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PRECOMMITMENT STATEGIES FOR DISPOSITION OF FROZEN EMBRYOS

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ABSTRACT

The question of whether to enforce agreements to implant frozen embryos after divorce has become a major concern for the 300 clinics and thousands of couples who use infertility services every year. Although courts in New York and Tennessee support enforcement, recent decisions by appellate courts in Massachusetts and New Jersey have refused to enforce such agreements on the ground that courts should not force people to reproduce. This article analyzes conflicts over enforcement of agreements for disposition of frozen embryos in terms of the precommitment strategies that persons use to plan their lives. It shows that refusal to enforce contracts for frozen embryos is unfair to the parties who relied on them in undertaking invasive infertility treatments, and possibly unconstitutional. It also addresses the extent to which precommitments for rearing rights and duties in resulting children should be enforced, if agreements to implant embryos are recognized.

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INTRODUCTION

Uncertainties about future decisions often lead people to use precommitment strategies to plan their lives. These include resolutions, pre-emptive actions, "Ulysses" or self-binding contracts, advance directives, living wills, contracts, constitutions, and other devices.[1] Although precommitment strategies are used across the range of human behavior, they have special salience in bioethics, with its emphasis on informed consent and autonomy. This Article argues that precommitment strategies for disposition of frozen embryos and rearing rights and duties in resulting offspring may serve important reproductive and social interests, and should usually be enforced. In reaching that conclusion, this Article draws on the structure of precommitment strategies generally and illustrates the conflicts that arise in using those devices to control future reproduction.

Part I describes assisted reproduction and the problem of embryo disposition. Part II discusses precommitment strategies in general, while Part III discusses their use with frozen embryos. Part IV focuses on *A.Z. v. B.Z.*,[2] the Massachusetts case that recently had challenged the use of precommitment devices for embryos. Part V analyzes the arguments for and against precommitments to show that *A.Z. v. B.Z.* was wrongly decided. Part VI addresses the constitutionality of permitting or prohibiting precommitments for reproduction. Part VII explores related questions of the enforceability and constitutionality of advance agreements to allocate rearing rights and duties in children born from frozen embryos. Part VIII shows the efficiency problems that arise if precommitments are absent or not enforced. Part IX dispels the notion that precommitment enforcement will lead to wider use of contracts in coital and assisted reproduction. The Article concludes in Part X with implications of the discussion for precommitment theory generally.

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[1] JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979) ("ULYSSES AND THE SIRENS"); JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000) ("ULYSSES UNBOUND"); JOHANN WOLFGANG VON GOETHE, FAUST (1832); THOMAS SCHELLING, CHOICE AND CONSEQUENCE (1984); Rebecca Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777, 777-78 (1982); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); Richard A. Posner, *Are We One Self of Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 34 (1997); Fred Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 364-65 (1985).

[2] 725 N.E.2d 1051 (Mass. 2000).

I. IN VITRO FERTILIZATION AND THE PROBLEM OF EMBRYO DISPOSITION

Assisted reproductive technologies (ARTs)[3] are now well-established treatment modalities for infertility. In vitro fertilization (IVF) occupies a central position among those techniques. Since the first birth in the United Kingdom in 1978, IVF has matured into a treatment for a wide range of infertility problems, and has made egg and embryo donation and gestational surrogacy possible. Over 70,000 IVF cycles were performed in the United States in 1998, resulting in more than 14,000 children, for a success rate of thirty percent per egg retrieval.[4] The cost is $10,000 to $12,000 per completed cycle.

A major problem for IVF clinics and patients is disposition of excess or unwanted embryos. Because most IVF cycles involve hormonal stimulation to produce multiple oocytes, a woman might produce ten or more oocytes. Usually all oocytes are fertilized, because there is no guarantee that all will successfully divide and be suitable for placement in the uterus. Of those that are suitable, two or more embryos may be placed in the uterus at the same time, with the excess either discarded, or more likely, frozen for use in later cycles.[5] Many embryos will be stored for long periods of time, with the clinic charging an annual storage fee. If the couple does not use them or donate them to researchers or other infertile couples, they may eventually be removed from storage and discarded.[6]

With over 100,000 embryos in storage in 300 fertility clinics and the number rapidly growing, it is important to have clear rules for disposition of those embryos. Legally, it is well-established that the gamete providers have

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[3] "Assisted reproductive technologies" is the name given to noncoital medical treatments developed since the establishment of IVF in the early 1980s to treat infertility. Usually ARTs occur with the gametes of the infertile couple, as in IVF or intrauterine insemination, though sperm donation in cases of male infertility has been practiced for many years. Egg and embryo donation and surrogacy are other forms of assisted reproduction.

[4] The success rate per cycle started, some of which do not proceed to egg retrieval, is twenty percent. On both these measures, the success rate for women over thirty-eight drops dramatically due to poor egg quality. U.S. DEP'T OF HEALTH AND HUM. SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, *1996 Assisted Reprod. Tech. Success Rates: Nat'l Summary and Fertility Clinic Reports* (1998).

[5] A major medical, ethical, and policy issue is the need to limit the number of embryos placed in the uterus to avoid a multifetal pregnancy and the problems which that presents. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 203-07 (1994).

[6] Couples and IVF clinics are often reluctant to discard embryos or donate embryos for research, even though legally permitted. *See* Gina Kolata, *Researchers Say Embryos in Labs Aren't Available*, N.Y. TIMES, Aug. 26, 2001, at A1.

dispositional control over embryos and are free to create, store, discard, or donate them for research or to infertile couples.[7] Indeed, damages have been awarded for theft, misappropriation, or negligence in the handling of embryos.[8]

The problem posed by embryo storage for clinics and couples is more procedural than substantive. Most clinics are legally free, if they choose, to make any use of embryos the gamete sources specify, including discard, research, or transfer to others. The procedural question is how the couple's dispositional rights are to be exercised. If the gamete sources (usually husband and wife, but gamete donors may also be involved) contemporaneously agree with a particular disposition, there is usually no problem. The authorized disposition then occurs.[9]

Problems arise, however, if the couple is unavailable or is unable to agree about disposition, which happens with some frequency due to dispute, divorce, lack of interest, disappearance, or death. To provide some guidance in how to handle those decisions, clinics commonly present couples with a consent form describing the risks and benefits of the IVF procedure and options for disposition in the case of divorce, dispute, nonpayment, noncontact, and the like.[10] Such forms incorporate two main precommitment strategies—advance directives and contracts. They give clinics guidance about what they can do with embryos when both gamete providers are unavailable or unable to consent.[11] They may also function as contracts between the gamete providers and the clinic or between the providers themselves.[12]

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[7] While some people view the embryo as already a person with rights not to be destroyed, the embryo or fetus is not a person within the meaning of the Fifth and Fourteenth Amendments and thus has no constitutional status in its own right. *See* Roe v. Wade 410 U.S. 113, 156-158 (1973). Aside from a few states that have untested laws prohibiting embryo discard the law allows individuals to discard embryos or donate them for research or to other infertile couples. *See generally* Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 357 (1986); John A. Robertson, *In the Beginning: The Legal Status of the Early Embryo*, 76 VA. L. REV. 437, 437 (1990). Congress, however, has prohibited the use of federal funds to create or destroy embryos in research. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 511(a)(2), 112 Stat. 2681, 2681-86 (1998).

[8] Del Zio v. Columbia Presbyterian Hosp., No. 71-3588 (S.D.N.Y. 1978) (memorandum decision); *see also* Nick Anderson & Esther Schrader, *$10-Million Accord with UC Reported in Fertility Scandal*, L.A. TIMES, July 19, 1997, at A1.

[9] This assumes that the clinic will properly follow the couple's directions and not filch or negligently destroy the embryos, as occurred in a notorious case at the University of California-Irvine. *See* John A. Robertson, *The Case of the Switched Embryos*, HASTINGS CTR. REP., Nov.-Dec. 1995, at 13. California has since passed a statute making unauthorized use of embryos a crime. CAL. PENAL CODE § 367g (West 1999). *See also* CAL. BUS. & PROF. CODE § 2260 (West Supp. 2001).

[10] Such options might include discard, implantation, or donation for research or to other couples. Florida requires joint advance directions by law. *See* FLA. STAT. ch. 742.17 (1999).

[11] Presumably the clinic may, when the designated event occurs, dispose of the embryos as indicated

A 1992 Tennessee case first raised the issue of postdivorce disposition of embryos. The clinic in *Davis v. Davis*[13] had not presented the couple with options to check, leaving the court to determine the disposition of seven frozen embryos remaining from several unsuccessful IVF cycles. In resolving that question, the court noted, "prior agreements concerning disposition should be carried out."[14] Three years later, the New York Court of Appeals in *Kass v. Kass*[15] denied a divorcing wife the right to implant frozen embryos over the husband's objection because the jointly signed consent form had said that, in the case of divorce, embryos were to be used for research.[16]

Advance directives and contracts for future disposition of embryos provide a convenient and reasonable way to resolve questions of embryo disposition when the couple is unavailable or unable to agree. They enable the gamete providers to control those choices by advance commitment, rather than permit other decisionmakers to decide.[17] For couples for whom the ultimate disposition of embryos is important, reliance on advance commitments may be essential if they are to undergo IVF at all. Precommitments also give clinics a clear and efficient way to administer the deposit, storage, and removal of thousands of embryos.[18]

The legal effect previously ascribed to precommitments for frozen embryos recently had been rejected by state supreme courts in Massachusetts and New Jersey. The Massachusetts Court refused to allow a divorced wife to have four frozen embryos implanted in her, despite a consent form that said, were the

without fear of legal liability for wrongful disposition of the embryos.

[12] If those forms are to serve as dispositional agreements binding the parties, they will need to be presented and understood in different ways than they now are. *See infra* notes 135-37.

[13] 842 S.W.2d 588 (Tenn. 1992).

[14] *Id.* at 604. Because there was no agreement to be enforced, technically the court did not hold, based on the facts before it, that it would enforce such agreements.

[15] 696 N.E.2d 174 (N.Y. 1998).

[16] *Id.* at 181.

[17] John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409-18 (1990).

[18] If there is no signed agreement on which to rely, the cost in arriving at a solution may be considerable. Although each embryo takes up relatively little space, reliable cryopreservation units that contain hundreds or thousands of embryos and backup generators are needed, as is considerable paperwork to make sure that annual storage fees are paid and contact with couples maintained. Many couples "forget" or ignore their embryos, leaving clinics in a quandary about when they may be discarded. If litigation is necessary, court *Time A*nd attorney fees will be consumed to resolve the issue. J.O. Oghoetuma et al., *Use of In-vitro Fertilization Embryos Cryopreserved For 5 Years or More*, 355 LANCET 1336, 1336 (2000); Guido Pennings, *What Are the Ownership Rights for Gametes and Embryos? Advance Directives and the Disposition of Cryopreserved Gametes and Embryos*, 15 HUM. REPROD. 979, 983 (2000).

couple to be separated, "the preembryos were to be returned to the wife for implantation."[19] The court had doubts that this language reflected the true intention of the parties. But even if it had, the court refused on grounds of public policy to "enforce an agreement that would compel one donor to become a parent against his or her will."[20] New Jersey courts reached a similar conclusion when the husband claimed that his wife had agreed that, in the case of divorce, the couple's frozen embryos would be donated to an infertile couple. Lower courts found that no such contract had been made, but if it had, "a contract to procreate is contrary to New Jersey public policy and is unenforceable."[21] The New Jersey Supreme Court affirmed this decision,[22] but left some room for a different outcome if the party who contracted for postdivorce implantation had since become infertile.[23]

Other commentators also criticize precommitments for disposition of frozen embryos.[24] They argue that couples trying to get pregnant cannot focus intelligently or meaningfully on future contingencies antithetical to their present purposes.[25] Once the circumstances of concern arise, one partner might see the situation very differently and regret their prior commitment.[26] In addition, those directives are usually contained in consent forms drafted for the convenience of clinics, and may not give clear notice of their legally binding nature to the couples signing them. Also, the preferences expressed may not have been material to the decision to undergo IVF or freeze embryos, e.g.,

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19 A.Z. v. B.Z., 725 N.E.2d 1051, 1054 (Mass. 2000).

20 *Id*. at 1057.

21 J.B. v. M.B., 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000).

22 J.B. v. M.B., No. A-1544-98T3, 2001 WL 909294 (N.J. Sup. Ct. 2001).

23 *Id*. at *11. *See also* Litowitz v. Litowitz, 10 P.3d 1086 (Wash. Ct. App. 2000) (finding that no agreement existed for infertile wife to control postdivorce disposition of embryos created with donor egg and husband sperm; husband's right to avoid reproduction gave him the right to donate embryos created with donor egg to other couples without former wife's consent).

24 NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 317-18 (1999); George J. Annas, *Ulysses and the Fate of Frozen Embryos—Reproduction, Research, or Destruction?*, 343 NEW ENG. J. MED. 373, 375 (2000); Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 56-57 (1999); Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consensus*, 32 ARIZ. ST. L.J. 897, 939-40 (2000) (arguing that infertile couples cannot give meaningful consent because of the pressures of infertility). For a contrary view more consistent with the approach of this article, see Judith F. Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J.L. MED. & ETHICS 197 (2001).

25 There is social and cognitive science literature on this point. *See* Eldar Shafir & Amos Tversky, *Thinking through Uncertainty: Nonconsequentialist Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449, 449-52 (1992).

26 If they both see it differently, they can rescind precommitments that bind only them.

nonenforcement might not deter couples from undergoing IVF or freezing excess embryos.

The anti-contractualist position has the potential to undercut most precommitment strategies for the disposition of frozen embryos. Although adamant that agreements should not be enforced that allow the embryos to be implanted at a future time, the opponents of contract have seldom addressed the implications of their position for the many other situations for which embryo precommitments may be applicable, including, for example, agreements that embryos may be discarded or used in research if no contact has occurred for a specified period or the couple has failed to pay storage fees.[27] Nor have they addressed the implications of their position for agreements between the couple and fertility clinic concerning other aspects of receiving services.[28]

This Article addresses the role of precommitments for frozen embryos in IVF treatment for infertility. Recalling Sir Henry Maine's insight that the movement of the law over the last several centuries has been from status to contract, I argue that written directives and agreements for future disposition of embryos should be enforced when they have been *knowingly and intelligently made*, and the parties *have relied* on them in undergoing IVF.[29] If so, agreements that specify rearing rights and duties in offspring born from frozen embryos might also be respected. Enforcing precommitments for disposition of embryos and rearing rights in resulting offspring should withstand constitutional attack, though it is less clear that enforcement is constitutionally required. However resolved, study of these questions illuminates the problems and dilemmas that arise more generally with precommitment strategies for controlling the future, and how the acceptability of their use is highly dependent on the decisional context in which they are used.

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[27] It is unclear whether anticontractualists also object to enforcement of prior agreements that call for discard of embryos or donation to researchers, since in either case no unwanted reproduction would occur. *See infra* note 134. At least one, George Annas, would object to contracts to donate for research as well. *See* Annas, *supra* note 24, at 375.

[28] The New Jersey Supreme Court in *J.B. v. M.B.*, to its credit, did state that other aspects of contract between the parties may be enforceable. 2001 WL 909294, at *11.

[29] *See* SIR HENRY MAINE, ANCIENT LAW 163-65 (Beacon Press 1963).

II. PRECOMMITMENT STRATEGIES GENERALLY

The advance directives and contracts used in IVF clinics for disposition of frozen embryos are examples of precommitment strategies, or efforts by individuals at *Time A* to exercise control over what will happen in the future at *Time B*. Such strategies are used because of a fear or inability to make a particular decision at *Time B*, or because the precommitment is necessary to get others to provide the resources or assistance that one needs to accomplish a joint activity.[30] Although Rousseau asserted (in a somewhat different context), "it is absurd for the will to put itself in chains for the future,"[31] many people would disagree, for they do exactly that because of the additional freedom that it gives them.

But, as Rousseau recognized, there is a price to be paid for that freedom. In gaining the freedom at *Time A* to control what will happen at *Time B*, one loses the freedom at *Time B* to avoid costlessly the prior commitment. The gamble at *Time A* is that the precommited outcome will best serve the person's interests at *Time B*, even if at *Time B* she views the matter differently. Precommitments, however, are not only methods of self-control or self-paternalism (the present self protecting the future self from itself). They are also devices that enable persons to join with others to marshal resources and commitments for their mutual benefit, as occurs with contracts and constitutions. They also reflect a person's estimate of the value at *Time A* of control over decisions at *Time B*, independently of whether the *Time B* decision is in the person's interests once *Time B* arrives.

Although precommitment strategies take many forms, much recent discussion of them has framed the problems they raise as time-varying preferences in a single individual—of the multiple selves with different preferences over time that constitute an individual's identity.[32] Thomas Schelling and Richard Posner have richly explored this theme, showing the many variations in devices and techniques used to give the self in control at

[30] As Elster puts it, "[T]hey may want to protect themselves against passion, preference change, and . . . time-inconsistency. They do so by removing certain options from the feasible set, by making them more costly or available only with a delay, and by insulating themselves from knowledge about their existence." ELSTER, ULYSSES UNBOUND, *supra* note 1, at 1.

[31] E. ALLAN FARNSWORTH, CHANGING YOUR MIND 1 (1998) (quoting JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL, *reprinted in* OEUVRES COMPLÈTES, at 368-69 (Bernard Gagrebin ed., 1964) (1792)).

[32] They also have been described as examples of time-inconsistent discount rates. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumptions from Law and Economics*, 88 CAL. L. REV. 1051, 1119 (2000).

Time A the power to control the self at *Time B*.[33] Schelling has analogized the problem of self-management over time to managing others,[34] and both Schelling and Posner have confronted issues of the extent to which law and policy have favored or should favor the preferences of the earlier or the later self.[35]

Both note the similarity of precommitment issues conceived as a problem of multiple selves to issues of collective action. With precommitments, however, the transaction costs of reaching a mutually acceptable arrangement among all the selves are insurmountable because the later self is never present to negotiate with the earlier self over whether the preferences of the *Time A* or *Time B* self shall control. As a result, there is a strong first chooser effect, subject only to the *Time B* self's claim that it is being treated unfairly because it had no say in the *Time A* commitment. The problem for law and policy is to determine when *Time A*'s commitments should control *Time B*'s preferences, even though the later self was not represented in the earlier deliberations and now objects.

Although there is no general theory for resolving the time preference problems that arise in precommitment situations, several factors are relevant.[36] Each type of use of precommitment strategy must be assessed separately, for their uses differ greatly in their operation and the burdens and benefits that result. Factors relevant to whether public policy should recognize precommitments are the revocability of the precommitted choice at *Time B*; the degree of restraint imposed; the benefits and burdens of the precommitment; the circumstances in which it was made; and whether other persons have relied on the precommitment to change their position.

A. Revocability

One important dimension in assessing whether law and policy should permit *Time A* control of *Time B* preferences is whether the *Time A* precommitment can be altered or revoked at or prior to *Time B*. If it can, attention can then focus on whether the precommitter should be able to do so at *Time B*. If the precommitment cannot be revoked, more attention will have to

[33] SCHELLING, *supra* note 1, at 57-112; Posner, *supra* note 1, at 34; Thomas C. Schelling, *Self-Command in Practice, in Policy and in a Theory of Rational Choice*, 74 AM. ECON. PAPERS & PROC. 1 (1984).

[34] Thomas C. Schelling, *The Intimate Quest for Self-Control*, *in* CHOICE AND CONSEQUENCE 69 (1984).

[35] SCHELLING, *supra* note 1, at 108; Posner, *supra* note 1, at 34.

[36] ELSTER, ULYSSES UNBOUND, *supra* note 1, at 1, is perhaps the most general work in precommit-ment theory.

be paid to the *Time A* maker's information and knowledge of *Time B* effects, because the *Time A* commitment will also determine what happens at *Time B*.

An easily revocable form of precommitment is a resolution at *Time A* to do X at *Time B*. Resolutions present few policy issues, because they present no barrier to not doing X at *Time B*, except for the person's shame at not being able to carry out an announced resolution.[37] Most precommitment devices, however, make it appreciably more difficult to act on a different preference at *Time B*. With certain preemptive actions, the precommitment is totally irreversible at *Time B*, e.g., the remorseful compulsive thief who has her hands cut off to prevent future theft and now wishes her hands back; the sex offender who agrees to castration to avoid future sex crimes;[38] or the scientist who commits to winter in Antarctica to avoid seeing a former lover and thus is unable to leave for six months when an unforeseen medical emergency develops.[39]

In other situations, it may be possible but very difficult to act on a different preference at *Time B*. The alcoholic who in a fit of sobriety throws out all his liquor and then regrets his precommitment may restock only at substantial inconvenience or cost. Persons who, for the purpose of constraining future spending, invest in certificates of deposit, "Christmas Clubs," or back-loaded mutual funds may not be able to regain control of their savings during that period at all or only at the price of a high penalty.[40] The woman who has chosen the implantable contraceptive Norplant may, if she changes her mind, have to undergo surgery and wait several months for fertility to be restored.[41]

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[37] Although resolutions are the weakest form of precommitment, the reputational costs associated with changing a publicly announced position might prevent some people from not doing what they publicly said they would. For example, politicians who take a pledge to serve only two terms may incur significant political costs if they then seek a third term. Philip Shenon, *Wellstone Campaigns in Race He Pledged Not to Run*, N.Y. TIMES, Sept. 3, 2001, at A12.

[38] Chemical castration, however, may be reversed after a period, and thus is more likely to be permitted in such situations. Similarly, sterilization is a precommitment to avoiding reproduction, though some forms may be reversed surgically or fertility restored through IVF.

[39] *See* Denise Grady, *Trapped at the South Pole, Doctor Becomes a Patient*, N.Y. TIMES, July 13, 1999, at A1. In that case, the scientist wanted to leave because she had discovered a tumor in her breast and needed treatment, but was prevented by her preemptive action in coming to the South Pole. JERRI NIELSON, ICEBOUND: A DOCTOR'S INCREDIBLE BATTLE FOR SURVIVAL AT THE SOUTH POLE 1 (2001). The same result could also arise as a by-product of a decision to work at the South Pole for reasons unrelated to constraining her future options as such. (I am grateful to Owen Jones for pointing out this distinction.)

[40] Christmas Clubs enabled countless families unsure of the strength of their savings preference when money was in hand to save for "Christmas." *See* SCHELLING, *supra* note 1, at 57-112.

[41] ROBERTSON, *supra* note 5, at 69-70. In some cases, the effect on *Time B* choice might also be a by-product of contraceptive preference rather than an attempt to constrain *Time B* freedom as such.

In these situations, the legal or policy question will be whether the initial commitment should be permitted (and enforced) in the first place because of the difficulty of reversing the decision at *Time B*, and the likelihood that the *Time B* preferences might independently deserve respect. Irreversible preemptive actions, such as cutting off one's hands or genitals to prevent future crimes, are so invasive and likely to lead to substantial regret at *Time B* that they may not be permitted (a higher paternalism trumping the self-paternalism the person sought in amputation). With proper protections for informed consent, however, physical forms of precommitment, such as transsexual operations, sterilization, long-term contraception, and chemical castration are acceptable to the extent that they are reversible or are seen as serving important personal or social interests.[42] In addition, numerous social policies, from low-tar regulations for cigarettes to rules for adding folic acid to breakfast cereals to prevent birth defects in offspring of pregnant women, may be thought of as collectively imposed precommitments, giving priority to an abstract self's preference for health over the actions that an individual at *Time B* would have to take to opt for the less healthy course.

One area where there is social reluctance to allow a person to bind him or herself in the future is in human subjects research, where a long-recognized principle states that a subject is always free to withdraw from research.[43] Thus, a research subject cannot be penalized for withdrawing from a study, even if she had promised that she would not and the researchers relying on her promise will incur non-trivial costs as a result. A related question is whether a person may agree to have DNA samples and medical records used in future research without recontacting the patient to obtain consent for the particular study being proposed.[44] On the other hand, there is much support for patients

[42] Ulysses' own form of self-paternalism—being strapped to the mast and unable to free himself when he heard the Sirens' alluring song—would be acceptable because the limitation on *Time B* freedom is temporary and serves his best interests by allowing him to hear the Sirens' sweet song without losing his life in trying to reach them. Indeed, some physicians are even acceding to patient requests for amputation unconnected to harmful actions toward others. *See* Carl Elliott, *A New Way to Be Mad*, ATLANTIC MONTHLY, Dec. 2000, at 73 (describing apotemnophilia, the compulsion to amputate one's own healthy limbs).

[43] 45 C.F.R. § 46.116(a)(8) (2000). In some studies, however, the costs to researchers and other subjects may be so great, and the risks and burdens to the subject of staying in the research so slight, that enforcement of a precommitment to stay the course of the study may be justified.

[44] *See* Robert F. Weir, *The Ongoing Debate about Stored Tissue Samples, Research, and Informed Consent*, *in* 2 RES. INVOLVING HUM. BIOLOGIC MATERIALS: ETHICAL ISSUES & POL'Y GUIDANCE F-1, F-6 (Nat'l Bioethics Advisory Comm'n ed., 2000). Since the patient is agreeing in advance to research without knowing what its risks and benefits are, some NBAC members thought that informed consent was not satisfied and oppose such a policy. They would require that the subject be recontacted for specific consent to future studies. *Id.* at F-7.

agreeing in advance to be used as subjects in dementia research, even though they are demented and incompetent to consent or object at the time the research is performed.[45]

B. Advance Directives for Future Incompetency as Precommitments

In some precommitment situations, a change of heart is not possible at *Time B* because the precommitter is unavailable, unaware that *Time B* has arrived, or unable due to incompetency to communicate a change in preference. This form of precommitment now plays a major role in end-of-life care for terminally ill persons who have made "living wills" against further medical treatment when they become incompetent and are unable to communicate a different choice.[46] It may also play a role in authorizing research on demented patients who are no longer able to give competent consent.[47]

Advance directives that take effect when a person is incompetent or unavailable to speak present a different form of precommitment conflict, because the self at *Time B* is not asking that the directive be overridden, as can occur in most precommitment situations, even though his interests might be better served by ignoring the precommitment. To take an extreme case, testamentary dispositions that take effect at death are not a precommitment strategy that could pose a conflict with *Time B* preferences or interests because no self exists at *Time B* with conflicting preferences.[48] Situations involving living wills or advance directives for dementia research differ from testamentary wills because the maker still has interests at *Time B*. Although the maker cannot then competently voice a different preference, a proxy or agent appointed to protect the person's *Time B* interests could do so. Here the policy issue is to what extent directives made by a person when competent

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[45] Rebecca Dresser, *Advance Directives in Dementia Research: Promoting Autonomy and Protecting Subjects*, 23 IRB: ETHICS & HUM. SUBJECTS RES. 1, 1 (2001). But note that this form of precommitment is an advance directive, and not a precommitment that is applicable at a future time when the maker is competent. *See infra* notes 46-49.

[46] *See* Texas Natural Death Act, TEX. HEALTH & SAFETY CODE ANN. §§ 166.044-51 (Vernon 1999); Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115-117, 1388-204-206 (1990) (codified in scattered sections of 42 U.S.C.). It is still a major problem to get doctors, nurses, and health care facilities to observe their patients' living wills. *See* Denise Grady, *At Life's End, Many Patients Are Denied Peaceful Passing*, N.Y. TIMES, May 29, 2000, at A1.

[47] *See* Dresser, *supra* note 45.

[48] The deceased may in fact have changed his mind about whom he wished to inherit his estate, but if he had not altered his will, he did not give legal effect to that change.

(*Time A*) control when the person is incompetent or unavailable (*Time B*) but may still have *Time B* interests deserving protection.[49]

C. Reliance by Others

A key dimension in determining the legal acceptability of precommitments is whether another person has relied to her detriment on the maker's *Time A* precommitment for *Time B* action. If so, allowing the maker's *Time B* preference now to control over the preference precommitted to at *Time A* would harm or treat unfairly those who relied on the *Time A* commitment. Some persons would argue, however, that certain *Time A* precommitments should never be enforceable against the maker's wishes at *Time B*, even if there has been detrimental reliance by others, e.g., agreements to implant frozen embryos after divorce.

Reliance on precommitments may fall into two main categories: (1) reliance is necessary to effectuate the maker's *Time A* precommitment goals; and (2) contracts or joint precommitments at *Time A* concerning what will happen at *Time B*.

1. Reliance is Necessary to Effectuate the Precommitted Action

An example of the first category is Schelling's evocative example of Captain Ahab submitting to amputation of his injured leg on the condition that the surgeon ignore his withdrawal of consent once the pain became excruciating.[50] The surgeon must follow this precommitment to help Ahab's *Time A* goal, even if Ahab's *Time B* self objects. Relying on the *Time A* commitment, the surgeon may ethically and legally ignore Ahab's fervent *Time B* pleas to stop cutting and complete the operation.[51] Indeed, if the surgeon had not completed the amputation as agreed, he would have acted unethically in not protecting the interests of his patient. Theoretically, he

[49] For an analysis of conflicts in living wills between competent preferences and incompetent interests, see John A. Robertson, *Second Thoughts on Living Wills*, HASTINGS CTR. REP., Nov.-Dec. 1991, at 6-9.

[50] Schelling, *Self-Command*, *supra* note 33, at 9-10. Schelling also mentions the pregnant woman who wants a natural childbirth and thus authorizes her obstetrician not to administer analgesics no matter how much she screams for them, and the depressed person who requests help with suicide. *Id*. at 1-2. Note that Ulysses' situation did not present this problem, because his crew, their ears stopped with wax, could not hear his pleas to free him, and no system of non-verbal signals had been agreed upon. *See infra* note 69.

[51] He would also be acting lawfully in following Ahab's *Time A* instructions. His reliance on Ahab's *Time A* commitment would provide a defense to a theoretical battery action for operating at *Time B* without consent. Ahab, in effect, would be estopped from claiming a battery because of his prior consent.

would owe Ahab damages for breach of his agreement to complete the amputation despite Ahab's *Time B* protests.

Similar examples of reliance on a person's *Time A* commitments despite different directions at *Time B* arise in a more contemporary setting. One drug rehabilitation program for addicted physicians requires participants to write a letter to the state medical examining board disclosing their past drug abuse, which the participants agree the program can mail if they miss three consecutive therapy sessions, even if they later object to the mailing.[52] The program should not incur damages for breach of confidentiality for mailing the letter when three misses occur, despite the physician's *Time B* withdrawal of permission to disclose the information. Indeed, if the program acceded to *Time B* wishes, the relapsing physician might have a claim for damages against the program for failing to fulfill its agreement to treat in this way.

Another example is the prior commitment of a person with bipolar disease to be committed civilly against his will when he enters a manic phase where he is likely to wreak havoc on himself and his finances.[53] Enforcing his precommitment to be committed civilly, even though at *Time B* he is legally competent and objects, would provide a defense to his suit against the hospital for false imprisonment. Indeed, the patient would have a good claim against the hospital if they honored his *Time B* preferences and did not commit him, because it had not performed its promise to commit the patient over his *Time B* objections, thus impairing his interests. In all three examples, the maker is estopped from suing the person who relied on the precommitment in providing services at *Time B*. Without such reliance, the laudable personal goals sought through such precommitments would be frustrated.

2. Contract and Constitutions as Joint Precommitments

Another kind of reliance on *Time A* precommitments arises in ordinary contracts, where two persons bind themselves at *Time A* to perform (or allow to be performed) certain actions at *Time B* in exchange for the other's promise to do as agreed. Contracts thus operate as joint or mutually binding precommitments. Mutual reliance enables persons to combine resources and energies to achieve welfare-enhancing goals that could not be achieved without enforcement of the mutual promises. Unless the promisee releases the

[52] Thomas C. Schelling, *Self-Command: A New Discipline*, *in* CHOICE OVER TIME 167 (George Loewenstein & Jon Elster eds., 1992).

[53] *See* Dresser, *supra* note 1, at 779-80.

promisor from her contractual obligation, the precommitter cannot change what will occur at *Time B* even though she regrets her prior choice.

With contractual forms of precommitment, the conflict among different selves is almost always resolved in favor of the prior self because of the reliance interest of the other party, and because of the social welfare and efficiency gains for both parties and society from enforcing contractual precommitments.[54] In some instances, however, contracts are deemed to be against public policy, and may not be enforced at *Time B*, thus allowing one party's *Time B* preferences to control over the *Time A* commitment on which the other party relied.

Such limitations on contractual precommitments have typically arisen when the contract involves an illegal activity; an agreement to enter into intimate relations, such as a contract to marry; or some particular public policy goal. The principles of research ethics, for example, which preserve a subject's right to withdraw from research, might bar a researcher's suit for damages against a subject who caused a researcher substantial costs in withdrawing from research when he had promised not to.[55] Legal rules concerning representation in class action law suits prohibit agreements among plaintiffs to accept majority rule of the class and nondisclosure among the parties in accepting a joint settlement of their claims.[56] Limits on contractual precommitments, however, are generally rare, though they are often recognized in matters affecting family life, reproduction, and the body. Yet, even family law increasingly has recognized the role of precommitment. Many states now permit couples to settle postdivorce property arrangements by prenuptial contracts.[57] A few states also allow couples to choose "covenant" over ordinary marriage to create more obstacles to divorce later on.[58]

Constitutions have elements of mutual reliance, but to the political community generally, rather than to specific promisees. The mutually self-

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[54] *See* Posner, *supra* note 1, at 34.

[55] *See supra* note 43.

[56] Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767-68 (1997) (discussing how Rule 1.8(g) of the Model Rules of Professional Conduct prevent aggregate settlements not meeting certain conditions, even if parties in advance have agreed to be bound by a different set of conditions).

[57] *See, e.g.*, UNIFORM PREMARITAL AGREEMENT ACT § 3 (1983); TEX. FAM. CODE ANN. §§ 4.001-4.010 (Vernon 1998).

[58] ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000); ARK. CODE ANN. §§ 9-11-801 to -811 (Michie Supp. 2001); LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000); Diane Schemo, *In Covenant Marriage, Forging Ties that Bind*, N.Y. TIMES, Nov. 10, 2001, at A8.

binding nature of constitutions is most evident when they are first written. If truly attempting to reflect the preferences of "Peter when sober" in order to control "Peter when drunk," the constitution-makers would be binding themselves.[59] However, they bind future generations who had no say in the original act of self-binding.[60] As a result, the advantages and disadvantages of precommitment strategies may inform or illuminate some aspects of constitutions and constitution-making, but constitutions in themselves tell us little about how different kinds of precommitments should be regarded.[61]

III. PRECOMMITMENT STRATEGIES FOR DISPOSITION OF FROZEN EMBRYOS

With this brief background on the use of precommitment strategies, I now discuss two precommitment devices that figure heavily in bioethics and in assisted reproduction: advance directives and contracts for future disposition of embryos. Advance directives state what may be done with embryos at *Time B* if the maker is not available to decide. Because they are purely self-binding, the maker is free to revoke an advance directive at any time prior to the occurrence of the operative contingency at *Time B*.[62] Contracts, on the other hand, involve the exchange of promises and reliance by clinic or partner about actions or performance at *Time B*. They are revocable only if both parties agree at or prior to B to rescind the contract. Both forms of precommitment commit to an outcome at *Time B* that might conflict with the person's interests or preferences at *Time B*, but operate in different ways and impose different costs.

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[59] Holmes, *supra* note 1, at 195 (arguing that constitutions are an instance of "Peter sober controlling Peter drunk"). A legislative majority deprived of giving effect to its preferences on race or abortion by constitutional barriers might wish that those restraints had not been included, but is willing to abide by the overall constitutional arrangement, including the supermajority barriers to constitutional amendment. For the downside of constitutions, see Jon Elster, *Intertemporal Choice and Political Thought*, *in* CHOICE OVER TIME 35-45 (George Loewenstein & Jon Elster eds., 1992). Elster is also skeptical that constitution-makers are always "sober," noting that constitutions are often written in times of social crisis and upheaval, citing the making of the French constitution of 1791 at the height of the French Revolution as an example. *See* ELSTER, ULYSSES UNBOUND, *supra* note 1, at 159.

[60] It is unrealistic to view the nation as a larger political "self" of which later generations are a part, so that constitution-makers are viewed as making *Time A* commitments for their *Time B* selves.

[61] *See* ELSTER, ULYSSES UNBOUND, *supra* note 1, at 88-167.

[62] Although not a contract as such, a person relying on a legally effective prior directive should have a defense to a suit brought against her for following the directive. Of course, advance directives could also be framed as contracts with health providers, e.g., "as a condition of receiving services, the maker agrees to waive all claims against the provider for actions taken in reliance on the prior directive." If so, the maker loses the right unilaterally to change the commitment, a right she has with a noncontractual precommitment.

An advance directive for frozen embryos exists in a signed consent form, usually provided by the clinic, that says that if the person is dead, incompetent, or unavailable to render a decision, embryos may be discarded or donated. Since the directive is self-binding only, the maker is free to rescind the directive prior to *Time B* or even after, if he or she later is available to do so.[63] A reasonable legal posture would be to permit clinics and other actors to rely on the prior relinquishment of a need for present consent at *Time B*. Following the directive at *Time B* will not override the makers' liberty at that point because they will not be present or competent to express a different preference, even if they might have done so if present.[64] If the person later surfaced and sued the clinic because it had followed the advance directive and discarded embryos because the person had not paid storage fees, or had no contact with the clinic for five years, no damages should be awarded for relying on that precommitment.[65]

A second form of precommitment for frozen embryos is a contract or agreement between the couple and the clinic, or between the couple themselves, concerning future disposition of resulting embryos. Many IVF treatments include, for example, agreements between the couple and the clinic about what the clinic may do regarding the creation, storage, and disposition of embryos. The stated dispositions may take effect if specified events occur, such as death, disappearance of the couple, failure to pay storage fees, the clinic's cessation of services, or some other stated contingency, whether or not the parties are there to object.[66]

The gamete providers might also agree in advance about how their joint right of control over disposition of embryos at some future time will be exercised. As a condition of undergoing IVF at all (the woman undergoing

[63] An advance directive for embryos that is binding at a time when the couple is not available to ratify or disagree with the choice is similar to a living will in some respects, but differs in that the person, if aware of the need for decision at *Time B*, would ordinarily be competent to express a choice.

[64] Advance directives generally may be thought of as advance waiver or relinquishment by renunciation of a right at *Time B*. One renounces one's right to control disposition of embryos at a future time in order to guide the program and provide the maker with certainty. *See* FARNSWORTH, *supra* note 31, at 127-62.

[65] Of course, if the directive had been framed as a contract, e.g., "as a condition of receiving services, the maker agrees to waive all claims against the provider for destruction or donation of embryos based on the makers' prior consent to such a disposition," that provision would provide a defense to a claim of wrongful destruction of embryos. The considerations of estoppel operative in both cases reflect recognition of the legally binding effect of some precommitments.

[66] The courts are likely to give legal effect to such arrangements, though no cases have yet been reported. For a discussion of whether clinics should be free to set any condition they choose, see Robertson, *supra* note 7, at 471-73.

ovarian stimulation and egg retrieval and the man providing sperm), the couple might agree about what disposition they want if they are available at *Time B* and cannot agree on a different disposition, as might occur if they have divorced.[67] If this form of precommitment is permitted, the party wishing to follow the disposition agreed upon at *Time A* would have the legal right to have the specified disposition at *Time B* occur, despite the current objection of the other party.

Note that both IVF precommitment strategies differ in certain key respects from such precommitment devices as "Ulysses" or self-binding contracts.[68] The advance directive form of precommitment for frozen embryos is self-binding only, but differs from a Ulysses contract in that the maker is not available or able to voice a different preference at *Time B*, as Ulysses did once he heard the Sirens' song. Moreover, advance directives are revocable until incompetency at *Time B* arrives, whereas many forms of self-binding contracts take effect immediately, e.g., surgical preemption of future crimes or investment in certificates of deposit.[69]

The contractual form of precommitment for frozen embryos, on the other hand, differs from self-binding and other precommitments that do not involve reliance by others. Contractual precommitments for embryos involve an exchange of promises with another about what will occur at *Time B* in order to undertake a mutually beneficial activity at *Time A*. Unlike precommitments at *Time A* that bind only the maker, contractual precommitments are revocable at *Time B* only if the other party agrees.

Both forms of precommitment for disposition of frozen embryos are a reasonable, efficient way of ordering reproductive preferences when couples contemplating IVF treatment for infertility have strong preferences about the future disposition of embryos. In those cases, advance directives and contracts between themselves enhance freedom because precommitment gives clinics and couples the assurances that individuals need if they are to undertake IVF. In the absence of precommitment, couples may not be willing to undergo the procedure because of their inability to exercise control over *Time B* events, such as whether remaining embryos will be implanted or discarded. Although

[67] Such agreements might also allocate rearing rights and duties in resulting offspring. For a discussion of this issue, see *infra* pp. 1032-34.

[68] In arguing against the enforcement of embryo precommitments, George Annas thus inaccurately compares them to Ulysses' contracts. *See* Annas, *supra* note 24, at 373.

[69] Similarly, Ulysses could not change his mind once he had himself bound to the mast and his sailors' ears stopped with wax. HOMER, THE ODYSSEY 276-77 (R. Fagles trans., Penguin Books 1996).

aware that one of them may change his or her mind once *Time B* arrives and still be bound, they bet that they will be happier with their precommitment and what it enables them to do at *Time A*, despite the lack of unilateral freedom at *Time B*.[70]

If precommitments are to play a salient role in disposition of frozen embryos or other reproductive situations, it is essential that they be made knowingly, intelligently, and voluntarily, with full awareness of the binding legal significance such precommitments might have. Although that standard has not always been met in the past, it should be a prerequisite for future reliance on precommitments for disposition of frozen embryos.[71] Courts and commentators who would block precommitments for frozen embryos, however, do not focus only on defects in *Time A* knowledge or understanding about *Time B* consequences. Instead, they argue that, as a matter of principle, freedom over embryos at *Time B* is more important than that freedom at *Time A*. Because the focus of their objections has been to precommitment contracts for reproduction more than to advance directives, I analyze the arguments for and against frozen embryo precommitment strategies by focusing on *A.Z. v. B.Z.*,[72] the first case denying the validity of advance contracts for postdivorce implantation of frozen embryos.[73]

IV. FROZEN EMBRYO PRECOMMITMENTS RECONSIDERED: THE CASE OF *A.Z. V. B.Z.*

The case of *A.Z. v. B.Z.* arose out of the efforts of a Massachusetts couple to have children through IVF after a second ectopic pregnancy had led to removal of the wife's fallopian tubes.[74] Between 1988 and 1991, the couple went through seven IVF cycles at a Boston clinic.[75] The last IVF cycle in 1991 led to the birth of twin daughters in 1992 and two vials of frozen embryos for

[70] If both change their minds, they are free to rescind the contract between them and no longer be bound by *Time A* preferences.

[71] *See* discussion *infra* notes 136-38.

[72] 725 N.E.2d 1051 (Mass. 2000).

[73] The case against advance directives would rest on the importance of actual contemporaneous consent, as opposed to merely the lack of actual objection to the disposition in question. While some opponents might argue that actual consent should always be required if implantation or even donation to research was at issue, they might accept embryo discard by advance directive if certain contingencies occurred, such as the couple has had no contact with the clinic for five years or has not paid storage charges for a designated period. *See* Annas, *supra* note 24, at 375-76.

[74] 725 N.E.2d at 1052-54.

[75] *Id.*

later use.[76] In the spring of 1995, the wife had one of the cryopreserved vials thawed and an embryo unsuccessfully placed in her uterus, apparently without her husband's consent.[77] Later that same year, the wife sought a protective order against the husband.[78] They separated and the husband filed for divorce.[79] The probate court judge hearing the divorce issued a permanent injunction against the wife implanting the frozen embryos.[80]

The probate court did not question that the couples had agreed that "should we become separated, . . . the embryos were to be returned to the wife for implantation," nor rule that there were substantive limits to what couples may agree to concerning disposition of their embryos.[81] Rather, it found that the circumstances had changed so radically—twins had been born, the wife had sought a protective order, and they were now divorcing—that it would be unfair to enforce in 1995 an agreement made in 1991 which "did not contemplate the actual situation facing the parties."[82] Given the changed circumstances, the court found that no agreement was in effect.[83] It then balanced the wife's interest in *procreating* against the husband's interest in *avoiding procreation.*[84] Because the wife already had twin daughters, it found that the husband's interest in avoiding procreation outweighed the interest of the wife in having additional children, and enjoined her from implanting the remaining embryo.[85]

The wife appealed to the Massachusetts Supreme Judicial Court, which affirmed the probate court decision on two separate grounds: (1) there was not

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[76] *Id.* at 1053.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 1052.

[81] *Id.* at 1054.

[82] *Id.* at 1055. The court appears to have ignored the fact that the changed circumstances were exactly what the parties were guarding against in making the agreement to have embryos implanted. It also overlooked the fact that contract violations often involve some change in circumstance that leads the reneging party to have a different *Time B* preference. As a result, changed circumstance is rarely a defense to a contract action.

[83] *Id.*

[84] *Id.*

[85] *Id.* The court did not address the allocation of rearing rights and duties between the parties, and whether the wife could release him from those obligations by promising not to seek child support from him. *See* discussion *infra* pp. 145-51.

a clear agreement between the parties;[86] and (2) even if there were one, an agreement to reproduce is not enforceable.[87]

A. Had the Couple Agreed about Disposition?

One ground on which the Massachusetts high court refused to enforce the signed form was that it was not a valid contract.[88] It based this conclusion on evidence about how the form had been signed.[89] That evidence showed that the husband and wife had jointly signed the form for the first of seven IVF cycles in 1988 after the wife had filled in a blank space for "other" with the statement "that if they 'should become separated, they both agreed to have the embryos . . . returned to the wife for implant[ation].'"[90] In each of the six egg retrievals that then followed, the husband always signed a blank consent form, either when the husband and wife were traveling to the clinic or before they went there.[91] Each *Time A*fter the husband signed the form, the wife filled in the dispositional alternative listed on the first form in 1988, and then signed the form herself.[92]

The court found several reasons why the agreement should not be viewed as a contract binding on the parties.[93] First, it found that the primary purpose of the clinic in providing the form was to inform the couple of the risks and benefits of the procedure and to guide the clinic if the donors as a unit did not wish to use the frozen embryos.[94] The form did not state and the record did not indicate that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree about disposition.[95] Second, the court noted that the form had no duration provision, and thus should not be taken to govern the disposition of frozen embryos four years later when circumstances had changed radically.[96] A third reason, the words "should we become separated" did not clearly apply to the circumstances of divorce, which is a termination, not merely a suspension, of

86 725 N.E.2d at 1057.
87 *Id.* at 1059.
88 *Id.* at 1057.
89 *Id.*
90 *Id.* at 1054.
91 *Id.*
92 *Id.*
93 *Id.* at 1056-57.
94 *Id.* at 1056.
95 *Id.*
96 *Id.* at 1056-57.

marriage.[97] Fourth, the court was not convinced that the consent form represented the true intentions of the husband, because he had signed a blank form which the wife later filled in, even though the language added was identical to the language inserted on the first, contemporaneously signed form in 1988.[98] Finally, the consent form could not be viewed as a separation agreement binding on a couple in a divorce proceeding, for it contained no provision for custody, support, and maintenance in the event that the wife became pregnant and gave birth to a child.[99]

Although the process between husband and wife of contracting for disposition of frozen embryos upon divorce was far from ideal, the court's reasons for concluding that a binding agreement had not been made are not entirely convincing. Based on the same evidence, it could have found that a valid contract for disposition of the embryos had been made. A contracting party might sign a form in blank, allowing the other party to fill in a previously arrived at understanding, as evidenced by the added language of the jointly signed first agreement which was incorporated into each subsequent form.[100] Nor is it "uncontractual" not to specify the duration, for it is not unreasonable to think that such an agreement would hold indefinitely until the embryos were used. Nor would use of the term "separation" rather than "divorce" render the contract invalid, for "separation" might for the parties be intended to include "divorce." Finally, the fact that the clinic drafted the form and intended it to be used primarily for the benefit of the clinic does not mean that the couple was unwilling to use the clinic's form to bind them. Although not the ideal way of contracting for postdivorce disposition of frozen embryos, the arrangement here could have just as easily been interpreted as an agreement between husband and wife for the wife's use of the embryos in case of divorce.

B. Agreements to Reproduce Will Not Be Enforced

Even if a contract clearly existed, however, the Massachusetts high court would not enforce it on the ground that "as a matter of public policy . . . forced procreation is not an area amenable to judicial enforcement."[101] It supported

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[97] *Id.* at 1057.

[98] *Id.*

[99] *Id.* The question of rearing rights and duties in resulting offspring is a major issue in determining whether precommitments to reproduce should be enforced. *See infra* pp. 1033-39.

[100] The first party might also designate the second as his agent to fill in what she thinks he wants, or even to cede his right to determine disposition jointly to her.

[101] *A.Z.*, 725 N.E.2d at 1057-58.

this claim by appealing to the doctrine that public policy considerations sometimes outweigh freedom of contract, and looked to legislative and judicial precedents for guidance of when that occurred.[102] It cited legislative abolishment of a cause of action for breach of a promise to marry, a statute that abrogated contracts for agreements to give up for adoption prior to the fourth day after the birth of a child, and a Massachusetts case that refused to enforce a surrogate mother's agreement to relinquish a child at birth to the contracting parents. It then stated:

> [O]ur law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship. We would not order either a husband or wife to do what is necessary to conceive a child or prevent conception, any more that we would order either party to do what is necessary to make the other happy.[103]

It concluded from this brief survey of legislation and cases:

> [P]rior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions. This enhances the "freedom of personal choice in matters of marriage and family life." . . . This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship. "There are personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should not be attempted."[104]

Refusing to "compel a person to become a parent over his or her contemporaneous objection," the court affirmed the probate court's injunction against use of the embryos.[105]

C. J.B. v. M.B.*: Variation on a Theme*

In *J.B. v. M.B.*,[106] a New Jersey couple who had married in 1992 resorted to IVF due to the wife's fallopian tube blockage and endometriosis.[107] Eleven

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[102] Unless legal criteria exist to guide judges in determining when contracts are against public policy, judges would have inordinately wide discretion in determining whether a given contract is valid.

[103] *A.Z.*, 725 N.E. 2d at 1058 (citations omitted).

[104] *Id*. at 1059 (citations omitted).

[105] *Id*. at 1059.

[106] 2001 WL 909294 (N.J. Sup. Ct. 2001).

[107] *Id*. at *1.

embryos were produced.[108] Placement of four embryos in the wife's uterus led to pregnancy and delivery of a baby girl in March 1996.[109] The remaining seven embryos were frozen.[110] Six months after the birth, the wife filed for divorce, and requested that the remaining embryos be discarded.[111] The husband disagreed, and claimed that the embryos were made with the understanding that they would be used by either party or donated.[112] A consent form signed by each stated "our [embryos] will be relinquished to the IVF Program . . . [in the event of] a dissolution of our marriage . . . unless the court specifies who takes control and direction of the [embryos]."[113] A trial court found that there had been no contract and ordered that the embryos be discarded.[114] The intermediate appellate court affirmed, in an opinion that closely followed the reasoning of *A.Z. v. B.Z.*[115]

The New Jersey Supreme Court affirmed the appellate court, but left an important loophole for individuals seeking postdivorce implantation who had since become infertile.[116] Agreeing with the lower courts that there was no contract between the parties for disposition of embryos in case of divorce, the court turned to constitutional principles to determine disposition of the embryos.[117] After summarizing basic understandings of procreational liberty based on precedent, it described the application of those principles[118] in the Tennessee Supreme Court's decision in *Davis v. Davis*.[119]

Because there was no *Time A* agreement between the parties, the *Davis* court balanced one party's interest in procreating with the disputed embryo against the opposing party's interest in not procreating.[120] The court concluded that if the party wishing to reproduce with the embryos had other available ways to reproduce, permitting her to reproduce with the disputed embryos would impose the burden of unwanted reproduction on the other party without

108 *Id.* at *2.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.* at *5.
114 *Id.* at *3.
115 725 N.E.2d 1051 (Mass. 2000).
116 *J.B.*, 2001 WL 909294, at *11-12.
117 *Id.* at *6-7.
118 *Id.* at *7-8.
119 842 S.W.2d 588 (Tenn. 1992).
120 *Id.* at 603-04.

good justification.[121] However, if no other reasonable reproductive options existed, including adoption, than the interest in reproducing might take priority.[122]

Applying this standard, the *Davis* court found that the wife's claim to retain the embryos for implantation was weak because the wife, who had remarried, only wished to donate the embryos to another couple, and no longer wanted to gestate and rear herself.[123] In that case, her interest in genetic reproduction *tout court*, given the burdens on the husband of unwanted genetic reproduction, was deemed less compelling.[124]

The New Jersey Supreme Court agreed with the *Davis* court that, in the absence of contract, "ordinarily the party wishing to avoid procreation should prevail."[125] If no contract were applicable in *J.B.*, denying the husband use of the embryos would not impair or prevent him from reproducing with other eggs and partners:

> M.B.'s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos. M.B. is already a father and is able to become a father to additional children, whether through natural procreation or further in vitro fertilization. In contrast, J.B.'s right not to procreate may be lost through attempted use or through donation of the preembryos. Implantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.[126]

The New Jersey Supreme Court, however, also addressed the situation in which a contract for postdivorce disposition of embryos existed, and one of the parties later changes his or her mind.[127] Noting the holding in *A.Z. v. B.Z.* that "agreement[s] to compel biologic parenthood are unenforceable as a matter of

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[121] *Id.* at 604.

[122] The court gave no guidance on how the availability of alternatives was to be judged. Its suggestion that adoption might be an adequate substitute implies that it had not thought carefully about the relative importance of genetic connection and gestation versus rearing in the reproductive needs of a divorced person with frozen embryos. *Id*. *See also* J.B. v. M.B., 2001 WL 909294, at *12 (Zazzali, J., concurring).

[123] 842 S.W.2d at 604.

[124] *Id.* In *Davis*, the husband had established that genetic reproduction without rearing would have caused him considerable suffering because of his own history as an abandoned child who had lived with foster parents.

[125] *J.B.*, 2001 WL 909294, at *9. For an early articulation of this position, see John A. Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CTR. REP., Nov.-Dec. 1989, at 7-12.

[126] *J.B.*, 2001 WL 909294, at *9.

[127] *Id.* at *10.

public policy,"[128] the court found that New Jersey law also "evince[s] a policy against enforcing private contracts to enter into or terminate familial relationships," citing the invalidity of suits for breaches of contracts to marry, of contracts for private placement adoptions, and for surrogate mother contracts.[129] It then ruled that prior agreements for disposition of frozen embryos "[when] one party has reconsidered her earlier acquiescence [sic] raises similar issues."[130] Although recognizing the disagreement on this issue both among legal commentators and in the limited case law, the court came down on the side of nonenforcement:

> If there is disagreement about disposition because one party has reconsidered his or her earlier decision, the interests of both parties must be evaluated. . . . Because ordinarily the party choosing not to become a biological parent will prevail, we do not anticipate increased litigation as a result of our decision. In this case, after having considered that M.B. is a father and is capable of fathering additional children, we have affirmed J.B.'s right to prevent implantation of the preembryos. *We express no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment*.[131]

The New Jersey court, while ostensibly following *A.Z. v. B.Z.* in denying enforceability of precommitment contracts for frozen embryos, differs in an important respect. Although agreeing that contracts for postdivorce implantation of disputed embryos will not be enforced and that the equities between the parties in the absence of contract will generally favor non-implantation, it implied the possibility of an exception if the party seeking to preserve the embryos has now become infertile.

In drawing this line, the New Jersey court may have opened a much bigger exception than it realized. Although there will be few men who become infertile during the IVF and embryo storage process, many women might. If a couple has sought IVF treatment in their mid- to late-thirties, when success

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128 *Id.* at *9.

129 *Id.* at *10.

130 *Id.*

131 *Id.* at *11 (emphasis added). Two judges concurred in the result, Justice Vierno pointing out that the principle enunciated—destroy unless no alternative—would argue in favor of use of embryos in other cases. Justice Zazzali disagreed with the majority that adoption is a viable alternative to reproduction. *Id.* at *12 (Vierno & Zazzali, JJ., concurring).

rates are still reasonably good, the woman may become infertile by the time disputes over frozen embryos arise. After the age of thirty-eight or forty, the quality of oocytes is so poor that IVF has a very low chance of success.[132] A woman who had agreed to undergo IVF only on condition that she could use or donate all embryos and is now over forty would have a good claim that she has no other chance for reproduction. Her claim would be somewhat weaker if she has already had children (as the wife in *A.Z.* had), but if this is her last chance for genetic offspring, her claim to use the embryos, either pursuant to the contract or to the equities in the case, would be a strong one.

If New Jersey will recognize an exception for postdivorce implantation for infertile persons, then contracts for implantation would be honored if the person seeking enforcement is now infertile (on an equitable rather than a contractual theory). By the same token, a contractual agreement to discard all embryos in the case of divorce would apparently not be enforced if one of the parties has since become infertile and now wants to use the embryos to reproduce. On this standard, a woman would be free to ignore her earlier agreement to discard and claim that use of the embryos is her last chance for motherhood.

Although the New Jersey court does not address the use of embryos in research, nor how rearing rights and duties will be assigned if the infertile person's interest in procreating is now honored, it does make clear that clinics might rely on agreements between parties who are not disputing disposition. That is, the agreement between the parties controls vis-à-vis the clinic and others, as long as the parties have not changed their mind.[133] Agreements that will affect relations with the clinic, if made on forms provided by the clinic, must be clearly written and "reviewed" with a qualified clinic representative before execution to make sure that the parties have given due consideration to the matter.

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[132] Success rates for this age group are under five percent. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 4.

[133] This rationale explains the court's language:

> We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored [embryos].

J.B., 2001 WL 909294, at *11.

V. SHOULD PRECOMMITMENTS FOR DISPOSITION OF FROZEN EMBRYOS BE ENFORCED?

The Massachusetts and New Jersey courts, contrary to the high courts of New York and Tennessee, believe that an agreement for postdivorce implantation of frozen embryos should not be enforced. The issue in those cases does not arise with non-contractual advance directives, for there is no contemporaneous objection at *Time B*.[134] Nor does the problem exist with contracts if both parties at *Time B* agree to a different disposition, for they are free to rescind their previous commitments to each other if they so choose.

The precise question is whether a *Time A* contractual precommitment to engage in—or avoid—reproduction at *Time B* should be honored when the agreement was knowingly, intelligently, and voluntarily made, and one of the parties at *Time B* then wishes to repudiate that agreement. In considering arguments for and against enforcing such agreements, I first address the importance of reliable contract formation, and then analyze the competing interests at stake in enforcing *Time A* precommitments for disposition of frozen embryos.

A. Full Negotiation and the Conditions for Contracting

If contractual precommitments for disposition of frozen embryos are to be given effect, procedures for making such agreements should be established. The parties should be fully aware of the legal consequences of their commitments and not enter into them unknowingly. The clinic's role in this process should be to alert the couple to the option of making an agreement between themselves about future disposition of embryos, in addition to any internal agreement that the clinic requests they enter into with the clinic concerning storage, payment, transfer to other programs, donation, and discard.

Ideally, such agreements should be prepared by the couple's own separate attorneys, with a clear statement that the parties have entered into and are relying on the contract in deciding to go ahead with IVF, fertilization, and cryopreservation of embryos.[135] It should also state that they are aware and

[134] If a noncontractual directive had been made and the objecting party is available and able to object, the conditions specified in the directive would not apply. Alternatively, the maker could revoke the directive before *Time B* arrives.

[135] Professor Jane Cohen, Boston University School of Law, Boston, Mass., has helpfully described the requirements here as "full negotiating integrity" between the parties. (Feb. 22, 2000).

intend the agreement to be legally binding if the stated future contingencies occur. A duration for the agreement should be specified, and words such as "separation" and "divorce" used precisely as the parties intend. The parties might also specify how rearing rights and duties will be allocated between them if implantation leads to the birth of offspring.[136] Finally, each party should sign the agreement separately after all the terms have been filled in and the signatures notarized.[137]

Such formality and specificity should go a long way to resolving questions about whether the parties knowingly made an agreement about future disposition of embryos. Of course, as with all agreements concerning future commitments, one cannot know for sure how one will feel at *Time B*. Generally, however, wishing at *Time B* that a different commitment had been made at *Time A* has never been a defense to a contract action, and considerations of estoppel argue for holding persons to agreements on which others have relied to their detriment. The formality required here will minimize claims that the parties did not knowingly and intelligently make that commitment.

Because of the uncertainties about *Time B* preferences, couples who are uncertain or risk averse about how they might decide in the future need not commit themselves in advance. For some individuals, however, certainty at *Time A* about a particular future disposition at *Time B*—for example, whether embryos will be implanted or discarded—may be essential to whether a party is willing to embark on IVF in the first place. For them, a *Time A* commitment about the disposition of embryos at *Time B* may be needed to provide the assurance essential if they are to go forward at *Time A* with ovarian stimulation, egg retrieval, or sperm provision, even with the risk of a change of mind at *Time B*. The use of contractual precommitments thus helps both parties, for without the agreement, one or both of them may be unwilling to try to have offspring through IVF. Even if one of the parties thinks that he or she

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[136] Whether contractual precommitments for rearing rights and duties will be given effect will depend upon state law and the constitutionality of enforcing such arrangements. *See infra* discussion pp. 1033-39.

[137] In *J.B. v. M.B.*, the New Jersey Supreme Court would give effect to some agreements between couples and clinics:

> Principles of fairness dictate that agreements provided by a clinic should be written in plain language, and that a qualified clinic representative should review the terms with the parties prior to execution. Agreements should not be signed in blank, as in *A.Z.* . . . or in a manner suggesting that the parties have not given due consideration to the disposition question.

J.B., 2001 WL 909294, at *11.

may have a different preference at *Time B*, that party may be willing to forego control in exchange for the chance of having offspring at *Time A*.

B. The Meaning of "Unwanted Parenthood"

The Massachusetts and New Jersey courts upheld repudiation of *Time A* commitments to allow reproduction with frozen embryos at *Time B* by emphasizing that enforcing such agreements would force "unwanted parenthood" on the reneging partner.[138] In taking this position, the courts may have assumed a unitary conception of parenthood that lumps together different reproductive and rearing situations, each of which deserves separate treatment.

For example, the court's conclusion in *A.Z.* that it would not "*compel* an individual to become a *parent* over his or her contemporaneous objection" covers several different types of possible encroachments on liberty at *Time B*, from the use of previously provided gametes or created embryos to bodily intrusions and child-rearing duties.[139] If the prior agreement in *A.Z. v. B.Z.* were upheld, the husband would, strictly speaking, not be compelled to do anything, e.g., he is not being ordered to provide sperm or to have intercourse with his ex-wife. Rather, the question is whether embryos created and stored pursuant to his prior agreement may be released or implanted by the wife or clinic without liability based on his agreement at *Time A*.

It is true that if implantation of the embryos leads to a child, he will have become a genetic parent over his contemporaneous objection, just as a man who impregnates a woman, who then refuses his request to abort, will become a genetic parent over his objection. In determining whether that outcome is acceptable, however, the court should have analyzed more carefully what the burdens of unwanted "reproduction" or "parenthood" would be, and then compared those burdens to the loss to the party seeking enforcement if the agreement to implant the embryos postdivorce was not enforced.

Unwanted "parenthood" and "reproduction" do not have a single or unified meaning. One can reproduce or be a parent in the narrow genetic sense in which there is no rearing involvement or even knowledge that offspring have

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138 *Id.* at *8-9.

139 A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (emphasis added). The New Jersey court by contrast seems to place great weight on the emotional impact of biologic reproduction independent of rearing. *J.B.*, 2001 WL 909294, at *9 ("Implantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.").

been born (biologic reproduction or parentage *tout court*).[140] One can also reproduce genetically and have the rearing rights and duties that ordinarily accompany coital reproduction.[141] Unless genetic reproduction *tout court* is always deemed an enormous burden, evaluation of justifications for overriding a person's contemporaneous objections to becoming a parent must thus address the degree of parenting or reproduction that would follow from overriding those objections.

Without knowing the level of resulting obligation, a court cannot assess adequately whether the burdens of unwanted reproduction at *Time B* always outweigh the wife's reliance on the husband's promise at *Time A*.[142] Yet, neither court considered that the objecting husband might have no rearing rights or duties at all, including no financial burdens. While genetic reproduction *tout court* may also be psychologically and socially significant, it is generally less burdensome than genetic reproduction with rearing or financial duties as well. The differences among degrees of rearing responsibility require analysis and evaluation if the interest of the party wishing to avoid his *Time A* commitment is to be properly compared to the loss that the party denied enforcement will then experience.

C. Comparing the Burdens

An evaluation of the desirability of enforcing the agreement to implant embryos after divorce should thus address both the burdens that unwanted reproduction at *Time B* would cause the objecting party, and the burdens that refusing to enforce the agreement would cause the party wishing to implant the embryos. In *AZ v. BZ*, the burdens on the husband from enforcing his prior commitment to implantation might have been limited to the psychological burdens of genetic parentage *tout court*, without any additional support or rearing obligations. On the other hand, due to the wife's age of forty-five at the time of the decision, the wife's ability to have additional genetic children would be lost if the prior agreement was not honored.

Because the couple already had twins, an opponent of enforcement might argue that nonenforcement is a relatively light loss for the wife, compared to

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[140] *See* ROBERTSON, *supra* note 5, at 108.

[141] Gestation with or without also providing the oocyte or the rearing that usually follows gestation is another variation on "reproduction" and "parent."

[142] In some cases, the party whose embryos are used for reproduction against his *Time B* wishes might then want full rearing rights and duties in his genetic offspring.

the husband who now wishes to avoid even biological procreation. In the absence of a contract, such a solution might be acceptable. However, if she underwent the physical burdens of IVF with the intent to have several children, then limiting her to the children already born limits her procreative freedom in a significant way.[143] In many cases, however, implantation of the frozen embryos may be the only way for the wife who had relied on the husband's commitment at *Time A* to reproduce at all.[144] The Massachusetts court simply ignored the crucial fact that one party's interest in avoiding reproduction (or reproducing) comes at the expense of the other party's interest in reproducing (or not reproducing). It gives no reason why the husband's interest in avoiding reproduction (however defined) is greater than the wife's interest in using the embryos to have a child.

The court instead appealed to precedents and policies concerning adoption, marriage, and surrogate motherhood, and to a more general concern that a court should not create or impose family or reproductive relations. With regard to relevant precedent, no state statute or decision regulating IVF and disposition of frozen embryos existed in Massachusetts, despite its high volume of IVF activity.[145] The disposition of frozen embryos is different than the relinquishment of a child for adoption immediately upon birth, as arises in surrogacy. It is also different from a contract to marry or from agreements that require reproductive performances or bodily intrusions. With disposition of already-created frozen embryos, any intrusion on the man or woman to produce the gametes and embryo necessary for reproduction has already occurred.

Indeed, the situation is more akin to situations in which a man, who has provided sperm for another's reproduction through sexual intercourse or sperm donation, wishes that reproduction then not occur. In cases of coital conception, the man loses the right to have the pregnant woman abort, even if he will end up with full rearing rights and duties in the child if she refuses.

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[143] The right to reproduce is not dependent on whether one has already reproduced, much less that one has reproduced responsibly, though at some point after frequent, irresponsible reproduction, some limitations might be acceptable. *See* State v. Oakley, 629 N.W.2d 200, 209-13 (Wis. 2001) (requiring man as condition of probation to refrain from reproduction justified by his intentional refusal to pay child support for nine children).

[144] The enforcing party might also believe that an embryo is a new human person whose rights must be respected and might suffer if his or her embryo is discarded or not implanted.

[145] Because state law requires health insurers to provide coverage for infertility treatments, which includes IVF, to infertile couples, Massachusetts has one of the highest per capita rates of IVF in the country. *See* MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2000).

The law permits her to continue the pregnancy, thus "compell[ing] him to enter into intimate family relationships . . . when they are not desired," and saddles him with child support and other parental duties as well.[146] In that case, "freedom of personal choice in matters of marriage and family life" gives way to respect for the freedom of the pregnant woman to decide whether to continue a pregnancy or not.[147] A similar evaluation of the loss to the woman who is denied use of the embryos at *Time B* pursuant to an agreement upon which she relied should also occur. Although she is not pregnant, she has undergone the bodily intrusions that made production of the embryos possible, in reliance on her partner's promise that she would be able to implant the embryos in the case of divorce.

Cases of revoked sperm donations are rare, but situations may arise in which persons who have provided gametes or embryos to others seek to withdraw their consent before embryos are formed or implanted. It is unlikely that the gamete or embryo providers will be able to revoke their consent if the recipient has significantly relied on the other's promise to provide gametes for their reproductive use.[148]

D. Compelling Intimate Association

In addition to non-IVF specific precedent, the Massachusetts and New Jersey courts relied on a more general concern with the undesirability of courts enforcing agreements that involve intimate, family, or reproductive relationships. As the *A.Z.* court said, "[w]e would not order either a husband or wife to do what is necessary to conceive a child or prevent conception, any more that we would order either party to do what is necessary to make the other happy."[149] The question of court enforcement of intimate, family, or reproductive matters conflates two concerns, which need separate analysis. One is the issue of forced bodily intrusions. The second is the loss of a

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146 A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).

147 *Id.* (citing Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977)). *See also* Daar, *supra* note 24, at 199.

148 Although rare, such cases have occurred. In Australia, a donor of sperm to a couple undergoing IVF wished to withdraw consent before the embryos had been implanted. The Victoria Infertility Treatment Act of 1995 permitted gamete donors to withdraw consent "before a procedure is carried out." Infertility Treatment Act, 1995, § 12(3) (Austl.). The agency charged with administering the law interpreted this provision as allowing withdrawal before embryos formed with donor sperm were placed in the uterus. Because of the detrimental reliance that would ensue for couples using donor sperm for IVF, the agency later revised its interpretation to allow withdrawal of consent only until a fertilization procedure had occurred. *See* Giulana Fuscaldo, *Gamete Donation: When Does Consent Become Irrevocable?*, 15 HUM. REPROD. 515-19 (2000).

149 725 N.E.2d at 1058.

person's freedom over intimate, family matters if *Time B* objections about implantation of embryos are ignored.

1. Physical Performances and Bodily Intrusions

The reluctance of courts to enforce *Time A* agreements is based in part on a perception that bodily intrusions or performances might be required, which the law is generally loath to order. But nothing akin to enforcing conception, contraception, abortion, gestation, or other bodily intrusions, much less the more ethereal goal of marital happiness, was being asked of the court. In *A.Z. v. B.Z.*, the gametes had been removed from each person and conception had already occurred. The sole issue was whether the clinic may release the embryos for implantation in the wife, without liability, as was previously agreed. The husband would, if a child were subsequently born, have become a genetic parent, and perhaps have child support or other rearing duties imposed against his will—obligations that courts enforce when coital conception occurs. Enforcing the contract will require him to do nothing further than he has already done at *Time A*.[150]

A decision in favor of the *Time A* commitment to allow embryos to be implanted thus would not mandate that contracts requiring bodily performances or intrusions for reproduction also be enforced at *Time B*. Agreements, for example, that required the wife before or after divorce to have embryos implanted in her and carried to term, that required a gestational surrogate to abort/not abort if prenatal genetic tests were positive or if she were carrying twins,[151] or that required a man to provide sperm would raise different questions because of the bodily intrusions and burdens, which they would entail.

A strong theory of rights at *Time A* to precommit for *Time B* could extend to precommitments that require a bodily intrusion or performance at *Time B*. Enforcing those agreements, however, would be less easily accepted because of the advance commitment to physical burdens and intrusion and the risk that the person may not have fully grasped the significance of her *Time A* commitment. Given the reluctance of courts to order specific performance of

[150] A similar question arises with agreements, as in *Kass v. Kass*, to have embryos remaining at divorce donated for research. 696 N.E.2d 174 (N.Y. 1998). Since the objecting party need do nothing further, the question is whether the clinic would incur liability if it disposed of them in reliance on the advance directive or agreement.

[151] For a case in which a gestational surrogate mother refused to abort when she was found to be pregnant with twins, see *New Parents Found for Surrogate Twins Family*, L.A. TIMES, Aug. 14, 2001, at B7.

personal service or performance contracts, it would be surprising if an order to perform—in this case, provide the reproductive service—would issue.[152]

Damages for violations of contracts for bodily intrusions or performances might also rarely be imposed. However, there may be instances where the reliance interest and present loss of one party is so great, and the physical performance or intrusion demanded not so unduly burdensome, that awarding damages for breach of the *Time A* promise to use his or her body in a particular way at *Time B* might be justified.[153] A refusal to order or give damages for nonperformance of *Time B* actions, however, does not mean that refusals to enforce *Time B* contracts for use of embryo and gametes where no further action or services are necessary are also appropriate.

2. Loss of Reproductive Freedom at Time B

The court's objection to enforcement of frozen embryo contracts is deeper than avoiding unwanted bodily intrusions. It objects to enforcement also on the ground that liberty in an intimate, personal area of life—family and reproduction—is at stake. According to the court, "respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship," for refusing to enforce such contracts enhances the "freedom of personal choice in matters of marriage and family life."[154] Its view is that there are "personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should not be attempted."[155]

In taking this position, the Massachusetts court is siding with Rousseau on the issue of precommitment. It believes that liberty at *Time B* in reproductive and family matters is always superior to liberty at *Time A*. Yet, a rule that always privileges *Time B* preferences over those at *Time A* is not persuasive for all situations, reproductive or otherwise. The widespread use of precommitment strategies in human behavior, including their frequent use in assisted reproduction and other bioethical contexts, suggests that many people are decidedly un-Rousseauian in intimate personal matters. Use of such devices is often a rational way to order one's future affairs, because of the great benefits it brings. For example, precommitments enabled Ulysses to hear

152 This is not to say that such an order would be improper.

153 *See* discussion *supra* notes 141-42.

154 *A.Z.*, 725 N.E.2d at 1059 (citing Commonwealth v. Stowell, 449 N.E.2d 357 (Mass. 1983)).

155 *Id.* (citations omitted).

the Sirens' song and survive, Ahab to have his life saved by amputation, and physicians addicted to drugs effectively treated.[156] With precommitments for disposition of frozen embryos, two persons gain the chance to use IVF to reproduce at A in exchange for relinquishing their right to object to reproduction at B.[157] That is no small gain for an infertile couple. It should not be shunted aside with an *ipse dixit* about personal liberty.

If a couple has carefully considered the importance of a particular *Time B* disposition, fully negotiated the matter, memorialized that agreement, and proceeded with physical acts in reliance on it, it is difficult to see why a change of mind by one party at *Time B* should now prevail. As we have seen, enforcing the agreement at *Time B* may simply lead to unwanted reproduction *tout court* without further rearing duties.

Even if financial or other rearing duties would be imposed on the objecting party, one cannot fairly ignore the other party's loss of reproductive freedom at *Time B* if the agreement is not honored. For some women, postdivorce use of embryos may be their last chance for reproduction, since they may now be too old to produce viable eggs. For others, it will alleviate the need for another costly and burdensome IVF cycle.[158] If conception had occurred coitally, her wishes to end or continue the pregnancy would be paramount. They should be as well if the parties had agreed, as a condition of her undergoing IVF, that she would have the same control over resulting frozen embryos as over embryos or fetuses inside her body.[159]

The court's judgment that "respect for liberty and privacy" requires reproductive freedom at *Time B* and over that freedom at *Time A* ignores the loss of *Time B* reproductive freedom for the party denied enforcement. Although the wife, in agreeing to ovarian stimulation and egg retrieval, had relied on the husband's commitment that all embryos would be implanted, she

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156 *See* HOMER, *supra* note 69; SCHELLING, *supra* note 1, at 9-10; Schelling, *supra* note 52. Of course, the gains to Ulysses and Ahab occurred in fiction, not in real life, but real life situations involving beneficial precommitments are easily imagined.

157 The fact that Ulysses' precommitment protected him from a self-destructive action at *Time B* does not negate the gain in freedom that he achieved with his precommitment. As noted above, see *supra* note 150, precommitments may function both as forms of self-paternalism and judgments that *Time A* freedom is more important than freedom at *Time B*, regardless of whether the *Time B* actions help or hurt the maker at *Time B*.

158 Nor do these interests disappear if the party seeking implantation already has offspring, although the burden of nonenforcement might be somewhat lessened.

159 In other cases, some women and men might have strong religious beliefs against discard of embryos, which they had sought to protect by the *Time A* agreement. *See* J.B. v. M.B., 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000).

is now being denied the use of embryos upon which her willingness to undergo significant bodily burdens rested. In addition, couples for whom *Time A* certainty about *Time B* disposition of embryos is determinative of whether they undergo IVF will be reluctant to engage in IVF at all, if they cannot be assured of the *Time B* outcomes that matter so much to them. Given the lack of a clear normative metric to determine whether freedom at *Time A* or *Time B* is always more important, allowing the parties' own written wishes at *Time A* to control, particularly when one party has relied on that agreement to her physical detriment, is the better course of action.

E. Precommitments for Other Dispositions of Embryos

The Massachusetts court does note that its decision does not address contracts with clinics or for dispositions other than implantation, but gives no guidance as to whether directives and contracts that do not involve unwanted reproduction will also be rejected because of the court's preference for *Time B* freedom.[160] If unwanted reproduction at *Time B* is the key factor, then an agreement to have embryos donated for use by infertile couples should also be negated, because that too would lead to unwanted reproduction, albeit reproduction *tout court*. If that case is distinguishable by the absence of rearing rights and duties in the now unwilling partner, then agreements for implantation in the wife with an explicit agreement to relieve the objecting husband of all rearing rights and duties should also be accepted.

On the other hand, if the agreement were to have the embryos donated for research upon divorce (the option chosen and upheld in *Kass*), upholding the agreement should follow because no reproduction is foisted on an objecting party.[161] Similarly, there should be no objection to enforcing agreements to discard embryos in the case of divorce, nonpayment of storage fees, unavailability, or inability to agree, because none of them involve unwanted reproduction. Nor should there, ordinarily, be objections to reliance on an advance directive when the specified contingency occurs, for there is no one actually objecting at *Time B* to the specified disposition.[162]

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[160] The New Jersey Supreme Court is much more helpful in this regard, but still leaves some questions open, such as whether agreements to discard embryos will be enforced if the objecting party has become infertile. *See infra* note 172.

[161] The party might strongly object, however, at *Time B* to destruction of embryos and their unavailability for implantation. Whether that agreement should be enforced should depend upon whether it was a material element of his or her agreement to undergo IVF in the first place, and was stated to be such in a prior agreement. *But see* Annas, *supra* note 24 (expressing a contrary view).

[162] If the incompetent person's *Time B* interests are substantially impaired by enforcement, a different

Neither *A.Z. v. B.Z.* nor *J.B. v. M.B.* said anything about the welfare of children who might be born from enforcement of the prior agreement as a reason for not enforcing contracts for implantation. Indeed, protecting children from being born with only one committed rearing parent could occur in those cases only by preventing the child's existence altogether. As desirable as it may be for a child to be born with two parents committed to its existence, surely the rigors for the child of having an absent parent do not justify, as viewed by the child once it is born, depriving the child of life altogether by preventing implantation from occurring.

F. Are Reproductive Rights Inalienable?

An alternate way of articulating the objection to enforcement of contracts for implantation of frozen embryos has been to claim, as Carl Coleman has done, that reproduction is an inalienable right, and as such, cannot be exercised or alienated by a prior agreement for disposition of gametes or embryos.[163] Coleman, however, misunderstands the nature of inalienability. He assumes that it applies to situations of future alienability alone rather than to other situations in which one relinquishes or divests oneself of a right or power. As Joel Feinberg reminds us, in discussing alienability, one must distinguish between total relinquishment of a right, waiver in a given circumstance, and alienating or transferring the ability to exercise the right in the present or the future.[164] Reproduction is clearly not inalienable in any of those senses. We can relinquish the right totally by sterilization. We may waive it in a particular instance by abstinence, contraception, or abortion. We also transfer the ability to reproduce genetically and gestationally to others when we donate sperm, eggs, or embryos to infertile couples for their own reproduction.[165]

What Coleman means is that reproduction is only partially inalienable, and thus fits Susan Rose-Ackerman's category of modified inalienability.[166] Under her conception of modified inalienability, one may give something away but not sell it (or conversely, sell it but not give it away, e.g., the assets of a bankrupt estate). One could argue that reproduction is or should be subject to a

result may be required. *See supra* text accompanying notes 63-65.

[163] *See* Coleman, *supra* note 24, at 89.

[164] Joel Feinberg, *Voluntary Euthanasia*, *in* ESSAYS IN SOCIAL PHILOSOPHY 221, 221 (1980).

[165] The same holds for the related right to rear one's offspring. We relinquish or transfer that right to others in the case of termination of parental rights and adoption, foster parentage, and other temporary custodial or rearing arrangements.

[166] Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COL. L. REV. 931, 942 (1985).

regime of modified inalienability in that it should be a gift but not sold. This would explain the preference for unpaid coitus, egg, sperm, and embryo donations, and surrogacy. Most people, including Coleman, are not against unpaid gamete and embryo donations and surrogacy, so they are not against all alienation of reproduction. Nor would Coleman be against necessarily all payments to gamete donors or surrogates, though he might object to payment for embryos.

Coleman appears to use "inalienability" of reproductive rights in the sense that those rights cannot be exercised in advance by a contract or other precommitment device. But once we remove objections based on bodily intrusion, have clear and explicit contracts, and recall current practices of alienating reproductive interests by gamete and embryo donation and sterilization, there should be no principled objection to transferring interests in control of gametes or embryos by advance agreement. If the parties have knowingly and intelligently agreed at *Time A* to use embryos or gametes at *Time B* for reproduction, nonenforcement will frustrate the reproductive freedom they gain by entering into those agreements. Reliance on contract will be essential for many individuals to plan for the consequences of providing gametes, embryos, and other actions necessary to participating in IVF or collaborative reproduction.

VI. THE CONSTITUTIONALITY OF PRECOMMITMENT STRATEGIES FOR FROZEN EMBRYOS

The argument for enforcing dispositional contracts for frozen embryos rests on the importance of the choice being enforced and the enforcing party's prior reliance on the other party's *Time A* promise. The argument for enforcement holds whether the prior agreement is for use or discard of the embryos. Enforcement, however, risks a situation resulting in the reneging party becoming a parent—or not becoming a parent—against his or her wishes at *Time B*.

Enforcement of the *Time A* promise at *Time B* would impose reproduction (or its avoidance) on a person over his contemporaneous objection. Would *Time B* enforcement thereby violate the party's right at *Time B* to avoid reproduction (or to engage in it)? [167] Put differently, may constitutional rights

[167] I am assuming that a state's enforcement or refusal to enforce the *Time A* commitment would involve state action sufficient to implicate Fourteenth Amendment due process and equal protection. The intermediate

to reproduce (or to avoid reproduction) be exercised in advance by means of contract or advance directive? In addressing this question, the assumption is made that a coherent interpretation of Supreme Court decisions with holdings or dicta relating to reproduction and the family is that negative liberty *rights to reproduce or not reproduce* with a willing partner have fundamental right status. The precise scope and contours of such rights, of course, remain in many respects uncertain and contested.[168]

Answering that question is complicated by the constitutional objection that arises from the opposite direction if the contract is not enforced. One could just as plausibly argue that it would be unconstitutional not to enforce those agreements, because it would deter people from making the binding commitment about future use of embryos upon which their willingness to reproduce through IVF depends. Under that conception of reproductive rights, the constitutional right to reproduce or avoid reproduction includes the right to exercise the right in advance.

A. Constitutionality of Enforcing Contracts for Implantation of Frozen Embryos

Is enforcement of contracts for the implantation of frozen embryos constitutional if one of the parties at *Time B* objects to enforcing the original agreement (the situation presented in *A.Z. v. B.Z.*)? Would failure to enforce the agreement violate the procreative liberty of the party who participated in IVF in reliance on the agreement?

Implantation or release of embryos for implantation at *Time B* on the basis of the agreement at *Time A* would not infringe the objecting party's *Time B* right to avoid reproduction because he or she is not being forced to do anything at *Time B*. Rather, an action which the *Time B* objector authorized through

appellate court in *J.B. v. M.B.* had doubts that state enforcement of a private contract constitutes sufficient state action to implicate constitutional protections, and thus avoided a decision on constitutional grounds. 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000).

[168] Needless to say, the Court has not explicitly endorsed rights to avoid or engage in reproduction in precisely the same way or to the same extent asserted here. The argument for this position and discussion of whether those rights also extend to unmarried persons is found in John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 417-20 (1983); ROBERTSON, *supra* note 5, at 38. *But see* Lori B. Andrews, *Is There a Right to Clone: Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 656 (1998); Ann M. Massie, *Regulating Choice: A Constitutional Response to Professor John Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 161-62 (1995); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 956-62 (1996).

contract with another will now occur. Although enforcement could lead to the objecting party's genetic reproduction, he or she had previously agreed to this action, and the enforcing party has taken action in reliance on that promise. Enforcing an otherwise valid contract concerning what shall occur at *Time B* does not ordinarily infringe the objector's constitutional rights at *Time B*.

If enforcement were found to be an "infringement" of his or her *Time B* right, the question would be whether that infringement was justified because of the maker's agreement at *Time A* to waive that person's reproductive rights at *Time B*. The Supreme Court has not addressed directly the question of when advance waivers of constitutional rights may function as estoppels or are otherwise acceptable.[169] There is no a priori constitutional reason,[170] however, why a state could not prefer to honor the free, intelligent, and knowing waiver or relinquishment of reproductive rights when the interests of others who relied on the waiver or relinquishment would be significantly hurt, and such waiver enabled the parties to engage in the socially useful practice of treating infertility.

Where persons have freely, intelligently, and knowingly agreed to forego their right at *Time B* to avoid reproduction, where another person has relied on that commitment, and where both persons have gained the freedom to embark on IVF at *Time A* as a result, the case for enforcement is strong. Given the wide use of precommitment strategies in many settings and the acceptability of contemporaneous waivers of constitutional rights, a constitutional rule against all advance waivers of constitutional rights—a rule that always prefers freedom at *Time B* to freedom at *Time A*—should be rejected.

If the agreement to implant embryos at *Time B* were not enforced, the losing party could argue that her right to reproduce was being violated unconstitutionally because nonenforcement prevents her from using the embryos that she needs to reproduce. Without reliance on the husband's promise to allow the wife to implant the embryos at *Time B*, she never would

[169] *See generally* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478 (1981). In one of the few instances such a right has been considered, Justice O'Connor, concurring in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289-92 (1990) (O'Connor, J., concurring), suggested that Fourteenth Amendment liberty did include the right to appoint an agent for health care decisions when one became incompetent. Although I have argued against finding such a constitutional right, if a right to appoint a health care proxy exists, it should also include the right to make an advance directive or living will. *See* John A. Robertson, Cruzan *and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1179 (1991).

[170] There is no reason, in the sense that none of the traditional textual, historical, structuralist, precedential, or ethical sources of constitutional argument support such a claim.

have undertaken IVF. Her claim would be that the court's preference for his *Time B* freedom over hers, and over the freedom of both of them at *Time A* to determine what happens in the future, is not a sufficiently compelling ground to justify that infringement, and thus would violate her reproductive liberty. Given her reliance on his promise at *Time A* to undergo bodily intrusions and her loss of reproductive freedom at *Time B* if enforcement does not occur, maximizing his freedom at *Time B* over her freedom at *Time B* is not such a strong personal or societal interest that it justifies overriding her right to reproduce with the embryos created in reliance on his *Time A* promise.[171]

B. Constitutionality of Contracts to Avoid Future Reproduction

A similar analysis applies in a case where the couple had agreed to dispose of embryos if divorce or another stated contingency occurred. One of the parties now objects and would like to have the embryos released for implantation and reproduction, either into herself or a gestational surrogate, or donated to an infertile couple. Suppose the wife shows that she can no longer produce viable eggs, and that use of these embryos is her only way to have genetic offspring.[172] Or, the party seeking to save the embryos for implantation has since adopted right-to-life views and cannot bear the thought of his embryos being discarded. In either case, assume that the party seeking to override the prior agreement to discard the embryos will assume all rearing rights and duties in offspring.

To sustain a claim against enforcing the *Time A* agreement to discard embryos at *Time B*, the reneging party has two hurdles to surmount. One is to establish that the rule to be adopted when there are disagreements about present uses of jointly created embryos is that prior agreements should not control. The second is to establish that the interest of persons wishing to reproduce, at least if they have no other reasonable alternative ways of doing so, should then take priority. Resolution of the latter question concerns the relative burdens and benefits of unwanted reproduction versus not reproducing,

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[171] The case is equally strong for the husband who had provided sperm for IVF in reliance on a promise from the wife that embryos remaining after divorce would be donated or used by the husband with a new partner for reproduction. Although he might be able to create other embryos, it is his strong belief that embryos should not be discarded that he sought to protect with this agreement, which was essential to his willingness to undergo IVF. A similar argument applies to a woman's insistence on enforcing an agreement for postdivorce implantation, even if she is fertile and could produce more embryos.

[172] Under the reasoning in *J.B. v. M. B.*, 751 A.2d 613, 618-20 (N.J. Super. Ct. App. Div. 2000), a contract to dispose of embryos at *Time B* is not enforceable if one party has changed her mind, and the party now opposing discard has become infertile and has no other reasonable means of reproduction.

in light of other alternatives.[173] But even if the rule followed that loss of the chance to reproduce was always or sometimes deemed a greater burden than unwanted reproduction *tout court*, the wife still would have to show why her agreement at *Time A* for embryo discard at *Time B*, on which she and her husband relied in going forward with IVF, should not control.

Surely she is on weak ground if she is arguing that the right to reproduce can never be waived or relinquished in advance, thus blocking state legislatures and courts holding otherwise. There is no sound constitutional basis for saying that Rousseau's views are constitutionally required—that a state's preference for reproductive freedom at *Time A* at the expense of freedom at *Time B* is always unconstitutional, even when the other party has relied on the *Time A* promise. A state might constitutionally view *Time A* commitments as freedom-enhancing overall, despite regret or objections by some persons at *Time B*, and choose to enforce such agreements.[174]

In addition, a failure to enforce the prior agreement against reproduction at *Time B* might violate the husband's right to reproduce at *Time A*. Suppose that his willingness to undergo IVF at *Time A* depended on the joint agreement to discard embryos in the case of divorce. A failure to enforce that agreement, with postdivorce implantation occurring despite the prior agreement, would substantially burden or infringe the right to reproduce, by making the couple more reluctant to undertake IVF in the first place. A wife's interest in using the embryos at *Time B*, which she had previously relinquished at *Time A* and on which her husband had relied, would not count as a justification to infringe *his* interest in reproducing at *Time A*, which ignoring the agreement to discard at *Time B* would do. Some persons in the future might be unwilling to use IVF if they cannot count on *Time B* preferences, negotiated with the other, being honored.[175]

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[173] *See id.* at 618-19.

[174] Just as the Constitution does not enforce Herbert Spencer's Social Statics, it does not enforce Jean-Jacques Rousseau's Social Contract. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[175] Again, this is an empirical matter whether one or both partners would have not reproduced unless the agreement existed. *See infra* pp. 1037-38. It may be that a rule stating that provision of sperm for IVF could lead to postdivorce implantation in certain circumstances (party objecting to enforcement has never reproduced, previous child has died, etc.) would not deter people from undergoing IVF, anymore than men are deterred from intercourse or consent to implantation, because they cannot force abortion if the woman gets pregnant.

VII. ALLOCATING REARING RIGHTS AND DUTIES IN OFFSPRING BORN FROM FROZEN EMBRYOS

Judicial discussion of frozen embryo dispositions has seldom addressed the child-rearing implications of dispositional decisions. However, if embryos are implanted over the *Time B* objection of one party, the question of how rearing rights and duties in offspring should be allocated needs to be addressed. Indeed, answers to these questions might influence the dispositional outcome chosen by the parties or courts. This is relevant, of course, only if a contract or directive for embryo implantation is involved, for no rearing rights and duties arise if the agreed upon disposition is nontransfer or discard of embryos.

In most cases to date, however, the parties have not stated in advance who will have rearing rights and duties in offspring born from disputed implantation. The agreement signed in *A.Z. v. B.Z.*,[176] for example, said nothing about the father's rights or obligations if implantation occurred after divorce without his consent. Nor have the courts themselves discussed the issue, despite its great importance. One surmises that the *A.Z.* court assumed that the full rights and duties of parenthood would attach to the husband who objected to enforcing his prior agreement.[177] Suppose, however, that as part of the agreement for postdivorce use of embryos, the parties also agree that the party wishing to use the embryos shall assume all rearing rights and duties and the other party none. Alternatively, that both parties will share rearing rights and duties in specified ways. Should such agreements be enforced? Is it constitutional to do so?[178] Is it constitutional to refuse to enforce them?

A. Should States Enforce Agreements Allocating Rearing Rights and Duties?

The first question is whether state law should permit *Time A* agreements for rearing rights and duties in children born from implantation of frozen embryos after divorce to control at *Time B*, when such births occur.[179] Or, should state parentage laws based on coital conception, which usually prevent the parties

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[176] 725 N.E.2d 1051, 1053-54 (Mass. 2000).

[177] The intermediate appellate court in *J.B. v. M.B.* did mention the possibility that embryo donation against the wife's will would divest her of any rearing rights and duties, thus constituting a double insult to her reproductive liberty. *See* 751 A.2d at 620.

[178] The Supreme Court has recognized the right of biologic parents to rear their children when asserted in a timely manner after birth. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Santosky v. Kramer, 455 U.S. 745 (1982); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923).

[179] Recall that if both partners should change their minds, they can terminate their agreement.

from allocating in advance rearing rights and duties in offspring, bar such arrangements?[180]

Consider a case where a couple in undergoing IVF has agreed that the wife may use the embryos for postdivorce implantation and will have sole rearing rights and duties in resulting children. A variation on this theme arose in *In re O.G.M.*, in which a Texas couple agreed to have frozen embryos implanted in the wife after divorce and a daughter was born.[181] The ex-husband was actively engaged in her rearing until the ex-wife learned that he planned to remarry and denied him further access to the child. He then sued to protect his rearing rights. The ex-wife alleged, contrary to his claim, that he had agreed as a condition of her implanting the embryos that he would have no rearing role in resulting children. The Texas courts held that the state's paternity law controlled and held him to be the father.[182]

State paternity laws generally make the sperm source (in cases other than sperm donation for artificial insemination) the legal father for all purposes, and would not enable a man to relinquish parental rearing rights and duties by advance agreement unless a statute or court decision specifically authorized it. Under those laws, the genetic father would still retain rights to custody, companionship, or visitation, if he had claimed them expeditiously after the birth of the child, regardless of whether he had previously agreed to relinquish them. He would also have child support duties, despite a prior agreement with the mother to relieve him of that responsibility.

It may be that this policy should extend also to assisted reproduction. However, to encourage or facilitate the use of IVF as a means to treat infertility, a state might choose to enforce advance agreements for allocation of rearing rights and duties in children resulting from postdivorce implantation of frozen embryos. The issue of advance disposition of rearing rights arises, of course, only if there was an agreement that one of the parties may use remaining embryos for implantation and reproduction. If the parties have also agreed that their willingness to consent to postdivorce implantation is based on the other's release of all rearing rights and duties, enforcing rearing contracts

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[180] *See, e.g.*, TEX. FAM. CODE ANN. § 151.001(a)(2) (Vernon 1996).

[181] 988 S.W.2d 473 (Tex. App. 1999). Petition for review was granted at 42 Tex. Sup. Ct. J. 1120 (1999) and review was dismissed without objection from either party at 43 Tex. Sup. Ct. J. 824 (2000).

[182] In finding that the state's paternity law making him the father controlled, the Texas courts never addressed the question of whether the preimplantation rearing agreement alleged late in the proceeding by the ex-wife existed, nor the constitutional questions which nonenforcement would raise.

would encourage the use of excess embryos and meet the needs of the parties to reproduce and parent.

Such a judgment would parallel state law practice with gamete and embryo donation, in which many states allow the donor to relinquish all rearing rights and duties in advance of birth, and the recipient individual or couple to assume them. States treat reproduction through gamete donation differently from coital reproduction to help infertile couples have children with kinship ties to one or both of them, on the assumption that resulting children will be well-treated.[183] If rearing agreements for frozen embryos are upheld, the divorcing parent with the embryos will function very much like a single woman recipient of sperm or egg donation, unless he or she had a spouse or partner. Although not as many states explicitly recognize single mother donor arrangements, some states do on the very reasonable assumption that an unmarried woman might still have an important interest in reproducing, even if a husband and rearing father will not be present.[184] If the woman is a responsible person, there is no reason to think that resulting children will not have a meaningful and satisfying life.[185]

Suppose, however, that the prior agreement calls for both parties to share rearing, either through joint custody or regular visitation and support. Should a state give effect to such agreements? Here the concern in doing so would not be the absence of a parent, as occurs in gamete donation and frozen embryo agreements to exclude one of the genetic parents, but rather the complications that might arise from the presence of another rearer who is not a full cohabiting social parent. Given interests in maximizing the survival of embryos, meeting the needs of postdivorce couples to reproduce, and assuring children two rearing parents, a state might also reasonably choose to enforce agreements to involve both parties in rearing.

B. Would Enforcement of Contracts Allocating Rearing Rights and Duties Be Constitutional?

If state law permitted the parties to allocate rearing rights and duties in offspring born after divorce from frozen embryos, questions about the

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183 The degree of kinship will vary, both from being genetic parents in gestational surrogacy (the husband being a genetic parent and the wife a gestational parent in egg donation) and only the wife having a biological tie in sperm donation.

184 *See* ROBERTSON, *supra* note 5, at 128.

185 The question of whether there is a constitutional right to allocate rearing rights and duties in IVF offspring is discussed below, *infra* notes 188-89.

constitutionality of advance waiver or relinquishment of the constitutional right to rear biologic offspring would then arise. Married couples have substantive due process rights to rear their biologic offspring.[186] Single parents do as well, at least if they have asserted that interest in a timely manner after birth.[187] Parents also have state law rights to terminate or relinquish parenting rights and duties after birth occurs. The question posed is whether a person's *Time A* relinquishment of his or her rearing rights in offspring born from postdivorce use of frozen embryos violates his *Time B* right to rear. The analysis is similar to the analysis of the constitutionality of enforcing or not enforcing precommitments for the use of frozen embryos.

One set of disputes would arise when the partner who had agreed to implantation on condition that he would have no rearing rights and duties in resulting offspring asserts an interest at birth or shortly thereafter in rearing his genetic child.[188] State law that divested a father who had made such an agreement of parental rights and duties would "infringe" his constitutional right to rear his child at *Time B*, but could be found to be justified by his prior relinquishment of that right and the ex-wife's reliance on that relinquishment in implanting and gestating the embryos. A state reasonably might adopt a policy effectuating advance allocation of rearing rights in order to protect embryos and allow postdivorce reproductive wishes to be satisfied.

In these circumstances, there is no good reason for holding state enforcement of such agreements to be unconstitutional. If the advance waiver of rearing rights has been freely, knowingly, and intelligently made, there is no constitutional principle that requires that waivers or relinquishments of constitutional rights only be made contemporaneously—that the Constitution, like Rousseau, always prefers freedom at *Time B* to relinquishment of that freedom at *Time A*. Indeed, rejecting advance waivers will discourage

[186] *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (holding that parental rearing rights must be taken into account in determining whether a state grant of visitation to grandparents over a custodial parent's objections is valid); Wisconsin v. Yoder, 406 U.S. 205 (1972) (affirming parental right to educate at home); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (affirming the right to send children to a private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (affirming the right to have children learn a foreign language).

[187] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Santosky v. Kramer, 455 U.S. 745 (1982); Caban v. Mohammed, 441 U.S. 380 (1979); Quillon v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). *But see* Michael H. v. Gerald H., 491 U.S. 110, 119-21 (1989) (holding that protection of marital unit permits state to bar biological father's claim to rear).

[188] The wife in *In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999), claimed very late in the proceeding that failure to enforce her alleged agreement to be the sole rearer would violate her constitutional right to procreate. The husband countered by arguing that enforcement of such an alleged agreement would violate his right, once his daughter was born, to rear her. The court, however, never reached the question.

postdivorce implantation of embryos and frustrate the parties who would reproduce after divorce only if the other partner were absent from any future rearing.[189] Nor would the state's choice to uphold the agreement clearly harm children. As with donor sperm, it encourages the birth of children who might not otherwise be born if the partner's commitment to relinquish rearing rights and duties could not be enforced. A child of donor gametes—or postdivorce implantation and reared by only one genetic parent—is not harmed by that status alone.

A variation on this problem would arise if the wife, after the birth of the child, sought to have the father support the child, contrary to their prior agreement for her to assume all rearing duties, which a state has chosen to enforce. If a state chooses to give effect to such an agreement, she would have difficulty framing a convincing constitutional argument against the state's relieving him of that duty based on her prior agreement. Her right to rear at *Time B* is not infringed by enforcing her agreement with the husband that he would have no rearing rights and duties if she proceeded with implantation.[190]

Similarly, state enforcement at *Time B* of *Time A* agreements to include a partner in rearing would also be constitutional, even if one of the partners later tried to block the agreed-upon rearing arrangement. In this case, one rearing partner at *Time B* would like to exclude the other partner, but is barred from doing so by her agreement at *Time A* to include him in rearing.[191] Since her constitutional right to rear offspring is not a right to rear alone when the other parent is willing and able, she would have to argue, quite unconvincingly, that she would not have agreed to use the embryos unless she had carte blanche over rearing at all future times, despite her agreement at *Time A* to include him in rearing once the child was born.[192] If she could convince a court that that were true, a state would be obligated constitutionally to protect her interest at the expense of the ex-husband's interest in rearing, to which they had both agreed at *Time A*.

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[189] Recall that the advance waiver of rearing rights and duties would be relevant only if there had also been a contemporaneous or advance waiver of the right not to have embryos implanted.

[190] Her claim that enforcement of the agreement will discourage postdivorce implantation and thus infringe the postdivorce right to reproduce is not persuasive, since a person should not be constitutionally free to reproduce at the price of tricking another person into providing the needed gametes or embryos. Under such an argument, state laws that relieve sperm donors of rearing duties at the time of donation would be unconstitutional because they would prevent the recipient from later seeking child support from them.

[191] She would also be barred by his timely assertion after birth of his interest in rearing.

[192] I am assuming that the best interests of the child are not affected by either rearing arrangement.

C. Would Refusal to Enforce Rearing Agreements Be Constitutional?

What if a state refused to give effect to frozen embryo contracts allocating rearing rights and duties between the couple? This would occur, for example, if traditional paternity laws according the father rearing rights and duties were held applicable to postdivorce reproduction, despite his prior agreement to relinquish them and the wife's reliance on his agreement in having the embryos implanted. Would application of the state's paternity or other family laws in those circumstances to frustrate the parties' *Time A* agreements about postdivorce rearing be constitutional?

The answer is probably yes, even though it deters people from using embryos after divorce. The counterargument would rest on the woman's claim that she would not have had the embryos implanted if she had not been able to rely on the husband's agreement to relinquish rearing rights. The question here would be whether failure to enforce the agreement infringes or substantially burdens her right to reproduce, and if it did, whether protecting the best interest of children and the other party's interest in rearing at *Time B* outweighs that reproductive interest.

The question of whether nonenforcement would discourage implantation of embryos might be difficult to show in specific cases.[193] Even if one could, courts do not always find that reproductive liberty is infringed or substantially burdened whenever failure to enforce an agreement concerning that liberty occurs. The law does not, for example, recognize an infringement of reproductive liberty when a man claims that child support laws discourage him from reproducing coitally because he is unable to agree in advance to have the woman assume all rearing duties. Nor have courts found a constitutional obligation to enforce surrogate mother contracts, despite the need for enforcement if couples who cannot gestate are to use gestational surrogates.[194]

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193 This will be an empirical claim for triers of fact. *See supra* notes 171-75.

194 The New Jersey Supreme Court reversed a trial court finding that failure to enforce a surrogate mother contract violated the infertile couple's right to reproduce. *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988). The argument is strongest in the case of gestational surrogacy, if the couple can show that they would not have entrusted their embryos to a surrogate unless they were sure that they could rear. Failure to enforce surrogate contracts is arguably discrimination against infertile women who need to use gestational surrogates to reproduce, and a burden on their fundamental right to reproduce. In support of this position, see John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, LAW, MED. & HEALTHCARE, Spring/Summer 1998, at 18; but see Alexander M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as Paradigm for Motherhood*, LAW, MED. & HEALTHCARE, Spring/Summer 1998, at 34.

Even if nonenforcement of such agreements substantially burdened procreative choice, the state might justify that infringement by its strong interest in assuring a child has two rearers and in protecting freedom over major life decisions at *Time B.*[195] The state has a strong interest in wanting children to have two rearing parents, even if having only one parent also is acceptable. Preferring the interests of children who are born over the reproductive interests of divorced persons who wish to implant frozen embryos is not irrational, and is well within state discretion. In short, although it may be constitutional to enforce such agreements, it is also constitutional not to enforce them, regardless of how conception and implantation have occurred.[196]

An equal protection argument against nonenforcement of contracts to relinquish rearing rights and duties in children resulting from postdivorce implantation of embryos is stronger in states that authorize sperm donors to relinquish rearing rights and duties in donations to unmarried women.[197] In such states, unmarried women similarly situated with respect to an interest in reproduction would be treated dissimilarly if the gametes necessary for reproduction came from their own previously created embryos rather than from a donor. The state might rationalize the unequal treatment by its hoary power to proceed "one step at a time" in addressing a problem, in this case meeting the reproductive needs of unmarried persons.[198] But infringements of reproductive rights must satisfy more than rational basis scrutiny. States that allow single women to cut off the sperm donor's rearing rights and duties will be hard-pressed to show why prebirth rearing arrangements in implanted frozen embryos should not be treated the same.

VIII. EMBRYO DISPOSITION AND EFFICIENCY IF PRECOMMITMENTS ARE ABSENT OR NOT ENFORCED

With the use of IVF and the storage of embryos growing, legislatures and courts will be faced with devising rules for resolving disputes over disposition of frozen embryos in divorce and other circumstances. A main argument for enforcing precommitments for disposition of frozen embryos is the importance

195 This is not inconsistent with the earlier claim that children with only one rearing parent will have meaningful and satisfying lives. It may be better to have two parents, even if having only one is adequate and acceptable.

196 *See supra* note 190.

197 *See, e.g.*, TEX. FAM. CODE ANN. § 151.101(b) (Vernon 1996).

198 *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

of the freedom that it provides individuals at *Time A* to control or restrain future reproductive choices at *Time B*. An additional advantage is the greater efficiency it provides in resolving those disputes which do arise. If the situation is covered by a valid agreement, there will be little about which to argue. While disputes about the validity of the contract may still occur, they are likely to be much fewer if procedures for making such contracts are well-defined.[199]

If contractual agreements are not honored, courts or legislatures will have to decide what set of interests to prefer in such conflicts and then implement those choices as disputes arise.[200] Although efficiency in resolving disputes and conserving judicial resources is not a preeminent value, it is nonetheless important. It is a plus if precommitment policies that enhance reproductive choice are also efficient.

To avoid fact intensive inquiries, some states may adopt immutable rules prohibiting any use of advance agreement in these situations, or default rules for cases in which precommitments are absent. Such rules might specify that in cases of dispute, embryos will always be discarded, or that such embryos will be implanted into a willing recipient, with rearing rights and duties assigned as deemed fit.[201] Another alternative would be to favor discard generally, unless the other party had no other reasonable means of reproduction.

A default rule could be to implant always, if one party's wishes avoids destruction of embryos and helps parties trying to reproduce. Women who have undergone intrusive physical burdens to produce the embryos might prefer this option, but some men might as well.[202] Nor would it be unconstitutional to treat provision of sperm for IVF like provision of sperm through coitus or for artificial insemination.[203] In coital reproduction, once the

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[199] *See* discussion of contract formation, *supra* notes 135-37.

[200] *See* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 405, 409-18 (1990).

[201] I forego discussion of other rules that might be adopted, such as split evenly, sweat equity, and lottery. *See* John A Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CTR. REP., Nov.-Dec. 1989, at 7-12.

[202] *See J.B. v. M.B.*, 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000).

[203] The trial court in *Kass v. Kass*, 696 N.E.2d 174, 177 (N.Y. 1998), was overbroad and imprecise on this issue, but its point that location of embryos outside the man's body might be treated, at the woman's discretion as irreversible a step toward reproduction as is sexual intercourse, is a reasonable default position to adopt. *See* Edward R. Adams, *Wife Granted Frozen Embryos*: *First Impression Ruling Issued in Matrimonial Dispute*, 213 N.Y.L.J. 1 (Jan. 20, 1995). There are also strains of such a position in *Nachmani v. Nachmani*,

sperm is deposited inside the vagina, the male loses the right to avoid or insist on reproduction, for the sperm is now in the woman's body and under her control. Similarly, a sperm donor probably loses the right to control whether the sperm is then used, once he provides the sperm to the recipient or intermediary handling the donation.[204] Such a rule is pro-natalist and pro-life, and assumes that the child is not irreparably harmed by being born with an absent genetic parent.

The opposite default rule—always discard if unavailable or in dispute—may have greater support in the United States. Here, contemporaneous unwanted reproduction is privileged over the desire to reproduce, both because of the interest in having a child born with two rearing parents and in avoiding reproduction unless a person has consented to it. In addition to courts in Massachusetts and New Jersey, some commentators and the New York State Task Force on Life and the Law have taken this position, even though it gives insufficient attention to the interests of the party with no reproductive alternatives.[205]

An intermediate position, taken in *Davis v. Davis*[206] and implied in *J.B. v. M.B.*, is to favor discard unless the other party could establish that he or she has no other reasonable means of reproduction except with the embryos in question. This approach is more fine-tuned than either of the other two rules, but does require a factual inquiry and decision about what physical conditions constitute infertility, and whether adoption, stepparent, or foster-parent options are close enough substitutes.

Any of the three default positions discussed—assess the equities, always implant, always discard—are rational solutions for disposition of frozen embryos when precommitments are absent. But none of these default positions is compelling enough to justify a rule that denies the parties the ability to contract for a different result. Even if states are constitutionally free to ignore

50(4) P.D. 661, the decision of the Israeli Supreme Court awarding frozen embryos to the woman after separation. *See* J. Greenberg, *Israeli Court Gives Wife Right to Her Embryos*, N.Y. TIMES, Sept. 13, 1996, at A10.

[204] *But see supra* note 148. In Victoria, a sperm donor may withdraw consent up until a fertilization procedure with the sperm has occurred. Infertility Treatment Act, 1995, § 13 (Austl.).

[205] N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 24, at 317-18. Its report ignores the loss suffered by the party then unable to reproduce, who will often be the woman who had undergone the physical burdens of IVF. Nor does it distinguish between reproduction *tout court* and full rearing rights and duties, and thus the degree of burden which favoring reproduction would entail.

[206] 842 S.W.2d 588 (Tenn. 1992).

reproductive precommitments, the arguments remain strong for allowing the parties to bind themselves at *Time A* as they choose.

IX. PRECOMMITMENT STRATEGIES AND THE CONTRACTUALIZATION OF REPRODUCTION

The case for enforcing precommitment strategies for frozen embryos (and rearing rights and duties in resulting offspring) grows out of the special needs of the IVF context. Whether those same devices should be available for other reproductive choices depends on their advantages and disadvantages in those settings, not on the solution chosen for IVF.

Some persons might argue, however, that IVF practices are not separated easily from other reproductive practices.[207] Appealing to fears of a slippery slope, they predict that recognition of contracts for disposition of frozen embryos inevitably will hasten the contractualization of other reproductive arrangements to the detriment of participants and offspring. Three areas of contractualization are of special concern.

One is the fear that approval of contracts for frozen embryos will lead to enforcement of reproductive precommitments entailing bodily intrusions or performances, such as agreements to implant or not implant embryos, to test or not test fetuses carried by surrogate mothers, or to abort or not abort pregnancies, however achieved. Persons opposed to contractualization argue that decisions over the use of the body in reproduction should never be controlled by advance agreement, because liberty requires that one should always be free to decide at *Time B* whether to use the body in a particular way.

It is difficult, however, to believe that acceptance of precommitments for disposition of frozen embryos will in itself lead to a contract regime for bodily intrusions different than would have otherwise existed. As noted previously, contracts for implantation of frozen embryos involve no bodily intrusion or performance by the objecting party, and thus are not a precedent for contracts that do. The relative importance of freedom at *Time A* over freedom at *Time B* depends on the performance and intrusion in question and other burdens and benefits involved, and not significantly on the position taken with regard to precommitments for implantation of frozen embryos.[208]

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[207] *See* Annas, *supra* note 24, at 373-76.

[208] Contracts with gestational surrogates to abort or not abort, for example, might be treated differently than abortion agreements between couples before sexual intercourse. In the former the infertile couple has

A second area of concern is that the enforcement of contracts for implanting frozen embryos will encourage legal recognition of contracts for gamete and embryo donation and surrogacy, thus fostering those practices and the risks to donors, surrogates, and the children they entail. Although it is unlikely that legal recognition of agreements for frozen embryos will affect the willingness of states to legislate on other family law issues in assisted reproduction, it would be a desirable outcome if they did, for the current absence of legal infrastructure for many of these reproductive arrangements is a problem.

Most uses of contract in collaborative reproduction have been in the area of artificial insemination with donated sperm. In the case of married couples, the law of thirty-five states reflects a contractualist or advance waiver approach to these arrangements.[209] The remaining states, and states that have no provision for donations to single- or same-sex couples, thus allow a common practice to occur without clear legal rules for parties contemplating the use of donor sperm. Enforcement of precommitments for rearing resulting in children would be a clear improvement over the present lack of law.

A similar dearth of law affects egg and embryo donation and gestational surrogacy. Only five states have legislation on egg donation, yet more than 5,000 egg donation cycles now occur annually.[210] Only two states have law on embryo donation.[211] More states (twenty-three) have legislated against giving effect to surrogacy contracts, but none of those laws distinguish between full surrogacy, in which the gestator provides the egg and conception occurs artificially in vivo, and gestational surrogacy, in which the surrogate gestates the embryo provided by the couple.[212]

entrusted their embryos to the surrogate in reliance on her promise regarding abortion and their lack of other gestational options. A case for awarding damages might be justified if she then breaches, even if specific performance is not.

[209] For state citations, see Lori B. Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 378 n.17 (2000).

[210] FLA. STAT. ch. 742.14 (1997); N.D. CENT. CODE § 14-18-04 (1997); OKLA. STAT. ANN. tit. 10, § 555 (West 1998); TEX. FAM. CODE ANN. § 151.102 (Vernon 1996); VA. CODE ANN. § 20-158 (Michie 1995). The most recent available data for number of egg donation cycles by clinics reporting to the CDC-ASRM registry lists 5,162 donor cycles in 1996, which suggests that considerably more are being done now. The number of cycles, however, does not tell us how many donors are involved, a figure that is not available. *See* CTRS. FOR DISEASE CONTROL & PREVENTION-AMERICAN SOC'Y FOR REPROD. MED. & RESOLVE, ASSISTED REPROD. TECH. IN THE U.S. 22 (1997).

[211] FLA. STAT. ch. 742.14 (1997); TEX. FAM. CODE ANN. § 151.102 (Vernon 1996).

[212] Andrews, *supra* note 209, at 379 n.24.

In states without surrogacy laws, courts have been more receptive to enforcing rearing agreements with gestational surrogates. The California Supreme Court in *Calvert v. Johnson* gave legal effect to the surrogate's preimplantation agreement to relinquish rearing at birth.[213] A California appeals court also gave effect to a gestational surrogacy contract in *Buzzanca v. Buzzanca*, when a couple who had contracted for an embryo donation and surrogate gestator split up prior to birth and disowned any responsibility for the child.[214] The court assigned parentage solely on the basis of the intentional and contractualist understandings of the parties, holding the contracting couple liable for child support because they undertook this obligation in initiating the donation and surrogacy.[215]

Legal recognition of collaborative reproduction agreements by statute or judicial decision is a good way to fill the legal vacuum that often faces infertile couples who must resort to sperm, egg, or embryo donation, or surrogacy. Although legal clarification might facilitate more use of these techniques, clear law is preferable to no law, for it provides the certainty needed for planning, protection of the parties, and a more intelligent exercise of reproductive options.[216]

A third area of concern is that contracts for implantation of frozen embryos will loop back and affect rearing rights and duties in children born from sexual intercourse, encouraging more people to form families from preconception and prenatal contracts for adoption. If so, a woman who is unable or unwilling to adopt could agree to be impregnated by a man on condition that he will have no rearing rights or duties in a resulting child. Of much greater concern, it might legalize a system in which poorer women are paid money for getting pregnant and agreeing in advance to have their children adopted.

At present, no state permits the advance allocation of rearing rights and duties in coitally conceived offspring, even when contractual allocation might be permitted for donor gametes, surrogates, or frozen embryos. Although this situation prevents some persons from realizing parenthood coitally, the right to reproduce has never included the right to conceive children and not be

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213 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993).

214 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

215 It is unclear whether the court would have decided parenting claims asserted by the gestating woman on the same basis, because the couple had not, as in *Calvert v. Johnson*, provided the gametes themselves, though they did arrange for their provision by separate donors.

216 For a discussion of the merits of a facilitative legal infrastructure, see John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 922-25 (1996).

responsible for their welfare. Nor has it included a right to acquire nonrelated children for rearing, which is the liberty interest served by commissioned adoptions.[217] Because commissioned pregnancies for adoption implicate *rearing* as opposed to *reproductive* interests (the rearing parent has no biologic connection with the child), state discouragement of such arrangements does not infringe reproductive rights. Given the strong support for existing policies that reject contracts to adopt, recognition of contracts for implantation of frozen embryos should have no effect on whether a contract regime is extended to coital reproduction.

X. IMPLICATIONS FOR PRECOMMITMENT THEORY

The discussion of precommitment strategies for disposition of frozen embryos is a useful step on the way toward developing a more general theory of precommitment strategies. First, it shows clearly the temporal dissonance or tension in all precommitment situations, and thus the dilemma for policymakers deciding whether to permit or encourage the use of such strategies. Whether used to aid self-paternalism or to combine with others to produce a joint product, precommitment devices operate by privileging the self's freedom at *Time A* over the self's freedom at *Time B*, without the *Time B* self having had a say in the discussion, until *Time B* arrives and she expresses a different preference.

The dilemma is that there is no clear, a priori way to determine which self—freedom at which time—is more important. As Schelling notes, the problem is similar to the problem of the interpersonal comparison of utilities.[218] Just as between two persons, there is no way to know definitively whose utility is greater, as there is no way to say which self or temporal preference should have priority. At bottom, a normative judgment or commitment to a particular view of autonomy and freedom is required.

For individuals, the question of whether *Time A* or *Time B* freedom is preferable is primarily an existential choice to be made as persons choose and structure their lives, and experience the satisfaction or regret that such decisions carry for them at *Time A* and *Time B*. For society and the law, the question of whether to enforce such arrangements—whether to prefer freedom at *Time A* or freedom at *Time B*—is more policy-oriented and pragmatic. That

[217] ROBERTSON, *supra* note 5, at 142-44.

[218] *See* Schelling, *Self-Command*, *supra* note 33, at 8.

judgment depends on many factors, including the knowledge and circumstances in which the precommitment was made, the freedom or activity that is precommitted, the gains from precommitment, the costs of regret at *Time B*, and the reliance interests of other persons in enforcing the commitment. Although precommitment strategies enhance freedom, they exact a price in freedom at *Time B*. Rather than prescribe precommitment policy generally, each precommitment situation must be assessed on its own terms, with a recognition and assessment of the temporal choice trade-offs that are at stake in that instance.[219]

Studies of precommitment strategies for frozen embryos also show the relative advantages and disadvantages of particular forms of precommitment. Although they lack the self-paternalism aspects of many precommitment devices, frozen embryo precommitments enhance an individual's *Time A* freedom and control her *Time B* choices in other ways. Advance directive strategies for frozen embryos are, like living wills, applicable when the maker is no longer available to express a different view, and thus do not limit *Time B* freedom in the way that self-binding or contractual precommitments do that take effect when the person regrets his or her earlier choice. Although advance directives for frozen embryos may be self-binding only and at some point as irreversible as Ulysses contracts, they bind irreversibly only because the maker is not available or competently able at *Time B* to disagree.[220]

Contracts for postdivorce implantation and rearing, on the other hand, do involve clear conflicts between *Time A* and *Time B* preferences. But here, another person has relied on the *Time A* preference and precommitted herself in turn—a key factor lacking in purely self-binding situations. While this difference is usually significant enough to privilege the *Time A* contractual choice over the other party's *Time B* preference to renege on the contract, societal estimates of the importance of *Time B* freedom or doubts about the validity of the *Time A* commitment may lead to a different result. I have argued that refusal to enforce an agreement for implantation of frozen embryos requires a more convincing justification than has yet been provided by courts

[219] Russell Korobkin and Thomas Ulen agree that a "situation specific judgment" will have to be made in determining whether public policy should support or discourage various precommitment devices, which they discuss under the rubric of "time inconsistent discount rates" and the multiple-selves problem. *See* Korobkin & Ulen, *supra* note 32, at 1124.

[220] If he were available, the *Time B* directive would not take effect, or he could revoke it before *Time B* arrives. A proxy could communicate a different choice on his behalf, but would not have actual *Time B* knowledge that the maker's competent preferences had changed because the maker is incompetent. *See supra* notes 46-49.

or commentators. Indeed, as this article has shown, analysis of the competing considerations should lead to a preference for enforcing properly made *Time A* commitments for implantation or other disposition of frozen embryos at *Time B*. But this conclusion tells us little about how other precommitment situations should be handled.

CONCLUSION

Investigation of precommitment strategies for frozen embryos shows the paradoxical relation between freedom and restraint. It is not absurd, as Rousseau claimed, for "the will to put itself in chains for the future," if the chains are freely chosen and the increase in freedom is a net gain. Given the complex personal value judgments involved in undergoing IVF and freezing embryos, precommitments for disposition of frozen embryos are reasonable ways to increase an individual's procreative freedom when *Time B* outcomes matter in advance to her. A person might believe quite reasonably that reproductive freedom at *Time A* is preferable to the risk of the loss of reproductive and rearing freedom at *Time B*, and commit herself accordingly as a condition of undergoing IVF. With clear standards for informing people of the legal implications of such choices and assuring that their precommitments are freely made, there are sound reasons for giving effect to precommitment strategies in the IVF clinic.