Notes

REHABILITATING BIOETHICS: RECONTEXTUALIZING IN VITRO FERTILIZATION OUTSIDE CONTRACTUAL AUTONOMY

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INTRODUCTION

As in vitro fertilization (IVF) and other reproductive technologies become increasingly prevalent, the legal and bioethical issues that inevitably accompany these new technologies are outpacing both legislative and judicial responses.[1] Thus far, legislatures hesitant to address the ethical uncertainties in IVF have been slow to adopt clear guidelines regarding the disposition of the frozen preembryos[2] that remain after an IVF procedure.[3] As a result,

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1. *See* F. Barrett Faulkner, Note, *Applying Old Law to New Births: Protecting the Interests of Children Born Through New Reproductive Technology*, 2 J. HIGH TECH. L. 27, 27 (2003):

> In most states, the legislature has been slow in resolving the conflicts between old laws and new reproductive technologies. Courts in many of these states have attempted to find a set of rules for determining parentage of children born through new technology, using statutes adopted at a time when legislatures could not have anticipated such births.

2. Although the relevant case law uses the terms "pre-zygote" and "preembryo" interchangeably, John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 CAL. L. REV. 939, 952 n.45 (1986), barring direct quotation, this Note will rely solely on the term "preembryo." A preembryo is the term for a zygote, or fertilized egg, that has not been implanted (for development into the embryo proper) into the uterus; the preembryo is the category for the first cell stage at which zygotes may be cryopreserved in the IVF process. Susan L. Crockin, *"What Is an Embryo?": A Legal Perspective*, 36 CONN. L. REV. 1177, 1178–80 (2004).

3. There is a dearth of legislation regarding the disposition of frozen preembryos. As of this writing, only three states have enacted relevant legislation. *See* FLA. STAT. ANN. § 742.17 (West 1997) ("A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."); LA. REV. STAT. ANN. § 9:124 (West 2000) (providing that the preembryo must be considered a "juridical person"); N.H. REV. STAT. ANN. § 168-B:15 (2001) ("No preembryo

courts have been left to themselves to determine the best response when a divorce subsequent to IVF generates dispute over the disposition of remaining preembryos,[4] when one of the parties to IVF argues against the validity of signed consent forms,[5] or when public policy appears to argue against forcing donors to become parents against their will.[6] The disposition of frozen embryos implicates a variety of legal issues, and any fruitful consideration of these issues must operate alongside an analysis of contemporary bioethics. This Note proposes that the bioethical concerns intrinsic to IVF cryopreservation of preembryos militate against a traditional contract approach that turns on personal autonomy and freedom of contract.

Drawing upon contemporary bioethics and theological discourse, this Note suggests that the unique relationships resulting from the IVF process preclude the use of classical, contractual frameworks privileging individual autonomy. An alternative, teleological framework can recontextualize IVF within contract theory in a manner that better accounts for the intersection of IVF and the bioethical concerns that IVF necessarily implicates.

Under contemporary case law, contracts are often interpreted with an eye toward preserving individual autonomy.[7] By contrast, a teleological approach to contracts would favor for enforcement those contracts that successfully achieved the original telos, or purpose, underlying the given contract: in the case of IVF procedures, the development of a parent-child relationship. Ultimately, this Note argues that this underlying purpose radically informs the interpretation of contracts concerning preembryo disposition. Given this new hermeneutic, contract interpretation would be more likely to produce results consistent with both the intent of the parties at the time that the contract was formed and the principles of bioethics.

Part I of this Note describes the IVF procedure, focusing on those elements at the center of contemporary legal battles. In large part, the legal disputes concern the disposition of the cryopreserved preembryos that remain after the conclusion of the IVF process. In

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shall be maintained ex utero in the noncryo-preserved state beyond 14 days post-fertilization development.").

4. *E.g.*, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

5. *E.g.*, A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

6. *E.g.*, J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

7. *See infra* notes 101–13 and accompanying text.

discussing these foundational issues, Part I also examines how the confusion surrounding the legal and ontological status of preembryos influences IVF litigation.

Subsequently, Part II examines the relevant case law to demonstrate the existing disconnect between contemporary bioethical issues and legal responses. Although only five state courts have ruled on the disposition of cryopreserved embryos, the resulting opinions illustrate the complex questions that often arise in such cases: whether preembryos are persons, property, or neither; which party should have decisional authority over the remaining preembryos; whether written consent forms pertaining to disposition should be enforced; the extent to which public policy issues should inform the legal discourse concerning IVF; and, finally, the degree to which party intent should be a factor in contract interpretation. Although the state courts reached different conclusions regarding preembryo disposition, for the most part their discourse framed the contractual analysis regarding IVF contract agreements around the language of individual autonomy prevalent in contemporary contract theory.

After exploring the relevant legal concerns, Part III navigates the current theological and bioethical terrain as it pertains to IVF; in particular, this discussion considers the different constructs of personhood and parental relationships at issue in new reproductive technologies. Currently, a high premium on individual autonomy generates a theory of contract that may neglect to account for the relationships central to the IVF process. As an alternative, this Note contends that both theological and bioethical perspectives support a teleological framework for IVF litigation that does not require dismissing either individual autonomy or communitarian values. This teleological perspective would allow for the implementation of new policies, including embryo adoption and legislated limits on embryo cryopreservation.

I. BACKGROUND ON IN VITRO FERTILIZATION

With the 1978 birth of Louise Brown, the first child conceived outside a woman's body,[8] the reproductive landscape changed dramatically. Conventional notions of conception and childbirth gave way to the possibility of long-term gamete and embryo

8. Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101, 106 (2003).

cryopreservation, surrogate motherhood, and even posthumous reproduction.[9] In particular, the development of reproductive technologies such as IVF provided a solution for infertile couples who sought a "genetic, biological connection" with their children.[10] Although society's premium on genetically related offspring may prompt criticism from academics,[11] reproductive procedures such as IVF are increasingly popular and, each year, Americans spend over one billion dollars on medical and surgical fertility procedures.[12] At the same time, the science underlying these procedures is gradually eroding traditional ways of understanding when life begins,[13] personality develops,[14] and the parent-child bond forms.[15]

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9. *See id.* at 107 ("[T]he presumed biological anchors through which families were once understood are being replaced with a variety of alternative *truths* about human reproduction.").

10. Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 937 (1999).

11. Leslie Bender, Professor of Law and Women's Studies at Syracuse University, argues that a construction of parenthood based purely on a genetic relationship ("genetic essentialism") ignores the formative, nonbiological aspects of human personality. *See* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 4 (2003) ("[Genetic essentialism] ignores the ways our cells and environments interrelate, the ways our physiological system functions as a whole organism, and the ways our minds and hearts affect our being.").

12. Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L.J. 315, 317 (1998).

13. The tension in determining when life begins is most evident in abortion debates. *See, e.g.*, Donald Hope, *The Hand as Emblem of Human Identity: A Solution to the Abortion Controversy Based on Science and Reason*, 32 U. TOL. L. REV. 205, 206 (2001) ("The pro-choice arguments are most persuasive when referring to the early, embryonic, stages of development, but are much less convincing when applied to fetal life. Conversely, pro-life reasoning applies most forcefully to fetuses, but runs into serious difficulty when applied to embryonic life.").

14. *See id.* at 207:

> While some claim that human individuality begins at conception, the scientific facts do not support this assertion . . . . After the fertilized egg's first divisions, there is the possibility of the splitting of one embryo into two or more separate individuals. There is also the possibility of the merging of two distinct embryos with different genotypes into one individual. These phenomena call into question the entire notion of individuality at this early cellular level of development.

(footnote omitted).

15. *See* Dolgin, *supra* note 8, at 107 ("As a result of [developments in reproductive technologies], biological maternity has been separated into two different aspects (gestational and genetic) . . . and the presumed biological anchors through which families were once understood are being replaced with a variety of alternative *truths* about human reproduction."). Embryo adoption, one of the newest developments in family law, further illustrates the potential for evolution in the parent-child relationship. *See* Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 572 (2003) ("Through embryo adoption, infertile couples can now experience the miracle of birth as well as the growth process inside the mother's womb [of a genetically unrelated child].").

The science of the IVF procedure begins when doctors use hormonal stimulation to cause a woman's ovaries to produce multiple eggs.[16] Subsequently, these eggs are removed to a petri dish, where they are fertilized with sperm.[17] Fertilization results in preembryos, which are then transferred to the uterus through a cervical catheter.[18] Despite the awkwardness of the term "preembryo," the label is accurate because, at this point, the collection of cells constituting the preembryo has not undergone sufficient differentiation to form what will later be termed the embryo.[19] To result in a successful pregnancy, the preembryo must be implanted into the uterine lining.[20] Although it is customary for a doctor to retrieve ten or more eggs during the process of hormone stimulation, no more than three or four preembryos are transferred to a uterus at any given time because of the increased risk of multiple pregnancies.[21] Much of the legal controversy, then, centers around the legal and ontological status of the preembryos remaining after implantation. Through cryopreservation, a technique that allows for the indefinite preservation of preembryos in liquid nitrogen, remaining preembryos can be set aside for subsequent implantation attempts, disposal, or research.[22] If clinics used hormonal stimulation to retrieve only the number of eggs intended for implantation, IVF would be somewhat less controversial. However, this method seems unlikely; because most couples must undergo several IVF cycles before a successful pregnancy, cryopreservation presents an economically efficient means of avoiding subsequent, costly ovarian stimulation and egg retrieval.[23]

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16. Walter, *supra* note 10, at 938.

17. *Id*.

18. *Id*.

19. *See* Am. Fertility Soc'y Ethics Comm., *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY 15S, 31S–32S (1990):

> [T]he first cellular differentiation of the new generation [of cells] relates to physiologic interaction with the mother, rather than to the establishment of the embryo itself. It is for this reason that it is appropriate to refer to the developing entity up to this point as a preembryo, rather than an embryo.

(emphasis omitted) (quoted in Davis v. Davis, 842 S.W.2d 588, 595 (Tenn. 1992)).

20. Walter, *supra* note 10, at 938.

21. Karissa Hostrup Windsor, Note, *Disposition of Cryopreserved Preembryos After Divorce*, 88 IOWA L. REV. 1001, 1005 (2003).

22. *Id*.

23. *See* J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001) ("Cryopreservation of unused preembryos reduces, and may eliminate, the need for further ovarian stimulation and egg retrieval, thereby reducing the medical risks and costs associated with both the hormone regimen and the surgical removal of egg cells from the woman's body."); Suchitra Jittaun

The disposition of unused preembryos does not occur wholly without guidance. IVF clinics that offer to use cryopreserved preembryos for later implantations often enter into formal, written agreements with infertile couples.[24] Typically, these written agreements offer couples several options with regard to the disposition of any remaining preembryos.[25] Most often, these options include reserving the preserved preembryos for future implantation, destruction of the preembryos, donation to a different couple, or donation to the IVF clinic for research purposes.[26] Clinic agreements may also provide that the death of a party, divorce, refusal to remain in an IVF program, or termination of an agreement will trigger a given option.[27] Although these contractual constructs appear relatively transparent, substantial legal confusion remains because of IVF's implications for several charged bioethical issues.[28]

II. STATE SUPREME COURT CASE LAW RELATING TO IN VITRO FERTILIZATION

Although relevant case law is sparse, the five cases discussed in this Part illustrate the diversity of judicial responses to the questions surrounding the disposition of remaining cryopreserved preembryos. The discussion of these cases emphasizes each state court's approach to the question of IVF contract interpretation.[29] Although other

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Satpathi, Comment, *Gliding over Treacherous Ice: Fulfillment and Responsibility in the New Reproductive Era; Why Contractual Ordering Is Appropriate*, 18 TEMP. ENVTL. L. & TECH. J. 55, 58 (1999) ("IVF is a costly and draining procedure. The cost of the numerous rounds usually required in order to achieve a successful pregnancy can be upwards of $40,000.").

24. Walter, *supra* note 10, at 938.

25. *Id*.

26. *Id*.

27. *Id*.

28. *See* Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 172 (2003) ("Courts have consistently refused to enforce contracts . . . that would result in one party becoming a parent against his or her will.").

29. Because state courts have largely viewed the problem of preembryo disposition through a contractual lens, this Note does not consider an earlier case, *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989), which is the sole case to frame the relationship between the parties to an IVF agreement and their preembryos as a property issue. In that case, the court found: "[T]he inference to be drawn from these provisions of the Cryopreservation Agreement is that the defendants fully recognize plaintiffs' property rights in the pre-zygote and have limited their rights as bailee to exercise dominion and control over the pre-zygote." *Id.* at 426–27.

factors, such as the right to privacy[30] and public policy considerations,[31] often figured in the courts' decisionmaking processes, the courts generally focused on contract interpretation. For that reason, the balance of this Note focuses on this area of law.

A. Davis v. Davis*: A Constitutional Inquiry*

Although by 1992 IVF was already prominent in the United States, the Supreme Court of Tennessee was the first to address the contractual questions concerning the disposition of frozen preembryos.[32] The court's landmark case, *Davis v. Davis*,[33] illustrates the difficulties generated when courts grapple with the legal status of preembryos in concert with the often complex relationships among parties to IVF.[34] In *Davis*, the court determined custody of frozen preembryos from a married couple's IVF procedure after the couple had divorced. The couple involved, Mary Sue Davis and her ex-husband Junior Lewis Davis, had cryopreserved seven preembryos after six unsuccessful attempts at IVF.[35] Two facts were central to the *Davis* court's analysis: first, when signing up for the IVF procedure, the Davises had not executed a written agreement specifying what should be done with the remaining preembryos after the cryopreservation process;[36] second, no Tennessee statute governing such disposition had existed at the time, and none had been enacted since.[37] As a result of this ambiguous legal landscape, the seven

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30. *See* Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992) ("Here, the specific individual freedom in dispute is the right to procreate. . . . We hold that the right of procreation is a vital part of an individual's right to privacy.").

31. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) ("We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired.").

32. *See Davis*, 842 S.W.2d at 590 ("Despite the fact that over 5,000 IVF babies have been born in this country and the fact that some 20,000 or more 'frozen embryos' remain in storage, there are apparently very few other litigated cases involving the disputed disposition of untransferred 'frozen embryos' . . . .").

33. 842 S.W.2d 588 (Tenn. 1992).

34. *See 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.").

35. *Id.* at 589, 591.

36. *Id.* at 590.

37. *Id.*

unused preembryos became the sole subject of legal dispute in an otherwise uncomplicated divorce proceeding.[38]

In an opinion awarding custody of the preembryos to Junior Davis,[39] the court delineated various theories by which disposition could be settled, all deriving from disparate views concerning the nature of preembryos (i.e., whether a preembryo should be allocated "person" or "property" status) or the degree to which the personal autonomy of either party to the IVF procedure should be considered.[40] The court considered several legal theories; one theory would have required that gamete providers use all preembryos obtained during IVF, whereas another theory would have required that any remaining preembryos be discarded.[41] Still another theory would have given female gamete providers control over the preembryos in all cases because of females' "greater physical and emotional contribution to the IVF process."[42] Alternatively, the court considered two "implied contract" theories: one inferring that participation in IVF granted disposition authority to the IVF clinic, and one inferring that both parties to IVF had made an "irrevocable commitment to reproduction," and that, therefore, any remaining preembryos must be transferred either to the female provider or to a viable third party.[43]

Ultimately, rejecting the "personhood" of the preembryo,[44] the *Davis* court adopted a middle-of-the-road approach regarding the status of preembryos and personal autonomy.[45] First, the court concluded that the preembryos were "not, strictly speaking, either

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38. *Id.* at 592.

39. *Id.* at 604.

40. *See id.* at 590 ("[M]edical-legal scholars and ethicists have proposed various models for the disposition of 'frozen embryos' when unanticipated contingencies arise, such as divorce, death of one or both of the parties, financial reversals, or simple disenchantment with the IVF process.").

41. *Id*.

42. *Id*.

43. *Id.* at 590–91.

44. *Id.* at 594–97.

45. *See id.* at 591:

> As appealing as [the possibility of adopting a bright-line test] might seem, we conclude that given the relevant principles of constitutional law, the existing public policy of Tennessee with regard to unborn life, the current state of scientific knowledge giving rise to the emerging reproductive technologies, and the ethical considerations that have developed in response to that scientific knowledge, there can be *no easy answer* to the question we now face.

(emphasis added).

'persons' or 'property,' but occup[ied] an interim category that entitle[d] them to special respect because of their potential for human life."[46] Second, in weighing the right to procreative autonomy,[47] the court focused on whether "the parties [would] become parents" and concluded that "the answer to this dilemma turn[ed] on the parties' exercise of their constitutional right to privacy."[48] Significantly, noting that a right to privacy, or personal autonomy, "[was] deeply embedded in the Tennessee Constitution,"[49] the court concluded that the decisionmaking authority remains with the gamete providers rather than with the court or the IVF clinic, "at least to the extent that the providers' decisions had an impact upon their individual reproductive status."[50] Ultimately, the *Davis* court held that Junior's interest in avoiding parenthood outweighed Mary Sue's interest in donating the embryos.[51] Although the *Davis* court used a balancing test in determining the disposition of the remaining preembryos, the court suggested that an agreement pertaining to the disposition of remaining preembryos in the event of unforeseen events "should be presumed valid and should be enforced."[52]

B. Kass v. Kass*: Written Agreements Enforced*

In 1998, six years after the *Davis* decision, the New York Court of Appeals examined the question of preembryo disposition in *Kass v. Kass*.[53] There, prior to IVF procedures, Maureen and Steve Kass signed consent forms detailing what should be done with the remaining preembryos.[54] After the couple divorced, Maureen sought

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46. *Id.* at 597.

47. "[T]he right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation." *Id.* at 601.

48. *Id.* at 598.

49. *Id.* at 599.

50. *Id.* at 602.

51. *Id.* at 604. After the lower court decisions, Mary Sue decided against using the preembryos herself but, rather, sought the right to donate them to another couple. *Id.* at 590.

52. *Id.* at 597.

53. 696 N.E.2d 174 (N.Y. 1998).

54. In relevant part, the consent forms indicated:

> We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of *both* of us . . . . In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.

Id. at 176. The Kasses also signed a "Statement of Disposition" that indicated in relevant part:

custody of five cryopreserved preembryos, whereas her ex-husband argued that the couple had explicitly consented to donate the preembryos to the IVF program for research purposes.[55] In analyzing the relevant consent forms,[56] the *Kass* court followed *Davis* dicta and held that the prior written agreement should be enforced: "Agreements 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."[57]

Unlike the *Davis* court, which devoted a substantial portion of its opinion to the question of the legal (and ontological) status of the preembryo, the *Kass* court did not broach that question, observing that preembryos are not constitutionally recognized as "persons."[58] The court further noted that the disposition of preembryos "does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice."[59] Because the Kasses had signed consent forms regarding preembryo disposition, the *Kass* court was able to sidestep the larger ontological issues and focus on how to allocate the authority over disposition.[60]

Ultimately, the New York Court of Appeals held that the written consent forms signed by the Kasses required that the preembryos be donated to the IVF program for research.[61] In reaching that conclusion, the court not only encouraged future IVF parties to "think through possible contingencies and carefully specify their wishes [regarding preembryo disposition] in writing,"[62] but also framed the importance of the contract between the IVF clinic and the

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> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes . . . :
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> . . . Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program . . . .

Id. at 176–77.

55. *Id.* at 177.
56. *See supra* note 54.
57. *Kass*, 696 N.E.2d at 180.
58. *Id.* at 179 (citing Roe v. Wade, 410 U.S. 113, 162 (1973)).
59. *Id*.
60. *Id*.
61. *Id*. at 181.
62. *Id.* at 180.

Kasses as an expression of joint intent.[63] In affirming the enforceability of the written consent forms, the *Kass* decision illustrates the effect of giving primacy to the notion of freedom of contract.[64]

C. A.Z. v. B.Z.*: Written Agreements Not Enforced*

Highlighting the diverse approaches within the relevant case law, in the 2000 decision *A.Z. v. B.Z.*,[65] the Supreme Judicial Court of Massachusetts refused to enforce a consent form signed by an IVF clinic and the parties to an IVF procedure.[66] As in prior cases, the couple involved had separated subsequent to IVF treatments that had produced cryopreserved embryos.[67] Moreover, as with the Kasses, the couple had signed a consent form (required by the clinic) providing that, in the event of separation, the wife would retain control of the preembryos for her future implantation.[68] Following the lead of the *Kass* court, the *A.Z.* court did not discuss the status of the preembryo; rather, the opinion turned on issues of freedom of contract and public policy.[69]

Despite acknowledging that the consent forms contained legal ambiguities,[70] the court ultimately concluded that, "even had the husband and the wife entered into an unambiguous agreement

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63. *See id.* at 181 ("[T]he informed consents signed by the parties *unequivocally manifest* their *mutual intention* that in the present circumstances the pre-zygotes be donated for research to the IVF program." (emphases added)).

64. *See id.* at 182 ("These parties having clearly manifested their intention, the law will honor it.").

65. 725 N.E.2d 1051 (Mass. 2000).

66. *Id.* at 1059.

67. *Id.* at 1053.

68. *Id.* at 1054. *A.Z. v. B.Z.* has the distinction of being the first reported case to deal with a contract purporting to give any remaining preembryos to one of the donors for future implantation. *Id.* at 1056.

69. *See id.* at 1058 ("It is well-established that courts will not enforce contracts that violate public policy.").

70. The consent form contained the undefined phrase "[s]hould we become separated." *Id.* at 1057. Because the custody dispute arose in the context of a divorce, not a separation, the *A.Z.* court ultimately could not conclude that the consent form was intended to govern in the particular circumstances. *Id.* Moreover, the court held that the consent form could not represent the husband's "true intention" regarding preembryo disposition because, when he signed the consent form, it was still blank; only after he signed did the wife fill in the blank to reserve the embryos for her own implantation. *Id.* Ultimately, the court concluded that the consent form was "legally insufficient in several important respects" and did not reach the "minimum level of completeness" required for enforcement. *Id.*

between themselves regarding the disposition of the frozen preembryos," public policy, at times, must trump the freedom of contract.[71] The public policy value given priority was society's reluctance to compel donors to become genetic parents against their will.[72] According to the *A.Z.* court, this policy derived from the principle that "respect for liberty and privacy" required that an individual have the freedom to decide whether to enter into a family relationship.[73]

D. J.B. v. M.B.*: Diminishing the Role of Contract*

In August 2001, the New Jersey Supreme Court decided *J.B. v. M.B.*,[74] which concerned the enforceability of a signed consent form stipulating that unused preembryos would be donated to the IVF clinic in the event of divorce, unless the court ordering the divorce specified some other disposition.[75] As in *A.Z.*, J.B and M.B. signed a consent form prior to their IVF procedure,[76] but this couple successfully conceived a daughter, who was born shortly before the couple separated.[77] When J.B. filed a divorce complaint in which she sought a court order to have the eight remaining frozen embryos discarded, M.B. counterclaimed, seeking to compel J.B. to allow the donation of the preembryos to another couple.[78]

Noteworthy in the court's contractual analysis was its focus on public policy issues; the court ultimately suggested that the policy of protecting individuals from unwanted family responsibilities could supersede the enforcement of a contract.[79] After determining that it could enforce the court order clause in the consent form, the *J.B.* court chose to use the same balancing of interests approach taken in

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71. *Id.* at 1057–58.

72. *Id*.

73. *Id.* at 1059.

74. 783 A.2d 707 (N.J. 2001).

75. *Id*. at 710. In relevant part, the consent form stated: "The control and disposition of the embryos belongs to the Patient and her Partner. . . . I, J.B. (patient), and M.B. (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF Program under . . . [a] dissolution of our marriage by court order . . . ." *Id*.

76. *Id.* at 709–10.

77. *Id.* at 710.

78. *Id*.

79. *See id.* at 719 ("The public policy concerns that underlie limitations on contracts involving family relationships are protected by permitting either party to object at a later date to provisions specifying a disposition of preembryos that that party no longer accepts.").

Davis.[80] Ultimately, the court held that prohibiting M.B. from donating the preembryos would neither deny nor diminish his right to procreate.[81] By contrast, authorizing donation would violate J.B.'s right not to procreate, even though she would not be raising the prospective child herself.[82]

The *J.B.* opinion attempted to outline some considerations for future consent agreements, noting that they "should be written in plain language," that parties should have the opportunity to review the terms with a clinic representative prior to execution, and that, as a general principle of contract law, parties should not sign blank agreements.[83] However, adding greatly to the confusion of the relevant case law, the court opined that it would enforce such contracts only if both parties had the right to change their minds.[84] This final caveat diminishes the authoritative weight of IVF contracts.

E. Litowitz v. Litowitz*: Enforcing Contracts as Emblematic of Party Intent*

Most recently, in *Litowitz v. Litowitz*,[85] the Washington Supreme Court enforced an IVF cryopreservation contract stipulating that, if a husband and wife could not reach a mutual agreement regarding preembryo disposition, the couple would submit the question to the court.[86] The court enforced the Litowitz contract, in which the parties agreed to abide by the court's instructions if they could not reach a consensus concerning the disposition of the preembryos.[87] David Litowitz wanted to put the remaining preembryos up for adoption, whereas Becky Litowitz wished to implant the preembryos in a surrogate mother and subsequently raise the resulting children as her own.[88]

As stipulated by the contract, because the couple disagreed on the proper disposition of the frozen preembryos, the court took the

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80. *Id.* at 716; *see supra* notes 44–52 and accompanying text.

81. *Davis*, 783 A.2d at 717.

82. *Id*.

83. *Id.* at 719.

84. *See id*. ("[T]he better rule . . . 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.").

85. 48 P.3d 261 (Wash. 2002).

86. *Id.* at 270–71.

87. *Id.* at 271.

88. *Id*.

responsibility of providing instructions regarding the disposition.[89] In reaching its conclusion regarding the contractual issues, the *Litowitz* court focused on the parties' intent to thaw the preembryos;[90] the contract required that the remaining preembryos be "thawed but not allowed to undergo further development" if the preembryos remained in cryopreservation for more than five years.[91]

Although only David Litowitz was a gamete provider, the court found that "he ha[d] no greater contractual right to the eggs" than Becky Litowitz, the intended mother.[92] Despite this acknowledgment of maternal and paternal rights, the *Litowitz* court sidestepped a more precise determination of the ontological status of the contested preembyros, declaring that the question of whether the preembryos constituted children was "not a logical or relevant inquiry."[93] The Supreme Court later denied Becky Litowitz's petition for a writ of certiorari, perpetuating the legal confusion surrounding cryopreserved preembryos.[94]

III. A TELEOLOGICAL APPROACH TO IVF CONTRACT INTERPRETATION

As the relevant case law demonstrates,[95] there is little analytical intersection between the dominant legal theories underlying preembryo disposition and the bioethical theories concerning personhood and personal autonomy.[96] Although it may seem intuitive that the legal issues raised by assisted reproductive technologies necessarily implicate the vocabulary of bioethics,[97] the courts have

89. *Id.* at 268.

90. *See id.* ("Contract interpretation must be based on the intent of the parties as reflected in their agreement.").

91. *Id.* at 264.

92. *Id.* at 268.

93. *Id.* at 269.

94. Litowitz v. Litowitz, 537 U.S. 1191 (2003).

95. *See supra* Part II.

96. The question of control is at the center of several bioethical debates, including embryonic stem cell research and the destruction of cryopreserved preembryos. However, the two debates often elicit dissimilar popular reactions. *See* Dolgin, *supra* note 8, at 108 ("[I]n the main, embryos produced in the context of infertility treatment have not engendered the sort of intense controversy about the status and rights of the embryo that has surrounded discussion of therapeutic cloning and embryonic stem cell research.").

97. *See, e.g.*, Bender, *supra* note 11, at 6 ("For the last two decades, our judicial system has trailed woefully behind the complex bioethical dilemmas that accompany the rapid advances in biotechnology, biomedicine, and assisted reproductive technologies."); John A. Robertson,

moved toward an analytical bifurcation of the two issues. Indeed, the *Litowitz* court declared that the status of the preembryo was not even a "logical or relevant inquiry."[98] Other courts have avoided bioethical issues entirely. For people who continue to feel that the legal questions surrounding IVF cryopreservation and other assisted reproductive technologies cannot avoid a dialogue with bioethics,[99] the current legal frameworks are untenable.

This Part illustrates that it is imperative for contemporary bioethics to inform the legal dialogue surrounding IVF cryopreservation. A legal response that relies primarily upon classical, autonomy-oriented contract law frameworks[100] critically ignores the unique bioethical concerns implicated by the IVF process. However, a wholesale rejection of the contractual framework is unnecessary. Rather, contemporary scholars in both bioethical and theological discourse find analytical benefits in an alternative, teleological approach to contractual interpretation. This teleological approach interprets the IVF process through its purpose of developing a

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"Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions, 81 TEX. L. REV. 1729, 1737 (2003) ("Bioethics concerns the ethics, norms, and laws that arise out of medical practice and innovation and often involves questions that involve the extension or creation of life.").

98. *Litowitz*, 48 P.3d at 269.

99. *See* STANLEY HAUERWAS, *Salvation and Health: Why Medicine Needs the Church*, *in* SUFFERING PRESENCE: THEOLOGICAL REFLECTIONS ON MEDICINE, THE MENTALLY HANDICAPPED, AND THE CHURCH 63, 72 (1986):

> [W]e are currently trying to do the impossible—namely, "build a civilization with an agreed civil tradition and [in] the absence of a moral consensus." This makes the practice of medicine even more morally challenging, since it is by no means clear how one can sustain a non-arbitrary medicine in a genuinely morally pluralistic society.

(quoting Paul Ramsey, *The Nature of Medical Ethics*, *in* THE TEACHING OF MEDICAL ETHICS 14, 15 (Robert M. Veatch et al. eds., 1973) (alteration in original)); Oliver O'Donovan, *Again: Who Is a Person?*, *in* ABORTION AND THE SANCTITY OF HUMAN LIFE 125 (J.H. Channer ed., 1985) (discussing the multifarious bioethical issues arising from the newest reproductive technologies).

100. *See* Chad McCracken, Note, *Hegel and the Autonomy of Contract Law*, 77 TEX. L. REV. 719, 720–21 (1999) ("[C]ontract law as classically conceived was both corollary to and bulwark of liberal individualism."); *id.* at 730 (noting that in contract law, the "actual, subjective choice of the individual" is viewed as "crucial for autonomy and thus deserving of protection"). Although not represented in the current debates over the disposition of cryopreserved preembryos, some scholars suggest that legal developments such as the doctrines of unconscionability and promissory estoppel evidence the movement of contract law away from classical ties to autonomy. *See, e.g.*, Julian S. Lim, Comment, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 605 (2003) ("Unconscionability is a fairly modern doctrinal development in contract law, typifying contract law's shift away from a classical theory of contracts based on freedom of contract and autonomy rationales.").

parent-child relationship. Ultimately, this approach points toward concrete, alternative policies.

A. Traditional Contract Theory and the Premium on Personal Autonomy

The contractual interpretation driving the most recent state court rulings[101] places a premium on an issue of paramount importance to bioethicists: personal autonomy. For both contract law and reproductive bioethics, a critical concern is whether there is a moral or ontological imperative to protect individual autonomy.[102] Whereas the bioethical debate revolves around the extent to which individuals can or should control the reproductive process,[103] contract law, at its core, involves the enforceability of legal restraints on personal autonomy.[104] The dominant framework for contractual interpretation turns on the intent of the parties.[105] Not surprisingly, this emphasis on individual choice places a "virtual veto power" in the hands of parties

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101. *See* Dolgin, *supra* note 8, at 108 ("For the most part, courts, entertaining disputes about frozen embryos, have relied on contractual agreements to resolve such disputes, or in the absence of such agreements, on the comparative interests of the parties." (footnote omitted)).

102. *See* Bernadette Tobin, *Did You Think About Buying Her a Cat? Some Reflections on the Concept of Autonomy*, 11 J. CONTEMP. HEALTH L. & POL'Y 417, 418 (1995) (observing that, in the bioethical debate over euthanasia, some commentators "believe that the capacity to live autonomously is the crucial mark of moral maturity and . . . believe that respect for the autonomous individual signifies respect for that person as a human being").

103. *See, e.g.*, William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 506 (2001) ("Emphasis upon personal autonomy, freedom of conscience, and the importance of the family as the focal point of procreation formed the larger context for theological reflection upon the bioethics of reproductive medicine."); Joseph Fletcher, *Technological Devices in Medical Care*, *in* ON MORAL MEDICINE: THEOLOGICAL PERSPECTIVES IN MEDICAL ETHICS 277, 279 (Stephen E. Lammers & Allen Verhey eds., 1998) ("[M]orally, the heart of the matter [concerning assisted reproductive technologies] is *control*. The question is whether human beings may choose or make the conditions of life, health, and death." (emphasis added)).

104. *See, e.g.*, David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 58 (2003) ("The principle of 'freedom of contract' . . . rests on the belief that respect for personal autonomy is a necessary complement to both the liberal political state and a free-market economy."); Jeanne L. Shroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455, 509 (1996) ("Under traditional liberal analysis, in order to further personal autonomy, contract law should be subjective, in that the parties should be able freely to bind themselves by contract however they want. Autonomy, however, also demands that no one be bound without her consent.").

105. *See, e.g.*, Litowitz v. Litowitz, 48 P.3d 261, 268 (Wash. 2002) ("Contract interpretation must be based on the intent of the parties as reflected in their agreement.").

who want to avoid reproduction.[106] Although this form of contractual interpretation drives the case law, there remains a confusing diversity of approaches to enforcing the written agreements: the contract, if present, is sometimes enforced,[107] sometimes not enforced if public policy suggests otherwise,[108] or, most strangely, sometimes enforced until the point when any given party to the contract reneges consent.[109]

Although the cases described in Part II reached different conclusions regarding preembryo disposition, the individualism characterizing the respective courts' discussions of the IVF agreements derives from a subjective or will theory of contract law, which proposes that contracts are enforceable only if there has been a "meeting of the minds" between the parties.[110] In other words, if individual autonomy reigns, contractual agreements that do not reflect the subjective agreement of the parties are moot.[111] When the subjective theory of contract, or will theory, is the prevailing lens through which the IVF decision is construed, there is no reason for an inquiry into either the ontological or teleological worth of frozen preembryos.[112]

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106. *See* Morley et al., *supra* note 28, at 174:

> The practical effect of [the current case law] approach is that it gives the individual opposed to implantation a virtual veto power, because the zygotes must stay cryopreserved until the couple reaches a resolution; this is exactly what happens when a court refuses to enforce a contract over the objection of a party seeking to avoid reproduction.

107. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) ("Agreements 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."); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (finding that a written agreement providing for the disposition of cryopreserved preembryos in the event of unforeseen circumstances "should be presumed valid and should be enforced").

108. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000) ("[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 . . . . [a]s a matter of public policy . . . .").

109. *See* J.B. v. M.B., 783 A.2d 707, 718–19 (N.J. 2001) (holding that the enforceability of an agreement depends on either party's being able to "change his or her mind about disposition").

110. *See* Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 933 (1987) ("[T]he *subjective* or *will* theory of contract . . . urges that contractual liability be imposed because, and only to the extent that, the individual has voluntarily undertaken such liability.").

111. McCracken, *supra* note 100, at 738.

112. *See id.* at 732 (observing that the will theory of contract would "bar an inquiry into the purposes of the contracting parties or the objective worth of the things to be exchanged").

The autonomy-based perspective on contract theory becomes complicated in the arena of IVF procedures because of the unique bioethical questions that issues of reproduction and family implicate. At the outset, however, it is crucial to emphasize that no single bioethical critique can productively reach the diversity of contemporary bioethical perspectives. This Note therefore focuses on those voices in bioethics that seek a balance between personal autonomy and communitarian values.[113] As a result, perspectives that place a higher premium on personal autonomy[114] are outside the scope of this particular discussion.

The central bioethical[115] issues here concern the extent to which individual autonomy exists within familial relationships.[116] Much contemporary debate over the place of autonomy in family relationships surrounds the use of contractual vocabulary—such as "rights" terminology—in the concept of family.[117] Several recent legal developments reflect a trend toward interpreting the family as a collection of autonomous, independent individuals; these

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113. *See, e.g.*, Bruce Jennings, *Beyond the Harm Principle: From Autonomy to Civic Responsibility*, *in* MORAL VALUES: THE CHALLENGE OF THE TWENTY-FIRST CENTURY 191, 195 (W. Lawson Taitte ed., 1996) (discussing the moral challenges generated by increasingly sophisticated biotechnologies and the clash between these moral challenges and society's traditional protection of personal autonomy).

114. *See, e.g.*, William M. Sage, *Physicians as Advocates*, 35 HOUS. L. REV. 1529, 1538 (1999) (discussing how the extension of the "rights" vocabulary to "matters that previously had been addressed through professional morality . . . was seductive to physicians[,]" who found deferring to personal autonomy or public adjudication simpler than "reorient[ing] one's moral compass"); Adrienne E. Quinn, Comment, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 SEATTLE U. L. REV. 573, 574 (1997) ("Personal autonomy, a principle rooted in Western philosophy, has strongly influenced American law and bioethics.").

115. This Note's emphasis on the bioethical nature of this conversation explains its focus on family relationships in specific as opposed to general contractual relationships. In the main, the ethical questions stem from the potential of the preembryo to become party to a parent-child relationship.

116. Professor Janet L. Dolgin suggests that the contemporary discourse on embryonic stem cell research is the product of a post-Enlightenment reinterpretation of the family. *See* Dolgin, *supra* note 8, at 104 ("[The debate about embryonic stem cells] represents . . . a new debate about personhood that assumes *autonomous individuality* even in *familial settings*." (emphasis added)).

117. *See* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 347–48 (2002):

> By the 1960s and 1970s, the values of the marketplace were being applied to, and were redefining, the domestic arena. Family members (especially adults within families) began to understand themselves as *autonomous individuals*, free to negotiate the terms of their relationships, and as potentially liberated from traditional family roles by the possibility of exercising *choice* at home, as well as at work.

(first emphasis added) (footnote omitted).

developments include state provisions for no-fault divorce[118] and the willingness of courts to recognize and enforce prenuptial agreements that anticipate the possibility of divorce.[119] Likewise, in its family law jurisprudence, the Supreme Court underwent an analytical shift from *Griswold v. Connecticut*,[120] in which Justice Douglas described marriage as a "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred,"[121] to *Eisenstadt v. Baird*,[122] in which Justice Brennan focused on the individual autonomy of each spouse, noting, "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[123] Notably, although legal scholarship suggests a growing protection of adults as autonomous individuals within some family contexts,[124] the role of autonomy becomes much more ambiguous within the parent-child relationship.

When touching upon legal issues involving parent-child relationships, courts are conflicted about how principles of personal autonomy should apply to individual family members.[125] By way of illustration, over the last thirty-five years, the Supreme Court has delivered opinions describing children as autonomous individuals,[126]

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118. *See Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2089 (2003) ("[N]o-fault divorce centers on respect for individual autonomy—the ability of parties to make decisions about marriage and divorce free from overwhelming state control.").

119. *See* Dolgin, *supra* note 8, at 122 n.139 ("A number of the early decisions recognizing prenuptial agreements in contemplation of divorce justified that step by referring to sociological changes in the character of families [including the increasing rate of divorce].").

120. 381 U.S. 479 (1965).

121. *Id.* at 486.

122. 405 U.S. 438 (1972).

123. *Id.* at 453. The Court further noted that the right of privacy includes the right of an individual, whether married or single, to be free to make autonomous reproductive decisions. *Id*.

124. *See* Dolgin, *supra* note 8, at 123 (observing that the notion of the family is premised on "autonomous individuality," or the concept that family members are "free to negotiate the terms of familial relationships and to define their sexual and reproductive lives without reference to the constraints of traditional family life").

125. *See id.* at 124 n.152 ("The still unresolved ideological struggle about family in the United States today focuses not on the relationship between adults within families but on the dimensions and meaning of the parent-child relationship.").

126. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution.").

unequal dependents,[127] or members of an ambiguous interim category.[128] The extent to which the Court confers autonomy within a parent-child relationship is generally dependent on context.[129] The heightened ambiguity concerning personal autonomy within parent-child jurisprudence illustrates why circumscribing individual autonomy may become necessary when unrestrained choice produces unconstructive or even damaging results.[130] Therefore, to best evaluate the role of autonomy in the interpretation of disposition contracts for cryopreserved preembryos, a more contextual understanding of the possible parental relationships is necessary.

B. The Need for a Teleological Approach

As a foundational matter, proposing a teleological approach for contractual interpretation in IVF cases requires discussing the telos of the contractual agreement.[131] Under this approach, the contractual agreement to undergo IVF cannot be understood apart from the parties' ultimate goal of generating some type[132] of parent-child

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127. *See* Parham v. J.R., 442 U.S. 584, 616–17 (1979) (upholding a state law that allowed parents voluntarily to commit children into mental institutions).

128. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 899–900 (1992) (holding that a state may require a minor seeking an abortion to obtain parental consent as long as an adequate judicial bypass procedure is available).

129. Questioning the reach of constitutional jurisprudence that presumes autonomous individuality in protecting individual rights, Professor Dolgin suggests that family law inappropriately applies personal autonomy frameworks to the parent-child relationship. *See* Dolgin, *supra* note 8, at 405 ("[American constitutional jurisprudence and its presumption of autonomous individuality] cannot easily serve groups defined by status [such as children] . . . . For such groups, legal protection almost inevitably becomes synonymous with paternalism.").

130. *See* Merry Jean Chan, Note, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1189 (2003) ("Regulating parental rights is necessary to prevent certain extreme expressive choices with respect to childbearing or childrearing from undercutting the social goal of regenerating society.").

131. *See* Henry Mather, *Searching for the Moral Foundations of Contract Law*, 47 AM. J. JURIS. 71, 72 (2002) ("[I]f some social institution or activity has such an end, it would seem that we should evaluate that institution or activity according to how well it promotes that end.").

132. The complexity of assisted reproductive technologies has generated new constructions of parenthood that eclipse a traditional view of parenthood based purely on genetic relationship. *See, e.g.*, Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 339 (2003) (contrasting genetic parenthood with surrogate parenthood, in which a surrogate mother agrees to implantation with a fertilized egg provided by either an intended mother or an egg donor); Faulkner, *supra* note 1, at 28 ("With IVF, donors may provide both ova and sperm, so there are potentially four people with parental interests: the genetic father (sperm donor), the genetic mother (egg donor), the gestational mother, and the husband of the gestational mother.").

relationship.[133] Indeed, if the contract privileges the concept of individual autonomy rather than the parent-child relationship, it fails to reflect accurately the interdependent relationships implicated when the contract is enforced.[134] Whereas a contractual framework oriented around autonomy may prove insufficient given the collective and relational objectives at stake, a teleological framework permits the desirable predictability of a concrete legal standard while supporting the uniquely *relational* concerns at stake in the IVF process.[135] The teleological approach, rather than privileging ideals of individual autonomy, develops out of natural law theory's emphasis on continuity between morality and the law, focusing on the *purpose* of a given legal structure.[136] An examination of the teleology of IVF requires engaging the reality of the relationships among the affected

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133. *See*, *e.g.*, Roger H. Taylor, *The Fear of Drawing the Line at Cloning*, 9 B.U. J. SCI. & TECH. L. 379, 398 (2003) (distinguishing between the teleology of IVF and that of genetic cloning by noting that "[t]he purpose of IVF embryos is to create a new human being" whereas "the purpose of an embryo cloned for therapeutics is to improve an existing human's life"); Erik W. Johnson, Note, *Frozen Embryos: Determining Disposition Through Contract*, 55 RUTGERS L. REV. 793, 796 (2003) ("In vitro fertilization has provided patients with a marginal success rate, but it is typically the last resort of parents who wish to procreate using their own genetic material."); Satpathi, *supra* note 23, at 56 ("The paradigm that determines legal parenthood on the basis of individual intentions about procreation and parenting, in the context of reproductive technology, should recognize, encourage, and reinforce individual choices to nurture children."); Mario Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 827 (1992) ("The main premise of the contract framework assumes that the biological donors mutually decided to undergo IVF, thereby entering into a contract, either explicitly or implicitly, with each other to create pre-embryos for the purpose of implantation, with the *ultimate goal* of achieving live births." (emphasis added) (footnote omitted)).

134. *See* Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy* Age, 68 IND. L.J. 727, 736 (1993) ("By making the autonomous actor and the 'lone rights-bearer' our model for social thought, we inadvertently disparage and injure those who do not fit the model, 'the very young, the severely ill or disabled, the frail elderly, as well as those who care for them.'" (quoting MARY ANN GLENDON, RIGHTS TALK 47, 74 (1991))).

135. Significantly, although contract law has been viewed as a legal structure that commodifies its subjects by treating them as units of exchange, a teleological approach can prevent such commodification by highlighting the subjects as ends, not purely as means. *See* Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1088 (2003) (arguing that to allow a court to make its own assessment regarding a couple's preembryos may devalue embryos in ways that contractual enforcement does not).

136. *See* Mather, *supra* note 131, at 72:

> Natural law theory is teleological. It evaluates a human artifact, human institution, or human activity by how well it achieves its proper purpose, its end, its *telos* . . . . The end of medicine is health. The end of shipbuilding is a vessel. The end of strategy is victory.

parties, thereby altering the legal terrain surrounding IVF contracts.[137] This Section addresses both the bioethical and theological arguments that support such a teleological theory of contract.

Perhaps unsurprisingly, courts that choose to address bioethical issues in the context of IVF litigation generally focus on the personhood (or lack thereof) of the preembryo.[138] The ontological personhood of the fetus (and now the embryo or preembryo) has been a baseline assumption of many commentators who view casual disposition of embryos as morally objectionable.[139] The conventional perspective on the legal and ethical controversies surrounding assisted reproductive technologies or abortion posits the existence of two camps: people who view the embryo as a person and people who deny the embryo any ontological status.[140] People who argue for the personhood of a cryopreserved preembryo often do so because society traditionally associated personhood with both dignity and the conferring of legal rights.[141]

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137. *See* Robert J. Araujo, *Abortion, Ethics, and the Common Good: Who Are We? What Do We Want? How Do We Get There?*, 76 MARQ. L. REV. 701, 721 (1993) ("Because we as individual humans are also social beings whose existence is grounded in relationships with others, the concept of the *telos* helps us to understand [our ethical goal] by placing it into a communal setting.").

138. *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (choosing to resolve the dispute without discussing whether preembryos are deserving of "special respect" as legal persons); Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (observing that a fundamental issue in the disposition dispute was whether the remaining preembryos should be considered legal "persons").

139. *See* Dolgin, *supra* note 8, at 118:

> [During and after the nineteenth century,] the ontological status of the fetus was one among a wide set of concerns and assertions publicized by abortion opponents. . . . Nineteenth-century abortion opponents constructed the notion of the embryo-as-person, but their agenda was grounded in a vision of traditional family life and gender roles.

140. *See* Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 FLA. ST. U. L. REV. 343, 355 (2003) ("For abortion opponents, assertions about the fetus-as-child have provided the sort of strategic tool that has largely been lacking in other contexts involving legal responses to adults' expanded choices, especially about reproductive matters, within family contexts.").

141. *See* Stephen M. Wise, *Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Society*, 22 VT. L. REV. 793, 795 (1998) ("[O]nly human beings . . . and institutions that represent human interests[] have ever been eligible for legal personhood and therefore legal rights."). For some commentators, the decision to confer legal rights onto "persons" is incontrovertibly linked to the notion that autonomous individuals should have legal rights. *See id.* at 798 ("Like liberty rights, dignity-rights are almost universally claimed to be derived from a capacity for autonomy.").

A more cogent, bioethically informed approach to the disposition of cryopreserved preembryos could avoid the current legal wrangling over personhood.[142] In contemporary society, however, the vocabulary of "personhood" may no longer carry the same resonance.[143] Consequently, bioethicists are now challenging the adequacy of "personhood" as a useful inquiry for resolving the legal complexities generated by assisted reproductive technologies.[144] Contemporary bioethical discourse supports a stronger emphasis on teleology. Many ethicists now suggest that the ethical inquiry underlying issues such as IVF should depend not on ontological questions of personhood but, rather, on whether a given choice damages a *relationship*.[145] From this perspective, resolving the bioethical tensions surrounding cryopreserved embryos requires not ontological postulation, but in-depth examination of the prospective relationship that served as the telos for the initial IVF contract.[146]

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142. *See* Windsor, *supra* note 21, at 1007–13 (describing three different approaches to the legal status of cryopreserved preembryos: the Person Status/Right-to-Life Approach, the Property Status Approach, and the Special Respect Approach).

143. *See* Stanley Hauerwas, *Must a Patient Be a Person to Be a Patient? Or, My Uncle Charlie Is Not Much of a Person but He Is Still My Uncle Charlie*, 39 CONN. MED. 815, 817 (1975):

> [W]e are now in a period when some people no longer think simply because a child is born to them they need to regard it as their child. We will not solve this kind of dilemma by trying to say what the doctor can and cannot do in such circumstances in terms of whether the child can be understood to be a "person" or not.

144. *See id.* at 815–17 (arguing that most moral decisions have less to do with the ontological concept of a "person" than with the *relationships* developed through a given situation); O'Donovan, *supra* note 99, at 127 (suggesting a self-described "existentialist anthropology," by which society does not "confer[]" personhood by treating an object as a person but rather "discover[s]" personhood through an object's relationships with others).

145. *See* Hauerwas, *supra* note 143, at 816 ("[T]he reason that we do not use one man for another or society's good is not that we violate his 'person,' but rather because we have learned that it is destructive of the trust between us to do so."). Professor Roger B. Dworkin rejects the notion that individualism and personal autonomy should be the guiding principles of bioethical discussions. *See* Dworkin, *supra* note 134, at 736:

> The American style of discussing rights is so deviant from that of other western democracies that Professor Mary Ann Glendon refers to it as a "dialect" and suggests that it "is turning American political discourse into a parody of itself." Our focus on the individual and his rights increases conflict and impedes the search for common ground. It ignores responsibility, without which rights become license, and it ignores our interdependence.

(quoting MARY ANN GLENDON, RIGHTS TALK 171 (1991)) (footnotes omitted).

146. Professor Stanley Hauerwas, a Christian ethicist at Duke Divinity School, suggests that the question of whether a fetus is a human person is not the central concern in another visceral contemporary debate, abortion. *See* Hauerwas, *supra* note 143, at 816:

> [T]he issues surrounding whether an abortion should or should not be done seldom turn on the question of the status of the fetus. Rather, they involve why the mother

Reframing the IVF debate in the context of teleology—in terms of relationships—also prevents an inappropriate "reduction" of the preembryo to an object of exchange, or a unit of reproductive success or failure.[147] Noted bioethicist and law professor Michael Shapiro argues that biomedical technologies ought to be evaluated based on the likelihood that they will erode "noncontingent bonds."[148] For Professor Shapiro, these noncontingent bonds are the affections and duties implicit in the typical parent-child relationship.[149]

Both traditional and contemporary theology posit a sharp divide between the teleology of the sacred and the secular spheres.[150] Several theologians writing in the early centuries developed notions of community through the language of teleology. Writing in the early centuries of the Christian tradition, Saint Augustine distinguished the "earthly city" from the "city of God" by describing the earthly city as one in which the telos of self-love reigned and the individual was insulated from the rest of the community, and the city of God as one characterized by the love of God and neighbor.[151] Later, Thomas Aquinas buttressed Augustine's notion of a common good by framing the concept of justice around the "mutuality or reciprocity shared among . . . members of society."[152] Notably, for both Augustine and Aquinas, respect for the community was not philosophically at odds with respect for the individual.[153] Rather, as Professor Robert Araujo notes: "[P]rotection of the human person in all of his or her dignity requires insertion and participation in, not insulation and separation from, the community. The community . . . withers when [its members] turn within and tend only to their private cares."[154]

> does not want the pregnancy to continue, the conditions under which the pregnancy occurred, [and] the social conditions into which the child would be born. The question of whether the fetus is or is not a person is almost a theoretical nicety in relation to the kind of questions that most abortion decisions actually involve.

147. *See* Michael H. Shapiro, *Is Bioethics Broke?: On the Idea of Ethics and Law "Catching Up" with Technology*, 33 IND. L. REV. 17, 119–20 (1999) (describing a form of "reduction" in which a person's value "is ascribed to the single trait or traits in question").

148. *Id.* at 119.

149. *See id.* ("'Bonds' here refers to the sense of duty and feelings of affection we have for our children, whatever their traits, and for each other as persons.").

150. Araujo, *supra* note 137, at 735–36.

151. *Id.* at 736.

152. *Id.*

153. *Id.* at 736–37.

154. *Id.* at 741.

What these theological perspectives suggest, therefore, is that a communitarian framework need not come at the expense of individual choice. Adopting a teleological framework to assess IVF cryopreservation may prevent courts from falling into the common fallacy of viewing autonomy and community as mutually exclusive ideals.[155]

C. Policy Implications

The practical effect of applying a teleological framework for contract law is the enforcement of those contracts that are philosophically consistent with the telos of the foundational IVF contract: developing some type of parent-child relationship, biological or not. Under that framework, because the telos implicates every preembryo, courts would need to reevaluate contract clauses allowing for the destruction of remaining preembryos.

There currently exist several alternatives to preembryo destruction that could be incorporated as contractual options, including preembryo adoption[156] and limitations on the transfer of more preembryos than necessary in a given IVF cycle.[157] Donating embryos for adoption is consistent with the end for which parties initially engage in the IVF process: creating a parent-child relationship.[158] Likewise, limiting the number of preembryos transferred for fertilization during the IVF process is consistent with IVF's teleological aim because parties would not be transferring several more preembryos than they would be willing to parent. Such limits would provide the dual benefits of avoiding the problem of remaining preembryos (not all of which, presumably, the IVF parties

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155. *See* Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1218 (1996) ("[T]his view that the framework of choice excludes other frameworks is simply wrong, when stated as an across-the-board proposition.").

156. *See* Batsedis, *supra* note 15, at 569 ("[F]rozen embryos can now be adopted by others . . . . [I]f the embryos survive the thawing process, and if the implantation is successful, a woman will give birth to a child she adopted as an embryo.").

157. *See* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 624–25 (2003) (observing that some researchers have recommended that IVF clinics only transfer one or two preembryos for fertilization purposes).

158. Significantly, there is no genetic "bias" in preembryo adoption. Rather, the adoptive parents retain full legal rights over their adopted children. *See* Batsedis, *supra* note 15, at 570 (noting that Snowflakes, an embryo adoption agency, requires that parties sign a contract indicating that no legal ties would remain between the biological parents and their embryo).

would want to parent) and reducing the risk of multifetal pregnancy as well.[159] The approach of limiting the number of transferred preembryos is one that can be legislated as well.[160] However, fewer embryos transferred may mean lower fertility rates, which is problematic for clinics.[161] That concern notwithstanding, that other countries (such as the United Kingdom) have successfully legislated such limits on the number of transferred preembryos[162] demonstrates that practicable alternatives exist that comport with a teleological approach.

CONCLUSION

With the development of assisted reproductive technologies such as in vitro fertilization, human inventiveness opened a Pandora's box of bioethical and legal issues. In particular, profound uncertainty exists when a party to IVF subsequently contests the disposition of cryopreserved preembryos. Perhaps because these technologies implicate some of the most intimate human concerns—reproduction, parenting, and marriage—both legislatures and the courts have been reluctant to speak explicitly about any resolution of the present confusion. The few courts to address the issue of remaining preembryos have considered the problem within the typical framework of contract interpretation, focusing almost exclusively upon the ideal of individual autonomy. Despite agreement on a contractual approach to this problem, courts have reached conflicting results. Some state courts have argued that written IVF agreements should always be enforced,[163] other courts have refused to enforce agreements against public policy,[164] and still other courts have

159. Because of the risk of multifetal pregnancies generated by current multiple preembryo implantations, some scholars suggest a restriction on the number of preembryos transferred for fertilization. *See, e.g.*, Carson Strong, *Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities*, 31 J.L. MED. & ETHICS 272, 275 (2003) ("In IVF, the risk of multifetal pregnancy can be reduced by transferring fewer preembryos, but . . . . reducing the number of preembryos lowers the chances that pregnancy will occur.").

160. Noah, *supra* note 157, at 625.

161. *See* Strong, *supra* note 159, at 275 ("Clinic-specific pregnancy rates are required by law to be reported and are published annually. . . . Infertility specialists thus have a personal interest in achieving high pregnancy rates.").

162. *See* Noah, *supra* note 157, at 625 n.94 (noting that several countries prohibit the transfer of more than three embryos, and that the United Kingdom recently lowered its limit to two).

163. *See supra* Part II.B.

164. *See supra* Part II.C.

indicated that agreements are enforceable only if the parties remain in agreement regarding the contract.[165] Ultimately, case law is not a positive source of guidance on the issue of preembryo disposition.

This Note aims to illustrate how an honest consideration of the bioethical issues at stake in the IVF process can illuminate a more productive framework for legal analysis. In particular, the telos of the IVF process—the development of a parent-child relationship—militates against a classical, autonomy-oriented contractual approach. This alternative approach, however, does not necessitate falling into the typical camps in the debate over reproductive technologies: people who view preembryos as persons and people who view preembryos as merely collections of cells. Indeed, as bioethicists now suggest, attempting to define the ontological status of the preembryo may ultimately be a losing cause. Rather than ontology, this Note argues for teleology as the guiding bioethical principle to resolve this legal debate.

165. *See supra* Part II.D.