Embryo Adoption or Embryo Donation?: The Distinction and Its Implications

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What's in a name? Wouldn't a rose by any other name smell just as sweet? It depends. Labels carry significant weight in debates of great political importance--such as the determination of the legal status of the human embryo. Labels also may reveal a great deal about motivations and can be used in an attempt to increase or decrease the value of someone or something. When a human embryo is safely implanted in a woman who eagerly awaits his birth, he is usually referred to as a baby. On the other hand, when an embryo is desired by scientists as a subject for destructive research, she is sometimes termed a "pre-embryo" or "pre-person."

Coupled with the uncertainty of the nom du jour for the embryo is his "squishy" legal status. Is the embryo person or property? If a person, she cannot be bought or sold. Nor can her parents "give" her away. The Thirteenth Amendment (abolishing slavery) prohibits the ownership of one person by another. If, however, the embryo is deemed to be property, he may be contracted like goods or services. Or, if the embryo is equated with human tissue, blood, or organs, she may be donated, but with no payment to the donor. Here arise the questions of who is the donor--the genetic parents or the embryo--and of the purposes for which the embryo may be donated.
The legal dilemma concerning the moral status of the human embryo is poignantly highlighted in the current controversy over "embryo adoption." In vitro fertilization procedures have created tens of thousands of (likely over 100,000) human embryos who have not been implanted. Such "surplus" embryos are suspended in a frozen state, waiting to be thawed and discarded, donated to science, or implanted in a womb. In the case of embryo adoption, the frozen embryo is implanted in the womb of a woman who is not the genetic mother with the consent of the genetic parents. Some infertile couples choose embryo adoption over traditional adoption because they can be certain of a healthy prenatal environment for their child.

Public controversy was sparked when the federal government announced that it had earmarked nearly $1 million to promote embryo adoption. One recipient of such money is Snowflakes, the Christian adoption agency that pioneered the extending of adoption arrangements to embryos. This agency has been awarded approximately $500,000 of the federal grant money. Snowflakes was created as an alternative to discarding "surplus" embryos or donating them for destructive embryonic stem cell research. To date, 16 babies have been born as a result of this program.

What is the impact of programs such as Snowflakes? It is telling that the term "embryo adoption" is opposed by infertility specialists. The IVF industry is worried that references to "adoption" will enhance the legal status of the early embryo, thereby leading to restrictions on its currently unregulated, multi-million dollar business. It cites fears that treating the embryo as a legally adoptable child would enhance his legal status in other areas, making those in the infertility industry legally responsible for keeping track of every embryo they create. Also, it is alarmed that embryo adoption could prevent the donation of "surplus" embryos to science. At least one adoption attorney has challenged the notion of embryo adoption, asserting that adoption applies only to "living children" and that embryos must therefore be transferred by contract.

The above arguments ignore the law's ability to make fine distinctions and assume that if an embryo is protected by adoption law, he would thereby be declared a full legal person for all purposes. However, this is not necessarily so. The law frequently creates classifications of similar or identical entities. For example, non-living entities--corporations--enjoy the legal status of "person," yet no one argues that they are also human beings and moral persons. Another distinction is reflected in fetal homicide laws, which penalize the killing of an unborn child by a third party (other than an abortionist) but do not interfere with the mother's legal right to choose abortion. The October 30, 2002 issue of the Washington Post was the first to report that President Bush's administration has included the embryo as a "human subject" for purposes of the advisory committee on the protection of human subjects in research. Embryo adoption laws could make a distinction similar to those noted above by limiting the extension of legal protection to embryos who are implanted into women desiring to bring them to term. Though this arrangement certainly would not completely satisfy those who desire that the full protection of the law be extended to embryos, it may be a way to grant needed protection promoting a practice favored by pro-life advocates.

The stated purpose of embryo adoption laws would be to ensure that the child born to the gestational couple is legally regarded as their child, the parental rights of the genetic parents are severed, paternity or inheritance claims are not made against the genetic parents, the child cannot be "returned" to the genetic parents if she is born with a disability, and the genetic parents
cannot contest the adoption. In other words, the child born to the birth parents is regarded as much their own as if he had been conceived by them.

Proponents of embryo donation argue that it is significantly cheaper than adoption. However, donation currently lacks the safeguards of traditional adoption arrangements. The infertility specialist (rather than the genetic parents) could select the birth parents at his own whim. There is also no screening to determine how the new parents, who have often pursued a biological child at great cost, will psychologically handle raising a child unrelated to them. If, on the other hand, the transfer of an embryo from one couple to another is treated as an adoption, the child’s best interests can be protected. As with traditional adoption, a home study of the prospective parents (including medical and psychological screening) and counseling for both couples would be required. Personal and medical information may also be exchanged between those involved in the arrangement while protecting the identities of all parties. Some couples choose an open adoption, through which the genetic parents may have future contact with the birth family.

Currently only two states--Florida and Louisiana--even recognize "embryo adoption" as legal adoption. Because of this, Snowflakes is forced to rely on traditional contract law, bound by the current view of most courts that unimplanted (frozen) embryos are more like property than persons and therefore are "donations." Not only does such a label diminish the legal status of the embryo, it is unnecessary.

The single greatest obstacle to embryo adoption is abortion advocacy. Any act which could be interpreted as increasing moral respect or providing legal protection for the human embryo is characterized by abortion advocates as a stealth assault on abortion rights, regardless of the context. For example, abortion advocates callously attacked a White House regulation[7] which would permit--but not require--states to provide prenatal care from conception for children of otherwise uninsured mothers.[8] So, it is not surprising that abortion advocates oppose embryo adoption. Despite their spoken allegiance to "choice," they would deny the freedom of two consenting couples to choose a gestational plan for an embryo that would fully protect her as the birth parents’ own child.

If questions of abortion advocacy did not eclipse the picture and embryo adoption was regarded as a method for providing infertile couples with a child, then the legal and moral questions might be more helpfully addressed. As long as this is not the case, every inch of linguistic and legal ground will continue to be contested. Is the very early human being "pre-embryo" or "child," "pre-person" or "person"? Is transferring such an entity to another couple "donation" or "adoption"? Or is it something else entirely? The term "child" or "unborn baby" is sweet indeed, but the disposable terms "pre-embryo" and "pre-person" are wholly unpalatable. It is not only possible, but imperative, that the law secure the future of "embryo adoption" by creating a legal environment that protects the interests of everyone involved. Whether the abortion lobby and pro-life activists can tolerate such a politically necessary compromise is yet to be seen.

References


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