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ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

The use and disposal of stored embryos

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ABSTRACT

Claims that human embryos are “human beings” or “persons” cannot be agreed, because philosophies and approaches differ, awarding them statuses from full human to property. In 1984, the UK (Warnock) Committee of Inquiry into Human Fertilisation and Embryology made recommendations that still offer legal and ethical guidance. It is widely agreed, for instance, that embryos created through in vitro fertilization (IVF) should not be transferred for reproductive purposes without relevant consent, whether for gamete donors' or others' family-building. A consequence of courts enforcing parties' IVF agreements on stored embryo use or balancing parties' competing interests is that one party—usually the male—can veto the other's use of the embryo for reproduction on termination of a partnership. The extent to which surplus IVF embryos can be donated for research ranges from prohibition to infertility treatment and more, but wider needs for embryology research are appearing that, despite prevailing bans, may require embryos for study created to genetic specifications.

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1. Introduction

When human embryos are created artificially—i.e. outside a woman's body—by in vitro fertilization (IVF), they may be used for a short time while fresh or stored for later use by freezing, usually in liquid nitrogen (cryopreservation). Storage can be for long periods, theoretically in perpetuity, although evidence indicates finite limits, perhaps decades, to their continuing utility. Women being prepared for IVF may be hormonally (hyper)stimulated for recovery of multiple ova for fertilization, so that many embryos are created for assessment (possibly by preimplantation genetic diagnosis) and selective transfer in utero in the hope of achieving pregnancy. This can mean that some embryos remain in storage so that women wanting further transfers of their embryos will be spared the risks and the physical and financial costs of repeated hormonal ovarian stimulation. Unless there are legal or other limits to how many embryos can be created and stored, which several countries have introduced, embryos that gamete donors do not want for their own reproduction can remain. Issues therefore arise of lawful and ethical disposal of surplus embryos.

Although many countries at different stages of industrial development have IVF facilities, this form of medically assisted reproduction may not be governmentally funded or adequately funded so that it remains “luxury medicine” available mainly to more affluent populations that, through personal means or private insurance, can afford the procedures and the costs of storing surplus embryos. In November

2015, for instance, the Superior Court of California accepted evidence that there are more than 4 million frozen embryos in medically assisted reproduction clinics in the USA, including about 100,000 at the Center for Reproductive Health at the University of California, San Francisco [1].

Embryos that gamete donors do not want to use for their own reproduction can often be offered to others for their family-building, analogously to private adoption, or be offered to appropriate laboratories for scientific research or education. Alternatively, embryos that the gamete sources cannot or do not want to provide for use can be removed from storage and left to natural disintegration, which is often described emotively as being “destroyed.”

2. The status of stored embryos

The moral status of the human embryo will remain unresolved as long as different philosophies, religious traditions, perceptions, and interests in their destiny continue to compete with each other. Proponents of certain doctrinal perspectives may adhere to their own convictions, dispute different viewpoints of others, and favor conclusions based on their viewpoints over contending preferences of others. They may seek to pre-empt others' approaches by claiming that the moral status they ascribe to human embryos is inherent, as a matter of nature or supernatural grace, and beyond rational dispute. Others may affirm that qualities found in embryos are attributed by human reason, or perhaps by material, utilitarian, or other considerations. Laws, cultural practices, and clinic policies founded on different determinations of the proper role and function of human embryos in reproduction and/or scientific research can govern or guide how stored embryos should be managed according to legal and/or ethical principles.

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More than 30 years ago, but with continuing relevance, an influential governmental committee in the UK, chaired by Cambridge University moral philosophy professor Dame (later Baroness) Mary Warnock, consulted with a wide variety of community institutions, groups, and individual members to gather evidence and report on a spectrum of views that exist on the status of human embryos located outside women's bodies. The Report of the (Warnock) Committee of Inquiry into Human Fertilisation and Embryology [2] provided a basis for legislation, and is still a seminal reference document for comparable reviews in the UK and other countries, including on subsequent developments, such as mitochondrial donation [3].

Some organizations that submitted evidence to the Warnock Inquiry published it independently, but the Committee's report did not include details of such evidence. More recent scholarly analysis of the written evidence filed in the Parliamentary Archives, however, discloses that the two central ethical questions that engaged witnesses and the Committee were "When does life begin to matter morally?", and "Should we permit research upon human embryos?" [3] (p.592). Further, although several witnesses were neutral regarding the direction they preferred Committee recommendations to take, they generally divided, as we might now predict, between advocates of a religious or conservative "pro-life" approach and those urging accommodation of a scientific, research-friendly "pro-choice" approach.

For instance, the Catholic Bishops' Joint Committee on Bio-Ethical Issues stated that "...at the time of conception there comes into existence a new life...a living cell from the father fertilizes a living cell from the mother...Each such new life is the life not of a potential human being but of a human being with potential" [3] (p.594). This equation of conception with fertilization was rejected on scientific and legal grounds when the Inter-American Court of Human Rights addressed IVF, which Costa Rica had prohibited as violating the right to protection "from conception" provided by the national constitution. The Court denied that such protection applied from fertilization before an embryo becomes implanted in utero, because "the Court considers that the term 'conception' cannot be understood as a moment or process exclusive of a woman's body, given that an embryo has no chance of survival if implantation does not occur" [4] (para. 187). Accordingly, the Court ruled that conception "occurs at the moment when the embryo becomes implanted in the uterus" [4] (para.264).

Describing an embryo as a "human being" or "person" similarly disregards the volume of historical and modern law, the so-called "born alive" rule, which regards live birth as the origin of "a human (in) being". The US exceptionally recognizes independent fetal personhood at prenatal viability. The generally prevailing history is embodied, however, in the Canadian Criminal Code section 223(1) provision that "A child becomes a human being...when it has completely proceeded, in a living state, from the body of its mother..." The child before live birth is human, but is not what historical homicide law recognized as "a person in being" until completely separate from the mother. Section 238(1) creates a separate offence of deliberately causing death during its birth of "any child that has not become a human being". The Catholic Bishops' urging that embryos "with potential" be recognized as human beings, which is commonly denied, requires their assessment of respect due to non-embryonic human tissues that, through cloning, might also have potential to be developed into members of human society, in the way that non-embryonic tissue from a sheep was cloned into the sheep "Dolly" in 1996. The speed with which legislatures and ethics agencies rushed to prohibit human cloning confirms cloning's potential [5].

The Catholic Church has adapted its doctrine on the beginning of human life, taking account of evolving understanding. Before 1869, it considered "quickening"—a woman's first sense of fetal movement—to indicate the beginning of pregnancy, but in that year, recognizing that conception precedes quickening by about 3 months, pronounced that life begins at conception [6]. The Church condemns the more recent development of "test tube" fertilization before conception, and now asserts that protection of embryos in vitro must begin at fertilization.

The veneration shown to human embryos, sometimes described as "embryolatry", seems not to be reflected in nature. The expert scientific witness appointed by the Inter-American Court of Human Rights testified to the high rate of spontaneous wastage of embryos, observing that:

The process that generates human life includes embryonic death as part of a natural and necessary process. Of every 10 embryos spontaneously generated in the human species, no more than 2 or 3 are able to survive natural selection and be born as a person. The remaining 7 or 8 embryos die in the female genital tract, generally without the parents' knowledge [4] (para. 310).

Some products of fertilization are so defective as to be non-viable and are rejected by the body's immune system, but among those fit for implantation and gestation, which of them succeed seems a random matter of chance rather than inherent destiny. With IVF and the movement to elective single embryo transfer to reduce the incidence of multiple pregnancy [7], criteria for selection of embryos for transfer have become refined, such as by developments in the practice of preimplantation genetic diagnosis, for instance to test for monogenetic and chromosomal disorders.

More settled though laws and practices tend to become, background controversies remain. Pro-life groups, for instance, can seek to intervene in divorce disputes over preservation of stored embryos [8], and philosopher/ethicists can doubt the moral underpinnings of their arguments [9]. Courts remain generally reluctant to recognize stored embryos as a species of property, but are being driven toward that conclusion to achieve certainty of control and responsibility in their management [10].

3. Rights to (non-)parenthood

One area in which the law has become relatively settled concerns custody and use of divorced or separated couples' stored embryos for reproduction. Disputes do not concern the legal status of the embryos themselves, but gamete contributors' rights to achieve, and particularly to avoid, parenthood to which implantation might lead. When legislation provides that contributors' joint consent is required for implantation, whether into the ovum donor or another woman, it is likely to be upheld even to the deprivation of the ovum donor's only prospect to have her genetically linked child. The European Court of Human Rights upheld UK law to this effect when an applicant who had created IVF embryos developed a condition that compelled removal of her ovaries. Now separated from her partner, she requested the Court to overcome his refusal of consent to her use of the embryos and to their preservation. Having previously ruled in a case from France that embryos themselves do not have a right to life [11], the Court upheld the partner's legislated right not to become a parent with the applicant over her prospect to have her own genetic child [12].

In the absence of controlling legislation, courts apply principles of their own, which usually follow one of two main models [13]. Whether or not laws require parties to IVF arrangements to specify in advance how stored embryos can be used, any such agreements the parties reach are likely to be enforced. Following what is described as the contractual model [13] (p.335), many courts will enforce what the parties creating IVF embryos previously agreed. Almost invariably, agreements are based on equality of parties, allowing either to withdraw consent on breakdown of the marital or analogous relationship, but in case one dies, the survivor is often left free to decide on use. This usually favors a widow who wants to bear her deceased partner's child, but by contrast, men who leave relationships almost invariably do not want their ex-wives or partners, or strangers, to bear their children, bringing related issues of custody, visitation rights, and legal duties of financial support that can require emotionally and financially draining litigation, with no prospect of satisfactory outcomes for any of the parties involved, including the children.

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