 64–67 and accompanying text.

[12] *See* Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 306 (2006) (outlining different views on the moral

Indeed, studies show that most of the patients who currently participate in IVF have multiple approaches to the meaning of the embryos they have created.[13] Embryo fundamentalists, in contrast, include both some who are opposed to IVF entirely as inconsistent with human dignity and others who might embrace ART if the process were remade to reflect their values.

The conflicts between these groups accordingly have both symbolic and practical implications. The symbolic clash involves an extension of the abortion fight into the disposition of the hundreds of thousands of frozen embryos in clinic freezers. Proposals are multiplying to permit, and in many cases encourage, their transfer for reproductive purposes.[14] At the same time, surveys show a majority of IVF patients would like to transfer their leftover embryos for research purposes.[15] And the clinics that store them would like greater direction on their disposition, if only to avoid the continuing storage costs for embryos unlikely to be used for other purposes.[16]

The symbolic clash addresses embryo status and the issue of whether the state should treat embryos as human life from the moment of conception or as human cells subject to the wishes of those who create them. Yet, these differences need not necessarily affect existing ART practices. Indeed, Louisiana enacted a statute that treats embryos from the point of conception until implantation in a woman's body as "juridical persons" entitled to equal respect.[17] Georgia has enacted provisions to facilitate embryo transfer that use the language of adoption and adoption-like procedures as part of the process.[18] The fertility industry, which successfully blocked proposed legislation to limit the number of embryos that could be implanted at one

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status of embryos); Paul D. Simmons, *Perspectives: Protestant*, THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, http://www.rcrc.org/perspectives/protestant.cfm (highlighting Protestant perspective on reproductive issues); *see also* Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107 (2007) (utilizing postmodern critique to explore questions surrounding frozen embryo disputes).

[13] *See, e.g.*, Lyerly, *supra* note 10; Denise Grady, *Parents Torn Over Extra Frozen Embryos From Fertility Procedures*, N.Y. TIMES, Dec. 4, 2008, at A26.

[14] *See infra* Part IV.

[15] *See* Lyerly, *supra* note 10, at 506 ("Consistent with single-site studies from Europe and Australia, donation for research was the most popular option for disposition of excess embryos.").

[16] *See id.* at 500 ("[D]elayed decisions create difficulties for the providers who are responsible for safe storage or disposition of apparently abandoned embryos.").

[17] LA. REV. STAT. ANN. § 9:125 (2009) ("An in vitro fertilized human ovum as a juridical person is recognized as a separate entity apart from the medical facility or clinic where it is housed or stored.").

[18] GA. CODE ANN. § 19-8-41 (2009); *see* Steven Ertelt, *Georgia State House Passes Embryo Adoption Bill to Protect Unborn Children*, LIFENEWS, Mar. 13, 2009, http://www.lifenews.com/bio2793.html. Use of the term "adoption" for embryo transfers is yet another symbol of the morally contested terrain and the complexities of language. *See* Sarah B. Lawsky & Naomi Cahn, *Embryo Exchanges and Adoption Tax Credits*, 122 TAX NOTES 1365 (2009) [hereinafter Lawsky & Cahn].

time,[19] did not oppose these proposals because clinics in these states do not destroy existing embryos in any event, and the new legislation would not otherwise restrict IVF practices.[20] Like mandatory sonograms, parental consent, waiting periods, and restrictions on late term abortions, these measures underscore fealty to a particular moral viewpoint, although they have not necessarily triggered a backlash from politically powerful opponents.

The creation of a legal infrastructure to encourage embryo transfers is another matter. The demand for fertility services is growing. To date, IVF users have overwhelmingly been relatively wealthy and better educated.[21] College educated women have experienced the greatest delay in family formation, hence the greatest age-related fertility issues.[22] Moreover, the lack of public funding for fertility services has limited the benefits to those of independent means.[23] And, of course, those opposed to IVF per se have had little reason to participate in the creation of the industry. The result is an industry with a small, but affluent and politically powerful clientele that has flourished with relatively little oversight.

All of these factors may be changing. The average age of first birth is increasing for the country as a whole.[24] Adoptions have become harder to come by, and international adoptions, which have filled some of the gap, have declined as the supplier nations have imposed more restrictions.[25] The adoption of legal measures facilitating embryo transfer for reproductive purposes may accordingly take root, not only to object to the ethical practices of others, but to create new networks for assisted reproduction—and ultimately for the recreation of family life.

The result raises a series of far reaching questions about the relationship between legal infrastructure and moral understandings.[26] To date, ART generally and IVF in particular have developed with a minimum of public scrutiny and with practices

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[19] *See* Press Release, Resolve, The National Infertility Association and Supporters Defeat Dangerous Georgia Bill (Apr. 9, 2009), *available at* http://www.resolve.org/site/PageServer?pagename=fmed_mccpr040809.

[20] *See* Ertelt, *supra* note 18.

[21] *See* Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL'Y 275, 289–90 (2006).

[22] *See* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES (2010); *see also* Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 607–09 (2004) (finding that college educated women have experienced the greatest delay in age of child-rearing).

[23] Davis, *supra* note 21, at 289–90.

[24] *See* NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NCHS DATA BRIEF NO. 21, MORE WOMEN ARE HAVING THEIR FIRST CHILD LATER IN LIFE (2009), *available at* http://www.cdc.gov/nchs/data/databriefs/db21.pdf (detailing rise in average age for first birth to 25).

[25] *See* LESLIE HARRIS, JUNE R. CARBONE & LEE E. TEITELBAUM, FAMILY LAW 1004 (4th ed. 2009).

[26] *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

that proceed from the interaction of physicians committed to IVF and patients who seek out their services.[27]

Two pieces of legislation have nonetheless had far reaching effects. The first is a federal statute that requires reporting clinic success rates, which has meant the U.S. industry, to a much greater degree than elsewhere, values successful pregnancies. In turn, this creates more emphasis on techniques such as longer in vitro development that select for healthier embryos and greater resistance to restrictions, such as those on the number of embryos implanted, that might result in lower success rates.[28] The second, state legislation in California that created a comprehensive legal infrastructure for embryo transfer, has also helped to create an ethic of donation.[29] The legislation facilitates embryo transfer for research purposes, establishing a registry, specifying consent forms, and clarifying the status and responsibilities of donors, donees, and fertility clinics.[30] This legislation, which was designed to help spur stem cell research, also facilities embryo donation for reproductive purposes, and embryo "adoption" clinics appear to be flourishing in the state.[31]

Additional legislation in Louisiana, Georgia and Oklahoma may similarly encourage creation of alternative networks for embryo transfers.[32] The result could be new reproductive practices that reconcile IVF procedures with a greater variety of religious beliefs, facilitating family formation at later ages for a larger part of the population.[33] The development of such a legal infrastructure—and the creation of a new constituency for IVF—might then create greater support for assisted reproduction and break the log jam that has prevented regulation designed to promote safety and effectiveness.

Alternatively, of course, the result could be to create a fundamentalist infrastructure for the oversight of assisted reproduction to the exclusion of other views, including the views of the majority of the population. The Catholic Church, for example, which has led in the development of a comprehensive theological approach to the treatment of embryos as human beings, rejects the acceptability of IVF generally, and the use of IVF to create extra embryos in particular.[34] Yet, legislating these views, which would either restrict the availability of IVF or preclude some of the practices that increase success rates, would be far more controversial than either the symbolic act of declaring embryos to be "juridical persons" or the practical one of encouraging embryo transfer networks using the rhetoric of adoption.

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[27] *See infra* notes 121–32 and accompanying text.

[28] *See infra* note 127 and accompanying text.

[29] *See infra* note 209 and accompanying text.

[30] *See id.*

[31] *See, e.g.*, Tracey Garcia, *Snowflake Program Matches Families, Embryos*, PASADENA STAR-NEWS, Feb. 28, 2009, http://www.pasadenastarnews.com/news/ci_11807959.

[32] *See infra* Part IV. A–C.

[33] *See* CAHN & CARBONE, *supra* note 22.

[34] *See infra* note 115 and accompanying text.

In this Article, we consider where such nascent regulatory efforts are likely to take us, examining in particular:

1. The differences in approaches to ART regulation involving fundamentalist principles, which treat embryos as humans from the moment of conception, versus more secular approaches that defer to the values of the progenitors;
2. The inherent tensions in a fundamentalist approach that encourages embryo transfer for reproductive purposes before working through the acceptability of IVF practices;
3. The potential for the creation of fundamentalist friendly ART regulation;
4. The likely impact of these differing approaches on the future development of the industry, given the ease of fertility tourism, cross-border clinic selection, and the recreation of political battle lines; and,
5. The potential redefinition of constitutionally protected reproductive rights and family integrity.

In undertaking this analysis, we start with the factors driving "embryo fundamentalism." We will explain the rise of a more polarized political discourse around moral issues, and the role of that polarization in giving voice to the most fundamentalist positions on reproduction. We will then describe the different positions underlying the moral status of embryos and how these positions fit within the larger national political discourse. We will provide a detailed comparison of existing legislation that governs disposition of the embryos created in IVF, comparing the approaches of California, Louisiana, Oklahoma, and Georgia. We will end with consideration of how the new legislation may shape the future development of an industry still largely in its infancy.

I. CONTESTED DISCOURSES AND EMBRYO ETHICS

The fight over the future of assisted reproduction may depend on the status of embryos. Janet Dolgin writes that the idea of embryos began as a normatively "neutral term" in contrast to use of the words "fetus" or "baby."[35] It became politically contested terrain with its association with the "culture wars."[36]

Nonetheless, assisted reproduction itself, despite the use of fertility enhancing drugs and other techniques that pose potential health risks to mother and children, has received relatively little scrutiny.[37]

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[35] Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, and Politics*, 16 HEALTH MATRIX 27 (2006).

[36] *Id.* at 27.

[37] Lars Noah writes that "[o]ne could criticize some of the existing academic commentary as engaging in little more than bioethical parlor games. . . . Unfortunately, some of the more fundamental questions about the safety of different techniques and how best to control those

The legal status of embryos has been addressed in one context: disputes over the disposition of frozen embryos when couples divorce.[38] In these cases, the male progenitor has opposed use of the embryos for reproductive purposes, while the female progenitor, who is more likely to see the fertilized eggs as her only opportunity to produce biologically related offspring, has wanted to implant them.[39] Every court to rule on the issue has prohibited implantation even when the couple had signed an agreement that would have allowed it.[40] The courts have recognized embryos in this context as something other than rights-bearing human beings, and concluded that the male interest in preventing "involuntary" parenthood outweighed the partner's desire for offspring.[41] Though some have argued that embryos are human lives and should be implanted if one of the progenitors wishes to do so, courts in states as conservative as Tennessee[42]

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risks have received less scrutiny. In fact, the controversy over human cloning has perhaps prematurely left unanswered lingering but hardly inconsequential questions about the now relatively lower-tech ARTs." Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 606 (2003). For even more scathing criticism of the failure to interrogate the use of fertility enhancing drugs, see Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1724–25 (2008). Goodwin observes that "[r]esearchers prodigiously document how ovaries may be stressed by undergoing cycles to release numerous eggs, many times more than that produced in a normal, one-month ovulation cycle. According to one commentator, some researchers are concerned about the stress ovaries endure through aggressive hyper-stimulation procedures to produce more eggs, warning that 'stimulating them, with drugs like Clomid or Pergonal, to produce more eggs could cause more stress, perhaps damaging ovaries.'" *Id.* She also cites research suggesting a link between fertility drugs and cancer in both patients and fetuses. *Id.* at 1725.

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

[39] *Id.*

[40] *See id.*; Davis, *supra* note 21, at 287 & n.86 (suggesting that Louisiana might rule otherwise); *see also* In re Marriage of Witten III, 672 N.W.2d 768, 783 (Iowa 2003) ("[N]o transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs."); *A.Z.*, 725 N.E.2d at 1059 ("In this case, we are asked to decide whether the law of the Commonwealth may compel an individual to become a parent over his or her contemporaneous objection. The husband signed this consent form in 1991. Enforcing the form against him would require him to become a parent over his present objection to such an undertaking. We decline to do so."). For an examination of these disputes, see Upchurch, *supra* note 12, at 2110–11.

[41] *See* Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not to be a Parent,"* 12 COLUM. J. GENDER & L. 128, 131 (2003).

[42] *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). Indeed, the Davis court observed that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law." *Id.* at 597.

and Texas[43] have held otherwise, and the decisions have encountered relatively little opposition from anti-abortion groups.[44]

A series of authors have attempted to address why abortion—and the female interest in similarly avoiding involuntary parenthood[45]—has become so much more intense an issue in contrast, and why that intensity seems to be increasing. The conventional wisdom, created through the pioneering work of Kristin Luker[46] and extended in the legal context by Janet Dolgin[47] and Reva Siegel and Robert Post,[48] is that abortion rose to political prominence only when it became associated with tension over changing family norms. These authors argue that while the debate about abortion is framed as a debate about the status of embryonic and fetal life, it is also "a last stand for the preservation of traditional family life and the values and beliefs that sustained that form of family."[49] Writing during the period in the 1980s when President Reagan was putting together a conservative coalition and trying to recruit Protestant evangelicals, Luker emphasized the importance of conventional gender roles to anti-abortion women's sense of place and the threat pro-life forces felt from the challenge to traditional sexual mores and the changing nature of the family.[50]

Over time, however, the fight against abortion has assumed a life of its own, one focused much more single-mindedly on the status of the fetus as the basis for the moral outrage associated with abortion. Dolgin writes, "pro-life adherents are more reluctant than ever to compromise their position with regard to fetal and embryonic status. Their rhetoric, their tactics, and their underlying agenda all have come to depend increasingly on the notion that abortion constitutes murder because fetuses and embryos are people."[51]

As the movement has become more intense and more focused on fetal status, embryo fundamentalism, as we have termed it, is less likely to be limited to abortion. Indeed, over the last decade, the same insistence on absolutism has shaped the debate over embryonic stem cell research.[52] This research involves extracting pluripotent

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[43] Roman v. Roman, 193 S.W.3d 40, 41–42 (Tex. App. 2006), *cert. denied*, 128 S.Ct. 1662 (2008).

[44] *But see* Teresa Stanton Collett, *Whose Life Is It Anyway?: Texas Public Policy and Contracts to Kill Embryonic Children*, 50 S. TEX. L. REV. 371 (2009) (criticizing *Roman* opinion).

[45] The contrast is striking, of course, because in the case of IVF the embryos could only have been created through activities designed to produce a child. No one engages in IVF, after all, because they were swept away by the passion of the moment.

[46] KRISTIN LUKER, ABORTION & THE POLITICS OF MOTHERHOOD (1984).

[47] Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101 (2003).

[48] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

[49] *See* Dolgin, *supra* note 47, at 130.

[50] LUKER, *supra* note 46, at 197–202.

[51] Dolgin, *supra* note 47, at 132–33.

[52] *See* Dolgin, *supra* note 47, for a comparison of the two issues.

stem cells, which have the potential to develop into any part of the body, from an embryo during an early stage of development, thereby destroying the embryo.[53] While the opposition to stem cell research has been every bit as adamant as the opposition to abortion in some quarters, it has never commanded as much support among the public as a whole because it lacks a connection to traditional family values. Public opinion polls show that sixty-two percent of the American public finds embryonic stem cell research to be morally acceptable, compared to only thirty percent opposed.[54] On the issue of government funding, however, fifty-seven percent of Republicans favor restrictions while Democrats and Independents are opposed.[55] The issue accordingly appeals to embryo fundamentalists even if it does not command the same degree of support as anti-abortion politics generally.

In vitro fertilization, however, may present the issue of fetal status—and thus trigger embryo fundamentalism—in starker terms. Under current practices, IVF will almost inevitably produce excess embryos. The average IVF cycle produces as many as seven extra embryos that are not used.[56] Moreover, while a few clinics will work with couples who want to implant all of the embryos produced, many will not for fear that the practice will lower their success rates or that implantation will result in multiple births, endangering the health of the mother and resulting children .[57]

The number of leftover embryos in the United States is estimated to be approximately 500,000.[58] When people are asked what they would like to do with their leftover embryos, their responses include deciding to save the embryos for their own further use, donate them to another couple, donate them for medical research, destroy them, or keep them "in frozen limbo."[59] Davis suggests that "the more these stored embryos come to seem like children to their 'parents,' the less willing the 'parents' are to donate them to infertile couples and to imagine their children growing up in unknown circumstances."[60] As they contemplate these options, couples may be frozen with paralysis, unable to decide what to do, "waiting on an epiphany that never comes."[61]

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[53] *See id.* at 105.

[54] Lymari Morales, *Majority of Americans Likely Support Stem Cell Decision*, GALLOP, Mar. 9, 2009, http://www.gallup.com/poll/116485/majority-americans-likely-support-stem-cell-decision.aspx.

[55] *Id.*

[56] Julia Duin, *Vatican Condemns Cloning, In Vitro; Document Outlines Biomedical Ethics*, WASH. TIMES, Dec. 12, 2008, at A1.

[57] Davis, *supra* note 21, at 278 & nn.19–20 (citing the Cleveland Clinic as an example of a clinic that will implant all embryos produced).

[58] Bob Smietana, *Leftover Embryos Lie in Frozen Limbo*, THE TENNESSEAN, Apr. 5, 2009.

[59] *Id.*

[60] Davis, *supra* note 21, at 280 (citing Sheryl de Lacey, *Parent Identity and "Virtual" Children: Why Patients Discard Rather than Donate Unused Embryos*, 20 HUM. REPROD. 1661, 1665 (2005)).

[61] Laura Bell, *What is the Fate of Leftover Frozen Embryos*, PARENTING (Aug. 27, 2009), http://www.msnbc.msn.com/id/32489239/ns/today-parenting_and_family/. "In a recent survey of 58 couples, researches from the University of California in San Francisco found that 72

Or consider another study of one thousand couples, which found:

> 54% of respondents with cryopreserved embryos were very likely to use them for reproduction, 21% were very likely to donate for research, 7% or fewer were very likely to choose any other option. Respondents who ascribed high importance to concerns about the health or well-being of the embryo, fetus, or future child were more likely to thaw and discard embryos or freeze them indefinitely.[62]

These attitudes suggest that couples undergoing IVF will inevitably produce a large number of embryos that will never be implanted,[63] and that their decisions reflect not callous indifference, but profound concern about the fate of the embryos.

IVF practices are accordingly on a collision course with embryo fundamentalism. The Catholic Church and other religious groups have misgivings about IVF generally. Yet, the anti-abortion movement as a whole has not mobilized against IVF;[64] its focus has been on the embryos. For those who believe that the cluster of cells are not just the potential for life, but akin to a living child, the indefinite freezing, much less destruction, of embryos is anathema. Consider this quote from the *Journal of Markets and Morality*:

> Christians and defenders of human dignity who acknowledge embryos to be preborn persons have a dual responsibility to protect the innocent and also to do no harm. The stakes are high because, as Ron Stoddart founder of Nightlight Christian Adoptions

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percent were undecided about the fate of their stored embryos . . . . Couples have held on to embryos for five years or more." *Id.*

[62] *See* Lyerly, *supra* note 10, at 499.

[63] Anne Drapkin Lyerly et al., *Factors That Affect Infertility Patients' Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623 (2006).

[64] *See, e.g.*, Davis, *supra* note 21, at 292 ("[W]hile the embryo in the abortion context is, as Dolgin shows, a stand-in or replacement for concerns about family life and structure, the embryo in the context of IVF exists primarily to allow married, heterosexual, economically stable couples to 'complete' their families by having children."). On the other hand, we suspect that the majority of the public has simply not focused on the issue and IVF itself has not crystallized as a constituent of political identity. Many religions other than the Catholic Church do not have a strong position on it and pro-life forces (including pro-life Catholics) view IVF as secondary to other concerns. *See, e.g.*, discussion of Nadya Suleman, a.k.a. the "Octomom," with anti-abortion blogger Jill Stanek asserting, "Finally, about Octomom. Pro-lifers differ on the morality of IVF. But most agree children should not purposefully be born into a single parent home." Dan Gilgoff, *Are Opponents of Embryonic Stem Cell Research Using Octo-Mom as a Poster Girl?*, US NEWS & WORLD REPORT, Jan. 16, 2010, *available at* http://www.usnews.com/blogs/god-and-country/2009/03/13/are-opponents-of-embryonic-stem-cell-research-using-octo-mom-as-a-poster-girl.html.

> stresses, "[a]n embryo is not a potential human life—it is human life with potential."[65]

Christians who share these views are calling for the "rescue" of these human lives with potential from their deep freezes. Thus, Nightlight Christian Adoptions declares on its website that "[i]n 1997, Nightlight began the Snowflakes Frozen Embryo Adoption Program, which is helping some of the more than 400,000 frozen embryos realize their ultimate purpose—life—while sharing the hope of a child with an infertile couple."[66] The appropriation of the language of life—putting the face of a child on the cells in the deep freeze—moves ART practices from the privacy of market-based services into the political arena.[67]

II. ABORTION TSUNAMIS AND POLITICAL SALIENCE

The staying power of the pro-life movement rests with a shift away from its identification with the moral attributes of the traditional family per se and toward an insistence on the personhood of the fetus.[68] Some scholars associate the power of that shift with the ability to personalize the embryo, to use ultrasound to show fetal development in utero, and to capture the imagination of the public.[69] Other scholars, however, explain the appeal of abortion politics in terms of its moral clarity—and the ideological reorganization of American politics.[70] This analysis suggests that it is the very absolutism and intrinsic divisiveness of the abortion issue that creates its political power and that the importance of embryo fundamentalism depends on whether it can harness the same motivations.

Few debate the intrinsic divisiveness of abortion—at least as it has been cast in recent political debate. Either the union of egg and sperm marks the beginning of life and destruction of the resulting embryo is murder or the moment of conception

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[65] Stephen J. Grabill, *Evangelicals and Embryo Adoption*, THE SAN DIEGO UNION-TRIBUNE, Sept. 8, 2006, http://legacy.signonsandiego.com/uniontrib/20060908/news_lz1e8grabill.html.

[66] Nightlight Christian Adoption Homepage, http://www.nightlight.org/adoption-services/snowflakes-embryo/default.aspx (last visited Apr. 17, 2010).

[67] *See, e.g.*, Jennifer Baker, Comment, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671 (2009). For a thoughtful exploration of some of the issues involving moral values and money, see Kimberly D. Krawiec, *Show Me the Money: Making Markets in Forbidden Exchanges: Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW. & CONTEMP. PROB. 59 (2009).

[68] Janet L. Dolgin et al., *Attitudes About Human Embryos, Embryonic Stem Cell Research, and Related Matters*, 37 HOFSTRA L. REV. 319, 322–23 (2008).

[69] *See id.*; *see also* Davis, *supra* note 21, at 291.

[70] Indeed, Dolgin observes that for the Catholic Church during the nineteenth century, "opposing abortion was part of a more general opposition to modernization. At stake was the future of a venerable universe of power and belief. That universe was grounded in faith; it prized hierarchy and status and it frowned upon autonomous choice for almost everyone." Dolgin, *supra* note 47, at 117.

constitutes one step among many on the way to reproduction and the embryo's status depends on its importance in the eyes of its progenitors. Indeed, the very act of stating the issue in such terms—between an absolute standard and a contextual one—triggers deep divisions that go beyond the issue of abortion itself.

Despite this, religious views on the origin of life vary considerably, and a majority of the American people favors intermediate positions on abortion.[71] Moreover, while the issue has always been controversial, it has not always been political. Instead, the overlap of polarized public opinion with legislative partisanship on abortion is relatively new, and reflects the ideological realignment of the major parties.[72]

In describing the forces driving polarization in political life, political science research considers the extent to which values preferences align with partisan identity, political rhetoric, religious participation, and other forms of group membership.[73] We have argued at length elsewhere that the more these factors correspond and reinforce each other, the deeper the divisions; the more these different sources of convictions and identity crosscut each other, the easier to craft political compromises.[74] The result produces a tsunami effect: waves that reinforce each other reach greater heights with lower troughs between them.

A growing literature considers the extent to which political positions correspond to values preferences. These studies differ in their hypotheses as to the source of the differences, and they do not necessarily use the same vocabulary in describing them. Nonetheless, the major studies appear to produce similar results in finding divisions between those who are attracted to absolute values and those who see the world in terms of contextual decision-making.[75] These studies complement older political analyses that tied political orientation to traits such as openness and conscientiousness.[76]

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[71] *See* Lydia Saad, *More Americans "Pro-Life" Than "Pro-Choice" for First Time*, GALLUP, May 15, 2009, http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx (while 51% of Americans identify themselves as pro-life, 53% of Americans think abortions should be legal but only under certain circumstances).

[72] *See* Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 410 (2008).

[73] For a summary of the political science literature, see *id.* (finding polarization on moral issues largely non-existent forty years ago, greater polarization today on moral issues among the better educated and the more politically active and polarization on moral issues increasing much more dramatically since the mid-eighties). *See also* MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 37–49 (2005) (disputing the polarization thesis and maintaining that public attitudes have been remarkably stable); John H. Evans, *Have Americans' Attitudes Become More Polarized?—An Update*, 84 SOC. SCI. Q. 71, 87–89 (2003) (concluding that activists have become more partisan and polarized on values issues).

[74] This section is adapted from the analysis in CAHN & CARBONE, *supra* note 22, ch. 4. *See also* Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 465 (2007).

[75] *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 122–24 (2007).

[76] John T. Jost, *The End of the End of Ideology*, 61 AM. PSYCHOLOGIST 651, 651 (2006).

Linguist George Lakoff argues that the differences in worldviews correspond to different rhetorical styles and openness to different types of arguments.[77]

This analysis suggests that not only do anti-abortion stances appeal more to those inclined toward absolutist world views, but also that those same people are less likely to favor access to abortion by teens or the unmarried for reasons that may not be intrinsic to the issue of abortion itself.[78]

A preference for more absolutist versus more contextualist political perspectives, or for traditional values versus more modernist values, does not automatically translate, however, into particular political positions. Instead, public views on particular issues are mediated by religious, political and other loyalties, which may undercut or reinforce each other.

Before the 1980s, abortion in the U.S. was viewed as a largely Catholic issue.[79] The Catholic Church then, as now, staked out a strict position on conception as the beginning of life and made abortion a frequent topic of Sunday sermons.[80] Post and Siegel report that the political dynamics of the issue shifted in the eighties when Protestant churches reframed the abortion question in terms of changing gender roles and family values.[81] Once the issue became less associated with Catholic teaching, and more with the concerns Lakoff and Dolgin identify about the ability to defy conventional teachings on marriage and sexuality, opposition to abortion attracted greater support across sectarian lines.[82]

This analysis suggests that part of what has taken place in politics is a "resorting" in which those drawn toward more absolutist values, who in most eras are likely to be conservative and to attend church regularly, have also become more likely in the

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[77] GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 3 (2002). For views that cultural styles and values, with or without a genetic component, also affect political perceptions and make divisions relatively impervious to fact based arguments, see Donald Braman, Dan M. Kahan & James Grimmelmann, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283 (2005); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 163 (2006). *See generally* The Cultural Cognition Project at Yale Law School, http://www.culturalcognition.net/ (last visited Apr. 17, 2010).

[78] "Most liberals begin with the premise that teenagers should not have babies . . . while most conservatives begin with the premise [that single teenagers] should not have sex." News Release, Stanford University News Service, *Teen Pregnancy*: *Economics More Important Than Age* (Oct. 20, 1993), *available at* http://news.stanford.edu/pr/93/931020Arc3093.html (quoting Stanford University Law Professor Deborah Rhode).

[79] For a discussion of the political transformation of this issue, see Post & Siegel, *supra* note 48, at 412–23.

[80] For a discussion of the Catholic position on abortion, see TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 54–57 (1991) (suggesting that *Roe* helped mobilize Catholic bishops because it moved abortion politics from state legislatures onto a national political agenda).

[81] *See* Post & Siegel, *supra* note 48, at 415–17.

[82] *See id.* at 415.

modern era to vote Republican. Conversely, those who tend to be more contextualist in their decision-making, more egalitarian than hierarchical in their value preferences, more open to different choices, and less judgmental about others, are more likely in the modern era not to attend church and to vote Democratic, rather than simply to be more liberal members of a given party or congregation.[83] As these influences reinforce each other, Republicans have become more adamant in their anti-abortion policies, and anti-abortion positions have become more closely associated with more traditionalist religious denominations.[84] Three important constituents of identity—a preference for absolutes, religious identity, and political loyalty—thus overlap, and coincide with a greater ability to choose congregations, neighborhoods, cable TV channels, and internet sites that reinforce the views and the values associated with them.[85] Bill Bishop argues that the more people associate with those who think the same way they do, the more intense and extreme the convictions become.[86] Political scientists Baldassarri and Gelman conclude that: "Political polarization constitutes a threat to the extent that it induces alignment along multiple lines of potential conflict and organizes individuals and groups around exclusive identities, thus crystallizing interests into opposite factions."[87]

These developments, which reflect a much broader political realignment than simply a shift on abortion, frame the context for the emergence of the pro-life movement, with its efforts to make the fetus into a child, as a political force in the modern era. This makes compromise (and perhaps even reasoned discourse) less likely. Some of the developments reflect a self-conscious political strategy, a strategy made possible in part by the fact that emotions about abortion are not exactly parallel. As polls indicate, those opposed to abortion are less inclined to compromise than those who favor its legality (and, of course, those attracted to absolutist positions are less inclined to compromise than those who see political issues on a continuum).[88] Expressing

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[83] Michael Hout and Claude S. Fischer, for example, hypothesize that the percentage of people listing "no religion" in public opinion polls doubled in the nineties in reaction to the growing identification of religion with conservative politics. Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 166, 188–89 (2002). Nonetheless, religious attendance rather than denominational identity tends to provide the most robust predictor of attitudes toward abortion. Indeed, frequent church attendees are likely to oppose abortion even if they attend relatively liberal churches who do not oppose abortion on religious grounds. *See* Ted G. Jelen & Clyde Wilcox, *Causes and Consequences of Public Attitudes Toward Abortion: A Review and Research Agenda*, 56 POL. RES. Q. 489, 492–93 (2003).

[84] *See also* BILL BISHOP, THE BIG SORT 27 (2008) (In 2006, sixty-nine percent of Democrats were strongly pro-choice compared to twenty-one percent of Republicans).

[85] Bishop notes for example that historically political loyalty did not correspond with church attendance. *Id.* at 82.

[86] *Id.* at 72–77.

[87] Baldassarri & Gelman, *supra* note 72, at 409.

[88] Survey Report, The Pew Research Center for the People & the Press, Support for

opposition to abortion is thus necessary to hold those who see abortion as an all or nothing political issue. At the same time, imposing some restrictions on abortion need not necessarily offend the majority who favor making abortion legal, a group that is less likely to view the issue in absolute terms. Psychologist Drew Westen describes the Republican political response in these terms, observing that it has been "unequivocal: describe abortion as murder, define an uncompromising stance as the only *moral* stance one could take, get the 30 percent of Americans with the least tolerance for ambiguity on moral questions to the polls, and let the Democrats offer dozens of different positions."[89]

Finally, intriguing research finds that while elite and mass polarization reinforce each other, the more powerful influence may be that of party leaders on the public. A study of Florida legislators, for example, reported that the individual characteristics of legislators, not the characteristics of voters in the district, best predicted votes on abortion-related issues.[90] Other work indicates that the increase in polarization among party activists is the most likely driving force producing greater polarization among both party leaders and the public.[91] Almost all observers agree that the result has been destruction of the center in Congress, and in many state legislatures.[92] Accordingly, while centrist leaders might diffuse contentious issues such as those surrounding abortion, most legislators in today's more partisan political environment emphasize positions opposed to compromise.[93]

III. LAW, THE SEARCH FOR BABIES AND THE CREATION OF AN INDUSTRY

Fertility politics, of course, are not necessarily abortion politics, but the regulation of in vitro fertilization, at least when it intersects with embryo fundamentalism, could recreate some of the same alliances. The pro-life movement, having staked out an

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Abortion Slips: Issue Ranks Lower on the Agenda (Oct. 1, 2009), *available at* http://people-press.org/report/549/support-for-abortion-slips.

[89] Drew Westen, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION 178 (2007).

[90] Jelen & Wilcox, *supra* note 83, at 495 (citing David Schecter, *What Drives the Voting on Abortion Policy? Investigating Partisanship and Religion in the State Legislative Arena*, 23 WOMEN & POL. 61, 74–77 (2001)).

[91] Geoffrey C. Layman, Thomas M. Carsey, & Juliana Menasce Horowitz, *Party Polarization In American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 104 (2006).

[92] Bill Bishop, for example, reports that from the end of World War II through the seventies, between thirty-five percent and forty-five percent of Congress would have been considered moderates, while today only ten percent would be so labeled. BISHOP, *supra* note 84, at 246–47.

[93] *See id.* at 97; Jelen & Wilcox, *supra* note 83, at 495. In Canada, for example, pro-life legislators voted against a measure to recriminalize abortion when the legislation in their view did not go far enough in outlawing abortion. *See* ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE: A COMPARATIVE STUDY OF STATE FEMINISM 81 (Dorothy McBride Stetson ed., 2001).

uncompromising stance on the status of embryos,[94] has been eager to exploit the images of the hundreds of thousands of frozen cells in fertility clinic freezers. In 2001, for example, President George W. Bush embraced "embryo adoption," speaking about the importance of ensuring that "our society's most vulnerable members are protected and defended at every stage of life,"[95] and securing federal funds to promote a movement, the transfer of embryos for reproductive purposes, that it is not clear anyone wanted for other than ideological reasons.[96]

At the same time, while some scholars underscore IVF's association with heterosexual efforts to complete traditional families,[97] others emphasize the class and cultural divide separating IVF users from the rest of the public.[98] Poorer women suffer higher overall rates of impaired fertility.[99] Untreated sexually transmitted diseases have a significant effect on the ability to reproduce, and women without access to routine medical care suffer from them disproportionately.[100] Despite this, better educated, older and wealthier women are more likely to seek out and use fertility services.[101] In 2002, for example, fifty-four percent of women undergoing fertility treatments were over the age of thirty-five.[102] Another study found that income, insurance coverage, and parity (number of previous births) all significantly affect the probability of seeking infertility treatment, though in different ways and to different degrees.[103]

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[94] O. Carter Snead, for example, in his retrospective on Bush-era bioethics, comments that the "most distinctive feature of President Bush's conception of human equality was its unconditional and uncontingent nature." O. Carter Snead, *Public Bioethics and the Bush Presidency*, 32 HARV. J. L. & PUB. POL'Y 867, 872 (2009).

[95] In doing so, he clearly equated protection of frozen embryos with the anti-abortion cause, observing that "there is no such thing as a spare embryo. Every embryo is unique and genetically complete, like every other human being. And each of us started out our life this way. These lives are not raw material to be exploited, but gifts." Priests for Life, President Discusses Embryo Adoption and Ethical Stem Cell Research (May 24, 2005), http://www.priestsforlife.org/news/05-05-24bushstemcellresearch.htm; *see* Jaime E. Conde, *Embryo Donation: The Government Adopts a Cause*, 13 WM. & MARY J. WOMEN & L. 273 (2006).

[96] *See, e.g.*, Arthur Caplan, The Problem with 'Embryo Adoption': Why Is the Government Giving Money to 'Snowflakes?,' MSNBC, June 24, 2003, http://www.msnbc.msn.com/id/3076556/ (criticizing award of $1 million in federal funds to agency promoting embryo donation for reproductive purposes).

[97] See discussion of Dolgin and Davis, *supra* notes 46–64 and accompanying text.

[98] *See* CAHN & CARBONE, *supra* note 22.

[99] Seung-Eun Song & Youngtae Cho, *Educational Differences in Impaired Fecundity and the Utilization of Infertility Services* 3 (2004), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/0/2/5/pages110252/p110252-2.php.

[100] While infertility is more likely to affect the less educated, more highly educated individuals are more likely to receive medical services. *See id.* at 2–3.

[101] *Id.* at 6.

[102] VICTORIA CLAY WRIGHT ET AL., NAT'L CTR. FOR CHRONIC DISEASE PREV. & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2002, at 6 (2005), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5402a1.htm.

[103] J. Farley Ordovensky Staniec & Natalie J. Webb, *Utilization of Infertility Services:*

Complicating the matter is the fact that the increased demand for fertility services is associated with later ages of childbearing—a factor identified with the investment college-educated women make in their careers.[104] The most highly educated women are the most likely to postpone childbearing.[105] Kristin Luker found in the 1980s that a significant difference between pro-life and pro-choice activists was the age of family formation; the "average" pro-life activist woman in 1984 was married at seventeen, had three or more children, had some college education, and was not employed for pay. In contrast, the "average" pro-choice activist woman had some graduate education, married at twenty-two, had one or two children, and was employed outside the home.[106] Today, similar differences describe the population of states likely to vote "red" rather than "blue." Family characteristics have become a major predictor of voting patterns, and the politically relevant characteristics include age of marriage, teen births, overall fertility levels (i.e., the number of children per family), and women's employment patterns.[107] While we have not found more recent studies that examine the relationship between age of marriage and pro-choice or pro-life views, the states that show the greatest support for abortion rights also tend to have higher average ages of marriage and lower fertility rates.[108]

Accordingly, the demand for IVF, like the significance of abortion, varies with the importance of modern versus traditional patterns of family formation, and an embrace of modern family patterns has occurred more readily in the more liberal and pro-choice parts of the country. Nonetheless, support for IVF is widespread—three-quarters of the American public approves of IVF[109]—and the fifteen states that have mandated

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How Much Does Money Matter?, 42 HEALTH SERVICES RES. 971 (2007), *available at* http://www.ncbl.nlm.nih.gov/pmc/articles/PMC1955265/pdf/hesr004-0971.pdf.

[104] Katherine E. Heck et al., *Delayed Childbearing by Education Level in the United States, 1969–1994*, 1 MATERNAL AND CHILD. HEALTH J. 81, 86 (1997), *available at* http://www.springerlink.com/content/g40p440425n3077/fulltext.pdf.

[105] *Id.*

[106] LUKER, *supra* note 46, at 197.

[107] CAHN & CARBONE, *supra* note 22, at ch. 1.

[108] *Id.*; *see also* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 731 (2002) (examining the correlations between the availability of contraception, abortion and the age of marriage); Ron Lesthaeghe & Lisa Neidert, *Voting and Families: America's Second Demographic Transition*, NEW GEOGRAPHY, Dec. 11, 2008, *available at* http://www.newgeography.com/content/00461-voting-and-families-america%E2%80%99s-second-demographic-transition (establishing a correlation between family form and voting patterns); Ron Lesthaeghe & Lisa Neidert, *The "Second Demographic Transition" in the U.S.: Exception or Textbook Example?*, Mar. 2006, *available at* http://sdt.psc.isr.umich.edu/pubs/online/US_SDT_text.pdf.

[109] Davis points out, for example, that "[b]etween 1978 and 1994, public acceptance of IVF in the United States increased from 60 to 75%," and suggests that this is true because IVF, unlike abortion, involves the efforts of traditional heterosexual couples to have children. *See* Davis, *supra* note 21, at 282.

some form of insurance for fertility services seem to be a random assortment that include Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas and West Virginia.[110]

Embryos are another matter because the passions they inspire, the absolutist rhetoric associated with them, and their association with political identity have the potential to drive the future regulation of assisted reproduction. Moreover, public discourse and legislative initiatives often proceed from a combination of philosophical predispositions and prejudices and sensational news coverage. Examples include Louise Brown (the first "test tube baby"),[111] Melissa Stern (known as "Baby M," the child conceived through the use of artificial insemination and the subject of the first contested surrogacy case),[112] and Nadya Suleman (known as "Octomom," the single mother of six who used IVF to give birth to octuplets).[113] Given the incendiary nature of anything associated with the moral status of embryos, the definition of the pro-life movement in absolutist terms, and the existence of a cadre of legislators who have staked their political careers on identification with abortion politics, it would be remarkable if the regulation of ART were not influenced by these divisions.

Indeed, culture war politics have already limited oversight of assisted reproduction. The controversial nature of the practices has obstructed agreement on financing and oversight, and the ironic result is that the industry has grown with few of the controls that shape other parts of medical practice.[114] The systematic provision of services—research, testing, regulation, insurance coverage, and financing—has been caught up in the same political divisions that hamstring more systematic approaches to contraception and abortion. Legislative and regulatory oversight of assisted reproduction has been characterized by moral posturing and regulatory gridlock.

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[110] Fertility Lifelines, State Mandated Insurance Coverage, http://www.fertilitylifelines.com/payingfortreatment/state-mandatedinsurancelist.jsp (last visited Apr. 17, 2010). California, New York, and Louisiana, however, exclude all or part of the costs associated with IVF.

[111] *See Medicine: Test-Tube Baby: It's a Girl*, TIME, Aug. 7, 1978, *available at* http://www.time.com/time/magazine/article/0,9171,948239,00.html.

[112] *See* Roger Rosenblatt, *Baby M.—Emotions for Sale*, TIME, Apr. 6, 1987, *available at* http://www.time.com/time/magazine/article/0,9171,963927,00.html.

[113] *Nadya Suleman: Octuplets' Mom "Didn't Want to Get Married," Had IVF for 14 Kids*, ASSOC. PRESS, Jan. 31, 2009, *available at* http://www.huffingtonpost.com/2009/01/31/nadya-suleman-octuplets-m_n_162756.html.

[114] Business school professor Debora Spar describes our existing regulatory regime as follows: "In the United States, however, regulatory and legislative authorities have largely ignored the market for reproductive services. There are very few restrictions on fertility treatments and little regulation of providers. Instead, the market for fertility in the United States is vibrant, competitive, and expanding in the absence of any kind of formal controls. Because the United States is such a large and technically advanced market, moreover, it serves as a magnet for infertile couples around the world." DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 5 (2006).

Comprehensive approaches have stalled in part because of religious opposition. The Catholic Church has opposed in vitro fertilization altogether, objecting that the practices emphasizing "the human dignity proper to the embryo," and "the right of every person to be conceived and to be born within marriage and from marriage."[115] Mainstream Protestants (including the Episcopal Church, the Presbyterian Church, USA, the United Methodist Church, and the United Church of Christ), Jews and Muslims have largely supported IVF, but more fundamentalist Protestants, including the Southern Baptist Convention, recognize embryos as human lives and object to excess embryos being discarded, frozen, or used for research purposes.[116] Leon Kass, the Chairman of President George W. Bush's Council on Bioethics, denounced reproductive and genetic research in 1972 as heralding "a new holy war against human nature."[117]

The result was blocked research funding at the federal level until President Obama took office. Not only did social conservative groups oppose funding for embryonic stem cell research that would destroy embryos in the process of creating a stem cell line, these groups thwarted funding for embryo research that might enhance fertility.[118] The efforts started in the seventies almost immediately after *Roe v. Wade* legalized

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[115] Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html. The instruction states, "*[i]n homologous IVF and ET . . . therefore, even if it is considered in the context of 'de facto' existing sexual relations, the generation of the human person is objectively deprived of its proper perfection: namely, that if being the result and fruit of a conjugal act* in which the spouses can become 'cooperators with God for giving life to a new person.' These reasons enable us to understand why the act of conjugal love is considered in the teaching of the Church as the only setting worthy of human protection." *Id.* The instruction also objects to freezing embryos: "*[t]he freezing of embryos*, even when carried out in order to preserve the life of an embryo cryopreservation *constitutes an offence against the respect due to human beings* by exposing them to grave risks of death or harm to their physical integrity and depriving them, at least temporarily, of maternal shelter and gestation, thus placing them in a situation in which further offences and manipulation are possible." *Id.*

[116] KATE M. OTT, RELIGIOUS INSTITUTE, A TIME TO BE BORN: A FAITH-BASED GUIDE TO ASSISTED REPRODUCTIVE TECHNOLOGIES 19 (2009), *available at* http://www.religiousinstitute.org/sites/default/files/study_guides/atimetobeborn.pdf. Nonetheless, social conservative groups have not acted to oppose IVF entirely. *See, e.g.*, Robin Toner, *The Vatican's Doctrine: Political Impact; Contrast to Abortion Issue is Discerned*, N.Y. TIMES, Mar. 12, 1987, at B10 (contrasting the absence of a "powerful consensus" among Catholics, fundamentalist and evangelical Christians about surrogacy and test-tube fertilization with those groups' opposition to abortion).

[117] ROBIN MARANTZ HENIG, PANDORA'S BABY: HOW THE FIRST TEST TUBE BABIES SPARKED THE REPRODUCTIVE REVOLUTION 70 (2004) (quoting Leon Kass, *New Beginnings in Life*, *in* THE NEW GENETICS AND THE FUTURE OF MAN 20–21 (Michael P. Hamilton ed., 1972)) (internal quotation marks omitted).

[118] *Id.* at 258–60.

abortion and culminated in the "Dickey Amendment," which has been attached to every Health and Human Services appropriations bill since 1996.[119] The amendment forbids federal funding for "research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death."[120] Since much of the federal regulation of medicine involves controls on research spending, and since embryo research addresses the techniques most likely to further assisted reproduction, reproductive research has taken place largely free from public oversight, approval, or guidance.[121]

In addition, health insurance plans, which tend to favor more qualified doctors and more tested procedures, and which may insist on greater transparency and accountability,[122] rarely cover assisted reproduction.[123] A small number of states mandate health insurance coverage for assisted reproduction in plans that otherwise cover reproductive services, but the courts have found that federal pension legislation preempts state law, limiting state mandates to smaller plans.[124] The combination of limited insurance coverage with the lack of European-style public subsidization effectively limits access to assisted reproduction to wealthier and more sophisticated patients, which in turn alleviates what might otherwise be greater pressure for regulation.[125]

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[119] Philip J. Nickel, *Ethical Issues in Human Embryonic Stem Cell Research*, *in* FUNDAMENTALS OF THE STEM CELL DEBATE: THE SCIENTIFIC, RELIGIOUS, ETHICAL, AND POLITICAL ISSUES 62, 74 (Monroe et al. eds., 2008).

[120] Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 128, 104th Cong., 110 Stat. 26, 128 (1996). The 2005 version of the amendment provided that "None of the funds made available in this Act may be used for . . . research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.208(a)(2) and 42 U.S.C. 289g(b)." Dep't of Health and Human Serv. Appropriations Act 2006, Pub. L. No. 109-149, § 509, 109th Cong., 119 Stat. 2833, 2280 (2005).

[121] Note, *Guiding Regulatory Reform in Reproduction and Genetics*, 120 HARV. L. REV. 574, 579 (2006). IVF clinics had little difficulty attracting private research funds, and in this context, "caution was not a foremost concern, and few external forces existed to slow the work of the clinic." *Id.* at 587.

[122] Robert J. Levine, *Federal Funding and the Regulation of Embryonic Stem Cell Research: The Pontius Pilate Maneuver*, 9 YALE J. HEALTH POL'Y L. & ETHICS 552, 561–62 (2009) ("Because insurance coverage for ART is quite limited, reimbursement requirements fail to promote quality care.").

[123] John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665, 674 (2007) (reviewing DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006)); *see* JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 8–11 (2007), *available at* http://www.americanprogress.org/issues/2007/12/pdf/future_choices_section1.pdf. California requires insurance coverage of most treatments for infertility but excludes IVF procedures. *See* CAL. HEALTH & SAFETY CODE ANN. § 1374.55 (West 2000); CAL. INS. CODE ANN. § 10119.6 (West 1993).

[124] *See* ARONS, *supra* note 123, at 9.

[125] *See* Levine, *supra* note 122, at 562.

The ironic result of these forces has been the development of an industry of willing patients and providers, selecting procedures in the context of small scale private clinics.[126]

Within this deregulatory environment, the only significant piece of federal legislation to date has been a reporting requirement; the United States Fertility Clinic Success Rate and Certification Act of 1992 requires fertility clinics to report success rates, albeit with no punitive sanctions for failure to disclose.[127] Fertility clinics are also required to comply with human tissue testing regulations concerning the safety of donor gametes, which largely limits the participation of gay men as donors.[128]

These developments have consequences for the shape of the industry. First, the lack of regulation has meant that fertility clinics can easily arrange for the delivery of services that cross state, and sometimes international, lines. Through internet advertising and the development of affiliations, they can take advantage of a larger market, with the ability to refer prospective patients to friendlier legal jurisdictions if necessary.[129] Growing Generations, for example, began in California as a surrogacy agency with services focused on the gay community; it now is affiliated with a sperm bank and a law center, provides consultations in Australia and Britain, and offers to meet with anyone, anywhere, through Skype.[130]

A controversial surrogacy case illustrates how such interstate transactions work. A commissioning parent in Ohio (the 62-year-old chairman of the Math Department at Cleveland State) secured the services of a Ohio clinic, which arranged for a gestational surrogate in Pennsylvania, and an egg donor from Texas.[131] The subsequent litigation over custody of the resulting triplets created new law in Pennsylvania, which had neither statutory nor case law addressing the matter, and a companion case about payment in Ohio.[132] Had the commissioning parent been unable to find a suitable

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[126] The *Harvard Law Review* suggests that "the initially stronger connection between abortion and reproductive services—due to the use of embryos in IVF research—may have created an early regulatory deadlock that unexpectedly accelerated the development and broad availability of IVF. The strong public acceptance of IVF that ensued, coupled with an entrenched economic force in the form of a private fertility industry, may have then solidified the early deadlock into a long-term deregulatory norm that has persisted to this day." *Guiding Regulatory Reform*, *supra* note 121, at 584.

[127] The United States Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. §§ 263a-1 through 263a-7 (1994).

[128] *See, e.g.*, CAHN, *supra* note 5, at 56–59.

[129] *See, e.g.*, *Thailand Offers Less Expensive Fertility Treatment, Preimplantation Genetic Diagnosis, Attracting "Fertility Tourists,"* MEDICAL NEWS TODAY, Aug. 10, 2006, *available at* http://www.medicalnewstoday.com/articles/49176.php.

[130] Growing Generations Home Page, http://www.growinggenerations.com (last visited Jan. 30, 2010).

[131] *Surrogate Mom, Biological Dad Battle Over Triplets*, ASSOC. PRESS, May 1, 2005, *available at* http://www.sptimes.com/2005/05/01/Worldandnation/Surrogate_mom__biolog.shtml.

[132] J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006); J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 9 Dist. 2006).

clinic in Cleveland, it would have been a relatively easy matter for him to secure one elsewhere.

Second, with private financing critical to fertility clinics and federally mandated reporting of success rates important to patient choice, the desire to improve success rates often drives accepted practices. This has meant, for example, that American clinics have been slower than European clinics to reduce the number of embryos implanted.[133]

Third, with small scale clinics, private financing, and little public oversight, the discussion of appropriate practices has also been limited. The American Society for Reproductive Medicine (ASRM) has promulgated ethical guidelines, but these voluntary professional guidelines do not receive the same attention or enforcement as public oversight.[134] Texas Professor John Robertson observed the existence of "the moral dilemma that the need for legal infrastructure presents to those loathe to accept ART in the first place. Creating infrastructure signals approval, legitimizes the practice, and encourages expansion by reducing the planning costs of those engaging in it."[135] While the absence of regulation has not been a barrier to "full-throated development of the field,"[136] it has meant that development of ethical understandings of the practices has been reserved for the participants—to the extent it has occurred at all.

All of these factors, however, have begun to change. Over the last two decades, more states have mandated insurance funding[137] and the number of couples undergoing fertility treatments has risen. Some new procedures, such as preimplantation genetic diagnosis, which allows testing for genetic traits and defects before implantation of an embryo in a woman's womb, have sparked new controversies and calls for regulation.[138] In other cases, medical researchers question the wisdom of older techniques, particularly those that lead to risky multiple births.[139]

Moreover, the increase in the number of patients has in itself increased the visibility of the practices, and awareness of fertility clinic abuses. Embryo mix-ups, for example, in which an embryo has been accidentally implanted in the wrong woman

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[133] *See* Stephanie Nano, *Most Fertility Clinics Break the Rules*, Feb. 23, 2009, *available at* http://www.komonews.com/news/health/40089337.html. It also encourages the production of extra embryos because the extraction of multiple eggs from the woman's body makes subsequent efforts less intrusive and expensive and because doctors have had more success freezing embryos than unfertilized eggs.

[134] American Society of Reproductive Medicine, Practice Comm. Reports, http://www.asrm.org/Media/Practice/practice.html (last visited Mar. 26, 2010).

[135] Robertson, *supra* note 123, at 684.

[136] *Id.* at 685.

[137] Infertility Coverage in Your State, RESOLVE: The National Infertility Association, http://www.resolve.org/site/PageServer?pagename=lrn_ic_stintro (last visited Apr. 17, 2010) (noting fifteen states have laws requiring insurance coverage for infertility treatment).

[138] *See* Goodwin, *supra* note 37, at 1710, 1726 & n.343.

[139] *See, e.g.*, *id.* at 1658–59.

have caused heart-rending, and often publicly riveting, dilemmas.[140] And everything about the solicitation of gamete donors, from the Ivy League ads seeking women with high SAT scores, to the ubiquitous Craigslist postings seeking Asian eggs, to the enterprising children tracing their supposed anonymous progenitors, has generated public discussion and calls for oversight.[141]

Yet, the calls for oversight set the stage for a battle over the terms of engagement. Some oppose the very idea of IVF as an affront to the role of reproduction within marriage and to the natural order and the dignity of the resulting child.[142] Other groups see assisted reproduction as a way to circumvent the historic limitations on non-marital reproduction, and to create a variety of families of choice.[143] Even among those who favor assisted reproduction, no agreement exists on its symbols or significance. These disputes set the stage for the emergence of embryo fundamentalism as a significant force not only in the national debate over ART, but in the creation of the networks that will determine the future development of the industry. The determination of the largely unformed terms of these new practices seems destined to take place on a battlefield defined by the most extreme and irreconcilable of societal views.

IV. EMBRYO FUNDAMENTALISM AND LEGISLATIVE ACTIVISM

The current round of embryo activism has been generated by the 2009 publicity surrounding Nadya Suleman's octuplets, although a few states had already enacted legislation regulating the status of embryos.[144] The controversial births prompted legislative proposals that have brought together moral absolutism on the status of embryos, increased calls for regulatory oversight from the left and the right, and helped the development of a movement to encourage embryo transfers for reproductive purposes.[145] These proposals linked right-to-life/anti-abortion activists even more directly with reproductive technology issues.

Suleman, already a single mother of six, had six remaining embryos left over from earlier IVF efforts when she and her doctor decided to implant all of them in what they expected would be a last effort to produce additional children.[146] Although she was

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[140] *See, e.g.*, *Embryo Mix-Up at Fertility Clinic Resolved Amicably*, NEW HAVEN REGISTER, Sept. 24, 2009, *available at* http://www.nhregister.com/articles/2009/09/24/news/d3-embryo3rd.txt.

[141] CAHN, *supra* note 5, at 145–64.

[142] *See id.* at 167.

[143] *See id.*

[144] *See* National Conference of State Legislatures, *Embryo and Gamete Disposition Laws*, http://www.ncsl.org/default.aspx?tabid=14379 (last visited Apr. 17, 2010) (detailing which states had laws regarding embryos in 2007).

[145] *See* Lawsky & Cahn, *supra* note 18.

[146] *Nadya Suleman's Fertility Doctor Under Scrutiny*, NBC, Feb. 7, 2009, http://www.nbclosangeles.com/news/local-beat/Nadya-Sulemans-Fertility-Doctor-Under-Scrutiny.html.

relatively young (33), the doctor had implanted six embryos in each of her prior pregnancies, resulting in two sets of twins and two singleton births.[147] Neither she nor her doctor believed that all six would develop, much less that two of the embryos would split, producing octuplets.[148] Implanting six embryos, however, violated ASRM guidelines, and the California Medical Board investigated the doctor's practices to determine if there was "a violation of the standard of care."[149] Moreover, Suleman, as a divorced mother on disability living with her parents, touched off denunciations in many circles by her use of IVF to have fourteen children.[150] To many on all sides of the ART issue, she stands as a dramatic symbol of the unregulated nature of the industry.

The legislative moral panic and proposals that have followed, however, reflect pre-existing ideological positions more than pragmatic responses to the Suleman case. No legislature, for example, has adopted limits on the number of embryos to be implanted in spite of widespread agreement that the doctor's actions in implanting six embryos in a young woman of proven fertility were inappropriate.[151] Instead, the proposals have used the Suleman controversy to stake out fundamentalist approaches to IVF. This section uses Louisiana's approach, developed before the Suleman moral panic, as an early role model,[152] and then considers how other states have approached the legal status of embryos.

A. Louisiana

Louisiana became the first state to address the status of IVF embryos, adopting comprehensive legislation in 1986.[153] At the time the Louisiana legislature enacted the measures, the Reagan coalition had emerged nationally. Louisiana, however, has long combined conservative Southern politics with an influential Catholic constituency, and the Louisiana legislation reflected state forces.

The bill originated with John Krentel's 1983 article in the Louisiana Bar Journal in 1985, which he wrote while he was still at Loyola Law School.[154] He published the article three years after the birth of the first IVF baby in the United States, and did so as IVF clinics were still getting off the ground in Louisiana.[155] The first baby was

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[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See* Cahn & Collins, *supra* note 1 (providing an analysis of the response to Nadya Suleman).

[151] *Id.* at 503.

[152] *See infra* notes 165–74.

[153] *See* John B. Krentel, *The Louisiana "Human Embryo" Statute Revisited: Reasonable Recognition and Protection for the In Vitro Fertilized Ovum: Reproductive Technology and the In Vitro Fertilized Ovum*, 45 LOY. L. REV. 239 (1999).

[154] John B. Krentel, *"Ownership" of the Fertilized Ovum In Vitro: A Hypothetical Case in Louisiana*, 32 LA. B. J. 284 (1985).

[155] For Krentel's retrospective on the act, see Krentel, *supra* note 153.

born in the United States from a frozen embryo only after the article was published;[156] Krentel reported that Louisiana practice at the time was to implant all embryos created.[157] Krentel noted that the nascent industry lobbied for the legislation, and that "the medical specialists specifically requested that the legislature define the required medical qualifications for the practice of reproductive medicine with regard to the fertilization, implantation, and storage of fertilized embryos."[158]

Nonetheless, the statute's principal innovation was its attempt to define embryos as human life, and to construct a legal infrastructure for their disposition consistent with that definition. Krentel reasoned that "a state has the sovereign power to create juridical identities,"[159] a term previously used to describe corporations,[160] and that it represented a middle ground acknowledging the humanity of the embryo, but stopping short of granting it the full personhood of a "natural" person.[161] Krentel, however, insisted on recognition of "the essential equality of all human beings."[162] He observed, "[w]hile the Supreme Court may be incapable of embracing this fundamental premise, nonetheless those health care providers involved in *in vitro* fertilization services ought to strongly consider this maxim,"[163] and the new statute sought to compel them to do so.

The statute directly addressed embryo status, providing that, "An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law."[164] By limiting the statute's reach to the period between fertilization and implantation, the statute avoided conflict with a woman's bodily integrity and the Supreme Court decisions recognizing a woman's right to terminate an embryo during the early stages of pregnancy. The statute emphasized further that "[th]e use of a human ovum fertilized in vitro is solely for the support and contribution of the

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[156] *See* Giovanna Breu & Frank Feldinger, *In California, a Small Bundle of Medical History Arrives on Time: The First U.S. Frozen Embryo Baby*, Archive, PEOPLE, June 23, 1986, *available at* http://www.people.com/people/archive/article/0,,20093925,00.html.

[157] Krentel, *supra* note 154, at 287.

[158] Krentel, *supra* note 153, at 240.

[159] Krentel, *supra* note 154, at 287.

[160] LA. CIV. CODE ANN. art. 479 (1983).

[161] Krentel, *supra* note 153, at 242–43. Krentel observes, "Because of the potential for development into a full human person, the Louisiana legislature determined that this entity is deserving of special consideration, respect, and legal recognition as a juridical person. Furthermore, the legislature also impliedly found that the fertilized ovum is not yet ready for full recognition as a natural person. In Louisiana, the rights and privileges appertaining to a natural person do not flow to the in vitro fertilized ovum, but certain rights are ascribed to this unique extra-corporeal biological being: the right to life, the right to protection from harm, the right to counsel, and the right to be adopted." *Id.* (citations omitted).

[162] Krentel, *supra* note 154, at 287.

[163] *Id.*

[164] LA. REV. STAT. ANN. § 9:123 (2009).

complete development of human in utero implantation."[165] Sale or creation for other purposes is expressly prohibited.[166]

The statute thus precluded the creation of embryos for stem cell or other research even though stem cell research was not on the horizon in the mid-eighties. The statute rejected the idea that an embryo could be regarded as property or could be destroyed.[167] Instead, it took pains to recognize the cells as children with "parents."[168] The statute states that if the progenitors express their identity, "then their rights as parents as provided under the Louisiana Civil Code will be preserved."[169] If not, the physician would become a "temporary guardian" until "adoptive implantation can occur."[170] The court also has the power to appoint a curator to protect the embryo's rights. These provisions, while treating the embryo as similar to a child, stop short of requiring progenitors to implant them. The statute nonetheless specifies that the embryos are owed a "high duty of care"[171] and that if the patients renounce their parental rights "by notarial act,"[172]

> then the in vitro fertilized human ovum shall be available for adoptive implantation . . . . The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. . . . Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.[173]

This section provided for embryo donation for reproductive purposes well before the idea took hold elsewhere.[174] It facilitates embryo transfer by providing for the prebirth termination of the progenitors' parental rights, and establishing the donees' parental status without formal adoption procedures such as a home study.[175] It accordingly resolves doubts about the resulting child's identity and parentage. Moreover,

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[165] *Id.* § 9:122.
[166] *Id.* § 9:124.
[167] *Id.* § 9:126.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* § 9:130.
[172] *Id.*
[173] *Id.*
[174] "[O]ne IVF-cryopreservation clinic in the state donates all spare embryos but has confronted a dilemma in that, at least in the first few months of operation, more couples want to donate than receive spare embryos." ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 96 (1989).
[175] LA. REV. STAT. ANN. § 9:130 (2009).

the statute directed that any dispute would be resolved in accordance with "the best interest of the in vitro fertilized ovum."[176] This section appears to provide for implantation of the embryo in the event of a dispute between progenitors who divorce, in light of its articulation of a "best interest" standard. The result would directly contradict the decisions in other states, but no cases appear to have arisen to date.[177] The statute does not address the validity of contracts providing for the disposition of frozen embryos, but its use of a best interest standard to resolve disputes suggests that third parties cannot contract around the statutory provisions any more than parents can use contracts adversely to a child's interests.[178]

The constitutionality of the Louisiana statute has never been tested, although it has certainly been subject to critique.[179] It stops short of requiring that the progenitors implant all of the embryos they create or make them available for adoption. While it precludes destruction, it would not appear to prevent the indefinite storage of frozen embryos[180] or to bar transfer out of state.[181] So long as they remain in Louisiana, however, embryos merit the protection of the state. Indeed, during the aftermath of Hurricane Katrina, the governor of Louisiana personally oversaw rescue efforts of frozen embryos in the freezers of New Orleans hospitals.[182]

B. Georgia

If the Louisiana legislation dates back to the beginning of IVF in the United States, the Georgia legislation is a direct response to the publicity surrounding Nadya Suleman's octuplets.[183] Rep. James Mills, a longstanding abortion foe, introduced the "Option of Adoption Act" as part of a set of bills that constituted an anti-abortion

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[176] *Id.* § 9:131.

[177] *See supra* notes 38–44 and accompanying text.

[178] Louisiana law also limits the liability of the clinics involved in the transfer of embryos to "the human uterus" and deals with inheritance rights. LA. REV. STAT. ANN. §§ 9:132–133.

[179] *See, e.g.*, Sarah A. Weber, Comment, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549 (2005).

[180] The Fertility Institute in New Orleans already has seven thousand preembryos in storage, including ones that have been there since the late 1980s. Glaser, *supra* note 10.

[181] *See, e.g.*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (holding that parents could use replevin to recover embryos in Virginia that they wanted to transfer to a different clinic in California). A Louisiana court could conceivably find, however, that the best interests of the embryo preclude transfer if the parents still live in Louisiana and wish to transfer them out of state to destroy them or to evade the protections of Louisiana law and the statute arguably grants the court jurisdiction to appoint a conservator even in cases in which the progenitors are asserting parental rights. LA. REV. STAT. ANN. § 9:126.

[182] MICHELLE WARD GHETTI, AMERICANS UNITED FOR LIFE, LIFE AND THE LOUISIANA SUPREME COURT: A DRAMATIC RESCUE TELLS IT ALL 1 (2007), http://www.aul.org/xm_client/client_documents/sscp?LA.pdf.

[183] Cahn & Collins, *supra* note 1, at 503.

response to Suleman.[184] These bills had a variety of objectives: adopting language that systematically recognizes embryos as human life from the moment of conception, facilitating embryo transfer for reproductive purposes, limiting stem cell research in the state, and more closely regulating IVF.[185] The resulting legislation, however, jettisoned the provisions that would have had the greatest impact on the well-established Georgia fertility industry and focused on the procedures necessary to facilitate embryo donation for reproductive purposes.

The rhetoric in the initial bills crafted a right-to-life approach. The proposed "Ethical Treatment of Human Embryos Act" would have amended the chapter of the Georgia Code relating to the parent-child relationship to define an embryo as a "biological human being who is not the property of any person or entity."[186] Similarly, the initial version of the "Option of Adoption Act" would have amended the definition of "child" for purposes of the Georgia adoption statute, so that "child" meant not only "a person who is under 18 years of age and who is sought to be adopted," but also "a human embryo."[187]

The proposed legislation received strong support from Georgia Right to Life, an anti-abortion group, viewing them as part of an effort to "establish personhood for the pre-born."[188]

The final version of the Option of Adoption Act did not, however, redefine "child" to include human embryos. Instead, the legislation amends the Georgia Code to add a new article that allows the progenitors to "relinquish all rights and responsibilities for an embryo to a recipient intended parent" before transfer of the embryo.[189] The act states that:

> A child born to a recipient intended parent as the result of embryo relinquishment pursuant to subsection (a) of this Code section shall be presumed to be the legal child of the recipient intended parent; provided that each legal embryo custodian and each recipient intended parent has entered into a written contract.[190]

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[184] *See* H.B. 388, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

[185] *See* S.B. 169, 150th Gen. Assem., Reg. Sess. (Ga. 2009) (as introduced); H.B. 388, 150th Gen Assem., Reg. Sess. (Ga. 2009) (as introduced).

[186] S.B. 169, 150th Gen. Assem., Reg. Sess. (Ga. 2009). A version of this bill that did not define an embryo as a human being was passed by the Senate and as of January 15, 2010 has yet to be voted on by the House. For further discussion of the legislation, see generally Lawsky & Cahn, *supra* note 18.

[187] H.B. 388, 150th Gen. Assem., Reg. Sess. (Ga. 2009) (as introduced).

[188] Audrey Barrick, *Ga. House Passes Nation's First Embryo Adoption Bill*, CHRISTIAN POST, Apr. 4, 2009, *available at* http://www.christianpost.com/Society/Ethics_rights/2009/04/ga-house-passes-nation-s-first-embryo-adoption-bill-04/index.html (quoting Daniel Becker, President, Georgia Right to Life).

[189] H.B. 388, 150th Gen. Assem., Reg. Sess. (Ga. 2009) (as introduced).

[190] GA. CODE ANN. § 19-8-41(d) (2009).

This provision offers a modern twist on the marital presumption in traditional family law by creating a presumption that the birth mother and her husband are parents without further legal action. Another provision, however, authorizes the intended parents to petition the courts before or after the child's birth for an expedited order of "adoption or parentage."[191] The court order, which can be issued by a court with jurisdiction over adoption, provides greater protection for prospective parents and greater likelihood of interstate recognition should parentage be contested in another jurisdiction.[192] Unlike the legal procedures applicable to adoption, the statute effectively authorizes a transfer of parental rights before birth and without the home study that would be ordinarily required in an adoption.

Georgia also considered legislation last spring (2009) that would have established (a) limits on the number of eggs that could be fertilized; (b) limits on the number of embryos that a doctor could transfer; (c) a ban on freezing embryos, and (d) a ban on payment for donor egg, sperm and embryo.[193] RESOLVE, the national infertility advocacy group, was able to help generate almost 100,000 contacts to the state legislature to prevent enactment of the legislation.[194] The Georgia fertility industry successfully argued that such restrictions would simply drive fertility patients out-of-state.[195] The legislation that passed in Georgia, by contrast, staked out a more fundamentalist position on the status of embryos without directly affecting fertility clinic practice in the state; the only legislation to take effect facilitated embryo transfers without the inflammatory rhetoric that dominated press coverage.[196] Even then, its sponsors encouraged the headlines celebrating the act as the "nation's first embryo adoption bill" despite the fact that legislation existed in states as varied as California, Louisiana, Oklahoma and Florida authorizing the practice.[197]

C. Other Approaches to Embryo Transfers: From Oklahoma to California

Oklahoma has also passed legislation facilitating embryo transfers for reproductive purposes.[198] The legislation treats the resulting child as the child of the "husband

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[191] *Id.* § 19-8-42(a).

[192] *See* June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 393–94 (2006).

[193] S.B. 169, 150th Gen. Assem., Reg. Sess. (Ga. 2009) (as introduced).

[194] Press Release, *supra* note 19.

[195] *See, e.g.*, *Georgia "Octomom Bill" Would Limit Embryo Implants*, CNN, Mar. 3, 2009, http://www.cnn.com/2009/US/03/03/georgia.octomom.bill/index.html ("Patients seeking reproductive care in Georgia will go to Tennessee or South Carolina or Alabama. They will just leave.").

[196] Ewa Kochanska, *The Nation's First Embryo Adoption Bill Passed Georgia Senate*, EXAMINER, http://www.examiner.com/x-6571-Atlanta-Political-Buzz-Examiner~y2009m4d1-The-nations-first-embryo-adoption-bill-passed-Georgia-Senate (last visited Mar. 26, 2010).

[197] *See id.*; *see also infra* Section C.

[198] OKLA. STAT. tit. 10, § 556 (2009).

and wife desiring to receive" so long as the donor husband and wife and the recipients sign written agreements to that effect.[199] The statute requires the physician performing the procedure to file the written consents with the court, and the recipients' consent must be "executed and acknowledged" by "any judge of a court having adoption jurisdiction in this state."[200] The legislation further provides that an embryo transfer is not "trafficking in children" so long as there is no sale involved.[201]

In 2009, Tennessee considered legislation that would have provided the protections of a formal adoption to those who used donated embryos, although it did not require formal court approval in order for the embryo exchange to proceed.[202] Some of the entities that strongly supported the Tennessee legislation were the Tennessee Eagle Forum[203] and FACT,[204] which defines its mission as a belief that "healthy families and communities come about when basic values from the Bible are embraced and upheld. Neglecting commonsense biblical values contributes to many of our nation's current ills like crime, disease, divorce, 'unwanted' pregnancies, teen suicide and academic failure."[205]

In other states, there have been movements to support "personhood" initiatives that accord personhood status to embryos.[206] A Nevada judge in early 2010 struck down an attempt to bring such an initiative to a vote.[207] As attorneys opposing the initiative explained, it would have had implications for reproductive technology as well as abortion.[208]

A number of states, however, have provisions that facilitate embryo transfer as part of a comprehensive approach to assisted reproduction. California, for example, in creating a legal infrastructure designed to encourage stem cell research passed legislation in 2002 requiring fertility clinics to provide patients with a complete list of embryo disposition options.[209] These options include destruction and donation for

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[199] *Id.*

[200] *Id.* § 556(A).

[201] *Id.* § 556(E).

[202] S.B. 2136, 150th Gen. Assem., Reg. Sess. (Tenn. 2009); Emily Bregel, *Georgia: Clarifying Terms of Adoption*, TIMES FREE PRESS, Apr. 27. 2009, http://northgeorgia.timesfreepress.com/news/2009/apr/27/georgia-clarifying-terms-adoption/?print.

[203] Tennessee Eagle Forum, Legislative Action Alert, http://www.tneagleforum.org/custpage.cfm/frm/36598/sec_id/36598 (last visited Apr. 17, 2010).

[204] Family Action Council of Tennessee, What is Fact?, http://www.factn.org/organization.htm (last visited Apr. 17, 2010).

[205] *Id.*

[206] *See* Kathleen Gilbert, *Nevada Launches Personhood Initiative*, Oct. 22, 2009, *available at* http://www.lifesitenews.com/ldn/2009/oct/09102202.html.

[207] *See Nevada Judge Throws Out "Personhood" Initiative*, NPR, Jan. 10, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=122377040&ft=1&f=1001.

[208] Sandra Chereb, *Judge Throws out Nevada "Personhood" Initiative*, SILICON VALLEY MERCURY NEWS, Jan. 8, 2010, *available at* http://www.mercurynews.com/news/ci_14148345.

[209] CAL. HEALTH & SAFETY CODE § 125315 (2009).

research or reproductive purposes.[210] The Texas Uniform Parentage Act provides for embryo donation as part of its regulation of parenthood in the context of a variety of techniques.[211] The Act requires a married women and her husband to consent in writing to establish parenthood,[212] and recognizes the woman who gives birth as the legal mother unless there has been a legal proceeding recognizing someone else.[213] The Florida Parentage Act similarly terminates the parental status of the donors[214] and provides that, with the exception of gestational surrogacy, "any child born within wedlock who has been conceived by means of donated eggs or preembryos shall be irrebuttably presumed to be the child of the recipient gestating woman and her husband, provided that both parties have consented in writing to the use of donated eggs or preembryos."[215]

The California, Florida and Texas statutes, which were passed in the context of systematic oversight of ART, address embryo donation without all of the political posturing of embryo fundamentalists to the legal status of embryos. To be sure, the Florida and Texas provisions limit the process to husbands and wives,[216] but in none of these states was the support for embryo donation to infertile couples particularly controversial.[217] Indeed, even in Louisiana, the industry did not oppose the legislation that defined embryos as "juridical persons" because the statute effectively provided legislative sanction for the potentially controversial practice of IVF at an early stage in its development.[218]

The relatively recent Georgia statute, in contrast, could be hailed as the nation's first "embryo adoption" law precisely because it eschewed the language of donation for adoption. Although as a practical matter, the statute operates in similar legal terms to parentage statutes elsewhere, the right to life press hailed use of the term "legal embryo custodian" to replaces "embryo donor" throughout Georgia's new code as though it were a critical innovation.[219] Whatever happens to assisted reproduction in practice, the war of words is likely to continue.

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[210] *Id.*

[211] *See generally* TEX. FAM. CODE ANN. § 160 (Vernon 2009).

[212] *Id.* § 160.704(a).

[213] *Id.* § 160.201(a). The statute also terminates the parental status of donors. *Id.* § 160.702.

[214] FLA. STAT. § 742.14 (2009).

[215] *Id.* § 742.11.

[216] So, too, do the Louisiana and Oklahoma statutes. This presents significant practical and symbolic political issues.

[217] *See* FLA. STAT. § 742.11 (legislating the status of children born via donated embryos "within wedlock"); TEX. FAM. CODE ANN. § 160 (limiting consent to a "married woman" and "her husband").

[218] *See* Susan L. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 610 (2005) (noting that the Louisiana statute imbues the embryo with personhood and stating that the IVF patients and fertility clinics may not destroy the embryos, but instead "may be deemed a 'temporary guardian,' until 'adoptive implantation' by 'another married couple' can occur").

[219] *Georgia Passes Nation's First Embryo Adoption Law*, CHRISTIAN NEWSWIRE, Apr. 3, 2009, *available at* http://www.christiannewswire.com/news/630359951.html.

V. EMBRYO FUNDAMENTALISM AND THE POLITICS OF PURITY

Janet Dolgin identified the critical development in the right-to-life movement of the last two decades as its shift from a movement in rebellion against the changing status of women to one focused on fetal and embryonic status.[220] This shift occurred as a part of a more general political realignment that has given greater voice to the most authoritarian, hierarchical and uncompromising voices in the American political spectrum, and as the Republican party considers an ideological purity test as a basis for party support.[221] Abortion politics has gained appeal in this context precisely because of its claim to moral clarity and its resistance to compromise.

The move to greater insistence on ideological purity, however, also gives rise to a dilemma. While fealty to the pro-life cause has locked in a conservative base of support, extension of the same principles more generally—to stem cell research, embryo freezing, IVF—risks alienating a significant part of the electorate.[222] The result has been a preference for rhetoric over action. Introducing pro-life bills designed to fail, holding efforts to ban reproductive cloning (which relatively few want) hostage to efforts to prohibit therapeutic cloning (which the majority supports), defining embryos as "juridical persons" without interfering with fertility practices allows the voices of purity to rally the base without producing the type of backlash that marginalizes the cause.

The result has produced legislative gridlock over the regulation of assisted reproduction. Pragmatic oversight, such as the California legislation authorizing embryo donation,[223] risks granting official approval to controversial practices, and such legislation has been relatively rare.[224] At the same time, the fertility industry has flourished and has had enough clout to block Georgia's efforts to grant too much standing to embryos or to limit ethically questionable practices such as the implantation of multiple embryos in an apparently fertile thirty-three-year old.[225]

As the industry has matured, however, the calls for legal reform grow louder. Some center on greater oversight of industry practices.[226] The most basic address the issues of parentage. Embryo donation, like gamete donation before it, is risky without certainty about parental status. Prospective adoptive parents have been traumatized

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[220] Dolgin, *supra* note 47, at 132–34.

[221] *See, e.g.*, *Republicans Considering Ideological Purity Test for Candidates*, YAHOO!, Nov. 24, 2009, http://news.yahoo.com/s/ynews/ynews_pl996; *supra* nn. 68–80.

[222] *See, e.g.*, Dolgin, *supra* note 47, at 154–60.

[223] CAL. HEALTH & SAFETY CODE § 125315 (2009).

[224] For an overview of the legislation states have enacted surrounding embryo disposition, see NATIONAL CONFERENCE OF STATE LEGISLATURES, EMBRYO AND GAMETE DISPOSITION LAWS, http://www.ncsl.org/default.aspx?tabid=14379 (last visited Apr. 17, 2010).

[225] *See, e.g.*, Press Release, *supra* note 19 ("Facing a groundswell of opposition from patients, doctors, and lawyers, the legislators first gutted, and then passed a much watered-down version of the original bill, Senate Bill (SB) 169.").

[226] *See generally* CAHN, *supra* note 5.

by the fear that birth parents will change their mind before an adoption is complete.[227] Carrying a child to term only to enter into a fight over the child's future would be heart rending. Just as legislative sanction has encouraged the growth of egg and sperm donation, so, too, does embryo donation benefit from a legal infrastructure authorizing the practice and providing certainty about the resulting parental status. And there seems to be relatively little opposition to the practice so long as it arises between consenting donors and recipients.

The issue instead is one of ideological purity: will embryo donations become simply one more arena for the construction of the meaning of reproduction, and will it be done on terms that advance one view to the exclusion of others?

A. The Stakes

If abortion rose to prominence as a political flash point because of its association with the modern family at the expense of traditional family values, so too is assisted reproduction associated with modernity and the technological manipulation of the sacred (the production of a child) to serve individualistic ends. The Catholic Church emphasizes exactly this perspective in its opposition to IVF.[228] At the same time, of course, traditional women see fulfillment in terms of their roles as wives and mothers, and infertility thus affects them profoundly. As the age of marriage rises across the United States,[229] the interest in assisted reproduction is likely to increase as well. The question will then become on what terms.

Kristin Luker's characterization of the abortion debate provides a clue as to how the battle lines are likely to be drawn. She observed that:

> Women who oppose abortion and seek to make it officially unavailable are declaring, both practically and symbolically, that women's reproductive roles should be given social primacy . . . when personhood is bestowed on the embryo, women's nonreproductive roles are made secondary to their reproductive roles.[230]

Underlying this description is not just the recreation of the gender role fights of the eighties, but of the idea of agency that underlay them. For traditional women, reproduction is something that follows from sexuality and imposes order on family life. For modern women, it is something to be chosen and managed.

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[227] *See, e.g.*, Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 428–32 (recounting pain and feelings of powerlessness of infertile couples).

[228] Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of* In Vitro *Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 522–23 (2005).

[229] *See* Davis, *supra* note 21, at 281.

[230] LUKER, *supra* note 46, at 200.

Applying these same ideas to embryo donation changes the terms of the debate. For modern women, IVF allows older women to determine the terms of reproduction, to go forward with gametes they choose, to control the timing of the process.[231] While infertility treatments are costly, painful and emotionally draining,[232] they are also tied to a determination to produce a certain kind of family, even if the meaning of that family differs from one person to the next. Embryo donation, in contrast, can be reconciled with the idea of submission to God's will. It can be thought of in terms of obligation rather than choice, of a fated match between parents and child rather than a managed one. In practical terms, it may be less expensive than new rounds of IVF and it can be reconciled even with religious beliefs opposed to IVF itself.[233] The growth of embryo donation thus opens the door to new meanings for assisted reproduction, for the benefit of new constituencies, who increase the demand for different laws.

This in turn may increase the fight to control the meanings of the resulting legislation.

B. The Laws

The conflict between the ideals underlying ART—individualism, technological sophistication, gender equality, determination to produce the best possible children—and the emerging ideals underlying embryo adoption is greatest at the symbolic level. Moreover, the clash between the two ideals is not parallel. Pro-choice states such as California actively facilitate embryo transfers[234] while pro-life states such as Georgia hail its "embryo adoption" legislation because it addresses IVF only in pro-life terms.[235] As embryo fundamentalists seek more influence, ART regulation might proceed in multiple, potentially overlapping or potentially exclusionary, directions, which we briefly outline below.

1. Segregated Networks

First, it is entirely possible that new legislation will facilitate further development of separate networks for the provision of fertility services, with radically different moral and ethical views about ART. Clinics with fundamentally different philosophies currently exist in California. One need only compare Rainbow Flag Health

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[231] For intriguing commentary on the idea of "planned parenthood," see Susan Frelich Appleton, *"Planned Parenthood": Adoption, Assisted Reproduction, and the New Ideal Family*, 1 WASH. U. J.L. & POL'Y 85 (1999).

[232] Peter K. Rydel, *Redefining the Right to Reproduce: Asserting Infertility as a Disability Under the Americans with Disabilities Act*, 63 ALB. L. REV. 593, 594 (1999).

[233] The Catholic Church has even reserved judgment on embryo adoption as a lesser evil. *See* discussion *supra* notes 64–67 and accompanying text.

[234] *See* CAL. HEALTH & SAFETY CODE § 125315 (2009).

[235] *See* GA. CODE ANN. § 19-8-41(d) (2009).

Services[236] in Oakland, CA with Nightlight Christian Adoptions in Anaheim, CA.[237] Rainbow Flag affirmatively reaches out to the gay and lesbian community,[238] while Nightlight Christian Adoptions is deeply rooted in a more conservative Christian outlook that focuses on married couples as its primary constituency.[239]

Second, regulation might facilitate fertility tourism. If states create distinctly different background laws, encouraging donation for research in some states (California) and donation for reproduction in others, subsidizing some programs and harassing or limiting others, the net result may be specialized networks by state. California already has clinics that cater to foreign fertility tourists seeking a more supportive legal environment;[240] Americans might choose the clinic of their choice based on the state's legal infrastructure.

Fertility tourism is already possible, of course, and India has become a desirable international destination.[241] Today's world, which involves widespread availability and negligible oversight for those who can afford fertility services may continue, perhaps with new clinics becoming even less likely to open in hostile states; conversely, national legislation forbidding embryo destruction could limit the practical differences among states.

Third, there may be practical convergence. To date, evangelicals have been less likely to use IVF, partly because of the expense and partly because of younger average ages of childbearing.[242] If embryo adoption were to become more widespread, it might create new constituencies for IVF itself. Even though some religions oppose IVF altogether, most Protestant denominations do not yet have fully developed views on the subject.[243] Embryo adoption, which remains unusual today, might become a more common response to infertility, and ultimately increase support for ART more generally.

The Louisiana[244] and Georgia[245] statutes discussed above provide some evidence of convergence as well as ideological posturing. In Louisiana, the industry effectively

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[236] Rainbow Flag Health Services, http://www.gayspermbank.com/ (last visited Apr. 17, 2010).

[237] Nightlight Christian Adoptions, http://www.nightlight.org/ (last visited Apr. 17, 2010).

[238] Rainbow Flag Health Services, *supra* note 236.

[239] Nightlight Christian Adoptions, Adoption Agency, http://www.nightlight.org/about-christian-adoption-agency/ (last visited Jan. 23, 2010); NIGHTLIGHT CHRISTIAN ADOPTIONS, ELIGIBILITY REQUIREMENTS FOR DOMESTIC ADOPTIONS (2010), http://www.nightlight.org/downloads/nightlight-ca-domestic.pdf.

[240] Rainbow Flag Health Services, *supra* note 236.

[241] Shilpa Kannan, *Regulators Eye India's Surrogacy Sector*, BRITISH BROADCASTING CORP., Mar. 18, 2009, http://news.bbc.co.uk/2/hi/business/7935768.stm.

[242] Colleen Neary, Hall v. Nalco Co.*: Protection For Women Unable to Conceive Naturally*, 40 U. TOL. L. REV. 1021, 1025–26 (2009); David M. Smolin, *Does Bioethics Provide Answers?: Secular and Religious Bioethics and Our Procreative Future*, 55 CUMB. L. REV. 473, 508 (2005).

[243] Cynthia B. Cohen, *Protestant Perspectives on the Uses of the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 135, 135–37 (2002).

[244] *See* LA. REV. STAT. ANN. §§ 9:130–131 (2009).

[245] *See* GA. CODE ANN. § 19-8-41(d) (2009); *Id.* § 19-8-42(a).

accepted recognition of the special status of embryos as the price of approval for state authorization of IVF.[246] In Georgia, on the other hand, the pro-life forces dropped the more extreme language on the status of embryos in order to enact legislation providing for embryo adoption, with the symbolically important authorization of parentage decrees from adoption courts.[247] The result in both states has been greater legal clarity that makes embryo transfers more likely.

2. Constitutional Clashes?

The laws that have been adopted to date appear to stop short of direct conflict with established IVF practices or the kind of infringement on reproductive autonomy that would prompt litigation. Even the limitations in statutes like those in Texas[248] and Florida[249] permitting embryo adoption by a "husband and wife" have not been tested. Nonetheless, such prohibitions on access to reproductive services based on marital status might run afoul of some existing state civil rights laws, and may be unconstitutional under the federal constitution. [250] Attempts to limit reproductive liberties would become more likely to be challenged if they:[251]

a) Mandated implantation of all embryos, even over the objections of the progenitors. Such a requirement would be inconsistent with existing state cases on the disposition of extra embryos in contexts in which husbands and wives have disagreed, and appear inconsistent with older Supreme Court cases such as *Skinner v. Oklahoma*[252] and more recent decisions in the abortion context. Requiring progenitors who will not or cannot implant their embryos to allow others to do so would clearly intrude on reproductive autonomy. Conversely, if a state were to provide notice

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[246] *See* LA. REV. STAT. ANN. § 9:125.

[247] *See* GA. CODE ANN. § 19-8-41(d).

[248] TEX. FAM. CODE ANN. § 160.704(a) (Vernon 2009).

[249] FLA. STAT. ANN. § 742.11(2009).

[250] *See* North Coast Women's Care Med. Group, Inc. v. Superior Court, 189 P.3d 959 (Cal. 2008); CAHN, *supra* note 5; Judith F. Darr, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18 (2008); *see also* Bebe J. Anderson, *Lesbians, Gays, and People Living with HIV: Facing and Fighting Barriers to Assisted Reproduction*, 15 CARDOZO J.L. & GENDER 451, 467–74 (2009) (discussing various potential constitutional rights at issue when gays and lesbians are unable to access assisted reproductive technology); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (analysis of state laws and the effect of the emphasis on marriage).

[251] We would like to thank Josh Marrone for some of these suggestions.

[252] Skinner v. Oklahoma, 316 U.S. 535 (1942); *see, e.g.*, VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008); Sonia M. Suter, *The "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514 (2008).

to progenitors at the time they create the embryos that the state will favor implantation in the event of a dispute between the progenitors, then the provision of notice would strengthen the argument for the statute's constitutionality, at least where one of the progenitors wishes to produce a child. At the same time, the retroactive application of such laws to couples who signed agreements to the contrary before the legislation was passed may also raise constitutional issues about procedural, as well as substantive, due process.

b) Prohibit the creation of extra embryos. The potential enactment of statutes modeled after those in Italy, which limit the number of embryos created and requires couples to implant all of the embryos they create,[253] raises various constitutional issues. To date, the focus has been on the existence of a constitutionally guaranteed right to procreation. As the debate between John Robertson and Radhika Rao[254] shows, the precise contours of such a right have yet to be articulated. Such a law could result in extensive litigation, and the outcome might depend on whether:
   - The U.S. Supreme Court would intervene in the issue at all or leave the matter to the states. The most recent abortion cases indicate a high degree of deference to state legislatures, and the court might decide that the determination of embryo status rests with the states, at least where it applies to the determination of an embryo's status outside of the human body that poses no direct conflict with another person's bodily integrity.[255]
   - The legislation justifies a limit on the number of embryos created based solely on the moral status of the embryo irrespective of the individual patient's circumstances, or permits consideration of other factors such as the patient's health, age, or the likelihood of reproductive success.
   - The legislation ties determination of the number of embryos that can be created to the number to be implanted. Doctors could easily circumvent restrictions by implanting embryos at a time or under circumstances unlikely to lead to pregnancy.

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[253] *New Fertility Law Divides Italy*, BUZZLE, Dec. 12, 2003, http://www.buzzle.com/editorials/12-12-2003-48530.asp.

[254] *See* Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008).

[255] *See* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 230 (2006). For an analysis of the constitutional implications of restrictions on reproduction, see I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 (2008); Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 ALB. L. REV. 625, 627–38 (2002); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 477 (1990); Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549, 578–79 (2005).

c) Progenitor criminal liability for the destruction of embryos. The status of a law that required all progenitors who object to implantation of their embryos to keep them frozen indefinitely raises a complex series of issues. Many couples undergoing fertility treatments do not want more than a certain number of children and would object vehemently to their genetic offspring being raised by someone else. Consistent with the special respect they might accord their potential children, they may well object to indefinite storage of the embryos. The question of what deference the state owes the views of such progenitors, which may reflect the progenitors' individual religious or ethical views, is an unexplored issue underlying the debate. A criminal prosecution for "pulling the plug" on a freezer or taking embryos out of state for thawing and disposal would squarely present the issues; a request to a Louisiana court to enjoin interference for plans to thaw and bury embryos might raise similar issues.

d) Rational relationship to a legitimate state purpose: A state regulation requiring the indefinite storage of frozen embryos over the objections of the progenitors may be challenged on the ground that it lacks a rational relationship to a legitimate state purpose.[256] Conversely, a state law prohibiting the transfer of frozen embryos out of state or to jurisdictions that permit their destruction may violate the right to travel.

CONCLUSION

If reproductive technology is to move forward, then the political conundrum for the future of embryo regulation is determining the rights of embryo progenitors and recipients. If the embryo is a child, then adoption laws apply, but those laws ordinarily allow progenitors to change their mind after the child's birth and require adoptive parents to submit to a home study by the state. As California demonstrates, however, it is possible to reach agreement on a legal infrastructure that allows embryo transfers to go forward without resolving global disagreements on embryo status.[257] The question is whether that will be enough for those invested in the ideological rhetoric of abortion politics.

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[256] *See* Bowen v. Kendrick, 487 U.S. 589, 598 (1988).

[257] The American Society for Reproductive Medicine, which is an organization of those providing fertility services, labels embryo donation a "medical," rather than a "legal" procedure. *See* ASRM Ethics Committee, *American Society for Reproductive Medicine: Defining Embryo Donation*, 92 FERTILITY & STERILITY 1818, 1819 (2009); ASRM, *2008 Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 90 FERTILITY & STERILITY S30 (2008).