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“Who Gets the Children?”: Innovations in Reproductive Technology Create More Problems than Solutions for the Legal System, 53 UIC J. Marshall L. Rev. 163 (2020)

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“WHO GETS THE CHILDREN?”:
INNOVATIONS IN REPRODUCTIVE
TECHNOLOGY CREATE MORE PROBLEMS
THAN SOLUTIONS FOR THE LEGAL
SYSTEM

MADISON HYNES*

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Abstract

With some advances in technology, come increased complexities for the American legal system. Specifically, when it comes to frozen embryos and what happens to them when the parents who created them, divorce or separate. This comment explores the current state of the law in the United States surrounding this issue and shines a bright light on the resulting lack of uniformity, which can only be remedied by the national government taking action.

* Juris Doctor Candidate, UIC John Marshall Law School, 2020. I dedicate this Comment to, first and foremost, my family and fiancé for taking this law school journey with me, to the faculty and staff of UIC John Marshall who I have had the pleasure of learning from, and to the members of UIC John Marshall Law Review, this will be an experience I cherish forever.

I. INTRODUCTION

Remember the “good old days” when everything was simpler?¹ Before twelve year-olds had cell phones, when gas was less than a dollar a gallon, when “hanging out” with friends meant building forts in the backyard until the sun went down, and when having divorced parents was unheard of? Just fifty years ago, the American divorce rate barely touched twenty percent.² Today, gas is well over two dollars a gallon and almost one in every two married couples are destined for divorce.³ With the divorce rates rising, legal issues relating to family law have become more complex than ever.⁴ For married and unmarried couples with children, one of the burning questions couples constantly face when splitting up is, “who will get custody of the children?”⁵ Thanks to the ever-evolving advances in technology, more controversial questions have arose including: who will get custody of the *unborn* children?⁶ With advancements in reproductive technology and rising divorce rates, the legal status of frozen embryos will likely be a heavily disputed issue for years to come.⁷

The intricacies of frozen embryo disputes are amplified by the fact that “no federal law, and few state laws, address ... the division of frozen embryos.”⁸ One California judge expressed her

1. Henry Hanks & Katie Hawkins-Gaar, *Was it Really a Simpler Time? Your '60s Family Photos, Revealed*, CNN (June 6, 2014), www.cnn.com/2014/06/04/living/60s-familyirpt/index.html.

2. Jennifer Bates, *Historical Divorce Rate Statistics*, LOVETOKNOW, www.divorce.loveto-know.com/Historical_Divorce_Rate_Statistics (last visited Sept. 15, 2018).

3. John Harrington & Cheyenne Buckingham, *Broken Hearts: A Rundown of the Divorce Capital of Every State*, USA TODAY (Feb. 2, 2018), www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001/ (explaining that today “about 40% to 50% of married couples in the United States divorce”); *Top 10 Lowest Gas Prices & Best Gas Stations in Chicago*, GASBUDDY, www.gasbuddy.com/GasPrices/Illinois/Chicago (last visited Feb. 3, 2019) (indicating that as of February 2, 2019, Chicago, Illinois gas prices ranged between \$2.09 and \$2.17).

4. Bates, *supra* note 2.

5. *Who Gets Custody*, FINDLAW, www.family.findlaw.com/child-custody/who-gets-custody.html (last visited Sept. 15, 2018).

6. Jennifer Ludden, *After A Divorce, What Happens To A Couple's Frozen Embryos?*, NPR (Aug. 22, 2018), www.npr.org/sections/health-shots/2015/08/22/433535994/after-a-divorce-what-happens-to-a-couples-frozen-embryos.

7. *Id.*

8. Anna Stolley Persky, *Deep Freeze: Contentious Battles Between Couples Over Preserved Embryos Raise Legal And Ethical Dilemmas*, 102 A.B.A. J. 46 (2016); *Embryo Freezing*, NAT'L CANCER INST., www.cancer.gov/publications/dictionaries/cancer-terms/def/embryo-freezing (last visited Oct. 6, 2018); see also Vikki Ziegler, *In The Event Of A Divorce, Who Keeps The Embryos Created From IVF?*, HUFFINGTON POST (Feb. 15, 2017), www.huffingtonpost.com/entry/in-the-event-of-a-divorce-who-keeps-the-embryos-created_us_589afa50e4b0985224db5c22 (explaining that in addition to few federal and state laws governing

frustrations, stating that “there must be rules to govern the disposition of [frozen embryos].”⁹ Lacking such a disposition fuels the drawn out battles with “little protection ... for those seeking a remedy for disposition of their preserved embryos.”¹⁰ With the absence of any federal law regulating disputes surrounding frozen embryos, the states that have legislated on this topic have reached vastly different conclusions.¹¹ In situations such as this, technology is one step ahead of the law “leaving adjudicating couples in uncharted waters with multiple issues to resolve.”¹² Although some states have developed laws to remedy this type of dispute, at the same time, it has reignited the decades old debate of when life begins.¹³

As this Comment will demonstrate, the complexity of custody litigation hits its peak with the issue of whether frozen embryos are to be considered people or property. This is an issue that has not been cast aside by the courts, however there is not yet an overarching ruling on this issue. The background of this Comment will examine why couples decide to freeze their embryos and what that process entails. It will also assess the differing views between states on the disposition of frozen embryos. Additionally, this Comment will analyze the effects of considering embryos as people. Finally, this Comment will propose two different alternatives as a way to make uniform the vastly different frozen embryo laws that exist between the states; the implementation of a universal contract or a federal regulation declaring frozen embryos as “property of special character.”

the disposition of frozen embryos, “nor is much case law available to offer them guidance when a legal inquiry ensues”).

9. Christina Cauterucci, *What Should Be the Fate of a Spare Frozen Embryo?*, SLATE (Jan. 28, 2016), www.slate.com/articles/double_x/doublex/2016/01/frozen_embryos_and_the_anti_abortion_activists_who_love_them.html.

10. Ziegler, *supra* note 8 (explaining that “disputes regarding the disposition of frozen embryos often take years to resolve”).

11. David Orenstein, *For Frozen Embryos in Dispute, Scholars Propose Guidelines*, BROWN U. (July 18, 2016), www.news.brown.edu/articles/2016/07/embryos (lacking uniformity in the law means that “individuals who cryopreserve embryos face an uncertain and shifting terrain of varying state laws, with varying degrees of respect for contract, and case law that might generate different outcomes depending on changes in the underlying fact pattern”).

12. Ziegler, *supra* note 8.

13. Ariana Eunjung Cha, *Who Gets the Embryos? Whoever Wants to Make Them Into Babies, New Law Says*, WASH. POST (July 17, 2018), www.washingtonpost.com/national/health-science/who-gets-the-embryos-whoever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html (explaining that a recent Arizona law “could dramatically alter the practice of fertility medicine, as well as the debate over when life begins”).

II. BACKGROUND

First, this background will discuss the potential effect of overturning the monumental case *Roe v. Wade* could have on current American laws regarding the disposition of frozen embryos. Second, this background will touch on reasons why couples freeze their embryos as well as how the cryopreservation process works. This section will also discuss the three different categorizations of frozen embryos that currently exist among the states: people, property, or property of “special character.” Finally, this background will assess the effects that a couple’s separation has on their frozen embryos.

A. Abortion and Frozen Embryos Collide

Abortion has existed in the United States ever since the first settlers arrived in America, around 1607.¹⁴ It was not until the “mid-to-late 1800s [that] states began passing laws that made abortion illegal.”¹⁵ Later, abortion became a household conversation topic in 1971 when a woman, “Jane Roe,” sued to challenge a Texas law that prohibited abortion.¹⁶ She filed suit against Henry Wade, then district attorney for Dallas County, on the basis that the law infringed on her constitutional right to privacy.¹⁷

Two years later, the case reached the United States Supreme Court, which decided that a person’s “right to privacy ... is broad enough to encompass [a] woman’s decision whether or not to terminate her pregnancy.”¹⁸ Therefore, the Fourteenth Amendment protects a woman’s right to have an abortion.¹⁹ Part of the Supreme

14. *History of Abortion*, NAT’L ABORTION FEDERATION, www.prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/ (last visited Oct. 6, 2018); *Colonial America (1492-1763)*, AMERICA’S LIBRARY, www.americaslibrary.gov/jb/colonial/jb_colonial_subj.html (last visited Oct. 6, 2018).

15. *History of Abortion*, *supra* note 14 (explaining that abortion laws varied from state to state because states “fear[ed] that the population would be dominated by the children of newly arriving immigrants, whose birth rates were higher than those of “native” Anglo-Saxon women”); *Roe v. Wade*, HISTORY CHANNEL, www.history.com/topics/womens-rights/roe-v-wade (last visited January 10, 2020) (beginning in “the late 19th century, abortion was legal in the United States before ‘quickening,’ the point at which a woman could first feel movements of the fetus”).

16. *Roe v. Wade Fast Facts*, CNN, www.cnn.com/2013/11/04/us/roe-v-wade-fast-facts/index.html (last visited Oct. 6, 2018).

17. *Id.* (explaining that the law prohibiting abortion did allow for abortion if it was required to save a woman’s life).

18. *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Court instructed “from and after this point [the end of the first trimester of pregnancy], a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” *Id.* at 173.

19. *Roe v. Wade Fast Facts*, *supra* note 16; *see also Roe*, 410 U.S. at 163 (implementing the trimester framework, meaning that during the first

Court’s decision incorporated a “trimester framework” that was overturned nineteen years later in *Planned Parenthood v. Casey*.²⁰ While the essential holdings of *Roe* were maintained, *Planned Parenthood* altered the trimester framework explaining, “to promote the State’s interest in potential life throughout pregnancy, the State may take measures to ensure the woman’s choice is informed.”²¹

Today, almost half a century since *Roe* legalized abortion and twenty-six years since its essential holding was reaffirmed in *Planned Parenthood*, comes the shocking reality that it may be overturned, as its “future [] looks more tenuous than it ever has.”²² In 2016, the United States of America elected Donald J. Trump as its forty-fifth president.²³ One of President Trump’s initiatives was to “appoint ‘pro-life’ justices to the Supreme Court.”²⁴ Trump explained that this would lead to the “overturning of the landmark Supreme Court decision giving women the right to abortion [and] ‘will happen automatically.’”²⁵ Accordingly, *Roe* would be reversed and the legality of abortion would be a decision for the states.²⁶

On October 6, 2018, Brett M. Kavanaugh, a Trump appointee, was confirmed to the Supreme Court, “locking in a solid conservative majority on the [C]ourt.”²⁷ It would take about two

trimester the state cannot impose any regulations on abortion and the woman’s choice to it, at the end of the first trimester through the second, the state may only regulate to the point that it protects the mother’s health, and at the end of the second trimester until birth, the state may, but does not have to, prohibit abortion completely).

20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court criticized *Roe*’s trimester framework as “suffer[ing] from these basic flaws: in its formulation it misconceives the nature of the pregnant woman’s interest; and in practice it undervalues the State’s interest in potential life.” *Id.* at 873.

21. *Id.*

22. *Roe*, 410 U.S. 113; *Planned Parenthood*, 505 U.S. 833; B. Jessie Hill, *Will the Supreme Court Overturn Roe v. Wade? And if It Does, What Happens to Abortion Rights?*, THE CONVERSATION (Aug. 2, 2018), www.theconversation.com/will-the-supreme-court-overturn-roe-v-wade-and-if-it-does-what-happens-to-abortion-rights-99248.

23. Helena Horton, *How the World Reacted as Donald Trump Became President*, TELEGRAPH (Jan. 20, 2017), www.telegraph.co.uk/news/2017/01/20/world-reacted-donald-trump-became-president/ (reporting that when the United States of America welcomed one of its most controversial presidents to date, Donald J. Trump, world leaders expressed their not so enthusiastic regards for Americans).

24. Clare Foran, *The Plan to Overturn Roe v. Wade at the Supreme Court is Already in Motion*, CNN (June 29, 2018), www.cnn.com/2018/06/29/politics/abortion-roe-v-wade-supreme-court/index.html.

25. Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

26. *Id.*

27. Sheryl Gay Stolberg, *Kavanaugh is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), www.nytimes.com/2018/10/06/us/

years for the topic of abortion to reach this conservatively swayed bench.²⁸ In March of 2020, the Supreme Court is set to hear arguments challenging Louisiana's new abortion law, which "will be the first abortion case heard by the high court since Trump nominees Neil Gorsuch and Brett Kavanaugh have joined the bench."²⁹ Specifically, if upheld, the law would "require doctors who perform abortions to have admitting privileges at a local hospital."³⁰ It is believed that the result of this case "will have lasting consequences for abortion access across the country."³¹

B. *The Decision to Freeze*

1. *The Creation and Preservation of Frozen Embryos*

The process by which embryos are created and frozen is often referred to as "embryo cryopreservation."³² Embryo cryopreservation has proven to be the most effective way to preserve a woman's chances of becoming pregnant at a later date.³³ In fact, a recent study conducted by Stanford University found that women over the age of thirty-five who have gone through the frozen embryo transfer process "were 73% more likely" to successfully carry a child than those women who have a "fresh transfer."³⁴ Once a couple

politics/brett-kavanaugh-supreme-court.html.

28. Richard Wolf, *Supreme Court Agrees to Rule on Abortion Restrictions, Setting Up Contentious Election Year Debate*, USA TODAY (Oct. 4, 2019), www.usatoday.com/story/news/politics/2019/10/04/abortion-supreme-court-hear-case-presidential-race-heats-up/3852781002/.

29. Rachel Frazin, *Supreme Court Sets Date for Louisiana Abortion Case*, THE HILL (Nov. 26, 2019), www.thehill.com/policy/healthcare/abortion/472113-supreme-court-sets-date-for-louisiana-abortion-case.

30. *Id.*

31. *Id.*

32. *Embryo Cryopreservation*, NAT'L CANCER INST., www.cancer.gov/publications/dictionaries/cancer-terms/def/embryo-cryopreservation (last visited Oct. 28, 2018) (defining embryo cryopreservation as "the process of freezing one or more embryos to save them for future use").

33. *7 Reasons Why Frozen Embryos Can Increase Your Chances of a Successful Pregnancy*, SHADY GROVE FERTILITY (June 11, 2016), www.shadygrovefertility.com/blog/treatments-and-success/7-reasons-why-frozen-embryos-can-increase-your-chances-of-a-successful-pregnancy; *Preserving Fertility in Women with Cancer*, AM. CANCER SOC'Y, www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/fertility-and-sexual-side-effects/fertility-and-women-with-cancer/preserving-fertility-in-women.html (last visited Feb. 9, 2020).

34. *What Are the Success Rates of Using Frozen Embryos in Your IVF Cycle?*, S. CAL. REPROD. CTR. (Jan. 2, 2018), www.blog.scrivf.com/frozen-embryo-success-rates; see also *Advantages of Frozen Embryo Transfers Increasing: Fresh vs. Frozen IVF Cycles*, WOMEN'S INTEGRATED NETWORK, www.winfertility.com/advantages-frozen-embryo-transfers-increasing-fresh-vs-frozen-ivf-cycles/ (last visited Oct. 28, 2018) (clarifying the difference between a "fresh transfer," harvesting mature eggs from the woman and

engages in the process of freezing their embryos, the first step is to retrieve oocyte, or egg cells, from a woman and sperm from a man.³⁵ Once both the sperm and oocyte are collected, the process of in vitro fertilization begins.³⁶ After the embryos are created, they are “exposed” to cryoprotectants (“CPAs”).³⁷ Since embryos are made up of cells, and cells contain mostly water, CPAs are used to ensure that ice will not form between the cells within the embryos, as the ice can destroy the viability of the embryo.³⁸ The embryos are then stored in tanks with liquid nitrogen in below freezing temperatures.³⁹ The tanks are “monitored” every day and are connected to alarm systems that notify lab employees in the event that the tank temperatures rise or the nitrogen levels decrease.⁴⁰

Embryos can remain frozen for years.⁴¹ The longest known frozen embryo was stored for twenty-four years before it was implanted in a woman, and she delivered a healthy baby nine months later.⁴² However, freezing embryos and keeping them frozen over an extended period of time can come at a hefty price.⁴³ First, women need to take various medications to prep their bodies for successful egg retrievals.⁴⁴ These medications are priced between \$1,500 and \$3,000.⁴⁵ The cost of one round of in vitro fertilization,

fertilizing them with sperm in the lab and then transferring them into the woman’s uterus only two to five days later, as opposed to a “frozen transfer,” freezing them for a long period of time and then transferring them into a woman’s uterus).

35. Katherine T. Johnson & Jennifer Potter, *Fertility Assessment and Preservation*, SCI. DIRECT, www.sciencedirect.com/topics/medicine-and-dentistry/embryo-cryopreservation (last visited Oct. 28, 2018).

36. *Id.*; see also *In Vitro Fertilization (IVF)*, MAYO CLINIC, www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 (last visited Oct. 28, 2018) (explaining that in vitro fertilization is the process by which egg cells from a woman are fertilized by sperm from the man in the lab, outside of the uterus).

37. Johnson & Potter, *supra* note 35.

38. *Embryo Cryopreservation: Procedure Details*, CLEV. CLINIC, www.my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation/procedure-details (last visited Oct. 28, 2018).

39. *Id.* (keeping embryos frozen at “-321° Fahrenheit”).

40. *Sperm and Embryo Freezing*, PACIFIC FERTILITY CTR., www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing (last visited Oct. 28, 2018); *Embryo Cryopreservation*, CLEV. CLINIC, www.my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation (last visited Feb. 9, 2020).

41. *Id.*

42. Sarah Zhang, *A Woman Gave Birth From an Embryo Frozen for 24 Years*, ATLANTIC (Dec. 21, 2017), www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876/ (reporting that an embryo frozen in 1992 was donated to an infertile couple who carried the embryo to full term in 2017).

43. Rachel Gurevich, *What You Should Expect for In Vitro Fertilization Costs*, VERYWELL FAMILY (Feb. 12, 2018), www.verywellfamily.com/how-much-does-ivf-cost-1960212.

44. *Id.*

45. *Id.*

the process by which eggs are fertilized by sperm in a lab, can range from \$10,000 to \$20,000.⁴⁶ After the embryos are created, the cost to keep them frozen depends on the facility, ranging from \$350 to \$2,000 per year.⁴⁷ The creation and preservation process of frozen embryos is lengthy, costly, and ongoing.⁴⁸

2. *Reasons Why People “Freeze”*

Freezing embryos is like freezing time. This process appeals to a couple who is not yet ready to have children but who will be considered past their “prime” when they are ready.⁴⁹ With embryo freezing, couples have the opportunity to preserve their healthier and more youthful embryos until they are ready to have a child.⁵⁰ Additionally, medical concerns can impact a couple’s decision to freeze their embryos.⁵¹ Women who are diagnosed with cancer and undergo chemotherapy run the risk of temporary or permanent infertility.⁵² By preserving embryos, these women will have a better chance of successfully carrying a child once the embryos are transferred.⁵³ The inability to conceive naturally can also occur for similar reasons in men. For example, past diseases or medical conditions can negatively affect the quality and quantity of the sperm, which in turn can hinder the process of natural fertilization.⁵⁴ Men may also inherit genes that cause them to be infertile.⁵⁵ Regardless of the reasons why, couples who choose to freeze their embryos have the chance to parent at a future time when conceiving naturally may no longer be a viable option.⁵⁶

46. *Id.*; *The Costs of Egg Freezing Breaking Down the Likely Costs*, FERTILITYIQ, www.fertilityiq.com/egg-freezing/the-costs-of-egg-freezing (last visited Feb. 9, 2020).

47. *Embryo Storage Costs*, REPROTECH, www.reprotech.com/embryo-storage-costs.html (last visited Oct. 28, 2018); *The Costs of Egg Freezing Breaking Down the Likely Costs*, *supra* note 46.

48. Gurevich, *supra* note 43.

49. Vishvanath Karande, *Top 10 Reasons as to Why You Should Freeze Your Embryos*, INVIA FERTILITY (June 20, 2012), www.inviafertility.com/blog/blog/infertility/drvkarande/top-10-reasons-as-to-why-you-should-freeze-your-embryos/.

50. *Id.*

51. *Freezing Embryos Helps Women Conceive After Breast Cancer Treatment*, BREASTCANCER.ORG, www.breastcancer.org/research-news/freezing-embryos-helps-women-conceive (last visited Oct. 28, 2018).

52. *Id.*

53. *Id.*

54. Krisha McCoy, *What Causes Infertility in Men?*, EVERYDAY HEALTH (Feb. 24, 2010), www.everydayhealth.com/pregnancy/getting-pregnant/male-infertility.aspx.

55. *Id.*

56. Karande, *supra* note 49.

C. Embryos: The “Person” or “Property” Debate

An initial debate regarding frozen embryos in a custody proceeding is whether they are considered persons or property.⁵⁷ Courts have been hesitant to provide a solid classification for the embryos.⁵⁸ Perhaps this is because “embryo disposition is still a relatively new family law issue.”⁵⁹ However, some courts have decided to take action.⁶⁰ The decision as to whether frozen embryos are considered persons or property is necessary to determine what responsibilities each parent will have.⁶¹ Marital property has long been measured as the property obtained, by either spouse, during the duration of the marriage.⁶² Federal courts have tip toed around the question of when life begins, making the classification of embryos even harder to determine.⁶³ Time and time again, federal law has declined to classify the unborn as “whole persons” under the law.⁶⁴

1. Embryos as “Property”

Property is generally defined as “belongings of an individual” that are both tangible and intangible.⁶⁵ For the small number of states that have classified frozen embryos, the majority considers them property.⁶⁶ A New York court found that “the disposition of pre-zygotes does not implicate a woman’s right to privacy or bodily integrity in the area of reproductive choice.”⁶⁷ Therefore, “in a custody dispute over pre-zygotes, the relevant inquiry becomes who has dispositional authority over them,” because they are property rather than people.⁶⁸

57. Meghan Hamilton, *Embryos: People or Property?*, HUMANIST (Sept. 22, 2017), www.thehumanist.com/commentary/embryos-people-property.

58. Elizabeth A. Trainor, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253, 255 (2001).

59. Stolley Persky, *supra* note 8.

60. Trainor, *supra* note 58.

61. *Id.*

62. *McQueen v. Gadberry*, 507 S.W.3d 127, 148 (Mo. Ct. App. 2016).

63. *Roe*, 410 U.S. at 159 (explaining “we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer”).

64. *Doe v. Obama*, 670 F. Supp. 2d 435, 440 (S.D. Md. 2009).

65. *Personal Property*, THE LAW DICTIONARY, www.thelawdictionary.org/personal-property/ (last visited Feb. 3, 2019).

66. *I Did Not Consent to Further Use of Frozen Embryos – What Are My Rights?*, HG.ORG, www.hg.org/legal-articles/i-did-not-consent-to-further-use-of-frozen-embryos-what-are-my-rights-42438 (last visited Feb. 3, 2019).

67. *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998).

68. *Id.*

Similarly, Tennessee courts have reiterated “nor do pre-embryos enjoy protection as ‘persons’ under federal law.”⁶⁹ Consequently, they do not “possess independent rights under the law.”⁷⁰ In Oregon, a husband in a dissolution of marriage proceeding challenged a contractual agreement with his then wife regarding their frozen embryos.⁷¹ The agreement designated his wife with the “sole and exclusive” power to decide the fate of their frozen embryos, in the event of a disagreement between the parties.⁷² The husband considered the frozen embryos as “living things that he d[id] not want killed.”⁷³ The contract, however, allowed the wife to destroy them if she so chooses.⁷⁴ The Oregon appellate court upheld the trial court’s order to destroy the embryos reasoning, “the right to possess or dispose of the frozen embryos is personal property that is subject to a ‘just and proper’ division under [Oregon law].”⁷⁵

2. Embryos as “People”

Only one state has ventured to broaden the idea of people to include frozen fertilized egg cells.⁷⁶ Louisiana is the only state that classifies frozen embryos as people.⁷⁷ In 1986, Louisiana made an unprecedented move and adopted a law that states as follows:

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 ... which entitles such ovum to sue or be sued ... [and] is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum.⁷⁸

By classifying a viable frozen embryo as a person, Louisiana law grants them “certain rights” and forbids the intentional destruction of them.⁷⁹ Additionally, donating the embryos for

69. Davis v. Davis, 842 S.W.2d 588, 595 (Tenn. 1992).

70. *Id.*

71. In re Marriage of Dahl, 194 P.3d 834, 836 (N.Y. 2008) (providing “*If the CLIENTS are unable or unwilling to execute a joint authorization, the CLIENTS hereby designate the following CLIENT or other representative to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement*”) (emphasis in original).

72. *Id.*

73. *Id.* at 577.

74. *Id.* at 575.

75. *Id.* at 580.

76. Legal Status, LA. STAT. ANN. § 9:124 (2018); Greer Gaddie, *The Personhood Movement’s Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood*, 96 TEX. L. REV. 1293, 1295-96 (2018).

77. LA. STAT. ANN. § 9:124 (2018).

78. LA. STAT. ANN. §§ 9:123-124, 126 (2018); Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KPLC TV (Mar. 27, 2009), www.kplctv.com/story/10081861/the-fertility-dilemma-frozen-embryos/.

79. Glaser, *supra* note 78; *see also* LA. STAT. ANN. § 9:124 (2018)

research is also forbidden.⁸⁰ Every viable frozen embryo is to “end[] up inside someone’s uterus.”⁸¹

3. *Neither Persons nor Property*

While states like New York, Tennessee, and Oregon classify frozen embryos as property, and Louisiana considers them people, Missouri, for example, does not label them as either.⁸² Missouri takes the approach that frozen embryos are of “special character.”⁸³ Missouri defines property as “any external thing over which the rights of ... use ... are exercised,” and any obtained during the marriage of two individuals is considered marital property.⁸⁴ A woman appealed a Missouri trial court’s decision that defined her frozen embryos as “marital property of special character,” arguing that they were in fact her children.⁸⁵ Missouri’s appellate court upheld the trial court’s classification of the frozen embryos.⁸⁶ The special character aspect simply means that the frozen embryos “are to remain in their status quo” until both parties can agree as to their fate.⁸⁷ Therefore, any judgment in regards to the frozen embryos must be “consistent with the principle that frozen embryos are entitled to a special [care].”⁸⁸

D. *The Effect of Parental Separation on Frozen Embryos*

In the event that a couple separates, many decisions have to be made. Besides the usual splitting of assets and debts, now some couples face the decision of how they will “split” their frozen embryos. A divorced Iowa couple entered into a legal dispute

(establishing that a non-viable frozen embryo is “an in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation” and therefore not a juridical person).

80. LA. STAT. ANN. §§ 9:129, 130 (2018); *Embryo Cryopreservation Can Improve Your Chances of Becoming Pregnant*, FERTILITY INST., www.fertilityinstitute.com/our-services/other-services/embryo-cryopreservation (last visited Oct. 28, 2018).

81. Cynthia Gorney, *The Real-Life Dilemmas of Frozen Embryos*, WASH. POST (June 26, 1989), www.washingtonpost.com/archive/lifestyle/1989/06/26/the-real-life-dilemmas-of-frozen-embryos/756ad964-551b-4bf7-a8afe530b425d4b2/.

82. Lorraine Bailey, *Missouri Court Rules Frozen Embryos Are Not Children*, COURTHOUSE NEWS SERV. (Nov. 16, 2016), www.courthousenews.com/missouri-court-rules-frozen-embryos-are-not-children/.

83. *McQueen*, 507 S.W.3d at 132.

84. *Id.* at 148.

85. *Id.* at 136.

86. *Id.* at 132.

87. *Id.* at 149.

88. *Id.*

against one another over their frozen embryos.⁸⁹ The wife was highly opposed to the disposal or donation of the embryos, while the husband was not.⁹⁰ Iowa's highest court ruled that the frozen embryos were not considered children and therefore not subject to the child custody statute of the state.⁹¹ The court went on to say that the embryos are to remain their "status quo" until the, now separated, couple can "reach an agreement."⁹² In the meantime, the wife, "the party who opposed destruction," is solely responsible for "storage fees."⁹³

A slightly different outcome of the same situation occurred in Arizona. In 2018, Arizona passed a law, deemed the "first of its kind in the nation."⁹⁴ In the event that a dispute erupts over the "custody" of the embryos, the new law requires that they should be placed with the party who is "most likely to make them 'develop to birth.'"⁹⁵

In Louisiana, however, an entirely different outcome would be expected.⁹⁶ In 2013 a separated couple who had never married, Sofia Vergara and Nicholas Loeb, entered into a highly contested dispute over their frozen embryos.⁹⁷ Loeb is insistent on retaining custody of the frozen embryos so that he can "bring them to birth via a gestational carrier."⁹⁸ Shortly after bringing suit, Loeb voluntarily dismissed the suit, which was taking place in California, only to re-file in Louisiana, a coincidentally "pro-life state."⁹⁹ On January 9, 2018, Loeb filed this ongoing action on behalf of himself and the parties' two frozen embryos, "Human Embryo #3 HB-A and

89. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

90. *Id.* at 772-73.

91. *Id.* at 775-76.

92. *Id.* at 783.

93. *Id.*

94. Christina Cauterucci, *Why Anti-Abortion Groups Love Arizona's New Frozen-Embryo Law*, SLATE (July 19, 2018), www.slate.com/news-and-politics/2018/07/arizonas-new-frozen-embryo-law-is-terrible-news-for-couples-thinking-about-in-vitro-fertilization.html; see also *Arizona Passes Law To Dictate How Separated Couples' Frozen Embryos Can Be Used*, WBUR (Apr. 17, 2018), www.wbur.org/hereandnow/2018/04/17/arizona-frozen-embryos-law (asserting that the new law will "trump[] the contract that the two parties had...developed before, which had specified how they wanted to deal with the embryos post-divorce").

95. Cauterucci, *supra* note 94 (explaining "[t]he more laws that treat embryos as fully fledged human beings, advocates believe, the more grist courts will have to restrict abortion rights and criminalize women who terminate their pregnancies").

96. Legal Status, LA. STAT. ANN. § 9:124 (2018).

97. Shari Puterman, *Sofia Vergara Loses 'Custody Battle' Over Frozen Embryos*, USA TODAY (June 27, 2018), www.usatoday.com/story/life/people/2018/06/27/sofia-vergara-custody-battle-frozen-embryos-nick-loeb/73925002/.

98. Judith Daar, *Interest Groups Add New Element To Embryo Custody Battles*, LAW 360 (Feb. 3, 2016), www.law360.com/articles/753377/interest-groups-add-new-element-to-embryo-custody-battles.

99. Puterman, *supra* note 97.

Human Embryo #4 HB-A.”¹⁰⁰ Vergara maintained the position that the embryos should be kept in storage and motioned to remove the lawsuit to federal court on the constitutional issue of privacy.¹⁰¹ She also argued that Louisiana’s child custody statute affects living children only.¹⁰² The federal court was quick to remand the case back to Louisiana state court because the only issue left to be decided was the fate of the frozen embryos and that is a “state law custody claim over which federal courts lack jurisdiction.”¹⁰³

III. ANALYSIS

This section analyzes the benefits and consequences of considering frozen embryos as people, property, and property of “special character.” It examines what the legal result these definitions have, and could have, on couples.

A. *When Disposal Becomes Murder*

In previous decisions, courts have ordered or allowed couples to destroy their remaining frozen embryos in the event of divorce or separation.¹⁰⁴ However, if laws regulating abortion are given back to the states, states that would choose to criminalize abortion would also likely criminalize the destruction of frozen embryos.¹⁰⁵ Louisiana has already taken a step in that direction by classifying frozen embryos as people under the law.¹⁰⁶

One could be charged with criminal conspiracy, feticide, first-degree murder, or second-degree murder because they chose to dispose of their own frozen embryos that they and their soon to be former spouse created. In Louisiana, that looks to be the very likely outcome.¹⁰⁷ Criminal conspiracy in Louisiana is an agreement between two or more people with the “specific purpose” to commit a crime.¹⁰⁸ Individuals act with a “specific purpose” when the circumstances surrounding the event suggest they desired a

100. *Loeb v. Vergara*, No. 18-3165, 2018 U.S. Dist. LEXIS 115197, at *6 (E.D. La. July 11, 2018).

101. Nancy Dillon, *Sofia Vergara in Renewed Battle to Keep Frozen Embryo Lawsuit Out of Louisiana State Court*, DAILY NEWS (June 25, 2018), www.nydailynews.com/news/ny-news-nick-loeb-still-battling-sofia-vergara-over-embryos-20180625-story.html#.

102. Puterman, *supra* note 97.

103. Dillon, *supra* note 101; *Loeb*, No. 18-3165, 2018 U.S. Dist. LEXIS 115197 at *22.

104. *J.B. v. M.B.*, 783 A.3d 707, 719-20 (N.J. 2001); *Dahl*, 194 P.3d. at 841-42.

105. Legal Status, LA. STAT. ANN. § 9:124 (2018).

106. Glaser, *supra* note 78; Legal Status, LA. STAT. ANN. § 9:124 (2018).

107. LA. STAT. ANN. § 9:123 (2018).

108. LA. STAT. ANN. § 14:26(A); *State v. Hinton*, 6 So. 3d 242, 245 (La. App. 1st Cir. 2009).

particular criminal outcome.¹⁰⁹ However, an agreement to commit a crime will not be considered criminal conspiracy, unless one of the agreeing parties acts “in furtherance of the object of the agreement.”¹¹⁰ First-degree murder in Louisiana is the killing of another human being, *inter alia*, “when the offender has specific intent to kill ... upon a victim who is under the age of twelve,” while second-degree murder is the killing of another human being, with the same specific intent to kill or to inflict great bodily harm as required in first-degree murder.¹¹¹ Similarly, first-degree feticide is committed when an unborn child is killed and the offender had “a specific intent to kill or to inflict great bodily harm.”¹¹²

A study conducted by and reported in *The Association for Politics and the Life Sciences*, describes the nationwide disposal processes of frozen embryos.¹¹³ Of the 341 clinics that participated in the study, 217 of them engage in the practice of disposing embryos.¹¹⁴ A majority of those clinics mandate that both members of the couple give permission for the disposal, but some only require consent from one of the members.¹¹⁵ Once some type of consent is established, the clinic’s embryologist usually conducts the disposal process, but some clinics have other employees aid in the process as well.¹¹⁶ The remaining thirty-three clinics that participated in the

109. *Hinton*, 6 So. 3d at 245.

110. LA. STAT. ANN. § 14:26(a),(c)-(d) (2018) (resulting in the punishment being “[w]hoever is a party to a criminal conspiracy to commit any crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; provided, however, whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment shall be imprisoned at hard labor for not more than thirty years ...Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both”).

111. LA. STAT. ANN. § 14:30; § 14:30.1 (2018).

112. LA. STAT. ANN. § 14.32.6 (2018); LA. STAT. ANN. § 14.32.5 (2018) (defining feticide in Louisiana as “the killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child. The offense of feticide shall not include acts which cause the death of an unborn child if those acts were committed during any abortion to which the pregnant woman or her legal guardian has consented or which was performed in an emergency... Nor shall the offense of feticide include acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment,” which is punishable by no more than fifteen years of imprisonment).

113. Andrea D. Gurmankin, Dominic Sisti, & Arthur L. Caplan, *Embryo Disposal Practices in IVF Clinics in the United States*, 22 *POLITICS & LIFE SCIS.* 5 (2004).

114. *Id.* at 6.

115. *Id.*

116. *Id.* (reporting that the other employees besides embryologists that are “responsible” for disposal are physicians, nurses, or other technicians); *see also Embryologists*, FERTILITY SMARTS, www.fertilitysmarts.com/definition/

study do not engage in disposal practices for many reasons including that state laws prohibit it.¹¹⁷

In the event that a Louisiana couple chooses to dispose of their frozen embryos, whether it is because they are divorcing, they are getting too old, or they simply do not want to pay to maintain their embryos in storage any longer, the couple has taken their first step in planning out the “murder” of their embryos.¹¹⁸ As discussed in the study, some clinics require consent of both parties, while some only require consent from one of the parties.¹¹⁹ Louisiana law makes it clear that consent to disposal would be irrelevant, as a viable frozen embryo is a juridical person, which is not to be “intentionally destroyed by any natural or other juridical person through actions of any other such person.”¹²⁰ If some clinics decide to engage in the practice of disposing frozen embryos despite state laws, the couple or individual who has made the decision to dispose is, by definition, guilty of conspiracy to commit first or second-degree murder.¹²¹ The embryologist, and/or other employees of the clinic, physically disposing of the embryos are also, by definition, guilty of first or second-degree murder and first-degree feticide.¹²² The “specific purpose” element to commit any of the aforementioned crimes, is easily satisfied as both the embryologist and the parents of the frozen embryos desired a particular criminal outcome, the embryos be disposed of in a state that strictly prohibits it.¹²³

B. *Accidental Disposal*

In March of 2018, a tank storing 4,000 frozen embryos at University Hospital Ahuja Medical Center in Ohio malfunctioned and all 4,000 embryos were lost.¹²⁴ The malfunction was reportedly caused by human error and was completely avoidable.¹²⁵ The

1075/embryologist-fertility (last visited Oct. 28, 2018) (defining embryologist as “a reproductive health specialist, typically found in a fertility clinic or lab that is involved in reproductive research or fertility treatments” and “scientists who may facilitate testing, sample retrieval, and laboratory work for assisted reproductive technologies (ART) like in vitro fertilization (IVF”).

117. Gurmankin, *supra* note 113, at 7.

118. LA. STAT. ANN. § 14:30; § 14:30.1 (2018).

119. Gurmankin, *supra* note 113, at 6.

120. LA. STAT. ANN. § 9:129 (2018).

121. LA. STAT. ANN. § 14:26(A) (2018).

122. LA. STAT. ANN. § 14.30, 30.1, 32.6 (2018).

123. *Id.*

124. Christine Hauser, *4,000 Eggs and Embryos Are Lost in Tank Failure, Ohio Fertility Clinic Says*, N.Y. TIMES (Mar. 28, 2018), www.nytimes.com/2018/03/28/us/frozen-embryos-eggs.html.

125. Julia Jacobo, *Couple Argues that Lost Frozen Embryo Was a Person, Lawsuit States*, ABC NEWS (Aug. 13, 2018), abcnews.go.com/US/couple-argues-lost-frozen-embryo-person-lawsuit-states/story?id=56994691; *see also* Hauser, *supra* note 124 (explaining “[t]hese failures should not have happened, we take responsibility for them — and we are so sorry that our failures caused such a

storage tank temperatures rose to the point that made the embryos no longer viable.¹²⁶ The hospital explained that there is an alarm system that notifies staff members if that situation ever arises, but in this case the alarm had been manually turned off and failed to alert the staff.¹²⁷

Among the individuals and couples affected by this catastrophic failure were Wendy and Rick Penniman.¹²⁸ The Pennimans decided to freeze their embryos so that they could have the option of having a child sometime in the future.¹²⁹ Due to the negligent handling at the Ohio hospital, that is no longer an option for them and many others.¹³⁰ The Pennimans sued the hospital and asked the judge to legally declare their frozen embryos as people.¹³¹ Shortly thereafter, a Cuyahoga County judge not only dismissed the complaint, but also opined that frozen embryos “did not deserve the same legal protections as a child.”¹³² The Pennimans warned that this ruling is not the end of their efforts to classify their lost frozen embryos as lost people under the law.¹³³

1. *Negligent Homicide*

Assuming arguendo, the Ohio hospital was actually located in Louisiana, the Pennimans would have had a much different outcome.¹³⁴ Louisiana criminalizes the conduct of an individual that “amounts to gross deviation” from that of a reasonable person, which results in the killing of a human being, as negligent homicide.¹³⁵ Negligent homicide is punishable by up to five years in prison, a fine of no more than \$5,000, or both.¹³⁶

The employees of the hospital in Ohio failed to fulfill their duties which led to the inadvertent disposal of over 4,000 frozen embryos.¹³⁷ Since an employee was reportedly the source of the alarm system malfunction, it can be concluded that the employee’s conduct deviated from that of which is reasonably expected from someone employed by the hospital.¹³⁸ In fact, couples and individuals alike are paying to ensure that one day their embryos

devastating loss for you”).

126. Jacobo, *supra* note 125.

127. Hauser, *supra* note 124.

128. Jacobo, *supra* note 125.

129. *Id.*

130. Hauser, *supra* note 124.

131. Jacobo, *supra* note 125.

132. *Id.*

133. *Id.*

134. LA. STAT. ANN. § 9:123-124, 126 (2018).

135. LA. STAT. ANN. § 14:12 (2018); LA. STAT. ANN. § 14:32 (2018).

136. *Id.*

137. Hauser, *supra* note 124.

138. *Id.*

can make them parents.¹³⁹ One parent, Kate Plants, explained that the no longer viable frozen embryos were her “future children.”¹⁴⁰ Due to the current state of Louisiana law, it can be assumed that the employees in this case could be prosecuted for negligent homicide.

2. Wrongful Death

Currently, the issue has evolved into how can grieving couples and individuals be compensated for this tragic, perhaps “negligent” mistake? Dave Sierra and his wife lost all of their embryos and explained, “[the hospital] can't replace what they took. ... Nobody is going to get back the eggs they ruined.”¹⁴¹ In an effort to find some type of relief, the Pennimans’ goal in seeking the judge to declare their frozen embryos as people was to use the ruling to ignite a wrongful death claim against the hospital.¹⁴² Despite the dismissal of the case, Ohio Supreme Court precedent still states that for purposes of Ohio’s wrongful death statute “a viable fetus which is negligently injured *en ventre sa mere* [in the mother’s womb], and subsequently stillborn” may have a right to a wrongful death claim.¹⁴³ This precedential decision concerned a viable fetus inside the mother’s womb, but the court also recognized that medical developments within reproductive technology were on the horizon.¹⁴⁴ The court further noted that this “concept” of viability will become hard to apply once technology is advanced enough to keep a fetus viable outside of the mother’s womb.¹⁴⁵ Thirty-three years later, Ohio’s highest court was right, it is “increasingly difficult” to apply this outdated “concept” today as the parents of 4,000 embryos are desperate for relief.¹⁴⁶

In 2005, Illinois, a state that has not explicitly ruled on the classification of frozen embryos, ruled a frozen embryo is a “human being” for “purposes of the Wrongful Death Act.”¹⁴⁷ In 2006, Illinois,

139. Randi Kyle & Michael Nedelman, ‘Our Future Children’: Families Speak After Loss of Frozen Embryos in Tank Failure, CNN (May 12, 2018), www.cnn.com/2018/05/12/health/ohio-fertility-clinic-embryos-families/index.html.

140. *Id.*

141. *Id.*

142. *Thousands of Unique Human Beings Die After Fertility Clinic Has Storage Tank Malfunction*, LIFENEWS (Apr. 4, 2018), www.lifenews.com/2018/04/04/thousands-of-unique-human-beings-die-after-fertility-clinic-has-storage-tank-malfunction/.

143. *Werling v. Sandy*, 17 Ohio St. 3d 45, 45 (1985); see also *En Ventre Sa Mere Law and Legal Definition*, USLEGAL, definitions.uslegal.com/en-ventre-sa-mere/ (last visited Oct. 28, 2018) (defining *en ventre sa mere* as inside the mother’s womb).

144. *Werling*, 17 Ohio St. 3d at 48.

145. *Id.*

146. *Id.*; Kyle & Nedelman, *supra* note 139.

147. Sherry Colb, *Judge Rules Frozen Embryos Are People*, CNN (Feb. 23,

Georgia, Louisiana, Missouri, South Dakota, and West Virginia, were the only six states that allowed frozen embryos to be considered people for purposes of wrongful death claims.¹⁴⁸ As a constant reminder of the inconsistent views between the states in 2006, Arizona dismissed a wrongful death action against a fertility clinic that “misplaced” a couple’s frozen embryos while transferring them to a different clinic.¹⁴⁹ The court reasoned that frozen embryos are not “persons” for purposes of the Arizona Wrongful Death Act.¹⁵⁰

When considering wrongful death, the disparities between states reinforces the need for a uniform law. Critics of viewing pre-embryos as people for wrongful death claims have professed their frustration as they “worry about its potential implications for the right to abortion.”¹⁵¹ While believing that this could have a complex effect on abortion rights, critics have recognized that there is a need for some type of remedy for these grieving parents.¹⁵²

C. *The Right to Parent (or Not)*

For the couples who preserved their embryos and then separated, who gets the frozen embryos? Courts today are facing couples who have differing opinions as to the fate of their embryos and deciding the ultimate outcome has headlined the news. Federal courts have held that there is a fundamental right to parent dating as far back as 1925.¹⁵³ In *Meyer v. Nebraska*, the United States

2005), www.cnn.com/2005/LAW/02/23/colb.embryos/index.html; see also *Judge: Couple Can Sue Over Discarded Embryo*, NBC NEWS (Feb. 5, 2005), www.nbcnews.com/id/6919010/ns/us_news/t/judge-couple-can-sue-over-discarded-embryo/#.W9UYZRKjow (declaring in an Illinois wrongful death claim, “a pre-embryo is a ‘human being’ ... whether or not it is implanted in its mother’s womb”).

148. Amber N. Dina, *Wrongful Death And The Legal Status Of The Preivable Embryo: Why Illinois Is On The Cutting Edge Of Determining A Definitive Standard For Embryonic Legal Rights*, 19 REGENT U. L. REV. 251, 255-56 (2006); see also LA. CIV. CODE ANN. art. 2315.2 (2018) (allowing “the surviving father and mother of the deceased, or either of them if he left no spouse or child surviving” may bring a wrongful death action if their child “dies due to the fault of another”).

149. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389-90 (Ariz. Ct. App. 2005).

150. *Id.* at 393.

151. Colb, *supra* note 147.

152. *Id.* (explaining “the law could recognize a cause of action analogous to one for wrongful death, that would compensate the “parents” of an embryo for its destruction. Such a cause of action would honor their pain ... [but would] produce a potentially crippling litigation burden for fertility clinics”).

153. Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as “Fundamental”*, HOME SCHOOL LEGAL DEF. ASS’N (Oct. 27, 2003), www.hslda.org/content/docs/nche/000000/00000075.asp. In the 1925 case of *Pierce v. Society of Sisters*, the United States Supreme Court upheld the “recognition” that *Meyer v. Nebraska* gave to the fundamental right parents have to direct the upbringing of their children. *Id.* The Court held that Oregon law mandating that all school aged children must attend public schools

Supreme Court held that the Fourteenth Amendment guarantees an individual’s right to “establish a home and bring up children.”¹⁵⁴ Two decades later the fundamental right to parent was upheld in *Griswold v. Connecticut*, and the Court struck a law that restricted a married couple from purchasing contraceptives explaining that couples have the right to decide when they want to become parents.¹⁵⁵ This precedent suggests that if one member of the couple wants to implant the frozen embryos, but the other does not, forcing the other to become a biological parent will not be favored by courts.

¹⁵⁶

Sofia Vergara and her then boyfriend, Nicholas Loeb, thought that preserving their embryos and having a surrogate carry them at a later date, would give them the chance to be parents.¹⁵⁷ However, before the embryos had a chance at life, the couple separated.¹⁵⁸ One issue remains between the pair: what will happen to their previously frozen embryos?¹⁵⁹ Loeb wishes to retain custody of the embryos and implant them in a surrogate; however, Vergara would like them to be kept frozen indefinitely.¹⁶⁰

A now separated Colorado couple, Drake and Mandy Rooks, are in a similar position.¹⁶¹ Mandy hopes to use their frozen embryos to have more children in the future, but Drake wants them destroyed, as the couple is no longer together.¹⁶² Both Louisiana and Colorado will be faced with the decision of the fate of both of these couples’ embryos.¹⁶³ If the courts decide that the embryos go to Loeb and Mandy, there is a real chance that both Vergara and Drake will be

“unreasonably interfere[s] with the liberty of parents and guardians to direct the upbringing and education of children.” *Id.*

^{154.} *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invalidating a Nebraska law that criminalized teaching children any language other than English until they passed eighth grade); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (including in an individual’s right to parent the right to decide when they become parents).

^{155.} *Griswold*, 381 U.S. at 480.

^{156.} *Id.*

^{157.} Mona Charen, *Sofia Vergara, Frozen Embryos and Forced Procreation*, CREATORS (Jan. 12, 2018), www.creators.com/read/mona-charen/01/18/sofia-vergara-frozen-embryos-and-forced-procreation.

^{158.} *Id.*

^{159.} *Id.*

^{160.} *Id.*

^{161.} Andrew Fies, *Divorced Couple Take Their Fight Over Frozen Embryos to Colorado Supreme Court*, ABC NEWS (Jan. 10, 2018), www.abcnnews.go.com/US/divorced-couple-fight-frozen-embryos-colorado-court/story?id=52270585

(explaining that Mandy and Drake married in 2002 and used IVF in order to have children). They successfully had three children through IVF and froze the remaining embryos. *Id.* Over a decade later, the couple decided to divorce. *Id.* The couple signed a contract, prior to freezing their embryos that indicated the fate of their frozen embryos would be “left [] up to courts to decide who should get the embryos if the marriage dissolved.” *Id.*

^{162.} *Id.*

^{163.} *Id.*

forced to become biological parents as the embryos contain DNA of both parents.¹⁶⁴ In *Griswold*, the Supreme Court held that people have a right to decide when they become parents; however, it is unclear whether that same logic will apply to a couple who is in possession of viable fetuses but only one wants to parent them.¹⁶⁵

IV. PROPOSAL

While laws surrounding the disposition of frozen embryos are still uncertain, there are several things that *are* certain. Reproductive technology is only going to improve, providing individuals who cannot conceive naturally the chance to become parents, and if the past is any prediction of the future, the American divorce rate is on a steady incline. As analyzed to date, states either consider frozen embryos as people, property, something in between people and property, or have not defined them at all.¹⁶⁶ The lack of uniformity between the states, and sometimes within a single state, without any input by the federal government, is the driving force behind the chaotic legal disputes regarding frozen embryos.¹⁶⁷

This Comment proposes two alternatives that the federal government can implement as a way to bring order to this chaos. First, a uniform federal law declaring frozen embryos as a “unique person,” somewhat mirroring what the Missouri court decided in *McQueen* and the Tennessee court in *Davis*.¹⁶⁸ In addition to, or in the alternative, this Comment proposes a universal contract containing precisely what is to be done with a given couple’s embryos in the event of, but not limited to, a couple’s separation, that is enforceable and honored in every federal and state court.

A. *The “Unique Person” Law*

Creating a federal law that provides a blanket classification of frozen embryos eliminates the reality that one couple who is getting divorced could be held criminally liable in one state, like Louisiana, for disposing their embryos, while that same couple one state over

164. See Charen, *supra* note 157 (explaining “it kind of runs against all decency — forcing a parent to have a child they don’t want”).

165. *Griswold*, 381 U.S. at 479.

166. *Kass*, 696 N.E.2d at 180; *McQueen*, 507 S.W.3d at 158; LA. STAT. ANN. § 9:124.

167. *The Legal Uncertainty Surrounding the Disposition of Frozen Embryos in American Divorce Proceedings*, MACELREE HARVEY, www.macelree.com/the-legal-uncertainty-surrounding-the-disposition-of-frozen-embryos-in-american-divorce-proceedings/ (last visited Nov. 17, 2018) (stating that without the implementation of a uniform law, every frozen embryo dispute will be decided based on the “personal views of the presiding judge”).

168. *McQueen*, 507 S.W.3d at 158; *Davis*, 842 S.W.2d at 596-97.

could be ordered by the court to dispose of them.¹⁶⁹ Why propose a law that classifies a frozen embryo as a “unique person” instead of people or property? This Comment has explored in depth the implications of classifying frozen embryos as people. Those implications can result in harsh consequences in general, but especially for couples that separate and decide to dispose of their frozen embryos. In effect, the consequences serve as a deterrent for those couples that are thinking about freezing their embryos but understand that the future of any relationship is never certain.

Upon divorce, or separation if the parties were not married, there are usually items like a car, microwave, or a television that need to be assigned to the correct party before the couple parts ways. The items previously listed are property, and more specifically personal property.¹⁷⁰ Cars, microwaves, and televisions are made up of materials like plastic and metal. Frozen embryos on the other hand are human cells that have “the potential to become born children.”¹⁷¹ Frozen embryos require the exposure to cytoprotectants and must be stored in temperatures as low as -321° Fahrenheit.¹⁷² The distinction between the definition of a car, personal property, and the definition of a frozen embryo is enough to warrant a frozen embryo the classification of something other than “property.”

Similarly, a frozen embryo, by its terms, is not a person.¹⁷³ Congress has defined a person as a human being, child, and individual who has been “born alive.”¹⁷⁴ To be born alive a person has been completely extracted from his or her mother’s womb and has taken a breath, has a heartbeat, or has made a “definite movement of voluntary muscles.”¹⁷⁵ A frozen embryo has not met the criteria of a person as defined by the federal government.¹⁷⁶ In fact, while a frozen embryo can be seen as in the first stages of the biological human development, there is no guarantee that frozen embryos will one day be born alive.¹⁷⁷ That begs the question,

169. LA. STAT. ANN. § 9:124.

170. *Personal Property*, BUS. DICTIONARY, www.businessdictionary.com/definition/personal-property.html (last visited Nov. 12, 2018) (defining personal property as “movable and includes tangible (appliances, car, furniture, jewelry) and intangible (bonds, right to a benefit, shares or stocks) items whose ownership belongs to the individual”).

171. *McQueen*, 507 S.W.3d at 149 (explaining that frozen embryos are warranted to “special respect” because “though frozen pre-embryos may never realize their biologic potential, even if implanted, they are unlike traditional forms of property or external things because they are comprised of a woman and man’s genetic material, are human tissue, and have the potential to become born children”).

172. *Embryo Cryopreservation: Procedure Details*, *supra* note 38.

173. 1 U.S.C. § 8 (2018).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Frequently Asked Questions About Frozen Embryo Transfers*, SHADY

should someone be held criminally or civilly liable for mishandling or disposing of a frozen embryo, in the same way as if they were to do the same to a living person? The answer is clear – no.

Couples who are in the midst of divorcing and separating go through an emotional time. Separation often causes disputes and it is likely that couples will make rash decisions during this time. The fate of frozen embryos is a decision that must be thought through carefully and decided by *both* parties. Giving frozen embryos the status of “unique person” gives them a heightened sense of respect and consideration by the courts. The court will not treat them as children but will allow the frozen embryos to maintain their status quo until the couple can come to an agreement regarding their fate. This creates an incentive for the couples to come to an agreement, as they will still be paying for their frozen embryos to maintain their status quo until a decision is made. Additionally, giving the classification of “unique person” to frozen embryos allows couples to come to their decision without any penalty. If couples choose to dispose of their embryos, donate them, put them up for adoption, or continue to preserve them, no state law will be able to criminally punish a couple, as a “unique person” does not meet the criteria of a person in any state. Finally, the “unique person” law does not leave any member of the couple as the sole decision maker when it comes to the fate of the embryos. Both members of the couple must agree before the court releases the power back into the hands of the couple.¹⁷⁸

B. *The Universal Contract*

Most, if not all, fertility clinics require couples to sign contracts prior to beginning the process of creating embryos and then freezing them.¹⁷⁹ These contracts usually include language of what is to happen with the frozen embryos in the event of death of one or both members of the couple or divorce or separation of the couple.¹⁸⁰ Yet,

GROVE FERTILITY (Sept. 11, 2017), www.shadygrovefertility.com/blog/treatments-and-success/frequently-asked-questions-about-frozen-embryo-transfers/ (reporting that when women are younger than thirty-five, there is a sixty percent chance of a successful transfer of the frozen embryo into the woman’s uterus, however, not every successful transfer results in a child being born alive).

¹⁷⁸ Puterman, *supra* note 97 (analyzing that had this “unique person” law been in place, the highly complex dispute between Sophia Vergara and Nicholas Loeb would be much simpler. There would be no gray area as to whether Loeb could take the embryos and implant them into a surrogate despite Vergara’s opinion. The frozen embryos would, and as they are as of right now, remain in storage until both of them can come to the agreement as to the embryos’ fate).

¹⁷⁹ Szafranski v. Dunston, 34 N.E.3d 1132, 1141 (Ill. App. Ct. 2015).

¹⁸⁰ *Id.* at 1164 (upholding that an oral agreement had been made between the parties in which the girlfriend would have control and custody of the frozen embryos).

the enforceability of contracts is different in every state. Creating a universal contract simply means that regardless of the state the contract is being enforced in, that state cannot refuse to enforce it if it would be deemed against public policy in their state. For example, enforcing a California contract that states the embryos are to be disposed of in the event of a divorce in Louisiana would be against Louisiana’s public policy. The universal contract provides a solution, and the contract would have to be enforced in states like Louisiana.¹⁸¹

The goal of implementing either, or both, the “unique person” law or a universal contract is to force couples to agree either before or after they freeze their embryos of the fate their embryos will have in the event of an unforeseen circumstance such as divorce or separation. It also precludes punishment if the couple decides to dispose of them, as becoming a parent, or not, is a right every person has, as established by the United States Supreme Court.¹⁸² No one member of the couple should have the power to be the sole decision maker over the frozen embryos, and these two proposed solutions seek to prevent that.

V. CONCLUSION

The innovative technique of freezing embryos gives men and women a chance to become parents.¹⁸³ When freezing embryos became possible, the idea of future conflict regarding them was nowhere in sight, but that is no longer the case. The primary issue regarding frozen embryos is their fate in the event of a dispute, separation, or divorce between the couple. In an effort to aid this problem states started creating laws, as well as using their current laws to govern the disputes.¹⁸⁴ However, this just added to the

181. Puterman, *supra* note 97 (hypothesizing if the universal contract law was currently in place, the dispute between Sofia Vergara and Nicholas Loeb would be non-existent. Loeb’s argument that the California contract between himself and Vergara is against public policy and therefore unenforceable in the state of Louisiana would fail).

182. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (finding that the Due Process Clause of the Fourteenth Amendment requires that “before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence”).

183. *Preserving Fertility in Women With Cancer*, AM. CANCER SOC’Y, www.cancer.org/treatment/treatments-and-side-effects/physical-side-effects/fertility-and-sexual-side-effects/fertility-and-women-with-cancer/preserving-fertility-in-women.html (last visited Nov. 17, 2018) (explaining that one reason why freezing embryos has given couples a second chance at becoming parents is that women who have to undergo cancer treatment are not able to conceive naturally after the fact, but freezing their embryos give them, and their partner, a second chance at becoming parents).

184. *Kass*, 696 N.E.2d at 180; *McQueen*, 507 S.W.3d at 158; LA. STAT. ANN. § 9:124.

conflict.

States took it upon themselves to classify frozen embryos as people, property, property of a special character, or nothing at all.¹⁸⁵ The importance of classification is pivotal as that is what governs the fate of disputing couples' frozen embryos. The large disparity between state law, or lack thereof, has only fueled this fight. Without any uniform law in place, courts will continue to decide cases on a decision-by-decision basis, not drawing upon on any "established legal precedent."¹⁸⁶ The federal government has the power to end the discrepancies between state laws, yet they have not stepped in. Now, more than ever, is the time for Congress to unite the country on the issue of the disposition of frozen embryos. This unity can be made possible through the implementation of either the "Unique Person" law or the Universal Contract.

185. *Kass*, 696 N.E.2d at 180; *McQueen*, 507 S.W.3d at 158; LA. STAT. ANN. § 9:124.

186. *The Legal Uncertainty Surrounding the Disposition of Frozen Embryos in American Divorce Proceedings*, *supra* note 167.