CONCEIVING A NEW LEGAL FRAMEWORK: THE IMPLICATIONS OF TEXAS ABORTION REGULATIONS FOR IN VITRO FERTILIZATION

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ABSTRACT

Following the overturning of Roe v. Wade *with the United States Supreme Court's 2022 decision,* Dobbs v. Jackson Women's Health Organization*, abortion has no longer been deemed to be a fundamental right and regulating abortions has been left to the states. Some states have continued to allow abortion with limited restrictions while others, such as Texas, have implemented regulations with, arguably, strict restrictions. In lieu of* Dobbs*, some states have acted to explicitly exempt the destruction of embryos created through in vitro fertilization (IVF) in their legislation, while others have issued attorney general memorandums to provide clarification in the alternative. Texas has not taken any action at this time. Legal experts, medical practitioners, and citizens have remained in the dark as to Texas's legislative intent and whether IVF embryos that are not implanted into a patient may be destroyed at the dissolution of a marriage, death of an individual or simultaneous death of the couple, or within standard medical practices when embryos are defective, abandoned, or treatment is terminated. To alleviate this confusion and provide guidance, it is vital for the Texas legislature to act and provide explicit exemptions for the destruction of IVF embryos, or in the alternative, issue an attorney general memorandum to provide some sort of clarification. If Texas continues failing to act, multiple concerns may arise such as constitutional issues and a negative impact on state commerce.*

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I. INTRODUCTION

Suppose a husband and wife in Texas are facing difficulty conceiving a child.[1] They decide to look into their options for assisted reproductive therapy (ART) and decide to go through with in vitro fertilization (IVF), a type of ART.[2] Prior to beginning the process, the clinic overseeing the procedure has the couple create a contract regarding the fate of their stored, frozen embryos in the event of divorce or the death of one of the partners.[3] Because of their current, happy relationship, the couple decide that it would be best for the embryos to be destroyed in the event of a death of one of the spouses and for the husband to have the right to destroy the embryos in the event of a divorce.[4] A few years later, the couple decide to divorce.[5] However, the question becomes whether the husband has the right to destroy the embryos per their original contract, under new abortion regulations.[6] In a situation like this, the wife could potentially argue that, under laws defining personhood, the embryos should not be deemed as property but rather as life; thus, the embryos should not be disposed.[7]

In the United States, infertility is not an uncommon issue.[8] In fact, the Centers for Disease Control and Prevention reports that 19% of women between the ages of nineteen and forty-nine who have had no previous births are considered infertile.[9] In this event, an individual may decide to conceive through IVF.[10] However, IVF is not exclusive to individuals with infertility issues and may also be appropriate when one reaches an advanced maternal age or for same-sex couples.[11] Since the first baby was born through IVF in 1978, over 8 million children have been born through this alternative process.[12]

The average cost of an IVF cycle in the United States can range between $15,000 and $20,000, depending on the cost of medication.[13] Because of the high cost and invasiveness of the IVF procedure, it is common practice to

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1. *See* Antoun v. Antoun, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *1 (Tex. App.—Fort Worth July 13, 2023, pet. denied).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See* Antoun v. Antoun, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *1 (Tex. App.—Fort Worth July 13, 2023, pet. denied).
7. *See id.*
8. *Infertility: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2024), https://www.cdc.gov/reproductive-health/infertility-faq/index.html [https://perma.cc/8AGY-QMXZ].
9. *Id.*
10. *See IVF (In Vitro Fertilization)*, CLEVELAND CLINIC, https://myclevalandclinic.org/health/treatments/22457-ivf (last visited Mar. 2, 2023) [https://perma.cc/N7YR-7YHC].
11. *Id.*
12. *Id.*
13. *Id.*

collect multiple eggs at a time to create embryos and store them through cryopreservation, where they will remain frozen until implantation.[14] The cost of this storage process may create an additional financial burden because of the necessity of maintaining the liquid nitrogen used to keep embryos in their frozen state.[15]

Since the Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health*, concerns have arisen as to whether embryos created through IVF and frozen through cryopreservation are considered "human life."[16] While some states have explicitly clarified or exempted embryos created through IVF in their abortion laws, Texas has failed to act.[17]

Part II of this Comment discusses the standard medical practices and IVF procedure.[18] Part III outlines the history of United States Supreme Court cases regarding procreation and the regulations of Texas and other states post-*Dobbs*.[19] Part IV considers the inconsistencies in the current Texas regulations, how Texas regulations have already impacted other forms of ART, the constitutional issues that may be presented, potential issues regarding cost of storage, issues arising from the current outdated legislation, and the potential effect on commerce.[20] Ultimately, this Comment concludes that there is a need for Texas to explicitly exempt embryos created through IVF from their abortion laws or, alternatively, issue a memorandum of clarification.[21]

II. UNDERSTANDING ASSISTED REPRODUCTIVE TECHNOLOGY, IN VITRO FERTILIZATION, AND STANDARD MEDICAL PRACTICES

IVF is a form of ART.[22] During this procedure, ART is used to fertilize an egg using sperm outside the body.[23] This process is sometimes referred to

14. *Id.*; *see* Yeganeh Torbati, *With egg freezing increasingly common, fertility clinics hike storage fees*, WASH. POST (Apr. 14, 2023, 10:40 AM), https://www.washingtonpost.com/business/2023/04/12/egg-freezing-storage-prices/ [https://perma.cc/BAY7-N24B]; Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

15. *See* Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

16. *See* Anne M. Brendel & Rebecca Kennedy, *Implications of Abortion Laws for Fertility Services*, GOODWIN L. (Jan. 20, 2023), https://www.goodwinlaw.com/en/insights/publications/2023/01/01_20-implications-of-abortion-laws-for-fertility-services [https://perma.cc/852V-PGHU].

17. María Méndez, *IVF treatment can continue under Texas' current abortion law, experts say*, TEX. TRIBUNE, https://www.texastribune.org/2022/07/13/texas-ivf-treatments/ (last updated July 15, 2022) [https://perma.cc/H65x-MFSN]; *In Vitro Fertilization*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortIon-laws/related-topics (last updated Nov. 12, 2024, 9:00 AM) [https://perma.cc/MEM8-8AF8].

18. *See* discussion *infra* Part II.

19. *See* discussion *infra* Part III.

20. *See* discussion *infra* Part IV.

21. *See* discussion *infra* Part VI.

22. *IVF (In Vitro Fertilization)*, *supra* note 10.

23. *Id.*

as "test-tube" conception.[24] In 1978, British scientists Dr. Robert Edwards and Dr. Patrick Steptoe contributed to the birth of the first child conceived through IVF, Louise Brown.[25] In fact, Louise is still alive and well today.[26] In recalling the life of her mother, Lesley Brown, Louise told Time Magazine, "[N]ot long before mum passed away, she said that without IVF she wouldn't have anybody left in the world . . . [E]ven up to her last days she was proud of who she was and what she did [for the progression of ART]."[27]

ART has been used in the United States since 1981, with the most common form being IVF (99% of fertility treatments in the United States involve IVF).[28] These "test-tube babies" are born just as healthy as naturally conceived children—notably, an estimated 8 million children internationally have been conceived through IVF methods.[29] IVF is a common procedure for individuals with infertility issues, who are of advanced maternal age or for individuals in same-sex partnerships.[30] Regarding infertility or medical issues, IVF may be an option for individuals who have blocked or damaged fallopian tubes, endometriosis, low sperm count, polycystic ovary syndrome (PCOS), uterine fibroids, or are at risk of passing on a genetic disease or disorder.[31] Following the first pregnancy resulting from a frozen embryo in Australia in 1983, cryopreservation has also become a common means of storing embryos prior to implantation.[32] This section will explain the IVF procedure by dividing the process into three steps: (1) preparation, (2) procedure, and (3) embryo transfer or cryopreservation.[33]

A. Preparation

There are two types of artificial insemination processes—homologous insemination (AIH) and heterologous insemination (AID).[34] AIH is the process in which an individual is artificially impregnated with their partner's

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24. Rachel Gurevich, *The Past and Future of In Vitro Fertilization*, VERY WELL FAM., https://www.verywellhealth.com/rachel-gurevich-4781242 (last updated July 6, 2020) [https://perma.cc/3BEN-CUAG].

25. *Id.*; Milandria King, *Cold Shoulder Treatment: The Disposition of Frozen Embryos Post-Divorce*, 25 T. MARSHALL L. REV. 99, 100 (2000).

26. *The History of IVF: Origin and Development of the 20th Century*, PAC. FERTILITY CTR. L.A. (July 25, 2022), https://www.pfcla.com/blog/history-of-ivf [https://perma.cc/8CHD-AK9H].

27. Ciara Nugent, *What It Was Like to Grow Up as the World's First 'Test-Tube Baby'*, TIME MAG. (July 25, 2018, 5:00 AM), https://time.com/5344145/louise-brown-test-tube-baby/ [https://perma.cc/4MPQ-XPF4].

28. Robert E. Oliphant & Nancy Ver Steegh, WORK OF THE FAM. LAW. 1, 782 (Wolters Kluwer, 5th ed. 2020); *The History of IVF: Origin and Development of the 20th Century*, *supra* note 26.

29. Gurevich, *supra* note 24.

30. *IVF (In Vitro Fertilization)*, *supra* note 10.

31. *Id.*; Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

32. Oliphant & Ver Steegh, *supra* note 28, at 782 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach*, 84 MINN. L. REV. 55 (1999)).

33. *See* discussion *infra* Sections II.A–C.

34. Oliphant & Ver Steegh, *supra* note 28, at 782.

semen, while AID is the process of insemination using a third-party donor.[35] AID has increased in popularity in the United States because of the unavailability of adoptive children and for the purposes of avoiding hereditary diseases found within the family.[36] IVF differs from AIH and AID because, for IVF, fertilization of an egg occurs outside of the body and is later transferred into the uterus.[37] However, donations of eggs or sperm may still be used for the IVF procedure.[38] Preparation for these IVF procedures occurs through three steps—contracting, testing, and prescribing birth control.[39]

Prior to beginning the entirety of the IVF procedure, clinics will provide couples with many forms and waivers, including an IVF agreement.[40] While the effectiveness of these agreements may vary from state to state, these agreements provide a clinic with clarity on how to handle cryopreserved embryos in the event of death, divorce, or termination of treatment.[41] In the event of a divorce, a couple may elect to have the embryos destroyed, donated to medical research or a third party, or choose to allow one of the spouses to make the decision at a later date.[42] A potential contract for IVF supplied by a clinic may provide a couple with the following options in the event of dissolution of the marriage, death of a spouse, or simultaneous death; for example:

> I/we agree that the embryos should be disposed of as checked below (check only one box):
> 1. ❑ Give to Patient's Spouse or Partner, which gives complete control over the embryos for any purpose, including implantation to achieve a pregnancy, donation to achieve pregnancy by someone else, donation for research or clinical training, or destruction and discard. . . .

35. *Id.*

36. *Id.*

37. *Id.*

38. *Egg Donation (for the recipient)*, YALE MED., https://www.yalemedicine.org/conditions/egg-donation-recipient (last visited Nov. 13, 2023) [https://perma.cc/F8AQ-Y2YJ]; *Donor Sperm Insemination*, UCSF HEALTH, https://www.ucsfhealth.org/treatments/donor-sperm-insemination (last visited Nov. 13, 2023) [https://perma.cc/NQP9-J56C].

39. *See IVF (In Vitro Fertilization)*, *supra* note 10.

40. Derek Mergele-Rust, Comment, *Splitting the Baby: The Implications of Classifying Pre-Embryos as Community Property in Divorce Proceedings and Its Impacts on Gestational Surrogacy Agreements*, 8 TEX. TECH. EST. PLAN. & CMTY. PROP. L.J. 505, 509 (2016).

41. *Id.*; Matthew Ellis, Comment, *In Vitro Fertilization and Consent Agreements: Where Does California Stand?*, 42 SANTA CLARA L. REV. 1191, 1194 (2002).

42. Amy Fontinelle, *Who Gets the Frozen Embryos in a Divorce—and Other Issues*, INVESTOPEDIA, https://www.investopedia.com/who-gets-the-frozen-embryos-in-a-divorce-and-other-issues-5197047#:~:text=Your%20doctor%27s%20office%20may%20have,or%20to%20a%20third%20party (last updated Nov. 11, 2024) [https://perma.cc/QVT4-ZMNA].

> 2. ❑ Donate to achieve pregnancy, either to one or more recipient located and selected by [the clinic] or to a specific recipient(s) we identify here[.]
> . . .
> If the named individual or couple is unable or unwilling to accept the embryos, I/We direct [the clinic] as checked below (choose either option 1 or 2):
>
> > 1. ❑ Do not donate to another recipient(s), or entity, but discard our embryos.
> > 2. ❑ Try to locate and donate to an embryo bank or one or more recipient(s) to attempt a pregnancy if practical (as determined by [the clinic] in its sole discretion), and if this is not possible, discard our embryos.
>
> . . .
> 3. ❑ Donate for research purposes, including but not limited to embryonic stem cell research, which may result in destroying the embryos, but will not result in the birth of a child.
> 4. ❑ Donate for clinical training, which may result in destroying the embryos, but will not result in the birth of a child.
> 5. ❑ Discard the embryos. . . .[43]

Notably, it has been reported that couples who choose to dispose of, instead of donate, their embryos most commonly express concerns of the potential misuse of embryos if they were donated.[44] In some cases, a donor may request that their donated embryos are not to be destroyed if the donee decides to no longer pursue ART treatment.[45] However, prohibiting a donee from the destruction of embryos senselessly forces a donee to store embryos indefinitely.[46] Therefore, a donee may dispose of donated embryos, even if it is against the donor's wishes.[47]

Criticism regarding IVF agreements arises because couples may be in a "happier" place at the time of contracting and may not contemplate the consequences of their agreement.[48] Regardless, some courts continue to uphold these agreements or contracts and consider them binding onto the

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43. *Embryo Disposition Agreement*, MAIN LINE FERTILITY CTR. 1, 1–10 (2018), https://www.mainlinefertility.com/wp-content/uploads/2019/02/SART-Disposition-of-Embryos-2019.pdf [https://perma.cc/HHY2-VX8Z].

44. *See* Rose Maria Massaro Melamed et al., *Deciding the fate of supernumerary frozen embryos: parents' choices*, 12 HUM. FERTILITY 185, 187 (2009).

45. Guido Pennings, *Decisional authority of gamete donors over embryos created with their gametes*, 37 J. OF ASSISTED REPROD. & GENETICS 281, 283 (2020).

46. *Id.*

47. *Id.*

48. *See* Fontinelle, *supra* note 42.

parties.[49] In fact, an argument can be made that a breach of contract exists if one party files suit against another contrary to a previous IVF agreement, as seen through the recent suit between actress Sofia Vergara and her ex-partner, Nick Loeb.[50]

Following contracting, screening for preparation is necessary.[51] Some states may even legally require medical testing in cases were sperm is donated.[52] The screening or testing process of preparation may vary from clinic to clinic.[53] Testing may include ovarian reserve testing, semen analysis, infectious disease screening (for diseases such as HIV), practice embryo transfer, and a uterine exam.[54] These tests typically screen for hepatitis B, hepatitis C, FSH or estradiol, thyroid-stimulating hormone (TSH), varicella, rubella, cystic fibrosis, and hemoglobin electrophoresis.[55] These tests may be run on the female partner, the male partner, and egg or sperm donor and surrogate, if applicable.[56] All of these tests are done to eliminate any potential risks and assist a physician in determining the best way to proceed with the IVF process.[57]

Prior to beginning an IVF procedure, a physician is likely to prescribe birth control to stop the release of ovulation hormones.[58] Birth control may help stop the abnormal release of hormones, manage medical condition side effects such as PCOS, and schedule and control the beginning of ovulation.[59]

Ovarian stimulation is the next phase of the IVF process, following the preparation and prescription of birth control.[60] During this phase, two key hormones (follicle stimulating hormone and luteinizing hormone) are injected into the patient for eight to fourteen days.[61] These injections help

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49. *See* Mergele-Rust, *supra* note 40.

50. Megan E. Cobb, *Sofia Vergara: In Vitro Fertilization and the Right Not to Procreate*, WAKE FOREST L. REV.: CURRENT ISSUES BLOG (Mar. 25, 2021), https://www.wakeforestlawreview.com/2021/03/sofia-vergara-in-vitro-fertilization-and-the-right-not-to-procreate/ (stating that the Los Angeles Superior Court found Nick Loeb in breach of contract for suing for custody of the couple's embryos despite having a contract with Sofia Vergara to set up a trust for the embryos) [http://perma.cc/4TLC-FWQ7].

51. *In vitro fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [http://perma.cc/MWM2-MLA8].

52. *See* DEL. CODE ANN. tit. 16, § 2801(b) (West 2017); *see* OHIO REV. CODE ANN. § 3111.91 (West 2015).

53. *In vitro fertilization (IVF)*, *supra* note 51.

54. *Id.*

55. *IVF testing requirements at PFCLA*, PAC. FERTILITY CTR. L.A., https://www.pfcla.com/services/in-vitro-fertilization/testing/requirements (last visited Jan. 30, 2024) [http://perma.cc/FL4P-NTGA].

56. *Id.*

57. *In vitro fertilization (IVF)*, *supra* note 51.

58. Cathy Lovering, *Birth Control Pills Before IVF*, HEALTHLINE (Mar. 24, 2023), https://www.healthline.com/health/birth-control/birth-control-before-ivf [https://perma.cc/SLE7-S97B].

59. *Id.*

60. *What to Expect from Ovarian Stimulation in IVF*, ASPIRE FERTILITY (Nov. 29, 2015), https://www.aspirefertility.com/blog/what-to-expect-from-ovarian-stimulation-in-ivf [https://perma.cc/PZ2R-XUCV].

61. *Id.*

maximize the number of retrievable eggs.[62] It is important to retrieve as many eggs as possible due to the costliness and invasiveness of IVF, and to ultimately avoid unnecessary repeats of the process.[63]

B. Procedure

After the final stimulation injection, within thirty-four to thirty-six hours, the eggs are retrieved from the patient's ovaries.[64] Prior to retrieval, a medication is administered to the patient to alleviate any pain that may be felt through the procedure.[65] An ultrasound device is then placed into the vagina to assist in locating follicles, and a thin needle connected to a suction tool is inserted using the ultrasound device to collect the eggs.[66] On average, ten to fifteen eggs are retrieved; however, that number may be higher or lower depending on age.[67] Notably, the number of eggs retrieved does not equate to the number of possible embryos because the mature eggs then need to be fertilized.[68] On average, after fertilization, only about 50% of mature eggs develop far enough to be considered for cryopreservation or implantation.[69]

Following egg retrieval, the mature eggs are placed into a laboratory dish with the sperm.[70] This dish is then stored in an environmentally controlled chamber to await fertilization.[71] Usually, fertilization occurs in a matter of a few hours.[72] Approximately 80% of retrieved eggs will fertilize.[73]

For the following five to six days after fertilization, the fertilized eggs are monitored to ensure proper and healthy embryonic development.[74] The

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62. *Id.*

63. Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

64. *In vitro fertilization (IVF)*, *supra* note 51.

65. *Id.*

66. *Id.*

67. Halle Tecco, *The IVF Funnel: Understanding Your Chances of Success*, NATALIST (Feb. 18, 2024), https://natalist.com/blogs/learn/the-ivf-funnel-understanding-your-chances-of-success [https://perma.cc/88LP-HJZ4]; *Number of eggs retrieved and IVF success rates according to female age*, ADVANCED FERTILITY CTR. OF CHI., https://advancedfertility.com/success/age-and-fertility-success-rates/ (last visited Jan. 31, 2024) ("Women under 35 have the highest success rates in all of the 'egg number' groups[.] Women under 38 in our IVF program have acceptable live birth rates even with only 3-6 eggs, do better with more than 6 eggs, and do best with more than 10 eggs. Women 38-40 and 41-42 have low live birth rates with low egg numbers. Success rates are much better when relatively high egg numbers are obtained. All age groups have very low success rates with less than 3 eggs retrieved.") [https://perma.cc/W8KC-RJVE].

68. *Number of eggs retrieved and IVF success rates according to female age*, *supra* note 67.

69. *IVF (In Vitro Fertilization)*, *supra* note 10.

70. *In vitro fertilization (IVF)*, MEDLINEPLUS, https://medlineplus.gov/ency/article/007279.htm (last reviewed Mar. 31, 2024) [https://perma.cc/T2SP-E8VE].

71. *Id.*

72. *Id.*

73. Cynthia Murdock, *IVF Attrition Rate: Why Don't All Eggs Create Embryos?*, ILLUME FERTILITY (May 30, 2024), https://www.illumefertility.com/fertility-blog/ivf-attrition-rate [https://perma.cc/7D3R-REP9].

74. *IVF (In Vitro Fertilization)*, *supra* note 10.

first day following fertilization, physicians monitor and ensure the presence of two pronuclei in each egg.[75] If an egg contains more or less than two pronuclei, there is likely a chromosomal abnormality.[76] By the third day, most embryos should have around eight cells and are able to be graded by a physician to determine the likelihood of continual growth.[77] On the final day of monitoring, the cells should reach the blastocyst stage and thus become the placenta or trophectoderm.[78] At this point, embryos may begin "hatching" out of the zona pellucida.[79] This "hatching" must occur prior to implantation.[80] However, these embryos are not considered "life" from a scientific viewpoint if not transferred because the embryo cannot further develop outside of the uterus.[81] On average, only 50% of fertilized embryos successfully develop and are able to be transferred or stored.[82] When embryos fail to develop or have some abnormality, it is common medical practice to discard the affected embryos.[83]

C. Embryo Transfer or Cryopreservation

Finally, a patient may either transfer their embryos for implantation or freeze them for later use—distinguished as "fresh" and "frozen" embryo transfers.[84] During the transfer procedure, the gestational carrier, either a surrogate or the biological parent, is given a mild sedative and the embryo is inserted into the uterus using a catheter and syringe.[85] When embryos are frozen, they are dethawed before implantation.[86] Notably, there is no "expiration date" for cryopreserved embryos.[87] In theory, embryos can remain frozen for decades, and even perhaps centuries.[88] In fact, in one case,

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75. *Embryo Development*, TEX. FERTILITY CTR., https://www.fertilitysanantonio.com/in-vitro-fertilization/embryo-development/ (last visited Jan. 30, 2024) [https://perma.cc/K99G-4CJ6].

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Birgit Kvernflaten et al., *Kin or Research Material? Exploring IVF Couples' Perceptions about the Human Embryo and Implications for Disposition Decisions in Norway*, 19 J. OF BIOETHICAL INQUIRY 571, 571 (2022).

82. *IVF (In Vitro Fertilization)*, *supra* note 10.

83. *Id.*; Mara Simopoulou et al., *Discarding IVF embryos: reporting on global practices*, 36 J. OF ASSISTED REPROD. & GENETICS 2447, 2448 (2018).

84. *See IVF (In Vitro Fertilization)*, *supra* note 10.

85. *In vitro fertilization (IVF)*, *supra* note 51.

86. *IVF (In Vitro Fertilization)*, *supra* note 10.

87. *See id.*

88. Zsolt Peter Nagy et al., *Vitrification of the human embryo: a more efficient and safer in vitro fertilization treatment*, 113 FERTILITY & STERILITY 241, 244 (2020).

a healthy live birth was reported after the cryopreservation of embryos for nineteen years and seven months.[89]

III. CURRENT LEGAL FRAMEWORK

Abortion regulations have an extensive history within the American legal system.[90] Before this Comment analyzes the issues arising from current Texas regulations, the Uniform Parentage Act, United States Supreme Court history, and the responses of states following the infamous *Dobbs* decision must first be established.[91]

A. Uniform Parentage Act

The Uniform Parentage Act (UPA) was established by the National Conference of Commissioners on Uniform State Laws in 1973, before the first successful case of IVF.[92] Following its establishment, the UPA has influenced many state regulations through its various updates over time.[93] Notably, the UPA seeks to ensure equal treatment of children born from same-sex couples and recognizes intended parents without regard to sex, sexual orientation, or marital status.[94] The UPA also recognizes the use of written agreements through the ART process.[95] The UPA serves many functions, including: permitting married couples to have children when a partner is infertile, impotent, or ill; allowing an unmarried person to conceive absent sexual intercourse; encouraging men to donate semen by providing protection against potential future claims from the child or the child's mother; and providing rights to a mother's partner if they consent to artificial insemination.[96] Furthermore, the UPA provides guidance to resolve potential disputes regarding parental rights, specifically in situations when a mother's husband consents to be the father of the child or when an unmarried mother is freed of any claims by the donor for parental rights.[97]

The ideology of the UPA has been adopted in the Texas Family Code.[98] Regarding the establishment of parentage, donors of eggs or sperm are not deemed to be a parent of a child despite the use of their biological materials.[99]

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89. *See* Donna Dowling-Lacey et al., *Live birth from a frozen-thawed pronuclear stage embryo almost 20 years after its cryopreservation*, 95 FERTILITY & STERILITY 1120.e1, 1120.e2 (2010).
90. *See* discussion *infra* Section III.A–D.
91. *See* discussion *infra* Section III.A–D.
92. Oliphant & Ver Steegh, *supra* note 28, at 783; *see* King, *supra* note 25, at 100.
93. Oliphant & Ver Steegh, *supra* note 28, at 783.
94. *Id.*
95. *Id.*
96. *Id.* at 783–84 (citing McIntyre v. Crouch, 780 P.2d 239 (Or. App. 1989)).
97. *Id.*
98. *See* TEX. FAM. CODE ANN. § 160.001.
99. *Id.* § 160.702.

This means that a donor does not have any of the parental rights or duties, including the duty to provide child support.[100] In establishing paternity, a husband is deemed to be a child's father if he provides sperm for the ART process or consents to the ART procedure as provided by Texas Family Code Section 160.704.[101] Section 160.704, titled "Consent to Assisted Reproduction," provides:

> (a) Consent by a married woman to assisted reproduction must be in a record signed by the women and her husband and kept by a licensed physician. This requirement does not apply to the donation of eggs by a married woman for assisted reproduction by another woman.
> (b) Failure by a husband to sign a consent required by Subsection (a) before or after birth of a child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.[102]

Notably, regarding further parentage issues that may arise, such as the rights of same-sex couples, the Texas Family Code provides that the determination of paternity additionally applies to the determination of maternity.[103]

B. Stare Decisis of the United States Supreme Court

Regarding the discussion of the history and stare decisis leading to the regulations we know today, this section analyzes the United States Supreme Court rulings *Griswold v. Connecticut*, *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Dobbs v. Jackson Women's Health Organization*.[104]

1. Griswold v. Connecticut

In the 1965 Supreme Court case of *Griswold v. Connecticut*, the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician and professor appealed their arrests after operating a Planned Parenthood facility in the state for violating a statute prohibiting the use of any instrument for the purpose of preventing pregnancy.[105] Although *Griswold* was not a case about abortion, it did pave the way for the future

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100. *Adoption and Sperm Donation in Texas*, L. OFF. OF BRYAN FAGAN PLLC (Apr. 20, 2021), https://www.bryanfagan.com/blog/2021/april/adoption-and-sperm-donation-in-texas/ [https://perma.cc/348J-2A
46].

101. TEX. FAM. CODE ANN. § 160.703.

102. *Id.* § 160.704.

103. *Id.* § 160.106; *see* Treto v. Treto, 622 S.W.3d 397, 403 (Tex. App.—Corpus Christi-Edinburg 2020, pet. denied).

104. *See* discussion *infra* Sections III.B.1–4.

105. *See* Griswold v. Conn., 381 U.S. 479, 485 (1965).

rulings of *Roe* and *Casey*.[106] Ultimately, the Court found that the Connecticut law was unconstitutional, writing:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principal, so often applied by this Court, that a 'government purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[107]

While *Griswold* only recognized the right to use contraceptives for married individuals, the Supreme Court in *Eisenstadt v. Baird* expanded *Griswold* and recognized the right for unmarried individuals to use contraceptives.[108] Moreover, this right was even further expanded in the Supreme Court case *Carey v. Population Services International*, which recognized the right to sell and distribute contraceptives.[109]

2. Roe v. Wade

In *Roe v. Wade*, an unmarried woman seeking an abortion and her physician asked the Supreme Court to address the constitutionality of Texas's abortion regulations.[110] The Texas statutes at issue provided:

> **Article 1191. Abortion**
> If any person shall designedly administer to a pregnant person or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled.
> By 'abortion' it is meant that the life of the fetus or embryo shall be strong in the woman's womb or that a premature birth thereof be caused.

106. *Tapping the Scales of Justice – A Dose of Connecticut Legal History: The Right to Privacy*, STATE OF CONN. JUD. BRANCH L. LIBR. SERV., https://www.jud.ct.gov/lawlib/history/privacy.htm (last visited Jan. 30, 2024) [https://perma.cc/YEJ9-KW8Q].

107. *Griswold*, 381 U.S. at 485–86 (citing NAACP v. Alaska, 377 U.S. 288, 307 (1964)).

108. *See* Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1973).

109. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977).

110. *See* Roe v. Wade, 410 U.S. 113, 120 (1971).

> **Article 1192. Furnishing the means**
> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
> **Article 1193. Attempting at abortion**
> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
> **Article 1194. Murder in producing abortion**
> If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
> **Article 1196. By medical advice**
> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.[111]

The Court further noted that the Texas statutes criminalizing abortion had remained substantially unchanged since the 1850s.[112]

At common law, abortion was not considered illegal until the "quickening" of the fetus, which occurred around the sixteenth to eighteenth week of pregnancy.[113] Quickening was understood to be the point when the fetus became "recognizably human."[114] However, it is still disputed as to whether, at common law, abortion of a quick fetus was a felony or was viewed as a lesser crime.[115] Regardless, the common law abortion regulations were more favorable to the woman compared to modern American regulations.[116]

Ultimately, the Court concluded that abortion is protected under the Fourteenth Amendment's right of personal privacy.[117] However, according to the Court, the right of personal privacy regarding abortion is not absolute and must be considered against important state interests.[118] Thus, the Court conceived a new legal framework, deeming that a state's compelling and important interest in regulating abortions begins at the end of the first trimester of pregnancy.[119] In other words, according to *Roe*, a state does not have a compelling interest in protecting fetal life until the fetus reaches viability—the point in which the fetus "has the capability of meaningful life outside the mother's womb."[120]

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111. TEX. PENAL CODE ANN. §§ 1991–1996; *see* Tex. Att'y Gen. Op. H-369 (1974) (explaining how *Roe v. Wade* affects the Texas abortion statutes).

112. *Roe*, 410 U.S. at 119; Catherine Martin Christopher, *Nevertheless She Persisted: Comparing Roe v. Wade's Two Oral Arguments*, 49 SETON HALL L. REV. 307, 328 (2018).

113. *Roe*, 410 U.S. at 132.

114. *Id.* at 133.

115. *Id.* at 134.

116. *Id.* at 140–41.

117. *Id.* at 154.

118. *Id.* at 153.

119. *Id.* at 163.

120. *Id.*

3. Planned Parenthood v. Casey

Nineteen years following the *Roe* decision, the United States Supreme Court was asked to analyze the constitutionality of a Pennsylvania statute that required a woman to seek consent from her husband and required a minor to seek consent from her parents prior to receiving an abortion.[121] The Court reiterated that a woman's right to abortion is derived from the Fourteenth Amendment's Due Process Clause that provides "[n]o State shall deprive any person of life, *liberty*, or property without due process of law."[122] While abortion is not explicitly mentioned in the Due Process Clause, the Court recognized that other issues not mentioned in the Clause have been determined to be protected, such as the right to marriage, the right to child rearing, the right to bodily autonomy, and the right for parents to engage in the education of their child.[123] The Court explained:

> These matters, involving the most intimate and personal choices a person may make in their lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[124]

Ultimately, the Court reaffirmed the central holding of *Roe*.[125] Specifically, the Court agreed that a state's legitimate interest should be drawn at viability, which is the time when "there is a realistic possibility of maintaining and nourishing a life outside the womb."[126] However, the Court rejected the trimester framework created through *Roe* and agreed with Justice O'Connor's previous concurrence in *Webster v. Reproductive Health Services*, describing the framework as "problematic."[127] Rather, the Court held that states may not place undue burdens against a woman seeking an abortion before viability of the fetus.[128]

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121. Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).

122. *Id.* at 846 (emphasis added) ("The controlling word in the cases before us is 'liberty.'").

123. *Id.* at 847–51; *see* Loving v. Virgina, 388 U.S. 1, 12 (1967) (recognizing the right to marry for interracial couples); *see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing the right to childrearing and forbidding the act of forced sterilization of habitual criminals); *see* Washington v. Harper, 494 U.S. 210, 236 (1990) (recognizing the right to bodily autonomy and the right to refuse treatment without adequate due process); *see* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (recognizing the right for parents to engage in educating their child).

124. *Casey*, 505 U.S. at 851.

125. *Id.* at 853.

126. *Id.* at 870.

127. *Id.* at 873 (citing Webster v. Reprod. Health Serv., 492 U.S. 490, 518 (1989) (O'Connor, J., concurring in part and concurring in judgment)).

128. *Id.* at 877–78.

4. Dobbs v. Jackson Women's Health Organization

Following *Casey*, the United States Supreme Court overruled both *Casey* and *Roe* in its 2022 decision, *Dobbs v. Jackson Women's Health Organization.*[129] The issue presented to the Court involved a Mississippi statute which provided:

> Except in a medical emergency or in a case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[130]

Thus, the Court was asked to consider "whether all previability prohibitions on elective abortions are unconstitutional."[131] The Court infamously concluded that *Roe* and *Casey* must be overturned and that "the authority to regulate abortion must be returned to the people and their elected representatives."[132] In other words, the Court provided that if women want the right to an abortion, they should vote for it.[133] While the Supreme Court noted that its opinion was not to be understood to negatively impact precedents that do not concern abortion, many legal experts have become concerned over Justice Clarence Thomas's recommendation to revisit other landmark substantive due process cases such as *Griswold* and *Obergefell v. Hodges*.[134] While *Griswold* and *Obergefell* are not substantive due process cases regarding assisted reproductive technology, the right to access assisted reproductive technology in itself is bolstered by the substantive due process argument.[135] Because the majority opinion does not provide the impacts of personhood laws and abortion regulations in regards to IVF, absent any clarification, the problem is left to the states.[136] Although IVF procedures are seemingly different from abortion procedures, following *Dobbs*, many states

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129. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

130. *Id.* at 2243 (quoting MISS. CODE ANN. § 41-41-191 (2018)).

131. *Id.* at 2244.

132. *Id.* at 2279.

133. *See* Maya Manian, *The Ripple Effects of Dobbs on Health Care Beyond Wanted Abortion*, 76 SMU L. REV. 77, 79 (2023).

134. Emily Rosenthal, In the Wake of Dobbs, IVF's Future Becomes Uncertain, Forecasts Prof. Melissa Murray, N.Y. Univ. (Sept. 27, 2022), https://www.nyu.edu/about/news-publications/news/2022/september/in-the-wake-of-dobbs--ivf-s-future-becomes-uncertain--forecasts-.html [https/perma.cc/88QX-3ZA7].

135. *Id.*

136. *Id.*

have created personhood definitions in their abortion regulations referencing fertilization, inherently including embryos.[137]

C. Texas Abortion Regulations

Abortion regulations across the United States have been categorized in seven tiers: most restrictive, very restrictive, restrictive, some restrictions/some protections, very protective, and most protective.[138] Texas is among the states classified as most restrictive.[139] Following the analysis from the *Dobbs* decision, this section will outline and discuss the current abortion regulations in place in the state of Texas, including legislation and case law.[140]

1. Chapter 245 of the Texas Health and Safety Code

Chapter 245 of the Texas Health and Safety Code provides regulations and restrictions for physicians practicing abortion.[141] While the original intention of this code was to apply to physicians, the definitions provided have been referenced in other Texas codes, including the Texas Family Code.[142] Section 245.002 of the Texas Health and Safety Code defines "abortion" as the act of providing an instrument to a woman known to be pregnant for the purpose of terminating the pregnancy.[143] Moreover, this section provides exceptions in which an abortion is legal.[144] These exceptions include contraceptives or birth control and abortions meant to save the life of the fetus, remove a dead fetus, or remove an ectopic pregnancy.[145]

2. The Texas Heartbeat Act

Senate Bill 8, or the Texas Heartbeat Act, was codified in the Texas Health and Safety Code and outlines the legality of abortions after a heartbeat is detected and establishes the punishments for such illegal abortions.[146] While the specifics of the Act, which create concern will be addressed later

137. Lisa C. Ikemoto, *How IVF could be derailed by abortion restrictions*, L.A. TIMES (July 7, 2022, 3:01 AM), https://www.latimes.com/opinion/story/2022-07-07/ivf-roe-vs-wade-abortion [https://perma.cc/XT7N-H4NS].

138. Lauren Gaydos Duffer, *The Fallout From Dobbs*, ABA CLE: FAM. L. 1, 2 (2023) (citing *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/abortion-policies (last updated Nov. 13, 2024)) [https://perma.cc/S3AF-7RAV].

139. *Id.* at 2–3.

140. *See* discussion *infra* Section II.C.1–4.

141. TEX. HEALTH & SAFETY CODE ANN. § 245.002.

142. *See* TEX. FAM. CODE ANN. § 33.001.

143. TEX. HEALTH & SAFETY CODE ANN. § 245.002.

144. *Id.*

145. *Id.*

146. *See* Tex. S.B. 8, 87th Leg., R.S., 2021 Tex. Gen. L. 62 (Texas Heartbeat Act).

in this Comment, this subsection will discuss the general regulations enacted in Senate Bill 8.[147]

The beginning of the Act provides: "The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade* . . . that prohibit and criminalize abortion unless the mother's life is in danger."[148] In this way, the legislature explicitly reinstates abortion regulations prior to the Supreme Court's 1973 ruling in *Roe*.[149] Furthermore, the Act now applies personhood to fetal life by stating: "'Unborn child' means a human fetus or embryo in *any stage of gestation* from *fertilization* until birth."[150] While the terms "gestational age" and "gestational sac" are defined, the term "gestation" is never actually defined in the Act.[151] When a term is not defined in legislation, a court may rely on the ordinary meaning of the word found in dictionaries but, to avoid inconsistencies in definitions from different dictionaries, an easy solution is to simply include a standard definition of gestation in the Act.[152]

The most crucial aspects of the Act are the civil and criminal liabilities imposed against anyone who "aids" or "abets" in an abortion prohibited by the Act.[153] However, the Act further fails to define the terms aiding and abetting, and some Texas legislators have interpreted that aiding and abetting reaches so far as even including anyone who provides finances for travel to a woman seeking an out-of-state abortion.[154] Moreover, the Act provides no exceptions for abortions in cases of pregnancies resulting from rape or incest.[155] Following the enactment of the Texas Heartbeat Act in May of 2021, pro-life advocates have gone as far as setting up hotlines and websites to receive anonymous reports of illegal abortions.[156] This has resulted in

147. *See id.*

148. *Id.*

149. *See id.*

150. *Id.* (emphasis added).

151. Antoun v. Antoun, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *1 (Tex. App.—Fort Worth July 13, 2023, pet. denied).

152. *See* Kawack v. Antero Res. Corp., 582 S.W.3d 566, 576 (Tex. App.—Fort Worth 2019, pet. denied).

153. *See* Tex. S.B. 8, 87th Leg., R.S., 2021 Tex. Gen. L. 62 (Texas Heartbeat Act).

154. *See id.*; *see Texas Companies Face Legal Repercussions for Abortion Travel Reimbursement Policies*, MEHAFFY WEBBER (July 26, 2022), https://www.mehaffyweber.com/news/texas-companies-face-legal-repercussions-for-abortion-travel-reimbursement-policies/ (stating that some Texas legislators have advised against funding out-of-state abortions after companies such as Sidley Austin, Uber, Bumble, Tesla, and Citibank have pledged, in response to Texas's abortion regulations, to reimburse their employees for travel costs incurred from receiving an out-of-state abortion) [https://perma.cc/6TC3-HA23].

155. Casey Michelle Haining et al., *The Unethical Texas Heartbeat Law*, 42 PRENATAL DIAGNOSIS 535, 535 (2022).

156. Kimberley Harris, *How Do You Solve a Problem Like S.B. 8? Flagrantly Unconstitutional Laws, Procedural Scheming, and the Need For Pre-Enforcement Offensive Litigation*, 89 TENN. L. REV. 829, 832 (2022).

many abortion clinics and physicians ceasing practice entirely and has created many concerns about the future practice for these providers.[157]

Even though there has been no clarity or guidance offered, the future of reproductive rights in Texas continues to change.[158] In December 2023, an expectant mother, Kate Cox, filed to receive an abortion under Senate Bill 8.[159] The woman's petition was granted based on the fetus's genetic condition and very low chance of survival.[160] However, on appeal from the Attorney General of Texas, the Texas Supreme Court reversed.[161] Prior to this ruling, though, the woman had already left the state to receive an abortion, it is unclear at this time how the prohibition of traveling to receive an abortion will affect Cox.[162]

3. How Do Texas Regulations Currently Impact IVF?

It is unclear now how the current Texas abortion regulations will impact the practice of ART and IVF.[163] The Texas State Law Library provides:

> As of July 2022, Texas's abortion laws do not specifically mention in vitro fertilization (IVF) or other fertility treatments. Until a court rules on how the new abortion laws apply to IVF, it is unclear how these kinds of treatments will be affected. The Legislature may also choose to write new laws on the topic in the upcoming legislative session.
> Until then, medical and legal experts can only suggest theories about the impacts of the new laws.[164]

4. Texas Case Law

To understand how IVF has or will be impacted by Texas abortion regulations, it is important to consider what Texas case law says about the matter.[165] This subsection will discuss two specific Texas cases: *Roman v. Roman* and *Antoun v. Antoun*, cases parallel to the introductory hypothetical.[166]

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157. *Id.* at 833.

158. *See* Selena Simmons-Duffin et al., *5 things to know about the latest abortion case in Texas*, NPR (Dec. 13, 2023, 2:25 PM), https://www.npr.org/sections/health-shots/2023/12/13/1218953788/texas-abortion-ban-supreme-court-kate-cox [https://perma.cc/5YQ7-WD9C].

159. *Id.*

160. Selena Simmons-Duffin, *Texas judge grants permission for woman's abortion*, NPR, https://www.npr.org/section/health-shorts/2023/12/06/1217637325/Texas-women-asks-court-for-abortion-because-of-pregnancy-complications (last updated Dec. 7, 2023, 11:30 AM) [https://perma.cc/QP34-K4FG].

161. *See In re* State, 682 S.W.3d 890, 892 (Tex. 2023).

162. *See* Simmons-Duffin et al., *supra* note 160.

163. *See In Vitro Fertilization*, *supra* note 17.

164. *Id.*

165. *See id.*

166. *See* discussion *supra* Part I.

In *Roman*, the Texas Court of Appeals in Houston faced an issue of first impression: whether a court could award cryopreserved embryos to a wife in divorce proceedings despite the couple's IVF contract requiring the embryos to be discarded in the event of divorce.[167] In upholding the validity of the IVF contract, the court reversed the trial court's decision and ordered that the embryos be discarded.[168] However, in coming to this conclusion, the court explicitly mentioned that there was no guidance in place by the Texas legislature, although they anticipated there soon would be.[169]

Seventeen years later, the *Roman* anticipation of new legislation has yet to be taken up by the Texas legislature.[170] The 2023 Fort Worth Court of Appeals case, *Antoun*, evaluated an ex-wife's argument that disposition of IVF embryos per the couple's IVF agreement was unconstitutional in light of *Dobbs*.[171] In overruling the ex-wife's issues after comparing Senate Bill 8's use of "gestation" to the "ordinary meaning" of the word, the court reiterated that the legislature has yet to determine the status of cryopreserved embryos in Texas.[172] In her concurrence, Justice Elizabeth Kerr urged the legislature to determine this arguing that it is an inevitable issue.[173]

D. What Are Other States Doing?

When conceiving this new legal framework in Texas, it is important to analyze how other states handle issues arising from IVF embryos and discarding embryos.[174] This section will consider abortion regulations in Louisiana, Indiana, Arizona, West Virginia, and South Carolina, as well as alternative approaches in Tennessee, Oklahoma, and Arkansas.[175]

1. Louisiana

Louisiana has defined embryos as a "person" and granted them certain rights and protections.[176] Louisiana Revised Statute Section 9-129 provides:

> A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An in vitro fertilization human ovum

167. Roman v. Roman, 193 S.W.3d 40, 42 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).
168. *Id.* at 49–55.
169. *Id.* at 44.
170. Antoun v. Antoun, No. 23-0994, 2023 Tex. App. LEXIS 5096, at *17 (Tex. App.—Fort Worth July 13, 2023, pet. denied) (Kerr, J., concurring) (citing Roman, 193 S.W.3d at 44).
171. *Id.* at *2–3.
172. *Id.* at *9–17.
173. *Id.* at *17 (Kerr, J. concurring).
174. *See* discussion *infra* Sections III.D.1–6.
175. *See* discussion *infra* Sections III.D.1–6.
176. *See* LA. STAT. ANN. § 9:121 (West 1986).

> that fails to develop further over a thirty-six-hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person.[177]

2. Indiana

Following the *Dobbs* decision, Indiana was the first state to enact new abortion regulations.[178] Although Indiana banned most abortions in its new regulations, it also adopted exemptions to IVF practices.[179] Specifically, in chapter titled "Public Policy Concerning Performance of Abortions; Use of Public Funds; Civil Actions," the Indiana legislation states, "This article does not apply to in vitro fertilization."[180]

3. Arizona

Arizona is another state that explicitly exempts IVF procedure from abortion regulations.[181] Arizona Revised Statute Section 1-219 provides:

> A. The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons; citizens and residents of this state, subject only to the constitution of the United States and decisional interpretations thereof by the United States Supreme Court.
> B. This section does not create a cause of action against:
> *1. A person who performs in vitro fertilization procedures as authorized under the laws of this state.*
> 2. A woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.
> C. For purposes of this section, "unborn child" has the same meaning prescribed in section 36-2151.[182]

4. West Virginia

Compared to Arizona and Louisiana, West Virginia explicitly exempts and defines IVF in their abortion regulations.[183] West Virginia defines IVF as "a complex series of procedures used to help fertility or prevent genetic

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177. *See id.* § 9:129.
178. Kerry Lynn Macintosh, *Dobbs, Abortion Laws, and In Vitro Fertilization,* 26 J. OF HEALTH CARE L. & POL'Y 1, 12 (2023).
179. *Id.*
180. IND. CODE ANN. § 16-34-1-0.5 (West 2022).
181. *See* ARIZ. REV. STAT. ANN. § 1-219 (West 2021).
182. *Id.* (emphasis added).
183. *See* W. VA. CODE. ANN. § 16-2R-2 (West 2022).

problems and assist with the conception of a child."[184] Moreover, the West Virginia legislation states:

> (A) An abortion does not include:
>
> (1) A miscarriage;
>
> (2) A stillbirth;
>
> (3) The use of existing established cell lines derived from aborted human embryos or fetuses;
>
> (4) Medical treatment provided to patient by a licensed medical professional that result in the accidental death of or unintentional injury or death of a fetus;
>
> (5) In vitro fertilization; and
>
> (6) Human fetal tissue research, when performed in accordance with Sections 498A and 498B of the PHS Act and 45 C.F.R. 46.204 and 46.206.
>
> (B) This article does not prevent the prescription, sale, transfer, or use of contraceptive devises, instruments, medicines, or drugs.[185]

5. South Carolina

South Carolina's proposed Human Life Protection Act provides that it is not a violation to its abortion legislation for a physician to perform an abortion when it is "necessary to his reasonable medical judgment," specifically, to prevent the death or substantial risk of death to a pregnant woman, when there is substantial physical impairment, or risk of substantial physical impairment of a pregnant person's major bodily functions.[186] While psychological or emotional conditions are not included in "impairments of a major bodily function," the proposed statute outlines presumed conditions that do constitute a substantial risk of death or substantial physical impairment of a major bodily function, including: "molar pregnancy, partial molar pregnancy, blighted ovum, ectopic pregnancy, severe preeclampsia, HELLP syndrome, abruptio placentae, severe physical maternal trauma, uterine rupture, intrauterine fetal demise, and miscarriage."[187]

Similar to the abortion regulations of other states, South Carolina's Human Life Protection Act further provides:

> (C)(1) It is not a violation of Section 44-41-820 to use, sell, or administer a contraceptive measure, drug, chemical, or device if the contraceptive measure, drug, chemical, or device is used, sold, prescribed or administered in accordance with manufacturer's instructions and is not used, sold, prescribed or administered to cause or induce an abortion.

184. *Id.*
185. *Id.* (emphasis added).
186. H.R. 3552, 2023 Leg., 125th Sess. (S.C. 2023).
187. *Id.*

> (2) It is not a violation of Section 44-41-820 to use, sell, prescribe, and insert an intrauterine device if the intrauterine device is used, sold, inserted, and prescribed within the reasonable medical judgment of a physician and is not used, sold, prescribed, or administered to cause or induce an abortion of an unborn human being.
> (3) It is not a violation of Section 44-41-820 to use, sell, prescribe, and administer an emergency contraceptive drug designed to be taken within five days of unprotected sex and used according to the manufacturer's instructions. For purposes of this item, an emergency contraceptive drug does not include mifepristone or misoprostol.
> (D)(1) Except as provided in item (2), it is not a violation of Section 44-41-820 perform or undergo assistive reproductive technology, including but not limited to in vitro fertilization, within the accepted standards of care by the reproductive medical community.
> (2) Performing selective reduction is a violation of Section 44-41-820 unless it is necessary within reasonable medical judgment to prevent a substantial risk of death or a substantial and irreversible physical impairment of a major bodily function of another unborn child.[188]

6. Attorney General Statements in Tennessee, Oklahoma, and Arkansas

In October 2022, the Attorney General of Tennessee issued an opinion in response to the Tennessee Senate Majority Leader's request.[189] The opinion stated that disposal of IVF embryos that have not been transferred does not constitute an illegal abortion because, while "[s]uch an embryo may fit the . . . definition of '[u]nborn child,'. . . the Act does not prohibit the embryo's disposal unless and until it is 'living within' a woman's body."[190]

Despite the Oklahoma attorney general believing that the state's abortion laws are clear in their implicit exception to IVF, he found that many women and doctors within the state were being told otherwise.[191] Thus, he provided clarity on Oklahoma's criminal and civil abortion laws.[192] Specifically, he provided that none of the state's laws are to be skewed to punish a mother seeking an abortion and the regulations do not apply to unintentional miscarriages, ectopic pregnancies and related treatments, IVF, and contraceptives, including Plan B.[193] While Oklahoma and Tennessee addressed the issue of misinformation on the applicability of IVF in abortion

188. *Id.* (emphasis added).
189. *See* Tenn. Op. Att'y Gen. No. 22-12, at 1–2 (Oct. 20, 2022).
190. *Id.*
191. *Oklahoma A.G. O'Connor Releases Guidance for Law Enforcement After Newest Abortion Law Takes Effect*, THE OKLA. CITY SENTINEL, https://www.citynewsokc.com/townnews/law/oklahoma-a-g-o-connor-releases-guidance-for-law-enforcement-after-newest-abortion-law-takes/article_5b9dd546-29ff-11ed-9696-e77ace0adc3f.html (last updated Sept. 1, 2022) [https://perma.cc/X6TJ-GTQ3].
192. *Id.*
193. *Id.*

regulations, issuing attorney general statements are not official opinions and are not binding.[194]

Compared to Oklahoma and Tennessee, Arkansas provided verbal clarity on its abortion regulations.[195] The Office of Arkansas Attorney General reported to NBC News that abortion regulations do not implicate IVF.[196]

IV. THE NEED TO EXEMPT IVF EMBRYOS FROM ABORTION REGULATIONS

As stated previously, Texas is considered to have strict and restrictive legislation in relation to abortion.[197] Moreover, Texas takes pride in setting the standard and precedent for legislation in other states.[198] However, the implications of IVF under the Texas abortion regulations still remain vague despite other states also within the "most restrictive" category exempting IVF from abortion regulations.[199] In fact, Texas appellate justices have provided that it was not the legislative intent to include IVF in abortion legislation post-*Dobbs*.[200] Despite some assurances from Texas courts, no such protective legislation has been enacted for embryo destruction[201] With this, concerns arise about Texas's actual legislative intent and whether that was to extend and create stricter abortion laws to encompass the destruction of IVF embryos.[202] Arguably, this concern is applicable for both pro-life and pro-choice advocates, as seen through Justice Elizabeth Kerr's concurrence in the 2023 case, *Antoun v. Antoun*, writing:

> I write separately only to follow up on the majority's observation that it has been 17 years since our sister court in Houston 'anticipat[ed] that the issue [of how to deal with frozen embryos] will ultimately be resolved by the

194. *See Attorney General Opinions*, TEX. STATE L. LIBR., https://www.sll.texas.gov/law-legislation/texas/attorney-general-opinions/#:~:text=Upon%20request%20by%20certain%20Texas,is%20left%20to%20the%20courts (last updated Sept. 23, 2024, 5:57 PM) [https://perma.cc/WQ34-372R].

195. Aria Bendix, *States say abortion bans don't affect IVF. Providers and lawyers are worried anyway*, NBC NEWS (June 29, 2022, 11:56 AM), https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556 [https://perma.cc/QV8M-7UMX].

196. *Id.*

197. Duffer, *supra* note 138, at 2 (citing *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/abortion-policies (last updated Sept. 27, 2024)) [https://perma.cc/5TB6-A3G8].

198. Interview with Lauren Gaydos Duffer, Family Law Attorney Gaydos Duffer P.C. (Aug. 31, 2023).

199. *In Vitro Fertilization*, *supra* note 17; *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/abortion-policies (last updated Sept. 27, 2024) [https://perma.cc/5TB6-A3G8]; *see* W. VA. CODE ANN. § 16-2R-2 (West 2022); *cf.* H.R. 3552, 2023 Leg., 125th Sess. (S.C. 2023); *cf.* IND. CODE ANN. § 16-45-1-0.5 (West 2022).

200. *See* Antoun v. Antoun, No. 02-22-00343-CV**,** 2023 Tex. App. LEXIS 5096, at *9 (Tex. App.—Fort Worth July 13, 2023, pet. denied).

201. *Id.*

202. *See* Interview with Lauren Gaydos Duffer, Family Law Attorney Gaydos Duffer P.C. (Aug. 31, 2023); *see* Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

> Texas Legislature.' To date the legislature has not taken up this task, but I believe that it inevitably must.
>
> . . .
>
> These are questions for our elected representatives. I urge the Texas Legislature to grapple with them in light of, perhaps as on a continuum with, the policies that protect embryonic life when it is in a different location.[203]

Following Texas's "trigger bans" after the *Dobbs* ruling, potential new or continuing fertility patients have been deterred from IVF in fear that disposition of cryopreserved embryos may result in civil or criminal liability.[204] This section will analyze the different levels of concern arising from current Texas legislation and conclude that legislation should be enacted to explicitly exempt the disposition of cryopreserved embryos from abortion laws.[205]

A. Inconsistencies in Texas Abortion Regulations

Following the passage of the Texas Heartbeat Act, Republican Texas Governor Greg Abbott exclaimed: "Our [C]reator endowed us with the right to life and millions of children lose their right to life every year because of abortion. In Texas, we work to save those lives."[206] With respect to Governor Abbott's position, several questions and concerns arise as to whether IVF embryos were meant to be excluded from abortion laws.[207] It is unclear whether the goal for Texas is to outlaw the disposition of prenatal life entirely—including cryopreservation of IVF embryos.[208] While no explicit regulation has been created to define the disposition of cryopreserved embryos, the waters have become muddy considering the Texas Heartbeat Act's personhood definition.[209]

One may argue that an IVF embryo disposition exception is not necessary because Texas abortion laws only prohibit abortions after a heartbeat in accordance with "standard medical practices."[210] A fetal heartbeat can be detected using an ultrasound at around five or six weeks.[211]

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203. *Antoun*, 2023 Tex. App. LEXIS 5096, at *17–19 (Kerr, J., concurring).

204. Shannon Perri*, I want to expand my family. But Texas' abortion trigger ban stopped me in my tracks*, NBC NEWS (Aug. 25, 2022, 10:46 AM), https://www.nbcnews.com/think/opinion/was-using-ivf-get-pregnant-texas-abortion-law-made-stop-trying-rcna44416 [https://perma.cc/4BGS-BWCH].

205. *See* discussion *infra* Part VI.

206. Haining et al., *supra* note 155, at 536 (quoting Texas Governor Greg Abbott).

207. *See IVF (In Vitro Fertilization)*, *supra* note 10.

208. *See id.*

209. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.201(7) (Texas Heartbeat Act) ("'Unborn child' means a human fetus or embryo in any stage of gestation from fertilization until birth.").

210. *See id.*

211. Anna Smith Hanghighi, *When does a fetus have a heartbeat?*, MED. NEWS TODAY, https://www.medicalnewstoday.com/articles/when-does-a-fetus-have-a-heartbeat (last updated Jan. 29, 2024) [https://perma.cc/725M-58CE].

However, some physicians may argue that "fetal heartbeat" is not a clinical term and is rather used solely for the purpose of explaining the development of a fetus to a lay person, despite the Heartbeat Act stating that the fetal heartbeat is within standard medical practice.[212] Regardless, the detection of a heartbeat comes before a fetus's heart is even completely developed.[213] Notably, a heartbeat occurs prior to viability, which was what the former abortion trimester framework outlined in *Roe* to define whether an abortion was allowed.[214] Viability occurs at approximately twenty-four weeks.[215] Therefore, proponents against enacting cryopreserved embryo exemptions may argue that cryopreserved embryos are not developed until five or six weeks, thus the Texas Heartbeat Act and other Texas abortion regulations impliedly exempt the disposition of cryopreserved embryos.[216] However, the Texas Heartbeat Act provides:

> (5) "Pregnancy" means the human female reproductive condition that:
> (A) begins with fertilization;
> (B) occurs when the woman is carrying the developing human offspring; and
> (C) is calculated from the first day of the woman's last menstrual period.
> . . .
> (7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.[217]

Seemingly, looking just at the definitions provided in the Texas Heartbeat Act, Texas gives personhood to embryos starting from fertilization, inherently including cryopreserved embryos.[218] Outside of abortion laws, the definition of an "unborn child" appears in various criminal cases across the state when a person attempts to cause a stillbirth of another or when a gestational carrier is murdered, resulting in the loss of a fetus.[219] While in

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212. *See* Selena Simmons-Duffin & Carrie Feibel, *The Texas abortion ban hinges on 'fetal heartbeat.' Doctors call that misleading*, NPR, https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion (last updated May 3, 2022, 4:55 PM) [https://perma.cc/X6TJ-TGQ3]; TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).

213. Hanghighi, *supra* note 211.

214. *See* Roe v. Wade, 410 U.S. 113, 163–66 (1973); *see* Planned Parenthood v. Casey, 505 U.S. 833, 872–76 (1992).

215. *When Is It Safe to Deliver Your Baby*, HEALTH UNIV. OF UTAH, https://healthcare.utah.edu/womens-health/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver (last visited Jan. 31, 2024) [https://perma.cc/EDV8-D8MF].

216. *See* Macintosh, *supra* note 178, at 11.

217. TEX. HEALTH & SAFETY CODE ANN. § 171.201(5), (7) (Texas Heartbeat Act).

218. *See* Perri*, supra* note 204.

219. TEX. PENAL CODE ANN. § 1.07(a)(26) ("'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."); *see* Flores v. State,

cases of murder or attempted murder of an individual resulting in the loss of a fetus is a crime warranting a conviction of felony murder, it is still unclear as to whether the legislature intends for embryos created through IVF to be protected under similar regulations.[220] However, this concern may be rebutted by the fact the Texas Heartbeat Act provides that a woman must be "carrying the developing human offspring."[221]

Further clarification on what the legislature intended through the Texas Heartbeat Act may be found through analyzing other abortion regulations within the state.[222] The Texas Health and Safety Code provides:

> In this chapter:
> (1) "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:
> (A) save the life or preserve the health of an unborn child;
> (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or
> (C) remove an ectopic pregnancy.[223]

Clearly, abortion is separate from contraception.[224] Notably, birth control and contraceptives are used for the purpose of preventing and avoiding pregnancy *before it begins*.[225] Thus, inferring that when using birth control and contraceptives to prevent a pregnancy, there is no "unborn child" at the time.[226] It is unclear why the Texas legislature found the need to include birth control and contraceptives as an exemption to abortion while excluding standard reproductive health practices.[227] Given the science and access to contraception being constitutionally protected, the legislative intent of Texas excluding contraceptives from abortion regulation seems unclear.[228]

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215 S.W.3d 520, 524–31 (Tex. App.—Beaumont 2007, pet. granted) (illustrating a case in which the defendant was charged with felony murder because of standing on the mother's abdomen resulting in the loss of two fetuses); *see* Delgado v. State, No. 13-08-00490-CR, 2011 Tex. App. LEXIS 2595, at *1–34 (Tex. App.—Corpus Christi 2011, no pet.) (illustrating a case in which the defendant strangled and murdered his pregnant girlfriend, resulting in the loss of the fetus).

220. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).

221. *Id.*

222. *See id.* § 245.002.

223. *Id.* (emphasis added).

224. Joerg Dreweke, *Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise,* GUTTMACHER POL'Y REV. (Dec. 9, 2014), https://www.guttmacher.org/gpr/2014/12/contraception-not-abortion-strategic-campaign-antiabortion-groups-persuade-public/ [https://perma.cc/Q7HJ-S4YP].

225. *See Birth Control*, U.S. FOOD & DRUG ADMIN. (May 10, 2024), https://www.fda.gov/consumers/free-publications-women/birth-control [https://perma.cc/V8R6-3L8G].

226. *See id.*

227. *See id.*

228. *See id.*

Therefore, if the Texas legislature can find the need to exempt contraception from current abortion regulations, surely the legislature can find the need to exempt the disposition of cryopreserved embryos.[229]

B. Other Forms of ART Liability Under Abortion Regulations

Ambiguity in current legislation and in case laws exist as to how storage fees may be implemented when a couple gets divorced and what may happen when one or both partners pass away.[230] Explicit exemptions to the disposition of cryopreserved embryos may be necessary to alleviate concerns and questions arising from the current Texas political environment.[231] Notably, the current state of Texas abortion regulations has already impacted other forms of ART, specifically surrogacy—a form of alternative reproduction in which one carries and delivers a child for another person.[232]

Approximately 24% of pregnancies from ART have resulted in multiple births, or the existence of multiple fetuses.[233] Multifetal pregnancies create a higher risk of maternal and perinatal morbidity and mortality.[234] Additionally, children born from multifetal pregnancies have a higher risk of conditions such as prematurity, cerebral palsy, and development delay, while mothers have an increased risk of hypertension, preeclampsia, gestational diabetes, and postpartum hemorrhage.[235] The risk of spontaneous loss of the entire pregnancy increases based on the number of fetuses present—25% for quadruplets, 15% for triplets, and 8% for twins.[236] Because of these risks, reduction may be recommended through selective reduction or multifetal pregnancy reduction.[237] In selective reduction, fetuses are disposed based on their health status while multifetal pregnancy reduction is based on technical considerations such as which fetus is accessible to intervention.[238] A debate exists as to whether these procedures are considered abortions.[239] In Texas, medical professionals have been limited in their ability to utilize these

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229. *See* discussion *infra* Part V.

230. *See* discussion *supra* Section III.C.

231. *See* discussion *infra* Part V.

232. Duffer, *supra* note 138 at 2; *Surrogacy*, BLACK'S L. DICTIONARY 1582 (12th ed. 2024).

233. *See* Sarah Murray & Jane Norman, *Multiple pregnancies following assisted reproductive technologies – A happy consequence or double trouble?*, 19 SEMIN FETAL NEONATAL MED. 222, 226 (2014).

234. *Multifetal Pregnancy Reduction*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS' COMM. ON ETHICS (Sept. 2017), https://www.acog.org/clinical/clinical-guidance/commitee-opinion/articles/2017/09/multifetal-pregnancy-reduction [https://perma.cc/NX6Z-SLR4].

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *See* Silje Langseth Dahl et al., *Abortion and multifetal pregnancy reduction: An ethical comparison*, ETTIK I PRAKSIS – NORDIC J. OF APPLIED ETHICS 1, 89–111 (2019); *see* Simmons-Duffin & Feibel, *supra* note 212.

procedures and in some instances, patients have had to seek these reductions or abortions out-of-state.[240]

1. Possible Criminal and Civil Liability for Providers

Exempting the disposition of cryopreserved embryos in Texas abortion regulations is vital to avoid the unnecessary expansion of abortion criminal liability on physicians.[241] In the criminalization of abortion, historically it has been untenable to impose criminal liability against women who receive an abortion.[242] Instead, criminal liability has been imposed against a provider who assists a woman in receiving an abortion.[243] Chapter 170 of the Texas Health and Safety Code provides that it is a first-degree or second-degree felony—depending on whether the "child" dies as a result of the offense—for a provider to aid or abet in an abortion.[244] Few exceptions to aiding and abetting in an abortion exist when the pregnancy creates a greater risk of death or substantial impairment to the pregnant person.[245] Although reductions can be used to prevent risk of death or substantial impairment to the pregnant person, many Texas doctors have ceased practicing embryo reductions in fear of legal retaliation.[246]

In other states, imposing criminal liability against providers has created difficulty in the continuation of reproductive health practices.[247] For example, in Louisiana, a provider may not dispose of viable embryos cryopreserved through IVF.[248] As of now, Texas has not expanded criminal liability to include IVF embryos; however, at this point it is unclear whether future legislation will expand on these abortion regulations.[249] In the event that Texas legislation does expand criminal abortion liability, ART providers will

240. Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023); Simmons-Duffin & Feibel, *supra* note 212; Bekah McNeel, *For Texans who want a child but have difficult pregnancies, the new abortion law just made that journey even harder*, TEX. TRIB., https://www.texas tribune.org/2021/10/29/texas-abortion-law-complications/ (last updated Oct. 29, 2021, 10:00 AM) [https://perma.cc/R27L-SHQ6].

241. *See* discussion *infra* Part V.

242. Greer Donley & Jill Weiber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1705 (2022).

243. *Id.* at 1705–06.

244. TEX. HEALTH & SAFETY CODE ANN. § 170A.004.

245. *Id.* § 170A.002.

246. Eleanor Klibanoff, *Doctors report compromising care out of fear of Texas abortion law*, TEX. TRIB. (June 23, 2022, 5:00 PM), https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/ [https://perma.cc/FY9J-8NVN].

247. Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023); *see* Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.*, N.Y. TIMES, https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html (last updated July 6, 2022) [https://perma.cc/EH4G-4LGF].

248. *See* LA. REV. STAT. ANN. § 9:129 (West 1986).

249. Mendez, *supra* note 17.

be negatively impacted and may continue to struggle to utilize ART practices within the state.[250]

In addition to concerns of unnecessary criminal liability, exemption of cryopreserved embryos from abortion regulations is essential to avoid the unnecessary expansion of civil liability on physicians.[251] Chapter 170 of the Texas Health and Safety Code outlines civil liability against providers who aid or abet in an illegal abortion.[252] This section imposes a fine of at least $100,000 for each violation.[253] Moreover, this section also provides that the attorney general shall file for the action and may seek to recover applicable attorney fees.[254] This would create a risk for practitioners to have their medical license, registration, or permit revoked.[255] Like imposing criminal liability, applying civil liability to providers would actively discourage them from continuing their practices, even when they are practicing within medical standard.[256]

In practice, issues arise when embryos fail to develop or are abandoned by patients.[257] Expanding both unnecessary civil and criminal liability onto providers and physicians will have negative impacts on standard medical practices within ART.[258] After fertilization of a retrieved egg, the embryo development must be monitored for five to six days prior to cryopreservation or implantation.[259] On average, only 50% of fertilized embryos successfully develop to meet the requirements to be transferred or stored.[260] It is common practice within the medical field for embryos that fail to develop or have a genetic or chromosomal abnormality to be discarded.[261] However, this international standard medical practice will likely be unworkable for clinics and physicians in the state of Texas if the Texas legislature does not exempt the disposition of IVF embryos from abortion regulations.[262]

Another issue has become more common in modern society regarding the storage of embryos—abandonment.[263] While the exact number of abandoned embryos is not known, one clinic reports that nearly 21% of stored embryos in their facilities have been abandoned.[264] Moreover, experts expect

250. *See* Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).
251. *See* discussion *infra* Part V.
252. TEX. HEALTH & SAFETY CODE ANN. § 170A.005.
253. *Id.*
254. *Id.*
255. *Id.* § 170A.007.
256. *See* Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).
257. Simopoulou et al., *supra* note 83, at 2448.
258. *See IVF (In Vitro Fertilization)*, *supra* note 10.
259. *Id.*
260. *Id.*
261. *Id.*; Simopoulou et al., *supra* note 83, at 2448.
262. *See* Simopoulou et al., *supra* note 83, at 2448.
263. Mary Pflum, *Nation's fertility clinics struggle with a growing number of abandoned embryos*, NBC NEWS (Aug. 12, 2019, 3:34 AM), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806 [https://perma.cc/W752-YWYX].
264. *Id.*

that hundreds of thousands of embryos, if not more, have been abandoned in fertility clinics across the country.[265] Internationally, it has become common practice to dispose of abandoned embryos.[266] The American Society for Reproductive Medicine Ethics Committee provides that an embryo can be considered ethically abandoned for disposal "if at least 5 years have passed since contact with [the] individual or couple, . . . and no written instructions from the couple exist concerning disposition."[267] The committee has additionally attempted to provide guidelines for clinics, stating:

> In the face of legal uncertainty, some programs might prefer to continue storage of abandoned embryos indefinitely. Other programs will find the risk of liability to be acceptable and dispose of embryos after a lengthy passage of time and unsuccessful efforts to contact those with dispositional control. As an ethical matter, a program should be free to dispose of embryos after a passage of time and unavailability of a responsible individual or couple that reasonably indicates that the couple has abandoned the embryos. A program's willingness to store embryos does not imply an ethical obligation to store them indefinitely. An individual who, or couple that, has not given written instruction for disposition, has not been in contact with the program for a substantial period of time, has not provided current contact information, and who cannot be located after reasonable attempts by the program and facility, cannot reasonably claim an ethical violation on the part of the program or facility that treats the embryos as abandoned and disposes of them.[268]

Absent any change in the legislation, prohibiting the destruction of embryos that have been abandoned and thus implicitly requiring a clinic to bear the cost of indefinite storage, creates an unnecessary, unfunded mandate.[269]

If the Texas legislature does not allow the disposition of IVF embryos, standard practices within reproductive health will be negatively impacted.[270] In other words, fertility clinics may be forced to bear the high costs of storage or even cease operating to avoid illegal abortion liability.[271] Thus, it is clear that an IVF exemption in abortion regulations is necessary for medical

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265. *Id.*

266. Simopoulou et al., *supra* note 83, at 2448.

267. *Disposition of abandoned embryos: a committee opinion*, AM. SOC'Y OF REPROD. MED. (Mar. 7, 2013), https://www.fertstert.org/article/S0015-0282(13)00281-1/fulltext [https://perma.cc/S6DT-W3A7].

268. Rich Vaughn, *Uniform Laws Needed to Regulate Abandoned Embryos*, INT'L FERTILITY L. GRP. (Aug. 26, 2019, 4:10 PM), https://www.iflg.net/laws-needed-abandoned-embryos/ [https://perma.cc/3F3X-8GNK].

269. *See* Judith Daar, *Legal liability landscape and the person/property divide*, 1 F&S REP. 61, 62 (2020).

270. *See* discussion *infra* Part V.

271. *Id.*

professionals to continue their common practices, specifically in regard to faulty or abandoned embryos.[272]

2. Possible Liability for Couples and Individuals If Embryos Are Considered Community Property

Courts across the country disagree on the classification of cryopreserved embryos.[273] Some courts have determined embryos to be property in accordance with that state's probate code, while others have defined cryopreserved embryos as something in between property and persons.[274] The New York Court of Appeals in *Kass v. Kass* held that agreements regarding the storage or disposition of embryos should generally be presumed as valid and binding.[275] *Szafranski v. Duston*, a case arising out of Illinois, outlined three analyses a court may use to determine which party may control the disposition of cryopreserved embryos at the event of separation: the (1) Contractual Approach; (2) Contemporaneous Mutual Consent Approach; and (3) Balance Approach.[276] Under the Contractual Approach, courts will typically enforce contracts regarding the parties' wishes for the fate of their cryopreserved embryos, so long as the contract does not violate public policy.[277] However, this approach is criticized because it "insufficiently protects the individuals and societal interests at stake."[278] The Contemporaneous Mutual Consent Approach provides that cryopreserved embryos should only be donated or destroyed when the parties have a mutual agreement, but this approach is often criticized for being unrealistic in assuming the parties may reach an agreement because otherwise, they would not be seeking court interference.[279] Finally, the Balancing Approach allows a court to enforce contracts between adverse parties and then balance their interests in the absence of an agreement.[280] This approach has only been applied in three states (New Jersey, Pennsylvania, and Tennessee) and is criticized for its internal inconsistency, specifically:

> Public policy concerns similar to those that prompt courts to refrain from enforcement of contracts addressing reproductive choice demand even more strongly that we not substitute the court as decision makers in this highly

272. *Id.*

273. Oliphant & Ver Steegh, *supra* note 28, at 811.

274. *Id.*; *see* York v. Jones, 717 F. Supp. 421, 427 (E.D. Va. 1989); *see* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

275. Kass v. Kass, 696 N.E.2d 174, 565 (N.Y. 1998).

276. *See* Szafranski v. Dunston, 993 N.E.2d 502, 506 (Ill. App. Ct. 2013).

277. *Id.* at 506–10.

278. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88–89 (1999).

279. *Szafranski*, 993 N.E.2d at 510–12.

280. *Id.* at 512.

> emotional and personal area. Nonetheless, that is exactly what happens under the decisional framework based on the balancing test because the court must weigh the relative interests of the parties in deciding the disposition of embryos when the parties cannot agree.[281]

Ultimately, the *Szafranski* court upheld the Contractual Approach, similar to the *Kass* court, writing: "[W]e believe that the best approach for resolving disputes over the disposition of pre-embryos created with one party's sperm and another party's ova is to honor the parties' own mutually expressed intent as set forth in their prior agreements."[282]

In the community property state of Texas, couples are held liable for issues arising from their community property in matters such as debt and vehicle collisions.[283] As stated previously, aiding or abetting in an illegal abortion is prohibited in Texas.[284] Anyone may be charged or sued for aiding and abetting in an illegal abortion, including but not limited to: physicians; anyone who provides financial support, whether through separate or community funds, for an abortion procedure; pharmacists; and even anyone who drives a patient to an abortion clinic.[285] However, notably, the terms "aid" and "abet" are never explicitly defined in either the Texas Health and Safety Code or the Texas Heartbeat Act.[286] This means that aiding and abetting may be interpreted to be anything from actually destroying stored embryos within Texas to funding the disposition of embryos transferred to be cryopreserved in another state.[287] In fact, many cryopreserved embryonic transportation companies already exist to assist in transporting embryos out-of-state, such as CryoStork, BioCouriers, and ArkCryo.[288] Thus, assuming that embryos are classified as community property, if the current legislation was to be expanded to include cryopreserved embryos, a couple—whether

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281. Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. 2013) (quoting *In re* Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003)).

282. *Id.* at 514.

283. *See* Yamin v. Carroll Wayne Conn, L.P., 574 S.W.3d 50, 54–71 (Tex. App.—Houston [14th District] 2018, pet. denied); *see* Lawrence v. Hardy, 583 S.W. 2d 795, 796–800 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.).

284. TEX. HEALTH & SAFETY CODE ANN. § 170A.004; TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).

285. Benson Varghese, *Texas Abortion Law*, VARGHESE SUMMERSETT, https://versustexas.com/texas-abortion-law/ (last updated June 5, 2024) [https://perma.cc/29LA-G2AC].

286. *See* § 171.201 (Texas Heartbeat Act).

287. *See Texas Companies Face Legal Repercussions for Abortion Travel Reimbursement Policies*, *supra* note 154 (stating that Texas legislature has advised against funding out-of-state abortions).

288. *Frozen Embryo Safety: Out-of-State Transportation Services and Storage*, PAC. FERTILITY CTR. L.A. (July 6, 2022), https://www.pfcla.com/blog/frozen-embryo-safety-out-of-state-transportation-and-storage-facilities ("The recent overturn of the Roe vs. Wade ruling by the Supreme Court of the United States has impacted fertility services in many states across our nation. Some states have banned or restricted abortion access which may affect those undergoing fertility treatment and have frozen embryos. Experts are turning to cryopreservation in states that are maintaining abortion access.") [https://perma.cc/Q888-NWFF].

divorced, separated, or still together—may be liable for the disposition of any embryos created through IVF.[289]

The addition of an explicit exemption of cryopreserved embryos is necessary to protect community liability.[290] The Texas legislature has not defined the status of IVF embryos either as property or as a person for upholding IVF agreements or contracts.[291] Regardless, similar to *Kass* and *Szafranski*, Texas courts have arguably implied that embryos are property through continuing to uphold disposition agreements.[292] It should be noted that since donors of eggs or sperm are not considered legal parents of any resulting children, it is unlikely that donors will be considered liable for the disposition of resulting embryos.[293]

C. Constitutional Rights in Family Planning and the Right to Travel

The United States Supreme Court has protected the right to procreate (also referred to as the right to family planning) in a number of circumstances.[294] In *Griswold v. Connecticut*, the Supreme Court found that a Connecticut statute criminalizing the use of contraceptives was unconstitutional because married couples have a fundamental right to privacy, specifically the right to prevent pregnancy.[295] This right was expanded to unmarried individuals in *Eisenstadt v. Baird*.[296] The *Eisenstadt* Court wrote: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[297] This right to privacy, or rather "right to procreate," has been understood to include:

> [A] right to make procreative decisions without governmental restriction or force; a right to procreate without discrimination by doctors or others; *an equal right of infertile people to procreate when fertile people can do so*; a right to be assisted in procreating; a right to engage in reproductive contracts

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289. *See Texas Companies Face Legal Repercussions for Abortion Travel Reimbursement Policies*, *supra* note 154.

290. *See* discussion *infra* Part V.

291. Toluwani Osibamowo, '*We don't know where we stand': IVF in Texas is on Shaky ground*, TEX. STANDARD (July 1, 2024, 9:45 AM), https://www.texasstandard.org/stories/ivf-in-vitro-fertilization-rules-texas-denton-divorce-case/ [https://perma.cc/EUF4-BSD2].

292. *See* Antoun v. Antoun, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *1–17 (Tex. App.—Fort Worth 2023, pet. denied); *see* Roman v. Roman, 193 S.W.3d 40, 41–55 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

293. *See Adoption and sperm donation in Texas*, *supra* note 100.

294. Jessica Shillings-Barrera, *It Costs What!? To Start a Family? Infertility and the Constitutional Right to Procreate*, 62 SANTA CLARA L. REV. 683, 698–99 (2022).

295. *See* Griswold v. Connecticut, 381 U.S. 479, 480–86 (1965).

296. *See* Eisenstadt v. Baird, 405 U.S. 438, 440–55 (1973).

297. *Id.* at 453.

> or multiple-party interventions; and a right to have procreative assistance funded.[298]

If this is what the right to procreate is understood to be, how does the possibility of prohibiting the destruction of IVF embryos play a role?[299] First, the "right to make procreative decisions without governmental restriction or force" is impeded upon.[300] Potentially, couples or individuals who have sought IVF treatment may be left with the impossible choice of implantation and bearing a child when there is no longer a desire to procreate, have their genetic material donated against their wishes, or pay the high costs of storage indefinitely.[301] While the third option may not seemingly impede on the right to procreate, the first two most definitely do.[302] Additionally, because these are the options that IVF patients may be left with, infertile people do not have an equal right to procreate as fertile people do.[303] Because it is common practice to create IVF contracts regarding the wishes of the parties in the event of divorce or death, the possibility of a court failing to even consider a reproductive contract potentially impedes on the right to engage in the creation of such contracts.[304] Therefore, an argument may be created that prohibiting the disposition of cryopreserved embryos is unconstitutional because it violates a fundamental right to procreation.[305]

The United States Constitution provides the right to travel, a right that has been tied to interstate commerce and privileges and immunities.[306] Under this constitutional right, it has been common practice for a gestational carrier, or surrogate, to seek an abortion from an outside state if abortion is illegal in their home state.[307] However, the Texas government has already advised against seeking interstate abortions, specifically by warning against supplying funds for travel.[308] Thus, under this advisement and current legislation, an issue arises regarding the ability for a couple utilizing a surrogate or gestational carrier to supply funds for an out-of-state abortion.[309] Notably, intended parents and a surrogate may decide to seek an abortion

298. Laura Shanner, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 826 (1995) (emphasis added).

299. *See id.*

300. *Id.*

301. *See* Melamed et al., *supra* note 44, at 187; *see* discussion *infra* Section IV.D.

302. *See* Shanner, *supra* note 298, at 823.

303. *Id.*

304. *See* discussion *supra* Section II.A.

305. *See* Shanner, *supra* note 298, at 823.

306. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* art IV, § 2, cl. 1.

307. Interview with Lauren Gaydos Duffer, Family Law Attorney, Gaydos Duffer P.C. (Aug. 31, 2023).

308. Jacqueline Thomsen, *Texas lawmakers target law firms for aiding abortion access*, REUTERS (July 8, 2022, 6:19 PM), https://www.reuters.com/legal/legalindustry/texas-lawmakers-target-law-firms-aiding-abortion-access-2022-07-08/ [https://perma.cc/ZZX9-TSH9].

309. Interview with Lauren Gaydos Duffer, Family Law Attorney, Gaydos Duffer P.C. (Aug. 31, 2023).

when multiple births are expected to occur, the pregnancy is expected to be high risk, or the embryo is unhealthy or not developing properly.[310] In October of 2023, Lubbock County became the most recent and largest county to pass an ordinance that allows civil lawsuits against women seeking out-of-state abortions—following Goliad, Mitchell, and Cochran counties.[311]

D. Concerns Arising from Cost of Storage

Exempting the disposition of cryopreserved embryos is essential to avoid the hardship of unnecessary costs to store them indefinitely.[312] Paying for the storage of embryos is an additional cost of the IVF procedure.[313] This means, in addition to paying thousands of dollars for the IVF procedure (collecting the eggs, creating the embryos, etc.), one can expect to pay several hundreds of dollars in an annual fee to store their cryopreserved embryos.[314] Specifically, this additional storage fee goes to supply and replenish the liquid nitrogen required to preserve the embryos.[315] The cost of storage is typically around $500 to $600 annually depending on the clinic; however, with the current cost of inflation, the annual fee for storage has risen to approximately $900 annually.[316]

Disposition of embryos can alleviate a patient or couple from the high cost of storage.[317] In the event of divorce or death, forcing an individual or couple to pay the high costs of storing their embryos for the rest of their life to avoid an illegal abortion liability is completely unreasonable.[318] Absent any form of additional protection from legislation, it is likely that a patient may need to pay these high storage costs indefinitely without government support, resulting in a type of unfunded mandate.[319] Moreover, this would create additional issues that would arise in the event of divorce or death.[320]

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310. *Surrogates and Abortion: What to Know Before Taking This Journey*, SURROGATES, https://surrogate.com/surrogates/pregnancy-and-health/surrogates-and-abortion-what-to-know-before-taking-this-journey/ (last visited Jan. 31, 2024) [https://perma.cc/GL53-5Y8W].

311. Jayme Lozano Carver, *Lubbock County becomes latest to approve "abortion travel ban" while Amarillo City Council balks*, TEX. TRIB. (Oct. 23, 2023), https://www.texastribune.org/2023/10/23/abortIon-travel-ban-lubbock-county/ [https://perma.cc/5BUA-E42B].

312. *See* Dani Blum & Nicole Stock, *What to Know Before You Freeze Your Eggs*, N.Y. TIMES (Dec. 23, 2022), https://www.nytimes.com/2022/12/23/well/family/egg-freezing-risks-cost.html [https://perma.cc/SPK9-VSPT].

313. *Id.*

314. *Id.*

315. Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

316. *See id.*; *see* Blum & Stock, *supra* note 312; *see* Torbati, *supra* note 14.

317. Amy Demma, *Making Decisions About Remaining Embryos*, RESOLVE: THE NAT'L INFERTILITY ASS'N, https://resolve.org/learn/what-are-my-options/in-vitro-fertilization/remaining-embryos/ (last visited Feb. 1, 2024) [https://perma.cc/3SRB-FFVR].

318. *See* Blum & Stock, *supra* note 312.

319. *See* Shillings-Barrera, *supra* note 294, at 683.

320. *See generally* Mergele-Rust, *supra* note 40 (discussing case law in which constitutional arguments were brought by a spouse in divorce proceedings).

This may create a constitutional issue if one party wants to implant to continually stored the embryos while the other party no longer consents to their genetic material being used for implantation.[321] Allowing the disposition of unused embryos avoids and further solves such issues that are likely to arise by compelling their storage.[322]

E. Outdatedness of Current Texas Abortion Laws

Texas abortion regulations are outdated and must be updated to be current with today's advancing society.[323] After the reversal of *Roe v. Wade*, the United Sates Supreme Court has provided states with the discretion to regulate abortion within their borders.[324] The Texas legislature, through the Heartbeat Act, explicitly announced that abortion regulations prior to the 1975 *Roe* decision were reenacted as if they were never repealed.[325] This language impliedly reenacts abortion regulations going as far back as 1925.[326] However, the first child born through IVF was not born until 1978.[327] That first child was not even born in the United States, and IVF was not introduced to the United States until 1981.[328] In this way, Texas has enacted regulations impacting IVF embryos before IVF was even created or introduced nationally.[329] Thus, Texas abortion regulations are clearly outdated and should be reconsidered to reflect the modern views of society.[330]

F. The Effects on Commerce

Since its creation, the market for IVF has continued to grow across the nation.[331] However, as states began to implement new abortion restrictions following the overruling of *Roe*, individuals and physicians became concerned as to how procedures like IVF can continue.[332] The lack of clarity in legislation has created a risk of IVF clinics shutting down entirely or

321. *Id.*
322. *See* discussion *supra* Part V.
323. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).
324. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022).
325. TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).
326. Mendez, *supra* note 17.
327. *IVF (In Vitro Fertilization)*, *supra* note 10.
328. Oliphant & Ver Steegh, *supra* note 28, at 782.
329. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).
330. *See* discussion *supra* Part V.
331. *See* Pasquale et al., *The changing world of IVF: the pros and cons of new business models offering assisted reproductive technologies*, 39 J. ASSISTED REPROD. GENETICS 305, 305–06 (2022).
332. Sydney Halleman et al., *'I don't feel safe.' Abortion bans add new uncertainty to fertility treatment*, HEALTHCARE DIVE (Oct. 24, 2022), https://www.healthcaredive.com/news/ivf-roe-v-wade-abortion-bans-fertility-treatments-i-dont-feel-safe/634540/ [https://perma.cc/G3FS-JFAD].

moving out-of-state.[333] One physician provided that if laws were to expand and not protect embryos created through IVF, he would not be able to continue to work in Texas and would have to retire his practice.[334] While it is unclear how much revenue is gained from IVF clinics in Texas, the fertility business itself accounts for billions in gross revenue across the country.[335] Therefore, Texas's failure to act on this ambiguity may result in the loss of the state's portion of this revenue due to providers closing their clinics or moving out-of-state.[336]

In the state of Texas alone, 6,216,940 women between the ages of fifteen and forty-four are reported to be infertile.[337] While it is completely possible that not all of these women will seek IVF treatment, 33% of American adults report that they or someone they know have used a form of ART treatment.[338] If we take this statistic to mean that one-third of American adults use ART, with IVF being the most common form, about 2 million Texan women who have used or will use IVF.[339] Obviously, this is not an exact statistic because it does not include the various other reasons for seeking IVF treatment, such as assisting child rearing for same-sex couples or individuals of an advanced maternal age, it still allows a general idea of the amount of patients that may be affected.[340] With the lack of clarity from Texas legislation, the rise in embryo transfers out-of-state, and the risk of clinics closing or moving out-of-state, the future of IVF in Texas may not be long-lived.[341] If Texas continues to fail to act on this issue, the state may have no future in IVF practices, affecting both current patients who have to bear the cost of moving embryos out-of-state and the millions of future individuals who would have otherwise sought IVF.[342]

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333. Meg Barbor, *Cancer and Fertility Preservation: Will New Laws Leave Patients Without Options?*, ASCO POST (Oct. 10, 2022), https://ascopost.com/issues/october-10-2022/cancer-and-fertility-preservation-will-new-laws-leave-patients-without-options/ [https://perma.cc/C28C-BBMQ].

334. Interview with Dr. Sy Le, Reproductive and Infertility Endocrinologist, MD (Aug. 31, 2023).

335. Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. 1147, 1148 (2013).

336. *See id.*

337. *Number of Infertile By State*, RESOLVE: THE NAT'L INFERTILITY ASS'N, https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/getting-insurnace-coverage-at-work/number-of-state/ (last updated Feb. 2020) [https://perma.cc/3FYQ-34FN].

338. Gretchen Livingston, *A third of U.S. adults say they have used fertility treatments or know someone who has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/short-reads/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ [https://perma.cc/5Z7H-X8CM].

339. *See The History of IVF: Origin and Developments of the 20th Century, supra* note 26 ("The Centers for Disease Control and Prevention (CDC) recorded 306,197 fertility treatment cycles in America in 2018. Of that number, 99% of fertility treatments involved in vitro fertilization (IVF).").

340. *See id.*

341. *See* Chabeli Carrazana & Jennifer Gerson, *IVF patients started moving their embryos out of states with abortion bans when Roe fell*, THE 19TH (July 14, 2022, 5:00 AM), https://19thnews.org/2022/07/ivf-patients-moving-embryos-abortion-bans/ [https://perma.cc/T934-H2SK]; *see* Hawkins, *supra* note 335 at 1148.

342. *See* Carrazana & Gerson, *supra* note 341; *see* Hawkins, *supra* note 335, at 1148.

G. Viability of the Counterargument

Pro-life activists may argue that because "life begins at conception" and given the variety of different options, such as embryo donation, there is no need for further legislative interference.[343] In fact, the Texas Right for Life organization provides the following on their website regarding IVF:

> [Texas Right to Life] considers [IVF] a technology that ignores rather than enhances respect for human life. While we sympathize with infertile couples, we cannot ignore the fact that research and clinical trials for this procedure have involved the destruction of newly conceived human embryos in the laboratory. Furthermore, there are currently over 400,000 tiny embryonic human beings 'stored' in fertility clinics. The vast majority of these children will die in storage or be sacrificed to medical research.
>
> If parents agree to implant into the womb all of their embryonic children created via [IVF], then [Texas Right to Life] is neutral on the procedure. However, parents typically fertilize more embryos than they are prepared to implant into the womb.[344]

There are numerous inconsistencies with this statement from Texas Right to Life—this organization fails to recognize that (1) IVF is used for variety of reasons, not just for infertile couples; (2) embryos cannot develop if they are not implanted, and thus, are not considered life outside implantation from a scientific viewpoint; and (3) patients are not necessarily requesting that doctors create an abundance of embryos, rather it is doctors acting in accordance with standard medical practice.[345] Regardless, it is apparent that pro-life activists contend that all created embryos, no matter how many there may be, should be implanted.[346] This implicitly leaves patients with two options: implant the embryos for themselves or donate their embryos to be implanted for another patient.[347]

First, expecting a patient to implant all of their created embryos is unreasonable and creates multiple potential issues.[348] Assuming five embryos are created through the IVF procedure, it is clearly impracticable to force a patient to potentially have five children when they may not have the resources, time, or finances to support raising that many children.[349] Additionally, it would be unethical to force patients to become parents

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343. *What We Believe*, TEX. RIGHT TO LIFE, https://texasrighttolife.com/what-we-believe/ (last visited Jan. 31, 2024) [https://perma.cc/5QY2-AJYS].

344. *Id.*

345. *See IVF (In Vitro Fertilization)*, *supra* note 10; *see* Kvernflaten et al., *supra* note 81, at 571.

346. *What We Believe*, *supra* note 343.

347. *See id.*

348. *See id.*

349. *See id.*

against their wishes and their consent.[350] More issues may arise when a couple divorces; for example, an ex-husband may request that the embryos created between him and his ex-wife be implanted into his new wife against the ex-wife's wishes or an ex-spouse may inseminate all of their embryos for the purposes of increasing potential child support.[351]

Second, requiring embryos to be donated to another patient is completely unworkable.[352] Many patients choose to not donate their embryos because of the unsettling feelings that arise from the thought of another family raising their genetic offspring.[353] In these instances, genetic parents would have absolutely no control over the rearing and treatment of their offspring, and it is unlikely that these offspring will ever know their genetic parents.[354] Additionally, considering the average number of embryos created per IVF cycle, it is unlikely that each and every embryo currently stored across the country would have an interested donee.[355] If donation was required, it would not solve the problem of storage of excessive embryos and because embryos cannot be disposed of according to pro-life arguments, a dystopian *Handmaid's Tale* reality could be created.[356]

The pro-life argument that IVF embryos should not be destroyed is meritless.[357] Therefore, it is necessary for the Texas legislature to act and provide explicit protection for the IVF process in the state's abortion regulations.[358]

H. Weighing the Pros and Cons of Other State's Regulations in Considering Their Application to Texas

In considering a solution for the Texas legislature, it is vital to assess and critique the actions of other states.[359] This section reassesses the previously mentioned actions of Louisiana, Indiana, Arizona, West Virginia, South Carolina, Tennessee, Oklahoma, and Arkansas.[360]

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350. *See* Shillings-Barrera, *supra* note 294, at 696–700 (explaining the constitutional right to procreate).

351. *See* Fontinelle, *supra* note 42.

352. *See* Melamed et al., *supra* note 44.

353. Ellen S. Glazer, *Embryo donation: One possible path after IVF*, HARV. MED. SCH. (Dec. 3, 2021), https://www.health.harvard.edu/blog/embryo-donation-one-possible-path-after-ivf-202112032649 [https://perma.cc/P59B-Z62L].

354. *See* TEX. FAM. CODE ANN. § 160.702.

355. *See Number of eggs retrieved and IVF success rates according to female age*, *supra* note 67.

356. *See What We Believe*, *supra* note 343.

357. *See id.*

358. *See* discussion *infra* Part V.

359. *See* discussion *supra* Section III.D.

360. *See* discussion *supra* Section III.D.

1. Regulations in Louisiana, Indiana, Arizona, West Virginia, and South Carolina

While the current state of Louisiana regulations does not prohibit all standard medical practices of ART and IVF, at least some aspects are prohibited and greatly affect fertility clinics.[361] Specifically, while the statute provides exemptions for embryos that fail to develop past thirty-four hours or are stored though cryopreservation, it is still faulty because standard medical practices are unnecessarily impeded upon since embryos must develop five to six days before implantation or storage.[362] The narrowness of the Louisiana statute has already created issues and has even, in some cases, resulted in patients being forced to relinquish control to clinics and providers to avoid liability.[363] While it may be appreciated that the Louisiana legislature took the liberty to exempt some aspects of IVF procedure in their abortion regulations, the statute itself is far too narrow and the Texas legislature should avoid such strict guidelines in crafting updated regulations.[364]

In one single sentence, the state of Indiana provided exceptions to IVF procedures.[365] However, the Indiana Code fails to define IVF and standard practices.[366] Compared to both the Indiana and Arizona legislation, when applying exceptions to the state of Texas, the legislature should consider explaining IVF and what is considered standard practices in the medical field.[367] On the other hand, West Virginia does define IVF as a complex series of "procedures intended to improve fertility or prevent genetic problems and assist with conception."[368] When creating the new legal framework in Texas, the Texas legislature should define IVF similarly to West Virginia in addition to exempting IVF from its abortion regulations.[369]

Compared to Louisiana, Indiana, Arizona, and West Virginia, South Carolina's proposed Human Life Protection Act provides the most clarity on what is and is not considered an illegal abortion.[370] Notably, South Carolina outlines that IVF is an exemption performed "within the accepted standards of care by the reproductive medical community."[371] This seemingly solves issues regarding the unnecessary imposition on medical practices, and Texas should adopt similar language when creating a new legal framework.[372]

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361. Brendel & Kennedy, *supra* note 16.
362. *See IVF (In Vitro Fertilization)*, *supra* note 10.
363. Bendix, *supra* note 195.
364. *See* discussion *infra* Part V.
365. IND. CODE ANN. § 16-34-1-0.5 (West 2022).
366. *See id.*
367. *See* discussion *supra* Section III.D.2–3.
368. *See* W. VA. CODE. ANN. § 16-2R-2 (West 2022).
369. *See id.*
370. *See* H.R. 3552, 2023 Leg., 125th Sess. (S.C. 2023).
371. *See id.* (emphasis added).
372. *See* discussion *infra* Part V.

2. Attorney General Statements in Tennessee, Oklahoma, and Arkansas

While an attorney general opinion should be considered as an alternative in Texas, it is not ideal because "[o]pinions do not address factual matters nor do they create or amend existing laws."[373] Moreover, opinions are at risk of being overruled, modified, or withdrawn by current or future attorney generals.[374] In issuing an attorney general statement rather than official legislation, a risk is created that a future attorney general may come to a different opinion.[375] Therefore, issuing an attorney general statement should only be used as a last resort.[376]

Moreover, Arkansas's approach is not an ideal method to address the issue presented because Arkansas did not utilize a formal method of clarification.[377] Rather, to address the issue, Texas should take a more formal approach to ensure consistency in addressing IVF and abortion in the future.[378]

V. PROPOSED SOLUTION IN TEXAS

The Texas legislature should enact explicit legislation that exempts IVF embryos, and only in the alternative, issue an attorney general opinion.[379] Modifications to exempt IVF embryos from abortion regulations should be considered for both Chapter 245 of the Texas Health and Safety Code and the Texas Heartbeat Act.[380] Similarly, in modeling Texas legislation after Arizona legislation, the IVF exemptions should be clearer and more explicit to further protect couples or individuals.[381]

A. Amending Texas Health and Safety Code Chapter 245

Chapter 245 of the Texas Health and Safety Code should be amended to read as follows:

> (1) "Abortion" means the act of using or prescribing an instrument, a drug, a machine, or any other substance, devise, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral

373. *Attorney General Opinions*, *supra* note 194.
374. *Id.*
375. *See id.*
376. *See id.*
377. *See* Bendix, *supra* note 195.
378. *See* discussion *infra* Part V.
379. *See* discussion *supra* Section IV.H.
380. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.002; *see* TEX. HEALTH & SAFETY CODE ANN. § 171.201 (Texas Heartbeat Act).
381. *See* ARIZ. REV. STAT. ANN. § 1-219 (West 2021).

contraceptives. An act is not an abortion if the act is done with the intent to:

(A) save the life or preserve the health of an unborn child;
(B) remove a dead, unborn child whose death was caused by spontaneous abortion;
(C) remove an ectopic pregnancy; or
(D) disposal of embryos created through in vitro fertilization within the accepted standards of care by the reproductive medical community.

(2) "Abortion facility" means a place where abortions are performed.

. . .

(3) "Department" means the Department of State Health Services.
(4-a) "Ectopic pregnancy" means the implantation of a fertilized egg or embryo outside of the uterus.
(4-b) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.
(4) "Patient" means a female on whom an abortion is performed, but does not include a fetus.
(5) "Person" means an individual, firm, partnership, corporation, or association.[382]

B. Amending the Texas Heartbeat Act

First, to resolve the vagueness created by the lack of definitions in the Act, the legislature should amend Section 171.201 to read as follows:

(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heartbeat within the gestational sac.
(2) "Gestation" refers to the carrying of an embryo or fetus within the womb.
(3) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.
(4) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

. . .

(8) *"Aid" or "abet" means to assist, encourage, provide funding, or agree to forward the progression of an illegal abortion as outlined below*.[383]

382. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.002 (emphasis added to indicate proposed changes).

383. *See id.* § 171.201 (Texas Heartbeat Act) (emphasis added to indicate proposed changes); *see* discussion *supra* Section III.C.2.

The Texas Heartbeat Act only includes explicit exceptions for abortions that are medical emergencies.[384] Therefore, a new section must be added to explain and exempt IVF from abortion regulations.[385] This proposed additional section, titled "Exceptions for Embryos Created Through In Vitro Fertilization," should read as follows:

> (A) This section does not apply to the disposal of embryos created through in vitro fertilization, not yet transferred into the uterus, within the accepted standards of care by the reproductive medical community.
>
> (1) "In vitro fertilization" is a complex series of procedures used to help fertility or prevent genetic problems and assist with the conception of a child;
>
> (2) "Disposal" applies in cases of divorce, death, abandonment, and genetic abnormality;
>
> (3) "Abandonment" occurs if at least 5 years have passed since contact with the individual or couple, and no written instructions from the couple exist concerning disposition.
>
> (B) When considering the "accepted standards of care by the reproductive medical community," the physician must make determinations that are consistent with the physician's good faith and reasonable understanding of standard medical practices.
>
> (C) A physician may not be sued by a party or otherwise found criminally or civilly liable for complying with the instructions provided in a parties' original disposition or storage agreement.
>
> (D) There is no cause of action against a party for consenting to the disposing of cryopreserved embryos when acting in accordance with the parties' original disposition or storage agreement.[386]

VI. CONCLUSION

Following the overturning of *Roe v. Wade*, confusion has arisen as to whether embryos created through the IVF process and later cryopreserved rather than transferred are considered life under personhood definitions.[387] However, this confusion is limited to Texas because various states have already taken action through enacting explicit exceptions for the destruction of IVF embryos in regulations or, alternatively, issued an attorney general statement for clarification.[388] Because of the confusion that exists as to the Texas legislature's intent in abortion regulations regarding cryopreserved

384. *See* Tex. S.B. 8, 87th Leg., R.S., 2021 Tex. Gen. L. 62.

385. *See id.*

386. *See id.*

387. Erin Heidt-Forsythe et al., *Roe is gone. How will state abortion restriction affect IVF and more?*, WASH. POST (June 25, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-egg-donation/ [https://perma.cc/G8XQ-UFZ7].

388. *See* discussion *supra* Section III.D.

embryos, Texas must issue explicit exceptions or, although not binding, issue a statement of clarification.[389] Absent any action by the legislature, the future of IVF practices remain uncertain.[390]

389. *See* discussion *supra* Part V.
390. *See In Vitro Fertilization*, *supra* note 10.