ISSUE

Selected, Edited, and with Issue Framing Material by:
Eileen L. Daniel, *SUNY College at Brockport*

Should Embryos Produced During IVF Be Considered Children?

YES: Thomas Brejcha et al., from "Brief of Amici Curiae Missouri Right to Life, Lawyers for Life, and American Association of Pro-Life Obstetricians & Gynecologists," *Gadberry v. McQueen,* Missouri Court of Appeals (2015)

NO: Joseph J. Kodner and John M. Faust, from "Brief of Amicus Curiae American Society for Reproductive Medicine in Support of Respondent," *Gadberry v. McQueen,* Missouri Court of Appeals (2016)

Learning Outcomes

After reading this issue, you will be able to:

- Discuss the ethical dilemma posed by abortion.
- Discuss how different views of the embryo's status might affect reproductive medicine.
- Describe the concept of personhood and the connection to personhood of scientific information about embryonic development.

ISSUE SUMMARY

YES: In a friend-of-the-court brief submitted in a recent case in Missouri involving a dispute over embryos that a couple had put into storage, lawyers for the American Society for Reproductive Medicine argue that embryos are not persons and that treating them as such would have a profound negative effect on people who seek medical assistance in building their families.

NO: In a friend-of-the-court brief on the other side of the same case, lawyers representing several organizations that are opposed to abortion argue that science proves straightforwardly that embryos are persons, and that the embryos in the Missouri custody dispute should be given to the parent who seeks to take care of them.

Abortion has been one the most divisive bioethical issues of our time. The issue has been a persistent one in history, but in the past 40 years or so it has been particularly deeply polarized. One view—known as "pro-life"—sees abortion as the wanton slaughter of innocent life. The other view—"pro-choice"—considers abortion as an option that must be available to women if they are to control their own reproductive lives and therefore enjoy the same freedoms as men. According to the pro-life view, a human being is created at the moment of conception—at the moment that a human egg and sperm conjoin to form an embryo. Although that single cell undergoes constant division and development, it is impossible to identify (according to the pro-life view) any one moment at which an embryo can be said to have suddenly become a person. Moreover, a belief that we should protect the weakest among us and avoid making distinctions among human beings on the basis of their abilities should generate a moral commitment not to make any arbitrary distinctions.

According to the pro-choice view, women have the right to choose to have an abortion, especially if there are important issues at stake, such as preventing the birth of

a child with a severe genetic defect or choosing not to become a parent as a result of rape or incest. In the pro-choice view, human organisms are not necessarily persons, and it is the killing of persons that is unacceptable.

Some pro-choice positions also incorporate some elements of pro-life positions. Gradualist positions, for instance, hold that early-stage embryos do not warrant protections but that late-stage fetuses, while not necessarily full persons, are close enough to being persons that should not be killed. Maggie Little holds that embryos and fetuses are not persons but that they are "burgeoning human life" and deserve respect; moreover, Little holds that a woman may become committed to a developing human life in a way that generates moral duties toward it. In his book *Life's Dominion*, Ronald Dworkin holds that both biological human life and personhood possess value but that an examination of personhood nonetheless supports a defense of the right to choose abortion; it is therefore possible to believe, he argues, that abortion is morally wicked yet that women must be given the right to choose abortion.

Behind the strongly held convictions about the moral status of the fetus, as political scientist Mary Segers has pointed out, are widely differing views about what determines value (for example, whether value is inherent in a thing, is determined by God, or is ascribed to things in the world by human beings), the relationship between morality and law, and the use and limits of political solutions to social problems. Those who condemn abortion as immoral generally follow a classical tradition in which abortion is a public matter because it involves our conception of how we should live together in an ideal society. Those who accept the idea of abortion on the other hand, generally the liberal, individualistic ethos of contemporary society. They believe that abortion is a private choice and that public policy should reflect how citizens behave, not some unattainable ideal.

In the past decade, the debate about abortion has generated a number of subsidiary debates, such as whether particular abortion methods (such as the so-called "partial-birth abortion" or "intact dilation and evacuation") may be prohibited, whether limits to abortion may be imposed based on fetal sentience (which occurs earlier than viability), whether special restrictions may be imposed on doctors who perform abortions in order to protect the health of pregnant women, and what kinds of counseling should be required for women who request an abortion. A movement has also emerged to attack *Roe v. Wade* by passing "personhood" measures, which would aim to change the legal definitions of the word "person" to explicitly include a fertilized egg, embryo, or fetus. Passing such a law in the form of a constitutional amendment would have the effect of outlawing abortion; most proposed personhood laws, however, are proposed at the state level. In 2008, some pro-life groups banded together to form a national group called Personhood USA to press for personhood measures across the country, sometimes by supporting citizen-initiated ballot measures and sometimes through state legislation. As of 2016, none of the personhood measures had yet become law, although according to data from NARAL, 20 personhood bills were introduced in 2015. Such laws would not be constitutional, since they would be in conflict with *Roe v. Wade*.

Given the difficulty so far of passing personhood measures and the constitutional bar that would invalidate them, those who are pro-life are deeply split about their political advisability. Some, advocating for a more patient and incremental approach, have cautioned against them, worrying that advocating for personhood measures may actually be counterproductive. A fallback position is adoption of a measure that incorporates explicit language recognizing that the law must be applied in a manner that accords with the rulings of the Supreme Court concerning abortion.

The readings below address a Missouri law passed in 1986 that takes this fallback position. It declares that every human being is a person from conception, but it also acknowledges that it is subject to the decisions of the Supreme Court, as indeed any law must be. The law nonetheless provides an interesting and important opportunity for thinking about the moral status of embryos, and perhaps introducing and advocating for the idea that embryos should be treated as human beings, because of the possibility that it can support constitutionally acceptable policy protecting embryos that have been created and are maintained outside a woman's body. The readings below are amicus briefs—friend-of-the-court briefs—submitted by pro-life and pro-choice groups, respectively, on opposite sides of a case that involves a dispute over embryos that a couple had put into storage. Representatives of a pro-life group of attorneys argue that, given Missouri law and the current state of the science on embryonic development, the embryos should be treated as persons and should therefore be given to the parent who will protect them. Lawyers for the American Society for Reproductive Medicine, a professional medical group whose members offer in vitro fertilization to help parents conceive, argue that the embryos are not persons and that treating them as such would have harmful effects on couples seeking medical aid in having children.

YES

Thomas Brejcha et al.

Brief of Amici Curiae Missouri Right to Life, Lawyers for Life, and American Association of Pro-Life Obstetricians & Gynecologists

Introduction

In February, 2007, Justin Gadberry and Jalesia McQueen-Gadberry used in vitro fertilization (IVF) to produce four human embryos. Two of them were implanted in Jalesia immediately, were brought to birth, and are now eight-year-old boys named Tristan and Brevin. The other two were cryopreserved. They still remain unthawed and unborn, because Justin's and Jalesia's marriage broke down in 2010, and since then Justin and Jalesia have not agreed on how to treat them. In the divorce case that is now on appeal to this Court, the trial court treated the two cryopreserved embryos as property, not children. But current scientific knowledge has advanced since the early days of IVF and cryopreservation procedures. The advances demonstrate that the two frozen embryos are human beings.

Moreover, Missouri law protects the rights of human beings from their very beginning pursuant to Mo. Rev. Stat. § 1.205. The trial court did not mention § 1.205 in its judgment. . . .

The consequences of this appeal to these embryonic human beings are life and death. They are not lifeless property; they are living siblings of two boys who were conceived at the same time as they were. This brief will describe current science, analyze the key Missouri statute and case law on the subject, and recommend that this Court consider the best interests of these young human beings in determining this appeal. . . .

Statement of Facts

Petitioner, Jalesia McQueen-Gadberry, now Jalesia McQueen ("Jalesia"), and Justin Gadberry ("Justin") were married in September, 2005. (Transcript of trial, p. 4. Citations to the transcript will be abbreviated in the form, "Tr. 4," hereinafter.) At the time, Justin was on active duty in the U.S. Army at Fort Bragg, North Carolina (Tr. 79, 152). Jalesia lived and worked in the St. Louis area (Tr. 78). Jalesia asked Justin to consider storing semen even before they were married (Tr. 77, 151–152), because she was older than Justin and they wanted to have children (Id). Also, when they were married, Justin was facing deployment in the Middle East (Tr. 77, 153).

At some point after the marriage, Justin provided a sperm specimen to Jalesia's physician, Dr. Ronald Wilbois in the St. Louis area (Tr. 80, 154–155). Justin met with Dr. Wilbois before his deployment overseas, gave him the sperm specimen to freeze, but never met with him again (Tr. 155). While Justin was overseas, Jalesia attempted to become pregnant by artificial insemination from the frozen sperm, but the attempts were not successful (Tr. 78, 153).

In February, 2007, after Justin returned to Fort Bragg from Iraq, Justin consented to the use of in vitro fertilization (Tr. 155). His intention was to have children (Id.) Four embryos were created using Jalesia's eggs and the sperm that Justin had provided in 2005 (Tr. 79, 154–155). Two of the embryos were transferred to Jalesia's womb and implanted, and as a result she gave birth to twin boys, Tristan and Brevin, in November, 2007 (Tr. 80, 155). The remaining two embryonic children were cryopreserved by Dr. Wilbois and stored by him in the St. Louis area (Tr. 80).

In May, 2010, Dr. Wilbois notified Jalesia and Justin that he was retiring, and arrangements would need to be made in respect to the two frozen embryonic children that he held in storage (Tr. 80, 160). . . . The parties separated in September, 2010 (Tr. 4). Although the parties' relations afterward were apparently quite acrimonious, by the time of trial in September, 2014, the parties had agreed on the disposition of certain property and upon conditions for joint custody and visitation of Tristan and Brevin, who were then six years old (Tr. 7–9, 13–14,

Brejcha, Thomas; Olp, Tom; Lowery Gitchell, Rita; Nieters, Gerard A.; Cole, James S., "Brief of Amici Curiae Missouri Right to Life, Lawyers for Life, and American Association of Pro-Life Obstetricians & Gynecologists," Missouri Court of Appeals.

176–177). However, after they separated, the parties disagreed on what should happen with the two embryonic children at the Fairfax Cryobank facility in the event of divorce (Tr. 160, 168–169). At trial, Jalesia testified that she wanted to implant them and bring them to birth (Tr. 78). The guardian ad litem for these two children pressed her on her wishes, asking whether she would accept one and allow Justin to have one, or whether she would allow one or both to be donated to another couple (Tr. 131). Jalesia rejected the first alternative on the ground she knew Justin would destroy whichever one he received (Id.). She rejected the other alternative on the basis that these were her children and both were siblings of Tristan and Brevin (Id.). She said that personally she would agree not to hold Justin financially responsible for the two children, but she also opined that course of action may be against public policy (Tr. 122). She would be willing to discuss financial support with Justin (Id.).

Justin completely rejected ever allowing the two embryonic children to be turned over to Jalesia (Tr. 170). He suggested they could be donated to an infertile couple or to a scientific research laboratory, or they could be destroyed (Tr. 171). If the only choice were between himself and Jalesia, he would take them (Id.).

He testified that the environment between himself and Jalesia was too broken to bring more children into it; notwithstanding the agreement on custody and visitation previously submitted to the Court for approval, he asserted they could not co-parent Tristan and Brevin (Id.). He would find it "absurd" and "offensive" to bring more children into the broken environment between him and Jalesia (Tr. 171–172). The parties did not have the financial and emotional resources, he claimed, to deal with two more born children (Id.). . . .

The trial court declared that the embryonic children "are not minor children as defined in RSMo. 452" (Judgment, ¶ 39). It concluded that "Missouri Courts and Legislature provide no guidance concerning these issues" (Id., ¶ 46). It ruled that the embryonic children are marital property (Id., ¶ 40), but of a unique type, because what one party does with them in the future may impose unwanted obligations on the other, and the parties' intentions expressed in the courtroom did not bind them in the future (Id., ¶¶ 41, 44). Finding the approach taken in Iowa on this issue to be persuasive, the trial court awarded the embryonic children as marital property jointly to the parties with a restriction that "no transfer, release, or use of the frozen embryos shall occur without the signed authorization of both Husband and Wife" (Id., ¶ 58). However, either one could renew the storage contracts and pay the storage fees for them unilaterally (Id., 59).

Argument

. . . I. The trial court erred in concluding that the frozen embryos produced by in vitro fertilization were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that scientific research establishes that upon fertilization, unique human beings have been produced who cannot care for themselves.

The question as to when a human being comes into existence can and should be answered based on the most recent scientific evidence relating to the inception of human life. It is not a debate for ethicists, theologians, politicians, or journalists; it is a question of demonstrable scientific fact that must be answered as such, regardless of whatever ethical or legal consequences may flow from the fact. . . .

Justin's sperm and Jalesia's eggs (oocytes) were germ cells or gametes, each containing a haploid number (½ or 23) of the chromosomes that a somatic or body cell contains (46). This makeup permits the male and female germ cells to create a single cell that has a diploid or full set of chromosomes. Maureen L. Condic, When Does Human Life Begin: Scientific Evidence and Terminology Revisited, 8 Univ. of St. Thomas J. Law & Pub. Policy 44, 76–77 (2014) ("Human Life Scientific Evidence"). . . . At the instant of sperm–oocyte plasma binding in normal (and in vitro) human reproduction, a series of biochemical and molecular events occurs generating a one-cell embryo called a zygote, whose cell composition and behavior are immediately different from that of the sperm and oocyte (Id. at 47 and 79 fig. 1. The zygote's molecular composition is unique, with sperm and oocyte-derived components. The zygote immediately behaves as a new and unique human organism, using cell components to direct his or her own development, not just as a single cell, but towards "production of interacting groups of cells, tissues, and structures in a specific spatial and temporal sequence" (Id. at 48). In other words, the zygote immediately initiates a trajectory of development that ends only with the demise of the human organism. . . .

The scientific research is clear that from the time of fertilization as a one-cell zygote, an embryo is not a mere collection or aggregate of cells, but an internally directed, dynamic organism. . . .

An organism is distinguished by the interaction of its parts "in the context of a coordinated whole." Id. . . . Condic elaborates as follows:

> From the moment of sperm-egg fusion, a human zygote acts as a complete whole, with all the parts of the zygote interacting in an orchestrated fashion to generate the structures and relationships required for the zygote to continue developing towards its state. . . . The zygote acts immediately and decisively to initiate a program of development that will, if uninterrupted by accident, disease, or external intervention, proceed seamlessly through formation of the definitive body, birth, childhood, adolescence, maturity, and aging, ending with death. This coordinated behavior is the very hallmark of an organism (Westchester Institute White Paper at 7. . . .)

Among the symbolic sculptures at an exit of the Supreme Court of the United States is a statue of a turtle, symbolizing that the law moves slowly behind society. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court characterized unborn humans as "potential life," expressly citing the scientific knowledge at the time (Id. at 159, 160, 161, and n.62). That knowledge is now more than 40 years old. The foregoing outline of current human embryology establishes that while human development is indeed a process, lasting throughout prenatal and postnatal life, it begins with a particular event, fertilization. This Court should recognize, as the trial court did not, what science now unmistakably establishes and that the Missouri General Assembly has acknowledged in the law of this State—new human life is created at the instant of sperm–oocyte binding. The parents who contribute the sperm and oocyte for the express purpose of fertilization exercise their right to procreate at fertilization, when a new human being comes into existence and begins to direct his or her own development until death.

II. The trial court erred in concluding that the frozen embryos produced by in vitro fertilization were not children and in awarding them as marital property, because the court had a duty to make a determination of custody of the embryos according to their best interests, in that the laws of Missouri acknowledge that upon fertilization, unique human beings have been produced who have the rights of human beings but cannot care for themselves, and other states' jurisprudence beginning with *Davis v. Davis* have not assimilated current scientific research.

A. Missouri Law Acknowledges the Legal Rights of Human Embryos

Missouri has long acknowledged by statute that a human embryo is a person with protectable rights in life, health, and well-being from the moment of conception onward. The General Assembly has provided as follows:

1.205. 1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;
(2) Unborn children have protectable interests in life, health, and well-being;
(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child . . .

Mo. Rev. Stat. § 1.205. . . .

The trial court's attention was directed to this statute and the cases that interpret it. Petitioner's Proposed Judgment and Law, pp. 4–6 (filed October 14, 2014). Inexplicably, the trial court simply ignored the statute and interpretive authorities. The judgment is bereft of any allusion to them. The trial court wrote, "Missouri Courts and Legislature provide no guidance concerning these issues" (Judgment, ¶ 46).

Whatever the reason for the Court's refusal to address § 1.205, the omission is quite startling. It is an essential part of the role of courts in a representative government to carry out the intent of the legislature. . . .

III. The trial court erred in concluding that a constitutional right "not to procreate" requires both parties' agreement in the future to allow the frozen embryos to live and also in failing to protect the best interests of the embryos, because the court had a duty to make a determination of custody of these human beings, in that such a right not to procreate is moot when procreation has already occurred, and the best interests of the embryonic children include fostering their care, growth, and relationships with their parents and siblings.

A. The "Right Not to Procreate" Is Moot Because Procreation Has Already Occurred.

The trial court opined that the parties' "fundamental rights to privacy and equal protection under the 14th Amendment to the U. S. Constitution will be violated if either is forced to procreate against his or her wishes." The trial court erred. The parties have already procreated; neither has to contribute any more gametes or take any similar action in order for new human beings to be created. . . .

B. The Cases Resting on Principles of Strict Contract, Balancing-of-Interests, and Contemporaneous Mutual Consent Fail to Recognize the Human Status of the Embryos and the General Assembly's Command to Interpret All Missouri Statutes Accordingly.

The trial court in the case at bar purported to adopt a balancing-of-interests approach but at the same time found the decisions of the courts of Iowa to be particularly persuasive (Judgment, ¶¶ 47–48). The leading Iowa case is In Re: Marriage of Witten, 672 N.W.2d 768 (Iowa 2003). . . . There is no indication in Witten that scientific knowledge regarding the creation of human beings was presented to the Iowa Supreme Court which could have informed such an overarching principle. When it turned to Iowa's divorce statute, therefore, the Court did not interpret it to include a duty to insure the best interests of "fertilized eggs that have not even resulted in a pregnancy" (Id. at 780).

Lacking the most current scientific research and guidance from the Iowa Legislature, the Witten Court failed to acknowledge that the progenitors had already made their reproductive choice when they created the human embryos that they placed in cryostorage. . . .

C. The Best Interests of the Human Embryos Begin with Continued Life

The most important interest of an embryo is his or her interest in continued life. No other right is of any avail if a human being is not around to invoke it. In accordance with the Legislature's command, all other laws of Missouri must be interpreted with the status of each human being at its earliest stages in mind. . . .

Conclusion

All humans are unique and irreplaceable. All face challenges in their family life as they grow up; there are no perfect families. Each one of the children of Jalesia and Justin has a place in their family and in the world to grow and flourish. Missouri law, particularly § 1.205, protects their right to be nurtured in their family and their opportunity to seek and find their place in the world.

Missouri Right to Life is a grassroots pro-life organization based in Jefferson City, Missouri.

Lawyers for Life, part of Americans United for Life, is a network of attorneys that addresses abortion and other issues that involve decisions about the preservation of human life.

The American Association of Pro-Life Obstetricians and Gynecologists is a pro-life advocacy group whose members are primarily obstetricians and gynecologists.

NO

Joseph J. Kodner and John M. Faust

Brief of Amicus Curiae American Society for Reproductive Medicine in Support of Respondent

Statement of Facts

During their marriage, Appellant Jalesia McQueen and Respondent Justin Gadberry created four embryos together through in vitro fertilization (LF71). Two of the embryos were implanted and, as a result, Appellant gave birth to two children (Id.). The remaining two embryos were cryopreserved (Id.). When the parties later divorced, a dispute arose concerning the custody and disposition of the cryopreserved embryos (LF77). Holding that the embryos are a "unique" type of marital property, the trial court awarded them jointly to the parties with a restriction that "no transfer, release, or use of the frozen embryos shall occur without the signed authorization of both Husband and Wife" (LF 76–78, 80. . . .)

Argument

I. Resolving Embryo Custody Disputes With A "Best Interests Of the Embryo" Approach Would Have Significant Adverse Implications for Fertility Care.

Appellant and her supporting amici argue that, because the Missouri legislature has deemed human life to begin at conception and required state laws to be construed consistently with that finding, disputes such as this one over the custody of unimplanted embryos must be resolved according to the "best interests" of the embryos, as if they were children subject to Missouri's child custody statute (RSMo. Chapter 452). See Appellant Br. at 28; Thomas More Law Center Br. ("TMLC Br.") at 2–4; Missouri Right to Life, et al. Br. ("MRL Br.") at 7–8. The practical implications of that position are profound, particularly because Appellant and her amici are arguing that "continued life" or "future life and development" is the most fundamental of the embryos' "best interests," compelled to be enforced under Missouri law. See Appellant Br. at 31–34; MRL Br. at 37–38. In assisted reproduction, there is no precise way to know, in advance, exactly how many eggs can be successfully extracted and fertilized, or how many of the resulting embryos, assuming they prove suitable for implantation, should be implanted to achieve a successful pregnancy. As a result, it is very common—indeed, typical—for more embryos to be created than are transferred to the woman's uterus at any given time. Practice Committee of the ASRM, criteria for number of embryos to transfer: a committee opinion, 99 Fertility and Sterility 44 (January 2013). In consultation with her patient(s), the physician makes a professional judgment regarding implantation, attempting to maximize the chances of achieving pregnancy without unduly risking multiple births. In assessing the chromosomal soundness and other indications of each embryo's suitability for implantation, depending on the pertinent medical history and genetic makeup of the contributing adults, the physician may also recommend testing those embryos, since genetic predisposition to some very serious child-onset and even adult-onset health conditions can be revealed through such testing—Huntington disease, early onset Alzheimer disease, and breast cancer among them. Ethics Committee of the ASRM, Use of preimplantation genetic diagnosis for serious adult onset conditions: a committee opinion, 100 Fertility and Sterility 54 (July 2013).

If Appellant's "best interests" position were to prevail here, however, then in the event of a dispute between the man and woman who contributed their genetic material to the embryos, courts in such cases would be pressed to decide that, properly speaking, there is no such thing as an "excess" embryo. From that viewpoint, every embryo—not just the ones initially selected for implantation—must be considered a child from the moment of fertilization, with interests of its own that require it be implanted and given an opportunity to develop and be born, even if one or both of the adults who created them prefer otherwise. This could mean that excess embryos cannot be placed into long-term storage, much less ever discarded, nor even donated for stem cell research, despite the recognized

Kodner, Joseph J.; Faust, John M., Brief of Amicus Curiae American Society for Reproductive Medicine in Support of Respondent, Missouri Court of Appeals.

importance of that work in developing revolutionary treatments for "a wide range of diseases and conditions, including Parkinson disease, Alzheimer disease, cancer, spinal cord injury, and juvenile-onset diabetes." Ethics Committee of the ASRM, Donating embryos for human embryonic stem cell (hESC) research: a committee opinion, 100 Fertility and Sterility 935, 936 (October 2013) (discussing federal Executive Order 13505, "permit[ting] embryos remaining after fertility treatment to be used in the creation of [human embryonic stem cell] lines").

Courts could be urged as well to enjoin testing embryos, on grounds that the embryo has a right to life regardless of the prospect of serious disease or that the testing procedure itself poses a risk to the embryo, regardless of the potentially countervailing opportunity to detect and prevent the transmission of genetic disorders to new generations, and to avoid the often crushing emotional and economic impact of managing these illnesses. See 100 Fertility and Sterility at 55; Ethics Committee of the ASRM, The moral and legal status of the preembryo, 62 Fertility and Sterility 32S (November 1994) . . .

Donating the excess embryos for parenting by others may not be a workable solution, either, because, if the embryos are deemed to be "children," then their donation to infertile recipients might be deemed an "adoption," and thus might entail the home visits, judicial review, and other rigorous procedural requirements that typically must precede the adoption of an existing child. Ethics Committee of the ASTM, Defining embryo donation: a committee opinion, 99 Fertility and Sterility 1846–47 (June 2013) . . .

One can expect serious questions, too, about whether and to what extent those adults who contribute their genetic material to the embryos are deemed to be financially responsible for them, even when brought to birth against the wishes of one or both of those adults as the result of a "best interests of the embryo" approach. It is difficult to overstate the adverse impact on fertility care from concerns like these. Infertility is a very significant medical problem, affecting about 7.3 million Americans, or about one out of every eight couples of reproductive age . . . . For the many people who consider addressing this problem with assisted reproductive technology, . . . the decision is deeply emotional, fraught with concerns about the intimate, personal nature of the process, its cost, its uncertainty, and the impact on the couple's relationship should the process not yield the hoped-for results . . . .

If Appellant were to prevail here, couples already facing those challenges would also have to accept that, by seeking this type of medical assistance, their individual choices about what happens to their own genetic contributions may cease to be theirs should they ever have a dispute over the handling of the embryos they create—every one of which, whether initially selected for implantation or not, would have to be treated as if it were already a fully-formed person, with all attendant rights, from the moment of conception. This is a tremendous burden to place on patients seeking fertility care, and one that may cause a significant number of them to just accept their infertility, and possibly abandon hopes for a family altogether, rather than commit to a process in which they may be deemed to have created more people than they ever intended.

If they seek fertility care at all, moreover, couples may face significant pressure to produce fewer embryos than they, in consultation with their doctors, would otherwise conclude are optimal for achieving a successful pregnancy. That is because, according to Appellant and her amici, couples who choose to contribute their genetic material to create embryos have already exercised their procreative choice in favor of making a child out of every one of them, irrevocably assuming the rights and responsibilities of becoming a parent and waiving any further individual right to choose not to develop any of those embryos into live children . . . . From a patient care perspective, these are all unacceptable results, . . . none of which, ASRM respectfully submits, is required by science or the law.

II. Embryos Are Not Individual "Persons" from the Moment of Fertilization.

Whatever other asserted basis there may have been for the Missouri legislature's 1986 enactment concerning when life begins, there is no biological basis for treating an embryo, from the moment of conception, as if it were a single human person . . . . It is true that an alive, human, genetically unique entity emerges at fertilization . . . . At this stage, however, this entity—a zygote—has only a limited chance for development into a living newborn, even under normal conditions, i.e., outside the context of assisted reproduction. Moreover, throughout the course of the next several cell divisions, the entity will lack the "developmental singleness of one person," that is, each cell in this cluster of cells retains the full developmental potential that the zygote had to produce a complete individual human being, and also, importantly, the potential that either more than one individual (in the case of twinning) or less than one individual (in the case of cell fragmentation, fusion, or regression to a nonviable entity) will result. Only sometime later, in an ongoing process that spans about 14 days postfertilization, do the entity's cells resolve into the differentiated layers of more specialized cells that characterize a developing organism, as opposed to a packet of identical cells.

An outer, "extraembryonic" layer forms, which is principally involved in placental interaction with the

woman's uterus, and also a two-layer inner cell mass, with each of those internal regions themselves separated by a third layer called the "primitive streak." If it survives, this multilayered inner cell mass, called the "embryonic disc," is what will develop into a child, if and only if the embryo is successfully implanted and there is a pregnancy. Indeed, only now—at a time that corresponds roughly to the initiation of pregnancy-related physiological changes in the mother—is it possible to say that twinning or regression will not occur, such that we now have an entity that is biologically committed to forming a single human being. And only later, of course, will this entity undergo the functional, behavioral, psychic, and social development that many, in ordinary lay terms, would consider to be the hallmarks of human individuality and "personhood."

With these considerations in mind, ASRM has always steered a cautious middle course in defining the status of an embryo. That is, embryos are not mere property, but they are not "people," either. In particular:

> The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, it is not yet established as developmentally individual, and it may never realize its biologic potential. Ethics Committee of the ASRM, The moral and legal status of the preembryo, 62 Fertility and Sterility 33S (November 1994) . . . .

ASRM recognizes that the Court has been asked to address the implications of a legislative enactment that defines when life begins and, with certain important exceptions discussed below, requires "acknowledge[ment]," on behalf of unborn children, of the rights possessed by "other persons, citizens, and residents" of Missouri (RSMo. § 1.205). Where it applies at all, however, this required "acknowledgement" is not necessarily the same thing as equating the status of the unborn with that of "persons" in every legal context. Because the implications of doing so are so sweeping and serious (see Part I above), and because there is no clear biological imperative to do so (as just discussed), ASRM urges the Court to assure itself that there is a legal imperative to doing so before taking such a dramatic step. In fact, as shown below, there is no such imperative applicable here.

III. Section 1.205 Need Not, and Should Not, Be Construed to Require A "Best Interests of The Embryo" Child Custody Approach.

A. Conflict with federal constitutional law

Section 1.205 is expressly subject to "the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state." With respect to the first exception, it is common ground that the unborn are not "persons" within the meaning of the 14th Amendment to the U.S. Constitution, and thus have no rights of their own to the life, liberty, property, and equal protection of the laws guaranteed there. See *Roe v. Wade*, 410 U.S. 113, 158 (1973); TMLC Br. 15 ("the Supreme Court held that the unborn are not 'persons' under the Fourteenth Amendment and, thus, not [*sic*] are not entitled to its guarantee of the right to life").

Nonetheless, here, Appellant is asking the Court to enforce these exact rights—"continued life" chief among them—on behalf of constitutionally unrecognized entities, as against the asserted interests of those who do have constitutional status as "persons," including Mr. Gadberry in particular. Missouri courts have not had to confront that precise constitutional issue in the cases thus far, which have been limited to holding that the unborn are "persons" for purposes of criminal and tort liability for harm to those entities, by third parties, while their mothers carried them. See Appellant Br. at 15; TMLC Br. at 7–8. . . .

[N]ot one of the several reported cases around the country that have addressed embryo custody disputes over the last two decades or more has resolved custody by attempting to ascertain the best interests of the embryo as an entity with rights of its own. Rather, in various ways, each has sought to determine and balance the competing rights and interests of the adults who created the embryos. . . . ASRM believes that this focus on the wishes of the contributing adults, to the extent those wishes can be fairly determined and weighed, is the appropriate one, consistent with ASRM's consistent ethical guidance that embryos are unique entities worthy of special care and respect, but not people. . . .

The American Society for Reproductive Medicine is an organization that advocates for the advancement and practice of reproductive medicine.