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IVF is not Legally Supported

## 1. Introduction

Genesis 9:1 reads, "God blessed Noah and his sons and said unto them 'be fruitful and multiply and replenish the earth.'" We as a human race have done an excellent job at replenishing the earth, as the Earth now has 7.7 billion inhabitants. However, the way in which we replenish this earth is drastically changing. We have evolved from the creation of a child being the outcome of two people physically creating it, to choosing how and when the child will be created, what the child will look like, and even attempting to determine the child's IQ. In 1978, technology changed the way an embryo was created, it bypassed the natural order and developed invitro fertilization (IVF). However, even beyond religious norms what is of great concern ethically is whether these new technologies take into consideration the rights, and health, of unborn and unused embryos.

IVF was created in the 1970s specifically for women whose fallopian tubes were damaged or blocked. IVF is performed by first giving the mother hormone therapy two weeks before the actual procedure so that the number of healthy eggs increases. Then, those healthy egg and sperm are taken from the mother and father and are fertilized outside of the body, in vitro. Once fertilized, the sperm and egg are placed into the uterus of the carrier in hopes that one or two embryos survive. 6.0% of couples in the United States are fertile. However, because of IVF, there have been 30 thousand children born (Levine 1). For couples unable to conceive naturally, it seems logical and ethical to use IVF.

There are two fundamental bioethical questions that have surfaced as IVF has become more utilized. The first being, should the embryos created by IVF be considered property? The second being, what is to be done with unused embryos? By analyzing current, relevant case

law, I believe that law does not account for some of the ethical issues that are proposed. By looking at *Rooks v. Rooks*, *Bilbao v. Goodwin*, and the lack of regulation regarding unused embryos, this paper will argue that more concrete regulation surrounding IVF is needed so that IVF can be grounded in ethical frameworks.

## 2. Relevant Case Law

When determining whether or not IVF is supported legally, it is important to look at precedent cases concerning the matter. There are two questions that fall under the central idea of IVF: is an embryo property and what is to be done with unused embryos. However, in order to discuss both, *Roe v. Wade* must be analyzed so that the foundation of the argument can be laid.

### 2.1 *Roe v. Wade*

*Roe v. Wade* is a controversial case that ruled that state laws that ban a woman's decision to abort her pregnancy, except to protect or save a mother's life, is unlawful and unconstitutional. The decision was made with the support of the 14<sup>th</sup> Amendment Due Process Clause which expressed the concept of personal liberty regardless of marital status. Although abortion does not have much of a correlation with IVF at first glance, both topics do have in common the rights of a woman. *Roe v. Wade* spoke on a woman's right to her own body because of her right to privacy. *Roe v. Wade* also ruled that a woman has bodily integrity and cannot be forced to implant an embryo into her womb just as a woman has a right to abort her pregnancy before the third trimester. *Roe v. Wade* represents the constitutional right of liberty for all women (Menikoff 54-63). This case law does help answer the question of what is to be

done to unused embryos, as a woman cannot be forced into allowing an embryo to be inserted into her womb. However, it does not address the status of an embryo.

## 2.2 York v. Jones

1989 was a monumental year for those interested in or practicing using assisted reproductive technology (ART) because York v. Jones rules that embryos are considered property. Yorks v. Jones came to fruition when the York family, while living in New York, wanted to have the mother's six eggs harvested and preserved. The couple contracted with Medical College of Hampton Roads Jones Institute to perform IVF. With no success, the couple left the institute to try a different treatment in California. One embryo remained at the Jones institute. When the Yorks requested that their pre-zygote be shipped to California, the Jones Institute denied the request because they believed that the contract between the two parties only allowed for "embryo donation to another infertile couple, donation for human embryo research, or destruction. The Cryopreservation Agreement between the parties created a bailor-bailee relationship which obligated the bailee—The Jones Institute—to return the subject of the bailment upon termination of the relationship" (*Jones v. York*, 444 A.2d 382 (Me. 1982)). Thus, the district court ruled that the Jones Institute had to return the couples "property". This case set a precedent for all embryo centered cases to follow.

## 2.3 Rooks v. Rooks

Just as Roe v. Wade is a useful case that helps support the argument that there is not enough guidelines and laws surrounding IVF so that IVF can be ethically sound, so does Rooks v. Rooks. Rooks v. Rooks is a current case that addresses what should be done to unused embryos in the case of a couple divorcing unforeseeably. Mandy and Drake Rooks are two individuals

that used IVF during their marriage to create three healthy children. However, during this process, six frozen and unused embryos remained. Unfortunately, the couple divorced and the question of what to do with the unused embryos became a heavy topic among the two. Mandy, the mother, wanted to preserve the embryos while Randy, the father, wanted the embryos discarded, as he did not want to have children against his will. The disagreement was taken to the Colorado Supreme Court, which did not settle the couple's disagreement. However, it did rule that the district court made a decision using unregulated guidelines that did not balance the interest of both parents (*Rooks v. Rooks*, 2016 COA 153 (Colo. App. 2016)). *Rooks v. Rooks* is a precedent case regarding IVF because the Supreme Court created guidelines for embryo custody in divorced couple cases. Although it was monumental in the sense that it created guidelines regarding custody, it did not create legislation that mandated which situations required certain outcomes, thus supporting the argument that more legislation is needed surrounding the topic.

#### 2.4 Bilbao v. Goodwin

In the same way that *Rooks v. Rooks* helped create guidelines surrounding IVF but did not create legislation, so did *Bilbao v. Goodwin*. *Bilbao v. Goodwin* is another case where a couple, Jessica Bilbao and Timothy Goodwin, used IVF implantation to produce their only child. The difference in this case is that a contract was written prematurely regarding their plans for IVF. However, what was not included in the contract was what would happen to the unused embryo in the unforeseeable event that the couple separated. Years into their marriage, the couple decided to separate and what to be done with the unused embryo became a hard conversation to have. Timothy wanted to preserve the embryo in case he and his wife got back together, and

if that did not happen then he wanted to donate the embryo to another couple. Timothy's case was grounded in the belief that the embryo was a human being and had rights. Jessica, on the other hand, wanted the embryo discarded. The district court gave custody to the father but did not rule on the status of the embryo. The decision was appealed because Jessica believed that the right to procreate is just as constitutional as the right to avoid procreation. This case was then taken to the Supreme Court of Connecticut, which ruled that the mother was correct in her stance based on the contract that was signed in the clinic. The Supreme Court also ruled that embryos are property (*Bilbao v. Goodwin*, 217 A.3d 977 (Conn. 2019)). Although this case was useful in that it provided guidance for other cases in the future, it did not provide a legal definition of the status of an embryo nor did it address what is to be done with unused embryos in the case of a situation without a contract.

### 3. Bioethical Issues

In order to understand why principlism is an adequate foundation for case law, one must first understand what principlism is. To some, principlism is the foundation for ethical decision making. To others, however, principlism only suffices with the addition of the concept of habits, experiences, so that principlism can have an element of plasticity that parallels with the malleability of the medical field. (Hester 35) Principlism is made up of four principles: autonomy, beneficence, nonmaleficence, and justice. With the combination of these four principles alongside our experiences, ethical dilemmas and cases are then solved to the best of their ability. When looking at how ethics plays a role in IVF, it is evident there are many bioethical issues that arise because of the lack of legal support surrounding the topic.

The principle that is most revered and discussed in healthcare is autonomy. Autonomy can be defined as the right that an individual has to make decisions for themselves. The issue that arises concerning autonomy is that parents regardless of their marital status, married, separated, or divorced, have a right to their own bodily products. The question that is still to be unanswered is what is to be done if the two parties do not agree? Although guidelines were created about how custody should be determined if a couple is unforeseeably no longer together, there is still no concrete legislation surrounding the matter.

One area of IVF that is not agreed on is the status of the embryo. This uncertain aspect causes the principle of non-maleficence to be disrespected if an agent defines the embryo as having rights. Non-maleficence can be defined as the obligation to not bring about harm to others. So, if an embryo has rights and is assigned personhood, then the embryo is being harmed if discarded. Similarly, mental and emotional harm can be done to a parent if the parent is denied his or her offspring. This issue is also similar with the issue found with respect to the bioethical principle justice. If an embryo is assigned personhood, then every embryo is should be given an equal chance at life. By discarding or preserving an embryo, this fundamental right is taken away.

#### 4. Concluding Proposal

When considering the lack legislation surrounding IVF, one can also directly equate this to the lack of bioethical grounding. Thus, in order to create a form of assisted reproductive technology, such as IVF, that is grounded in ethical frameworks, better guidelines and laws need to be adopted. One proposal that would mitigate the grey area is to mandate that a legally binding, detailed contract be constructed. This contract would need to include the

following: the parents subjective view on the status of an embryo, what should be done with an unused embryo in specific cases, and what is to be done if a couple cannot come to an agreement on what is to be done to unused embryo without going to court. First, an assignment of an embryo's status is to be legally documented so that the court does not have to rule on the matter but can objectively come to a conclusion on a couple's case based on their terms of what rights an embryo has. Secondly, one specific event that should be determined in the contract is what is to be done with an unused embryo in the event that a couple unforeseeably separates. Those options would include the embryo being discarded, donated or preserved. Lastly, the binding contract should include the clause that if a couple cannot come to an agreement on what is to be done with the unused embryo but does not want to take the disagreement to court, then the embryo will be preserved, as preservation of an embryo is neither discarding the embryo nor donating it.

To conclude, the matter of IVF is becoming a universally used form of ART to help couples who cannot procreate naturally. As IVF becomes more accepted, guidelines and legislation are needed so that IVF can be grounded in ethical frameworks and so that less grey matter is seen within our court systems. Simply put, IVF is not legally supported as it needs more structure.



Work Cited

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