

PRENATAL “ADOPTION” AS AN  
ALTERNATIVE TO ABORTION: LEGAL  
AND ETHICAL CHALLENGES<sup>††</sup>

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INTRODUCTION

Adoption as a legal practice has origins that go back to ancient times.<sup>1</sup> For modern adoption, what was normally instituted for the preservation of the family in the local spirit of solidarity and subsidiarity<sup>2</sup> has moved to national and international policy. Regulations involving human rights, abortion, determination of personhood and advancements in reproductive technologies bring into question the legal framework for adoption and its definitions. While many respond to the call to adopt those children who are left without parents or abandoned, the process of legal adoption is often too long, overly restrictive, and detrimental to the child. In some circumstances it creates a financial burden on both the adopting parents and the birth parents as this paper will point out. Such an involved process may be found to incentivize mothers and couples to seek recourse to abortion as a solution for relief from the expecting child.

Death is only one of the harms that may follow poor adoption laws. For those fortunate children brought to term, their fate may be a long wait in a state of life where, though the basic needs of sustenance

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<sup>1</sup> Leo Albert Huard, *Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1955) (discussing the history of adoption law).

<sup>2</sup> Stephen Schneck, *What is Subsidiarity?* INST. FOR POL’Y RES. & CATH. STUD. (June 2, 2011), <http://ipr.cua.edu/blogs/post.cfm/what-is-subsidiarity>.

may be met, their need for love, affection and human attachment are more often wanting.<sup>3</sup> In fact it has become a growing concern fueled in part by psychological studies<sup>4</sup> that have shown long-term mental and emotional harms to institutionalized children who do not experience affective touch and love during the initial months after birth (attachment disorders).<sup>5</sup> Aimed to safeguard the child and promote responsible families, some adoption policies, as this paper hopes to demonstrate, in effect may also serve to cause an incentive for abortion over adoption.

Abortions continue with growing legal expansion<sup>6</sup> to advance the agenda for population control, by offering women an alternative to bringing their children to term and live birth. This alternative is the intentional and willful death of innocent human life when it is not wanted.<sup>7</sup> It becomes a matter of moral logic to seek to reduce recourse to abortion by making adoption a more viable and expedient alternative. Amending adoption policy to enable the process for adoption, including formal adoption to take place prior to the birth of the child has entered the discussion as a possible means to deter abortions<sup>8</sup> and readily secure the needs of children upon birth. However, noble and worthy a notion, prenatal adoption demands a broader look into the many and somewhat external laws that come to bear.

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<sup>3</sup> Charles H. Zeanah, *Disturbances of Attachment in Young Children Adopted from Institutions*, 21 J. DEV. & BEHAV. PEDIATR. 230-36 (2000).

<sup>4</sup> Thomas G. O'Connor & Michael Rutter, *Attachment Disorder Behavior Following Early Severe Deprivation: Extension and Longitudinal Follow-up. English and Romanian Adoptees Study Team*, 39 J. AM. ACAD. CHILD. & ADOLESC. PSYCHIATRY 703-12 (2000).

<sup>5</sup> Children who languish for extended periods in institutions or who lack human affection after birth has been shown to demonstrate certain and lasting physical, emotional and social problems. See AMERICAN ACADEMY OF ADOLESCENT AND CHILD PSYCHIATRY, REACTIVE ATTACHMENT DISORDER NO. 85 (2011),

[http://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/Facts\\_for\\_Families\\_Pages/Reactive\\_Attachment\\_Disorder\\_85.aspx](http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/Facts_for_Families_Pages/Reactive_Attachment_Disorder_85.aspx) (last visited June 30, 2015). See also *Facts for Family*, AMERICAN ACADEMY OF ADOLESCENT AND CHILD PSYCHIATRY, REACTIVE ATTACHMENT DISORDER NO. 85 (2011), [http://www.aacap.org/App\\_Themes/AACAP/docs/facts\\_for\\_families/85\\_reactive\\_attachment\\_disorder.pdf](http://www.aacap.org/App_Themes/AACAP/docs/facts_for_families/85_reactive_attachment_disorder.pdf) (last visited June 30, 2015).

<sup>6</sup> *Report on Abortion World Wide: A Decade of Uneven Progress*, THE GUTTMACHER INST., <https://www.guttmacher.org/sites/default/files/pdfs/pubs/Abortion-Worldwide.pdf> (last visited April 05, 2016).

<sup>7</sup> Maggie Kirkman et al., *Reasons Women Give for Abortion: A Review of the Literature*, 12 ARCH. WOMEN'S MENT. HEALTH, 365-78 (2009).

<sup>8</sup> Email from Pavel Byzov, International Director of the 2015 International Pro-Life Festival in Moscow, Russia, to Jennifer Kimball Watson, Executive Director of the *Culture of Life Foundation* in Washington, D.C. (June 10, 2015) (on file with author).

Identifying harms in adoption policies is necessary to bring about a change in policies to favor adoption over abortion. In seeking to reduce recourse to abortion, adoption policy is presented with three main obstacles: first, family policies that place economic burdens on parents wishing to give their child for adoption; second, policies that treat the retention and revocation of parental rights, custody, and obligations of birth parents; and third, the treatment of the unborn as non-persons in most countries.

### I. PRENATAL ADOPTION AS POSSIBLE AID

Where mothers may consider abortion in first, second or third trimester pregnancies, the notion of “adoption”<sup>9</sup> prior to birth, if made available, can easily be *thought* to assist with four moral demands: first, provision for proper care and assistance to the mother and the unborn; second, reduction in recourse to abortion; third, accelerate the timeline by allowing the process to begin prior to birth; and fourth, avoidance of long waits in orphanages for those abandoned, consequentially limiting psychological, emotional and other harms to the child.<sup>10</sup>

While the impact to unborn or abandoned children may be seen as positive where the moral demands can be enhanced, numerous legal and semantic challenges surrounding adoption of both prenatal and born children remain. As we will see shortly, adoption policy itself does not always serve to reduce abortions.

#### *A. Adoption Policy and the Incentive to Abort*

Some countries permit expedient and private adoptions for the placement of born children while others do not.<sup>11</sup> Russia,<sup>12</sup> for example, binds those parental obligations and duties of the natural parents even after relinquishment of the child to authorities or institutions, especially where private adoption is not permitted. The parent and child have been

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<sup>9</sup> The term “adoption” is placed here in quotes in reference to the fact that such a use of the term prenatally is new and, therefore, cannot not validly be applied prior to the birth of a child.

<sup>10</sup> Zeanah, *supra* note 3.

<sup>11</sup> *Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*, THE HAGUE CONF. ON PRIVATE INT’L L. (May 29, 1993), [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69).

<sup>12</sup> *The Family Code of The Russian Federation*, art. 71, ¶ 2 (Dec. 29, 1995), <http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf>.

legally divorced from each other though the parent must pay alimony for the continued support of the child while the child retains claim to rights of property and housing, to assets and inheritance, from the natural parents. The child's alimony (child support) is determined with the deprivation of parenthood<sup>13</sup> (removal of custody), from one fourth to one half of their monthly salary, depending on the number of children.<sup>14</sup> Such a "deprivation of parenthood"<sup>15</sup> is similar to our understanding of divorce in the U.S. Intervention in the spirit of solidarity and subsidiarity<sup>16</sup> at the community level, such as private adoption by members of the same community, are all but denied while unwanting or unable parents are bound to their children.

Where child alimony is determined by the state or governing bodies, current adoption policies may be said to incentivize a choice to abort over bringing the child to term for adoption. Though the intent of the state in imposing child alimony upon parents who want to relinquish the child may very well be to preserve the family, promote responsible paternity, protect the welfare of all members of society, and other worthy goods; abortion may serve as the only available means to avoid the burden of the child.

### *B. The Term Adoption for Prenatal Children*

Generally, when speaking of adoption we are speaking of the transfer of custody of a *known and nascent* human person<sup>17</sup> as a prenatal child cannot be considered an orphan and/or the mother incapable of caring for the child while gestating.<sup>18</sup> However, with prenatal adoption, or in some literature "fetal adoption,"<sup>19</sup> the child departs in circumstance from normal adoption, where a born child is outside of the mother's

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<sup>13</sup> *Id.* at art. 70, ¶ 3.

<sup>14</sup> *Id.* at art. 81, ¶ 1.

<sup>15</sup> *Id.* at art. 70, ¶ 3.

<sup>16</sup> Schneck, *supra* note 2.

<sup>17</sup> J. Margaret Datiles, *What Exactly is "Constitutional Personhood"? The Definition of Personhood and Its Role in the Life Debate*, AM. UNITED FOR LIFE (April 23, 2010), <http://www.aul.org/2010/04/what-exactly-is-%E2%80%9Cconstitutional-personhood%E2%80%9D-the-definition-of-personhood-and-its-role-in-the-life-debate/>.

<sup>18</sup> *Who Can Be Adopted?* Bureau of Consular Affairs, U.S. Department of State, Intercountry Adoption, <https://travel.state.gov/content/adoptionsabroad/en/adoption-process/how-to-adopt/who-can-be-adopted.html> (last visited April 5, 2016).

<sup>19</sup> Robert Freitas, *Fetal Adoption*, 40 THE HUMANIST 22-23 (1980), <http://www.calweb.com/~rfreitas/Astro/FetalAdoption.htm>.

womb. The prenatal individual for adoption is presented prior to birth, either *extra-utero* (out of the womb), as with in-vitro fertilization (IVF) and other forms of assisted reproductive technologies (ART), or *in utero*, (in the womb of the maternal mother). In either circumstance, the human individual is presented for adoption without the legal recognition of the fundamental human rights accorded to persons.<sup>20</sup> To speak of prenatal adoption policy then is to speak of the prenatal individual in various stages of development and circumstances, which are not recognized by state, national, and international adoption policies and regulations.

The use of the term “adoption” to describe transactions both *in-utero*, and prior to birth *extra utero*, such as with reproductive technologies more commonly referred to as *embryo adoption*<sup>21</sup> has caused a considerable amount of debate.<sup>22</sup> Abortion proponents find the term “adoption” problematic because they fear it affords the fetus or embryo a legal status they seek to challenge.<sup>23</sup> Pro-Life advocates prefer the term adoption in order to avoid treating the embryo or fetus as something non-human, as a commodity or mere property. Importantly for our discussion, current laws and policies are bound to consider these vulnerable human beings according to the contracts that bind them.<sup>24</sup> The contracts that bind the pre-nascent (preborn *extra utero* and *in utero*) do not fall under national or international adoption regulations.<sup>25</sup> The notion to institute or promote adoption prenatally would be subject to embryo disposition policies as well as those that protect the unborn.

### C. Nature and History of Adoption

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<sup>20</sup> J.L. Kunz, *The United Nations Declaration of Human Rights, art. I.*, 43 AM. J. INT’L L. 316-323 (1949). See also P. Clement & N. Katyal, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. 161 (2014), available at <http://harvardlawreview.org/2015/03/on-the-meaning-of-natural-born-citizen/> (discussing a historical account).

<sup>21</sup> Both of these terms—even though they do raise some different issues—can also be referred to as “fetal adoption”.

<sup>22</sup> Karen A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, U. ST. THOMAS J.L & PUB. POL., I:1, 106 (2007).

<sup>23</sup> Kathryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733-34, n.4 (1994).

<sup>24</sup> Robert J. Muller, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763 (1992).

<sup>25</sup> The author’s search for adoption policies that apply to or account for unborn children rendered nothing.

Current national and international child adoption laws apply *after* childbirth and govern the *act* of adoption.<sup>26</sup> Peter Conn of the Oregon State History Department is quoted in his research stating that, “adoption is among the oldest and most widespread of human social practices. The Code of Hammurabi, promulgated in the 18th century BCE, includes a definition of adoption.”<sup>27</sup> For centuries, communities of peoples had written and oral practices for the placement of children otherwise displaced from their families by war, famine, plagues and natural causes or to balance the perpetuation of heirs.<sup>28</sup> Adoption has a long history of being both a private and public agreement,<sup>29</sup> and it has a history where arrangements for the unborn regarding parenting and the power of ascendants were recognized.<sup>30</sup> Thus, prenatal arrangements for adoption are nothing new.

Roman Emperor Justinian issued the *Digest* or *Pandects* in 533<sup>31</sup> that recognized adoption, but denied the relinquishment of the natural father’s rights while he was still living. Interestingly, it allowed property rights, as with the rights and interests of natural born children, to be granted to the adopted progeny by the adopting father. This happened even while that child’s natural father retained paternal rights to the child and the child retained its rights to the goods of his natural father. Also under Justinian, adoption was allowed as a means to free slaves by their owners.<sup>32</sup>

During that time in Rome, adoption took place in two ways: either by imperial rescript, or by the authority of the Magistrate.<sup>33</sup> The imperial rescript gave a power to adopt called *arrogatio*.<sup>34</sup> Under the authority of the Magistrate, persons would be adopted in the power of an ascendant, whether in the first degree, as sons and daughters, or in an inferior degree, as grandchildren or great-grandchildren. Even during Roman times, all efforts to retain the bond of family and of Roman heritage were

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<sup>26</sup> *Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*, *supra* note 11.

<sup>27</sup> Peter Conn, *The Politics of International Adoption*, 1 ORIGINS, (2008), <http://origins.osu.edu/article/politics-international-adoption> (last visited June 30, 2015).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *see also* Huard, *supra* note 1.

<sup>30</sup> Huard, *supra* note 1.

<sup>31</sup> *See* MEDIEVAL SOURCE BOOK: THE INSTITUTE, 535 CE, Chapter XI, ¶ 2, *available at* <http://www.fordham.edu/halsall/basis/535institutes.html#XI.%20Adoption> (in an accounting of the document).

<sup>32</sup> *Id.*

<sup>33</sup> Conn, *supra* note 27.

<sup>34</sup> *Id.*

made.<sup>35</sup> This tradition is alive and well in many countries today, particularly in Russian Family Law.<sup>36</sup>

The current western interpretation and enactment of adoption began in 1851.<sup>37</sup> The Commonwealth of Massachusetts in the United States enacted the first modern adoption law. It recognized adoption as a social and legal matter requiring state supervision.<sup>38</sup> This law removed adoption from the community or private level and placed it at the discretion of state authorities.

Though such a recent enactment does not account for the history of the moral tradition of adoption, it nonetheless marked the first verifiable modern-day regulation of adoption, shifting adoption from common and localized applications of solidarity and subsidiarity to a far removed and authoritative institutional level, the state. The United Kingdom enacted legislation regulating adoption in 1926.<sup>39</sup> The Hague, in 1993, enacted the first international treaty on the Protection of Children and Cooperation in Respect of Inter-Country Adoption.<sup>40</sup>

Thus, while *pre-nacent* children may have an ancient history of being promised to other members of society, modern day adoption regulations account only for *born* children who are *already* recognized as persons by state, federal, and international authorities.<sup>41</sup> Additionally, western adoption policy can rarely be seen to aim at preserving natural family duties, obligations or inheritance.

#### D. "Fetal Adoption" Consent and Custody Considerations

The idea of fetal adoption as an alternative to abortion is not new. In 1980, prior to the rise of ART in western society, Robert A. Freitas, Jr. published in *The Humanist*<sup>42</sup> a theoretical proposal to reduce abortion and unwanted pregnancies by offering mothers the ability to donate their fetus during the first, second, and third trimesters. This would offer

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<sup>35</sup> Huard, *supra* note 1.

<sup>36</sup> *Family Code of the Russian Federation*, *supra* note 12.

<sup>37</sup> Alice Bussiere, *The Development of Adoption Law*, 1 ADOPTION Q. 3-25 (1998).

<sup>38</sup> *Id.*

<sup>39</sup> Conn, *supra* note 27; see also University of Oregon's *The Adoption History Project*, <http://pages.uoregon.edu/adoption/timeline.html> (last visited June 30, 2015).

<sup>40</sup> *Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*, *supra* note 11.

<sup>41</sup> *Id.*

<sup>42</sup> Freitas, *supra* note 19.

surgical transfer to the wombs of adopting mothers and/or to incubators (artificial wombs).<sup>43</sup> To quote a summary of his earlier publication:

The reluctant prospective mother simply visits the local Fetal Adoption Clinic, undergoes surgery for removal of her viable fetus, signs legal documents, and exits a free woman. At the same time, the developing embryo is preserved. Fetuses removed during the first trimester are transplanted into the appropriately-prepared uterus of a surrogate or infertile adoptive mother and carried to term in the usual manner. Second trimester fetuses are nurtured in warm, organic artificial wombs until the third trimester, when conventional modern incubation techniques can be brought into play. Fetuses taken during the third trimester are transferred directly to the incubator, an existing medical technology often used to save the lives of infants born up to three months premature.<sup>44</sup>

For Freitas, the brave new world was almost here. Yet even today, technology is not capable of supporting the transfer of the fetus *cross-utero* (heterologously) or *extra-utero*, to artificial wombs or “incubators.”<sup>45</sup> Freitas’ theory remains unrealized even thirty-five years later, as does the effort to rescue those who would otherwise be destroyed or abandoned.<sup>46</sup> The answer seems to lay not so much with technology, but with the enactment of policies to protect and support prenatal human life.

Internationally, the media’s focus on fetal adoption is limited almost exclusively to disputes over rights to the subject child and centers commonly on surrogacy and embryo donation cases.<sup>47</sup> Though captured under the banner of “adoption,” these cases fail to address the underlying legal framework whose absence is the fundamental source of the conflict.

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<sup>43</sup> The aim to create “artificial wombs” continues to make progress within the scientific community. The term refers to what is called “ectogenesis”, the ability to gestate, with the help of technology, an embryo or fetus outside of the human body. See Carlo Bulletti, et al., *The Artificial Womb*, 1221 ANNALS N.Y. ACAD. SCI. 124-28 (2011).

<sup>44</sup> Freitas, *supra* note 19.

<sup>45</sup> Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo*, 84 CHI.-KENT L. REV. 877 (2009); see also Carlo Bulletti, et al., *The Artificial Womb*, 1221 ANNALS N.Y. ACAD. SCI. 124-28 (2011).

<sup>46</sup> William E. May, *On “Rescuing” Frozen Embryos*, 5 THE NAT’L CATH. BIOETHICS Q. 51-57 (2005).

<sup>47</sup> A general Google search on news journals covering the topic of “embryo adoption” and “surrogacy” will render numerous articles covering disputes and issues but not necessarily citing scientific literature.



Currently “only two U.S. States (Alabama and Hawaii) allow the birth mother to consent [to adoption] before the birth of her child; however, the decision to consent must be reaffirmed after the child’s birth.”<sup>48</sup> Neither state, however, will grant final decrees of adoption before birth even if both natural parents and adoptive parents are willing.<sup>49</sup> Therefore, the language of cases and statutes of all U.S. states regarding disputed custody is largely moot for the purposes of fetal adoption since they do not countenance fetal adoption agreements.<sup>50</sup>

In 2003, Colorado’s legislature passed an amendment to its adoption law that includes provisions for a woman to relinquish her parental rights prior to the child’s birth,<sup>51</sup> thereby moving the process *towards* adoption one step further, conceivably opening the door to fetal adoption. What is interesting about this legislation is that, while it *may* allow for prenatal adoption to take place, it mirrors a woman’s constitutional right to relinquish her rights to the child and abort.<sup>52</sup> The key factor of recognizing the personhood of the unborn seems primary to parents obtaining the ability to relinquish parental rights and duties. Arguably, without a well-established right to life for the unborn, parental rights are without bearing to the good of the child.

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<sup>48</sup> *Consent to Adoption*, <https://www.childwelfare.gov/pubPDFs/consent.pdf>. (Alabama offers a birth mother five days after birth to revoke consent for an adoption before birth. Hawaii requires a renewed petition and ten days if a party requests); see also *Regulation of Private Domestic Adoption Expenses*, <https://www.childwelfare.gov/pubPDFs/expenses.pdf>, which offers a capsule summary of adoption laws relating to birth expenses. The rest of the manual goes state-by-state (including territories), outlining in brief each state’s laws regarding fetal adoptions, especially with regard to expenses.

<sup>49</sup> *Regulation of Private Domestic Adoption Expenses*, *supra* note 48.

<sup>50</sup> Email from Benjamin Bentrup, Esq., to Jennifer Kimball Watson, Executive Director of the *Culture of Life Foundation* in Washington, D.C. (June 24, 2015) (on file with author).

<sup>51</sup> *Colorado General Assembly*,

[http://tornado.state.co.us/gov\\_dir/leg\\_dir/olls/digest2003a/CHILDRENANDDOMESTICMATTERS.htm](http://tornado.state.co.us/gov_dir/leg_dir/olls/digest2003a/CHILDRENANDDOMESTICMATTERS.htm) (last visited June 30, 2015) (emphasis added to the word “towards” to clarify that the relinquishment language, while in the context of adoption law, does not constitute the actual adoption of a fetus but only eliminates paternal and maternal relinquishment of parental rights from the adoption process once the child is born).

<sup>52</sup> See *Roe v. Wade*, 410 U.S. 113 (1973), <https://www.law.cornell.edu/supremecourt/text/410/113>; *Doe v. Bolton*, 410 U.S. 179 (1973), <http://caselaw.findlaw.com/us-supreme-court/410/179.html>.

## II. ABORTION LAW AND THE PROBLEM OF PERSONHOOD

The greatest challenge to the formation and implementation of prenatal adoption comes from legalized abortion.<sup>53</sup> In most countries, and in Western Europe, abortion has become permissible or legalized as a “necessary evil” where matters of health, physical and mental, of both the mother and the fetus are seemingly weighed against the good of new human life to society.<sup>54</sup> In Ireland, for example, “The Offenses Against the Person Act of 1861 (originally enacted by the United Kingdom but parts of which are still active in Ireland) banned abortion in all circumstances. Later court decisions established an exception to save the mother’s life.”<sup>55</sup> But it was not until 1983 that, by a constitutional amendment, Ireland established a fetus’ right to life, equating it with a woman’s right to life.<sup>56</sup> Still, the issue of the “necessary evil,” or legalized abortion, gained ground in 1992 when a 14-year-old rape victim sought to travel to Great Britain to terminate her pregnancy.<sup>57</sup> Her travel was granted “only after the Irish Supreme Court ruled that requiring the girl to have the child *might* lead her to commit suicide.”<sup>58</sup> The Council of Europe, responsible for enforcing the *European Convention on Human Rights*, requires that all 47-member states, including Poland and Ireland, make access to abortions readily available in countries where they are legal. This attempts to decide for doctors what is good for the health of the mother, creating a legal and ethical juggernaut for many countries attempting to retain the recognition of *personhood* for the unborn.<sup>59</sup>

This European basis for the justification of abortion differs from what we have in the United States, where abortion has been made legal as a matter of personal privacy to the body and reproductive rights of the mother, creating a constitutional right.<sup>60</sup> No right to life was recognized for the unborn as civil rights. Indeed, they were not awarded to persons

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<sup>53</sup> *Abortion Laws Around the World*, PEW RES. CENTER (Sept. 30, 2008), <http://www.pewforum.org/2008/09/30/abortion-laws-around-the-world/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Council of Europe Closes Case Against Ireland on Abortion*, THE IRISH TIMES, <http://www.irishtimes.com/news/world/council-of-europe-closes-case-against-ireland-on-abortion-1.2025834> (last visited June 30, 2015).

<sup>58</sup> *Id.* (emphasis added to the word “might” given that such a prognosis would only be speculative at best).

<sup>59</sup> *Council of Europe Closes Case Against Ireland on Abortion*, *supra* note 57.

<sup>60</sup> *Id.*

until after live birth in the U.S. And though the question regarding the beginnings of human life was raised, it has yet to be answered by most courts. Even though science had affirmed it then, and continues to affirm it now, human life begins at the moment of conception, when the identity of a distinct and self-directing human individual comes into being. “How would a human individual not be a human person?”<sup>61 62</sup>

*A. Implications of the Human Embryo’s Non-Recognition as a Person*

When considering fetal adoption, the fetus’s status of the personhood, which is denied largely by abortion law,<sup>63</sup> raises a significant question to the formation of adoption regulation: Can an individual, not legally recognized as a person, be the subject of adoption? In countries such as Ireland and Poland, which account for the personhood of the unborn, it may be feasible though certain ethical considerations would surely come to bear. In the United States, laws would prevent any form of valid adoption of “non-persons” regardless of when the relinquishment of parental rights and duties would be permitted.<sup>64</sup>

*B. Persons and Property Amidst Pro-Abortion Policies*

Adoption of a child prenatally can better be divided up into two legal considerations: one, human life *in-utero*; and two, human life *extra-utero*. For the purpose of this discussion, this paper is better directed to the adoption of persons *in-utero*.

Legal considerations for persons *extra-utero*, (e.g. embryos) however, come to bear upon the legal and contractual standing of subjects for prenatal adoption *in-utero*. The unborn, unlike the abandoned child after birth, rests in a tangled web of policies surrounding his or her treatment as a non-person or human not bearing the rights of personhood.

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<sup>61</sup> *Congregation for the Doctrine of the Faith, Donum Vitae I. Respect for Human Embryos*, ¶ 3, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) (last visited June 30, 2015).

<sup>62</sup> *The Beginning of Life: Part I*, <http://www.culture-of-life.org/2015/08/13/the-beginning-of-a-new-life-part-1/> (last visited September 22, 2015).

<sup>63</sup> *Roe v. Wade*, *supra* note 52.

<sup>64</sup> It must be noted that a woman relinquishes her parental rights when she chooses to abort as well. She does this because the fetus in her womb is not a recognized person with natural born rights.

The earliest embryo disposition cases were *Nahmani v. Nahmani* in Israel<sup>65</sup> and *Davis v. Davis*, in the state of Tennessee. The holding in *Davis* resulted from a “custody” dispute by a divorced couple over their frozen embryos created and held in storage after failed attempts to become pregnant by means of In-Vitro Fertilization (IVF). The court ruled that “preembryos are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their *potential* for human life.”<sup>66</sup>

Where placement of progeny would normally have been determined under custody statutes, *Davis* determined that pre-nascent children, and in this case children *extra-utero*, would not be treated as persons but rather as a *form of property*.<sup>67</sup> In addition, it also established that a “gamete provider”<sup>68</sup> are “owners” of their “interests”<sup>69</sup> in the frozen embryos, and bear a “constitutionally protected right not to beget a child where no pregnancy has taken place” holding that “there is no compelling state interest to justify ordering implantation against the will of either party.”<sup>70</sup> Here a distinction is between being a parent, becoming a parent, and becoming pregnant in order to distance the initial court’s ruling that progenitors were parents, the embryos were human persons and the dispute was one of custody.<sup>71</sup> This decision broke from the mold of natural custody disputes among parents of *in-utero* or born children and severed parental rights and duties from progeny *extra-utero*.

In both cases, (*Nahmani* and *Davis*), the absence of a legal definition of an embryo, and its status (i.e., “person” or “property”),<sup>72</sup>

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<sup>65</sup> C.E. Breen-Portnoy, *Frozen Embryo Disposition in Cases of Divorce: How Nahmani v. Nahmani and Davis v. Davis Form The Foundation for Workable Expansion of Current International Family Planning*, 28 MD. J.INT’L L. 275 (2013),

<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1606&context=mjil>.

<sup>66</sup> The term “preembryo” was created during this case as a means to form a distinction between and embryo *extra-utero* as a clump of cells (though scientifically identified as a self-directing human individual) and an embryo *in-vivo* and attached to the uterus. The aim was to diminish, by way of obfuscation in terms, the human nature and viability of the embryo. The term arrived from case proceedings and not from scientific literature. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), (emphasis added), [http://biotech.law.lsu.edu/cases/cloning/davis\\_v\\_davis.htm](http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm).

<sup>67</sup> *Id.*

<sup>68</sup> It must be noted that if either party were acknowledged as a “parent” then the embryo would have to be a *child*.

<sup>69</sup> A word which should have meaning but from which all meaning was stripped.

<sup>70</sup> *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) 17,

[http://biotech.law.lsu.edu/cases/cloning/davis\\_v\\_davis.htm](http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm)

<sup>71</sup> *Id.*

<sup>72</sup> See Breen-Portnoy, *supra* note 65, at 276.

lead to problems of judicial classification.<sup>73</sup> Current international policies, as a result of rising rates of IVF, are moving to treat the unborn as a form of personal property (commodities or non-persons) as well.<sup>74</sup>

### C. Brief Ethical Considerations

When taking into account the circumstances above, ethical consideration for *all* subjects involved must be included. Therefore, it is necessary to first look to the rights, duties, and dignity belonging to the primary subject, the child. Next, the maternal mother will merit a review. Then, the paternal father where applicable will need to be another focus in this matter. Also, the adopting parents will deserve some study. And finally, the good of the community will also be of great importance in this discussion. The right to personal life of the child, born or unborn, is crucial to the rights and duties of parents.

Ethically, every human life, whether born or unborn, is the bearer of fundamental human rights. The first of these rights is the right to life, which presupposes certain basic goods necessary to sustain it, such as nutrition and hydration.<sup>75</sup> In the case of human lives *extra-utero*, the most basic good necessary to their survival is an environment proper to their biological development<sup>76</sup> followed by those goods necessary for personal development. Both nutrition-hydration and environment in the womb reside within the natural law, which it would normally provide through natural parents and within the natural order of procreation. For human lives *in-utero*, their right to life is just as valid and necessary, and presupposes a right to the maternal womb in which they develop until live birth places them in an altogether different environment and circumstance. At that time, other goods come into play along with other risks to the provision of those goods.

On a local level, the principal of solidarity and subsidiarity<sup>77</sup> demands that others, beginning with family and extending where

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<sup>73</sup> *I.e.* whether or not to use contract law principles when interpreting disposition agreements among parents and other interested parties.

<sup>74</sup> See *Human Fertilization and Embryo Act 1990*, <http://www.legislation.gov.uk/ukpga/1990/37/contents> (last visited June 30, 2015); see also, [http://coreethics.org/wp-content/uploads/International-Human-Embryo-Laws\\_7.30.14.pdf](http://coreethics.org/wp-content/uploads/International-Human-Embryo-Laws_7.30.14.pdf) (last visited June 30, 2015) (an international account of embryo and stem cell regulations by country).

<sup>75</sup> Personal analysis as an ethicist.

<sup>76</sup> The womb biologically matched to them.

<sup>77</sup> Schneck, *supra* note 2.

necessary to the broader community, step in to meet the needs of the vulnerable where those needs either cannot be met by themselves or those who bear responsibility. Extraction of child support from parents who choose to give a child up for adoption denies the exercise of this principle by others in the community who would happily take on the responsibility for the children. As with any application of this just principle, the natural law, natural rights and duties must be strengthened. All efforts to secure and protect these rights and duties must have been exhausted before *other* parties take upon themselves the task to provide them. With prenatal adoption, compliance with the principle of double effect<sup>78</sup> must also be considered along with a full account of the circumstances surrounding the unborn.

The principle of double effect comprises of a four-part framework for deciphering the moral and ethical value of an intervention that is likely to carry with it an unavoidable negative outcome: first, the act itself must be good; second, the only thing that one can intend is the good act, not the foreseen but unintended bad effect; third, the good effect cannot arise from the bad effect, otherwise, one would do evil to achieve good; and fourth, the unintended but foreseen bad effect cannot be disproportionate to the good being performed.<sup>79</sup>

Formal fetal adoption, unlike a mere promising of persons, requires that the maternal mother, prior to the birth of the child, relinquish her rights and duties to her progeny. Though such a relinquishment may enable the goods for the child to be secured by the adopting parents, it can also be seen to serve other harms where a mother relinquishes her rights and responsibilities to her preborn child, such as found in surrogacy contracts,<sup>80</sup> abortion,<sup>81</sup> frozen embryo disposition cases<sup>82</sup> and wrongful life, wrongful birth cases,<sup>83</sup> causing a pejorative of the harms it seeks to overcome.

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<sup>78</sup> J.M. Boyle, *Toward Understanding the Principle of Double Effect*, 90 ETHICS, 527-538 (1980).

<sup>79</sup> George Wiegel, *Clarifying "Double Effect"*, (Feb. 23, 2011) FIRST THINGS, <http://www.firstthings.com/web-exclusives/2011/02/clarifying-double-effect>.

<sup>80</sup> See B.A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79, UMKC L. REV. 507 (2010), for an overview of the contractual issues surrounding surrogacy.

<sup>81</sup> *Roe v. Wade*, *supra* note 52.

<sup>82</sup> Breen-Portnoy *supra* note 65.

<sup>83</sup> Margaret Datiles, *Better Off Dead: The Ethical Thicket of Wrongful Life, Wrongful Birth and Related Legal Issues* (Nov. 02, 2010) CULTURE OF LIFE FOUNDATION, <http://www.cultureoflife.org/2010/11/02/better-off-dead-the-ethical-thicket-of-wrongful-life-wrongful-birth-and-related-legal-issues/>.

Herein lies the broader ethical problem: while abortion remains legal and the unborn are denied the status of persons, can we conclude that the number of abortions prevented by prenatal adoption will be proportionate to other harms that currently exist as well as those that can be foreseen? In a case where a mother would otherwise terminate the life of the child, and where such a termination is verifiably probable and otherwise unavoidable, only then should an alternative that replaces maternal responsibility be presented in the form of fetal adoption. Where no other means to prevent the innocent killing of human life are available, prenatal adoption may serve as the good that is possible. The ethics, however, extend to considerations within the legal community and must be considered case by case in order to meet the test of the principle of double effect.<sup>84</sup>

In those countries where government authority is unilateral and the voice of the people renders no change in the law, adoption prenatally may be the “only possible alternative”.<sup>85</sup> A full ethical inquiry into the problem would most likely result in a negative ethical analysis for prenatal adoption where all possible efforts to prevent abortion in the law have not been met. It is the responsibility of the broader community, not only to protect the vulnerable among us, but also to prevent the offences against them from promulgation.

## CONCLUSION

The key to prevent prenatal persons from treatment as property or mere “interests” is to reestablish strong language surrounding personhood for the unborn in abortion policies, reproductive technology regulations, adoption codes, securing parental rights and having duties to the unborn. The key to prevent unborn children from death by abortion is first to make abortion illegal. Then, implement or amend adoption laws that incentivize natural parents to give the child for adoption and reduce the burdens that turn couples and/or expectant mothers to abortion, such as the extraction of child support. Lastly, the promotion of prenatal adoption informally (i.e. without formal legal contract to the

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<sup>84</sup> Weigel, *supra* note 79.

<sup>85</sup> Pilar Calva, *Abortion, The Mother's Life and the Principle of Double Effect* (Nov. 19, 2015) CULTURE OF LIFE FOUND., <http://www.cultureoflife.org/2015/11/19/abortion-the-mothers-life-and-the-principle-of-double-effect/> (discussing an application of the principle of double effect).

child as property or “interest”) will most certainly lead to the expedient adoption of children into the arms of waiting parents by those whose rights and duties are not relinquished during gestation but would retain the ability to relinquish those rights directly to those who can and would bear them. This would thereby reduce the likelihood of children suffering those harms that come with the long waits in the extensive institutional process.