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EXCESS EMBRYOS: IS EMBRYO ADOPTION A NEW SOLUTION OR A TEMPORARY FIX?*

INTRODUCTION

Kathy and Gary Butler tried to conceive for years.¹ They spent all of their money on myriad infertility treatments, and were quickly running out of options.² The couple wanted to adopt a child, but traditional adoption agencies turned Kathy away, as she was too old to qualify under existing regulations governing U.S. adoptions.³ When the Butlers learned of embryo adoption, they were thrilled at the prospect of being able to give birth to a child.⁴ Kathy was implanted with three embryos. Two survived the implantation, one of which split into identical twins.⁵ At the age of forty-seven, Kathy Butler was pregnant with triplets.⁶

The Butlers are among many people with fertility problems who are taking advantage of the growing industry of assisted reproductive technology ("ART").⁷ Fertility clinics and adoption agencies now offer embryo adoption, an increasingly

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¹ Gina Kolata, *Clinics Selling Embryos Made for 'Adoption,'* N.Y. TIMES, Nov. 23, 1997, at A1.

² *Id.*

³ *Id.* Adoption is governed primarily by state law. Generally, adoption agencies require prospective adopters meet certain criteria in order to qualify for consideration. For example, age is one factor that is commonly taken into consideration. National Adoption Information Clearinghouse ("NAIC"), *Adoption: Where Do I Start?*, at http://www.calib.com/naic/pubs/f_start.htm (last visited Jan. 18, 2003).

⁴ Kolata, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ Paul C. Redman II & Lauren Fielder Redman, *Seeking a Better Solution For the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 584 (2000). ART encompasses all of the available procedures involving the retrieval of eggs or oocytes from the ovary.

popular method of dealing with infertility.⁸ Recently, embryo adoption received heightened media attention as a result of the stem cell debate, which revealed the problem of the growing supply of unused frozen embryos resulting from *in vitro* fertilization ("IVF").⁹

IVF is one of the most frequently utilized methods of treating infertility. It occurs when eggs extracted from a female are fertilized with a man's sperm to create embryos.¹⁰ These embryos are implanted in a woman in limited numbers. Any excess embryos are frozen for possible future use.¹¹ In the event the embryos are no longer needed, however, IVF patients must decide the fate of their frozen embryos. Some people are not comfortable with the more traditional dispositional choices facing them, such as implantation, donation to research or destruction.¹² As a result, more and more IVF patients are turning to embryo adoption as a means of dealing with their surplus embryos.¹³

The growing practice of embryo adoption raises a host of new ethical, moral and legal dilemmas that have yet to be resolved.¹⁴ Despite this, fertility clinics and adoption agencies continue to facilitate embryo adoption, a practice left entirely unregulated by federal and state governments.¹⁵ As a result,

⁸ Rita Rubin, *100,000 Frozen Embryos—One Couple's Surplus Can Fill Void of Another*, USA TODAY, Dec. 8, 1998, at A1 (noting that, not only are adoption agencies beginning to offer embryo adoption, but that in a 1996 survey of fertility clinics, out of the 108 that replied, forty had "facilitated at least one donation . . .").

⁹ For a history of the stem cell debate, see Sharon Begley et al., *Cellular Divide*, NEWSWEEK, July 9, 2001, at 22.

¹⁰ Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 134 (1993).

¹¹ Redman & Redman, *supra* note 7, at 583; Davidoff, *supra* note 10, at 134.

¹² See generally Charlotte Moore, *Healthy Living: Updating 'the Talk'; New Fertility Techniques and Embryo Adoption Complicate the Age-Old Discussion of the Birds and the Bees*, ATLANTA J. & CONST., Sept. 24, 2002, at 1E (reporting on one couple's belief that turning their excess embryos over for scientific research would be killing the embryos, and that giving them to another couple was the best disposition), *Primetime Live: Extraordinary Birth Adopting Fetuses* (ABC News broadcast, Aug. 22, 2002) (describing how a Christian couple believed that life begins at conception and each embryo is a human being, and, therefore, embryo adoption was the only choice they could feel good about).

¹³ See, e.g., Moore, *supra* note 12; see also *Primetime Live*, *supra* note 12.

¹⁴ Charles Bullard, *Legal Problems May Await Embryo Adoption, Donation*, DES MOINES REG., Jan. 18, 1999, at 4A [hereinafter *Legal Problems May Await*] ("[R]eproductive technology is advancing so rapidly that embryo donation and adoption have not been tested in the courts, so there could be unforeseen . . . problems.") (quoting Lori Knowles of the Hastings Center, an independent think tank in New York).

¹⁵ See discussion *infra* Part V.

some commentators claim that this practice poses substantial risks for the intended and gestational parents, the donors and the resulting child.¹⁶

This Note discusses the growing practice of embryo adoption and some of the most salient issues and concerns its use implicates. Part I describes the practice of embryo adoption, focusing on the primary source of available embryos, namely IVF embryos. Part II explains the process of embryo adoption, and highlights the procedural differences between embryo adoption through an adoption agency and a fertility clinic. Part III addresses the advantages and disadvantages inherent in embryo adoption, for both the donating and adopting parties. The advantages and disadvantages of embryo adoption, however, extend beyond donors and the women and men who adopt embryos. Therefore, Part IV considers the ethical and legal implications of embryo adoption, and describes how conflicting views of the embryo—as property, life and potential life—drive these implications. Part V canvasses the existing state of regulation in the field of ART, and the regulation of embryo adoption specifically. It concludes that the practice of embryo adoption, and more generally ART, is almost wholly unregulated at both state and federal levels. This leaves IVF clinics and adoption agencies with the opportunity and need to fashion their own regulatory schemes. I conclude that embryo adoption should be encouraged as a method of dealing with the increasing supply of excess embryos, at least until necessary and appropriate regulation is set in place to curb any further excess.

I. EMBRYO ADOPTION¹⁷

Women who face difficulty becoming pregnant are increasingly turning to embryo adoption as a way to conceive.

¹⁶ See discussion *infra* Parts III and IV.

¹⁷ Although medical and legal experts discourage calling the practice “adoption,” preferring the term “donation,” the practice is more widely known as embryo adoption. Rubin, *supra* note 8. Advocates of the “donation” terminology maintain that embryo adoption should be referred to in this way because embryo adoption cannot be carried out the same way as child adoption. See SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL AND ETHICAL CONSIDERATIONS 320 (1998) (“[I]n a sense the use of the word adoption may be somewhat misleading, as traditional adoption has never involved the intentional creation of children for the purpose of being adopted. Thus embryo donation, which finds homes/wombs for existing embryos, bears a greater resemblance to adoption than does embryo creation.”).

Embryo adoption also provides those who have unused embryos, and are faced with unappealing dispositional options such as implantation or destruction, with a means of discarding the excess supply in a manner that is neither morally nor ethically offensive to them.¹⁸ Before the advent of embryo adoption, women who underwent IVF and found themselves with excess frozen embryos had four options: (1) using the embryos in an attempt at pregnancy; (2) paying the fertility clinic's annual storage fees to keep them frozen indefinitely; (3) donating them for scientific research; and (4) allowing them to be thawed and discarded.¹⁹ For some people, the idea of donating the embryos for research or discarding them is an unimaginable solution, because they view their embryos not only as potential life, but *their* potential children, and this belief renders them unable to destroy the embryos.²⁰ However, choosing to maintain the embryos in storage does not resolve this dilemma.²¹ Fertility clinics and adoption agencies, realizing the needs of existing and future patients, began to offer embryo adoption as an alternative means of disposing of excess frozen embryos.

Fertility clinics and embryo adoption agencies derive their supply of embryos from one primary source, IVF.²² IVF is

¹⁸ See generally Moore, *supra* note 12; *Primetime Live*, *supra* note 12.

¹⁹ Charles Bullard, *Embryo Adoption Program Offers Hope—and a Thicket of Questions*, DES MOINES REG., Sept. 1, 1996, at 1A [hereinafter *Thicket of Questions*].

²⁰ *Id.*; see also Bullard, *Legal Problems May Await*, *supra* note 14 (citing Lori Knowles of the Hastings Center, an independent think tank in New York, for her support of embryo adoption, as it disposes of embryos "in ways that respect their potential to become human beings"). These considerations also weigh into the decision of those seeking to adopt embryos.

²¹ Bullard, *Thicket of Questions*, *supra* note 19. This is an alternative some couples choose to buy themselves time. They eventually will have to make a more final decision, but maintaining the embryos in storage preserves them for possible future use. All biological activity is discontinued at the temperature at which they are stored. "The embryos, in effect, are suspended in time. As long as the supply of liquid nitrogen is maintained, the only threat to the embryos is from background radiation, which could degrade their DNA, but only after centuries of storage." *Id.*

²² Davidoff, *supra* note 10; see also Kolata, *supra* note 1. Another, lesser-known source of embryos comes from "pre-made embryos." Although it is unclear whether this practice is still offered, it was at one time discreetly provided to existing clients by a handful of IVF clinics. This is the practice whereby doctors solicit sperm and egg donors and mix them to create "a variety of embryos with different pedigrees." *Id.* In other words, doctors select sperm and eggs embodying the traits that they feel would be attractive to future adopting families. This practice commenced at a time when demand for embryos exceeded the supply. *Id.* The *New York Times* reported in 1997 that Columbia-Presbyterian Medical Center in Manhattan offered this service until the New York State Task Force on Life and the Law condemned it, noting the concern about the prospect of large banks of human embryos created solely for adoption. *Id.* An executive order in 1985 created the Task Force to recommend policy

one of the most popular methods by which infertile women attempt to achieve pregnancy.²³ IVF provides infertile women with the opportunity to conceive and bring to term their own biological child.²⁴ The IVF process begins with a woman receiving fertility drug treatments in order to stimulate ovulation and produce an unusually high number of eggs.²⁵ The eggs are then surgically removed and fertilized with sperm.²⁶ After fertilization is complete, the eggs are placed in the woman's uterus. The pregnancy, if successful, proceeds in the same manner as a coital pregnancy.²⁷

Excess embryos are a natural by-product of a successful IVF transfer. IVF is an expensive process, which many people can only afford to attempt once.²⁸ Therefore, a doctor will remove and fertilize as many eggs as possible during an IVF procedure to ensure the process results in pregnancy.²⁹ The excess embryos are cryopreserved,³⁰ which means that the embryo culture is packaged with cryoprotectants, and inserted into a glass or plastic container for "gradual freezing and eventual storage in liquid nitrogen."³¹

Before cryopreservation technology emerged, embryos were either implanted or discarded.³² Since the introduction of cryopreservation, however, many ethical issues have emerged

on a host of issues raised by medical advances. NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (April 1998). It recommends policy for the State of New York for each issue in the form of proposed legislation and public education. *Id.* Shortly after the Task Force made its position clear, Columbia-Presbyterian changed its practice, and now creates embryos with donor eggs only when the adopting couple picks the sperm donor. Rubin, *supra* note 8.

²³ Francine Kiefer, *A Call for Federal Oversight of Fertility Clinics*, CHRISTIAN SCI. MONITOR, Aug. 21, 2001, available at <http://www.csmonitor.com/2001/0821/p2s1-usgn.html> (last visited Jan. 15, 2003).

²⁴ Davidoff, *supra* note 10, at 133.

²⁵ *Id.* at 134. This process is often referred to as "superovulation."

²⁶ *Id.*

²⁷ *Id.*

²⁸ Bullard, *Legal Problems May Await*, *supra* note 14.

²⁹ It is important to note, however, that certain fertility clinics intentionally limit the number of eggs they are willing to remove and fertilize so as to avoid the moral dilemmas created by any leftover embryos. Marcia Joy Wurmbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1083 (1986).

³⁰ Davidoff, *supra* note 10, at 134. Cryopreservation is the means used to preserve the embryos for future use. The culture is the result of the IVF process. *Id.*

³¹ *Id.* at 134 n.33 (quoting Zev Rosenwaks & Owen K. Davis, *In Vitro Fertilization and Related Techniques*, in DANFORTH'S OBSTETRICS AND GYNCOLOGY 821, 823-24 (6th ed. 1990) ("Cryoprotectants are agents that replace cellular water, and thus protect the embryos from the potentially lethal effects of freezing.")).

³² *Id.* at 134-35.

regarding the treatment of frozen embryos. Human embryos have never been given a clear legal status; therefore, the conflicting views of the embryo—as property, life, and potential life—have sparked heated controversy over the rights that an embryo should be accorded.³³ For example, those who view life as beginning at conception deem the destruction of embryos murder, while groups advocating for a lesser legal status for embryos do not.³⁴ These views are heavily implicated in decisions surrounding the disposal of unused embryos.

In an attempt at avoiding problems that may arise when excess embryos remain after IVF, some fertility clinics require clients to sign embryo disposition agreements before commencing an IVF procedure.³⁵ In these agreements, clients make advance directives indicating their wishes for the disposition of any excess embryos.³⁶ Disposition agreements generally fall into one of two categories. The first category offers clients an advance directive option, allowing them to choose the dispositional fate of their embryos, in the event of a specific event, such as death, divorce or dispute.³⁷ This disposition agreement exists between the egg and sperm donors.³⁸ The second category dictates to IVF patients what will be done with the excess embryos by a fertility clinic should a specific event occur.³⁹ These agreements are contracts that exist between the IVF participants and their clinic.⁴⁰ This second category hinges on informed consent,⁴¹ and will be legally binding only “if the patient’s consent is voluntary, competent, and informed.”⁴² Given the growing number of stored embryos and the lack of desirable dispositional choices presented to people faced with this decision (whether or not an advance directive is in place), embryo adoption has emerged as

³³ See discussion *infra* Part IV.

³⁴ *Id.*

³⁵ Davidoff, *supra* note 10, at 148-49.

³⁶ *Id.*

³⁷ *Id.* at 149.

³⁸ *Id.*

³⁹ *Id.* For example, in the event of the death of a patient, the clinic may mandate that the embryos immediately be discarded, or donated to another couple for implantation. *Id.*

⁴⁰ Davidoff, *supra* note 10, at 149.

⁴¹ BLACK’S LAW DICTIONARY 779 (6th ed. 1990) (defining informed consent as “[a] person’s agreement to allow something to happen (such as surgery) that is based on a full disclosure of facts needed to make the decision intelligently; i.e., knowledge of risks involved, alternatives, etc.”).

⁴² Davidoff, *supra* note 10, at 149.

an attractive and morally pleasing answer for many people. As a result, IVF embryos are the leading source of embryos for embryo adoption.

II. THE PROCESS OF EMBRYO ADOPTION

Adoption agencies and fertility clinics provide embryo adoption services.⁴³ Although the ultimate goal is the same, an adoption agency and fertility clinic's procedures differ markedly. Therefore, it is important for prospective donors and adopters to be aware of them in order to make a fully informed decision.

A. *Traditional Adoption Agencies*

Traditional adoption agencies recently began applying their experience in child adoptions to facilitate embryo adoptions. One of the first agencies to do this was Nightlight Christian Adoptions.⁴⁴ Nightlight created a program called the Snowflakes Embryo Adoption Program,⁴⁵ to offer adoption of what it likes to call "pre-born children."⁴⁶ Although no state has established a legal framework for embryo adoption,⁴⁷ Nightlight uses its forty years of experience in traditional child adoption to match donating couples with adopting couples.⁴⁸ In addition to facilitating the actual adoption, Nightlight contracts with doctors to work on the actual embryo transfer.⁴⁹

⁴³ *Adoption Agency Begins Embryo Adoption Program*, BUS. WIRE, Oct. 14, 1998, available at http://www.findarticles.com/cf_0/m0EIN/1998_Oct_14/53081869/print.jhtml (last visited Jan. 22, 2003) [hereinafter *Agency Begins Program*]; Rubin, *supra* note 8.

⁴⁴ *Frequently Asked Questions*, Snowflakes Embryo Adoption Program, at <http://www.embryooption.com/FAQs.htm> (last visited Feb. 3, 2003) [hereinafter *Snowflakes*]; *Agency Begins Program*, *supra* note 43. The agency, located in Fullerton, California, is non-profit and state-licensed. It completed its first embryo adoption in 1998. *Id.*

⁴⁵ *Snowflakes*, *supra* note 44. Although Snowflakes was the pioneer adoption agency to become involved in embryo adoption, other agencies have begun to offer this service. The particular candidacy requirements for donors and adopters will vary among the different agencies. See, e.g., *Embryo Adoption: The Future is Now*, Aug. 8, 2002, at <http://www.adoption.about.com/library/weekly/aa071299.htm> (last visited Feb. 2, 2003).

⁴⁶ *Agency Begins Program*, *supra* note 43.

⁴⁷ *Snowflakes*, *supra* note 44.

⁴⁸ *Id.* The agency "hope[s] that instead of creating a new set of laws . . . the current laws for adoption will simply be expanded to include embryos." *Id.*

⁴⁹ *Agency Begins Program*, *supra* note 43.

Nightlight conducts its program as a traditional adoption.⁵⁰ Genetic parents complete a questionnaire which includes their medical history.⁵¹ They describe the type of adopting family they are looking for by indicating their preferences concerning the age, income, work plans, religion, prior marriages and race of the adopting family.⁵² The genetic parents also indicate the type and degree of future contact they are interested in having with the adopting parents.⁵³ A licensed adoption provider conducts a home study with the adopting family, which includes screening and education.⁵⁴ Once the home study is complete, the agency shares the results with the genetic parents if the results match the criteria the genetic parents indicated on their questionnaire.⁵⁵ The genetic parents select the family to which they would like to donate their embryos.⁵⁶ The agency counsels both the adopting and genetic parents on what to expect throughout the adoption process.⁵⁷ Although no laws govern this practice, the adoption agreement and relinquishment forms Nightlight employs are legally binding contracts between the genetic and adopting families.⁵⁸

Nightlight insists that what it practices *is* adoption because it differs significantly from embryo adoption at a fertility clinic.⁵⁹ Its adoption process is not anonymous,⁶⁰ and therefore, it offers the adopting family the chance to have a

⁵⁰ Snowflakes, *supra* note 44. It claims to be the only adoption agency that presently offers the adoption of embryos in the same manner as traditional adoption.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* The adopting parents are screened for a criminal record, as well as any history of child abuse. They are also educated "about how to parent an adoptee," which includes teaching the parents "how to talk to their child(ren) about their unique conception and adoption related issues." *Id.*

⁵⁵ Snowflakes, *supra* note 44.

⁵⁶ *Id.* This aspect differs markedly from fertility clinic practice where the doctor typically chooses the adopting family. *Agency Begins Program, supra* note 43.

⁵⁷ Snowflakes, *supra* note 44.

⁵⁸ *Id.* These forms serve to relinquish the rights of the genetic parents to any resulting child prior to the embryos being thawed. The genetic parents then have a three-day period in which to change their minds.

⁵⁹ *Id.* Snowflakes states that, with fertility clinic embryo adoptions, "the receiving family does not have a home study prepared, the genetic families are anonymous and there is no contact between the families even through an intermediary." *Id.*

⁶⁰ *Id.* The agency considers all its adoptions "open" in that it asks all parties to "select each other through letter, biographies and photos." *Id.* The agency does not require meetings, exchanges of last names or any other "identifying information." *Id.* Should one party desire a great deal of contact with the other, efforts will be made to match that party with one that desires the same amount of contact. *Id.*

relationship with the genetic parents.⁶¹ Regardless of the level of contact between the two parties, the adopting parents are assured that they will have access to their child's medical and genetic history.⁶² The agency charges the adopting family \$4,700.⁶³ There are no costs for the genetic family.⁶⁴ Should the adopting family fail to achieve pregnancy and exhaust the supply of adopted embryos from the genetic family, the agency will match them with another family for \$500.⁶⁵

Nightlight stresses that it does not encourage the creation and freezing of embryos for adoption purposes, as it "is trying to provide a solution to a problem that already exists," and "hope[s] that [people] will in fact limit the number of embryos they create so that there is not a surplus."⁶⁶ Thus, it distinguishes itself from fertility clinics, which make embryos through IVF cycles for infertile clients, or create pre-made embryos designed for the adopting party pursuant to their requests.⁶⁷

B. *Fertility Clinics*

Fertility clinics also offer embryo adoption.⁶⁸ The procedures for adoption through a fertility clinic differ from those employed by private adoption agencies. Fertility clinics do not treat embryo adoption as a traditional adoption. One such clinic is the University of Iowa Hospital.⁶⁹ This clinic views embryos as *potential* life, therefore deserving of less respect than a human being, but more respect than sperm or eggs.⁷⁰ Its IVF program forbids the storage of embryos

⁶¹ *Id.*

⁶² Snowflakes, *supra* note 44.

⁶³ *Id.* This is the fee for adopting families outside of Southern California. This includes \$200 for "out-of-pocket" expenses. The \$4,700 does not cover medical expenses, which would include the cost of the embryo transfer, which the agency quotes as ranging from \$800 to \$2,500.

⁶⁴ *Id.* Any incidental costs are covered by the adopting family.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Snowflakes, *supra* note 44; *see also supra* note 22 (discussing pre-made embryos).

⁶⁸ Rubin, *supra* note 8.

⁶⁹ University of Iowa Healthcare, Obstetrics & Gynecology: Assisted Reproductive Technology Information Page, at <http://www.uihealthcare.com/depts/med-lobgyn/reproductivecare/donor.html> (last visited Feb. 3, 2003); *see also* Bullard, *Legal Problems May Await*, *supra* note 14.

⁷⁰ Bullard, *Legal Problems May Await*, *supra* note 14. Fertility clinics offering embryo adoption will differ with regard to the manner in which they view the human

belonging to clients who have reached the age of fifty.⁷¹ Additionally, the program mandates that clients decide the fate of their frozen embryos after they have been in storage for two years.⁷² Should they be unable to make such a decision, continued storage is permitted until the client reaches age fifty.⁷³

Given the clinic's stringent storage requirements, adoption emerged as a desirable way for people to decide the fate of their embryos. University of Iowa Hospital guidelines for the embryo adoption program are very strict.⁷⁴ Adopting parties must sign documents acknowledging that they will have full legal responsibility for any resulting child(ren).⁷⁵ Donating parties must also conform to strict guidelines.⁷⁶ The clinic only accepts embryos that were frozen when the donor was below the age of forty.⁷⁷ The donating party is also required to sign documents relinquishing all of their legal rights to the embryos and to any resulting child(ren).⁷⁸ Both the donating and adopting parties undergo counseling to ensure they are comfortable with their choice.⁷⁹ The clinic also screens both parties for psychiatric illness and substance abuse problems.⁸⁰ After the adopters have met these requirements, the clinic provides them with a certain number of donors from which to choose. The information on each donor includes a physical description along with details of the donor's interests and

embryo—as property, life or potential life. See discussion *infra* Part IV.

⁷¹ Bullard, *Legal Problems May Await*, *supra* note 14.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* For example, an adopting party must have been diagnosed as infertile, but in good health. They must undergo a home study, and must show that they have enough money to pay for the transfer procedure. They must also undergo testing for blood type, rubella immunity and HIV. *Id.*

⁷⁵ *Id.*

⁷⁶ Bullard, *Legal Problems May Await*, *supra* note 14. For example, they must undergo thorough screening for medical and/or genetic problems, and be cleared from any infectious diseases.

⁷⁷ *Id.* This forty-year age cut-off is motivated by the concern that as women age, the risk of birth defects increases because of their aging eggs. As eggs get older, they have a greater chance of containing chromosomal errors, and this leads to an increased risk of the child having the error as well. An example of such a chromosomal error is Down Syndrome. Dr. Aniruddha Malpani & Dr. Anjali Malpani, *How to Have a Baby, Overcoming Infertility: The Older Woman*, at <http://www.fertilethoughts.net/malpani/new/Chap14.htm> (last visited Jan. 19, 2003).

⁷⁸ Bullard, *Legal Problems May Await*, *supra* note 14.

⁷⁹ *Id.*

⁸⁰ *Id.*

professions.⁸¹ The cost for adopting parties averages about \$3,150,⁸² much less than IVF or traditional child adoption.⁸³

The striking difference between the University of Iowa Hospital's fertility clinic adoption and Nightlight's program is that the former is completely anonymous.⁸⁴ The purpose of anonymity is to prevent biological parents from attempting to locate their biological children and to deter children from attempting to find their biological parents.⁸⁵

III. ADVANTAGES AND DISADVANTAGES OF EMBRYO ADOPTION

Embryo adoption provides advantages and disadvantages for both the donating and adopting individuals. Embryo adoption is not for everyone. Careful thought must be given not only to what is required of parties seeking to participate in the process as both donors and adopters, but also to the long-term implications of this choice.

A. *The Donor's Perspective*

The most significant advantage of embryo adoption is that the process provides some donors with an alternative means of dealing with their excess, unused embryos that is both morally and ethically acceptable to them. IVF clinics create their own guidelines regarding the disposition of excess frozen embryos, as the government does not regulate this practice.⁸⁶ Therefore, most IVF clinics provide the standard alternatives.⁸⁷ Many people choose to maintain their embryos in storage indefinitely, hoping to put off an eventual decision.⁸⁸

⁸¹ *Id.*

⁸² *Id.*

⁸³ Bullard, *Legal Problems May Await*, *supra* note 14. IVF can run upwards of \$10,000, and traditional child adoption can cost in excess of \$15,000. *Id.*

⁸⁴ Rubin, *supra* note 8.

⁸⁵ Bullard, *Legal Problems May Await*, *supra* note 14.

⁸⁶ See discussion *infra* Part V.

⁸⁷ As discussed in Part I, these options include (1) using the embryos in an attempt at pregnancy; (2) paying a fertility clinic's annual storage fees to keep them frozen indefinitely; (3) donating them for scientific research; and (4) allowing them to be thawed and discarded. Bullard, *Thicket of Questions*, *supra* note 19.

⁸⁸ Ellen Sarasohn Glazer, *In the Best Interest of the Embryos?*, AM. INFERTILITY ASS'N (Sept. 2001), available at <http://www.perspectivepress.com/embryoadooption.html> (last visited Feb. 1, 2003) (reporting that the number of "non-responses" to fertility center inquiries indicate that many couples are dealing with dispositional issues through avoidance).

For people who do not view life as beginning at conception, thawing and discarding the embryos, or donating them for scientific research are viable options. For people who dislike these choices, however, embryo adoption constitutes the *sole* alternative.

One disadvantage for the donating party is that they may wonder about the fate of the embryos they donate, and experience a sense of loss similar to that inherent in traditional adoption.⁸⁹ For at least some people, however, the positive aspect of potentially giving life to their potential child by refusing to discard the embryo will outweigh this sense of loss. Another disadvantage is that in programs that treat the adoption anonymously, a concern still exists that genetic parents may attempt to find the resulting child, and vice versa.⁹⁰ Some infertility experts maintain that any clinic guaranteeing complete anonymity is “acting in a foolhardy way,” because it is “certainly likely a 25-year old adult will go back to a clinic and demand his genetic history.”⁹¹

B. *The Adoptive Parent's Perspective*

Embryo adoption provides myriad benefits for adopting parents. The most significant benefit may be cost savings.⁹² The cost of embryo adoption ranges from \$3,150 to \$8,100,⁹³ while a complete IVF cycle typically costs in excess of \$10,000, and traditional adoption begins at about \$15,000.⁹⁴ This cost benefit has proven so attractive that some couples who are capable of using their own eggs and sperm in an IVF cycle opt for adoption.⁹⁵

Another important benefit of embryo adoption noticeably absent in traditional child adoption and surrogacy is control over the pregnancy. While parents who adopt children or use surrogates have no information about the nature of their

⁸⁹ Deborah N. Silverstein & Sharon Kaplan, *Lifelong Issues in Adoption* (1982), available at www.adopting.org/silveroze/html/lifelong_issues_in_adoption.html (last visited Jan. 22, 2003).

⁹⁰ *Embryo "Adoption": New Trend Raises Ethical, Legal Questions*, Kaiser Family Foundation, Dec. 8, 1998, at <http://report.kff.org/archive/repro/1998/12/kr9812-08.8.html> (last visited Feb. 3, 2003).

⁹¹ *Id.* (quoting Susan Cooper, a Boston infertility and adoption psychologist).

⁹² Bullard, *Legal Problems May Await*, *supra* note 14.

⁹³ *Id.* (reporting fertility clinic cost); Snowflakes, *supra* note 44 (reporting adoption agency cost).

⁹⁴ Bullard, *Legal Problems May Await*, *supra* note 14.

⁹⁵ Rubin, *supra* note 8.

child's *in utero* experience, embryo adoption provides adopting parties the chance to control the prenatal environment.⁹⁶ With the more traditional forms of adoption, children may bear the risks of drug and alcohol exposure *in utero*.⁹⁷ Embryo adoption dispels this concern by reducing potential problems caused by an unhealthy gestational period.⁹⁸ Also, because embryo adoption affords adopting parties the experience of pregnancy, they are given the opportunity to "bond" with their child prior to its birth.⁹⁹ Additionally, because embryo adoption is not legally an adoption,¹⁰⁰ the process is confidential and the parents do not have to endure legal proceedings in order to establish their parental rights.¹⁰¹

Adopting existing embryos also satisfies people who have ethical problems with intentionally creating genetically attractive embryos for adoption.¹⁰² "They prefer knowing that the embryo they adopt was conceived by a couple who longed to be parents and went to great lengths to achieve that goal."¹⁰³ Adoption of "pre-made" embryos, however, may be advantageous to people who desire a "greater genetic selection."¹⁰⁴ The ability to choose embryos based on the egg and sperm donors may increase an overall sense of control in the process, "as well as the illusion that they are 'designing' an ideal child."¹⁰⁵ Additionally, in a situation where a couple is involved, and where one person is fertile and the other is not, embryo adoption might be appealing if the couple feels more comfortable with the notion of having a child biologically related to neither of them as opposed to only one of them.¹⁰⁶

⁹⁶ Kolata, *supra* note 1.

⁹⁷ NAIC, *Drug Exposed Infants*, at http://www.calib.com/naic/pubs/s_drug.cfm (last visited Jan. 22, 2003). NAIC reports that 2.6 million infants are prenatally exposed to alcohol each year, and close to 500,000 are exposed to illicit drugs.

⁹⁸ COOPER & GLAZER, *supra* note 17, at 321.

⁹⁹ *Id.*

¹⁰⁰ Bullard, *Legal Problems May Await*, *supra* note 14. This is because embryos are not "considered people." *Id.*

¹⁰¹ COOPER & GLAZER, *supra* note 17, at 322. ("[E]mbryo adoption offers [adopters] privacy. Traditional adoption, by definition, is always public, whereas embryo adoption can be private, allowing the [adopting party] to reveal it when and to whom they choose.")

¹⁰² *Id.* This refers to the practice of pre-made embryos. *See supra* note 22.

¹⁰³ *Id.*

¹⁰⁴ *Id.* *See also supra* note 22 (discussing pre-made embryos).

¹⁰⁵ *Id.*

¹⁰⁶ COOPER & GLAZER, *supra* note 17, at 319.

Adopting pre-made embryos may also provide adopting parties with an increased sense of security that the donors will not attempt to reclaim their child.¹⁰⁷ A concern prevalent in surrogacy and adoption is that the woman who gives birth may change her mind and refuse to surrender the child.¹⁰⁸ With embryo adoptions, however, all of the rights of the donating party are relinquished prior to the embryos being thawed and implanted.

Regarding the potential disadvantages adopting parties face, Professor Lori Andrews cautions that, in the field of gamete donation, caveat emptor applies.¹⁰⁹ Caveat emptor in the gamete donation industry is particularly troubling, given the potential for consumer fraud, as there are no guarantees that the "donor is *as advertised*."¹¹⁰ Since the gamete donation and embryo adoption industries are both highly profitable and largely unregulated, agencies may employ devious and dishonest tactics to boost their profits.¹¹¹ Hence, parents adopting from questionable agencies that require absolute anonymity with regard to the donating party should keep this in mind.

IV. ETHICAL AND LEGAL IMPLICATIONS OF EMBRYO ADOPTION

A. *The Status of the Frozen Embryo*

To understand the ethical and legal implications of embryo adoption, a discussion of the three competing views of the embryo is required. One prevailing view regards the embryo as property with no protection. Another camp considers the embryo as a human being with independent rights under the law. A third group views the embryo as a potential life deserving of some protection.¹¹²

¹⁰⁷ This concern is greater in IVF embryo adoption, as those embryos were created by couples who had the intention of implanting them in the hope that a child would result, and therefore their ties to their embryos are potentially stronger.

¹⁰⁸ Kolata, *supra* note 1.

¹⁰⁹ Gina Kolata, *Infertile Foreigners See Opportunity in U.S.*, N.Y. TIMES, Jan. 4, 1998, at A1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Kristine Luongo, Comment, *The Big Chill: Davis v. Davis and the Protection of "Potential Life"*, 29 NEW ENG. L. REV. 1011, 1017 (1995).

1. Embryo as Property

One recognized view is that embryos are nothing more than property, and, therefore, are fungible with any other type of property or human tissue.¹¹³ They are the property of their donors, the gamete providers.¹¹⁴ This view accords no special respect to the embryo despite its potential for life, and focuses on the gamete donors (or legally adopting party, should there be one), considering them the owners and possessing the “decision-making authority” over the embryos.¹¹⁵ If the embryo is considered personal property, it should be treated in the same manner as any other property, “subject to the same doctrines as inanimate things, domestic animals, and various intangibles.”¹¹⁶ Scholars and commentators who advocate the property view avoid classifying the embryo as property in the traditional sense. The property view advocates granting decision-making authority to the “owners,” perhaps acknowledging that the “property” has a potential for life.¹¹⁷ As John Robertson, a well-known commentator in this field stated:

The question of decisional authority is really the question of who owns or has a property interest in early embryos. Applying terms such as “ownership” or “property” to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus. Although the bundle of property rights attached to one’s ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.¹¹⁸

The District Court for the Eastern District of Virginia in *York v. Jones*¹¹⁹ adopted the property view of embryos. The case

¹¹³ *Id.*

¹¹⁴ *Id.* Gamete providers are the “potential parents who have supplied the egg and the sperm.” *Id.*

¹¹⁵ *Id.* This authority is transcendent to the interests of any third parties, such as doctors, scientists or fertility clinics.

¹¹⁶ *Id.*; Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 268 (1990).

¹¹⁷ Martin & Lagod, *supra* note 116, at 268-69; Luongo, *supra* note 112, at 1021.

¹¹⁸ John A. Robertson, *In the Beginning: The Legal Status of Early Embryos* 76 VA. L. REV. 437, 454-55 (1990).

¹¹⁹ 717 F. Supp. 421 (E.D. Va. 1989).

involved a dispute between a couple and their fertility clinic.¹²⁰ The Yorks underwent IVF at a clinic in Virginia.¹²¹ When they moved to California, they requested that their sole remaining frozen embryo be transferred to their new clinic there.¹²² The Virginia clinic refused to allow this transfer, claiming that, pursuant to the cryopreservation agreement between the Yorks and the clinic, the embryo could only be disposed of according to one of the three ways listed in the agreement.¹²³

The district court ruled that the cryopreservation agreement created a bailor-bailee relationship between the parties. The court applied principles of contract law to the agreement and held that once the bailment relationship terminated, the clinic was under an obligation to return the "property" to the Yorks.¹²⁴ The court did not address the issue of whether the embryo constituted life, because the couple did not seek to destroy the embryo.

The property view has been subject to much criticism by commentators on the ground that the characterization of embryos as property fails to recognize the importance modern society places on life, and the inherent nature of embryos as holding the potential for such life.¹²⁵

2. Embryo as Life

Proponents of the view that embryos are human lives believe that embryos should have the same rights as children.¹²⁶ Accordingly, embryos should be subject to the same custody laws applied to children.¹²⁷ In the United States, the "best interests of the child" doctrine protects children in adoptions.¹²⁸ Under this doctrine, if neither biological parent wanted the

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 427. These were (1) donation to another infertile couple; (2) donation for approved research; and (3) thawing.

¹²⁴ *York*, 717 F. Supp. at 426-27. The court discussed the language used in the agreement, noting how it covered the Yorks' property rights over the embryos in the event of certain events and that it consistently referred to the embryos as property.

¹²⁵ Luongo, *supra* note 112, at 1021; *see also* Kim Schaefer, *In-Vitro Fertilization, Frozen Embryos, and the Right to Privacy—Are Mandatory Donation Laws Constitutional?*, 22 PAC. L.J. 87, 96 (1990).

¹²⁶ This is the case despite Supreme Court precedent, namely *Roe v. Wade*, 410 U.S. 113 (1973), which specifically refuses to embrace this interpretation.

¹²⁷ Redman & Redman, *supra* note 7, at 590.

¹²⁸ Luongo, *supra* note 112, at 1018.

embryo(s) implanted, they would be forced to relinquish their parental rights to dispose of the "gametic material."¹²⁹ One result of treating embryos as life is the potential that pressure from the state to relinquish rights will force gamete providers to have more children than they desire. This entails problems of constitutional dimension, as it affects procreational liberty.¹³⁰ The other result would be forced adoption of the embryo(s), which would involve donating the embryos to another woman or couple for implantation.¹³¹

The view that an embryo is a person, and therefore accorded legal rights independent of its parents, garners no support from the Constitution.¹³² Deeming embryos as humans flies in the face of *Roe v. Wade*,¹³³ where the Supreme Court declared that "the 'unborn' do not fall within the protection guaranteed to each 'person' by the Fourteenth Amendment."¹³⁴ Treatment of a frozen embryo as equivalent to a person directly conflicts with the Supreme Court's decision not to pronounce when life begins.¹³⁵

The "embryo as life" view was the central issue in the case of *Davis v. Davis*.¹³⁶ Mr. and Mrs. Davis were divorcing, and could not reach an agreement on the disposition of their frozen embryos. While Mrs. Davis wanted to implant the embryos, Mr. Davis wanted the embryos to remain frozen until he could decide whether he wanted to become a father outside of marriage.¹³⁷ The trial court determined that the frozen embryos were "human beings," reasoning that life began at the moment of fertilization and, therefore, the husband technically already was a parent during the IVF process.¹³⁸ Viewing the embryos as children *in vitro*, the court invoked the doctrine of *parens patriae*.¹³⁹ The court held that it was in the best

¹²⁹ Redman & Redman, *supra* note 7, at 590; *see also* Luongo, *supra* note 112, at 1018.

¹³⁰ Redman & Redman, *supra* note 7, at 590; *see also* Luongo, *supra* note 112, at 1020; *see generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹³¹ Luongo, *supra* note 112, at 1020.

¹³² *Id.* at 1019; *Roe*, 410 U.S. 113.

¹³³ 410 U.S. 113.

¹³⁴ Luongo, *supra* note 112, at 1019.

¹³⁵ *Id.*

¹³⁶ No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990).

¹³⁷ *Davis*, 1989 WL 140495, at *11.

¹³⁸ *Id.* at *9.

¹³⁹ *Id.* at *10-11. The court described this doctrine in the following manner:

interests of the children to be born rather than destroyed.¹⁴⁰ Since Mrs. Davis wanted to have more children, the court awarded her custody.¹⁴¹

When couples cannot agree on the disposition of unused embryos, they confront courts with difficult questions. These questions force courts to decide when life begins, whether embryos should be viewed as life, and what rights should be accorded to the embryo. If a court decides that an embryo possesses some rights, the parties to the dispute will be unable to destroy it. If a court finds that an embryo is not entitled to any rights, the parties will be able to do what they wish with it. Either result is extreme and, therefore, an intermediate category emerged to reach a middle ground.

3. Embryo as Potential Life

A third approach reaches a compromise between the two extreme views of life and property and espouses the belief that the embryo, although not the equivalent of a person, deserves a special form of respect given its potential for life.¹⁴² This is the most widely-held view.¹⁴³ The American Society for Reproductive Medicine explains:

[T]he [embryo] deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The [embryo] is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet

[t]he common law doctrine of *parens patriae* is defined as that power of the sovereign to watch over the interests of those who are incapable of protecting themselves. . . . The thrust of the equitable nature of this doctrine is that it turns its full focus on the best interests of the child; its concern is not for those who claim "rights" to the child, nor for those who claim custody of the child, nor for those who may suffer perceived or real inequalities resulting from scrupulously guarding the child's best interest. The doctrine of *parens patriae* is most commonly expressed as the "best interests of the child" doctrine and its sole objective is to achieve justice for the child.

Id.

¹⁴⁰ *Id.* at *11.

¹⁴¹ *Id.* The Tennessee Court of Appeals reversed, disagreeing with the lower court's reasoning. *Davis v. Davis*, 1990 WL 130807 (Tenn. Ct. App., Sep. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

¹⁴² Luongo, *supra* note 112, at 1022.

¹⁴³ *Id.* The American Society for Reproductive Medicine (formerly the American Fertility Society) has accepted this view.

established as developmentally individual, and may never realize its biologic potential.¹⁴⁴

This perspective is similar to the view that an embryo is property, in that it allocates primary decision-making authority to the gamete providers.¹⁴⁵ Unlike the property approach, however, this decision-making authority is not absolute; it would be superseded, for example, if there were legislation to the contrary.¹⁴⁶

The appellate history of *Davis v. Davis* illustrates this view. The Supreme Court of Tennessee rejected the trial court's reasoning that an embryo is a human life.¹⁴⁷ Noting that *Roe v. Wade*¹⁴⁸ explicitly refused to extend independent rights to fetuses,¹⁴⁹ the court embraced The American Society for Reproductive Medicine's position 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."¹⁵⁰

This interim category has not provided much guidance, however, as it does not define the protections the embryo should be accorded. One scholar stated that "[t]he notion of special respect will seem like empty rhetoric if it leads to no limits at all on what may be done with embryos."¹⁵¹

B. *Ethical Implications of Embryo Adoption*

For people who view life as beginning at conception, embryo adoption provides the only answer to the dispositional issue. In light of the recent controversy generated by stem cell research,¹⁵² it is clear that strong opposition exists to donating embryos for scientific research, as it necessitates the destruction of those embryos. Pro-life senators have referred to this practice as "an industry of death."¹⁵³

¹⁴⁴ Ethics Committee of The American Fertility Society, *Ethical Considerations of the New Reproductive Technology*, 62 FERTILITY & STERILITY 5, 33S (Supp. 1 Nov. 1994) [hereinafter *Ethical Considerations*].

¹⁴⁵ Luongo, *supra* note 112, at 1023.

¹⁴⁶ *Ethical Considerations*, *supra* note 144, at 33S.

¹⁴⁷ 842 S.W.2d 588 (Tenn. 1992).

¹⁴⁸ 410 U.S. 113.

¹⁴⁹ *Davis*, 842 S.W.2d at 595.

¹⁵⁰ *Id.* at 597.

¹⁵¹ Robertson, *supra* note 118, at 448-49.

¹⁵² See Begley et al., *supra* note 9.

¹⁵³ John Cloud et al., *Bush's No-Win Choice; Why the President's Stem-Cell*

Although embryo adoption garners wide support,¹⁵⁴ some advocates strongly oppose it, arguing that the excess embryo supply should in fact be distributed to scientists for stem cell research.¹⁵⁵ One commentator views stem cell research as “a logical and desirable by-product of infertility treatment and embryo adoption as most likely to be profoundly damaging for the adoptees, their biological parents and siblings.”¹⁵⁶ Facing the dilemma of having to make a choice regarding unused embryos, it is argued that donating them to stem cell research provides a more attractive alternative than embryo adoption, as donors will derive benefit from knowing that “extra life can be used to help save lives.”¹⁵⁷

Other people believe that embryo adoption will place extreme hardship on the resulting child.¹⁵⁸ They argue that, unlike adopted children, children resulting from embryo adoption will know that their parents created them with the purpose of parenting them.¹⁵⁹

Unlike any other adoptee in history, their fate was not determined because a pregnancy was unplanned or unwanted or because social or financial circumstances prevented their biological parents from raising them. Rather, this new breed of adoptees will have been placed for adoption because of a simple twist of fate: an embryologist in a lab chose another embryo(s) for transfer. This new breed of adoptees will grow up knowing that the random choice of an embryologist meant that their biological siblings have the privilege of being raised by their intended parents and they do not.¹⁶⁰

Another ethical concern regarding embryo adoption involves the ethics of creating a fetus from a donor embryo when there are currently thousands of living children who seek adoptive parents.¹⁶¹ One commentator argues that “ART clinics

Decision Could Define His Term, TIME, July 23, 2001, at 22 (quoting House Republican leader J.C. Watts).

¹⁵⁴ Bullard, *Legal Problems May Await*, *supra* note 14 (reporting that Lori Knowles of the Hastings Center, an independent think tank in Garrison, New York, does not know of any “organized opposition” to embryo adoption).

¹⁵⁵ Glazer, *supra* note 88.

¹⁵⁶ *Id.* Ms. Glazer is the author of *Choosing Assisted Reproduction: Social, Emotional and Ethical Considerations*, a member of the American Society of Reproductive Medicine’s Health Professional Group, and a clinical social worker dealing in infertility, adoption and related issues.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Glazer, *supra* note 88.

¹⁶¹ COOPER & GLAZER, *supra* note 17, at 322-23.

intentionally attempt to convince couples that reproduction in one form or another is inherently better than [traditional] adoption, and that families created from genetic ties (or partial genetic ties) are stronger and more desirable than those created by adoption.”¹⁶²

Additional concern stems from the inherent lack of regulation in the field of ART, and more specifically, embryo adoption.¹⁶³ For example, under traditional adoption law, not every applicant is found fit to adopt.¹⁶⁴ In addition, some adoption agencies have age restrictions that prohibit women over certain ages from adopting children.¹⁶⁵ Age restrictions stem from the preference of adoption agencies for parents in their twenties or early thirties, as this is the age at which the agencies expect average biological parents to reproduce.¹⁶⁶ “Older parents are often precluded from adopting children more than thirty-five or forty years younger than themselves on the ground that they would not have been likely to produce such children themselves.”¹⁶⁷ These efforts, along with other restrictions and qualifications, strive to make the adoptive “family” physically resemble the traditional biological family.¹⁶⁸

Furthermore, as women age, they face increased risks of medical problems during pregnancy.¹⁶⁹ Adoption agencies, such as Nightlight, and most fertility clinics place no age restriction on applicants.¹⁷⁰ There are also ethical concerns regarding

¹⁶² *Id.* at 23.

¹⁶³ See discussion *infra* Part VI.

¹⁶⁴ This assessment is based on home studies conducted on applicants. See, e.g., *Adoption Homestudies*, at <http://www.homestudies.com> (last visited Jan. 17, 2003).

¹⁶⁵ NAIC, at http://www.calib.com/naic/pubs/f_start.cfm#adopt (last visited Jan. 17, 2003). NAIC reports that some agencies place age restrictions on applicants. For example, some agencies will not consider applicants over the age of forty. See also *Review of Qualification Requirements for Adoptive Parents*, at <http://www.startingadoption.com/pg5b.asp> (last visited Jan. 7, 2003).

¹⁶⁶ Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 204 (1997).

¹⁶⁷ ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 72 (1993).

¹⁶⁸ Hanan, *supra* note 166, at 192. Up until the 1950s, adoptions were carried out in a way so as to ensure that physically and intellectually similar parents and children were matched, so that no one would think the child was adopted. *Id.*

¹⁶⁹ Malpani & Malpani, *supra* note 77. Such problems include increased risk of miscarriage (in women over the age of forty-one, the risk of miscarriage can be as much as 50%), increased risk of general medical problems during pregnancy, and increased risk of birth defects.

¹⁷⁰ Kolata, *supra* note 1. For example, Dr. Sauer of Columbia-Presbyterian Medical Center in Manhattan facilitated an embryo adoption for a forty-seven-year old

women who undergo ART. There are medical risks inherent in ART.¹⁷¹ Some critics question whether it is acceptable to expose egg donors to such risk when they are not the intended parents, especially when they may be ignoring these risks because of the huge financial incentives offered to them to participate.¹⁷²

With the Human Genome Project under way, and new discoveries that signal the importance of genetics,¹⁷³ Some commentators question whether it is ethically responsible to create a child through an anonymous embryo adoption.¹⁷⁴ Having an unknown genetic parent is problematic because "it may be psychologically or medically harmful to a person to

woman who had been turned away from traditional agencies because of her age. The mother, Kathy Butler, became pregnant with triplets as a result of the adoption. Some people think this age gap poses a disadvantage to the resulting children. For example, in *In re Adoption of Tachnik*, 210 N.W.2d 865 (Wis. 1973), the state supreme court considered an adoption agency argument that adoption of a three-year-old child by his biological grandparents, age fifty-nine and fifty-three, was not in his best interests because of their age. Although the court failed to find the argument persuasive, many people believe that children are better suited with younger parents in traditional adoption. This same argument can be made with regard to embryo adoption, as this practice implicates the same concerns. For a discussion of assisted reproductive technology regulation with regard to older women, see Sherri A. Jayson, "Loving Infertile Couple Seeks Woman Age 18-31 to Help Have Baby. \$6,500 Plus Expenses and a Gift": Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?, 11 ALB. L.J. SCI. & TECH. 287 (2001).

¹⁷¹ COOPER & GLAZER, *supra* note 17, at 325-26; Kolata, *supra* note 1. Egg donors agree to inject themselves with fertility drugs that stimulate their ovaries. This, in turn, makes the ovaries swell with ripening eggs. One doctor reported that the donor experience is not "totally benign" as there lies the possibility of overstimulation, in which case the donor's estrogen levels rise drastically above normal levels. As a result, the donor can enter a less threatening situation where she will suffer from fluid retention. However, in a much more serious case, although rare, the donor's kidneys will shut down, and occasionally, women have died.

¹⁷² COOPER & GLAZER, *supra* note 17, at 325-26; Kolata, *supra* note 1. Egg donors are offered an average of \$2,000 for one ovulation stimulation. However, people are willing to offer a great deal more for what they believe to be the most ideal eggs. See, e.g., *Grade A: The Market for a Yale Woman's Eggs*, ATLANTIC MONTHLY, Dec. 2002, available at <http://www.theatlantic.com/issues/2002/12/cohen.htm> (last visited Feb. 3, 2003) (reporting that couple offered \$20,000 to female Ivy League student willing to donate her eggs).

¹⁷³ Formally commenced in 1990, the Human Genome Project is a thirteen-year endeavor headed by the U.S. Department of Energy and the National Institute of Health to identify the approximately 30,000 genes in human DNA, and translate it into data that can be used to aid in medical developments, i.e., improved diagnosis of disease, earlier detection of genetic predisposition to disease. Human Genome Project Information, *What is the Human Genome Project?*, available at <http://www.ornl.gov/hgmis/project/about.html> (last visited Jan. 17, 2003).

¹⁷⁴ COOPER & GLAZER, *supra* note 17, at 24. If anonymous adoptions fail to provide medical histories of the birth parents, the child is at a disadvantage medically, and will not be able to reap the benefits of research projects such as the Human Genome Project.

have no information—or little information—about his/her genetic make-up.”¹⁷⁵ Some clinicians believe that it is ethically unacceptable to deny people crucial information about their identity, such as their medical history.¹⁷⁶

C. *Legal Discussion of Embryo Adoption*

An unsettled legal question in the field of reproductive rights involves the declaration of parental rights over a child resulting from embryo adoption. Only a handful of states have statutes recognizing donor embryo recipients as the legal parents of any resulting child.¹⁷⁷ In the states lacking such legislation, a possibility exists that donor couples might try to claim children born from their donated embryos.¹⁷⁸ Due to a lack of legislative guidance, attorneys specializing in adoption and reproductive technology law recommend that their clients obtain a court order in advance of the embryo donation.¹⁷⁹ Specialists recommend obtaining court orders because, with traditional adoption, the majority of states’ laws declare that adoptions are not final until at least a few days after the child’s birth.¹⁸⁰ In the event that a court is faced with a custody dispute over an embryo adoption child, it might look to traditional adoption law for a solution absent regulatory and legislative guidance for embryo adoption disputes.

V. REGULATION

There is almost no regulation of embryo adoption, IVF, or ART generally, at either the state or federal level. The ART industry operates in a rather laissez-faire system. Individual fertility clinics and adoption agencies fashion their own varying policies.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 25.

¹⁷⁷ Rubin, *supra* note 8; see, e.g., TEX. FAM. CODE ANN. § 151.103 (2002). (stating that with regard to the parental rights of parents of a child resulting from embryo donation, the resulting child of the adopting couple is the child of both of them).

¹⁷⁸ Rubin, *supra* note 8. This concern may not be so significant though, as many fertility clinics conduct the adoption anonymously, and therefore do not provide identifying information to the donors about the recipients of their embryos.

¹⁷⁹ Laura Meckler, *Forever Decisions: Couples Treated for Infertility; Struggle Over What to do with Leftover Embryos*, MILWAUKEE J. SENTINEL, Sept. 2, 2001, at 21 (citing Susan L. Crockin, an attorney specializing in this field, who said that if her clients do not take this step, “they’re leaving it up in the air”).

¹⁸⁰ *Id.*

A. *Existing Regulation*

Generally, ART operates in a "nearly regulatory-free environment."¹⁸¹ In 1992, Congress passed the Fertility Success Rate and Certification Act ("Act"). The Act is silent regarding regulation of ART practices. Its purpose, essentially, is to establish uniform guidelines that all fertility clinics must follow.¹⁸² The Act mandates that the Secretary of the Department of Health and Human Services, in conjunction with the Center for Disease Control, establish a model program for certification of embryo labs in each state.¹⁸³ The model must include standards for quality assurance, quality control and the maintenance of records for lab tests and procedures.¹⁸⁴ The Act also requires mandatory annual reporting of fertility clinics' pregnancy success rates, to protect clients against consumer fraud through misrepresentation.¹⁸⁵ Regulation focuses on data collection, certification of labs and informed consent.¹⁸⁶ There is no other federal regulation of ART.

Some states have passed statutes dealing with the disposition of frozen embryos. However, none of the existing regulations speak directly to the practice of embryo adoption. They deal more explicitly with the resolution of dispositional issues.¹⁸⁷

¹⁸¹ Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 639 (1997).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 645.

¹⁸⁶ Daar, *supra* note 181, at 642.

¹⁸⁷ Even regulation governing dispositional issues is lacking. However, some states have laws addressing frozen embryos. California, for example, makes it unlawful for anyone to knowingly use embryos for any purpose other than that indicated by the embryo providers. Additionally, the statute expressly forbids implantation of an embryo into a recipient who is not the embryo provider, unless such provider has given signed written consent. CAL. ANN. PENAL CODE § 376g (1999). In Florida, the law provides that a couple undergoing IVF shall enter into a written agreement for the disposition of embryos "in the event of a divorce, death of a spouse, or any other unforeseen circumstance." In the absence of such an agreement, the "commissioning couple" retains ownership and decision-making control. FLA. STAT. ANN. § 742.17 (1993). Kansas's statute declares that the "disposition of the product of in vitro fertilization prior to implantation" is lawful and that the state shall not place a ban on such disposition. KAN. STAT. ANN. § 65-6702 (1992). Louisiana's regulation is the most controversial, in that it places an absolute ban on the destruction of frozen embryos. The state has chosen to give a human embryo the status of a "juridical person." Therefore, any unused embryos that are not wanted by the embryo providers *must* be placed up for adoption. LA. REV. STAT. ANN. §§ 9:123, 9:130 (1993). Oklahoma's statute, entitled "Human embryo transfer and donation," pronounces that no one other than a

1. Comparative Approaches—International Models

Many countries have implemented strict policies to avoid dispositional dilemmas faced by people who donate and adopt IVF embryos in the United States. Some individuals struggling with infertility are coming to the United States from other countries to address their problems, as a number of countries have policies making it difficult to locate donors.¹⁸⁸

To combat its embryo storage crisis, England passed a law mandating that all frozen human embryos must be destroyed after five years.¹⁸⁹ The law allows a time extension for people who wish to maintain their embryos for future use. Embryos that have essentially been abandoned, however, are disposed of in accordance with this law.¹⁹⁰

Italy implemented a strict policy that prevents dispositional dilemmas by banning the practice of cryopreservation altogether.¹⁹¹ Doctors are limited to creating only three embryos in the IVF cycle.¹⁹² These embryos must be implanted in the uterus of the gamete provider within three months, and cannot be frozen for later use.¹⁹³ Additionally, the law mandates that no woman above the age of forty-five can seek donor eggs and hormone treatment.¹⁹⁴

2. Proposed Agency Guidelines

In 1996, the American Society for Reproductive Medicine ("Society") issued guidelines for the disposition of frozen embryos.¹⁹⁵ The Society recommends that fertility clinics

state-licensed medical practitioner may perform the "technique of human embryo transfer." It provides that written consent is required from the donating couple prior to any transfer procedure. This statute clearly authorizes embryo adoption within the state, but does not regulate the actual procedure of the adoption. OKL. STAT. ANN. tit. 10, § 556 (2002).

¹⁸⁸ Kolata, *supra* note 109. Particularly, countries such as England and Australia do not allow payments to egg donors. Many countries also make it difficult to attract sperm donors, as they place limits on the number of times a man can donate sperm. *Id.*

¹⁸⁹ Paul Raeburn, *A Delicate Issue Frozen in Time*, BUS. WK., July 22, 1996, at 42.

¹⁹⁰ *Id.*

¹⁹¹ Alessandra Stanley, *Bill to Regulate Fertility Procedures Gains in Italy*, N.Y. TIMES, May 28, 1999, at A4.

¹⁹² *Id.* In comparison, doctors in the United States have no regulation limiting the number of embryos that can be created. See discussion *supra* Part V.

¹⁹³ Stanley, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ AM. SOC'Y FOR REPRODUCTIVE MED., *Disposition of Abandoned Embryos*

should be free to “dispose of embryos after a passage of time that reasonably suggests that the [IVF patient] has abandoned the embryos.”¹⁹⁶ This recommendation stems from the Society’s view that a clinic’s willingness to provide initial storage does not create an “ethical obligation” to store them indeterminately.¹⁹⁷ Therefore, clients who have not kept in contact with their clinic for a considerable amount of time, have not provided any advance directive and have failed to provide contact information lose their rights to the embryos. They should not be able to claim any sort of injury if the clinic deems the embryos abandoned and disposes of them after an exhaustive attempt at contacting the owners.¹⁹⁸ However, the Society cautions that under no circumstances should embryos be donated to other couples without prior written consent.¹⁹⁹ The Society has also issued guidelines regarding embryo adoption that can be implemented by individual clinics,²⁰⁰ signaling its acceptance of embryo adoption ethically.²⁰¹

B. *Should There Be Increased Regulation?*

There is great debate over the state of regulation in the field of ART in the United States. ART is so closely intertwined with abortion and right-to-life politics that lawmakers may have been slow in approaching this area due to their genuine concern that any change in the law will deepen the already-existing moral divide over abortion in America. Although elected officials may subscribe to either right-to-choice or right-to-life positions, they may be unwilling to make clear pronouncements on their regard for embryos. The apparent lack of regulation begs the question of whether more regulation is needed.

(1996), available at <http://www.asrm.org/media/ethics/abandon.html> (last visited Feb. 4, 2003) [hereinafter *Disposition of Abandoned Embryos*].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ AM. SOC’Y FOR REPRODUCTIVE MED., *Guidelines for Embryo Donations* (1996), available at <http://www.asrm.org/media/practice/gamete.html> (last visited Jan. 22, 2003).

²⁰¹ THE NEW YORK TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES, ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (1998). These guidelines essentially provide instructions in dealing with the donors and recipients with regard to consent. Specifically, the Report states that although the Society has found embryo donation to be ethically acceptable, it raises the concern that the resulting child will not be “genetically linked” to either parent.

Many groups have emerged in favor of, and opposed to, a change in the regulatory landscape. Increased regulation would deeply offend various groups, based on their beliefs. The leading group advocating against increased regulation is known as the Procreative libertarians. This group believes that additional regulation would violate constitutional rights.²⁰² With the introduction of new reproductive technologies, a question emerged: Does the right to procreate encompass the right to procreate using this technology?²⁰³ Procreative libertarians argue that it should.²⁰⁴ Procreative liberty derives from the Constitution, which protects an individual's right to procreate coitally.²⁰⁵ John A. Robertson, an outspoken Procreative libertarian, argues that "having children satisfies basic biological, social, and psychological drives for many people and that 'noncoital reproduction should thus be constitutionally protected to the same extent as is coital reproduction, with the state having the burden of showing severe harm if the practice is unrestricted.'"²⁰⁶ This group argues that "almost every practice necessary to procreate should receive constitutional protection," as procreative liberty advocates "the presumptive primacy of procreative liberty."²⁰⁷ Indeed, Laurence Tribe, a premier constitutional law expert, has stated that "the very decision to use the law to condemn, and then outlaw, patterns of human reproduction—especially by invoking vague notions of what is 'natural'—is at least as dangerous as the technologies such a decision might be used to control."²⁰⁸

Another faction that may oppose increased regulation consists of Pro-Choice advocates, who are concerned that regulation would signify a restriction of a woman's right to reproductive freedom.²⁰⁹ Right-to-life advocates might also be

²⁰² See, e.g., Robertson, *supra* note 118.

²⁰³ COOPER & GLAZER, *supra* note 17, at 21.

²⁰⁴ *Id.* at 21-22.

²⁰⁵ See generally *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁰⁶ COOPER & GLAZER, *supra* note 17, at 22.

²⁰⁷ Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 951 (1996).

²⁰⁸ Laurence H. Tribe, *Law Professor Reconsiders Cloning*, CLEVELAND PLAIN DEALER, Dec. 9, 1997, at 9B.

²⁰⁹ Planned Parenthood, *Reproductive Freedom*, at <http://www.plannedparenthood.org/about/thisispp/mission.html#03Reproductive> (last visited Jan. 19, 2003) (explaining that reproductive freedom means providing access to all reproductive

concerned with the dangers regulation poses, as "such regulation would be an acceptance of the validity of such technology."²¹⁰

Proponents of increased regulation maintain that more regulation is necessary for myriad reasons. Several studies have revealed that women may have a more negative view of children born with the aid of assisted reproductive technology.²¹¹ It is argued that regulation would wield a positive influence on such perceptions by "moving these children to the center of consideration in the infertility business."²¹² Another justification for regulation stems from safety concerns for the patient who is implanted with multiple embryos in the IVF process.²¹³ This process often results in multiple pregnancies, which creates risk for both the mother and multiple fetuses, thereby necessitating fetal reductions.²¹⁴ However, patients who condemn abortion refuse to permit this type of procedure, and the results are often catastrophic, ranging from spontaneous abortion to premature infants who will suffer from significant lifelong health problems.²¹⁵ Regulation could rid IVF of such concerns.²¹⁶

Another rationale for regulation of ART would be to provide clear guidance in the event of disputes over excess frozen embryos resulting from IVF cycles. Employing a contractual approach to the disposition of any unused embryos through the use of binding advance directives could ultimately resolve the problem created by the burgeoning supply of excess embryos, by designating how the excess embryos will be dealt

options, and permitting every individual to enjoy the fundamental right of deciding freely and responsibly when and whether to have a child); see also Alexander N. Hecht, Note, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227 (2001).

²¹⁰ Howard W. Jones & Susan L. Crockin, *On Assisted Reproduction, Religion, and Civil Law*, 73 FERTILITY & STERILITY 447, 447 (2000) (describing how Right-to-Life protestors held a demonstration outside an IVF clinic in Virginia).

²¹¹ S. Lynn Mulcare & Herman Aguinis, *Effects of Adoptive Status on Evaluations of Children*, 139(2) J. SOC. PSYCHOL. 159, 160 (1999) (establishing that children will suffer adverse consequences because society will have a negative view of children who are considered "semi-adopted" through artificial insemination).

²¹² George J. Annas, *Fertility Clinics Hardly Letter-Perfect*, BOSTON GLOBE, Nov. 30, 1997, at D1 (citing President Clinton's 1997 proposed law aimed at shifting the focus in adoption from the rights of biological parents to the welfare of children and concluding that national standards and regulation of ART technology would have the effect of achieving the same result).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

with at the outset of the IVF process.²¹⁷ This view proves quite controversial, as some commentators argue that enforcement of such contracts “undermines a central aspect of procreative freedom—the right to make contemporaneous decisions about how one’s reproductive capacity will be used.”²¹⁸

A further consideration in the regulation debate surrounds selection criteria for ART participants; specifically, whether there should be a maximum age restriction for females seeking IVF treatments and embryo adoption. There is some support for such a restriction.²¹⁹ Most traditional adoption agencies place limits on the age of adoptive parents, and as a result, exclude certain age groups from this opportunity.²²⁰ The question arises whether this restriction should likewise be placed on embryo adoption, and more generally, within the practices offered in the field of ART. Because there is no uniform regulation of embryo adoption, some women are becoming pregnant in their later years. Many observers wonder if this is fair to the resulting children.²²¹ For example, one commentator stated that society must consider, from the potential child’s perspective, whether it is “good social policy for women of [ages fifty to sixty] to begin raising children.”²²² If this woman is the child’s only living relative, should she die while the child is still under the age of majority, the child will have to be put up for adoption.²²³ Regulation setting a maximum age limit at which women can gestate a frozen embryo would avoid such scenarios.²²⁴ Further supporting the argument for an age restriction is the widespread concern that the ART industry is “redefin[ing] some of the most basic elements of human life.”²²⁵ As one commentator has noted:

²¹⁷ Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 71 (1999).

²¹⁸ *Id.* at 56-57.

²¹⁹ See generally Kimberly E. Diamond, *Cryogenics, Frozen Embryos and the Need for New Means of Regulation: Why the U.S. is Frozen in its Current Approach*, 11 N.Y. INT’L L. REV. 77, 95-96 (1998); Jayson, *supra* note 170.

²²⁰ Malpani & Malpani, *supra* note 77.

²²¹ Diamond, *supra* note 219, at 95-96.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* England passed a maximum age limit of fifty in the summer of 1997, after the country’s IVF experts agreed that due to the “possible adverse social effects on a child growing up with elderly parents,” women over the age of fifty should not be permitted to participate in an IVF procedure. *Id.*

²²⁵ Sheryl Gay Stolberg, *The Nation: Timeless; Buying Years for Women on the Biological Clock*, N.Y. TIMES, Oct. 3, 1999, at 1D (internal citations omitted).

"[t]he biological clock has always been predicated on the cold, scientific fact that a woman's eggs deteriorate as she ages. Science has not yet put the clock out of business, but it could, and that's what gets some people nervous. . . . Parents' night at some pre-schools are beginning to look like grandparents' night."²²⁶ Some wonder if it is ethical to pursue certain things just because they are possible.²²⁷

CONCLUSION

Until regulation can be implemented to deal with the dilemma posed by excess frozen embryos, embryo adoption should be strongly encouraged as a means of dealing with this growing problem. The Bush Administration has already taken steps to achieve this goal, including the approval of a million dollar grant from the Department of Health and Human Services, half of which has been given to the Nightlight adoption agency for the development of a program to promote embryo adoption of excess IVF embryos.²²⁸ Another large portion of this grant was given to the National Infertility Association to develop and implement a public awareness campaign on embryo adoption.²²⁹ Additionally, the Department of Health and Human Services, at the behest of Congress, issued guidelines for organizations wishing to raise public awareness of the availability of frozen embryos up for adoption, further signaling the administration's embrace of the practice.²³⁰

Furthermore, as the above discussion reveals, regulation of assisted reproductive technology is an absolute necessity. Even simple temporary regulations should be established, if only to curb the excess IVF embryo supply. Such

²²⁶ *Id.*

²²⁷ COOPER & GLAZER, *supra* note 17, at 21.

²²⁸ Nancy McVicar, *Embryo Transfers for "Adoption" Give Rise to Controversy*, S. FLA. SUN-SENTINEL, Nov. 3, 2002, at A1.

²²⁹ Press Release, Resolve: Nat'l Infertility Ass'n, Resolve Receives Federal Grant to Implement Groundbreaking Educational Program on Use of Embryos (Oct. 10, 2002) available at http://www.resolve.org/pressrelease/102002_press_release.htm (last visited Feb. 5, 2003). The program, called "Embryo Donation—An Option," is designed to spread the word about embryo adoption, and also to educate medical professionals, patients and the general public about the medical, legal and emotional aspects inherent in this practice. *Id.*

²³⁰ Press Release, U.S. Newswire, American Life League: "Choice" in Federal Regulations Still Means Death for Human Embryos (Aug. 27, 2002), available at <http://www.usnewswire.com/topnews/search5/0827-102.html> (last visited Jan. 22, 2003).

regulation could come in various forms. A helpful discourse and proposal regarding the possible regulatory actors and models was described in Paul C. Redman II and Lauren Fielder Redman's article, titled *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*²³¹

Ultimately, technology continues to develop at a rapid pace. As a result, we must proceed slowly, as hindsight proves that in the area of reproductive technology, the law takes time to evolve and formulate responses to technological developments. Embryo adoption has the potential of giving life to unwanted embryos. However, the practice gives rise to many issues, as well as myriad ethical, moral and legal considerations. It is clear that regulation is necessary to deal with the excess supply of embryos resulting from IVF procedures. Until that happens, however, embryo adoption is a viable method of dealing with some of the excess supply.

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²³¹ Redman & Redman, *supra* note 7.

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