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Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law

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EMBRYONIC PERSONHOOD: IMPLICATIONS FOR ASSISTED REPRODUCTIVE TECHNOLOGY IN INTERNATIONAL HUMAN RIGHTS LAW

LAUREN B. PAULK*

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I. INTRODUCTION

Picture a person. What do they look like? Are they a fully-formed human being, capable of communicating advanced ideas? A toddling child? A fertilized egg in a petri dish? International human rights law attempts to advance a recommended set of protections for governments to follow when enacting laws for their citizenry.¹ But what is a “human”? Do human rights protections extend to embryos created in the course of infertility treatment and stored in freezers for later use? If so, what might this mean for assisted reproductive technologies such as in-vitro fertilization (IVF), in which the creation and development of embryos looms so large?

Granting embryos personhood has significant implications for IVF—an area of medical practice that renders procreative sex² unnecessary for impregnation. IVF is an increasingly popular option for those who wish to conceive a child.³ During the IVF procedure, an egg is fertilized by a sperm out-of-utero; the resulting embryo is then implanted in the uterine wall of either a biological or gestational mother.⁴ During IVF (and

1. *International Human Rights Law*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Apr. 21, 2014).

2. “Procreative sex” as used here refers to penile-vaginal sex between two fertile people undertaken for the purposes of conceiving a child.

3. See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY* 91 n.1 (2d ed. 2011) [hereinafter Kindregan & McBrien] (describing briefly the evolution and gradual acceptance of the in vitro fertilization process).

4. See *id.* at 91. When the person carrying the pregnancy is also the egg provider, that person is considered the genetic or biological parent. When the person carrying the pregnancy is not the egg provider, that person is called the gestational mother, or surrogate.

procreative sex), a sperm that meets an egg creates a zygote, which is considered an embryo from the moment of conception until about the eighth week of pregnancy.⁵

Since IVF is about 35% effective at producing a viable pregnancy,⁶ medical practitioners recommend that those looking to conceive via IVF fertilize several eggs at a time.⁷ The process of egg retrieval is expensive, painful, and arguably dangerous.⁸ Thus, rather than repeat the entire process each time, couples may choose to freeze “leftover” pre-implantation embryos to use in the future, either to try for more children or for use in case of an unsuccessful implantation.⁹ If embryos are granted personhood status under the law, these “leftovers” could be considered people, with all the rights that a person has under each nation’s constitution.¹⁰ Disposal or destruction of these embryos would be tantamount to murder, potentially for both the parents and the medical personnel assisting in the IVF process.¹¹

This Article analyzes the legal personification of embryos worldwide through the lens of human rights treaties. Its scope concerns the pre-implantation embryo—namely, embryos conceived as a result of assisted reproductive technology¹² for the specific purpose of in-vitro fertilization.¹³ Assertions in this Article are based on three interlocking assumptions: (1)

5. See BLACK’S LAW DICTIONARY 389 (9th ed. 2009) (“zygote”); see also BLACK’S LAW DICTIONARY 469 (9th ed. 2009) (“embryo”).

6. According to a 2006 study conducted in the United States. See KINDREGAN & MCBRIEN, *supra* note 3, at 95.

7. See *id.* at 94.

8. *Id.* at 95; see also Carlene Hempel, *Golden Eggs*, BOS. GLOBE (June 25, 2006), http://www.boston.com/news/globe/magazine/articles/2006/06/25/golden_eggs/ (noting the potential dangers of egg retrieval, particularly during the donation process).

9. See KINDREGAN & MCBRIEN, *supra* note 3, at 94 (discussing cryopreservation).

10. Ashley Pittman, *Assisted Reproductive Technology and the Status of the Embryo*, 81 MISS. L.J. 99, 99 (2011) [hereinafter Pittman]. Notably, but beyond the scope of this article, embryonic personhood also has legal implications for birth control, tax law, ectopic pregnancies, abortion, miscarriages, and stem cell research. See *id.* at 101 (noting implications of embryonic personhood for inheritance and custody as well); see also Ed Goldman, *The Conflict Between Fetal Personhood Laws and Women’s Rights*, JURIST (Nov. 17, 2011), <http://jurist.org/forum/2011/11/ed-goldman-personhood-laws.php> (discussing the legal implications of personhood laws in the United States).

11. See Pittman, *supra* note 10, at 100.

12. See generally KINDREGAN & MCBRIEN, *supra* note 3, at 1-4 (providing a general overview of ART in the United States).

13. See *id.* at 91.

once rights are granted to a developing entity, they cannot be lost at a later stage of development; (2) if a country declares that a fetus is not a legal person, it likely will not grant an embryo personhood; and (3) if a fetus has legal personhood at a young fetal age, a country may be more apt to find that a fertilized embryo is a person. In other words, when discussing a continuum of rights, a country is unlikely to find that reproductive materials¹⁴ possess rights, then lose them, and then regain them at a certain point in pregnancy.¹⁵

This Article analyzes the rights that are triggered when considering embryonic personhood status through the lens of human rights treaties and case law from both United Nations-based and regionally-based international bodies.¹⁶ This Article argues that the very idea of embryonic personhood is incompatible with the right to privacy, the right to life, and the principle of non-discrimination. It further argues that in the absence of an explicit pronouncement declaring IVF to be encompassed under an existing human right, it can and should be included where treaty bodies issue reports and recommendations on reproductive rights.

Part II introduces the concept of personhood and discusses the potential implications of pre-implantation embryonic personhood on IVF and those who access IVF, in addition to the reproductive justice implications of IVF access. Part III analyzes the concept of personhood under human rights law, concluding that current human rights treaties could be read either to support or discourage legal personification of embryos, depending on who interprets the treaties and which rights are emphasized. Part IV reviews international personhood legislation, with a focus on countries that have addressed cases specific to embryonic personhood. Part V briefly addresses international bioethical pronouncements on embryos, and what that may mean in the context of how embryos will be treated under human rights law. Part VI synthesizes the overall treatment of personhood by human rights bodies, and questions whether this will hurt or harm burgeoning IVF technology.

II. THE LEGAL IMPLICATIONS OF PERSONHOOD ON IVF

A zygote is considered an embryo from the moment of conception until

14. “Reproductive materials,” as used in this Article, refers to the immediate materials necessary to create biological life (e.g., sperm, eggs, and the joining of sperm and egg to create a zygote or embryo).

15. See Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 267 (2008) (articulating a similar statement).

16. With the caveat that rights other than those discussed here could certainly be triggered in contexts that are not explored in this Article.

about the eighth week of pregnancy.¹⁷ Is this embryo a human being? According to Black's Law Dictionary, a "person" is "a human being."¹⁸ Thus, only persons are "members of the human family"¹⁹ or "human beings."²⁰ It follows then that *human* rights treaties cover only persons, but at what point during development does reproductive material constitute a legal person covered by human rights treaties?

As a question of domestic law in the United States, it bears noting that regulation of assisted reproductive technology (ART) does not provide an answer. As it stands now, ART—such as IVF—is legally under-regulated.²¹ The status of the embryo is contested in the United States,²² and the only federal regulation that exists states that where embryo disposal has been addressed under state law, the parents are generally allowed to dispose of the embryos when they are ready to do so, as long as both parents agree.²³ Thus, under the few domestic legal regulations governing IVF, embryos are not considered persons.²⁴

International law provides a more complete answer to the embryonic personhood debate. International human rights law outlines rights that governments should protect and provide—and, in the case of governments that have signed and ratified human rights treaties, which rights governments are obligated to protect and provide.²⁵ Because of the

17. See BLACK'S LAW DICTIONARY 389 (9th ed. 2009) ("zygote"); see also BLACK'S LAW DICTIONARY 469 (9th ed. 2009) ("embryo").

18. BLACK'S LAW DICTIONARY 1257 (9th ed. 2009) ("person").

19. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 1 (Dec. 10, 1948) [hereinafter UDHR].

20. *Id.* at 1.

21. See KINDREGAN, & MCBRIEN, *supra* note 3, at 31-32. But see Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 416-21 (2006) (discussing both direct and indirect regulation of ART in the United States).

22. See, e.g., Robin E. Sosnow, *Genetic Material Girl: Embryonic Screening, the Donor Child, and the Need for Statutory Reform*, 7 J. HEALTH & BIOMEDICAL L. 609, 625-26 (2012).

23. See Pittmann, *supra* note 10, at 100. A notable exception is Louisiana, which has explicitly disallowed destruction of embryos and given them quasi-human status by calling IVF embryos a "juridical person." *Id.* at 101.

24. It is worth noting that the implications for embryonic personhood, particularly in the United States where IVF is popular, are great. Embryonic personhood would likely lead to parents or clinics not being permitted to destroy or freeze embryos. It would also likely force clinics into guardianship status of unused embryos, causing both financial and judicial complications. See Pittmann, *supra* note 10, at 101.

25. See *What are Human Rights?*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Apr. 21, 2014).

potential for the destruction of embryos inherent in the majority of IVF procedures,²⁶ granting personhood to embryos would mean that embryo destruction is murder²⁷ and a violation of the right to life, among other rights.²⁸ Even if no embryos were destroyed during the IVF process, embryonic storage and preservation would also take on a new hue, colored by the fact that under this articulation, IVF would require the cryogenic freezing of human beings.²⁹ If an embryo is a person, and therefore entitled to protection under human rights law, government allowance or regulation of IVF may be a violation of international human rights law.³⁰

A. Who Is Affected by Access to IVF?

The desire to become a genetic parent is strong for many individuals.³¹

26. See Pittmann, *supra* note 10, at 99.

27. See *id.* at 100.

28. Ostensibly, embryonic personhood could mean that embryos possess the whole panoply of human rights possibly applicable to them, such as the right to health (meaning embryos must be stored in such a way that they are kept healthy), the right to non-discrimination (including its implications for Pre-Implantation Genetic Diagnosis, which allows for the selection of certain traits), and the right not to be held in slavery (with attendant repercussions for the buying and selling of embryos).

29. Cf. Pittman, *supra* note 10, at 99. This is not intended to downplay the possibility of a middle ground – where embryos are not quite human beings, but are treated with more respect than non-humans. See Michael J. Meyer & Lawrence J. Nelson, *Respecting What We Destroy*, SANTA CLARA UNIV. MARKKULA CTR. FOR APPLIED ETHICS, <http://www.scu.edu/ethics/publications/ethicalperspectives/respect.html> (last visited Apr. 21, 2014) (“The first false absolute is that it’s always morally wrong to destroy human embryos, because extracorporeal human embryos [that is, embryos existing outside the human body] have the same moral status as human persons. The other unsound absolute is that it’s in no way whatsoever morally problematic to destroy embryos, because they have no moral worth at all; in short, destroying embryos is morally trivial. Fortunately, an alternative moral view to these two problematic positions exists. On this middle view, human embryos should be recognized as having modest moral worth. Consequently we must have serious reasons to destroy them, and in such a case we must show respect for them when we destroy them.”). This is in fact the case in at least one state (see Pittman, *supra* note 10, at 100-101, discussing a Louisiana statute that elevates embryos to the status of juridical persons). This Article instead seeks to explore how IVF *could* be affected by embryonic personhood, whether juridical or otherwise.

30. See *infra* Part III for a discussion on the enforceability of human rights law; see also Rosalie Silberman Abella, *International Law and Human Rights: The Power and the Pity*, 55 MCGILL L.J. 871, 874 (2010) (noting that international law regarding trade is highly enforceable, whereas human rights law is not).

31. See, e.g., Sydney Lupkin, *IVF: When Insurance Companies Won’t Pay*, ABC NEWS (Oct. 29, 2012), <http://abcnews.go.com/Health/couples-extremes-pay-ivf/story?id=17575724> (discussing the lengths to which people will go to fund their

Because science has advanced to the point where it is possible to conceive a genetic child without procreative sex via IVF, the time has come for a conversation about whether infertility – in all its forms – invokes a corresponding right to procreate, and for whom. Though articulating the contours of the right to procreate is beyond the scope of this Article,³² it will address the reasons people may need or choose to use IVF to have genetically related children. In this way, the Article will provide information regarding the range of people potentially affected by the over-regulation or restriction of IVF.

When discussing ART and the hierarchy of access to such technologies, scholars have articulated at least three types of infertility: medical, social, and elective.³³ Medical infertility refers to infertility that occurs because of a medical issue, while social infertility occurs as a result of sexual relationships – either lack thereof or same-sex relationships – which render an individual or a couple unable to engage in procreative sex.³⁴ Elective or lifestyle infertility refers to the process of the preservation of reproductive materials for ART while still fertile in order to delay reproduction.³⁵ As expected, scholars are in disagreement about how certain procedures should be classified, and which types of procedures should be covered by insurance.³⁶ Also, although it is beyond the scope of this Article, surrogacy is a closely related medical procedure that is often used in relationship with ART, and a brief explanation of surrogacy is necessary in order to clarify how IVF is used in practice.³⁷

IVF procedures).

32. It has, however, been explored extensively by other scholars, most notably Carter Dillard, who manages to synthesize the majority of legal thought around the procreative right. *See, e.g.*, Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. 151, 153 (2010) (analyzing whether a right to procreate is feasible and can be supported by existing legal authority); Carter Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 27-37 (2007) (situating the procreative right within international human rights law and comparative law).

33. Irit Rosenblum, *Being Fruitful and Multiplying: Legal, Philosophical, Religious, and Medical Perspective on Assisted Reproduction in Israel and Internationally*, 36 SUFFOLK TRANSNAT'L L. REV. 627, 629 (2013).

34. *Cf. id.* (defining medical and social infertility).

35. *Cf. id.* (defining elective or lifestyle fertility).

36. *See* Lisa Campo Engelstein, *For the Sake of Consistency and Fairness: Why Insurance Companies Should Cover Fertility Preservation Treatment for Iatrogenic Infertility*, in ONCOFERTILITY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES 381, 381-87 (Teresa K. Woodruff et al. eds., 2010) [hereinafter Engelstein].

37. *See generally* KINDREGAN & MCBRIEN, *supra* note 3, at 151-56 (describing surrogacy and its relationship to ART).

Surrogacy, when used with IVF, is referred to as gestational surrogacy.³⁸ During gestational surrogacy, an egg is fertilized with sperm outside of the body to create an embryo, and then that embryo is implanted in a non-genetic birth parent who acts as the carrier for the pregnancy.³⁹ This is different from traditional surrogacy, where a couple or single person contracts with an outside party and the outside party's own eggs are fertilized via alternative insemination.⁴⁰ Surrogacy is the only way for same-sex male couples to have children that are genetically related to one of the partners,⁴¹ and frequently the law only protects gestational surrogacy and not non-gestational surrogacy.⁴²

Co-maternity (also called ovum sharing) is a form of surrogacy sometimes used by same-sex female couples in order to allow both parties to participate in the biological process of procreation.⁴³ In co-maternity, one partner's egg is fertilized outside of her body using donor sperm, and then the fertilized embryo is implanted in the other partner's womb.⁴⁴ In this way, one partner is the genetic mother, and the other partner is the birth mother.

Whether medical, social, or elective, the following people may seek access to IVF treatments:

1. Single People or Couples Seeking Fertility Preservation

Fertility preservation occurs when people cryopreserve reproductive materials – either eggs or sperm – for later use.⁴⁵ People seek out fertility preservation for a number of reasons. They may be transitioning from one gender to another in a procedure that would destroy their reproductive materials.⁴⁶ They may also be diagnosed with cancer and seek to preserve

38. *See id.* at 153-54.

39. *See id.* at 154.

40. *See id.* at 152, 154.

41. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 372 (2012) [hereinafter Stark].

42. *Cf. id.* at 155 (“Gestational surrogacy, although, legally speaking, a safer alternative than traditional surrogacy, is not without potential complications.”).

43. *See* William S. Singer, *Exploring New Terrain: Assisted Reproductive Technology (ART), the Law and Ethics*, 8 RUTGERS J. L. & PUB. POL'Y 918, 922 (2011) (describing co-maternity).

44. *Id.*

45. *What is Fertility Preservation?*, REPROTECH LTD., <http://www.reprotech.com/fertility-preservation.html> (last visited Apr. 21, 2014).

46. *See* Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 95-102 (2013) (providing a nuanced discussion of the reproductive justice implications for fertility preservation in

reproductive materials prior to undergoing chemotherapy, which is known to cause infertility in some circumstances.⁴⁷ Other people may wish to preserve reproductive materials at a young age for use at a later age when they would not be as fertile, making it harder to conceive.⁴⁸ Still others may use IVF either because pregnancy is medically dangerous for them or because they do not wish to be pregnant and instead wish to employ a gestational surrogate.⁴⁹

2. *Same-Sex Couples*

As explained above, same-sex couples are generally socially infertile and, therefore, IVF is a method that same-sex couples can use to be genetically related to offspring. In the case of same-sex couples, one or more partners may also be medically infertile or seeking to engage in fertility preservation.

3. *Single People*

Single people are also often socially infertile and may choose IVF as a way to be genetically related to their potential child.⁵⁰ Single people may also be medically infertile, seeking to engage in fertility preservation, or may prefer IVF to artificial insemination.⁵¹

4. *Opposite sex couples with one or more medically infertile partner*

This is the most common IVF story told in the media⁵² – an opposite sex couple where one or more partners have fertility problems, but for whom

transgender people).

47. *Fertility Preservation 101: Cancer Treatment and Fertility Risks*, REPROTECH LTD, <http://www.reprotech.com/fertility-preservation-101.html> (last visited Apr. 21, 2014).

48. See Engelstein, *supra* note 36, at 381.

49. See Mayo Clinic Staff, *In Vitro Fertilization (IVF): Why It's Done*, MAYO CLINIC (June 27, 2013), <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/why-its-done/prc-20018905> [hereinafter Mayo Clinic Staff] (explaining the different health conditions a woman or man might have that would lead them to utilize IVF).

50. See Cosima Marriner, '*Socially Infertile*' *Thirtysomethings Turn to IVF*, MONASH IVF (Nov. 13, 2012), <http://monashivf.com/socially-infertile-thirtysomethings-turn-to-ivf/> (defining "socially infertile" as a woman who turns to IVF to conceive instead of waiting to find a partner).

51. See Mayo Clinic Staff, *supra* note 49 (noting that women who are about to start cancer treatment or who do not have a functional uterus may want to preserve their eggs for future use).

52. Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 187 (2013) [hereinafter Mutcherson].

IVF may be an option to still have a child that is genetically related to one or both of the partners. This narrow conception of who needs access to IVF is actively harmful to a complete discussion of what the law might “owe to people who seek parenthood through ART.”⁵³ A bigger picture regarding who barriers to accessing IVF will affect is important for understanding the types of human rights violations embryonic personhood may represent. By using the framework of reproductive justice, this Article considers embryonic personhood and IVF as issues that affect a number of marginalized populations with great consequence.⁵⁴

B. Access to IVF as a Reproductive Justice Issue

Reproductive justice (RJ) is a conceptual framework developed by women of color activists in the United States,⁵⁵ and provides a way to view reproductive health and rights through an intersectional⁵⁶ lens. Viewing reproductive health and rights as impacted by personal and group identities – that is, through the reproductive justice framework – helps to situate these concepts more clearly in a human rights context. By taking intersectional identities into account, reproductive justice illuminates the variety of human rights classifications that are applicable to situations such as access to IVF.⁵⁷

The traditional reproductive rights and health movements within the human rights field – both national and international – often overlook or ignore the premise that rights without access mean very little to a majority of the population.⁵⁸ In response to this limited view of the problems facing,

53. *Id.* at 190.

54. And for this the author owes a great debt to Professor Kimberly M. Mutcherson and her trailblazing article, *Transformative Reproduction*, which set a high bar for how to talk about ART as a reproductive justice issue. *See id.*

55. LAW STUDENTS FOR REPROD. JUSTICE, WHAT IS REPRODUCTIVE JUSTICE? 1 n.1, available at <http://lsrj.org/documents/resources/What%20is%20RJ.pdf> [hereinafter LAW STUDENTS FOR REPROD. JUSTICE].

56. Intersectionality is the concept that the identities a person holds may impact their experiences. In effect, an intersectional lens recognizes the way that identities, such as race, class, gender, sex, sexual orientation, ability, and immigration status] may impact reproductive “access, agency, and autonomy.” *Id.* at 1.

57. *Cf.* Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 480-82 (2008) (providing a number of examples of how arguments for reproductive rights are more expansive and progressive when contextualized in a human rights framework).

58. *Cf.* Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 *OFF OUR BACKS* 14, 14 (2006) (noting that reproductive justice advocates “fight for the necessary enabling conditions to realize [the right to have a child, the right not to have a child, and the right to parent the children we have, as well

in particular, poor women and women of color, women of color activists combined reproductive health and social justice principles to create the term “reproductive justice.”⁵⁹ Reproductive justice “will exist when all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.”⁶⁰ Therefore, under RJ principles, all people who want to use IVF as a method of procreation – the “how” of the previous definition – should be allowed access, including funding as necessary, to IVF treatments. Currently, this access – like the right to procreate – is limited by competing concerns.⁶¹ As we move forward into the brave new world of reproductive technologies, RJ requires that we ask whether these technologies “enhance or oppress,”⁶² or both.

Access to IVF as an RJ issue means that people seeking IVF should not be seen in a vacuum⁶³ – they may be infertile, single, part of a same-sex couple, or wishing to engage in fertility preservation for any number of reasons, such as a plan to undergo a surgical gender transition, or a need to undergo chemotherapy. Additionally, individuals may lack access to IVF due to cost or discrimination, among other things.⁶⁴ RJ requires that the resources necessary for individuals to experience full reproductive autonomy and dignity are available, and this includes access to IVF and other ART.⁶⁵

as the right to control our birthing options, such as midwifery]”).

59. LAW STUDENTS FOR REPROD. JUSTICE, *supra* note 55, at 1 n.1.

60. *Id.* at 1.

61. Concerns include the medical safety of ART and ethics questions ART poses, such as the regulation/allowance of transnational surrogacy arrangements. *See* Mutcherson, *supra* note 52, at 203.

62. *Id.* at 206; *see also id.* at 220-24 (exploring the notion of ART as reproductive oppression as part of a full discussion of the potential for ART to create both reproductive justice and reproductive oppression).

63. *See id.* at 199-200 (citation omitted) (“The hierarchies of the past persist when society elevates the reproductive acts of those with race, class, and sexual orientation privilege above the reproductive acts of those who lack any or all such privileges. Having a child, coitally or non-coitally, implicates race, gender, social status, immigration status, class, marital status, and a variety of other axes of social standing. This was the case when coital reproduction was the only way to make babies and it continues to be the case as more people have children through non-coital means of reproduction. Within this framework, it is critical to understand and evaluate how categories of difference are salient in non-coital reproduction.”).

64. *See, e.g., id.* at 200-204 (discussing cost as a barrier to accessing ART).

65. *See generally* LAW STUDENTS FOR REPROD. JUSTICE, ASSISTED REPRODUCTIVE TECHNOLOGY (2013), *available at* http://lsrj.org/documents/factsheets/13_Assisted_Repro_Technology.pdf. However, RJ

The human rights of privacy, access to information, health, to benefit from advances in science and technology, to found a family (procreate), and reproductive rights in general can all be invoked under a variety of human rights treaties when discussing access to IVF. Depending on the identities of the person or people involved in accessing IVF, a number of human rights treaties may be appropriate, including the Convention on the Rights of Persons with Disabilities,⁶⁶ the Convention on the Elimination of All Forms of Discrimination Against Women,⁶⁷ the American Convention on Human Rights,⁶⁸ or a number of other treaties. Though not all of these rights and treaties are analyzed below, RJ principles are an illustration of the wide variety of approaches human rights provides for analyzing access to IVF.

principles would not endorse someone receiving access to IVF “on the backs” of others, as detailed in a number of excellent articles exploring problems with surrogacy, most notably transnational surrogacy. See Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 190, 191 (2012); Mutcherson, *supra* note 52, at 203-04 (citing Nicole Bromfield, *Global Surrogacy in India: Legal, Ethical and Human Rights Implications of a Growing “Industry,”* RH REALITY CHECK (June 11, 2010, 9:00 AM), <http://www.rhrealitycheck.org/blog/2010/06/10/stateless-babies-legal-ethical-human-rights-issues-raised-growth-global-surrogacy-india>); Miriam Perez, *Surrogacy: The Next Frontier for Reproductive Justice*, RH REALITY CHECK (Feb. 23, 2010, 6:00 AM), <http://www.rhrealitycheck.org/blog/2010/02/23/surrogacy-next-frontier-reproductive-justice>; see also Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 327 (2005). See generally Heather Widdows, *Border Disputes Across Bodies: Exploitation in Trafficking for Prostitution and Egg Sale for Stem Cell Research*, 2 INT’L J. FEMINIST APPROACHES TO BIOETHICS 5 (2009) (asserting that egg “donation” is an exploitive practice that should not be endorsed by feminists).

66. See Dr. Maya Sabatello, *Who’s Got Parental Rights? The Intersection Between Infertility, Reproductive Technologies, and Disability Rights Law*, 6 L. HEALTH & BIOMEDICAL J. 227, 255-58 (2010) (citing Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, available at <http://www.un.org/disabilities/default.asp?id=259>) (discussing ART in the context of the Convention on the Rights of Persons with Disabilities).

67. See Stark, *supra* note 41, at 379-80 (discussing how the *Committee on the Elimination of Discrimination against Women* (CEDAW) is implicated in gestational surrogacy arrangements).

68. See discussion *infra* Part IV: B on how the American Convention of Human Rights has been used to articulate the denial of IVF as a violation of human rights.

III. PERSONHOOD IN HUMAN RIGHTS TREATIES

A. How Does International Human Rights Law Work?

Since there is no “world government,” nation-states have come together since 1948⁶⁹ in an attempt to establish governing international norms in regards to basic rights possessed by all individuals. What follows is a brief overview of the international human rights law process as carried out by the United Nations (UN).

Codified human rights are born through treaty processes: states draft a document setting forth a group of rights, and then the document is formally presented for signature.⁷⁰ A signature is an expression to be bound by a treaty.⁷¹ However, a state is not bound by a treaty until the treaty is ratified, and even then a sufficient number of state parties must ratify the treaty before the treaty becomes binding.⁷² The ratification process typically requires that the treaty go through the legislative process of the signing country, and, once approved, the treaty becomes binding law on that country.⁷³ In some instances, states may help to draft a document but then refuse to sign it because they consider the final language used to articulate the rights unsatisfactory.⁷⁴ In other instances, states may sign, but never ratify, a document. Although signatory states are expected to comply with treaties, they are not legally bound to follow them—unlike states that have ratified the treaties.⁷⁵

69. See Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT'L HUM. RTS. 1, 1 (2004).

70. See AMNESTY INTERNATIONAL, HUMAN RIGHTS HERE AND NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Nancy Flowers ed., 1998), available at <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/from-concept.htm> [hereinafter AMNESTY INTERNATIONAL].

71. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS: DILEMMAS IN WORLD POLITICS 5 (4th ed. 2013) [hereinafter DONNELLY].

72. *Id.*

73. See *id.* (explaining that in the United States, the president signs a treaty, which then must go to the Senate for ratification).

74. The United States is notorious for helping to draft and subsequently refusing to sign human rights documents. See, e.g., Cormac T. Connor, *Human Rights Violations in the Information Age*, 16 GEO. IMMIGR. L.J. 207, 230 (2001) (“In 1953, Secretary of State John Foster Dulles asserted that the United States did not intend to ratify any international human rights treaties. Official antipathy to international human rights instruments has been entrenched ever since courts have found the provisions of the Universal Declaration to be non-binding.”).

75. See Martin A. Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 ME. L. REV. 29, 33-34 (1987).

Each treaty has a corresponding “treaty body”—a body responsible for the enforcement and monitoring of that treaty.⁷⁶ The term enforcement is used loosely here, as no human rights treaty body has military authority to ensure treaty obligations are carried out.⁷⁷ Instead, treaty bodies rely on international pressure to encourage implementation of, and compliance with, international norms found in human rights treaties.⁷⁸ As a “party”, ratifying states must submit reports to the treaty body on their compliance with each ratified treaty.⁷⁹ The treaty body may then issue recommendations to the state party on how to maintain or achieve compliance.⁸⁰ Additionally, states are allowed to sign treaties “with reservations,” i.e., the state signs the treaty but indicates its own interpretation of certain articles or text in the treaty itself.⁸¹ Then, if the treaty body cites the state for a violation of the treaty,⁸² the state may attempt to point to its reservation as a defense.⁸³

Some treaty bodies are also judicial. These bodies will hear cases, find violations of the treaty, and issue specific recommendations and suggested remedies.⁸⁴ In some configurations, the treaty body itself hears a case.⁸⁵ In other configurations, the treaty body may serve as a commission and decide

76. OFF. OF THE HIGH COMM’R FOR HUM. RTS., THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM 23 (2012), available at <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf> [hereinafter HUMAN RIGHTS TREATY SYSTEM].

77. See Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 183-84 (2002) (noting that Burma is a perfect example of this, as its human rights abuses have been reported and pronounced numerous times, yet the abuse has not stopped).

78. See *id.* (“Any hopes for a remedy to human rights violations are generally left to the sometimes-influential but ultimately unenforceable mechanisms of moral persuasion and damning reports.”).

79. HUMAN RIGHTS TREATY SYSTEM, *supra* note 75, at 24.

80. *Id.* at 31.

81. See Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331.

82. See DONNELLY, *supra* note 71, at 5.

83. What kind of reservations may be enforced, and the enforceability of reservations in general, is debatable. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT. L. 531, 531-32 (2002).

84. See generally *Human Rights Bodies: Complaint Procedures*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/petitions/index.htm> (last visited Apr. 21, 2014).

85. See, e.g., Convention on the Rights of the Child, art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

(instructing States parties to hear cases under the Convention on the Right to the Child) [hereinafter Convention on the Rights of the Child].

which cases to pass to a court connected with a treaty or charter.⁸⁶ In still a third configuration, the court is the only body connected with the treaty, and thus serves as both commission and court.⁸⁷ However it happens, states are expected to follow the recommendations of the treaty body or face international pressure and embarrassment.⁸⁸ Therefore, international human rights “law” is law in a social sense.⁸⁹ There are no sanctions or fines, and the only punishments are shame and perhaps weak retaliation carried out by single countries or small groups of nations.⁹⁰

Some human rights bodies govern specific geographic regions, such as the Inter-American Court of Human Rights and the African Commission for Human and People’s Rights. These regional bodies, though independent of the UN, have similar systems to the one described above, and many use and have used the UN treaties and processes as a basis for their work and interpretation of human rights.⁹¹

Though sometimes criticized as ineffective,⁹² the influence of human rights law on the way the world conceptualizes “inviolable rights” is

86. See, e.g., *Basic Documents Pertaining to Human Rights*, INTER-AMERICAN COMM’N ON HUM. RTS., <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm> (last visited Apr. 21, 2014) (indicating that the Inter-American Commission on Human Rights decides admissibility of cases to the Inter-American Court of Human Rights).

87. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Otherwise known as the European Convention on Human Rights, it is the sole interpreter of the European Convention on Human Rights. *Id.* at 246.

88. Cf. Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT’L & COMP. L. 1, 5 (2006) (“Both Pollyannaish and cynical, the international system heavily relies upon the dubious premise that governments will faithfully implement international human rights standards within their own domestic systems and provide adequate domestic remedies to redress violations . . . Although not without exceptions, most international human rights institutions are generally limited to monitoring state compliance and promoting adherence to underdeveloped international standards through dialogue, condemnation, and moral suasion.”).

89. *Cf. id.*

90. *See id.*

91. See Fekadeselassie F. Kidanemariam, *Enforcement of Human Rights Under Regional Mechanisms: A Comparative Analysis*, 5-6 (Jan. 1, 2006) (unpublished L.L.M. thesis, University of Georgia School of Law), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1079&context=stu_llm.

92. Largely, criticism of human rights law is about a lack of enforceability. See, e.g., Penelope E. Andrews, *Some Middle-Age Spread, A Few Mood Swings, and Growing Exhaustion: The Human Rights Movement at Middle Age*, 41 TULSA L. REV. 693, 700 (2006) (citing Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 L. & CONTEMP. PROBS. 223, 230 (2002)).

paramount.⁹³ Though these laws may not always offer protection, they offer recognition,⁹⁴ and this is a great step forward to enforcement.⁹⁵

Although some scholars characterize them as merely aspirational,⁹⁶ UN treaties represent the legal floor for standards in international law.⁹⁷ Since most human rights bodies are based in large part upon these treaties, the next section will examine potentially implicated rights under a selected set of UN treaties. This Article will then examine the state of the law as interpreted by both UN treaty bodies and regional charters and treaty bodies.

B. Potentially Implicated Rights

To consider which rights are implicated in embryonic personhood, it is first important to consider individual treaties and resolutions, followed by how the treaty bodies have interpreted the rights set forth in these treaties. This section identifies and analyzes several rights that have either proven to be, or may prove to be, implicated when considering personhood from a human rights perspective.

The original conception of modern-day human rights was set out in the

93. See Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 HUM. RTS. Q. 201, 233 (1998) (concluding that “human rights have become hegemonic and therefore universal by fiat”).

94. In some cases, not all minorities are explicitly recognized in human rights documents. There are large rifts in the human rights field as to whether protections for these minorities can be found in existing treaty articles or if new treaties should be drafted for each group in need of protection. See Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 505 (2008).

95. Cf. Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26 STAN. ENVTL. L.J. 3, 10 (2007) (discussing how the recognition of environmental rights as human rights may lead to greater enforcement). Though environmentalism is a very different topic from IVF, the idea of recognition as helpful to enforcement bleeds across into all areas of human rights.

96. See Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 226 (2006).

97. Cf. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ I.1, U.N. Doc. A/CONF.157/23 (July 12, 1993).

(“The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil [sic] their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.”).

Universal Declaration of Human Rights (UDHR) in December of 1948.⁹⁸ The UDHR itself is not a treaty, but rather a resolution.⁹⁹ However, on the heels of the UDHR many new international treaties and treaty bodies formed within the United Nations, and three regional human rights systems emerged: the Inter-American System (including a Commission and a Court),¹⁰⁰ the African System,¹⁰¹ and the European System.¹⁰²

There are nine major international human rights treaties and one major resolution.¹⁰³ Among these, there are a few that are particularly pertinent to personhood: The Convention on the Rights of the Child (CRC),¹⁰⁴ the Universal Declaration of Human Rights (UDHR),¹⁰⁵ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),¹⁰⁶ and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁷ This article focuses on these particular instruments because of their overarching influence (UDHR),¹⁰⁸ pertinence to the parties involved (CRC and CEDAW)¹⁰⁹ and importance to traditional legal arguments about

98. AMNESTY INTERNATIONAL, *supra* note 70.

99. Universal Declaration of Human Rights, *supra* note 19. Technically, the UDHR is not a treaty, but rather it is a resolution by the United Nations General Assembly. However, scholars argue that it has become a binding force in international law. See DONNELLY, *supra* note 70, at 8. Together with the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights, it comprises the International Bill of Human Rights. *Id.*

100. The Inter-American System includes a Commission on Human Rights and a Court of Human Rights. See *What is the IACHR?*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Apr. 21, 2014).

101. The African System includes both the African Commission on Human and People's Rights and the African Court on Human and People's Rights.

102. The European System once included both a Commission and a Court, but the Commission has since been dissolved. See *Council of Europe: European Commission on Human Rights*, REFWORLD (Feb. 28, 2014, 1:24 PM), <http://www.unhcr.org/refworld/publisher/COECOMMHR.html>.

103. See *International Human Rights Law*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <http://www2.ohchr.org/english/law/> (last visited Apr. 21, 2014).

104. CRC, *supra* note 85, at 167.

105. UDHR, *supra* note 19.

106. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

107. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

108. See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 45 (4th ed. 2012) (noting the continuing influence of the UDHR on modern constitutional and legislative documents).

109. The CRC is about the rights of the child, and CEDAW is about the rights of women. These are the two parties whose rights would be most involved if personhood

reproductive rights (ICCPR).¹¹⁰ Using these human rights instruments as a guide, this Article analyzes the potentially implicated rights if embryos are granted personhood.

1. *The Right to Life*

The right to life is set forth as the basis for all other fundamental rights.¹¹¹ Although the original scholarly interpretation of the right to life was related to arbitrary deprivation of life in war and violence, human rights advocates now understand it to mean that States should take measures to prevent unnecessary death.¹¹² Without this right, other rights would not exist.¹¹³ However, when exactly life begins remains controversial. Those that argue life, in all understandings, begins at conception would insist that the right to life starts once an egg is fertilized.¹¹⁴ Others argue that although conception may be the biological

were recognized in the legal arena, and thus these two treaties are of great importance in the personhood debate.

110. Many arguments in other areas of the reproductive rights arena rely on civil and political rights as a backbone, such as privacy and bodily integrity. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, § II (1) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm> (author’s translation) (noting that the decision to have a child falls within the privacy sphere); *R. v. Morgentaler*, [1988] S.C.R. 30, 32-33 (Can.) (noting that the criminalization of abortion interferes with a woman’s bodily integrity and security of person); *K.L. v. Peru*, Judgment U.N. Human Rights Comm., No. 1153/2003, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/KL%20HRC%20final%20decision.pdf> (noting that Peru’s failure to allow K.L. to have an abortion was a privacy violation).

111. *Right to Life: Understanding Children’s Right to Life*, HUMANIUM, <http://www.humanium.org/en/fundamental-rights/life/> (last visited Apr. 21, 2014) [hereinafter *Right to Life*]. This right is featured in the following treaties: Universal Declaration of Human Rights, *supra* note 19; International Covenant on Civil and Political Rights, *supra* note 106, at art. 6; Convention on the Rights of the Child, *supra* note 84, at 167.

112. Janine Kossen, *Rights, Respect, Responsibility: Advancing the Sexual and Reproductive Health and Rights of Young People Through International Human Rights Law*, 15 U. PA. J. L. & SOC. CHANGE 143, 157 (2012).

113. *Right to Life*, *supra* note 110.

114. *See, e.g.*, Steven Ertelt, *Scientific Fact: Human Life Begins at Conception, or Fertilization*, LIFENEWS (Nov. 18, 2013, 7:08 PM), <http://www.lifenews.com/2013/11/18/undisputed-scientific-fact-human-life-begins-at-conception-or-fertilization/>.

beginning of life, the social meaning of life begins later.¹¹⁵ “Later” is defined in various ways—some define it at eight weeks,¹¹⁶ some at 16-18 weeks,¹¹⁷ some at viability,¹¹⁸ and others not until a child exits the womb.¹¹⁹ Depending on a court’s idea of when conception begins, it could either use the right to life to uphold or to strike down personhood laws. However, an analysis of pertinent human rights treaties demonstrates that the right to life was not meant to apply to embryos.

a. Universal Declaration of Human Rights

Article 1 of the UDHR begins by stating that, “all human beings are born free and equal in dignity and rights.”¹²⁰ At its adoption, the UN representative from France explained that this statement was intended to protect rights “from the moment of birth.”¹²¹ Since Article 1 prefaces the entire document, it seems clear that all subsequent rights are meant to apply to persons already born, not to fetuses or embryos.¹²²

b. Convention on the Rights of the Child

Similarly, the CRC defines a child as “every human being below the age

115. See JOHN HARRIS, ENHANCING EVOLUTION: THE ETHICAL CASE FOR MAKING BETTER PEOPLE 97 (2010) (“[P]ersons properly so-called are individuals capable of valuing their own existence.”); see also Michael V.L. Bennett, *Personhood From a Neuroscientific Perspective*, in ABORTION RIGHTS AND FETAL ‘PERSONHOOD’ (2d ed. 1990) (arguing that the brain is where personhood begins).

116. John M. Goldenring, *The Brain-Life Theory: Towards a Consistent Biological Definition of Humanness*, 11 J. MED. ETHICS 198, 199 (1985) (advocating a “brain-life” theory of when a fetus becomes a person under the law, saying that at eight weeks the brain begins to function, thus rendering a mass of cells a “person”).

117. *Roe v. Wade*, 410 U.S. 113, 132 (1973) (noting that in English common law, life was understood to begin at “quickening”, or somewhere around 16-18 weeks).

118. See *id.* at 159-60, 163 (finding though the Court was not in a position to say when life began, they do state that “meaningful life” begins at viability, which is commonly understood to be around 24-28 weeks); see also Kevin Glass, *Democratic Connecticut Senate Candidate: Life Begins at Birth*, TOWNHALL (Oct. 19, 2012, 8:43 PM), http://townhall.com/tipsheet/kevinglass/2012/10/19/democrat_connecticut_senate_candidate_life_begins_at_birth (noting that “[m]any more Americans believe that fetal life begins at viability”).

119. See Glass, C:\Users\Downloads\s supra supra note 117 (relaying that a political candidate announced his belief that life begins at birth).

120. Universal Declaration of Human Rights, supra note 19.

121. Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPRO. HEALTH MATTERS 120, 122 (2005) [hereinafter Copelon].

122. See *id.* at 121-22.

of eighteen years.”¹²³ While “human being” is not defined, the Committee on the Rights of the Child, the CRC’s treaty body, has called upon states to include safe abortion services in their provision of reproductive health to adolescents,¹²⁴ which would seem to indicate that embryos are not human beings.¹²⁵ The only provision that can be interpreted as potentially clarifying the scope of the right is in the Preamble, which states that children should receive legal protection “before as well as after birth.”¹²⁶ This language was advanced by the Holy See,¹²⁷ representatives for the seat of the Catholic Hierarchy in the Vatican. However, the Holy See clarified that this amendment “was not to preclude the possibility of an abortion.”¹²⁸ Moreover, the amendment was added with the caveat that it was not intended to “prejudice the interpretation of Article 1.”¹²⁹ Clearly, the drafters did not want the Preamble’s language to be interpreted as granting rights to the unborn.¹³⁰

*c. Convention on the Elimination of All Forms of Discrimination
Against Women*

CEDAW’s treaty language is highly sanitized in terms of reproductive rights,¹³¹ and it never explicitly discusses the right to life.¹³² However, when the CEDAW Committee issues reports, it frames access to safe abortion as a right to life issue for pregnant women.¹³³ Since it encourages states to facilitate safe abortion due to maternal mortality rates, CEDAW

123. CRC, *supra* note 85, at art. 1.

124. Copelon et al., *supra* note 121, at 122-23.

125. If embryos were human beings, all other CRC rights would apply to them, therefore precluding abortion. *See id.*

126. CRC, *supra* note 85, at Preamble ¶ 9.

127. Copelon et al., *supra* note 121, at 122.

128. *Id.* (citing Convention on the Rights of the Child, *supra* note 84, at art. 12).

129. *Id.*

130. *Id.*

131. By this I mean that CEDAW as a treaty does not position its discussion of abortion in the context of a woman’s right to choose. Rather, it discusses abortion in the context of maternal health, thus making it more palatable to states that refuse to recognize that abortion can be an autonomous option.

132. Copelon et al., *supra* note 121, at 123. There are provisions however that can be read as in support of a woman’s right to choose, such as the right to decide on the number and spacing of one’s children. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 105, at art. 16.

133. Copelon et al., *supra* note 121, at 123; *see also* CTR. FOR REPROD. RTS., BRINGING RIGHTS TO BEAR 3 (2008), *available at* http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF.

prioritizes the life of the mother over the “life” of the embryo or fetus.¹³⁴ Thus, if it can be assumed that a treaty would not grant rights to an embryo, take them away as a fetus and grant them again to a born child. Therefore, CEDAW does not recognize embryonic personhood.

d. International Covenant on Civil and Political Rights

Many of the provisos of the ICCPR specify the importance of negative duties, or protecting individuals from their governments.¹³⁵ These negative duties, however, are understood as existing in conjunction with a government’s positive obligation to protect its own citizens.¹³⁶ Therefore, in the context of human rights norms, the right to life is dualistic. It is presumed to be a principle violated by undue governmental intrusion where the government is also expected to take positive steps to protect the right to life.

Both the drafters and the current treaty body of the ICCPR have refused to codify the existence of a prenatal right to life.¹³⁷ The drafters of the ICCPR explicitly rejected a proposal saying: “the right to life is inherent in the human person from the moment of conception, [and] this right shall be protected by law.”¹³⁸ The Human Rights Committee (HRC), the ICCPR’s treaty body, has since made numerous pronouncements in favor of liberalizing abortion laws, noting that clandestine abortions are a risk to a pregnant woman’s right to life.¹³⁹

134. Copelon et al., *supra* note 121, at 123.

135. This is in contrast to social and economic rights, which are more about positive duties, or minimum standards of needs the government must provide for its citizens. See Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1764-65 (2008).

136. *Id.* at 1765 (discussing the fact that the UDHR contains both positive and negative rights, which shows that originally the international community understood them to exist together, despite the bifurcation in the treaty system caused by the Cold War rivalry between the United States and the Soviet Union).

137. See CTR. FOR REPROD. RTS., RIGHTS AT RISK: THE TRUTH ABOUT PRENATAL PERSONHOOD 15-16 (2012), *available at* http://www.ushrnetwork.org/sites/default/files/crr_personhoodpapers_briefingpaper.pdf.

138. *Id.* at 15 (quoting U.N. GAOR Annex, 12th Sess., Agenda item 33, at 96, U.N. Doc. A/C.3/L.654 (1957); U.N. GAOR, 12th Sess., Agenda Item 33, at 113, U.N. Doc. A/3764 (1957)).

139. *Id.* at 15 (citing United Nations, Human Rights Comm., General Comment No. 28, Article 3 (Equality of Rights Between Men and Women), ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Colombia, ¶ 19, U.N. Doc. CCPR/C/COL/CO/6 (August 4, 2010); United Nations, Human Rights Comm., Consideration of Reports

For example, the HRC decided its first abortion case in 2005, *K.L. v. Peru*.¹⁴⁰ In that case, the HRC ruled that Peru's failure to allow an abortion for a minor unduly interfered with her right to privacy under Article 17 of the ICCPR.¹⁴¹ Moreover, the Committee members reiterated that "restrictive provisions on abortion" subject women to "inhumane treatment" and that criminalization of abortion is prohibited under Articles 3, 6 (the right to life), and 7 of the ICCPR.¹⁴² The state's refusal to allow an abortion left K.L. with two risky options: seeking a clandestine abortion or carrying a dangerous pregnancy to term.¹⁴³ In this case, the dualistic right to life required Peru to stop interfering in K.L.'s ability to get an abortion, and to thus protect her from the harm that either a clandestine abortion or a dangerous pregnancy would bring. The HRC's

Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: El Salvador, ¶ 10, U.N. Doc. CCPR/C/SLV/CO/6 (November 18, 2010); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Poland, ¶ 8, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Argentina, ¶ 13, U.N. Doc. CCPR/C/ARG/CO/4 (March 31, 2010); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Ireland, ¶ 13, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of this Covenant, Concluding Observations: Mexico, ¶ 10, U.N. Doc. CCPR/C/MEX/CO/5 (May 17, 2010); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Monaco, ¶ 10, U.N. Doc. CCPR/C/MCO/CO/2 (Dec. 12, 2008); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Nicaragua, ¶ 13, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Panama, ¶ 9, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008)).

140. *K.L. v. Peru*, Judgment U.N. Human Rights Comm., No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/KL%20HRC%20final%20decision.pdf>.

141. Among other violations. *See id.* at ¶ 6.4. In this case, the minor was carrying an anencephalic fetus, which risks danger to the life of the mother and the fetus if carried to term. Both the minor and the fetus had severe health complications, and the child's death four days after birth caused K.L. to go into a deep depression.

142. *Id.* at ¶ 3.5.

143. *Id.* at ¶ 3.3. In addition to a violation of privacy, the HRC ruled Peru's actions were a violation of the right to an effective remedy due to discriminatory treatment based on sex, *id.* at ¶ 6.6, the right to protection of minors, *id.* at ¶ 6.5, and the right not to be subjected to torture, cruel, or inhuman punishment. *Id.* at ¶ 6.3.

acknowledgement that restrictive abortion provisions violate the right to life further demonstrates that the ICCPR's right to life provision is not meant to apply to embryos.

2. *The Right to Privacy*

The right to privacy has been used in international law to both uphold and restrict regulations related to embryonic personhood.¹⁴⁴ The right to privacy is defined as the right to be free from "arbitrary interference" by the government.¹⁴⁵ A typical caveat is that the government is justified in some privacy interference when it is related to matters of public import, such as national security, public health, or public morals.¹⁴⁶

In jurisprudence concerning medical matters, the right to privacy is sometimes cited to prevent arbitrary governmental interference with choices about health. For example, in states that recognize health care as a privacy right, a woman seeking an abortion cannot be arbitrarily denied that abortion by the state, as this would be an interference with her private health care choices.¹⁴⁷ By the same logic, denying a couple or single person the right to freeze leftover eggs would also be an interference with private healthcare choices.¹⁴⁸ Moreover, since infertility can and has been conceptualized as a health problem,¹⁴⁹ a doctor's recommendation

144. See *id.* at ¶ 6.4; see also, *Evans v. United Kingdom.*, 43 Eur. Ct. H.R. 21, ¶ 69-70 (2006).

145. Universal Declaration of Human Rights, *supra* note 19, at art. 12.

146. See Robert A. Ermanski, *The Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT'L & COMP. L. REV. 141, 148 (1992) (noting that the right to privacy is subject to lawful limitations); see, e.g., USA Patriot Act § 201, 18 U.S.C. § 2516 (2012) (allowing a certain level of invasion of privacy under the justification of national security); Rebecca F. Wisch, *Table of State Animal Sexual Assault Laws*, ANIMAL LEGAL & HIST. SOC'Y, <http://www.animallaw.info/articles/State%20Tables/tbusanimalassault.htm> (last visited Apr. 21, 2014) (explaining that bestiality laws are largely justified under judicial conceptions of public morality).

147. As this could also be characterized as government interference with a private choice about fertility, a health-related matter. See *supra* Part III(A)(4) (discussing *K.L. v. Peru*).

148. See Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97, 98 (2010) ("[T]he ability to control one's fertility is a health issue.").

149. See Françoise Shenfield et al., European Society of Human Reproduction and Embryology Task Force on Ethics and Law, *Gamete and Embryo Donation*, 17 HUM. REPROD. 1407, 1407 (2002). The World Health Organization has similarly classified infertility as a disease and a disability. See *Infertility Definition and Terminology*, WORLD HEALTH ORG., <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/index.html> (last

regarding infertility treatments, including IVF and egg-freezing, should be treated similarly to other health problems. That is, the patient's choice should be respected as a decision protected under the right to privacy.¹⁵⁰

The question of how human rights bodies have treated the right to privacy is a difficult one to answer.¹⁵¹ Although the right to privacy is found in several human rights documents,¹⁵² its scope is unclear. The right to privacy, perhaps more so than other rights, has been applied in a wide variety of situations.¹⁵³ Human rights scholar James Griffin identifies three conceptions of this right: privacy of information, privacy of space and life, and privacy of liberty.¹⁵⁴ Within these spheres, there are also further divisions.¹⁵⁵ Therefore, conceptually, the right to privacy can apply in many areas of life and law. However, since there is little guidance to be found in the treaties – and the cases are varied – the best way to currently assess the scope of privacy law is to examine specific cases that can be used as models for how the right to privacy could apply to embryonic personhood.

Specifically, many cases that address reproductive rights in general use the privacy right as all or part of the legal argument in favor of access to those rights. For example, in *K.L. v. Peru*,¹⁵⁶ *Roe v. Wade*,¹⁵⁷ and *C-355/06*,¹⁵⁸ the privacy right is used to justify the right to access an abortion. In

visited Apr. 21, 2014). It is unclear, as of yet, if social or elective infertility will be included in this definition, which is largely medical in nature.

150. See *Evans v. United Kingdom*, 43 Eur. Ct. H.R. 21, ¶ 71 (2006).

151. See *Ermanski*, *supra* note 145, at 148.

152. See INT'L COMM'N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW 47 (2009), available at <http://www.icj.org/dwn/database/PractitionersGuideonSOGI.pdf> [hereinafter INT'L COMM'N OF JURISTS].

153. INT'L COMM'N OF JURISTS, *supra* note 151, at 48-49.

154. JAMES GRIFFIN, ON HUMAN RIGHTS 234 (2008).

155. *Id.* at 234.

156. *K.L. v. Peru*, Human Rights Comm., No. 1153/2003, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) available at <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/KL%20HRC%20final%20decision.pdf> (noting that Peru's failure to allow *K.L.* to have an abortion was a privacy violation).

157. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

158. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, § II (1) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm> (author's translation) (last visited Apr. 20, 2014) (noting that the decision to have a child falls within the privacy sphere).

Evans v. U.K., the court concludes that a law on parental consent to the destruction of embryos does not violate the privacy right, affirming the balancing of competing societal and private interests.¹⁵⁹ In *Artavia Murillo y otros* (“*Fecundación in vitro*”) vs. *Costa Rica*, the court declares a ban on IVF to be a privacy violation in part due to the fact that a ban does not allow couples to have autonomy in their personal decisions concerning childbearing.¹⁶⁰ *Artavia Murillo* and *Evans* have other implications as well, and are discussed in full below.¹⁶¹ Thus, the privacy right has largely been interpreted to support situations that are at odds with embryonic personhood, such as IVF and abortion. As such, embryonic personhood is not a concept recognized under the right to privacy.

3. *The Right to Found a Family*

Both the UDHR and the ICCPR contain the “right to marry and found a family.”¹⁶² The right to found a family is not explicitly clarified in human rights law. However, as the IACHR recently used this right to declare the Costa Rican ban on IVF a violation of human rights in *Artavia Murillo*, its relevance for embryonic personhood is clear.¹⁶³

Some commentators argue that the right to found a family is encompassed in a general “right to procreate,” which is tied to the broader body of reproductive rights.¹⁶⁴ However, there is a split regarding the right’s breadth. Some see it as an unfettered general right to make all related childbearing decisions.¹⁶⁵ This is based in part on the sweeping

159. See *Evans v. United Kingdom*, 43 Eur. Ct. H.R. 21, ¶ 92 (2006); see also Richard F. Storrow, *The Proportionality Problem in Cross-Border Reproductive Care*, in *THE GLOBALIZATION OF HEALTH CARE* 125, 125-47 (I. Glenn Cohen ed., 2013) (noting the breadth of appreciation argument).

160. *Artavia Murillo* (“*Fecundación in Vitro*”) v. *Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 281, 285, 317 (Nov. 28, 2012). The court also says that the right to privacy is violated when governments place obstacles around the ways a woman chooses to control her fertility, including the decision to become a genetic parent. See *id.* at ¶ 39. Further, the court notes that, in the IVF context, the rights to private life and reproductive freedom become the right to access the medical technology needed to exercise those rights, and therefore the reach of the privacy right, reproductive autonomy, and the right to found a family extend to the right to benefit from the progress of science and the right to access reproductive technologies, like IVF. See *id.* at ¶ 31.

161. See *infra* § IV(A) & (B)(1).

162. Universal Declaration of Human Rights, *supra* note 19, at art. 16; International Covenant on Civil and Political Rights, *supra* note 106, at art. 23(2).

163. See *Artavia Murillo*, Inter-Am. Ct. H.R. (ser. C) No. 257 at ¶ 150, 317; see also *infra* Part IV(B) (discussing the implications of the case).

164. See Dillard, *supra* note 31, at 27-28.

165. Reed Boland, *Civil and Political Rights and the Right to Nondiscrimination*:

generalization of the right in some documents, and in part on human rights law's broad deference to individuals, rather than states, in matters such as abortion.¹⁶⁶

For instance, CEDAW states that men and women have equal "rights to decide freely and responsibly the number and spacing of their children, and to have access to the information, education, and means to enable them to exercise these rights."¹⁶⁷ The interpretation of any right as unfettered is, of course, unrealistic, considering that all rights are subject to limitations by other rights. However, embryonic personhood implicates the right to found a family because it could preclude infertile couples, single individuals, or same-sex couples from pursuing fertility treatments,¹⁶⁸ which would limit their right to become biological parents. According to the Inter-American Commission on Human Rights, the right to become biological parents is inherent in the right to found a family.¹⁶⁹

4. *The Right to Non-Discrimination*

Finally, in a creative application of human rights law, the right to non-discrimination potentially protects the legality of IVF. If a state denies a right, such as the right to found a family, based on a couple or single person's infertility¹⁷⁰ or same-sex status,¹⁷¹ for instance, it may be violating

Population Policies, Human Rights, and Legal Change, 44 AM. U. L. REV. 1257, 1263 (1995) (arguing that the ICCPR "implies the right to make fully voluntary decisions about childbearing").

166. See generally *Human Rights: Supporting the Constellation of Reproductive Rights*, U. N. POPULATION FUND, <http://www.unfpa.org/rights/rights.htm> (last visited Apr. 21, 2014).

167. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 105.

168. See *supra* Part II for a discussion of how personhood could affect IVF, thereby affecting those who need access to IVF in order to become genetic or gestational parents. See also *Artavia Murillo*, Inter-Am. Ct. H.R. No. 12.361 at ¶¶ 85-125 (detailing the heartache of infertile couples caused by infertility coupled with a ban on IVF treatments).

169. See Martin Hevia & Carlos Herrera Vacafior, *The Legal Status of In Vitro Fertilization in Latin America and the American Convention on Human Rights*, 36 SUFFOLK TRANSNAT'L L. REV. 51, 71 (2013) (quoting *Artavia Murillo v. Costa Rica*, Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10, ¶ 80 (2010), available at <http://www.cidh.oas.org/demandas/12.361Eng.pdf>).

170. See *Artavia Murillo* ("Fecundación *in Vitro*") v. Costa Rica, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 126 (Nov. 28, 2012). Representative Molina of the Inter-American Commission on Human Rights is quoted in the decision as saying that infertility qualifies as a disability, and that the infertile couples in this case were discriminated against for their infertility-disability. *Id.* The Court does not affirm this statement, but merely acknowledges that it was made. *Id.*

the non-discrimination principle. The right to non-discrimination includes some enumerated categories (e.g., race, color, sex, language, religion, political or other opinion, national or social origin) as well as the category of “other status,” which can and has been used by human rights bodies to protect all manner of statuses.¹⁷² However, the UN is clear that this right does not prohibit all distinctions.¹⁷³ Rather, the prohibition is on unreasonable, non-legitimate distinctions.¹⁷⁴ For example, distinctions that are made to remedy discrimination are permissible, whereas distinctions that prohibit people from enjoying their rights “on equal footing” with others are impermissible.¹⁷⁵ If this right were to be invoked in the face of embryonic personhood classifications, the questions for human rights bodies would be: 1) whether fertility is a legitimate distinction for discrimination purposes,¹⁷⁶ 2) whether a ban on IVF discriminates against

171. This is similar to an argument made by the Malta Gay Rights Movement in response to the Embryo Protection Act, a law made by the Maltese government that excludes same-sex couples and singles from a definition of “prospective parent”. Though the Malta Gay Rights Movements objected on the grounds of the human right to found a family, this means that lack of access to IVF could be seen as discriminatory against those who – like same-sex couples – may need IVF technology in order to realize the right to found a family. See Embryo Protection Act (2013) Cap. 524, (2013) Cap., available at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11960&l=1>; see also Matthew Xuereb, *Bishop: IVF Law Is ‘Not Homophobic,’* TIMES OF MALTA (Sept. 17, 2013 12:01AM), <http://www.timesofmalta.com/articles/view/20130917/local/Bishop-IVF-law-is-not-homophobic-486481#.UtAcf2RDvVs>. It is unclear as to whether the right could be extended to single people or those pursuing elective fertility, depending on whether these pursuits can be classified under non-discrimination theory.

172. See Sophie M. Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 *FORDHAM INT’L L. J.* 385, 390-93 (2012).

173. OFF. OF THE HIGH COMMISS’R FOR HUM. RTS., *The Right to Equality and Non-Discrimination in the Administration of Justice*, in *HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL FOR JUDGES, PROSECUTORS AND LAWYERS* 651 (2003), available at <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.

174. *Id.*

175. See *id.* at 660.

176. This question has been invoked before the Inter-American Commission on Human Rights in the *Artavia Murillo* case, but the discrimination was premised on the basis that infertility is a disability, and thus that a ban on IVF was discriminatory against people with infertility-disabilities. The discrimination issue was not addressed by the Inter-American Court of Human Rights’ (binding) follow-up decision. See *Artavia Murillo (“Fecundación in Vitro”) v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 138 (Nov. 28, 2012). (quoting in dicta Representative Molina of the Inter-American Commission on Human Rights as saying that infertility qualifies as a

same-sex couples,¹⁷⁷ and 3) whether that discrimination extends to other social or elective forms of fertility – and the limitations therein.¹⁷⁸

5. Reproductive Rights

Although they are not made explicit in any human rights treaty, the appellation “reproductive rights” is used as an umbrella term to capture a variety of experiences people have related to reproduction, including, but not limited to, contraception, access to safe abortion, and freedom from forced abortions.¹⁷⁹ In the absence of an explicit pronouncement declaring IVF to be encompassed under an existing human right, it can and should be included where treaty bodies issue reports and makes recommendations on “reproductive rights.” By recognizing IVF under this umbrella term, states would be discouraged from banning or over-regulating the procedure under international human rights law.¹⁸⁰

IV. STATE OF THE LAW

The majority of cases analyzed below concern fetal personhood, as most human rights bodies have not explicitly addressed embryonic personhood.¹⁸¹ However, operating under the assumption that a court’s rejection of fetal personhood reasonably implies that it would also reject

disability, and that the infertile couples in this case were discriminated against for their infertility-disability).

177. Because same-sex couples use IVF in order to become genetic parents to a child, this is one ground on which discrimination could be invoked, saying that a ban on IVF is discrimination on the basis of sexual orientation or “other status.”

178. I assume courts would articulate limitations surrounding, at least, elective forms of fertility where the denial of IVF or resources to access the same is based on a wish to delay parenthood that is unconnected to a medical condition. It is much harder to articulate a theory of discrimination when one uses IVF only because one is not ready to parent until a later age, though there may be case-by-case exceptions. There are also compelling arguments to the contrary. *See, e.g.,* Imogen Goold & Julian Savulescu, *In Favour of Freezing Eggs for Non-Medical Reasons*, 23 *BIOETHICS* 47, 47-58 (2009).

179. *See generally* *Human Rights: Supporting the Constellation of Reproductive Rights*, *supra* note 165.

180. The Inter-American Court of Human Rights, for example, has ruled that IVF relates specifically to reproductive rights, and that the right to found a family includes the right to access the necessary reproductive technologies (like IVF) to do so. *See, e.g.,* *Artavia Murillo*, Inter-Am. Ct. H.R. (ser. C) No. 257 ¶¶ 144, 150. Hopefully this would also encourage some modicum of regulation, since although over-regulation can be tantamount to deprivation in some cases, some regulation is important to ensure safety and ethical medical practices.

181. There are currently no overarching Asian human rights bodies, nor are there human rights bodies in Oceania, so the analysis here is limited to existing bodies.

embryonic personhood; this section will attempt to synthesize the state of international law around the rights of embryos.

A. Europe and the European Court of Human Rights

The European Court of Human Rights (ECHR)¹⁸² has implicitly denied fetal personhood on four occasions. In *Paton v. U.K.*, the Court ruled that the word “everyone” in Article 2 of the European Convention (the governing document of the Court¹⁸³) does not include fetuses.¹⁸⁴ In both *R.H. v. Norway* and *Boso v. Italy*, the Court held that a fetal right to life did not outweigh the interests of the pregnant woman, again affirming that the use of the word “everyone” in Article 2 does not include fetuses.¹⁸⁵ In *Vo v. France*, the Court again declined to rule explicitly that Article 2 includes fetuses, but was also particularly evasive regarding whether Article 2 could potentially be interpreted that way.¹⁸⁶

Most conclusive on the issue of embryonic personhood is the more recent case of *Evans v. U.K.*¹⁸⁷ In *Evans*, a couple wanted to use IVF to have a child.¹⁸⁸ The couple separated before IVF treatments began, but after the embryos had been fertilized.¹⁸⁹ After the separation, the husband wrote to the clinic where the embryos were stored, asking for them to be destroyed, thereby effectively withdrawing his consent for their continued storage.¹⁹⁰ Under English law, the consent of both potential parents is required for continued storage of embryos.¹⁹¹ Thus, the wife sued to

182. The European Court of Human Rights is now the main adjudicatory body in the European Human Rights System. Previously, there was also a European Commission on Human Rights, which disbanded in 1998. The Commission mainly served a gatekeeping function for the Court. See Storrow, *supra* note 158, at 133 (citing MICHAEL D. GOLDHABER, A PEOPLE’S HISTORY OF THE COURT OF HUMAN RIGHTS 4 (2007)).

183. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

184. *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408, 413 (1981).

185. *RH v. Norway*, App. No. 17004/90, 73 Eur. Comm’n H.R. Dec. & Rep. 155 (1992); *Boso v. Italy*, 2002-VII Eur. Ct. H.R. 441, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=671625&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

186. See Tanya Goldman, *Vo. v. France and Human Rights: The Decision Not to Decide*, 18 HARV. HUM. RTS. J. 277, 278-79 (2005).

187. *Evans v. United Kingdom*, 43 Eur. Ct. H.R. 21 (2006).

188. *Id.* at ¶¶ 13-15.

189. *Id.* at ¶¶ 17-18.

190. *Id.* at ¶ 18.

191. *Id.* at ¶ 15.

restore her husband's consent to the storage.¹⁹² After failing to win support under English law, the wife sued in the ECHR, arguing that the English law violated three articles of the European Convention.¹⁹³ The wife argued that the English law violated the embryo's right to life under Article 2, her right to respect for private and family life under Article 8, and her right to non-discrimination under Article 14.¹⁹⁴ The ECHR ruled in favor of the husband on all counts.¹⁹⁵

As for the embryo's right to life, the Court ruled that "the issue of when the right to life begins comes within the margin of appreciation. . . under English law. . . [and] an embryo does not have independent rights or interests and cannot claim. . . a right to life under Article 2."¹⁹⁶ Therefore, the ECHR has pronounced that the embryo lacks personhood under English law, but that the margin of appreciation¹⁹⁷ allows for other member states to decide differently.

Moreover, the ECHR concluded that it is not a violation of privacy, or a discriminatory measure, to require dual spousal consent for embryonic storage.¹⁹⁸ This measure is justified by balancing respect for the wife's desire to become a parent with the husband's desire not to become a parent such that one does not outweigh the other.¹⁹⁹ This ruling was made in the context of the Court's broad deference to the United Kingdom due to the lack of consensus among member states of the ECHR on the embryonic storage consent issue.²⁰⁰ The Court further justified this ruling by noting that it felt the United Kingdom was balancing the competing societal interests (in medical consent) with private interests.²⁰¹ This interpretation of what *Evans* means for embryonic personhood was arguably affirmed by

192. *Id.* at ¶ 19.

193. *Id.* at ¶ 3.

194. *Id.*

195. *Id.* at ¶¶ 56, 92, 96.

196. *Id.* at ¶ 54.

197. The "margin of appreciation" is a concept in the ECHR whereby the Court gives latitude to member states on certain issues that are not universally held in the European system based on national interests or moral relativism. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 (1999). This system threatens to undermine the universality of human rights jurisprudence as a whole. *Id.* at 844.

198. *Evans v. United Kingdom*, 43 Eur. Ct. H.R. at ¶¶ 68-70 (2006).

199. Natasha Hammond, *Case Commentary: Evans v. The United Kingdom*, in ETHICS, LAW AND SOCIETY 363, 364-65 (Jennifer Gunning & Søren Holm ed., 2013).

200. *Id.* at 364.

201. See *Evans*, 43 Eur. Ct. H.R. at ¶ 82; see also Storrow, *supra* note 64, at 298-99 (noting the breadth of appreciation argument).

implication in the cases of *S.H. v. Austria*²⁰² and *Costa and Pavan vs. Italy*.²⁰³ Both of these cases concerned the regulation of IVF, and the fact that neither case included a discussion of embryonic rights or embryonic life, supports the conclusion that embryos are not legal persons.²⁰⁴

In sum, embryonic personhood is not recognized under human rights law in the ECHR. However, this does not preclude other challenges that may affect access to IVF, such as challenges over how IVF is regulated. This is particularly true if challengers use *Evans* as precedent to successfully argue that larger societal interests, such as public health or welfare, are at stake in the use of procedures such as IVF.²⁰⁵

B. American States and the Inter-American Commission on Human Rights

The Inter-American Human Rights System is arguably more complicated than other governing human rights bodies. The main adjudicatory and quasi-adjudicatory bodies are the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (collectively IACHR).²⁰⁶ The IACHR is governed by two documents: the American Convention on Human Rights (AC) and the American Declaration on the Rights and Duties of Man (Declaration).²⁰⁷ The AC is the most up-to-date human rights treaty in effect for the Organization of American States, the oldest regional organization in the world.²⁰⁸ Some countries—like the

202. *S.H. v. Austria*, Judgment, App. No. 57813/00, EUR. CT. HUM. RTS. (Mar. 11, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-309>.

203. *Costa v. Italy*, App. No. 54270/10, EUR. CT. HUM. RTS. Eur. (Aug. 28, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112993>.

204. See *Artavia Murillo (“Fecundación in Vitro”) v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 242 (Nov. 28, 2012). It is also possible that the Court did not want to reach this issue, and that is why they ignored it. But I think this unlikely given the moral status that embryonic personhood proponents often attach to embryos. If a majority of members of the Court felt that embryos were persons under the law, embryonic life and/or rights would have been at least touched upon.

205. This has already happened, in fact, although personhood did not come up. See, e.g., *Costa*, App. No. 54270/10 Eur. Ct. H.R. at ¶ 38-40; *S.H.*, App. No. 57813/00, Eur. Ct. H.R.

206. See Ligia M. De Jesus, *Revisiting Baby Boy v. United States: Why the IACHR Resolution Did Not Effectively Undermine the Inter-American System on Human Rights’ Protection of the Right to Life from Conception*, 23 FLA. J. INT’L L. 221, 224-25 (2011).

207. See *Sources of the Mandate*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/sources.asp> (last visited Apr. 21, 2014). Much of the Declaration’s text is also included in the AC. *Id.*

208. See *Who We Are*, ORG. OF AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited Apr. 21, 2014).

United States—are members of the Organization for American States, but have not yet ratified the AC.²⁰⁹ Therefore, the default governing document binding on the United States is the Declaration.²¹⁰ Though the IACHR uses the AC as the main legally governing document, the Declaration is still considered binding on all member states.²¹¹

Therefore, when a potentially viable fetus was aborted in Massachusetts but courts refused to charge the doctor with manslaughter; two pro-life activists used the Declaration as a basis to bring the case of *Baby Boy v. United States*²¹² before the Inter-American Commission.²¹³ The petitioners argued that Article 4(1) of the Declaration, protecting the right to life “in general” applied here, under the premise that the United States’ refusal to prosecute the doctor was a violation of their binding commitment to uphold the Declaration. The United States, and ultimately the Inter-American Commission, argued that a combination of current state practice and historical drafting notes meant the words “in general” were intended to allow states to permit abortion.²¹⁴

This interpretation is arguably incorrect.²¹⁵ As both advocates and critics of the ruling note: it is not exactly clear why the Inter-American Commission elected to decide the case in this manner.²¹⁶ However, there

209. See De Jesus, *supra* note 206, at 231.

210. This is the oldest human rights treaty in existence, ratified just one year before the UDHR, together with the Organization of American States’ Charter. See Elizabeth Strenio, *The Inter-American Human Rights System*, HUM. RTS. EDUC. ASSOC., http://www.hrea.org/index.php?doc_id=413 (last visited Apr. 21, 2014).

211. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A), No. 10, ¶ 12 (July 14, 1989), available at http://www1.umn.edu/humanrts/iachr/b_11_4j.htm; *Basic Documents Pertaining to Human Rights in the Inter-American System*, INTER-AM. COMM’N ON HUM. RTS., <http://www.cidh.oas.org/Basicos/English/Basic1.%20Intro.htm> (last visited Apr. 21, 2014). The United States contests the assertion that the Declaration is binding law.

212. *Baby Boy v. United States*, Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶ 1-2 (1981), available at <http://www.cidh.org/annualrep/80.81eng/USA2141.htm>.

213. See De Jesus, *supra* note 206, at 226-27.

214. *Id.* at 233.

215. *Id.* at 258-262.

216. *Id.* at 263 (quoting Dinah Shelton, *International Law on Protection of the Fetus*, in ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE 1, 4 (Stanislaw J. Frankowski & George F. Cole eds., 1987) (noting the critiques that the Commission used “questionable reasoning, faulty analysis, and little or no attention [was] paid to the usual canons of construction of international documents”).

are a fair number of countries in the Americas that continue to ban abortion outright, with no exceptions.²¹⁷ Some countries in the Americas outspokenly interpret Article 4(1) of the convention to apply to life “from conception,”²¹⁸ which indicates their belief that fertilized embryos are covered under Article 4(1).²¹⁹ As noted earlier, the codification of the notion that life begins at conception would make the embryo a legal person, which is likely in direct conflict with the UDHR. Although the UDHR does not govern the IACHR system specifically, it has persuasive authority and relevancy to all human rights bodies as it is conceptualized as an overarching human rights standard.²²⁰

However, in November 2012, the IACHR reaffirmed *Baby Boy*’s holding in the *Artavia Murillo* case.²²¹ In the decision, the Court conducts a thorough analysis of the right to life and finds there is no precedent for embryonic personhood in either the Inter-American System or the International Human Rights system.²²² The Court further undertakes a comparative law analysis to the same end: the broad practice of IVF implies that other countries have interpreted governing human rights treaties as permissive of IVF and thus as contrary to the recognition of

217. See *World Abortion Laws Map*, CTR. FOR REPROD. RTS., <http://worldabortionlaws.com/map/> (last visited Apr. 21, 2014) (including El Salvador, Honduras, Nicaragua, the Dominican Republic, Haiti, Suriname and Chile).

218. See De Jesus, *supra* note 206, at 265-66. De Jesus argues that a historical analysis of the travaux préparatoires and various committees on interpretation of the Declaration, along with the ordinary meaning “in light of its object and purpose” shows that Article 4(1) is meant to protect both the “human embryo and human fetus’ right to life from abortion, from the time of fertilization until birth.” *Id.* at 264. Clearly De Jesus’ interpretation would hold that fertilized embryos, whether implanted or not, are protected under the Declaration.

219. *Id.* at 265-66. This includes Nicaragua, Guatemala, El Salvador, and the Dominican Republic. The IACHR has not explicitly endorsed the doctrine of margin of appreciation as used in the ECHR, but it made reference to it in one case. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 844 n.5 (1999) (citing Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4184, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984), available at <http://www1.umn.edu/humanrts/iachr/iachr.html>) (approving “the margin of appreciation which is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with”).

220. See Kidanemariam, *supra* note 90, at 5-6.

221. See *Artavia Murillo* (“Fecundación *in Vitro*”) v. Costa Rica, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 220-21 (Nov. 28, 2012).

222. *Id.* ¶ 244 (analyzing according to the Declaration, the AC, the UDHR, the ICCPR, and the CRC).

embryos as persons under the law.²²³

As there is at least one country in the Americas that is in defiance of the decision in *Artavia Murillo*, the next section examines country-specific laws in an attempt to understand how the region treats IVF and therefore embryonic personhood. The next section also explores how some countries' treatment of IVF has changed or will change in the wake of the *Artavia Murillo* case.

1. Country Studies in the Americas

At least one country, Costa Rica, has made an explicit pronouncement on the application of the right to life standard to pre-implantation embryos. Costa Rica currently does not allow IVF procedures because their Constitutional Court in 2000 declared that the procedure violates the right to life under Article 4(1) of the Declaration.²²⁴ Though the Constitutional Court held that IVF violates the right to life because embryos are people with legal protections,²²⁵ Costa Rica still allows abortion in limited cases where the mother's life or health is threatened.²²⁶ However, in the *Artavia Murillo* case, the IACHR declared that Costa Rica's ban on IVF is in violation of the right to personal integrity, the right to personal liberty, the right to private and family life, and the right to marry and raise a family.²²⁷ As of this writing, Costa Rica has not yet complied with the ultimate ruling in *Artavia Murillo* which requires it to pass a law regulating and allowing IVF.²²⁸ In December 2013, the Costa Rican Congress was poised to vote

223. *Id.* ¶¶ 247-256.

224. Corte Suprema de Justicia, Sala. Const. marzo 15, 2002, Sentencia No. 2306-00 (Costa Rica).

225. See generally Judgment No. 2000-002306, Supreme Court of Justice of Costa Rica (March 15, 2000), available at http://sitios.poder-judicial.go.cr/salaconstitucional/Centro%20de%20Jurisprudencia/normas_declaradas_inconstitucion.htm#2000 (summarizing judgments of the Court); see also Fernando Zegers-Hochschild et al., *Human Rights to In Vitro Fertilization*, 123 INT'L J. GYNECOLOGY & OBSTETRICS 86, 87 (2013).

226. See Press Release, Ctr. for Reprod. Rts., *Despite Country's Own Laws, Costa Rica Continues to Deny Women Legal Abortion* (Aug. 23, 2013), available at <http://reproductiverights.org/en/press-room/despite-country%E2%80%99s-own-laws-costa-rica-continues-to-deny-women-legal-abortion>; see also *World Abortion Laws Map*, *supra* note 217. This also contradicts my earlier argument that states who grant rights to embryos are less likely to then not grant those same rights to fetuses, and vice versa. However, recent reports show that perhaps Costa Rica is not actually allowing access to abortion in practice. Ctr. for Reprod. Rts., *supra* note 226.

227. See *Artavia Murillo*, Inter-Am. Ct. H.R. (ser. C) No. 257 ¶ 317.

228. See Alvaro Murillo, *Un Año Sin Cumplir una Sentencia Sobre Fecundación "In Vitro,"* EL PAÍS (Dec. 20, 2013, 6:18PM), http://sociedad.elpais.com/sociedad/2013/12/20/actualidad/1387560697_741825.html.

on a law concerning the regulation of IVF.²²⁹ However, 12 members broke the quorum, further delaying the vote and leaving Costa Rica without a law regulating IVF.²³⁰ As a result, it is still currently illegal to pursue treatment for IVF within Costa Rica.²³¹

The rest of the countries in the Americas either openly allow or regulate IVF, some at the national level, and many at more local levels.²³² However, there is controversy within some countries due to inside actors agitating for embryonic personhood. The most illustrative cases of this are Argentina and the United States. In Argentina in 1999, a Buenos Aires Court declared that personhood begins at conception, but local ART centers refused to comply with or enforce the law, which included revealing the number and parentage of all embryos in all Buenos Aires ART clinics.²³³ The clinics agreed among themselves not to take further action.²³⁴ When a fine was later imposed, the clinics appealed the decision, citing patient privacy rights and the preservation of patient-physician privilege.²³⁵

Subsequently in 2004, a Buenos Aires judge appointed a Catholic lawyer to be the legal guardian of all the cryopreserved embryos in ten Buenos Aires ART centers.²³⁶ The lawyer, Ricardo Rabinovich-Berkman, believing that embryos are abandoned children, had been petitioning the Buenos Aires courts since 1993 to protect the human rights of ART-created embryos and fertilized eggs.²³⁷ However, through “a united refusal to cooperate,” the ART centers in Buenos Aires rendered the rulings ineffectual, and Rabinovich eventually stepped down as guardian of the embryos.²³⁸ Therefore, although Buenos Aires courts ruled in 1999 that

229. *Id.*

230. *Id.*

231. *Id.* However, Costa Rica has complied with the ancillary measures in the court’s order, such as paying out compensation to the couples who originally brought the suit and providing them with free psychological care. See Patricia Recio, 23 *Parejas han Presentado Demandas Contra el Estado para No Permitir la FIV*, LA NACIÓN (Aug. 22, 2013, 5:21 PM), http://www.nacion.com/nacional/salud-publica/parejas-presentado-demandas-permitir-FIV_0_1361463958.html.

232. See Kelly Amanda Raspberry, *Conflicted Conceptions: An Ethnography of Assisted Reproduction Practices in Argentina* 178-79 (May 2007) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill), available at https://cdr.lib.unc.edu/content?id=uuid:748d6f41-9c8c-41d4-9246-214552fe888c&ds=DATA_FILE.

233. *Id.* at 288-89.

234. *Id.*

235. *Id.*

236. *Id.* at 287.

237. *Id.*

238. *Id.* at 288, 292.

life begins at conception, the ruling was never in force due to refusal by local centers to cooperate.²³⁹ The law has since been considerably liberalized. In 2010, the Buenos Aires provincial government passed Law 14.208, which guaranteed coverage of IVF procedures under the public health system for certain populations.²⁴⁰

Moreover, the Argentinean Supreme Court issued a clarifying ruling in March, 2012, declaring that abortion is permitted in cases of rape, while also noting that abortion was already allowed where the life or health of the mother is threatened.²⁴¹ Argentina has also recently issued a direct regulation of IVF at the national level, declaring that IVF treatments will be free for all adults seeking to become parents.²⁴² Although it is unclear what direct relationship this has, if any, with the *Artavia Murillo* ruling, Argentina is leading the way when it comes to what some have deemed “the right to fertility.”²⁴³

In the United States, regulation is lacking and federal and state laws have made multifarious pronouncements in the area. For example, in the case of *Davis v. Davis*,²⁴⁴ a Tennessee court declared that a pre-embryo is accorded respect – but is not a person.²⁴⁵ This is similar to a line of thinking about embryos called the “Third Way,” as articulated by Lawrence J. Nelson and Michael J. Meyer, whereby embryos, though not persons, are accorded special respect because of their *potential* for human life.²⁴⁶

239. *Id.* at 288

240. Law No. 14.208, Provincia de Buenos Aires, Dec. 2, 2010, B.O. 26507(Arg.); see also Decreto No. 2980/10, Provincia de Buenos Aires, Jan. 4, 2011, B.O. 26507 (Arg.). The law recognizes infertility as a disease as per criteria handed down by the World Health Organization. See Martin Hevia & Carlos Herrera Vacaflor, *The Legal Status of In Vitro Fertilization in Latin America and the American Convention on Human Rights*, 36 SUFFOLK TRANSNAT'L L. REV. 51, 61 n.31 (2013). Hevia and Vacaflor also state that the specific regulation is limited to women ages 30-40. *Id.*

241. See Jennifer Gurevich, *Argentina Decriminalizes Abortion in Cases of Rape*, CTR. FOR REPROD. RTS. (Mar. 19, 2012), <http://reproductiverights.org/en/press-room/argentina-decriminalizes-abortion-in-all-cases-of-rape> (explaining that the law was previously unclear in this area; however, Argentina did allow abortions in the case of a rape of a mentally disabled person). Argentina also allows abortion when the life or health of the mother is threatened. *Id.*

242. See Veronica Smink, *Argentina, Pionero en el Derecho a la Fertilidad*, BBC MUNDO (June 14, 2013), http://www.bbc.co.uk/mundo/noticias/2013/06/130610_argentina_fertilidad_vs.shtml.

243. *Id.*

244. *Davis v. Davis*, 842 S.W.2d 588, 596-97 (Tenn. 1992).

245. *Id.* at 596-97.

246. See Lawrence J. Nelson & Michael J. Meyer, *Confronting Deep Moral Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos*, 5 AM. J. BIOETHICS 33, 33 (2005).

In contrast to Tennessee, several states have advanced or are planning to advance legislation granting personhood at conception.²⁴⁷ Because of federal law governing abortion, state personhood legislation creates questions of federalism regarding which governmental entity is allowed to define life's beginning. Since the federal government requires a hands-off approach to abortion until up to 12 weeks of pregnancy (but allows states to regulate abortion after twelve weeks and until viability²⁴⁸), allowing states to define the beginning of life at conception has the potential to contravene a woman's ability to choose an abortion.²⁴⁹ Supreme Court precedent declares that laws creating a substantial obstacle to a woman's decision to have an abortion before viability constitute an undue burden and are therefore unconstitutional.²⁵⁰ Since defining an embryo as a person would make abortion legally tantamount to willful murder, state personhood statutes would effectively constitute an undue burden on a woman's decision to have an abortion. Therefore, embryonic personhood is unconstitutional under current United States legal precedent, despite attempts by states to advance it.²⁵¹

The remaining Organization of American States countries hold varied positions on embryonic personhood. In Chile, where abortion is illegal in all circumstances,²⁵² the ART community refers to very young fertilized

247. See, e.g., Emily Crockett, *Colorado Fetal 'Personhood' Amendment Will Be on 2014 Ballot*, RH REALITY CHECK (Oct. 18, 2013, 3:08 PM), <http://rhrealitycheck.org/article/2013/10/18/colorado-fetal-personhood-amendment-will-be-on-2014-ballot/>; Robin Marty, *Personhood Squelched in Alaska, Pops Up in Iowa*, RH REALITY CHECK (May 7, 2013, 12:12 PM), <http://rhrealitycheck.org/article/2013/05/07/personhood-squelched-in-alaska-pops-up-in-iowa/>; Robin Marty, *Ohio AG Approves "Personhood" Amendment Language*, RH REALITY CHECK (Jan. 2, 2012, 8:47AM), <http://rhrealitycheck.org/article/2012/01/02/ohio-ag-approves-personhood-amendment-language/>.

247. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992); Madalene Smith-Huemer, *6 States Where Reproductive Rights Will Be Under Attack in 2014*, POLICY MIC (Jan. 10, 2014), <http://www.policymic.com/articles/78407/6-states-where-reproductive-rights-will-be-under-attack-in-2014>.

248. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).

249. *Contra* MICHELLE N. MEYER, THE NELSON A. ROCKEFELLER INST. OF GOV'T, STATES' REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES: WHAT DOES THE CONSTITUTION ALLOW? 5 (2009), available at http://www.rockinst.org/pdf/health_care/2009-07-States_Regulation_ART.pdf ("[U]nder our Constitutional framework, states—and not the federal government—are the most natural regulators of procreation.").

250. *Casey*, 505 U.S. at 874.

251. See CTR. FOR REPROD. RTS., *supra* note 136, at 11.

252. See *Chile Abortion Laws: Senate Blocks Laws Lifting Ban on Abortions*,

embryos as “pre-embryos” to skirt pressure from the Catholic Church.²⁵³ However, the Chilean government does provide limited assistance to IVF through its public health program.²⁵⁴ Ecuador’s Constitution also codifies a complete ban on abortion, but IVF is unregulated and relatively prevalent.²⁵⁵ Unlike Argentina and Chile, the IVF community in Ecuador is not self-policing,²⁵⁶ and thus embryos have no apparent legal protection.

In Canada, the case of *Winnipeg Child Family Services v. G*²⁵⁷ established a legal precedent that a fetus is not a person and not entitled to the rights afforded to a person.²⁵⁸ Though Canada’s regulation of IVF is patchy at best and left largely to the provinces, there have been no unequivocal pronouncements on embryonic personhood from any Canadian governmental entities. Thus, it is fair to conclude that Canada does not consider embryos as persons.

In conclusion, it seems that most parties to the IACHR would not grant legal personhood to embryos. Additionally, the IACHR does not see life as beginning at conception.²⁵⁹ Rather, the IACHR allows member states to regulate abortion and IVF as they see fit, so long as the regulations are not in contravention of other articles of the Convention. Moreover, the IACHR has explicitly ruled that embryos are not persons,²⁶⁰ and that a total ban on IVF is contrary to the human rights to privacy,²⁶¹ to found a family,²⁶² and to reproductive autonomy.²⁶³

C. African Commission on Human and People’s Rights (ACHPR)

There is no case law available in the African Human Rights system that addresses embryonic or fetal personhood. However, there are a few cases

ASSOCIATED PRESS (April 5, 2012, 3:26 PM), http://www.huffingtonpost.com/2012/04/05/chile-abortion-laws-bills-lifting-ban-blocked_n_1406606.html; see also *World Abortion Laws Map*, *supra* note 217.

253. See Elizabeth F.S. Roberts, *Institutions That Matter: IVF, Abortion and Reproductive Governance in Ecuador*, STATES AT REGIONAL RISK, available at <http://sarr.emory.edu/documents/Andes/Roberts.pdf>.

254. See Smink, *supra* note 242.

255. See Roberts, *supra* note 253, at 6.

256. *Id.*

257. *Winnipeg Child Family Servs. v. G*, [1997] 3 S.C.R. 925 (Can.).

258. *Id.*

259. Artavio Murillo (“Fecundación *in Vitro*”) vs. Costa Rica, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 138 (Nov. 28, 2012).

260. *Id.* at ¶ 221.

261. *Id.* at ¶¶ 146, 150, 285.

262. *Id.* at ¶¶ 150.

263. *Id.* at ¶¶ 144, 150.

that may be useful in determining the stance of African countries toward embryonic personhood. In the case of *Republic of Kenya v. Nyamu*,²⁶⁴ the Kenyan High Court ruled that children are only considered “persons” under the law when they “[proceed] in a living state from [their] mother.”²⁶⁵ South Africa’s Constitutional Court ruled similarly in *The State v. Mushumpa and Best*,²⁶⁶ ruling that a fetal death due to assault may aggravate a crime, but that killing the fetus itself is not murder.²⁶⁷ The Court noted that this determination would involve complicated questions of when a fetus becomes a person, thus further indicating that the Court believes that there is some stage where the fetus is not a person.²⁶⁸

In 2003, the ACHPR made an explicit pronouncement on abortion. The Protocol on the Rights of Women in Africa, adopted by the ACHPR in 2003, is the first human rights document to include a *right* to abortion.²⁶⁹ Since this human rights body permits abortion, it is unlikely they would then grant personhood to an embryo only to take away that personhood once it becomes a fetus. It remains to be seen how this decision might affect both fetal and embryonic personhood, especially as IVF becomes more widely available in African countries.

V. BIOETHICAL CONSIDERATIONS

Some may argue that international bodies have sufficiently addressed IVF technologies, thus precluding the need for an explicitly “human-rights” related pronouncement on IVF. However, UN bodies have begun to confront bioethics questions involving embryos in the context of medical research,²⁷⁰ and one cannot ignore the connection between IVF and bioethics.²⁷¹ As it stands, one of the great questions in bioethics in the

264. See Case No. 81 of 2004 (Kenya High Court); CTR. FOR REPROD. RTS., LEGAL GROUNDS: REPRODUCTIVE AND SEXUAL RIGHTS IN AFRICAN COMMONWEALTH COURTS, VOLUME II 101 (2010), available at http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub_legalgrounds_vol2_2.10.pdf [hereinafter CTR. FOR REPROD. RTS., LEGAL GROUNDS].

265. *Id.*

266. See *State v. Mashumpa* 2008 (1) SACR 126 (E) at ¶ 62 (S. Afr.). See generally CTR. FOR REPROD. RTS., LEGAL GROUNDS, *supra* note 264, at 98-99.

267. *Mashumpa*, 2008 (1) SACR at ¶¶ 62-63.

268. *Id.*

269. See Rachel Rebouché, *Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 79, 105 (2009).

270. Universal Declaration on Bioethics and Human Rights, U.N. EDUC., SCI., AND CULTURAL ORGANIZATION (2005), http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html.

271. See, e.g., Lawrence J. Nelson & Michael J. Meyer, *Confronting Deep Moral*

United States is what to do with cryopreserved embryos in a research context.²⁷² In addressing these questions, ethics councils have issued various statements on just what sort of respect to accord the human embryo.²⁷³

The Universal Declaration on Bioethics and Human Rights (UDBHR)²⁷⁴ makes no explicit pronouncement about respect for embryos. Granted, the UDBHR is meant to cover all fields of bioethics, and as such it would be impossible to address the ethical concerns of each area. However, it is telling that the UDBHR makes several references to “human beings”—respect for, privacy of, consent of, among others.²⁷⁵ Additionally, the UDBHR notes that the development of new technologies must contribute to “justice, equity, and to the interest of humanity,” and further states that paying attention to the position of *women* is an important barometer for determining “social realities.”²⁷⁶

This language is promising. It seems as though human rights pronouncements related to bioethics thus emphasize human beings — particularly women, who are most often affected by embryonic personhood²⁷⁷ — and not reproductive materials as those entities most affected by bioethics. While bioethics and IVF cannot be fully conflated, the UDBHR can serve as an important reference point for including IVF considerations where they should belong—in conversations about life, privacy, non-discrimination, and the “reproductive rights” umbrella.

VI. ANALYSIS AND CONCLUSION

Most human rights bodies have implied or directly pronounced that neither fetuses nor embryos have existing rights as persons. Using the

Disagreement: The President's Council on Bioethics, Moral Status, and Human Embryos, 5 AM. J. OF BIOETHICS 33 (2005); Francoise Shenfield, et al., European Society of Human Reproduction and Embryology Task Force on Ethics and Law, *The Moral Status of the Pre-Implantation Embryo*, 16 HUM. REPROD. 1046 (2001).

272. See Shenfield et al., *supra* note 148, at 1047.

273. See, e.g., *id.*

274. United Nations Educational, Sci., and Cultural Org. Universal Declaration on Bioethics and Human Rights, (Oct. 19, 2005), http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html.

275. *Id.*

276. *Id.*

277. Although embryonic personhood affects everyone involved in childbearing and childrearing, because women are disproportionately involved in the IVF process, and because women are more likely than men to seek out procedures such as abortion, in which embryonic personhood is also implicated, I posit that women, more so than other groups, are most affected by embryonic personhood.

principle that human rights law would be unlikely to grant rights to reproductive materials at an early stage, take them away again, and then regrant them at birth, embryonic personhood would be a violation of already existing human rights norms. This conclusion is important when considering rights of access for infertile²⁷⁸ couples and individuals to burgeoning technologies such as IVF. In these cases, personhood legislation would likely cause considerable complications for the IVF process.²⁷⁹ One major complication would be the preclusion of embryonic destruction: whether due to disinterest or due to an already successful IVF procedure.²⁸⁰

If analyzed in the context of the way the human rights system has treated abortion, the very idea of embryonic personhood is incompatible with the right to privacy and the right to life.²⁸¹ Similar to the way that granting a fetus personhood abrogates a person's autonomy to decide whether or not to carry a pregnancy to term, embryonic personhood would also abrogate this autonomy.²⁸² Courts have already made various pronouncements respecting a woman's right to privacy and life in reproductive health decisions.²⁸³ Logically, they can and will do the same with respect to embryonic personhood, which strongly implicates reproductive decisions, just as the IACHR chose to do.²⁸⁴

278. In all its permutations – medical, social, and elective.

279. See, e.g., Pittman, *supra* note 10, at 101-04.

280. *Id.* at 100.

281. Because personhood rights threaten abortion rights, it is also arguable that under human rights law they similarly threaten a woman's right to health. See Zampas & Gher, *supra* note 15, at 252.

282. Cf. CTR. FOR REPROD. RTS., *supra* note 136, at 14.

283. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[T]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”); see also *R. v. Morgentaler*, [1988] S.C.R. 30, 32-33 (Can.) (noting that the criminalization of abortion interferes with a woman's bodily integrity and security of person); Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, § II (1) (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm> (noting that the decision to have a child falls within the privacy sphere); *Rex v. Bourne*, (1938) 1 K.B. 687, 695 (U.K.); *Artavia Murillo (“Fecundación in Vitro”) v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 146, 150, 281, 285, (Nov. 28, 2012) (concluding that a ban on IVF violates privacy and reproductive autonomy); *K.L. v. Peru*, Judgment U.N. Human Rights Comm., No. 1153/2003, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/KL%20HRC%20final%20decision.pdf> (noting that Peru's failure to allow K.L. to have an abortion was a privacy violation).

284. See *Artavia Murillo*, Inter-Am. Ct. H.R. (ser. C) No. 257 ¶ 244.

The IACHR ruled that laws based on embryonic personhood outlawing IVF violate the right to found a family.²⁸⁵ In the sense of IVF, as the IACHR noted, the right to found a family is closely tied to the right to enjoy the benefits of scientific progress.²⁸⁶ Here, science has made possible a way for infertile couples and individuals to become genetic parents. Thus, it is a violation of human rights law to say that embryonic personhood precludes access to IVF.²⁸⁷ Therefore, where embryonic personhood justifications are used to limit or ban IVF, the right to found a family is violated.

The right to non-discrimination may be less readily invoked regarding embryonic personhood. Though the Inter-American Commission on Human Rights has implied that non-discrimination may be implicated if infertility is considered a disability,²⁸⁸ human rights bodies should be able to declare discrimination against infertile people using infertility as a characteristic in its own right, separate from disability. The idea of discrimination is based on equal treatment under the law, and it is unnecessary to put infertility in the disability box in order to find a violation of the right to non-discrimination where access to IVF is obstructed by the state. Thus, embryonic personhood in and of itself is discriminatory against infertile people, regardless of infertility's classification as a disability.

Finally, embryonic personhood violates reproductive autonomy, and the treatment of embryonic personhood by the courts should note this fact. The IACHR ruled that precluding access to IVF abrogates the reproductive autonomy of infertile couples by taking away a choice to become genetic parents where that choice should be available.²⁸⁹ The Court further held that reproductive rights are paramount in considering the effects of a ban on IVF.²⁹⁰ Reproductive justice requires that the existence of a reproductive right be coupled with access to that right.²⁹¹ For those who

285. *See id.* at ¶¶ 146, 150.

286. *See id.* at ¶ 150.

287. *See id.* at ¶¶ 146, 150.

288. *See id.* at ¶ 138 (quoting Representative Molina of the Inter-American Commission on Human Rights who was quoted in the decision as saying that infertility qualifies as a disability, and that the infertile couples in this case were discriminated against for their infertility-disability. The Court does not affirm this statement, but merely acknowledges that it was made).

289. *See id.* at ¶¶ 143-50.

290. *See id.* at ¶¶ 152-54.

291. *See What is RJ/Why is Reproductive Justice Important for Women of Color?*, SISTER SONG, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=

wish to procreate using IVF, reproductive justice is denied and reproductive rights are violated where access to IVF is obstructed or taken away, especially where embryonic personhood is used as a justification. The idea of embryonic personhood further endangers other reproductive rights, such as abortion.²⁹²

International human rights bodies and individual countries must take their cues from the IACHR and address IVF technologies in their conception of other rights tied to reproduction. Embryonic personhood, while not explicitly addressed by human rights treaties or treaty bodies aside from the IACHR, should be discouraged under international human rights law. The implications of embryonic personhood on the right to life, privacy, the right to found a family, the right to non-discrimination, and reproductive rights are sweeping, and it is important that international human rights law continues to recognize human beings, and not their reproductive materials, as rights-bearers under the law.

mid=81 (last visited Apr. 21, 2014).

292. See Ed Goldman, *The Conflict Between Fetal Personhood Laws and Women's Rights*, JURIST (Nov. 17, 2011), <http://jurist.org/forum/2011/11/ed-goldman-personhood-laws.php> (discussing the legal implications for personhood laws in the United States).