

# Oklahoma Law Review

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Volume 65 | Number 2

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2013

## The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies

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### Recommended Citation

Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 OKLA. L. REV. 177 (2013), <https://digitalcommons.law.ou.edu/olr/vol65/iss2/1>

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# OKLAHOMA LAW REVIEW

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VOLUME 65

WINTER 2013

NUMBER 2

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## THE NEXT BATTLEGROUND? PERSONHOOD, PRIVACY, AND ASSISTED REPRODUCTIVE TECHNOLOGIES

MARK STRASSER\*

### *I. Introduction*

Personhood statutes and amendments have been proposed in several states.<sup>1</sup> Generally, they establish as a matter of law that legal personhood begins at conception. Such laws may have implications for state policies concerning abortion and contraception, depending upon whether or how certain murky issues in current privacy jurisprudence are ultimately resolved, and will have implications for other areas of law including state policies related to assisted reproductive technologies. Yet, some of the ways these different areas of law might be affected are not well understood.

Part II of this article discusses current privacy jurisprudence, suggesting that abortion jurisprudence has become destabilized and that personhood amendments could limit access to abortion, or even contraception, if privacy jurisprudence continues down certain paths suggested in the case law. Part III discusses some of the ways assisted reproductive technologies jurisprudence would be affected in states adopting personhood

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\* Trustees Professor of Law, Capital University Law School, Columbus, Ohio. I would like to thank Professor Susan Looper-Friedman for her discussions of these and related issues.

1. See, e.g., John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1024-25 (2011) (discussing personhood amendment ballots in Colorado and Mississippi); Sean Murphy, *'Personhood' For Embryos Sought: November Election Measures Proposed*, OKLAHOMAN, Jan. 17, 2012, at 11A ("A ballot measure that would criminalize abortion by granting 'personhood' status to a human embryo is one of nearly a dozen proposals that Oklahoma lawmakers want to send to voters in November.").

amendments. This article concludes that personhood amendments, if adopted, might affect existing law in a number of ways that are neither adequately discussed in legal or popular literature nor adequately appreciated by the very individuals voting on whether to adopt such amendments.

## II. Privacy Jurisprudence

Current right to privacy jurisprudence protects rights to contraception and abortion.<sup>2</sup> State laws declaring that personhood begins at conception would not in themselves modify federal guarantees, and thus such laws appear to pose no threat to privacy rights guaranteed by the federal constitution. However, current privacy jurisprudence is in flux and such amendments might affect the breadth of rights to abortion and contraception depending upon developments in case law. In any event, a modification in privacy jurisprudence, for example, because of a change in the Supreme Court's composition, could greatly increase the legal effects of personhood legislation.

### A. Abortion Jurisprudence

*Roe v. Wade* is the foundational case in current abortion rights jurisprudence.<sup>3</sup> There, the Court held not only that there was a constitutionally protected right to obtain an abortion without undue interference from the State, but also that the states were precluded from legislatively defining the status of the fetus in such a way as to undermine the right to abortion.<sup>4</sup>

At issue in *Roe* was a Texas law prohibiting abortion unless performed to save the pregnant woman's life.<sup>5</sup> Jane Roe<sup>6</sup> sought a declaratory judgment that the Texas statute was unconstitutional.<sup>7</sup> Roe could not obtain a safe,

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2. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

3. See 410 U.S. 113.

4. *Id.* at 162-64.

5. *Id.* at 117-18.

6. "Jane Roe" was a pseudonym. *Id.* at 120 n.4. The woman's real name was Norma McCorvey. Lynn M. Paltrow, *Missed Opportunities in McCorvey v. Hill: The Limits of Pro-Choice Lawyering*, 35 N.Y.U. REV. L. & SOC. CHANGE 194, 196 (2011) (discussing "Norma McCorvey, the original 'Jane Roe' in *Roe v. Wade*").

7. *Roe*, 410 U.S. at 122.

legal abortion in Texas and was too poor to travel to another state to obtain one.<sup>8</sup>

The Court addressed the State's interest in "protecting prenatal life," including "the theory that a new human life is present from the moment of conception."<sup>9</sup> Such a theory might be thought to suggest that "[o]nly when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail."<sup>10</sup> However, the Court offered two reasons to reject that such a theory should govern when abortions are permissible.

First, the Court denied that it was clear human life begins at the moment of conception.<sup>11</sup> The Court discussed the

confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.<sup>12</sup>

Thus, the consensus was not that the fetus's life began at conception.<sup>13</sup> Instead, although there was agreement that the fetus's life began sometime before birth, there was no consensus about the particular point during the pregnancy at which life began.<sup>14</sup> Indeed, the Court noted that according to some traditions, life began earlier for males than for females.<sup>15</sup> This lack of agreement that life began at conception undercut the claim that the Constitution embodied such an understanding.

Regardless of when the fetus's life might be thought to begin, a separate question is whether the fetus is a person for purposes of the Fourteenth Amendment. The *Roe* Court suggested that the resolution of the fetus's personhood could be dispositive with respect to whether the Constitution

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8. *Id.* at 120.

9. *Id.* at 150.

10. *Id.*

11. *Id.* at 133.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.* at 134 ("Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female.").

protected the right to obtain an abortion because if “personhood [was] established, the appellant’s case . . . collapse[d], for the fetus’ right to life would then be guaranteed specifically by the Amendment.”<sup>16</sup>

Yet, it is not at all clear that States would be precluded from permitting abortions in non-life-threatening circumstances, even if the fetus were a person for Fourteenth Amendment purposes. As Professor Gelman pointed out, the right to self-defense is triggered not only when one’s life is endangered, but also when one’s health is in need of protection.<sup>17</sup> But if self-defense includes the right to protect one’s health, then self-defense might be used to justify a woman obtaining an abortion both when continuing the pregnancy would endanger her life and under other circumstances. Further, there is no requirement that the individual posing a serious threat of harm have the subjective intent to produce the endangered person’s injury or death.<sup>18</sup> For example, an individual who is delusional (and thus might not intend to harm another human being) may be subjected to lethal force if that person nonetheless poses a threat of serious harm.<sup>19</sup> The self-defense rationale would seem to justify an abortion in a case in which the pregnancy posed severe but non-life-threatening risks to health.<sup>20</sup>

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16. *Id.* at 156-57.

17. Sheldon Gelman, “*Life*” and “*Liberty*”: *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 698 (1994) (discussing “the historic right of life, which includes limb, health, and indolency of body”).

18. See Stephen G. Gilles, *Roe’s Life-or-Health Exception: Self-Defense or Relative-Safety?* 85 NOTRE DAME L. REV. 525, 537 (2010) (“It could be argued that the analogy is defective because fetuses, far from being deliberate aggressors, are entirely innocent—indeed, are not even voluntary actors.”).

19. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 339 n.127 (2007) (“States can certainly allow for self-defense, even against so-called ‘innocent attackers’ who don’t realize the threat they pose to others.”); Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to “Future Generations”? Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1608 (2009) (“In law and in moral philosophy, however, it is widely accepted that the justification of self-defense does not depend on the guilt or culpability of the ‘attacker.’”); Gilles, *supra* note 18, at 537 (“Self-defense law generally authorizes the use of deadly force if an actor reasonably believes that he or she is in imminent danger of death or serious bodily harm.”).

20. Some commentators do not seem to appreciate this point. See Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 565 (2009) (“[A] non-life-saving abortion is unlawful lethal force if the embryo or fetus is a person, because the embryo or fetus did not exert lethal force against the woman.”); Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 170 (2009) (“If prenatal humans are constitutional persons, . . . the text of the Fourteenth Amendment, combined with other

However, while recognition of fetal personhood might not limit abortion permissibility to only when the pregnant woman's life was endangered, recognition of fetal personhood would nonetheless significantly modify the current jurisprudence. Because the use of lethal self-defense requires proportionality so that the user of force would have suffered serious harm had the defense not been employed,<sup>21</sup> such a model would require a showing of potential harm that is not now required for abortions before the fetus has attained viability.<sup>22</sup>

In any event, it was not necessary for the Court to decide the degree to which the Fourteenth Amendment imposed limits on abortion rights. The *Roe* Court found both that the fetus was not a person for purposes of the Fourteenth Amendment<sup>23</sup> and that the right to obtain an abortion was protected by the right to privacy.<sup>24</sup> However, the Court's holding that the Fourteenth Amendment protected abortion, but not the fetus, did not mean that abortion had to be provided on demand<sup>25</sup> because the State had interests in protecting "potential life."<sup>26</sup> Because of the "important state interests in regulation," the right to abortion "is not unqualified."<sup>27</sup>

There are two distinct state interests justifying the regulation of abortion: (1) protecting the life and health of the pregnant woman and (2) protecting the potential life represented by the fetus.<sup>28</sup> The *Roe* Court explained that

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standard legal doctrines, would require the State to ban all abortions—even those necessary to save the life of the mother.”).

21. *See* *Commonwealth v. Demapan*, 2008 MP 16, ¶ 29, No. 4-0006-GA, 2008 WL 3982060, at \*8 (N. Mar. I., Aug. 15, 2008) (“[I]n order to justifiably claim self-defense in exercising physical force, the following factors must be satisfied: (1) the defendant must have a reasonable fear of imminent danger; (2) the defendant may only use force against an unlawful aggressor; (3) the defendant's use of force must be necessary; and (4) the defendant's use of force must be proportional to the aggressor's use of force.”).

22. Current jurisprudence suggests that a State cannot prohibit abortion of a viable fetus unless it includes an exception to protect the health of the pregnant woman. *See* *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

23. *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

24. *Id.* at 153 (noting that the “right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy”).

25. *See Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (“The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”).

26. *Roe*, 410 U.S. at 150.

27. *Id.* at 154.

28. *See id.* at 170.

“[w]ith respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.”<sup>29</sup> The Court reasoned that “until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.”<sup>30</sup> After that “a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health,” such as by regulating who might perform the abortion and where it might be performed.<sup>31</sup>

The State also has an interest in protecting the fetus itself, which increases in significance as the pregnancy progresses.<sup>32</sup> The Court noted, “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”<sup>33</sup> Once the fetus is viable, the State “may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”<sup>34</sup> However, after announcing this basic framework for analyzing abortion regulation, the *Roe* Court explained that a State could not “override the rights of the pregnant woman that are at stake” through the expedient method of “adopting one theory of life,” for example, by passing legislation declaring that life begins at conception.<sup>35</sup>

In *Webster v. Reproductive Health Services*, the Court again examined the effect of a state definition of when life began.<sup>36</sup> At issue was a provision containing “‘findings’ by the [Missouri] state legislature that ‘[t]he life of each human being begins at conception,’ and that ‘unborn children have protectable interests in life, health, and well-being.’”<sup>37</sup> The Act provided that “all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court’s precedents.”<sup>38</sup>

The *Webster* Court made clear how such a statute should be construed. While a State cannot “‘justify’ an abortion regulation otherwise invalid

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29. *Id.* at 163.

30. *Id.*

31. *Id.*

32. *See id.* at 163-64.

33. *Id.* at 163.

34. *Id.* at 163-64.

35. *Id.* at 162.

36. 492 U.S. 490 (1989).

37. *Id.* at 501 (quoting MO. REV. STAT. §§ 1.205.1(1)-(2) (1986)).

38. *Id.* (citing MO. REV. STAT. § 1.205.2).

under *Roe v. Wade* on the ground that it embodied the State's view about when life begins,<sup>39</sup> such a limitation does not preclude a State from affording "protections to unborn children in tort and probate law."<sup>40</sup>

As a separate matter, the *Webster* plurality expressed misgivings about *Roe*'s trimester framework, noting that "the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does."<sup>41</sup> Those misgivings were cited with approval by the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the trimester framework was rejected.<sup>42</sup>

The plurality in *Casey* rejected the "rigid" trimester framework because it was not necessary to assure that "the woman's right to choose [would] not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."<sup>43</sup> Nonetheless, the *Casey* plurality claimed to reaffirm the three parts of "*Roe*'s essential holding":

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>44</sup>

The Court focused on viability for a few different reasons. First, some of the factual predicate had changed in the intervening years.<sup>45</sup> The Court explained that "time ha[d] overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow[ed] for abortions safe to the mother later in pregnancy than was true in 1973."<sup>46</sup> Further, "advances in neonatal

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39. *Id.* at 506 (explaining dictum in *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444 (1983)).

40. *Id.*

41. *Id.* at 518.

42. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) (citing *Webster*, 492 U.S. at 518).

43. *Id.* at 872.

44. *Id.* at 846.

45. *See id.* at 860.

46. *Id.* (citing *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 429 n.11 (1983)).



care ha[d] advanced viability to a point somewhat earlier.”<sup>47</sup> However, the plurality did not believe that the medical advances undermined the central holding that “viability mark[ed] the earliest point at which the State’s interest in fetal life [was] constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”<sup>48</sup> To some extent, the *Casey* plurality focused on viability for the sake of drawing a line that would be clear to the states and to the courts. “Liberty must not be extinguished for want of a line that is clear.”<sup>49</sup>

The *Casey* plurality understood that “abortion regulations interfere to some degree with a woman’s ability to decide whether to terminate her pregnancy,” and offered “the undue burden standard [as] the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”<sup>50</sup> However, unless spelled out more clearly, such a standard will not afford much protection for liberty. The plurality offered the following definition: “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>51</sup>

The “purpose or effect” language seems to offer robust protections for early abortions, although the *Casey* plurality was not thereby prohibiting all regulation of abortions prior to fetal viability. The Court held that:

Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.<sup>52</sup>

Thus, the State is permitted to express its strong preference for life as long as it does not impose too great a burden on a woman’s ability to obtain an abortion by doing so.

*Casey* was cited with approval in *Stenberg v. Carhart*, where the Court refused to “revisit” the principles laid down in *Roe* and *Casey* and instead sought to “apply them to the circumstances.”<sup>53</sup> At issue was a Nebraska law

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47. *Id.* (comparing *Roe v. Wade*, 410 U.S. 113, 160 (1973), with *Webster*, 492 U.S. at 515-16).

48. *Id.*

49. *Id.* at 869.

50. *Id.* at 875-76.

51. *Id.* at 878.

52. *Id.* at 877.

53. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

prohibiting partial birth abortions.<sup>54</sup> The Court cited two reasons that the statute did not pass muster.<sup>55</sup> First, the statute did not include “any exception ‘for the preservation of the . . . health of the mother.’”<sup>56</sup> Second, the law was deemed to “unduly burden[] the right to choose abortion itself,” at least in part, because “Nebraska’s law applie[d] both previability and postviability.”<sup>57</sup>

The Nebraska litigation implicated two distinct constitutional issues. First, the Nebraska statute failed to draw a line making clear that the prohibition at issue only applied to fetuses that had attained viability.<sup>58</sup> Second, Nebraska did not ban abortion as a general matter but, instead, “ban[ned] one method of aborting a pregnancy.”<sup>59</sup> The statute’s ban on one kind of abortion might be thought to militate in favor of its constitutionality because other abortion options were also available.<sup>60</sup> Or, it might be thought to militate in favor of the ban’s unconstitutionality because the State was unlikely to save the lives of any fetuses through the ban.<sup>61</sup> The *Stenberg* Court offered the latter analysis, reasoning that “[t]he Nebraska law, of course, does not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion.”<sup>62</sup> Thus, the statute did not directly further the State’s interest in protecting fetal life because it did not regulate whether particular fetuses would be aborted, only which method would be used.<sup>63</sup>

Consider two of the options that might be utilized by a woman seeking a late-term abortion. In the dilation and evacuation (D&E) procedure, “instruments are inserted through the cervix into the uterus to remov[e] fetal and placental tissue.”<sup>64</sup> Basically, the doctor performing the procedure uses the “instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina.”<sup>65</sup> The doctor then “uses the traction created by the opening

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54. *Id.*

55. *Id.* at 930.

56. *Id.* (quoting *Casey*, 505 U.S. at 879).

57. *Id.*

58. *See id.*

59. *Id.* at 923.

60. *See infra* notes 90-91 and accompanying text.

61. *See Stenberg*, 530 U.S. at 930.

62. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

63. *Id.*

64. *Id.* at 924-25.

65. *Id.* at 958 (Kennedy, J., dissenting).

between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body.”<sup>66</sup> Justice Kennedy noted in his dissent that “[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”<sup>67</sup>

The Court distinguished this D&E procedure, which Nebraska *permitted*, from the “intact D&E” procedure,<sup>68</sup> which included both the dilation and extraction (D&X) and partial birth abortion procedures that Nebraska prohibited.<sup>69</sup> The intact D&E procedure “involves removing the fetus from the uterus through the cervix ‘intact,’ *i.e.*, in one pass, rather than in several passes.”<sup>70</sup> Then, “[i]f the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix” (D&X).<sup>71</sup> If, instead, “the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix” (partial birth).<sup>72</sup>

Needless to say, both procedures are “gruesome,” and it is not at all clear that one is closer to infanticide than the other.<sup>73</sup> That said, however, one procedure posed more risks in certain cases than the other.<sup>74</sup> The Court noted that “[t]he D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications.”<sup>75</sup>

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66. *Id.*

67. *Id.* at 958-59.

68. *Id.* at 927 (majority opinion).

69. *Id.* at 928 (“Despite the technical differences we have just described, intact D&E and D&X are sufficiently similar for us to use the terms interchangeably.”).

70. *Id.* at 927.

71. *Id.*

72. *Id.*

73. *See id.* at 946-47 (Stevens, J., concurring) (“For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.”).

74. *See id.* at 932 (majority opinion) (“On the basis of medical testimony the District Court concluded that ‘Carhart’s D&X procedure is . . . safer tha[n] the D&E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart.’” (quoting *Carhart v. Stenberg*, 11 F. Supp. 2d, 1099, 1126 (D. Neb. 1998))).

75. *Id.* at 926.

After noting that “the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure,” the Court struck down the Nebraska ban.<sup>76</sup> The Court feared that the State’s “banning D&X without a health exception [might] . . . create significant health risks for women.”<sup>77</sup>

An important issue dividing the Court was whether the prohibited procedure was ever “necessary” to preserve the life or health of the mother.<sup>78</sup> The Court noted that the medical community was also divided on this point and that there were “highly qualified knowledgeable experts on both sides of the issue.”<sup>79</sup>

In his dissent, Justice Kennedy claimed that “the law denies no woman the right to choose an abortion and places no undue burden upon the right.”<sup>80</sup> He argued that “Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect.”<sup>81</sup> Justice Kennedy rejected that the relevant question was whether one procedure was safer than another for a particular class of women.<sup>82</sup> Instead, he argued that the dispositive consideration was that the statute “deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman.”<sup>83</sup>

While *Stenberg* seems relatively straightforward, its proper interpretation becomes more complicated when considered in light of the Court’s subsequent decision in *Gonzales v. Carhart*, which involved a federal partial birth abortion prohibition.<sup>84</sup> While the Nebraska statute and the federal statute differed in language,<sup>85</sup> the fatal defects in *Stenberg* were not fatal in *Gonzales*.<sup>86</sup> For example, the federal ban applied whether or not the

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76. *Id.* at 932.

77. *Id.*

78. *Id.* at 937.

79. *Id.*

80. *Id.* at 957 (Kennedy, J., dissenting).

81. *Id.* at 963.

82. *Id.* at 967 (“The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient . . .”).

83. *Id.* at 965.

84. *See* 550 U.S. 124, 141 (2007).

85. *Id.* (“[T]he Act’s language differs from that of the Nebraska statute struck down in *Stenberg*.”).

86. *Id.* at 168.

fetus was viable.<sup>87</sup> While the *Gonzales* Court affirmed *Casey*'s holding that a State "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,'"<sup>88</sup> the Court nonetheless upheld the constitutionality of the federal ban, reversing those circuit courts that had struck it down.<sup>89</sup>

The *Gonzales* Court noted "that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child," and argued that the state interest in fetal life "cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer."<sup>90</sup> Instead, the Court reasoned that where the State

has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.<sup>91</sup>

The Court did not offer any criteria to help determine which procedures might be thought to count as substitutes for others. To illustrate why that failure might be thought important, one need only suppose that there are certain health risks associated with performing a particular type of abortion, different health risks associated with a different type of abortion, and still different health risks posed by carrying the fetus to term. The Court has not explained the conditions necessary for one of those abortion methods to be barred—for example, what sorts of increased risks might acceptably be imposed by a State wishing to promote respect for life without thereby creating an undue burden on the right to abort. Nor has the Court explained under what conditions the State could ban both abortion methods without imposing an undue burden. For example, a State might justify prohibiting both types of abortion where both present certain health risks that would not be presented by carrying the fetus to term, notwithstanding certain other

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87. *Id.* at 147 ("The Act does apply both previability and postviability . . .").

88. *Id.* at 146 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)).

89. *Id.* at 167-68.

90. *Id.* at 158.

91. *Id.*

difficulties of carrying the fetus to term that are not presented by either type of abortion.<sup>92</sup>

As had also been true in *Stenberg*, *Gonzales* included testimony “that intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp.”<sup>93</sup> In addition, evidence was presented that “intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete.”<sup>94</sup> Finally, further evidence was presented to show that “intact D&E was safer for women with certain medical conditions or women with fetuses that had certain anomalies.”<sup>95</sup> However, there was testimony in both *Stenberg* and *Gonzales* by other experts disputing these conclusions.<sup>96</sup> The Court posed the issue in the following way: “The question becomes whether the Act can stand when this medical uncertainty persists.”<sup>97</sup> However, this time the Court suggested that “state and federal legislatures [should be given] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”<sup>98</sup>

The *Stenberg* Court viewed the medical uncertainty over whether the partial birth abortion ban created substantial risks as a reason to strike down the ban:

[T]he uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.<sup>99</sup>

In contrast, the *Gonzales* Court concluded: “The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a

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92. Cf. Gilles, *supra* note 18, at 527 (“The self-defense approach would rarely block the application of a ban on postviability abortions because very few pregnancies nowadays pose grave dangers of death or serious health impairment that can only be avoided by abortion.”).

93. *Gonzales*, 550 U.S. at 161.

94. *Id.*

95. *Id.*

96. *Id.* at 162.

97. *Id.* at 163.

98. *Id.*

99. *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”<sup>100</sup>

In her *Gonzales* dissent, Justice Ginsburg described the majority opinion as “alarming.”<sup>101</sup> Charging that the Court did not “take *Casey* and *Stenberg* seriously,” she noted both that the *Gonzales* opinion “blurs the line, firmly drawn in *Casey*, between previability and postviability abortions” and that it “blesses a prohibition with no exception safeguarding a woman’s health.”<sup>102</sup> She also addressed the lack of consensus in the medical community about the need for this kind of abortion, noting several organizations that had attested to the additional safety afforded by this technique.<sup>103</sup>

To make the case for the necessity of providing the intact D&E alternative even stronger, Justice Ginsburg noted “the District Courts’ well-supported findings” that many of those claiming there was no need for this option “had no training for, or personal experience with, the intact D&E procedure, and . . . performed abortions only on rare occasions.”<sup>104</sup> She compared the permissible abortions to impermissible partial birth abortion, suggesting that permissible abortions would likely undermine respect for life as much as the impermissible abortion did.<sup>105</sup> Noting that the Court’s analysis was motivated by “moral concerns” and that such concerns “could yield prohibitions on any abortion,”<sup>106</sup> she worried that other forms of late-term abortion might also be at risk.<sup>107</sup> Justice Ginsburg’s final observation

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100. *Gonzales*, 550 U.S. at 164.

101. *Id.* at 170 (Ginsburg, J., dissenting).

102. *Id.* at 170-71.

103. *Id.* at 176 (“[T]he congressional record includes letters from numerous individual physicians stating that pregnant women’s health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG [American College of Obstetricians and Gynecologists], the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods.”).

104. *Id.* at 180.

105. *Id.* at 182 (“Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality.” (citations omitted)).

106. *Id.*

107. *See id.* at 186 (suggesting that the prohibition of the D&E procedure might also be upheld).

was that there had been a change in the composition of the Court since *Stenberg* had been decided, which might have accounted for *Gonzales* having been decided differently.<sup>108</sup>

At least two points might be made about Justice Ginsberg's reference to the Court's composition. First, if there is another change on the Court, for example, if Justice Ginsberg retires, then the abortion jurisprudence may undergo a wholesale revision. Suppose that the post-Ginsberg Court were to hold that the Federal Constitution neither protects nor prohibits abortion, but instead permits the States to regulate it as they deem fit.<sup>109</sup> In that event, the personhood amendments would do a significant amount of work because even very early abortions would be impermissible unless, for example, a plausible self-defense argument could be offered. While it is unclear which medical conditions would be interpreted as sufficiently threatening to justify an abortion in a state in which personhood begins at conception,<sup>110</sup> it is clear that many abortions would simply not be permissible.<sup>111</sup>

Second, even if no Justices retire for the foreseeable future, abortion jurisprudence remains in doubt. Two of the key elements of the abortion doctrine recognized in *Casey* and affirmed in *Stenberg*, namely, the undue burden test for abortion of pre-viable fetuses and the necessity of having a

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108. *Id.* at 191 (“[T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”). Justice O’Connor wrote a concurring opinion in *Stenberg*, while Justice Alito, signed onto Justice Kennedy’s majority opinion in *Gonzales*. See *Stenberg v. Carhart*, 530 U.S. 914, 947-51 (O’Connor, J., concurring); *Gonzales*, 550 U.S. at 130. Justice Alito currently holds the seat formerly occupied by Justice O’Connor. See Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 53 (2012) (discussing “the replacement of Justice O’Connor with Justice Alito”).

109. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (“The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”).

110. For example, Professor Borgmann implies that abortions would be impermissible unless performed to save the life of the pregnant woman. See Borgmann, *supra* note 20, at 567 (“Where a woman’s life is not at risk, nine months of pregnancy (and perhaps non-life-threatening health consequences) must be weighed against a person’s life. This does not seem to meet the requirements for a necessity defense.”).

111. Cf. Ann MacLean Massie, *So-Called “Partial-Birth Abortion” Bans: Bad Medicine? Maybe. Bad Law? Definitely!* 59 U. PITT. L. REV. 301, 321-22 (1998) (“[A]bortion rights leaders have acknowledged that a large percentage of pre-viability D&X cases, like the overwhelming percentage of pre-viability abortions, generally, are elective procedures involving healthy women and fetuses.”).



health exception in laws prohibiting post-viable abortions, no longer seem so firmly grounded. After *Gonzales*, it simply is not clear where the bright lines will be drawn to protect abortion rights.

The *Stenberg* Court noted that it had “repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks.”<sup>112</sup> Basically, for purposes of the relevant constitutional guarantees, “a risk to a women’s [sic] health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.”<sup>113</sup> But if that is so, then the *Gonzales* Court’s upholding of a ban on a particular type of abortion could be used to justify upholding a statute that banned abortions more generally.

It is fair to suggest that *Stenberg* and *Gonzales* can be read in ways that do not pose such dangers for abortion jurisprudence. If one takes the Court at its word that it did not believe the prohibition of partial birth abortions posed an undue burden on the ability to get an abortion or, more generally, on women’s health, then perhaps the Court will not permit further incursions on the right to abortion. In that event, a State having passed a personhood amendment would not affect existing abortion rights.<sup>114</sup>

It is also true, however, that the current jurisprudence might permit further incursions on abortion rights. Justice Kennedy’s discussion of the regret that a woman might feel after having had an abortion might be used to justify additional limitations.<sup>115</sup> Further, some commentators have pointed to studies showing an increased suicide rate<sup>116</sup> or an increased rate

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112. *Stenberg*, 530 U.S. at 931.

113. *Id.*

114. See Rita M. Dunaway, *The Personhood Strategy: A State’s Prerogative to Take Back Abortion Law*, 47 WILLAMETTE L. REV. 327, 327-28 (2011) (“A State’s conferral of legal personhood upon unborn human beings would not, on its own, affect a woman’s existing abortion rights.”); Juliana Vines Crist, Note, *The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws*, 60 CASE W. RES. L. REV. 851, 867 (2010) (“The Supreme Court has already made clear that the fetus is not a ‘person’ under the Constitution, and thus is not entitled to protection from deprivation of ‘life, liberty, . . . [or] equal protection of the laws.’ Legislatures cannot declare otherwise, since this would be in derogation of the Constitution, as interpreted by the Supreme Court in *Roe v. Wade*.” (alterations in original) (citations omitted)).

115. See *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007).

116. See, e.g., Teresa Stanton Collett, *Transporting Minors for Immoral Purposes: The Case for the Child Custody Protection Act & the Child Interstate Abortion Notification Act*, 16 HEALTH MATRIX 107, 137 (2006) (“Two studies, one from the United States and the other from Finland, have shown surprising increased rates of suicide following abortion.”).

of complications in later pregnancies among those who have had abortions.<sup>117</sup> Such statistics might be used to justify additional limitations.

One of the reasons that *Casey* focused on viability was to set a bright line for the states and the courts.<sup>118</sup> It is unclear whether *Gonzales* has now undermined the importance of that line. Because the partial birth abortion statute upheld in *Gonzales* applied to abortions involving both pre-viable and post-viable fetuses,<sup>119</sup> it is not clear as a matter of abortion jurisprudence whether that clear line has become murky or whether, instead, the Court was applying the existing jurisprudence and finding as a matter of law that no undue burden was imposed by precluding this particular type of abortion.

Either way, abortion jurisprudence feels more precarious.<sup>120</sup> If the pre-viability/post-viability line has now been erased, then it is not clear what bright line will be adopted in its stead. Further, until a new line is firmly in

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117. See David C. Reardon, Thomas W. Strahan, John M. Thorp, Jr. & Martha W. Shuping, *Deaths Associated with Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications*, 20 J. CONTEMP. HEALTH L. & POL'Y 279, 316-17 (2004) (“It is also known that induced abortion is associated with a subsequent risk of placenta previa and premature delivery. Increased rates of genital tract infection, pelvic inflammatory disease, endometritis, ectopic pregnancy, retained placenta, preeclampsia, and other complications of pregnancy and delivery in subsequent pregnancies have also been identified in the literature. All of these complications are associated with higher risk of maternal and neonatal death. Even if these deaths are actually traceable to latent abortion morbidity (scarring of the uterus, for example), these deaths would be classified as maternal deaths rather than abortion-related deaths, and would therefore confound the comparison of mortality rates between abortion and delivery.” (footnotes omitted)); see also Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694, 1703 (2008) (“Those who would ban abortion now assert that restrictions on abortion protect women’s health and freedom and promote their ‘informed consent.’ The strategy is designed to erode the protections for women’s decisions set forth in *Roe* and *Casey*, and the passing discussion of postabortion regret in *Carhart* suggests it may yet succeed.”).

118. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

119. *Gonzales*, 550 U.S. at 147.

120. Cf. *Casey*, 505 U.S. at 870 (“We must justify the lines we draw. And there is no line other than viability which is more workable.”). Some commentators do not seem to appreciate the instability of current abortion jurisprudence and thus the difficulties that might be created by personhood amendments or, perhaps, by legislative weighing of the value of unborn life and the alleged risks posed by abortion. See, e.g., Crist, *supra* note 114, at 869 (“States are free to communicate their opinions on when life begins. However, such opinions do not confer personhood or challenge abortion rights. They are merely value judgments that do not, and because of the Supremacy Clause, cannot, threaten abortion jurisprudence.” (footnote omitted)).

place, states may feel tempted to adopt more and more restrictive legislation, if only to clarify which abortions may be restricted or prohibited without violating constitutional guarantees.

Suppose, however, that the Court is not creating a new bright line, but is instead still enforcing the undue burden test for abortion involving pre-viable fetuses. Even so, *Gonzales* provides a basis for upholding other attempts to restrict abortions of pre-viable fetuses, for example, by claiming that the availability of other alternatives would prevent the prohibition at issue from being an undue burden.<sup>121</sup> Further, given the diversity of opinion that exists about the relative safety of abortion, it would not be surprising to see some argue that abortion is not as safe in some cases as the alternative of childbirth.<sup>122</sup> Because the Court has already suggested that States have “legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child,”<sup>123</sup> and because the State “may express profound respect for the life of the unborn”<sup>124</sup> as long as it does not thereby create “a substantial obstacle to the woman’s exercise of the right to choose,”<sup>125</sup> the Court would already seem to have created a substantial amount of latitude for States wishing to limit abortions of pre-viable fetuses. Thus, the question at hand is whether, under the existing jurisprudence, the Court might say that the undue burden test permits the State to designate a particular set of cases in which a safe alternative to

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121. See *Gonzalez*, 550 U.S. at 164.

122. See Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 122 (2005) (“When longer-term effects are taken into consideration, and speaking only about the health of the mother, it does appear, at least in some studies, that childbirth is safer than abortion. When deaths of women in the ensuing year after abortion are considered, the relative safety of childbirth looks attractive.”). But see Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 343 (2010) (“Once pregnancy has begun, abortion is statistically safer than carrying to term until well into the second trimester.”).

123. *Casey*, 505 U.S. at 846.

124. *Id.* at 877; see also *Dunaway*, *supra* note 114, at 336 (“[*Gonzales*] indicates a shift in the balance of interests involved in abortion cases. Repeatedly, the majority reiterated the importance of the State’s interest in ‘promoting respect for human life.’ A reading of the majority opinion conveys, perhaps for the first time in the Supreme Court’s abortion jurisprudence, the impression that this interest in the life of the unborn (however nebulously described) is increasingly important relative to a woman’s ‘right’ to have an abortion. In Justice Ginsburg’s words, the Act ‘surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.’” (quoting *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting))).

125. *Casey*, 505 U.S. at 877.

abortion is childbirth.<sup>126</sup> Accordingly, while the State would have burdened the right to obtain an abortion, that burden would not be “undue” given the costs and benefits of the competing procedures.<sup>127</sup> If such an analysis wins the day, then a huge loophole in the existing jurisprudence has already been created.<sup>128</sup>

### *B. Rights to Contraception*

If the right to abortion can be limited, one might wonder about the degree to which a State can limit the right to access particular kinds of contraception. For example, while upholding the right of married couples to have access to contraception in *Griswold v. Connecticut*, the Court spent very little time focusing on contraception itself.<sup>129</sup> Instead, the Court spent considerable time describing the sacredness of the marital relationship.<sup>130</sup>

In *Eisenstadt v. Baird*, the Court specified the type of contraceptive at issue that had been given to a young woman in alleged violation of local law.<sup>131</sup> The law at issue prohibited giving an unmarried individual “any drug, medicine, instrument or article whatever for the prevention of conception.”<sup>132</sup> In striking down the Massachusetts law, the *Eisenstadt*

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126. See Thomas L. Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329, 365 (1987-88) (discussing childbirth as an alternative to abortion).

127. Cf. Dunaway, *supra* note 114, at 328 (“By conferring legal personhood upon the unborn, states may ultimately change the factual-legal context in which *Roe v. Wade* was decided, thereby producing a different result when a future abortion restriction is challenged. The Supreme Court could hold that in states where the unborn are afforded all the civil rights of persons, the woman’s privacy rights are outweighed by the unborn child’s fundamental right to life under the state’s constitution.”).

128. Cf. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (“No one would dispute that, for many, D&E [a type of abortion not prohibited under federal law] is a procedure itself laden with the power to devalue human life.”); Hendricks, *supra* note 122, at 348 (“If . . . abortion rights are limited to the health exception, *Carhart II* will be used to justify a high standard of medical risk that will substantially exceed the difference between the risks of normal pregnancy and the risks of early abortion. Only ‘significant threat[s]’ to a woman’s health will be adequate to overcome her duty to the fetus and the state.” (alteration in original)).

129. See 381 U.S. 479 (1965).

130. *Id.* at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

131. 405 U.S. 438, 440 (1972) (“Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.”).

132. *Id.* at 440-41 (internal quotation marks omitted).

Court did not address whether access to contraception involved a fundamental liberty interest, instead holding that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”<sup>133</sup> Only later did the Court suggest that contraception implicated an important liberty interest.<sup>134</sup>

Five years after issuing *Eisenstadt*, the Court had another opportunity to address contraception access.<sup>135</sup> In *Carey v. Population Services International*, the Court discussed contraception rights in terms of privacy rather than equal protection guarantees.<sup>136</sup> At issue was a New York law making it a crime:

- (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years;
- (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and
- (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.<sup>137</sup>

The *Carey* Court noted that “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”<sup>138</sup> While suggesting that contraception regulations that “do not infringe protected individual choices” may pass muster, the Court explained that “where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”<sup>139</sup>

The Court has long appreciated that States might try to limit abortion and contraception rights by declaring that personhood begins at the moment of conception. At issue in *Webster v. Reproductive Health Services* was the constitutionality of several Missouri provisions, including one stating both “that ‘[t]he life of each human being begins at conception,’ and that ‘unborn children have protectable interests in life, health, and well-being.’”<sup>140</sup> The State had described this provision as “precatory and

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133. *Id.* at 453.

134. *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 685-86 (1977).

135. *Id.* at 678.

136. *See id.* at 685 (“[T]he constitutionally protected right of privacy extends to an individual’s liberty to make choices regarding contraception . . .”).

137. *Id.* at 681.

138. *Id.* at 685.

139. *Id.* at 686 (alteration in original) (citing *Roe v. Wade*, 410 U.S. 113, 155-56 (1973)).

140. 492 U.S. 490, 501 (1989) (citing MO. REV. STAT. § 1.205.1(1)-(2) (1986)).

impos[ing] no substantive restrictions on abortions.”<sup>141</sup> The Court was sympathetic to the claim that the provision did not limit privacy rights and that it might merely be interpreted to offer “protections to unborn children in tort and probate law.”<sup>142</sup> If the provision was interpreted to limit privacy rights in some “concrete” way, then the federal courts could address its constitutionality.<sup>143</sup>

Justice O’Connor recognized in her *Webster* concurrence that the Missouri provision declaring that personhood begins at conception could be interpreted in a way that would limit privacy rights but was not worried because no evidence in the record suggested that it would be applied that way.<sup>144</sup> By the same token, she did not believe that it would be “applied to prohibit the performance of *in vitro* fertilization.”<sup>145</sup> While suggesting that post-fertilization contraceptive devices were protected under *Griswold*,<sup>146</sup> Justice O’Connor thought that “all of these intimations of unconstitutionality are simply too hypothetical to support the use of declaratory judgment procedures and injunctive remedies in this case.”<sup>147</sup>

Justice Blackmun was less sanguine about the effects of the provision in question in his concurrence. Because the provision “defines fetal life as beginning upon ‘the fertilization of the ovum of a female by a sperm of a male,’” he argued that “the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the ‘morning after’ pill, which may operate to prevent pregnancy only after conception as defined in the statute.”<sup>148</sup>

Justice Stevens also expressed misgivings about the provision’s effects in his *Webster* opinion.<sup>149</sup> He suggested that such a limitation could not pass

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141. *Id.* at 505.

142. *Id.* at 506.

143. *Id.*

144. *Id.* at 523 (O’Connor, J., concurring in part and concurring in the judgment) (“[A]s with a woman’s abortion decision, nothing in the record or the opinions below indicates that the preamble will affect a woman’s decision to practice contraception.”).

145. *Id.*

146. *Id.* (“It may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* . . .”).

147. *Id.*

148. *Id.* at 539 n.1 (Blackmun, J., concurring in part and dissenting in part). An IUD is an “intrauterine device,” which “works primarily by preventing a fertilized egg from implanting.” *Id.* at 563 n.7 (Stevens, J., concurring in part and dissenting in part) (quotation omitted).

149. *Id.* at 563 (Stevens, J., concurring in part and dissenting in part) (“Missouri’s declaration therefore implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD and the morning-after pill.”).

muster,<sup>150</sup> although he noted a possible reading of *Griswold* that might have saved the Missouri provision.<sup>151</sup> Justice Stevens stated, “One might argue that the *Griswold* holding applies to devices ‘preventing conception,’—that is, fertilization—but not to those preventing implantation, and therefore, that *Griswold* does not protect a woman’s choice to use an IUD or take a morning-after pill.”<sup>152</sup> However, he rejected such a distinction because he was unaware “of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization.”<sup>153</sup> On the other hand, he saw “an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth.”<sup>154</sup>

The difficulty presented is that by passing a personhood amendment, a State is implicitly denying that there is a non-arbitrary point after conception at which personhood might be conferred, and that the point in time at which fertilization occurs is a watershed moment.<sup>155</sup> It is simply unclear how many members of the current Court would view a state declaration of personhood at the moment of conception as a legitimate and legally defensible position.

Thus far, the Court has not employed its *Gonzales* approach in the contraception context by suggesting that it is permissible for a State to prohibit certain kinds of contraception as long as it is not thereby imposing an undue burden on that right. Were the Court to emphasize the importance

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150. *Id.* at 564 (“To the extent that the Missouri statute interferes with contraceptive choices, I have no doubt that it is unconstitutional under the Court’s holdings . . . .” (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965))).

151. *Id.* at 565-66.

152. *Id.* at 565 (citing *Griswold*, 381 U.S. at 480).

153. *Id.* at 566.

154. *Id.* at 569.

155. See *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (“Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child.”); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *YALE L.J.* 2475, 2493 (1997) (“[T]here comes into being at conception, not a mere clump of human cells, but a distinct, unified self-integrating organism, which develops itself, truly himself or herself, in accord with its own genetic blueprint. The significance of genetic completeness for the status of newly conceived human beings is that no outside genetic material is required to enable the zygote to mature into an embryo, the embryo into a fetus, the fetus into an infant, the infant into a child, the child into an adolescent, the adolescent into an adult. What the zygote needs to function as a distinct self-integrating human organism, a human being, it already possesses.”).

of promoting “respect for life, including life of the unborn,”<sup>156</sup> and were the Court to accept that the unborn would include not only, say, the eight-and-a-half-month-old fetus but also the zygote,<sup>157</sup> then the Court might distinguish between permissible and impermissible kinds of contraception regulation, for example, by reasoning that prohibiting some kinds of contraception does not impose an undue burden as long as other kinds are available. Indeed, some commentators distinguish between different kinds of contraception by focusing on whether conception, rather than implantation, is prevented,<sup>158</sup> claiming that where the latter is achieved the method is not appropriately classified as a form of contraception.<sup>159</sup>

Certainly, such a position would create an undue burden on someone who had been raped,<sup>160</sup> because the lack of access to a morning-after pill might condemn her to becoming pregnant by her rapist.<sup>161</sup> But the Court might account for that exception by saying that the Constitution only requires access to a morning-after pill when there has been a claim of forced relations, which would severely limit access to the particular form of contraception.<sup>162</sup>

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156. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

157. *Cf.* Robert Streiffer, *Chimeras, Moral Status, and Public Policy: Implications of the Abortion Debate for Public Policy on Human/Nonhuman Chimera Research*, 38 J.L. MED. & ETHICS 238, 242 (2010) (discussing a writer who “uses ‘fetus’ to refer to the conceptus at all stages of prenatal development”).

158. *See* Lynne Marie Kohm, *From Eisenstadt to Plan B: A Discussion of Conscientious Objections to Emergency Contraception*, 33 WM. MITCHELL L. REV. 787, 794 (2007) (“If the drug [in the morning-after pill] fails to inhibit ovulation or fertilization and instead inhibits implantation of an embryo, it is disingenuous to call the morning-after pill ‘emergency contraception,’ as the conception of human life has already occurred.”).

159. *See id.*; *see also* Jason M. Horst, *The Meaning of “Life”: The Morning-After Pill, The Question of When Life Begins, and Judicial Review*, 16 TEX. J. WOMEN & L. 205, 214 (2007) (“[A]pplying or imposing restrictions such as parental notification or consent requirements to the morning-after pill may be unconstitutional under contraception doctrine but constitutional under abortion doctrine.”).

160. *See* Katherine D. Spitz, Note, *Sex, Drugs, and Federalism’s Role: Regulation of the Morning After Pill on Public College and University Campuses*, 33 J.C. & U.L. 191, 223 (2006) (“One of the primary applications for the morning after pill for women of all age groups is its use to prevent unwanted pregnancies following rape.”).

161. *See* Kara N. Bitar, Note, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL’Y 275, 279 (2012) (“[I]t is important to understand rape in the United States. . . . [P]regnancies do result from rape . . .”).

162. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850-51 (1992) (“The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those



Will the Court apply an undue burden test to contraception rights or, perhaps, hold that the Fourteenth Amendment neither prohibits nor requires access to contraception?<sup>163</sup> The answer is unclear, but privacy jurisprudence as a general matter does not appear especially stable right now. Still, the federal courts seem to view the Constitution as affording more protection to contraception rights than abortion rights,<sup>164</sup> and it may well be that the Court will not permit States to limit access to contraception or early-stage abortions simply by passing a personhood amendment.<sup>165</sup> Further limitation of constitutional rights to contraception and abortion of pre-viable fetuses by the Court will likely depend upon whether the composition of the Court changes and how the developing jurisprudence is interpreted in the next several abortion cases. In any event, it is likely that personhood amendments will have implications for assisted reproductive technologies.

### *III. Personhood Amendments and Assisted Reproductive Technology*

To understand some of the possible implications that the adoption of personhood amendments would have for assisted reproductive technology (ART), it is helpful to consider some of the issues arising in that context. One issue that has arisen in several jurisdictions involves the disposition of frozen embryos upon divorce where the parties cannot agree on the method of disposition.<sup>166</sup> The way that this issue and others would likely be

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rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.”).

163. *Cf.* *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (“[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution . . .”). Justice Scalia might make the same claim about contraception. The *Casey* plurality noted that “in some critical respects the abortion decision is of the same character as the decision to use contraception.” 505 U.S. at 852.

164. *See* Horst, *supra* note 159, at 215 (“[C]ourts scrutinize limitations on rights to use and access to contraception to a greater degree than they do abortion rights.”); Annemarie Brennan, Note, *Is All Privacy Created Equal?*, 20 VT. L. REV. 815, 831 (1996) (“The Supreme Court appears to accept the idea that contraception and abortion are logically and legally separate . . .”).

165. *Dunaway*, *supra* note 114, at 357 (“Even if the state chose to view the prescription and ingestion of oral contraceptives as a form of abortion (which is unlikely for a variety of reasons), abortion would continue to be legal at this early stage by virtue of other state laws and by Supreme Court precedent.”).

166. *See* *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

resolved might change greatly in a state that had adopted a personhood amendment.

*A. Frozen Embryo Disposition*

The developing jurisprudence with respect to the right to transfer or dispose of frozen embryos has been predicated upon the embryo not being a person.<sup>167</sup> While the rationales have differed, courts have generally refused to award embryos to those who wished to use them when one of the progenitors objected to their use.<sup>168</sup> However, that jurisprudence would likely change dramatically in a state where personhood began at conception.

In *Davis v. Davis*, the Tennessee Supreme Court was asked to decide which of the two divorcing progenitors, Junior Davis or Mary Sue Davis, would be awarded custody of their remaining frozen embryos.<sup>169</sup> Initially, Mary Sue had wanted the embryos for her own use,<sup>170</sup> although she later decided that she wanted to donate them to a childless couple.<sup>171</sup>

When initially signing up for the embryo freezing program, the Davises failed to specify what should be done with any unused embryos.<sup>172</sup> Tennessee did not have any existing law governing what should be done in

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167. See *Kass*, 696 N.E.2d at 179 (“[N]or are the pre-zygotes recognized as ‘persons’ for constitutional purposes.” (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973))); *Davis*, 842 S.W.2d at 597 (“We conclude 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.”).

168. See *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003) (“A better principle to apply, we think, is the requirement of contemporaneous mutual consent. Under that model, no 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.”); *A.Z.*, 725 N.E.2d at 1057-58 (“[W]e would not enforce an agreement that would compel one donor to become a parent against his or her will.”).

169. 842 S.W.2d at 589 (“The parties were able to agree upon all terms of dissolution, except one: who was to have ‘custody’ of the seven ‘frozen embryos’ stored in a Knoxville fertility clinic that had attempted to assist the Davises in achieving a much-wanted pregnancy during a happier period in their relationship.”).

170. *Id.* (“Mary Sue Davis originally asked for control of the ‘frozen embryos’ with the intent to have them transferred to her own uterus, in a post-divorce effort to become pregnant.”).

171. *Id.* at 590 (“She no longer wishes to utilize the ‘frozen embryos’ herself, but wants authority to donate them to a childless couple.”).

172. *Id.* (“When the Davises signed up for the [in vitro fertilization] program at the Knoxville clinic, they did not execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process.”).

the event of a disagreement about the disposition of embryos.<sup>173</sup> The *Davis* court focused on whether embryos should be considered persons or property,<sup>174</sup> and cited with approval the intermediate court's point that the state's wrongful death statute did not apply to a viable fetus not born alive.<sup>175</sup> The Tennessee Supreme Court also noted that the fetus was not a person for purposes of federal law.<sup>176</sup>

The trial court found that preembryos were legal persons, a holding that the Tennessee Supreme Court feared would have dire implications for in vitro fertilization (IVF) programs.<sup>177</sup> The court stated, "Such a decision would doubtless have had the effect of outlawing IVF programs in the state of Tennessee."<sup>178</sup> The court did not explore why such a holding would have such an effect. For example, the court noted that Louisiana precluded the destruction of embryos, directing instead that such embryos should be put up for adoption,<sup>179</sup> but Louisiana nonetheless has fertility clinics.<sup>180</sup> Presumably, the Tennessee court had more in mind than merely that recognition of fetal personhood would mean that the State would now require embryo donation rather than embryo destruction.<sup>181</sup>

Further, the *Davis* court refused to classify the embryos as either persons or property, but instead as "occupy[ing] an interim category that entitles them to special respect."<sup>182</sup> The court explained that an agreement concerning the disposition of embryos "should be presumed valid and should be enforced as between the progenitors."<sup>183</sup> Although such an agreement could subsequently be modified by the parties, the court

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173. *Id.* ("Moreover, there was at that time no Tennessee statute governing such disposition, nor has one been enacted in the meantime.").

174. *Id.* at 594 ("One of the fundamental issues the inquiry poses is whether the preembryos in this case should be considered 'persons' or 'property' in the contemplation of the law.").

175. *Id.*

176. *Id.* at 595.

177. *Id.* ("Left undisturbed, the trial court's ruling would have afforded preembryos the legal status of 'persons' and vested them with legally cognizable interests separate from those of their progenitors.").

178. *Id.*

179. *See id.* at 590 n.1.

180. *See About the Doctors*, FERTILITY INST., <http://www.fertilityinstitute.com/html/doctors.html> (last visited Sept. 29, 2012).

181. *See infra* notes 282-84 and accompanying text (discussing why the court might have made that assessment).

182. *Davis*, 842 S.W.2d at 597.

183. *Id.*

explained that the original agreement should be enforced absent such a modification.<sup>184</sup>

In addition, the *Davis* court discussed the State's interests in potential human life represented by the embryos, reasoning that "if the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed, then surely there is no state interest in these pre-embryos which could suffice to overcome the interests of the gamete-providers."<sup>185</sup> However, the court's argument is incomplete. While the State might not have sufficiently important interests to justify overriding a woman's decision to abort her pre-viable fetus, that would not mean that the State did not have significant interests at issue when personal autonomy rights did not hang in the balance.

The *Davis* court explained that "the state's interest in the potential life of these preembryos is not sufficient to justify any infringement upon the freedom of these individuals to make their own decisions."<sup>186</sup> Because the State's interests were not sufficiently weighty and "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood,"<sup>187</sup> the court concluded "that Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood."<sup>188</sup> It was easier for the court to weigh Junior's interests more heavily than Mary Sue's because she wanted to donate the embryos whereas Junior would have had special difficulties as a result of his own personal history if the embryos had been implanted and resulted in a live birth.<sup>189</sup> Deciding who should have custody of the embryos would have been much more difficult if Mary Sue wanted to use the embryos herself and was no longer able to produce eggs.<sup>190</sup>

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184. *Id.* ("But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.").

185. *Id.* at 602.

186. *Id.*

187. *Id.* at 603.

188. *Id.* at 604.

189. *See id.* ("In light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents. . . . Likewise, he is opposed to donation because the recipient couple might divorce, leaving the child (which he definitely would consider his own) in a single-parent setting.").

190. *Id.* ("The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means.").

An important element in the *Davis* analysis involved the lack of an agreement between the Davises about what would be done with the embryos in the event of divorce. In *Kass v. Kass*, the New York Court of Appeals addressed the enforceability of an agreement that frozen embryos would be donated for research purposes upon a divorce.<sup>191</sup> The difficulty for the now-divorced Maureen Kass was that the frozen pre-embryos represented “her only chance for genetic motherhood.”<sup>192</sup>

Rejecting that the pre-zygotes were “recognized as ‘persons’ for constitutional purposes,”<sup>193</sup> the *Kass* court followed the *Davis* court’s lead in holding that “[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.”<sup>194</sup> When using this model, the pressing question involves determining whether the parties’ intent was clearly expressed.<sup>195</sup> The *Kass* court reasoned that as long as the intentions of the parties could be determined, the agreement should be enforced.<sup>196</sup>

The Supreme Judicial Court of Massachusetts took a much different approach in *A.Z. v. B.Z.*<sup>197</sup> The *A.Z.* court focused on whether to uphold an injunction preventing B.Z., the former wife of A.Z., from making use of

191. 696 N.E.2d 174, 175 (N.Y. 1998) (“[T]he parties agreed at the time they embarked on the effort that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes.”).

192. *Id.*

193. *Id.* at 179.

194. *Id.* at 180.

195. *Id.* (“The central issue is whether the consents clearly express the parties’ intent regarding disposition of the pre-zygotes in the present circumstances.”).

196. *Id.* at 182 (“These parties having clearly manifested their intention, the law will honor it.”). A Texas intermediate appellate court also endorsed a contract model for handling disputes about the disposition of frozen embryos. *See Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006) (“[A]llowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties. . . . [A]n embryo agreement that satisfies these criteria does not violate the public policy of the State of Texas.”); *see also Vitakis v. Valchine*, 987 So. 2d 171, 171 (Fla. Dist. Ct. App. 2008) (enforcing a settlement agreement specifying that wife would turn over “frozen embryos to the husband so that he could dispose of them”); *Karmasu v. Karmasu*, 2009-OHIO-5252, No. 2008 CA 00231, 2009 WL 3155062, ¶ 38 (Ohio Ct. App. Sept. 30, 2009) (“[T]he trial court did not err in holding that the ‘custody’ of the frozen embryos was controlled by the contract between the parties and Reproductive Gynecology.”); *Dahl v. Angle*, 194 P.3d 834, 841 (Or. Ct. App. 2008) (“[C]ourts should give effect to agreements showing the parties’ intent for the disposition of frozen embryos . . . .”).

197. 725 N.E.2d 1051 (Mass. 2000).

frozen embryos they created.<sup>198</sup> In the case, there was a writing expressly stating that if A.Z. and B.Z. “[s]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant.”<sup>199</sup> However, the court refused to enforce that provision, at least in part, because the form did “not state, and the record [did] not indicate, that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition.”<sup>200</sup> Instead, the court interpreted the form as constituting an agreement between the clinic and the couple as a unit.<sup>201</sup>

Such an interpretation was somewhat surprising.<sup>202</sup> The agreement did not state that the embryos should be returned to the couple, but to the wife in particular.<sup>203</sup> The husband agreeing to the clinic returning the embryos to the wife would at least suggest that the husband and wife had reached an agreement about the disposition of the embryos. If, for example, the clinic had intentionally violated the agreement by giving the embryos to the husband rather than the wife, the clinic might be subject to damages,<sup>204</sup> whereas the clinic would presumably not have been potentially liable for following the terms of the contract by transferring the embryos to the wife.<sup>205</sup>

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198. *Id.* at 1052 (“B.Z., the former wife (wife) of A.Z. (husband), appeals from a judgment of the Probate and Family Court that included, inter alia, a permanent injunction in favor of the husband, prohibiting the wife ‘from utilizing’ the frozen preembryos held in cryopreservation at the clinic.” (footnotes omitted)).

199. *Id.* at 1054 (alterations in original) (internal quotation marks omitted).

200. *Id.* at 1056.

201. *Id.* (“[I]t was intended only to define the donors’ relationship as a unit with the clinic.”).

202. See Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFF. L. REV. 1159, 1184-85 (2009) (“[I]t is utterly implausible to interpret the language at issue as merely intended to govern the relationship between the clinic and the donors as a unit, since it described the then-current intention to give the ex-wife the embryos for her own use should the couple later separate.”).

203. *A.Z.*, 725 N.E.2d at 1054.

204. *Cf. Unruh-Haxton v. Regents of Univ. of Cal.*, 76 Cal. Rptr. 3d 146, 157 (Ct. App. 2008) (“Based on our review of the complaints, we conclude the patients’ claims for fraud, conversion, and intentional infliction of emotional distress related to wrongful intentional conduct, not mere negligence. The allegations of stealing and then selling a person’s genetic material for financial gain is an intentional act of egregious abuse against a particularly vulnerable and trusting victim.”).

205. See *infra* notes 248-51 and accompanying text (discussing the Washington Supreme Court’s language noting that the clinic would not have been liable for destroying the frozen embryos, given the agreement between the clinic and the commissioning parties).

The *A.Z.* court's discussion was surprising in other ways as well. For example, the court noted that the form lacked a "duration provision."<sup>206</sup> However, because couples making use of frozen embryos do not have great success rates in achieving live births,<sup>207</sup> it is not unusual for couples to continue trying to achieve a live birth for years.<sup>208</sup> Thus, while the lack of a duration provision might have been a more persuasive argument under a different set of facts, it was not particularly convincing here.<sup>209</sup>

Finally, the clinic form employed the term "separated."<sup>210</sup> The *A.Z.* court reasoned:

Because this dispute arose in the context of a divorce, we cannot conclude that the consent form was intended to govern in these circumstances. Separation and divorce have distinct legal meanings. Legal changes occur by operation of law when a couple divorces that do not occur when a couple separates.<sup>211</sup>

But the *A.Z.* court's method of construing the agreement was not particularly convincing—one would neither expect nor require a couple to

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206. *A.Z.*, 725 N.E.2d at 1056. A duration provision would have specified the length of time that the provision would have been in effect. For example, the court noted that "[t]he wife sought to enforce this particular form four years after it was signed by the husband in significantly changed circumstances and over the husband's objection." *Id.* at 1056-57. The court seemed unconvinced that the parties had intended that the provision would still apply four years after it had been signed. *See id.* at 1057.

207. *See* David Orentlicher, *Discrimination Out of Dismissiveness: The Example of Infertility*, 85 *IND. L.J.* 143, 182 n.326 (2010) (discussing the lower success rate with frozen embryos than with fresh embryos).

208. *Cf.* Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 *IND. L.J.* 1203, 1232-33 (2009) ("Keeping in mind that on average 2.5 to 2.9 embryos are transferred per cycle, the actual success rate per unfrozen embryo is as low as eleven percent. If one takes into account that around thirty percent of embryos do not survive the thawing process, then the success rate per frozen embryo plummets to just under eight percent." (footnotes omitted)).

209. *See* Strasser, *supra* note 202, at 1185 ("Yet, it is not uncommon for couples to be deciding what to do with frozen embryos four years after their creation, so the lack of a duration provision should not have militated against enforcement in this particular case, given when that enforcement was sought." (footnote omitted)). In contrast, a different case would be presented if enforcement had been sought decades later. *Cf.* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 *MINN. L. REV.* 55, 102 (1999) ("The difficulty of predicting one's future feelings about cryopreserved embryos is compounded by the fact that disposition decisions may not be implemented for decades after the embryos are created.").

210. *A.Z.*, 725 N.E.2d at 1057.

211. *Id.* (footnote omitted).

distinguish between separation and divorce in this context unless, for example, they had sought legal counsel.

The *A.Z.* decision not to enforce the agreement was not driven by the alleged defects in the consent forms.<sup>212</sup> The court instead made clear that even if the agreement had been clear and unambiguous, it still would not have been enforced over *A.Z.*'s objection<sup>213</sup> because "forced procreation is not an area amenable to judicial enforcement."<sup>214</sup> The court cautioned that "prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions."<sup>215</sup> Implicit within such an analysis is that an individual should be free to change his or her mind before the agreement has been effectuated. However, once one has become a parent or, perhaps, has assured someone else that one will share in the parenting responsibilities, one should not be permitted to change one's mind and avoid the obligations that one had voluntarily accepted.<sup>216</sup>

In *J.B. v. M.B.*, the New Jersey Supreme Court cited *A.Z.* with approval.<sup>217</sup> At issue in *J.B.* was a disagreement about the disposition of frozen embryos upon divorce.<sup>218</sup> Here, there was conflicting testimony about the parties' common understanding when they had begun the IVF program.<sup>219</sup> *J.B.* testified that she intended to use the embryos *only* within her marriage, and that she now wanted them to be discarded.<sup>220</sup> In contrast, *M.B.* stated that the couple agreed that the embryos would either be used by *J.B.* or, instead, be donated to an infertile couple.<sup>221</sup>

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212. *See id.*

213. *Id.* ("[E]ven had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will.").

214. *Id.* at 1058.

215. *Id.* at 1059.

216. *Cf. In re Shockley*, 123 S.W.3d 642, 650 (Tex. App. 2003) (noting that Texas law "codified paternity by estoppel, allowing a court to deny a motion for genetic testing if the conduct of the mother or the presumed father estops that party from denying parentage").

217. 783 A.2d 707, 717 (N.J. 2001).

218. *Id.* at 710.

219. *Id.*

220. *Id.* ("J.B. filed a motion for summary judgment on the preembryo issue in April 1998 alleging, in a certification filed with the motion, that she had intended to use the preembryos solely within her marriage to M.B.").

221. *Id.* ("M.B., in a cross-motion filed in July 1998, described his understanding very differently. He certified that he and J.B. had agreed prior to undergoing the in vitro



The New Jersey Supreme Court rejected the need to determine the actual intent of the parties at the time they began the IVF process.<sup>222</sup> The court reasoned: “Assuming that it would be possible to enter into a valid agreement at that time irrevocably deciding the disposition of preembryos in circumstances such as we have here, a formal, unambiguous memorialization of the parties’ intentions would be required to confirm their joint determination.”<sup>223</sup> However, the court did not end its analysis there. The court explained, “M.B.’s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos. M.B. is already a father and is able to become a father to additional children, whether through natural procreation or further in vitro fertilization.”<sup>224</sup> But the effect on J.B. would allegedly be much different. “J.B.’s right not to procreate may be lost through attempted use or through donation of the preembryos. Implantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.”<sup>225</sup>

Yet, the *J.B.* court was somewhat selective in the harms that it wished to discuss. Suppose, for example, that M.B. viewed the destruction of an embryo as the equivalent of the loss of a child, a potential harm to him not even considered by the court. Courts have been willing to award damages for pain and suffering for the loss of a fetus,<sup>226</sup> so one might have expected the New Jersey court to have included more considerations in its balancing. Indeed, M.B. asserted religious convictions regarding the preservation of the preembryos, which provided additional interests to be weighed.<sup>227</sup>

It might be thought that the *J.B.* court adopted the approach employed in *Davis* to balance the parties’ interests in those cases where there was no express agreement to control the disposition of the embryos.<sup>228</sup> But such a view would be incorrect. The New Jersey Supreme Court made clear that even if there had been an express written agreement, such an agreement would not have been enforceable against the wishes of someone who had changed his or her mind.<sup>229</sup> According to the court, “[T]he better rule, and

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fertilization procedure that any unused preembryos would not be destroyed, but would be used by his wife or donated to infertile couples.”)

222. *Id.* at 714.

223. *Id.*

224. *Id.* at 717.

225. *Id.*

226. *See, e.g., Johnson v. Pastoriza*, 810 N.W.2d 42, 54 (Mich. Ct. App. 2010) (upholding “damages for emotional distress, mental anguish, and grief and sorrow”).

227. *J.B.*, 783 A.2d at 712.

228. *See Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

229. *J.B.*, 783 A.2d at 719.

the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.”<sup>230</sup>

The *J.B.* court clearly viewed its ruling as preventing an individual from being forced to become a parent against his or her will.<sup>231</sup> However, a separate question was raised by the court’s suggestion that an individual could change his or her mind about the use or *destruction* of the embryos, namely, whether an individual could block the destruction of the embryos by withholding his or her consent. Thus, the court did not explain whether it was offering the would-be parent a method by which he or she could maintain the status quo (continuing to neither be a parent nor have embryos destroyed) by keeping the embryos frozen.

The *J.B.* court also noted that the intermediate appellate court had ordered the embryos to be destroyed,<sup>232</sup> but that at oral argument *J.B.* manifested her willingness for the embryos to remain frozen if *M.B.* were willing to pay the costs associated with their continued preservation.<sup>233</sup> The court was amenable to that arrangement if *M.B.* agreed to those terms.<sup>234</sup> One cannot tell, however, whether *M.B.* could have blocked the destruction of the embryos as a matter of right (as long as he was willing to pay the costs of continued cryopreservation) or whether, instead, this possibility was presented only because of *J.B.*’s willingness to permit continued cryopreservation of the embryos.

The Washington Supreme Court employed yet another approach to analyze these issues in *Litowitz v. Litowitz*.<sup>235</sup> Becky and David Litowitz could not agree about what to do with the remaining frozen embryos at the time of their divorce.<sup>236</sup> Becky was unable to produce eggs or carry a child

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230. *Id.*

231. *Id.* (“[O]rdinarily the party choosing not to become a biological parent will prevail.”).

232. *Id.* at 720 (“Under the judgment of the Appellate Division, the seven remaining preembryos are to be destroyed.”).

233. *Id.* (“It was represented to us at oral argument, however, that *J.B.* does not object to their continued storage if *M.B.* wishes to pay any fees associated with that storage.”).

234. *Id.* (“*M.B.* must inform the trial court forthwith whether he will do so; otherwise, the preembryos are to be destroyed.”).

235. 48 P.3d 261 (Wash. 2002) (en banc).

236. *Id.* at 264.

to term and wanted the embryos implanted in a surrogate.<sup>237</sup> In contrast, David wanted them donated to another couple.<sup>238</sup>

The trial court awarded the embryos to David using a “best interests of the child” standard.<sup>239</sup> That court took into consideration that Becky would be a single, elderly mother if implantation in a surrogate led to a live birth.<sup>240</sup> It was not clear whether Becky’s lack of a genetic connection to the child (donor eggs had been used) secretly played any role in the analysis.<sup>241</sup>

The Washington Supreme Court explained that “the egg donor contract [gave] her and Respondent equal rights to the eggs even though she [was] not a progenitor.”<sup>242</sup> However, the court reasoned that “the egg donor contract [did] not relate to the preembryos which resulted from subsequent sperm fertilization of the eggs.”<sup>243</sup> Perhaps that is so, but the question remained whether Becky had a cognizable interest in the preembryos. If not, then one would have expected David’s wishes to be honored because his interest in the preembryos was not merely based on rights gained through contract.

Suppose that the *Litowitz* court had said that Becky lacked a cognizable interest in the preembryos because, after all, she had “no biological connection to the preembryos and [was] not a progenitor.”<sup>244</sup> It would not be difficult to imagine other kinds of cases where parental rights would be contested—one of the parties could claim that the other party did not have an interest in the embryos or, perhaps, in the child, because the latter party had no biological connection to those embryos or to that child.<sup>245</sup> In any event, it is clear that the court did not deny that Becky had an interest in the disposition of the embryos, if only because of the court’s refusal to simply award them to David.<sup>246</sup> Indeed, the court’s ruling was not in accord with the wishes of either David or Becky.<sup>247</sup>

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237. *Id.* at 262, 264.

238. *Id.* at 264.

239. *Id.*

240. *Id.* (quoting the trial court’s order and emphasizing that “both parties here are old enough to be the grandparents of any child, and that is not an ideal circumstance”).

241. *See id.* at 262-63 (noting that an “egg donor” had been used).

242. *Id.* at 267.

243. *Id.* at 268.

244. *Id.* at 267.

245. *See, e.g., In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005) (discussing an ex-partner who claimed that his ex-partner was not a parent of the children she carried to term because she was not genetically related to them).

246. *Litowitz*, 48 P.3d at 271.

247. *Id.*

The *Litowitz* court also noted that the original contract between the Litowitzes and the fertility center had specified that after five years the frozen embryos would be “thawed but not allowed to undergo further development . . . until such time as [that option selection was] changed, in writing, by [the Litowitzes’] joint direction.”<sup>248</sup> Because more than five years had elapsed since the contract was signed and before the first implantation had taken place, the Washington Supreme Court noted that the embryos might already have been destroyed.<sup>249</sup> If the embryos were still in existence, the court directed that the intention under the original contract be carried out,<sup>250</sup> which presumably meant that the embryos would be destroyed, contrary to the wishes of both parties.<sup>251</sup>

In *In re Marriage of Witten*, the Iowa Supreme Court adopted the approach suggested by the New Jersey Supreme Court in *J.B.*,<sup>252</sup> namely, that the status quo would be maintained in cases in which the parties could not agree.<sup>253</sup> Tamera and Trip Witten were divorcing, and they could not agree about the disposition of the embryos that had been created during the marriage.<sup>254</sup>

Tamera wished to have them implanted either in her or in a surrogate.<sup>255</sup> “She testified that upon a successful pregnancy she would afford Trip the opportunity to exercise parental rights or to have his rights terminated,” whichever he preferred.<sup>256</sup> She opposed donation or destruction of the

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248. *Id.* at 264 (emphasis and citation omitted).

249. *Id.* at 268-69 (“[T]he cryopreservation contract was signed by the Litowitzes on March 25, 1996. More than five years have passed since that date. The probable date of implantation of the three preembryos actually used was April 20, 1996. More than five years have passed since that date.”).

250. *Id.* at 269 (“If the two preembryos still exist, they would be a proper subject for consideration by the court under the cryopreservation contract.”).

251. *Id.* at 274 (Sanders, J., dissenting) (“But the majority’s disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the preembryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination.”).

252. *See supra* notes 232-34 and accompanying text (discussing one possible interpretation of *J.B.*).

253. *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003).

254. *See id.* at 772-73.

255. *Id.* at 772 (“Tamera asked that she be awarded ‘custody’ of the embryos. She wanted to have the embryos implanted in her or a surrogate mother in an effort to bear a genetically linked child.”).

256. *Id.* at 772-73.

embryos.<sup>257</sup> While Trip opposed destruction or use of the embryos by his ex-wife, he did not oppose the embryos being donated to another couple.<sup>258</sup>

One of the first legal issues addressed by the court was whether the fetus was a person for purposes of state law.<sup>259</sup> The court noted some inconsistency in the case law.<sup>260</sup> In one case, the Iowa Supreme Court held that a fetus not born alive was not a person,<sup>261</sup> but in a different case allowed recovery for the death of a fetus that was not born alive, reasoning that an unborn fetus should count as a deceased child.<sup>262</sup>

The *Witten* court then set about deciding whether the best interest test could be used in the context of deciding who should be awarded frozen embryos.<sup>263</sup> The court found such principles inapplicable because “it would be premature to consider which parent can most effectively raise the child when the ‘child’ is still frozen in a storage facility.”<sup>264</sup>

While recognizing that “Iowa statutes clearly impose responsibilities on parents for the support and safekeeping of their children,” the Iowa court reasoned that those laws “do not contemplate the complex issues surrounding the disposition and use of frozen human embryos.”<sup>265</sup> The court interpreted the state’s public policy to relate to “the State’s concern for the physical, emotional, and psychological well being of children who have been born, not fertilized eggs that have not even resulted in a pregnancy.”<sup>266</sup>

The Iowa court seemed to accept the judgment of sister courts that there was “no public policy that requires the use of the frozen embryos over one party’s objection.”<sup>267</sup> Further, the court was sympathetic to the approach offered by the Massachusetts and New Jersey courts, reasoning that “it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or

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257. *Id.*

258. *Id.* at 773.

259. *Id.* at 774.

260. *Id.*

261. *See id.* at 775 (discussing *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971)).

262. *See id.* (discussing *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983)).

263. *See id.*

264. *Id.*

265. *Id.* at 780.

266. *Id.*

267. *Id.*

use of the embryos.”<sup>268</sup> Indeed, the court, citing *J.B.*, adopted the contemporaneous consent model, holding that “agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, ‘subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo.’”<sup>269</sup> The court applied the contemporaneous consent model not only to the implantation of embryos, but also to their destruction.<sup>270</sup> The court explained that “no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors.”<sup>271</sup> The court understood that where one party wanted to use the embryos and the other party wanted to destroy them, there might well be a “stalemate.”<sup>272</sup> In that event, “the embryos [would be] stored indefinitely unless both parties [could] agree,” and “any expense associated with maintaining the status quo should . . . be borne by the person opposing destruction.”<sup>273</sup>

The *Witten* court was correct that the best interests test is not readily applied in the frozen embryos context if the question involves which of two would-be parents should be awarded frozen embryos. After all, there might not be any history to help determine which parent having custody would best promote the interests of the child. But that point, while accurate, hardly supports the contemporaneous consent model—it is difficult to understand why an embryo’s interests are promoted by being in perpetual frozen limbo unless the alternative is destruction.

#### *B. Frozen Embryos and Personhood*

Many of the courts addressing the disposition of frozen embryos have expressly noted that the embryos were not persons.<sup>274</sup> This played an analytical role in at least two distinct ways. First, courts deciding who should be awarded frozen embryos sometimes weigh the right to become a parent against the right to not become a parent.<sup>275</sup> But if the fetus is a person from the moment of conception, then those who have created embryos have already become parents (or, at least, have already created persons). Second, when deciding whether enforcing an agreement to

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268. *Id.* at 781.

269. *Id.* at 782 (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)).

270. *Id.* at 783.

271. *Id.*

272. *See id.*

273. *Id.*

274. *See* discussion *supra* Part III.A.

275. *See* discussion *supra* Part III.A.

destroy frozen embryos violates public policy, courts assumed that enforcement would not result in the death of persons.<sup>276</sup> In a state with a personhood amendment, enforcement of such a contract would not only destroy persons and thus violate public policy, but might also result in the imposition of criminal sanctions.<sup>277</sup>

That personhood amendments would have implications for criminal law should not be surprising. To see this, one need only consider the increasing tendency in the states to impose criminal or civil sanctions against those who cause the injury or death of a fetus, *even when the fetus is not considered a person*.<sup>278</sup> In these cases, abortion rights are not relevant because the pregnant mother plans to carry the fetus to term.<sup>279</sup> However, such statutes are also applied to pregnant women who expose the fetuses in utero to prohibited drugs.<sup>280</sup> For example, in *State v. McKnight*, South Carolina convicted a woman of homicide by child abuse for exposing her fetus in utero to cocaine.<sup>281</sup>

Personhood amendments would expand the universe of beings whose deaths might result in criminal sanctions. If frozen embryos are persons, then an individual who destroys them intentionally or recklessly would risk

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276. See discussion *supra* Part III.A.

277. A separate issue is whether criminal laws could be applied retroactively to punish those who destroyed embryos prior to the passage of a personhood amendment. See Dunaway, *supra* note 114, at 358 (“[A] personhood bill such as the model discussed herein would not and could not criminalize that practice. This is because due process requirements preclude the criminal prosecution of any individual without clear, specific guidance as to what behavior is proscribed. This bill would not meet those standards with regard to conduct that was legal prior to its passage . . .”).

278. See Crist, *supra* note 114, at 856.

279. See, e.g., *United States v. Boie*, 70 M.J. 585 (A.F. Ct. Crim. App. 2011) (discussing a husband who was charged with causing the death of his unborn child by secretly placing drugs in his wife’s food, where she wanted to carry the fetus to term); see also Crist, *supra* note 114, at 854 (“[I]t is entirely logical for a state to punish the same act (termination of a pregnancy) differently in different circumstances. Abortion by the mother is simply not the same as an unprovoked assault on the fetus by a third party.”).

280. See, e.g., *Ankrom v. State*, CR-09-1148, 2011 WL 3781258 (Ala. Crim. App. Aug. 26, 2011) (upholding conviction of a woman who exposed her fetus to cocaine in utero); *Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012) (woman charged with feticide for ingesting rat poison when she was thirty-three weeks pregnant); cf. Nelson, *supra* note 20, at 186 (“[A] pregnant woman could face criminal prosecution for child endangerment . . . if her prenatal human were a constitutional person because the State is obligated to protect the lives and health of the unborn to the same extent it protects the lives of born children.”).

281. 576 S.E.2d 168, 171 (S.C. 2003).

the imposition of criminal sanctions.<sup>282</sup> This might even mean that an individual who negligently caused the destruction of frozen embryos could be subject to criminal penalties.<sup>283</sup> It was perhaps the potential for civil and criminal liability that the *Davis* court feared would result in the closing of IVF programs.<sup>284</sup>

Certainly, it is fair to suggest that whether or not embryos are treated as persons, the mishandling of such embryos creates the potential for liability.<sup>285</sup> Yet, the kinds of potential civil and criminal liability would greatly increase if the recognition of personhood from the moment of conception were accorded.<sup>286</sup>

Some states permit wrongful death actions for fetuses.<sup>287</sup> For example, Louisiana recognizes wrongful death actions for fetuses,<sup>288</sup> but does not

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282. Cf. Nelson, *supra* note 20, at 203 (“Twenty-five states have statutes which make the unborn at any stage of development victims of criminal homicide . . .”).

283. See *Inst. for Women’s Health, P.L.L.C. v. Imad*, No. 04-05-00555-CV, 2006 WL 334013, at \*1 (Tex. App. Feb. 15, 2006) (“[A]n embryologist employed by Women’s Health dropped a tray of nine fertilized eggs, destroying eight of those eggs. . . . [T]he Imads subsequently filed suit against Women’s Health asserting theories of negligence, bailment and wrongful death.”). If negligence could be proven and the fertilized eggs were considered persons, the embryologist presumably might have been subject to criminal sanction.

284. See *supra* note 178 and accompanying text.

285. For example, a couple sued a fertility clinic for destroying eight of the nine fertilized eggs they had created. See *Imad*, 2006 WL 334013, at \*1; see also *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1258 (Ariz. Ct. App. 2005) (“The Jeters sued Mayo for the alleged negligent destruction or loss of five of the Jeters’ frozen human pre-implantation embryos or pre-embryos, which Mayo agreed to cryopreserve and store.” (footnote omitted)); *Unruh-Haxton v. Regents of Univ. of Cal.*, 76 Cal. Rptr. 3d 146, 157 (Ct. App. 2008) (“[T]he patients’ claims for fraud, conversion, and intentional infliction of emotional distress related to wrongful intentional conduct, not mere negligence. The allegations of stealing and then selling a person’s genetic material for financial gain is an intentional act of egregious abuse against a particularly vulnerable and trusting victim.”). Additionally, in *Frisina v. Women & Infants Hosp. of R.I.*, the plaintiffs “brought suit against the Hospital for the loss or destruction of their embryos,” asserting “three theories of recovery: medical malpractice, bailment, and breach of contract.” Nos. CIV.A. 95-4037, 95-4469, 95-5827, 2002 WL 1288784, at \*2 (R.I. Super. Ct. May 30, 2002).

286. For example, the *Jeter* court held that “absent legislative action expanding the wrongful death statutes, as a matter of law, a cryopreserved, three-day old fertilized human egg is not a ‘person’ for purposes of that statute.” 121 P.3d at 1259.

287. See *Hamilton v. Scott*, 97 So. 3d 728, 735 (Ala. 2012) (“Alabama’s wrongful-death statute allows an action to be brought for the wrongful death of any unborn child, even when the child dies before reaching viability.”); *Johnson v. Pastoriza*, 818 N.W.2d 279, 282 (Mich. 2012) (discussing a Michigan law that “imposes liability for wrongful or negligent acts against a pregnant woman that result in the pregnant woman’s miscarriage or stillbirth or ‘physical injury’ to the fetus”); *Pino v. United States*, 2008 OK 26, ¶ 24, 183 P.3d 1001,



thereby accord fetuses legal personhood as a general matter.<sup>289</sup> Were personhood recognized from the moment of conception, wrongful death actions might be brought on behalf of frozen embryos.<sup>290</sup>

Courts *might* also focus on whether the frozen embryo, if implanted, would have led to a live birth.<sup>291</sup> However, this focus would not be to determine whether a person would have existed, because that would have already been established by the personhood amendment.<sup>292</sup> Rather, such a focus might be helpful in determining which damages would be more than merely speculative.<sup>293</sup> Indeed, a separate issue is whether it would even be possible as a matter of law to prove damages in such cases.<sup>294</sup>

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1006 (“Oklahoma’s wrongful death statute, [12 OKLA. STAT. § 1053], afforded a cause of action for the wrongful death of a nonviable, stillborn fetus.”).

288. *Wartelle v. Women’s & Children’s Hosp., Inc.*, 704 So. 2d 778, 780-81 (La. 1997) (“Article 26 provides: An unborn child shall be considered as a natural child for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”) (quoting LA. CIV. CODE ANN. art. 26 (1987)).

289. *See id.* at 784 (“[I]t is indisputable that La. Civ. Code art. 26 creates *exceptions* to the general rule that a stillborn fetus has no legal personality. It is a well settled rule of statutory construction that exceptions to a general rule are narrowly construed.” (citing *State ex rel Murtagh v. Dep’t of City Civil Serv.*, 42 So. 2d 65 (La. 1949))).

290. *Dunaway*, *supra* note 114, at 347 (“One immediate effect of a personhood law would be the creation of a cause of action for the wrongful death of an unborn child in a state that does not already recognize this cause of action. Where left to interpretation, courts generally construe state wrongful death statutes to provide no cause of action for a stillborn child, even where the death results from the tortious act of a third party.”).

291. *See Jeter*, 121 P.3d at 1262 (“Unlike a viable fetus, many variables affect whether a fertilized egg outside the womb will eventually result in the birth of a child. This makes it speculative at best to conclude that ‘but for the injury’ to the fertilized egg a child would have been born and therefore entitled to bring suit for the injury.” (citation omitted)).

292. *Cf. Hudak v. Georgy*, 634 A.2d 600, 603 (Pa. 1993) (“[W]e are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person. Since live birth has always been and should remain a clear line of demarcation, an action for wrongful death and survival can be maintained on behalf of the Hudak triplets.”).

293. *See Rice v. Rizk*, 453 S.W.2d 732, 735 (Ky. 1970) (“Lack of proof of the decedent infant Rice’s power will not preclude recovery for the wrongful, negligent destruction of the infant’s power to earn money. To require such proof would be to deny damages in the instant case, as well as in all similar wrongful, negligent death cases involving infants. There is an *inference* that the child would have had some earning power, and in this lies the basis for recovery.” (citing *City of Louisville v. Stuckenborg*, 438 S.W.2d 94. (Ky. 1968); *Heskamp v. Bradshaw’s Adm’r*, 172 S.W.2d 447 (Ky. 1943))). *But see DiDonato v. Wortman*, 358 S.E.2d 489, 494 (N.C. 1987) (“We also hold that damages normally recovered under [the North Carolina statute]—loss of services, companionship, advice and the like—will not be available in an action for the wrongful death of a viable fetus. The

The personhood of embryos would have other legal implications as well. Consider *Cwik v. Cwik*, in which the ex-husband claimed that enforcing the previous agreement to give the frozen embryos to his ex-wife was contrary to public policy and “unenforceable.”<sup>295</sup> He argued “that it was in the best interest of the parties’ embryos that he be granted ‘custody’ because he would hire a surrogate to give birth to the embryos.”<sup>296</sup> The court rejected his argument, at least in part, because “[c]ourts have not afforded frozen embryos legally protected interests akin to persons.”<sup>297</sup> As a result, the court affirmed the lower court’s decision “awarding the frozen embryos in accordance with the signed [contract].”<sup>298</sup>

Suppose that *Cwik* were decided in a state where frozen embryos were considered persons. In that event, it would be difficult to justify awarding them to an individual who opposed their implantation.

For this reason, the *Witten* court’s analysis was correct, but incomplete, when it noted that the best interests test may not be particularly well-suited to deciding frozen embryo disputes.<sup>299</sup> The court was correct that when progenitors argue about who should have custody, there is, of course, no record with respect to who has exercised primary caretaking duties.<sup>300</sup> By the same token, one of the reasons that a custody allocation in a premarital agreement is viewed as contrary to public policy is that one cannot tell before the birth of a child which parent’s custody will best promote the

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reasons are the same as in the case of pecuniary loss. When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason.” (footnote omitted)).

294. See *Connor v. Monkem Co.*, 898 S.W.2d 89, 93 (Mo. 1995) (en banc) (“[P]arents and children have legally protectable interests in the life of a child from conception onward. . . . Plaintiff’s victory to this point, however, may be largely pyrrhic. While we hold that a wrongful death claim may be stated for a nonviable unborn child, plaintiff’s ability to prove damages is certainly subject to question. Missouri has recognized that “[s]peculative results are not a proper element of damages.” (alteration in original) (quoting *Wise v. Sands*, 739 S.W.2d 731, 734 (Mo. Ct. App. 1987))).

295. 2011-OHIO-463, No. C-090843, 2011 WL 346173, ¶ 56 (Ct. App. Feb. 4, 2011).

296. *Id.*

297. *Id.*

298. *Id.* ¶ 64.

299. See *In re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003).

300. See *Kurhajetz v. Fenice*, No. A07-0865, 2008 WL 570821, at \*4-6 (Minn. Ct. App. Mar. 4, 2008) (upholding custody award of child to mother, the primary caretaker).

interests of that child.<sup>301</sup> That said, the issue remains whether the embryo will be allowed to develop into a child *at all*. It would seem difficult to argue that the embryo's best interests would be served by never being implanted, unless there was reason to think that it would somehow be better for the embryo never to develop into a child.<sup>302</sup> That the best interests test is unhelpful in determining which parent should be awarded custody of frozen embryos does not mean that it is also unhelpful with respect to whether an embryo's interests would be furthered by being implanted.

In *Nash v. Nash*, a Washington appellate court awarded frozen embryos upon divorce to the ex-husband, James, who wished to use them, rather than to the ex-wife, Tina, who wanted them destroyed.<sup>303</sup> The court noted that James wanted to be a parent again and that he did not have reasonable alternatives to achieve that result.<sup>304</sup> The decision did not rely at all on the personhood of the embryos; rather, it relied on the parties' agreement to let the court decide who would have custody of the remaining embryos.<sup>305</sup> The point is that such a result would seem even more likely had the embryos already been deemed persons.

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301. See *Dysart v. Dysart*, No. D196/2001, 2002 WL 31940724, at \*2 (Terr. Ct. V.I. Dec. 17, 2002) (“[C]ourts have also found that the pre-marital resolution of support and custody rights are void as against public policy.”); see also Louis Parley, *Premarital Agreements in Connecticut Where We Are and Where We Are Going*, 69 CONN. B.J. 495, 512 (1995) (“For the most part, courts have treated custody, care (including religious up-bringing) and visitation provisions in premarital agreements as violative of public policy, being an interference with the courts’ obligation and authority to make such determinations based on the child’s best interests . . .”).

302. Such a claim would be analogous to the wrongful life claim. See Nanette R. Elster, *HIV and ART: Reproductive Choices and Challenges*, 19 J. CONTEMP. HEALTH L. & POL’Y 415, 424 (2003) (“A ‘wrongful life’ action is one in which the child ‘sues for damages, claiming that he would have been better off never having lived at all . . .’”).

303. 150 Wash. App. 1029, No. 62553-5-I, 2009 WL 1514842, at \*4 (June 1, 2009) (“In the Order Relating to Stored Embryos, the court ruled that James ‘shall have 100% control over the embryos stored at the Reproductive Medicine Laboratory, Inc., Portland, Oregon pursuant to the [cryopreservation agreement] signed by the parties on March 4, 2005.’ The order also provides that ‘[n]o other person has any parental obligations or rights related to the embryos’ and James ‘does not have to seek permission from any other person for any use of the embryos . . .’ Tina testified that she wanted the preembryos destroyed. James testified that because he had ‘never loved anything in my life as much as those two little boys,’ he ‘absolutely’ wanted more children.” (alterations in original)).

304. *Id.* at \*4.

305. See *id.* at \*5 (“In the mediation agreements, the parties agreed that ‘The issue of which party shall have control over . . . the embryos stored with Oregon Reproductive Medicine shall be determined by Judge Douglass North at a trial on October 6, 2008 or another date set by the court.’” (alteration in original)).

The court's consideration of another aspect of *Nash* might have been different, however. The *Nash* trial court ruled that Tina had no parental rights or obligations with respect to the embryos, a ruling affirmed on appeal.<sup>306</sup> If the embryos were viewed as persons, a court would likely be more reluctant to sever parental obligations of support (for example, where the embryo was implanted and resulted in a live birth) unless doing so could somehow be argued to be in the interest of the child.<sup>307</sup>

If embryos were viewed as persons by a State, a parent who opposed implantation could not ask for their destruction because that would be contrary to public policy. A more likely scenario would be that one parent would want the embryos implanted, while the other would seek to have them remain frozen. A court deciding between those two parents might take several factors into account. First, one question would be whether continued cryopreservation would be viewed as detrimental—for example, because continued cryopreservation might decrease the chances that eventual implantation would be successful.<sup>308</sup> Even were there no fear of reducing the likelihood of success of implantation, the court would have to compare whether it would be better for the possible future child to permit an implantation attempt or, instead, to maintain the status quo by keeping the embryo frozen.

An additional complication might arise if, for example, the embryos were cryopreserved in a state that considered them persons and one of the progenitors wished to have them transferred to a different state where they were not considered persons. *York v. Jones* involved a couple who wished to have their cryopreserved pre-zygote transferred from the Jones Institute in Norfolk, Virginia, to the Institute for Reproductive Research in Los Angeles, California.<sup>309</sup> When the plaintiffs entered the cryopreservation program, they lived in New Jersey.<sup>310</sup> However, they subsequently moved

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306. *Id.* at \*7 (“We conclude that the trial court did not exceed its authority in ruling that Tina did not have any parental obligation or rights to the preembryos.”).

307. *See In re Parental Rights as to T.M.C.*, 52 P.3d 934, 936 (Nev. 2002) (“The termination of parental rights is aimed at protecting the welfare of children. However, it is inappropriate to use termination of parental rights as a means to reward a parent by shielding him from his obligation to provide support for his child. It would be a rare circumstance in which the termination of parental rights would enhance, rather than deteriorate, the relationship between a parent and his child.” (citing *In re Termination of Parental Rights as to N.J.*, 8 P.3d 126, 133 (Nev. 2000))).

308. *See Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1264 (Ariz. Ct. App. 2005) (“[I]t is unclear how long a pre-embryo can safely remain in a cryopreserved state.”).

309. 717 F. Supp. 421, 422 (E.D. Va. 1989).

310. *Id.* at 423.

to California and asked the Jones Institute to transfer their remaining prezygote to California where they would again try to have a child.<sup>311</sup> Their request was refused.<sup>312</sup>

One of the implicated issues was how to characterize the relationship between the plaintiffs and the clinic. The *York* court explained that the case involved a bailment relationship,<sup>313</sup> and that “[t]he essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor.”<sup>314</sup> The Jones Institute was ordered to return the property to the plaintiffs.<sup>315</sup>

Suppose, however, that the embryos were treated as persons. The question would be whether relocation of the embryos to another jurisdiction would be in the embryos’ best interests. A case like *York*, in which the couple wished to attempt implantation at a facility in another state, would presumably be decided the same way. However, a separate question would be whether a court would permit relocation if, for example, the person seeking the relocation was simply trying to take the embryos to a state where they could be destroyed without violating the law.<sup>316</sup>

### C. *The IVF Clinic in the Personhood State*

Suppose that a state with IVF clinics passed a personhood amendment. Suppose further that the clinics remained in business, perhaps because they would face no more civil liability than clinics in other states and they were confident that they would not be prosecuted under criminal laws. At least

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311. *Id.* at 423-24.

312. *Id.* at 424. That refusal was based on the absence of approved “guidelines concerning the ethical, medical and legal implications of inter-institutional transfer.” *Id.* at 426.

313. *Id.* at 425 (“In the instant case, the requisite elements of a bailment relationship are present.”).

314. *Id.*

315. *Id.* at 427; see also John Matthew Aragona, *Dangerous Relations: Doctors and Extracorporeal Embryos, the Need for New Limits to Medical Inquiry*, 7 J. CONTEMP. HEALTH L. & POL’Y 307, 327 (1991) (“Because the relationship between the parties had been terminated by the Yorks, the Jones Clinic, as bailee, had an ‘absolute obligation to return the subject matter of the bailment to the bailor.’” (quoting *York*, 717 F. Supp. at 425)).

316. *Cf. McDonald v. Burch*, 91 S.W.3d 660, 666 (Mo. Ct. App. 2002) (“Section 452.377.9 places the burden of showing *both* that her request for relocation is made in good faith *and* that the relocation is in the children’s best interests. Mother has not carried the heavy burden of showing the trial court abused its wide discretion in finding that relocation was not in the children’s best interests. Accordingly, she failed to meet one of her burdens under § 452.377.9, so we affirm the trial court’s judgment denying her request to relocate.”).

one issue for prospective users of the clinic would be what direction they would give for the use of their frozen embryos.

Presumably, the State would permit couples to donate unused embryos to someone else.<sup>317</sup> However, a couple might not be willing to have someone else raise children produced from their embryos. Such a couple might have a few choices. First, if IVF clinics were located in states without personhood amendments, the couple could make use of one of those clinics, notwithstanding the increased costs because of extra travel. The current jurisprudence in many states suggests that an individual would not be forced to be a parent against his or her will, especially if the original agreement so specified.<sup>318</sup> Assuming that the clinic was in one of those states, the would-be parents would not need to worry that their embryos might be raised by someone else if their marriage ended sometime in the future.

Second, if the couple wanted to participate in an IVF program in a state with a personhood amendment, but was unwilling to consider donation of their embryos, they might still harvest eggs and, perhaps, sperm. However, rather than freeze embryos, they might instead consider freezing the eggs (and, perhaps, the sperm) and only creating embryos as needed. Because the frozen gametes would not themselves count as persons, the couple would not have to worry about the possible legal and ethical difficulties implicated in embryo disposal.<sup>319</sup>

Yet, one grave difficulty with freezing the gametes separately involves current technological limitations, because such a process is much less likely to lead to a live birth.<sup>320</sup> Even if technology were to develop so that this

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317. See discussion *supra* Part III.A (describing Louisiana statute mandating donation of unwanted embryos).

318. See discussion *supra* Part III.A (describing the current position in many states on awarding custody of embryos when a couple is divorcing).

319. Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 335 (2006) (“There is no question that freezing unfertilized eggs, rather than embryos, would obviate the difficult legal and moral issues associated with embryo cryopreservation.”); Virginia Godoy, Note, *Where Is Biotechnology Taking the Law? An Overview of Assisted Reproductive Technology, Research on Frozen Embryos and Human Cloning*, 19 J. JUV. L. 357, 369 (1998) (“Freezing eggs dispenses with the ethical and legal dilemma of disposition of unused frozen embryos and other issues associated with frozen embryos.”).

320. See Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women’s Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 619-20 (2011) (discussing the lower success rates when eggs are frozen separately); see also Katz, *supra* note 319, at 335 (“Although freezing human eggs is possible, there is still debate over its efficacy in IVF treatment. At the present time the freezing of ‘human oocytes still

option would be a more reliable choice, the would-be parents would still be confronted with a difficult choice, assuming that freezing the eggs continued to be less likely to eventually lead to a live birth. The woman would go through the difficult and painful process involved in harvesting eggs;<sup>321</sup> the couple would then have to decide whether to create as many embryos as possible so that they could maximize their chances of having a child without having to undergo the harvesting process again.<sup>322</sup> But divorce rates are high, which means that the couple might have to decide what to do with any remaining frozen embryos if their marriage failed.<sup>323</sup> Or, the couple could decide to freeze the gametes separately, thus making it less likely that they would be able to achieve their dreams of having a child.

#### IV. Conclusion

Several states have considered or will soon consider the adoption of personhood amendments. While such amendments would not themselves modify federally-protected rights to privacy, these rights seem somewhat precarious because of both the way the jurisprudence has been developing and the possibility that membership on the Supreme Court will change. If the Court were to hold that the Constitution gives the States more latitude with respect to their ability to regulate access to abortion and contraception, then a State's adoption of a personhood amendment might effectuate sweeping changes with respect to privacy rights within that state.

Even if there are no changes to current privacy jurisprudence, personhood amendments would significantly affect other areas of criminal and civil law. The focus here is on the effects on assisted reproductive technologies. Such amendments might well affect the availability of clinics and would certainly affect the decisions that would-be parents might make

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generally yields unsatisfactory results and is therefore considered experimental,' so it cannot be said to be the answer to the dilemma of frozen embryos." (footnotes omitted)); Godoy, *supra* note 319, at 368 ("Once the technology for the freezing of human eggs becomes reliable, freezing eggs and sperm separately could replace freezing embryos.").

321. Tracy J. Frazier, Comment, *Of Property and Procreation: Oregon's Place in the National Debate over Frozen Embryo Disputes*, 88 OR. L. REV. 931, 935 (2009) ("Because the process of harvesting a woman's eggs is invasive and expensive, and repeated attempts at implantation are often required, doctors prefer to harvest multiple eggs at once.").

322. *Id.* ("The eggs are then fertilized simultaneously, creating viable embryos. Of these embryos, several will be selected for implantation into the woman's uterus using a transfer catheter, while the others will be frozen in the event that the first implantation is unsuccessful." (footnotes omitted)).

323. See Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 638 (2011) (discussing high divorce rates).

about how to achieve their dreams of having a family. While such amendments would certainly affect, for example, whether embryos could be donated for research,<sup>324</sup> they would also affect decisions that families might make when deciding whether or how to bring children into the world. Such amendments also might add to the cost of what is already an extremely expensive undertaking. Further, some couples who would shudder at the thought of their children being raised by someone else would simply decide that the risks were too great and decide not to try to have children at all. Both amendment proponents and opponents fail to appreciate some of the significant effects that the adoption of such laws might have, and all parties might be both surprised and disappointed by some of the foreseeable consequences of such an amendment's adoption.

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324. See Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 140 (2007) (“Individual states may amend their state constitutions to legally define a human being as beginning at the time of conception and to confer personhood upon the unborn. Individual states may enact criminal, tort and other laws that outlaw abortion, violence against wanted unborn human beings, embryonic stem cell research, and cloning.”).