

Application for the Friends of Fondren Library Undergraduate Research Award

**For my research on
The Parenthood Problem: Examining Egg Donation, Adoption, and
Frozen Embryos in Terms of Law and Economics**

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As students at Rice University, we imagine Fondren Library to be the stately landmark that stands in the center of the campus as a beacon of learning and the haven for students thirsting for knowledge. It serves as a quiet refuge for students in pursuit of their intellectual studies and a resource for those who are innovating new ideas or who are simply learning about already-fathomed notions. Such is one perception of Fondren Library.

Another perception of Fondren Library is one alluding to a much more innovative and technology-savvy venue that exists in multiple locations around campus, such as on students' personal laptops, on desktop computers in classrooms, or even in computer labs at the nine residential colleges. This venue is Fondren's website <http://library.rice.edu/>. The Research Indexes and Databases that Fondren offers at its online location serve as personal library "branches" and valuable resources for students whose research requires a massive yet condensed source of information and up-to-date, modern exploration of their subjects.

It is with this priceless weapon—<http://library.rice.edu/>—that I embarked on my battle of discovery in the area of law and economics and my study of “The Parenthood Problem: Examining Egg Donation, Adoption, and Frozen Embryos in Terms of Law and Economics.” My research required two essential tools: easy access to legal documents, resources that would multiply my own ideas on the legal ramifications of parenthood.

This easy access not only refers to the speed or availability of the documents I needed but also refers to the physical place where I could conduct my research. While the location of Fondren Library in Rice’s academic quad offers many attractive features such as the sixth floor lounge and a spacious area for studying on the first floor, sometimes life with classes, studying, extracurricular activities, and a job to pay for college becomes hectic, and one jumps at the chance to conduct intelligent, complicated research from the comfort of one’s own dorm room while wearing a t-shirt and pajama pants. Thus, instead of spending hours pouring over legal tomes or calling the appropriate courts to request legal records, the online Research Indexes and Databases became my most helpful virtual assistant, as I was then able to pour through the online databases during any spare moment I had available.

It would seem incomplete if I fail to mention the specific indexes within Fondren’s online Research Indexes and Databases that aided me in my research on parenthood in relationship to law and economics. When I began my research, I found that the Ebsco Legal Collection database served as an obliging assistant in jumpstarting my ideas and pointing me in the appropriate direction. With broad search options, I could simply type in “egg donors” or “frozen embryos divorce” and everything from newspaper articles to legal journals would pop up in my search results. These documents

not only provided valid analysis of my subjects of interest but also directed me toward specific legal cases whose primary sources could potentially serve as critical support for my arguments. Furthermore, the Ebsco Legal Collection automatically provided the appropriate citation for its documents for multiple citation methods, including APA and MLA, the two citation methods most frequently used by Rice Students. As the Chair of the Rice Honor Council, I am constantly concerned with appropriately citing my resources, and this facet of the Ebsco Legal collection not only immediately provided me with the citation, but it saved me the time of meticulously stopping my research to pour over MLA guidebooks to form my citation and thus provided even more time for me to continue my research.

Once the Ebsco Legal Collection database guided me toward these cases, the databases Westlaw Campus and LexisNexis contained the primary sources for the legal documents pertaining to the actual cases I wished to research and cite within my paper. While I explored and recognized the merits of LexisNexis' legal records, I personally found Westlaw Campus to be easier to navigate and to offer interesting perks such as a timeline containing the legal documents as they traveled from district courts to appeals courts to state supreme courts or even to the United States Supreme Court. Not only would Westlaw Campus present a timeline for these documents, but it also flags the documents as containing material that has since been questioned or is "no longer good for at least one point of law." Because of these flags, I could either stay away from these documents as poor sources for my paper, or I could use this direction to show how the legal reasoning for this case worked in the past but no longer pertains to current law.

While Westlaw became my source for legal documents, the LexisNexis Statistical database served as my resource for statistical information gathered by government agencies regarding adoption and egg donation. Such support enforced my point of a need for legislation and consistency in the areas of adoption and egg donation.

Ultimately, I must thank Fondren Library for recognizing the challenges of the life of a modern student and for supporting the students by providing resources that cater to the needs of a student who is on-the-go. Without these online resources readily available at the touch of a key on my laptop, I would not have been able to fully realize the potential of my research nor would I have been able to actually enjoy my research so fully. I received high praise from my professor regarding the excellence of the research presented in my paper on “The Parenthood Problem: Examining Egg Donation, Adoption, and Frozen Embryos in Terms of Law and Economics,” and I owe such commendation in part to the resources offered by Fondren Library.

Even if my paper is not a recipient of the Friends of Fondren Library’s Research Award, ***I would like to take this as a chance to sincerely thank you for your support and appreciation of the modern student.***

Jackie Ammons

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ECON 439

Dr. Dagobert Brito

***The Parenthood Problem:
Examining Egg Donation, Adoption, and Frozen Embryos in Terms of Law & Economics***

Introduction

While many people imagine the idea of parenthood, it usually involves picturesque scenes from the first day of school, graduating from high school, or even painful birth contractions. However, what most individuals fail to realize is that parenthood comes with certain rights that some parents rabidly fight for but others easily give away.

Two major parenting trends have recently emerged: egg and sperm donation and adoption. Both require reassigning the rights of parenthood from one individual to another individual or couple. It is at this transfer point that the definition of parenthood drastically transfers from the sentimental, familial feelings described above to strict, legal property rights. In more economic terms, egg donation can be characterized as a market exchange where one person sells an item and another buys it. The issue of adoption is an exchange of property rights—also known as custody rights in the legal world—usually without the messy matter of compensation.

Another aspect of this popular, new market of egg donation involves cases where heterosexual couples freeze their embryos but divorce before the stored embryos are implanted into woman's the uterus. In the divorce proceedings, property claims—or, rather, custody battles—over the frozen embryos ensue, with one or both potential parents claiming the rights to the embryos. These types of cases become complicated, as they further confuse the already

perplexing issues of egg donors and adoption mentioned above, as the property rights assignments for the frozen embryos are unclear when the parties separate in the divorce.

Social concerns openly confront each the three issues of egg donation, adoption, and custody battles over embryos. For example, many individuals question whether it is ethical for women to charge money for the promotion of family through egg donations; these individuals are also concerned with the physical safety of the female donor, as she has to go through a strenuous medical process to retrieve the egg cells.

For adoption, some people value the rights of the adoptive parents over that of the biological parents and vice versa. Others claim that the interests of the child are more important than any rights that the adoptive or biological parents can even hope to claim.

The only one of these three issues that appears relatively untouched by social concerns is the dilemma of frozen embryos in divorce cases. This lack of attention is probably linked to the rarity of this type of case and is also due to the fact that such matters are more court-based: the embryos are already in the hands of their biological parents, and the only issue under scrutiny is who should have custody rights over the embryos.

Thesis

This paper will simultaneously address these social concerns while providing analysis in light of economic and legal reasons surrounding these three matters. Ultimately, the core question in each of these issues surrounds the concerns of legal property rights. Thus, there must be a direct focus on the following economic questions: Are egg cells property? If so, do egg donors have the right to be compensated for putting their property into a market where resources are scarce? In regards to adoption, does parenthood include certain property rights? If so, who has the property rights: the adoptive or birth parents?

Each of these questions regarding the legal nature of parenthood hinges in on multiple economic and legal issues, including scarcity, property rights, property assignment, and Pareto efficiency.¹ In response to these issues, the simplified yet provocative thesis of this paper is that, yes, egg cells are personal property that have substantial economic value as scarce resources, and donors should receive market-value compensation for the exchange of this property. For adoption cases, parenthood rights become trickier matters. If one viewed this issue as strictly as an economic matter, one would say that biological parents have the property rights over their children until such time as they give up those rights—in a transaction—to the adoptive parents. However, in certain cases, parents can symbolically waive such rights in forms other than an official transaction, such as abandonment through ineptitude in parenting.

An interesting area of parenthood rights arises with custody battles that involve frozen embryos in divorce cases. For some reason or another, couples oftentimes freeze their embryos for later use, but, prior to implanting the embryo in the uterus to become a child, the couple decides to divorce. A few options are available to the would-be parents: either destroy the embryos or divide the embryos between themselves as property. Courts often intervene in such cases and make the decision for couples by either mandating that the embryos should be destroyed or designating custody rights to one individual. However, while not officially parents yet, the couple should be able to effectively and efficiently bargain over the rights to the embryos without the court having to designate rights over the embryos. By engaging in bargaining over the embryos, the couple can efficiently ensure that the rights go to the person who values them more.

¹ Barnes & Stout, pg. 11-12

Thus far, this paper has simply hit the highlights of the legal and economic forces surrounding the issues of parenthood. A more in-depth study of both the logistical background and the economic reasoning behind these matters will reveal that the state of parenthood should be viewed as involving privileged property status and should entail all of the rights and responsibilities surrounding these property rights.

Current Status of Egg Donation in the United States & Case Law

Starting in the 1980's, egg donation started a new market that has become a fad in the United States.² With advertisements targeting women who are “attractive, intelligent, accomplished” and between the ages of 20 and 29 with compensation from \$2,000 to \$100,000, the offer to donate eggs seems exceedingly tempting and highly rewarding.^{3, 4}

Notably, this issue of egg donation is not some far-off subject that lies far beyond the hedges of Rice, but egg donation, in fact, creeps in through Rice's hedges. As an avenue by which to reach young, smart women, egg donation centers advertise in the classified section of *The Thresher*, Rice University's own newspaper, to appeal to potential female egg donors who are “intelligent, attractive, non-smoking women between the ages of 21-29 who are physically fit and maintaining a healthy lifestyle” and offer \$15,000 to donors who meet these qualifications.⁵

Even more far-reaching than *The Thresher* is the realm of Facebook.com, an online networking website that has become wildly popular among young adults; in an advertisement on Facebook.com, the Houston Egg Donation Center advertises to young women so as to convince

² Rao, Radhika

³ The Egg Donor Program

⁴ Rao, Radhika

⁵ *The Thresher*, Rice University

them to donate their eggs and to “give the gift that lasts a lifetime.”⁶ These advertisements attempt to make it seem hip and trendy to donate eggs, not to mention financially rewarding.

In light of this growing trend, these egg donations have resulted in over 10,750 egg transfer procedures that have lead to over 5,326 actual pregnancies for women who otherwise are unable to produce their own eggs to become pregnant in just the United States in the year 2001.⁷ As a result of such pregnancies, 6,333 children have been born.⁸

In spite of these seemingly positive results of egg donations, there are both social and physical risks associated with egg donations that have aroused concerns. One of the projected problems surrounding egg donation is the potential issue of coercion in that women might donate their eggs because of the high compensation and, for that reason, will blindly disregard the possibility of physical harm to their bodies. While compensation has been barred for women donating eggs for research purposes, the rewards of donating to an egg bank can reach up to \$100,000.⁹ In comparison to men who act as sperm donors, this potential issue of coercion does not seem to be a concern, for men only receive compensation for their sperms ranging roughly from \$50 to \$100 in comparison to women who can receive up to 100 times as much for their eggs.⁵

Another concern is the physical safety of the donors. The procedure involved in retrieving eggs has many potential side effects for donors, including unintentional pregnancy for seven percent of the donors.¹⁰ This increased potential for pregnancy finds its root in the hormone drugs that doctors prescribe for donors prior to their procedures so as to increase their

⁶ Facebook.com

⁷ Centers for Disease Control and Prevention

⁸ Centers for Disease Control and Prevention

⁹ Rao, Radhika

¹⁰ Stanford University

general fertility levels; because of the potential for pregnancy, donors must abstain from sexual intercourse for a short period of time following the procedure.¹¹ Other possible side effects of the egg procuring procedure include “chest and abdominal fluid buildup” for one percent of the donors, and an increased chance of ovarian cancer.¹² Additionally, in a recent study by Stanford University, 64 percent of donors “responded that the physical side effects of fertility drugs, injections, and retrieval were a negative aspect of donation.”¹³

With each of these concerns, it seems that the argument against egg donation is mounting even higher. However, as with all medical procedures, egg donor are informed of these risks before their procedures. Countless websites and organizations, such as the American Fertility Association, dedicate themselves to informing both egg donors and egg recipients alike, so there is no reasonable excuse for egg donors to be unaware of the potential personal costs involved with donating their eggs.¹⁴

While not specifically surrounding egg donation but certainly relating to the sale of human products, the case *Moore v. Regents of the University of California* sheds some light on the legal situation regarding both the compensation and information that should be provided to donors of body parts or cells.¹⁵ Medical researchers at the Medical Center at University of California in Los Angeles studied cells from Moore’s spleen so as to treat Moore.¹⁶ As a result of their studies, the researchers found that Moore’s cells could help to develop a very effective and lucrative treatment drug, and they developed this drug without Moore’s knowledge; later,

¹¹ Stanford University

¹² Stanford University

¹³ Stanford University

¹⁴ American Fertility Association

¹⁵ Westlaw, *Moore v. Regents of the University of California*

¹⁶ Barnes & Stout, pg. 79-84

Moore sued for part of the profits from the drug.¹⁷ The California Court of Appeals recognized the fact that “the plaintiff had a property interest in his genetic material,” while the California Supreme Court reversed this decision partly by stating that Moore should not be compensated because his compensation might stunt the growth of research; still, the California Supreme Court still acknowledged that Moore had a “properly stated cause of action” since he was not informed of his cells being used for research.¹⁸ The Court also stated that the plaintiff’s spleen cells were certainly his property, as he had “the right and interest or domination rightfully obtained over such an object, with the unrestricted right to its use, enjoyment and disposition.”¹⁹

From this case *Moore v. Regents of the University of California*, we can initially conclude that egg cells are indeed property, for egg donors have the “unrestricted right to its use, enjoyment and disposition” of their egg cells.²⁰ Second, we can also conclude that egg donors should be thoroughly informed of both the risks and the potential uses of their cells before they donate them. As far as compensation is concerned, if a donor is knowledgeable of the potential uses of her eggs, she should be able to relinquish or deny the use of her eggs, unlike Moore, for he was unable to have any kind of potential control over his cells due to his lack of information. Thus, the main conclusion of this case that can related to egg donation is that information should be properly communicated to donors before their procedures, and, as the California Supreme Court confirmed, this knowledge should allow the donor to be able to make the decision of whether or not to donate in light of the kind of compensation that is offered.

Economically speaking, the most efficient reasoning behind the decision of whether or not to donate one’s eggs should be determined, first, by evaluating whether the egg donor is risk

¹⁷ Barnes & Stout, pg. 79-84

¹⁸ Barnes & Stout, pg. 79-84

¹⁹ Barnes & Stout, pg. 80

²⁰ Barnes & Stout, pg. 80

averse or risk preferring in his or her decisions—how much she cares if side effects occur and the potential harm caused by the side effects. Similar to the Hand Rule, a useful tool in economic decisions developed by Judge Hand (usually employed in tort cases but is still logical here), an egg donor could weigh the benefits from donating, the compensation, in comparison to the cost of a side effect, if it did occur, multiplied by the percent chance that it could occur. If the benefits exceed the potential costs, in economic terms, it would be rational for the potential candidate to donate her eggs.

In addition to the usual egg donation, a couple can also temporarily “donate” their egg and sperm to a surrogate mother so that she can carry their embryo and produce their child for them. In such cases, concerns may arise involving the parenthood of the embryo: whether the baby belongs to the biological parents or whether it should belong to the birth mother. Case law supports the claims of the biological parents, as in *Jaycee B. v. Superior Court* in Orange County, California where the surrogate mother sought custody over the child Jaycee B. whom she had agreed to carry and give birth to for the biological parents.²¹ *Jaycee .B v. Superior Court* was a contract case, for the surrogate mother had signed a contract with the biological parents stating that she would give their baby back to them after she gave birth to it; due to the existence of the contract, the court granted the right to the baby to the parents, citing a breach in contract on the part of the surrogate mother.²² Essentially, the case of *Jaycee B. v. Superior Court* shows that contracts can often help to efficiently enforce property rights.

In theory, contracts designate the future of situations and help maintain expectations. While it is sometimes efficient for those expectations to be broken—or, rather, for one party to breach the contract—it is often the case that upholding former expectations is economically

²¹ Westlaw, *Jaycee B. v. Superior Court*

²² Westlaw, *Jaycee B. v. Superior Court*

efficient. As *Jaycee B. v. Superior Court* shows, contracts can play a useful part in maintaining these expectations by designating and upholding the rights of the appropriate parents designated in the original contract. Therefore, it is apparent that there are merits of contracts in that they help to efficiently determine property rights by giving the most effective and expected outcomes.

In legal terms, while one could argue that having the property rights over one's eggs is an inalienable right that cannot be transferred to another party, we must also recognize that this is a property right, that, according to history, has been transferred thousands of times without any major side effects whatsoever. Inalienable rights often imply that a certain personal harm might come to the person giving up the rights; however, this is certainly not true for egg donation, as the donor benefits financially and the community benefits by bringing another child into the world through the donation.

Additionally, it must come into play that we are also dealing with a scarce resource that is in high demand. If the donor is fully aware of the risks, the legal world should strive to comply with the economic world where high demand—approximately 10 percent of couples—currently confronts a relatively low supply of eggs—less than 11,000 transfers—many of which are unsuccessful.^{23, 24}

For these reasons, egg cells should legally be considered property, and, thus, egg donors should be compensated accordingly for the transfer of these property rights at a market price where supply equals demand. In view of such a position, donating an egg should be considered both a transfer of goods and a service. A woman not only transfers her property rights, but she also has to go through the medical procedure and must spend her valuable time undergoing the procedure that involves multiple risks. Compensation for this service should be given to the egg

²³ WebMD

²⁴ Centers for Disease Control and Prevention

donor in addition to the compensation that the receiver of her eggs contributes for the property transfer of the eggs.

Current Status of Adoption in the United States & Case Law

Over half of a million children currently reside in foster care homes.²⁵ Individuals in the United States are quite responsive to this need for parents, and, according to a study by the National Center for Health Statistics, 26.4 percent of women ages 18 to 24 who have at some point in their lives been married have considered adoption as an option.²⁶

While there is a large pool of willing adoptive parents, each of these couples must go through a careful legal process that is determined by each state. First, the state must establish who is eligible to adopt. Most states establish some kind of “good character” to adopt, and there are no restrictions on marriage status in most states: adoptive parents may be married or single.²⁷ One exception regarding eligibility remains in Florida where homosexual adoptive parents are strictly prohibited.²⁸

Adoptive parents go through a detailed process before officially becoming parents. The adoptive parents must find a child or baby to adopt, usually through an agency; both biological parents must consent to the adoption; and the courts must affirm the adoption through a hearing, typically with the assistance of an attorney.²⁹

In spite of these strenuous, time-consuming, and financially taxing procedures, there are over 120,000 children adopted in the United States each year.³⁰ Thus, with such willing numbers of adoptive parents and children in need of adoption, it would seem that United States courts and

²⁵ Spar, Karen

²⁶ National Center for Health Statistics

²⁷ The Florida Bar

²⁸ Lithwick, Dahlia

²⁹ Adoption.com

³⁰ Adoption.com

legislation would attempt to make the adoption process as easy as possible so as to place children in permanent homes. However, interesting property rights issues arise between the biological parents and the adoptive parents: whether one biological parent alone is able to give a child up for adoption and whether a biological parent's property rights—also known as custody rights—can be waived under certain circumstances.

As current laws stand, both parents must give up their rights before an adoption may proceed, and if one biological parent chooses not to give up his or her rights, then he or she must first be declared “unfit” before their rights are forcefully taken from them—without consent—by the courts.³¹ “Unfitness” is a rather arbitrary term: for example, in Illinois, a parent may be deemed “unfit” if he or she “failed to demonstrate a reasonable degree of interest, concern, or responsibility as to the welfare of the child during the first thirty days after birth.”¹⁴

If one assumes that parenthood is a property right, such is done with the understanding that contribution of an egg or sperm to the child's creation through copulation creates rights that are shared by both biological parents. Thus, adoption creates a transfer of these property rights from two people to one or two other people, even though the biological parents shall always have the same DNA as their child and the adoptive parents will never share this DNA that established the original parenthood and property rights.

If we can overcome this biological obstacle of DNA and assume that this property right can be transferred legally through adoption, then the most disturbing element surrounding adoption would be whether or not this right is able to be taken away—either forcefully though the definition of “unfit” or willingly through the legal process—from the adoptive parent.

Additionally, since the biological parents will always share their child's DNA, will the

³¹ Stevens, Gina Marie

transaction ever be absolute, and could the biological parent have natural rights at any time over his or her child, even after the legal adoption is complete?

Ultimately, once parenthood rights are transferred from the biological parents through the due process of law, the property rights lie exclusively in the hands of the adoptive parents. The reasons backing this assertion find support on the basis of efficiency. Transactions and property rights must be clear and cannot be reversed at later times: the attempts of biological parents to retrieve their custody or property rights after an adoption is finalized must not be encouraged, for the expectations of property rights should be consistent. This assertion finds further support in the social concern that children should not be in limbo about who their parents are; once parenthood is established, it must remain consistent, if only for the sake of the child.

Thus, *both* biological parents should either give up their parental rights before adoption or should be declared unfit before the adoption occurs. So as to make property rights clear, if one biological parent does not relinquish his or her rights, the adoption should not take place.

Courts generally uphold this economically efficient opinion, as seen in the case of *In Re Baby Girl Clausen*, also known as the “Baby Jessica Case” in the Michigan and Iowa Supreme Courts.^{32, 33} In this case, the biological mother Cara Clausen gave up her baby daughter to Roberta and Jan DeBoer for adoption without informing the biological father Daniel Schmidt of his paternity. After being informed of his paternity after the adoption was complete, Daniel Schmidt claimed custody rights because he had neither given up his parental rights at the time of the adoption nor had the courts declared him unfit as a parent. The Michigan Supreme Court ruled in favor of the father and granted him custody rights.

³² Westlaw, *In Re Baby Girl Clausen*

³³ Stevens, Gina Marie

This case clearly defines the property rights of parents and stipulated that they must give up their rights before another person can claim the rights. However, once an individual releases these rights, the change of property rights should be absolute: a man and a woman who have both given up their rights as parents should not be able to reclaim them after an adoption is complete so as to maintain clear property designations and thus preserve an efficient market.

Current Status of Embryos in Divorce Cases & Case Law

An interesting facet of parenthood rights emerges when a couple who has frozen embryos containing their fertilized egg and sperm decide to divorce before they choose to implant one or more of the frozen embryos in the uterus so that it might become a living, breathing child. When couples come to divorce court, some courts designate the rights to one parent, but other courts demand that the embryos be destroyed, citing “an individual’s right not to be forced into parenthood,” thereby giving legal, property status to the embryos through a parent’s decision as to whether or not the embryo should be given the chance to become a real child when unfrozen and placed in the uterus.³⁴

On the other hand, some courts prefer to have more control over the embryos and thus directly choose to decide the destiny of the embryos themselves. Some courts will order that the frozen embryos be destroyed—despite the protests of one or both of the parents—or that the mother implant the embryos within a certain amount of time if she wishes to use them.³⁵

According to precedents set in most states, most courts “entitle the progenitors of the embryos to an ownership or control interest that allows them to dictate the ultimate disposition of their embryos,” meaning that instead of letting the courts decide the destiny of the embryos, the

³⁴ *More Magazine* Online

³⁵ Pastner, Bruce, University of Houston

decision should be left up to the parents as to whether they wish to destroy the embryos or, instead, they wish to divide them among themselves as property.³⁶

One option for divorcing couples is to divide the frozen embryos up as community property in their divorce proceedings; another option is to draw up a binding, legal agreement before the creation of the embryos that details what to do with the embryos if the couple divorces.

Such was the case in *Roman v. Roman* in the Texas Court of Appeals in Houston in 2006.³⁷ Prior to their divorce, Randy and Augusta Roman froze three embryos from their eggs and sperms and subsequently signed a contract that stated they would destroy the embryos if they divorced. Upon their divorce and division of property, Augusta Roman petitioned to gain custody over the embryos, but the Appeals Court denied her petition by citing the agreement to destroy the embryos in the case of divorce.

Such a decision by the court is economically efficient because it makes the lines of property clear by upholding contracts. Making contracts and property rights apparent eliminates transaction and information costs by making expectations consistent and, therefore, remains economically efficient.

Lower transaction and information costs remove impediments to bargaining and make bargaining more effective. According to economic theory, the Coase Theorem dictates that the best—or, most efficient—outcome will produce itself through bargaining. Thus, if the parties involved in the divorce case gave themselves the chance to bargain over their rights to the embryos, then the party that places greater value on the embryos will gain control over the embryos and an efficient outcome will be achieved—all without the interference of the courts.

³⁶ Kindregan, Charles P., pg. 112

³⁷ Westlaw, *Roman v. Roman*

A Disclaimer: Property and Personhood

Before we begin to delve deeper into the specific economic reasoning surrounding the legal decisions regarding parenthood, one disclaimer must be presented: much of this discussion regarding property rights seems to shut out the fact that children and parents are human beings—individuals with thoughts, emotions, and situations in life that may not quite be in line or defined within the legal or economic realms.

On the contrary, parents and children are unique individuals, and because of their uniqueness, their situations in life become rather tricky. Egg donation, adoption, and embryo custody battles involve emotions that the legal and economic realms cannot completely quantify; however, the world of the law and the notions of economics attempt to categorize such ranging emotions and feelings into a system where there is the most fair outcome for the individuals involved.

It is for these reasons of human feeling and bodily safety that it is fair that egg donation centers should warn potential egg donors of the possible ramifications of the egg retrieval surgical process.³⁸ Likewise, it is also right that legislatures enact laws that prohibit the “selling” of children through the medium of adoption.³⁹

Thus, since we have established the current statuses for each of these facets of parenthood—egg donors, adoption, and embryos in divorce cases—we can move on to discuss the specific areas of economic reasoning that are in place—or, at least, *should* be in place—when making decisions regarding parenthood, while simultaneously recognizing the uniqueness of the individuals involved in such cases and how law and economics attempt to produce the best and most efficient outcomes.

³⁸ Rao, Radhika, pg. 1058

³⁹ Mabry, Cynthia R., pg. 184

The Rights of the Child or Embryo

This paper maintains the thesis that under the legal system, an egg, embryo, or adopted child is its parents' property and should thus be treated so efficiently, but this paper must not only focus on the parents' rights but must also examine the fact that the child involved in these cases may also have rights. This fact begs the question of what are a child's specific rights, and what rights do the parents owe the child?

When egg donations and embryo transfers come into play as properties undergoing economic transfers, one might argue that transferring embryos and treating them as properties might make egg donation mirror the notion of slavery; such an assertion would place egg donation and embryo transfer outside of Calabresi and Melamed's "preconditions for a valid sale" and could possibly forbid an exchange of property entirely.⁴⁰ Calabresi and Melamed theoretically claim that two conditions can bar the exchange of property: first, that the sale might hurt a third party and, second, that the sale falls under a moralism that is unacceptable to society.⁴¹ One could say that selling eggs might hurt a third party in the sense that a child who might be produced from the egg donation may not want to be separated from his or her biological parents. One could also assert that selling a part of one's self is a moralism that is unacceptable to society and reduces the egg to a form of slavery. If one reasoned in such a manner, Calabresi and Melamed's preconditions to sale could protect the rights of the potential child.

On the other hand, it is impossible—economically or legally—to consider the opinion of an egg cell before it is produced, thus making Calabresi and Melamed's "preconditions for a

⁴⁰ Barnes & Stout, pg. 75

⁴¹ Barnes & Stout, pg. 75-76

valid sale” irrelevant.⁴² In fact, when an egg is donated, it is not yet fertilized and may not even become an embryo that might produce a child. Such are the reasons that disqualify egg donation from falling into Calabresi and Melamed’s condition of affecting a third party, for the opinion of that third party—a cell— cannot even be consulted or considered before the transaction takes place, for it is not even a human being at that point in time.

Second, slavery in the case of egg donations is also a moot point due to the fact that eggs are not yet human beings. Still, even if the egg’s opinion could be considered once the egg becomes a human form, it has all of the related rights of a human being; therefore, it would not be treated as a slave. It is only before birth that the lines of transaction are even crossed. Thus, such a transaction does not violate Calabresi and Melamed’s preconditions to a sale.

Furthermore, as far as moralisms in relation to selling body parts are considered under Calabresi and Melamed’s rules, selling eggs has a general benefit to society that harms only the very few whose botched egg retrieval procedures are results of careless or freak accidents. As long as women are properly informed of the risks and doctors perform the procedures well, there exists only a net benefit for society in relationship to egg donation. Furthermore, because of these reasons, in situations regarding egg donations, the courts usually rule that donor parents have no rights over the children produced from their eggs, as is the case with *K.M. v. E.G.* where the judge ruled that the egg donor had no parental rights whatsoever over the twins that resulted after she donated her eggs.⁴³ Because the biological parent has no rights over the child, it is hard to determine what rights the child can ascertain from his or her biological parent. For these reasons, it is difficult to outline the rights of an egg before it is even fertilized, for there is a chance that it may not even become a living child.

⁴² Barnes & Stout, pg. 75

⁴³ Norton, Justin M.

Still, the rights of the fertilized embryos and the rights of living children after birth, including the rights of adopted children, must be considered. As far as the rights of the safety of unborn children extend, the case of *International Union v. Johnson Controls* stated that the physical safety of the unborn child is the responsibility of the parent, for “protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.”⁴⁴ In this case, the court addressed a policy that barred women with the potential to bear children from working in an environment that allowed the possibility of exposure to lead. The court found that women had the right to work in such an environment but that they also had the responsibility to defend their unborn children. Essentially, the courts did not want to deal with the rights of the unborn child for fear that it will violate on the rights of his or her parents. However, it is significant that the court acknowledged that the unborn child might have rights, even if the court did not want to further discuss these rights in the case of *International Union v. Johnson Controls*. Thus, the courts—as of now—essentially do not recognize any specific rights of the child, including eggs and frozen embryos before they are born, but *International Union v. Johnson Controls* suggests that these rights potentially exist.⁴⁵

On the other hand, while one must consider the rights of the child who is born, including adopted children and children who are products of egg donations, it is still hard to designate the rights of the child even when he or she is in human (as opposed to embryonic) form because the children are still underage in most cases. Nevertheless, it could be potentially helpful for an adopted child to be able to track down his or her biological parents so as to find out medical

⁴⁴ Westlaw, *International Union v. Johnson Controls*

⁴⁵ Westlaw, *International Union v. Johnson Controls*

history if the child encounters or is likely to encounter health problems; in fact, one might argue that it is the right of the child to know his or her parents if not knowing their records poses a physical threat to the child.

The legal history of adoption records has evolved over time. Since the 1950's, laws and courts generally barred children who were the products of adoption or egg donations from obtaining information regarding their biological parents due to the fact that most women during that time period gave up their children to adoption because of the social stigma associated with birthing a child out of wedlock.⁴⁶ In the 1970's, a movement pushing the rights of the adopted child to see his or her own adoption records began and peaked in 1998 in Oregon with Measure 58 that gave adoptees over the age of 18 access to the birth certificates that contain their biological parents' names.⁴⁷ However, the success of this movement stopped here, for most courts still uphold the biological parents' right to secrecy and deny the adoptee, even when he or she is an adult, any access to adoption records for the sake of the parents' right to anonymity, unless the adoptee can establish a "good cause," such as medical reasons, as to why he or she should have access to the records.⁴⁸ For example, in the 1981 case of a woman who showed probable proof of prenatal exposure to a drug that increased the likelihood of cancer, a New York court allowed the woman to see her adoption records.⁴⁹ Thus, in certain cases that involve life-or-death situations, courts will sometimes favor the adopted child's rights over that of the biological parents.

It is interesting, however, that the United Kingdom has taken an entirely different stance than the United States on this subject of adoption records: in 2005, the United Kingdom enacted

⁴⁶ Carp, E. Wayne, "Law and Society Review," pg. 435

⁴⁷ Carp, E. Wayne, "Law and Society Review," pg. 435

⁴⁸ Carp, E. Wayne, *Family Matters*, pg. 175-176

⁴⁹ Carp, E. Wayne, *Family Matters*, pg. 175-176

a law that allows adopted children or children created out of egg or sperm donations to find their biological parents once the adoptee turns 18.⁵⁰ While this sounds like a potentially favorable option for adopted children or children created from egg donation since they will be able to discover their biological parents' medical histories, it poses a threat to the parents' rights to anonymity and, consequently, a threat to the supply of egg and sperm donors and biological parents who are willing to give their children up for adoption. When the biological parents signed away their rights at the time of adoption, the biological parents also gained the right to anonymity; thus, the rights of the parents to remain anonymous conflict with the rights of the child to know the identities of his or her parents.

Certainly, the rights of the parents and the children are in conflict when it comes to adoption records, and this section has sought to answer the question of what are the rights of the child. However, there is no economically-, legally-, or socially-correct answer to this question. In the case of egg donation, the child's rights are irrelevant points before the egg is fertilized, so prior to fertilization, it is impossible to determine the child's rights since the child does not yet exist. In regards to embryos and adopted children, the answer to the question of the child's rights is unclear: there is no apparent, insightful answer to this question, for the courts wish to avoid any rulings in favor of the embryo that might interfere with the rights of the already-living mother. As *International Union v. Johnson Controls* suggests, the unborn child may have rights, but those rights are uncertain.⁵¹ The legal and economic worlds do not have clear-cut solutions to determine an embryo's rights, and they hesitate to grant rights to children that might dissolve the rights of their parents.

⁵⁰ *The Independent Online*

⁵¹ Westlaw, *International Union v. Johnson Controls*

Economic Reasoning: Scarcity

As evidenced by extremely high compensation given to egg donors, the market for eggs is scarce. A relatively low supply of eggs—less than 11,000 transfers, with only some of these transfers actually resulting in live births—ultimately fails to meet the high demand for egg donors that involves approximately 10 percent of infertile couples in the United States.^{52, 53} Similarly, there were 127,407 adoptions—the supply—completed in 2001 and compared to the “1.6 million women [who] had ever taken concrete steps toward adoption”—the demand.⁵⁴ Thus, it would take over 13 years for the average supply of 120,000 adoptions per year to meet such great demands for adoption, notwithstanding the fact that the number of parents wanting to adopt grows each year.⁵⁵ Therefore, it is economically efficient to achieve an equilibrium where supply equals demand; this efficiency can only be achieved if supply increases to meet the ever-growing demand for egg donations and the demand for children to adopt. It is at this point where the law comes in to make it easier to increase supply by removing impediments to such transactions.

In the case of egg donations, the greatest impediment to donating eggs and infertile couples receiving the eggs is potential uncertainty surrounding whether or not the egg donor will ever have access to the child that resulted from the egg donation and implementation into the recipient’s uterus and subsequent birth. Similarly, adoptive parents may hesitate to adopt if there is the risk that the biological parents might later claim custody rights over their biological children.

⁵² WebMD, “Sexual Health: Your Guide to Female Infertility”

⁵³ Centers for Disease Control and Prevention

⁵⁴ Child Welfare Information Gateway

⁵⁵ Child Welfare Information Gateway

Many state legislatures have enacted laws to curb such uncertainty and potentially encourage the supply of egg donors and children to adopt. The Illinois Adoption Act “requires that a parent who does not consent to adoption must be found unfit before parental rights may be terminated,” keeping in mind the “best interest of the child.”⁵⁶ This law clearly recognizes the rights of the biological parents until such time that the biological parent either gives up his or her custody rights or the court finds them to be “unfit.”

While legislatures have created no distinct laws regarding the rights of egg donors over the children produced by their egg donations or laws that might uniformly regulate egg donations.⁵⁷ However, laws currently exist regarding the compensation of egg donors in one specific area: research. In 1994, President Bill Clinton forbade the use of federal grants for research that would potentially destroy egg cells via an Executive Order from the Oval Office.⁵⁸ President George W. Bush affirmed this Executive Order in 2001.⁵⁹ Thus, no direct compensation exists for those who wish to donate their egg cells in the name of research. Nevertheless, the compensation for those who wish to privately donate their eggs to organizations or individuals is quite high, with donors potentially compensated for up to \$100,000 with no restrictions by the government.⁶⁰

The reasoning behind this discrepancy is that eggs given privately to organizations are more likely to result in a live birth in comparison to eggs donated to research that will inevitably be destroyed in the research process.⁶¹ This inconsistency shows the government to be making more of a moral stance than an economic one when it comes to egg donation: essentially, the

⁵⁶ Stevens, Gina Marie

⁵⁷ Rao, Radhika, pg. 1057

⁵⁸ Sauer, Mark V., pg. 258

⁵⁹ Rao, Radhika, pg. 1064

⁶⁰ Rao, Radhika, pg. 1063

⁶¹ Rao, Radhika, pg. 1064

legislation views egg cells and embryos more as potential life rather than basically non-differentiable biological factors. In a scarce market, this decision has little economic justification—and is more of a political move than anything else—for many of these eggs or embryos are left-over from in-vitro fertilization attempts or are willingly donated by individuals. By failing to use these eggs, the government creates inefficiency where supply could better meet demand—the demand of the individual, private market and the public research market.

Since very few laws have been passed regarding egg donation in the legislature, courts have more power in this area by setting precedents that either help to establish the rights of the parents who give birth in egg donor cases and the rights of adoptive parents in adoption cases so as to properly assign property rights and to encourage responsible paperwork and contracts for the transactions of these property rights. Likewise, most courts will uphold an Egg Donor and Surrogacy Contract signed before the completed donation.⁶² This contract should “specify the donor’s intent not to establish any form of a parent-child relationship with a child born pursuant to the agreement, as well as release the egg donor from any and all the responsibilities regarding rearing and caring for the child.”⁶³

For example, in the case of *Johnson v. Calvert*, a couple hired a surrogate mother to carry their embryo and signed an Egg Donor and Surrogacy Contract before the procedure that implanted the couple’s embryo into the surrogate mother’s uterus.⁶⁴ The surrogate mother attempted to claim maternity of the child, but the district court, the appeals court, and the Supreme Court of California upheld the biological parents’ rights because of the Egg Donor and

⁶² Sauer, Mark V., pg. 212

⁶³ Sauer, Mark V., pg. 212

⁶⁴ Westlaw, *Johnson v. Calvert*

Surrogacy Contract.⁶⁵ Thus, such contracts clearly designate the property rights of the eggs and make the transaction costs lower and ultimately lead to greater efficiency in a scarce market.

Economic Discussion: Pareto Efficiency

In considering the utility maximization of individuals, one must consider whether changing their allocation of property—egg donations and child adoption—will result in a generally positive change that falls under the specifications of being Pareto superior, a “change in allocations that left at least one person better off and no one worse off.”⁶⁶ In adoptions, one could assert that both parties—the adoptive parents and the biological parents—are better off because both parties willingly transferred property rights to their child. With egg donations, the case is similar: both parties are made better off, with the donor receiving compensation and the recipient potentially producing a child of her own.

Such situations exemplify Pareto efficiency and Pareto superior distributions, for both parties are, in fact, better off than they were before the change in allocation of property. If the government chose to restrict the provisions of Pareto efficiency by limiting the compensation of egg donors, the market would enter what is called Pareto inferior allocations: “any reallocation of resources that leaves at least one person worse off.”⁶⁷ By disallowing parties to enter negotiations regarding egg donation or adoption, these parties are made worse off than if they were allowed to do so. Thus, through laws that enable the transactions of egg cells and adoption, the government helps create a more efficient market that is compatible with Pareto efficiency.

⁶⁵ Westlaw, *Johnson v. Calvert*

⁶⁶ Barnes & Stout, pg. 11-12

⁶⁷ Barnes & Stout, pg. 11-12

Economic Discussion: Privacy Rights

If the government attempts to regulate a person's physical control over his or her body, then the government also begins to interfere with an individual's right to privacy. For example, in *Moore v. the Regents of the University of California*, by not informing Moore originally that his cells were being used for research that subsequently led to great profits, Moore's doctors did not inform him of the use of his property and therefore violated Moore's right to privacy and right to control his own body.⁶⁸

While state legislations have not created specific laws regarding the compensation of egg donors or biological parents—except in the case of forbidding compensation for research or “selling” one's child through adoption—the public must hope that future laws will not interfere with egg donation, if only for the sake of privacy issues that, if violated, might hinder women from donating their eggs or biological parents from choosing adoption as an option for their child.^{69, 70}

Ultimately, a woman must be able to maintain the physical authority over herself to donate her eggs, just as she should be able to make decisions regarding her own body in general. This economic argument finds legal support in the United States Supreme Court decision in *Roe v. Wade* that fully recognized the “constitutional right to privacy.”⁷¹ This right to privacy should extend itself to the fields of egg donation and adoption, as a woman should have the right to donate her eggs, and a man and a woman should collectively have the right to give up their shared child through adoption. Further, as discussed previously, if these rights to privacy are enforced by restricting access to adoption records, this observance of privacy for parents could

⁶⁸ Barnes & Stout, pg. 79-84

⁶⁹ Rao, Radhika, pg. 1057

⁷⁰ Mabry, Cynthia R., pg. 184

⁷¹ Westlaw, *Roe v. Wade*

encourage the market for egg donation and adoption, thereby solving at least part of the problem presented by scarce market resources so as to stimulate market growth.

Economic Discussion: Inalienable Rights

Due to the fact that none of our three issues addressed have the potential to hurt the woman or hurt the community surrounding the woman, they do not fall under what are called “inalienable rights.”⁷² In their book *Cases and Materials on Law and Economics*, Barnes and Stout state “an entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.”⁷³ Therefore, we have two basic factors that would make a property right inalienable and, thus, not in a position for transfer of ownership: first, it the two parties must be “willing,” and, second, the transaction must not endanger a community or either of the parties involved.

In addressing the first point, it must be taken into consideration that in the case of *Moore v. Regents of the University of California*, Moore was not a willing party.⁷⁴ However, in cases of egg donation, adoption, and embryo battles, both parties must be agreeable to a proper and equitable transfer of property taking place, unless, of course, the court declares one or more parent to be “unfit” for parenthood.⁷⁵

For the second point of endangerment, egg donation and adoption do not usually physically harm the parties themselves or the community surrounding them if the parties are fully aware of the possible liabilities. In fact, each of these two related subjects help the community to thrive, for infertile couples’ families grow from egg donation, and adoption places orphaned or unwanted children in willing homes. Aside from some potential side effects from

⁷² Barnes & Stout, pg. 56

⁷³ Barnes & Stout, pg. 56

⁷⁴ Westlaw, *Moore v. Regents of the University of California*

⁷⁵ Stevens, Gina Marie

the medical procedure, egg donation and adoption ultimately have a positive effect on both of the parties involved and the community surrounding them.

Thus, it is due to this lack of harm to the parents or the community that the rights of egg donors, adoptive parents, and the owners of embryos do not fall under the restrictions of inalienable rights. Therefore, individuals should be able to buy and sell the property rights of egg donors and parents, along with the inherent rights that attach themselves to ownership on an open market.

Conclusion

Egg cells, embryos and children are certainly participants in the biological and personal worlds, but they enter the legal world when it defines them as property inasmuch as a person has “the right and interest or domination rightfully obtained over such object with the unrestricted right to its use, enjoyment and disposition.”⁷⁶ While this would appear to be a simple legal definition of property, this paper has found two other tools are relevant in making the transaction of property efficient in economic terms: information and contracts.

Information is key in determining property rights, for the responsibilities and the liabilities of holding ownership over property must be clear. For example, it is prudent for a woman to know all of the potential medical consequences—as well as her legal rights—when donating her eggs. These lower information costs lead to lower transaction costs that assist the fluidity of bargaining, including bargaining over egg donation, bargaining over custody rights in adoption cases, or bargaining over embryos in the division of property in divorce cases.

Additionally, contracts can also help decide the designation of property rights. Contracts play interesting roles in enforcing property rights, for they can help to clearly define property

⁷⁶ Barnes & Stout, pg. 80

ownership and thus make the market more efficient. Contracts between biological parents and adoptive parents can help enforce the adoptive parents' property rights over their child and the biological parents' subsequent lack thereof. Accordingly, contracts that decide the destiny of frozen embryos in the event of a couple's divorce make court rulings less complex because the couple previously determined what will happen to their embryos. In this way, contracts effectively enhance the power of property rights.

Still, economic and legal analysis should not reduce people, children, or their bodies to simple property. Such an analysis is cold, harsh, and forgetful of the personal drive of the human elements that back this economic and legal research. With this being said, we can still consider property as being personal. It is for these personal reasons that individuals use the legal system to fight for what they believe is their property. Going hand-in-hand with this personal fight, economic analysis strives to make efficient distributions of property so as to create a fair and equitable market in which individuals live while maintaining to the stipulations of the law.

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