

Religious Freedom & the Fertilized Egg

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Anti-abortion activism and litigation have challenged established caselaw on the legality of in vitro fertilization (IVF) and the legal treatment of IVF fertilized eggs. These challenges rely on conservative Christian ideologies that full personhood occurs at fertilization. Litigation has primarily arisen out of wrongful death suits and divorce proceedings, wherein a party either has destroyed or seeks to dispose of frozen blastocysts. Some legislatures now seek to regulate the treatment of IVF fertilized eggs vis-à-vis legislation, as politicians increasingly seek to ban any destruction of human fertilized eggs by legally defining human life as beginning at fertilization. However, the question of when legal life begins is fundamentally an ethical and theological question of belief.

These shifts in the legal treatment of fertilized eggs coincide with recent Supreme Court cases that establish greater religious freedom claims. Notably, these cases have exclusively addressed Christian petitioners' claims. It remains to be seen whether similar claims brought by adherents of other faiths will receive the same protections. While Jews and Muslims have challenged anti-abortion laws on religious freedom grounds, similar litigation has yet to be brought within the IVF context. This Article argues that Muslims and Jews are well positioned to bring litigation challenging limitations on the disposal of IVF blastocysts.

The media has focused on the potential for IVF restrictions in states like Alabama and Texas. However, little attention has been given to the state of Louisiana, where such restrictions are a reality. This Article concludes by looking at the State of Louisiana as a case study for IVF restrictions, both in terms of the type of legislation anti-abortion activists will likely try to pass in other states, and to describe the religious freedom challenges Jews and Muslims might bring.

Furthermore, the Article argues that fetal personhood legislation that applies to IVF fertilized eggs substantially burdens the religious freedom of peoples with differing beliefs as to when potential and full human life begin. This Article is the first to make a religious freedom argument regarding IVF regulation. It is also the first to bring the jurisprudence of other religions, namely Judaism and Islam, into the legal conversation on IVF, in which conservative Christian perspectives typically dominate.

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INTRODUCTION

The passage of recent laws aimed at prohibiting abortion has detrimental impacts on the IVF process. The connection between abortion laws and IVF is not entirely evident at first. In theory, at least, abortion pertains to the termination of a developing embryo or fetus, while IVF pertains to the creation of blastocysts that may lead to live birth. However, the reality of the IVF process is that it often involves the disposal of potentially viable frozen blastocysts.¹ Within the context of abortion, scholars² and caselaw³ have begun to address religious freedom challenges to abortion bans. However, similar arguments have not yet been made regarding IVF. This Article is the first to articulate a religious right to create and dispose of IVF blastocysts.⁴

1. See *infra* Part.I for an extensive discussion of the IVF process.

2. See, e.g., Rabea Benhalim, *Agreeing to Disagree: Abortion Jurisprudence in Jewish and Islamic Law*, 50 *BYU L. REV.* 1217, 1222 (2025); Ari Berman, Note, *The Religious Exception to Abortion Bans: A Litigation Guide to State RFRAs*, 76 *STAN. L. REV.* 1129, 1132 (2024); Michael A. Helfand, *Using Jewish Law: Jewish Religious Liberty Advocacy for the Right to Abortion*, 70 *WAYNE L. REV.* 51, 53 (2024); Elizabeth Sepper, *Free Exercise of Abortion*, 49 *BYU L. REV.* 177, 182 (2023); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 *WIS. L. REV.* 475, 478; Josh Blackman, Howard Slugh & Tal Fortgang, *Abortion and Religious Liberty*, 27 *TEX. REV. L. & POL.* 441, 443 (2023); Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 *IOWA L. REV.* 2299, 2303–04 (2023); David Segal, Note, *A Religious Right to Choose? Prospects for Jewish Free Exercise Exemptions from Abortion Bans*, 61 *HOU. L. REV.* 677, 677 (2024); Deborah Machalow, *Religious Diversity and a Woman’s Right to Choose: The Religious Right’s Mistakenly Assumed Monopoly on Belief and Religious Support for Abortion*, 22 *RUTGERS J.L. & RELIGION* 476, 516–17 (2022); Carla Graff, Note, *The Religious Right to Therapeutic Abortions*, 85 *GEO. WASH. L. REV.* 954, 987 (2017); Ricky L. Welborn, Comment, *Abortion Laws: A Constitutional Right to Abortion*, 49 *N.C. L. REV.* 487, 487–88 (1971).

3. Plaintiff’s Emergency Motion for Temporary Injunctive Relief at 12, *Generation to Generation, Inc. v. State*, No. 2022-CA-000980 (Fla. Cir. Ct. June 16, 2022) (“In Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman.”); Complaint at 7, *Anonymous Plaintiffs 1–5 v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 49D01-2209-PL-031056 (Ind. Super. Ct. Sep. 8, 2022) [hereinafter Complaint, *Anonymous Plaintiffs*] (“Jewish law stresses the necessity of protecting the life and physical and mental health of the mother prior to birth as the fetus is not yet deemed to be a person.”); Complaint at 6, *Sobel v. Cameron*, No. 22-CI-005189 (Ky. Cir. Ct. Oct. 6, 2022) (“Jewish law stresses the necessity of protecting birth givers in the event a pregnancy endangers the woman’s life and causes the mother physical and mental harm.”); see, e.g., Verified Complaint at 2, *Pomerantz v. State*, No. 2022-014373-CA-01 (Fla. Cir. Ct. Aug. 1, 2022) [hereinafter Complaint, *Pomerantz*]; Second Amended Complaint at 3, *Generation to Generation, Inc. v. State*, No. 2022-CA-000980 (Fla. Cir. Ct. Oct. 7, 2022) [hereinafter Complaint, *Generation*]; Complaint at 4, *Satanic Temple v. Little*, No. 1:22-CV-00411 (D. Idaho Sep. 30, 2022) [hereinafter Complaint, *Little*]; Complaint at 3, *Satanic Temple v. Holcomb*, No. 1:22-CV-01859 (S.D. Ind. Sep. 21, 2022); Complaint at 9, *Sobel v. Cameron*, No. 3:22-CV-00570 (W.D. Ky. Oct. 26, 2022) [hereinafter Complaint, *Sobel*]; Complaint at 8, *Blackmon v. State*, No. 2322-CC00120 (Mo. Cir. Ct. Jan. 19, 2023) [hereinafter Complaint, *Blackmon*]; Complaint at 11, *Satanic Temple, Inc. v. Hellerstedt*, No. 4:21-CV-00387 (S.D. Tex. Feb. 5, 2021) [hereinafter Complaint, *Hellerstedt*]; Complaint at 20, *Planned Parenthood Ass’n of Utah v. State*, No. 220903886 (Utah Dist. Ct. June 25, 2022) [hereinafter Complaint, *Planned Parenthood Ass’n of Utah*]; Complaint at 3, *Johnson v. State*, No. 18732 (Wy. Dist. Ct. July 25, 2022) [hereinafter Complaint, *Johnson*]; see also *A Religious Right to Abortion: Legal History & Analysis*, COLUM. L. SCH.: L., RTS. & RELIGION PROJECT 15–24 (Aug. 2022), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1017&context=gender_sexuality_law (listing cases addressing religious freedom challenges to abortion bans).

4. Articles addressing religion and IVF typically address the ethical questions related to the scientific testing of human embryos, but not the religious right to create and dispose of IVF embryos.

A note on the terminology used within this Article: Although this Article uses the term “IVF embryos” occasionally to reflect IVF industry terminology, technically, IVF embryos are *not* embryos; they are fertilized eggs (hence the title of the article).⁵ Fertilized eggs are scientifically not considered embryos until they have developed into blastocysts *and* implanted into the uterine wall, a process that can take several weeks.⁶ Blastocyst refers to the stage of fertilized egg development five to six days after fertilization and prior to implantation into the uterine wall.⁷ However, it is common within the IVF industry to refer to fertilized eggs that have developed into blastocysts within the lab as “IVF embryos,” even though they will not become embryos until they successfully implant into the uterine wall. Some older texts refer to IVF embryos as “pre-embryos” to recognize that they have not yet reached the embryo stages, as they are still *in vitro* and not *in utero*.⁸ This terminology also plays a role in the culture wars, as fetal personhood advocates increasingly seek to shift the language to “[IVF] *human* embryos,” such as in Louisiana’s newly revised IVF law.⁹ Additionally, when referring to abortion, this Article uses the terms “abortion,” “induced miscarriage,” and “pregnancy termination” to reflect the understandings of classical and contemporary scholars within the Jewish and Islamic legal traditions.¹⁰

Religious-freedom abortion litigation has followed the Supreme Court’s *Dobbs v. Jackson Women’s Health Organization* opinion eliminating a constitutional right to abortion and concurrent “expansion of religious liberty rights” in other cases.¹¹ Though *Dobbs* was a substantive due process case, the abortion ban in question “was motivated by the religious belief that life begins at conception.”¹² Plaintiffs in multiple states, including Jewish and Muslim plaintiffs, have challenged their states’ abortion laws on religious freedom grounds.¹³ Many of the abortion laws these plaintiffs are challenging define life

5. See generally Ann A. Kiessling, *What Is an Embryo*, 36 CONN. L. REV. 1051 (2004) (providing an extensive discussion of the legal and medical definition of an embryo).

6. *Blastocyst*, CLEVELAND CLINIC (Apr. 29, 2022), <https://my.clevelandclinic.org/health/body/22889-blastocyst>.

7. *Id.*

8. See, e.g., Tanja Kronen, Elmar Schlüter, Elke Neuwohner, Susan El Ansari, Thomas Wissner & Gerd Richter, *What is the Preimplantation Embryo?*, 63 SOC. SCI. & MED. 1, 3 (2006); Joseph G. Schenker, *Pre-Embryo: Therapeutic Approaches*, 25 ANNALS OF MED. 265, 266–67 (1993); Vered H. Eisenberg & Joseph G. Schenker, *Pre-Embryo Donation: Ethical and Legal Aspects*, 60 GYNECOLOGY & OBSTETRICS 51, 52 (1998).

9. LA. REV. STAT. § 9:126(C) (2025) (emphasis added).

10. See Benhalim, *supra* note 2, at 1225.

11. Corbin, *supra* note 2, at 476.

12. *Id.* at 477.

13. See, e.g., Complaint, *Pomerantz*, *supra* note 3; Complaint, *Generation*, *supra* note 3, at 5–9; Complaint, *Anonymous Plaintiffs*, *supra* note 3, at 8; Complaint, *Sobel*, *supra* note 3, at 6; Complaint, *Blackmon*, *supra* note 3; Complaint, *Little*, *supra* note 3; Complaint, *Hellerstedt*, *supra* note 3, at 3; Complaint, *Planned Parenthood Ass’n of Utah*, *supra* note 3; Complaint, *Johnson*, *supra* note 3, at 5.

as beginning at conception,¹⁴ and therefore also threaten the rights of IVF patients to dispose of IVF fertilized eggs. This Article argues that IVF patients with differing beliefs as to when life begins should bring Free Exercise challenges to such laws.

The intersection between anti-abortion laws and IVF frozen blastocysts has recently come to the fore in the United States with a wrongful death suit of frozen IVF blastocysts in Alabama, a custody dispute over frozen IVF blastocysts in Texas, and IVF restrictions in Louisiana.¹⁵ The legal treatment of blastocysts and embryos is dominated by specific Christian beliefs about when life begins.¹⁶ With increased success prohibiting abortion access, anti-abortion Christian activists are now turning their eye towards IVF as they view frozen IVF fertilized eggs as the next vulnerable group to protect.¹⁷ In the words of one activist, “[W]e are also very passionate about pro-life options. . . . Embryos are invisible to the naked eye, but they are microscopic souls.”¹⁸ Some of these advocates argue that “the first solution is to prevent the proliferation of frozen embryos [created by IVF], through regulations,” as they believe frozen embryos are people, even though such regulations severely limit the overall success of IVF procedures.¹⁹

In some cases, conservative lawmakers have responded to concerns that anti-abortion laws will prohibit or significantly limit IVF by claiming that they are “pro-IVF” without clarifying what that stance means.²⁰ In other cases, lawmakers have explicitly stated that they support laws that prohibit the destruction of *all* embryos, whether in the IVF or abortion context.²¹ This

14. See, e.g., Idaho Code § 18-8802 (2026) (declaring that “[t]he life of each human being begins at conception”); Wyo. Stat. Ann. § 35-6-121 (2026) (defining an “unborn baby” as “being a member of the species homo sapiens from conception”); La. Stat. Ann. § 40:1061.1 (2026) (asserting that “every unborn child is a human being from the moment of conception”).

15. See, e.g., *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 680 (Ala. 2024) (holding that the word “child” also means frozen embryos); Dara E. Purvis, *Alabama Court’s Ruling that Embryos Are Children Opens up a Host of Other Legal Issues, Including Parental Rights*, CONVERSATION (Apr. 1, 2024, at 08:28 ET), <https://theconversation.com/alabama-courts-ruling-that-embryos-are-children-opens-up-a-host-of-other-legal-issues-including-parental-rights-224717> (discussing the impact of the *LePage* case on IVF availability in Alabama and the potential for wrongful death suits against IVF providers); *Antoun v. Antoun*, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *9 (Tex. Ct. App. July 13, 2023); H.B. 833, 2024 Leg., Reg. Sess. (La. 2024) (modifying the definition of “human embryo” in Louisiana Revised Statutes section 9:126).

16. See Gerard Magill, *Using Excess IVF Blastocysts for Embryonic Stem Cell Research: Developing Ethical Doctrine, Secular and Religious*, 37 HOFSTRA L. REV. 447, 452–53 (2008).

17. Kara Bettis Carvalho, *Frozen Embryos Are the New Orphan Crisis*, CHRISTIANITY TODAY (Dec. 2023), <https://www.christianitytoday.com/2023/11/ivf-frozen-embryos-are-new-orphan-crisis>.

18. *Id.*

19. *Id.*

20. See, e.g., Alice Miranda Ollstein & Ben Leonard, *Republicans Block Democratic Bill on IVF Protections*, POLITICO (Sep. 17, 2024, at 16:04 ET), <https://www.politico.com/news/2024/09/17/republicans-block-ivf-bill-00179626>.

21. Anna Kaminski, *Kansas Republicans Propose Symbolic Legislation to Ban Abortion, Give Embryos Rights*, KAN. REFLECTOR (Jan. 17, 2025, at 13:12 PT), <https://kansasreflector.com/2025/01/17/kansas-republicans-propose-symbolic-legislation-to-ban-abortion-give-embryos-rights> (discussing proposed legislation that would criminalize “the destruction of a fertilized embryo”).

became a major political issue in the 2024 presidential election. For instance, in anticipation of the Republican National Convention, the Republican party formally adopted a policy platform that supports states establishing fetal personhood through the Constitution's Fourteenth Amendment.²² Fetal personhood is the longstanding belief and argument of some anti-abortion activists that a fetus, embryo, or fertilized egg has the same legal rights as a person who has been born.²³ As recently as ten years ago, some anti-abortion activists saw the personhood movement as unachievable.²⁴ However, with major wins in state courts and the Supreme Court, the fetal personhood movement is increasingly active.²⁵ Fetal personhood laws equate abortion *and* IVF blastocyst disposal to murder.²⁶ In May 2024, the Texas Republican Party nearly passed a fetal personhood platform proposal specifically targeting IVF, which would have classified IVF blastocysts as "human beings" and the disposal of IVF blastocysts as "homicide."²⁷

At the same time, Republican Party leadership has tried to present itself as "pro-IVF" in response to the Alabama's Supreme Court's ruling in *LePage v. Center for Reproductive Medicine, P.C.*²⁸ On the campaign trail, President Trump promised that "[u]nder the Trump administration your government will pay, or your insurance company will be mandated to pay for—all costs associated with IVF treatment."²⁹ Trump previously referred to himself as the "father of IVF"³⁰ and issued an Executive Order on February 18, 2025, titled "Expanding Access to In Vitro Fertilization."³¹ It remains unclear exactly how

22. Anna Claire Vollers, *Conservatives Push to Declare Fetuses as People, with Far-reaching Consequences*, STATELINE (July 31, 2024, at 05:00 PT), <https://stateline.org/2024/07/31/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences>.

23. Jeff Amy, *Explainer: What's the Role of Personhood in Abortion Debate?*, ASSOCIATED PRESS (July 30, 2022, at 10:51 PT), <https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-constitutions-93c27f3132ecc78e913120fe4d6c0977>.

24. See, e.g., Rachana Pradhan & Jennifer Haberkorn, *Personhood Movement Loses Twice*, POLITICO (Nov. 5, 2014, at 00:00 ET), <https://www.politico.com/story/2014/11/personhood-movement-north-dakota-colorado-112552>; Katharine Q. Seelye, *Mississippi Voters Reject Anti-Abortion Measure*, N.Y. TIMES (Nov. 8, 2011), <https://www.nytimes.com/2011/11/09/us/politics/votes-across-the-nation-could-serve-as-a-political-barometer.html>.

25. John Hanna & Geoff Mulvihill, *Alabama IVF Ruling Is Spotlighting the Anti-Abortion Movement's Long Game*, ASSOCIATED PRESS (Feb. 24, 2024, at 08:08 PT), <https://apnews.com/article/embryos-ivf-abortion-personhood-laws-ffe4f4d326469a97fef999254ca86eca>.

26. See Vollers, *supra* note 22; see also Amy, *supra* note 23.

27. Bayliss Wagner, *Texas GOP Committee Considers IVF Restrictions at Convention: 'Maybe a Later Fight.'* AUS. AM.—STATESMAN (May 23, 2024, at 10:23 PT), <https://www.statesman.com/story/news/politics/state/2024/05/23/ivf-restrictions-texas-republican-gop-convention-embryos-embryonic-personhood-criticize-ted-cruz/73814851007>.

28. James Pollard, Michelle L. Price, Meg Kinnard & Bill Barrow *Ahead of South Carolina Primary, Trump Says He Strongly Supports IVF After Alabama Court Ruling*, ASSOCIATED PRESS (Feb. 24, 2024, at 10:24 PT), <https://apnews.com/article/trump-ivf-abortion-alabama-republicans-8215336740a5963b57bbd970b47bb3a7>.

29. ASSOCIATED PRESS, *Trump Says He Wants to Make IVF Treatment Free for Families*, at 00:06–00:20 (YouTube, Aug. 29, 2024), https://www.youtube.com/watch?v=qS-F7d6BP_g.

30. Cecelia Smith-Schoenwalder, *He Said, She Said: Trump Claims to Be the 'Father of IVF.'* Harris Says: 'Quite Bizarre,' U.S. NEWS & WORLD REP. (Oct. 17, 2024, at 10:42 PT), <https://www.usnews.com/news/national-news/articles/2024-10-17/he-said-she-said-trump-claims-to-be-the-father-of-ivf-harris-says-quite-bizarre>.

31. Exec. Order No. 14,216, 90 Fed. Reg. 10451 (Feb. 18, 2025).

Trump will lower the cost of IVF and how he will meet the concerns of other conservatives. If conservatives who believe in fetal personhood guide the process, it is likely that any federal IVF legislation will closely mirror Louisiana's IVF laws.

In Louisiana, the IVF procedure is legal, but the disposal of frozen embryos is illegal. Since 1986, Louisiana has defined IVF embryos as juridical persons and prohibited the disposal of IVF embryos.³² Louisiana requires IVF patients to use all of their embryos or relinquish them for others' use.³³ Like abortion bans, the only option IVF patients have to dispose of their embryos is to go out-of-state. However, in July 2024, the Second Circuit of the Louisiana Court of Appeals, in a divorce custody dispute, prohibited the disposal of IVF blastocysts created and stored out of state.³⁴ This leaves divorcing couples in the precarious position of indefinite storage, using the IVF blastocysts themselves, transferring custody of the IVF blastocysts to their former spouse, or relinquishing the IVF blastocysts to someone else to use.

Any support for IVF faces criticism and rejection from other Republicans³⁵ and Trump supporters. For instance, Ann Scheidler, president of the Pro-Life Action League, stated that while she also shared Trump's "desire for Americans to have more babies," the "plan to fund in vitro fertilization for all American women is in direct contradiction with that hope."³⁶ Ann Scheidler believes that "[h]undreds of thousands of embryos—each of them as fully human as you or me—are created and then destroyed . . . in IVF procedures."³⁷

Within the context of IVF, anti-abortion advocates have started to advocate for a legal understanding of fetal personhood, which recognizes a fertilized egg as legally fully human.³⁸ This movement has sought to effectuate this change vis-à-vis "state constitutional amendments recognizing the personhood of the unborn child [from fertilization of the egg] and immediately banning abortion [for everyone]."³⁹ Furthermore, these activists typically oppose abortion "as a matter of religious faith, while presenting support for abortion rights as purely secular,"⁴⁰ without any consideration or accommodation for different religious

32. LA. REV. STAT. § 9:126 (2025).

33. *Id.*

34. *Harper v. Harper*, 399 So. 3d 72, 77 (La. Ct. App. 2024).

35. See, e.g., Sahil Kapur & Dasha Burns, *Donald Trump's Call to Mandate Free IVF Coverage Baffles Republicans in Congress*, NBC NEWS (Sep. 10, 2024, at 12:45 PT), <https://www.nbcnews.com/politics/2024-election/donald-trump-plan-mandate-free-ivf-republicans-congress-opposition-rcna170327>; Philip Klein, *Trump's IVF Proposal Would Expand Obamacare*, NAT'L REV. (Aug. 29, 2024, 20:28 PT), <https://www.nationalreview.com/corner/trumps-ivf-proposal-would-expand-obamacare>.

36. *Pro-Life to Trump: "Walk Back IVF Scheme,"* PRO-LIFE ACTION LEAGUE (Aug. 30, 2024), <https://prolifeaction.org/2024/pro-life-to-trump-walk-back-ivf-scheme>.

37. *Id.*

38. Lucy Tu, *The Push to Grant Fetuses and Embryos Legal Rights is Threatening IVF Treatment*, SCI. AM. (May 7, 2025), <https://www.scientificamerican.com/article/ivf-treatment-faces-threats-from-fetal-personhood-laws-that-would-grant>.

39. MARY ZIEGLER, ROE: THE HISTORY OF A NATIONAL OBSESSION 130–31 (2023).

40. *Id.* at 129.

beliefs that might allow abortion and the defrost disposal of frozen IVF fertilized eggs.

Aside from the obvious liberty concerns related to bodily autonomy and genetic material, the inability to destroy IVF blastocysts directly contravenes the religious liberty of those who believe they have a religious obligation to dispose of excess embryos and/or whose religious beliefs forbid embryo adoption. Specifically, Islamic and Jewish law have unique religious understandings of the legal classification of IVF blastocysts that differ significantly from conservative Christian beliefs. This Article seeks to complicate the conversation with a discussion of the Jewish and Islamic requirements regarding the treatment of IVF blastocysts.

This Article focuses exclusively on the earliest stages of human development, the fertilized egg. Islamic and Jewish legal scholars are most permissive during this stage, and American fetal personhood advocates are increasingly advocating for stringent restrictions at this stage that would threaten the free exercise of religion for Muslims and Jews. During the earliest stage of embryonic development, Jewish law regards the embryo as “mere fluid.”⁴¹ Likewise, Islamic law understands from the Quran that in this phase the fertilized egg is “a drop of fluid.”⁴² Furthermore, both religious legal systems balance the competing values of procreation, protecting lineage/family integrity, and potential life. In circumstances such as divorce, Muslims and Jews may find themselves in a situation where they are religiously obligated to dispose of their IVF blastocysts and religiously prohibited from giving their fertilized eggs to anyone else. Therefore, Jewish and Muslim IVF patients under fetal personhood laws may find their religious practice significantly burdened.

In presenting the Islamic and Jewish legal positions on the legal treatment of embryos, this Article aims to challenge the prevailing American portrayal of the intersection of religion, abortion, and IVF. The Jewish and Islamic legal traditions both involve millennia of jurists grappling with complex issues of morality and legality and accommodating difference of opinion. This Article proceeds first by providing a background on the IVF process. Next, it describes the diversity of opinion on the legal standing of blastocysts and embryos in Jewish and Islamic law. Part III then discusses the American political and legal landscape, describing the ever-increasing influence of Evangelical and Catholic religious understandings in litigation and fetal personhood advocacy and legislation. Finally, this Article presents a case study of Louisiana IVF laws and how Muslims and Jews might bring Religious Freedom Restoration Act (RFRA) and free exercise challenges to those laws.

41. Fred Rosner, *The Jewish Attitude Toward Abortion*, 10 TRADITION: J. ORTHODOX JEWISH THOUGHT 48, 55 (1968).

42. QURAN, 23:12–14.

I. THE INS AND OUTS OF IVF

The relationship between IVF and anti-abortion personhood advocacy is not an obvious one. An individual pursuing IVF treatment presumably wants to carry a pregnancy to term. In the case of abortion, an individual has decided not to carry a pregnancy to term. However, IVF often involves both the creation and destruction of potentially viable fertilized eggs. Some anti-abortion advocates believe that IVF-fertilized eggs are “unborn human beings,” arguing that the legal protections of anti-abortion legislation should extend to the IVF context. The potential disposal of IVF-fertilized eggs arises because the standard approach in IVF is to maximize the possibility of a live birth, which means maximizing the potential number of viable blastocysts.

Recent developments in IVF technology, especially pre-implantation genetic screening, have also resulted in greater success rates of blastocyst transfers to live births. However, such screenings are controversial and may result in excess blastocysts, because tested blastocysts reveal which blastocysts have chromosomal abnormalities and which blastocysts have the greatest likelihood of live birth. If an IVF patient has excess blastocysts, they then have four options: (1) dispose of the blastocysts via thawing;⁴³ (2) donate the blastocysts for scientific research and eventual thawing; (3) compassionate transfer, wherein the blastocysts are transferred to a patient’s body at a location and/or within a certain timeframe when the blastocyst will not implant; (4) donate the blastocysts to someone else for their use and adoption of the resulting child.⁴⁴ However, IVF patients only have all four of these options if their jurisdiction does not define IVF blastocysts as legal persons.

A. THE HUNGER GAMES

Even without infertility or age-related issues, the average chance of getting pregnant during a single menstrual cycle ranges from ten percent to twenty-five percent.⁴⁵ Usually, only one egg matures within a woman’s ovulation cycle.⁴⁶ To increase pregnancy odds, an IVF cycle first involves medication to stimulate

43. Global practices for blastocyst disposal all involve removing the blastocyst from cryogenic preservation and allowing the blastocyst to thaw. Mara Simopoulou et al., *Discarding IVF Embryos: Reporting on Global Practices*, 36 J. ASSISTED REPRODUCTION & GENETICS 2447, 2448 (2019). One survey found that the range of disposal globally was as follows: “[T]he majority of embryologists opt to ‘place the carrier in a trash can strictly dedicated for embryo disposal while still frozen’ (36.7%), followed by ‘leave the carrier on the bench prior to disposing the embryos in a trash can’ (22%). A 17.7% of practitioners opt to ‘thaw embryos and leave them on the bench prior to disposing in a trash can.’ The remaining 20.3% responded by describing a different practice for this procedure contributing to a list of different approaches [typically involving a spiritual or religious element, such as a prayer, moment of silence, or burial].” *Id.* at 2450.

44. Amy Demma, *Making Decisions About Remaining Embryos*, RESOLVE (2023), <https://resolve.org/learn/family-building-options/in-vitro-fertilization/remaining-embryos>.

45. *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/having-a-baby-after-age-35-how-aging-affects-fertility-and-pregnancy> (last visited Oct. 27, 2025).

46. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sep. 1, 2023), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

a woman's ovaries that helps multiple eggs mature at one time.⁴⁷ Once multiple eggs appear mature under ultrasound, the woman will undergo an egg retrieval procedure to retrieve as many eggs as possible.⁴⁸ From this point forward, IVF involves continually dwindling odds.

The following hypothetical illustrates the "hunger games" odds of IVF.⁴⁹ A woman may have ten eggs retrieved, eight of which are mature (on average, eighty percent of eggs are mature).⁵⁰ Those eight eggs will then be fertilized by an embryologist in the lab with sperm, and of those eight eggs, six eggs successfully fertilize (on average, eighty percent of mature eggs fertilize).⁵¹ Once fertilized, an embryologist will carefully monitor the growth of the fertilized eggs in a lab.⁵² Those fertilized eggs will typically take up to seven days after fertilization to reach the blastocyst phase.⁵³ Of the six fertilized eggs, two eggs successfully reach the blastocyst phase (on average, thirty percent of fertilized eggs will reach blastocyst), and the other four eggs arrest, failing to develop.⁵⁴ Patients will then decide to either transfer blastocysts that reach this phase immediately (a fresh transfer) or freeze them for future use. Although fresh transfers used to be the standard of care, today most clinics encourage freezing eggs for future use, as spacing timing between retrieval and transfer results in better long-term outcomes for patients and pregnancy rates.⁵⁵ Increasingly, patients may choose to have some or all of the blastocysts biopsied for further testing.⁵⁶ If a patient decides to test them, both blastocysts would be frozen at this stage. Patients who do not test their embryos may opt for a fresh transfer.

The testing involves a biopsy of the development of placental cells. The test results usually take a few weeks and will show whether the blastocysts are euploid (meaning all the correct number of chromosomes), aneuploid (meaning the incorrect number of chromosomes, which results in a wide range of birth

47. *IVF (In Vitro Fertilization)*, CLEVELAND CLINIC (Mar. 2, 2022), <https://my.clevelandclinic.org/health/treatments/22457-ivf>.

48. *Id.*

49. Note that "hunger games" is a common reference on reddit threads to this process. See, e.g., u/cozydogcuddles, REDDIT (r/Infertility), *Infertility Hunger Games Dashboard* (July 19, 2022), https://www.reddit.com/r/infertility/comments/w3ejqa/rinfertility_hunger_games_dashboard.

50. *What Does the Number of Eggs Mean for Your IVF Success?*, EURO CARE IVF, <https://www.eurocareivf.com/fertility-blog/ivf-egg-to-embryo-ratio> (last visited Oct. 28, 2025).

51. Cynthia Murdock, *IVF Attrition Rate & Embryo Survival: What to Expect*, ILLUME FERTILITY (Feb. 26, 2025), <https://www.illumefertility.com/fertility-blog/ivf-attrition-rate>.

52. *In Vitro Fertilization*, NYU LANGONE HEALTH, <https://nyulangone.org/locations/fertility-center/in-vitro-fertilization-egg-freezing-embryo-banking/in-vitro-fertilization> (last visited Oct. 28, 2025).

53. Justine Taylor, *The IVF Process*, CNY FERTILITY (Aug. 26, 2025), <https://www.cnyfertility.com/ivf-process>.

54. See Murdock, *supra* note 51.

55. Giuseppe Gullo, Marco Scaglione, Gaspare Cucinella, Vito Chiantera, Antonino Perino, Maria Elisabetta Greco, Antonio Simone Laganà, Enrico Marinelli, Giuseppe Basile & Simona Zaami, *Neonatal Outcomes and Long-Term Follow-Up of Children Born from Frozen Embryo, a Narrative Review of Latest Research Findings*, MEDICINA, Sep. 4, 2022, at 1, 8–9.

56. NYU LANGONE HEALTH, *supra* note 52.

defects that may or may not be incompatible with life), or mosaic (meaning the sample included both euploid and aneuploid cells.⁵⁷ While it is more likely that a mosaic blastocyst is aneuploid, it is possible that the blastocyst will develop without issue).⁵⁸

Continuing the hypothetical, if both fertilized eggs are sent to testing, it would be typical for one blastocyst to test as euploid, and one blastocyst to test as aneuploid.⁵⁹ These average rates are largely dependent on age of the patient and day the blastocyst reaches blastocyst stage and can vary significantly.⁶⁰ Most embryology labs will discard any frozen aneuploid blastocysts at this stage, as they have very low rates of implantation, high rates of miscarriage, and often result in significant birth defects if carried to term.⁶¹

In this scenario, the patient having undergone an IVF cycle is left with one euploid blastocyst, which, depending on several factors, may have a fifty percent likelihood of reaching live birth.⁶² Patients often would like to have greater statistical odds of having a child and may want more than one child. They may achieve this by deciding to undergo multiple rounds of IVF. For instance, after three IVF cycles, a patient could have four euploid blastocysts that are likely to result in two live births. Statistically, the odds are now in the patient's favor.

That said, these are only statistical likelihoods, not a representation of each patient's IVF treatment experience. For example, a patient with four euploid blastocysts may end up going through multiple transfers, only to have all four blastocysts fail to implant. Or a patient could have success with the first two blastocysts, thus having completed their family with two children, but also having two frozen blastocysts remaining. There is no way for a patient to know any of their future outcomes. Therefore, patients who have the physical and financial means will try to have enough frozen blastocysts to meet the statistical likelihood of achieving their desired family size. The focus is almost always on creating enough blastocysts to have the desired number of children. If any given cycle results in more euploid blastocysts than statistically necessary, then that gives the patients more opportunities if the odds end up not being in their favor.

These differing success rates can leave patients in positions where they now have more potentially viable blastocysts than they, for whatever reason, may want to use. Typically, "up to 40% of . . . cryopreserved [blastocysts]

57. *What Are the Differences Between Euploid, Aneuploid, and Mosaic Embryos*, EGG DONATION, INC. (Mar. 9, 2020), <https://eggdonor.com/what-are-the-differences-between-euploid-aneuploid-and-mosaic-embryos>.

58. *Id.*

59. Min Yang, Tiago Rito, Jakob Metzger, Jeffrey Naftaly, Rohan Soman, Jianjun Hu, David F. Albertini, David H. Barad, Ali H. Brivanlou & Norbert Gleicher, *Depletion of Aneuploid Cells in Human Embryos and Gastruloids*, 23 *Nature Cell Bio. Biology* 314, 318 (2021).

60. *Id.* at 314.

61. *Abnormal Cells in Early-Stage Embryos Might Not Preclude IVF Success*, SCI. DAILY (July 10, 2020), <https://www.sciencedaily.com/releases/2020/07/200708133023.htm>.

62. *What Are My Chances of Success With IVF?*, UT HEALTH S.A., <https://uthscsa.edu/physicians/services/assisted-reproduction/what-are-my-chances-success-ivf> (last visited Oct. 28, 2025).

ultimately will not be used for reproduction and remain unused.”⁶³ In some instances, the patient may simply have reached their desired family size. In other instances, the patient may no longer be able to carry a pregnancy due to health risks, despite a desire to increase family size. Others may wish to grow their families more, but the costs associated with blastocyst storage, pregnancy, and childcare make it financially prohibitive. Storage alone can cost up to \$1500 per year into perpetuity, and even with insurance coverage is typically not covered beyond the first year.⁶⁴ Some patients also find themselves in the scenario of having multiple frozen blastocysts remaining, but after multiple failed transfers and miscarriages of prior frozen blastocysts, are physically, psychologically, and financially incapable of using those blastocysts.⁶⁵ Additionally, patients may find themselves in a situation, like a divorce, where they no longer wish to have a child with their partner. Finally, if the patient’s clinic chooses to freeze every blastocyst, including mosaic and aneuploid blastocysts, the patient may decide to dispose of blastocysts that could lead to severe fetal anomalies.

Many of the reasons a patient may choose to discard frozen blastocysts are the same reasons someone may seek to terminate a pregnancy: physical, financial, relationship, and psychological difficulties may all factor into the decision. However, there are distinct differences between the disposal of an IVF blastocyst and pregnancy termination. IVF blastocyst disposal occurs at an earlier stage than pregnancy termination, as pregnancy termination only occurs after a positive pregnancy test, which occurs after implantation. Because of this early stage, blastocyst disposal is in some ways close to the morning-after pill, or “Plan B,” as both prevent implantation of a fertilized egg. Additionally, IVF blastocyst disposal entails allowing frozen blastocysts to continue to thaw. Indeed, thawing is required whether a blastocyst is transferred to a uterus or disposed of. The question simply remains about how long it is thawed. Pregnancy termination, on the other hand, involves either medicated or surgical removal of the embryo from the uterus.⁶⁶

However, because both IVF blastocyst disposal and pregnancy termination involve ending the continued growth of a fertilized egg, anti-abortion rights activists in the United States are increasingly challenging the disposal of IVF blastocysts as part of the fetal personhood movement.

63. Judith Daar et al., *Compassionate Transfer: Patient Requests for Embryo Transfer for Nonreproductive Purposes*, 113 *FERTILITY & STERILITY* 62, 63 (2020).

64. Ron Lieber & Tara Siegel Bernard, *The Costs for I.V.F. Patients After Alabama’s Ruling*, N.Y. TIMES (Mar. 4, 2024), <https://www.nytimes.com/2024/02/27/business/alabama-ivf-embryos-costs.html>.

65. A standard IVF treatment cycle is expensive with the transfer of a single frozen embryo costing around \$5,000. See *IVF Clinic Costs*, REMEMBRYO, <https://www.remembryo.com/ivf-clinic-costs> (last visited June 26, 2024) (collecting data from IVF/fertility clinics).

66. See Rose Thorne, *Different Types of Abortion Explained*, HEALTHLINE (July 3, 2025), <https://www.healthline.com/health/types-of-abortion>.

B. PRE-IMPLANTATION GENETIC SCREENING

Notably, developments in IVF technology have helped reduce the number of abortions in certain IVF contexts, changing some of the ethical questions IVF implicates. The most significant development is pre-implantation screening of blastocysts prior to transfer and screening. In the 1990s this type of screening was considered experimental and is now considered standard care.⁶⁷ For instance, before pre-implantation genetic screening, physicians would often implant multiple blastocysts to increase the possibility of pregnancy.⁶⁸ These multiple implantations sometimes led to situations where the patient carried multiple fetuses.⁶⁹ Sometimes physicians would recommend selective reduction in these pregnancies. Selective reduction usually occurs in the context of pregnancy with multiple fetuses, wherein one of the fetuses threatens the wellbeing of the other fetuses.⁷⁰ In that context, physicians may encourage aborting one of the fetuses to improve overall pregnancy viability.⁷¹ In the 1980s, “when the Vatican took a strong stand against IVF and other assisted reproductive technologies, most anti-abortion and social-conservative groups stayed on the sidelines,” as to the creation of blastocysts via IVF.⁷² However, these groups have and continue to oppose selective reduction and increasingly oppose blastocyst disposal.⁷³ That said, opposition to both selective reduction and blastocyst disposal presents challenges to the most common IVF methods. The development of pre-implantation genetic screening significantly reduces the likelihood of selective reduction but increases the likelihood of extra embryos, as patients no longer implant multiple blastocysts at one time and have greater success with fewer blastocysts, resulting in extra blastocysts.⁷⁴

Furthermore, with pre-implantation genetic screening, physicians can better determine the blastocysts with the greatest likelihood of implantation and live birth.⁷⁵ By screening aneuploid blastocysts, physicians significantly reduce

67. Sarah Petch & David Crosby, *Updates in Preimplantation Genetic Testing (PGT)*, BEST PRAC. & RSCH. CLIN. OBSTET. & GYNAECOL., June 19, 2024, at 1, 1.

68. Laura A. Schieve, Herbert B. Peterson, Susan F. Meikle, Gary Jeng, Isabella Danel, Nancy M Burnett & Lynne S. Wilcox, *Live-Birth Rates and Multiple-Birth Risk Using In-Vitro Fertilization*, 282 JAMA 1832, 1833–35 (1999).

69. *Id.*

70. Michael Bebbington, *Selective Reduction in Multiple Gestations*, 28 BEST PRAC. IN CLINICAL OBSTETRICS & GYNAECOLOGY 239, 240 (2014).

71. Elizabeth Villiers Gemmette, *Selective Pregnancy Reduction: Medical Attitudes, Legal Implications, and a Viable Alternative*, 16 J. HEALTH POL., POL'Y & L. 383, 384 (1991).

72. Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 521 (2018).

73. *See e.g.*, Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *Committee Opinion 12—Ethical Treatment of Human Embryos*, 40 ISSUES IN L. AND MED. 48, 67 (2025).

74. Kim Dao Ly, Ashok Agarwal & Zsolt Peter Nagy, *Preimplantation Genetic Screening: Does It Help or Hinder IVF Treatment and What Is the Role of the Embryo?*, 28 J. ASSIST. REPROD. & GENET. 833, 834–35 (2011).

75. *Id.* at 834.

the likelihood of miscarriage and other pregnancy complications.⁷⁶ Furthermore, due to euploid blastocysts' increased likelihood of implantation and live birth, physicians generally discourage patients from implanting more than one euploid blastocyst at a time because of the increased risks of pregnancy with multiples.⁷⁷ Because aneuploidy can be determined prior to implantation, patients who choose to test their blastocysts can circumvent the possibility of terminating a pregnancy due to aneuploidy results on a noninvasive prenatal test during pregnancy.⁷⁸ A noninvasive prenatal test is usually given between ten and twelve weeks of pregnancy, and aneuploidy results may cause a patient to terminate their pregnancy, as aneuploidy fetuses carry significant health and miscarriage risks.⁷⁹ This can carry significant moral implications for patients who do not believe that a fertilized egg is a human but perhaps do believe that a fetus in the second trimester is a human.

However, both pre-implantation genetic screening and noninvasive prenatal testing are not without controversy. As Mary Ziegler has noted, “[a]bortion opponents and some disability-rights groups have also opposed prenatal genetic diagnosis . . . believing that it leads families to end pregnancies.”⁸⁰ While anti-abortion activities and disability rights activists may seem like strange bedfellows, disability rights activists who oppose such screening differentiate “between a pregnant woman who chooses to terminate the pregnancy because she *doesn't want to be pregnant* as opposed to a pregnant woman who *wanted to be pregnant* but rejects a particular fetus [due to a fetal anomaly], a particular potential child.”⁸¹ This reasoning aligns with Justice Clarence Thomas's eugenics concerns in his *Box* concurrence.⁸² The concern is that pre-implantation and prenatal screening will lead patients to choose blastocysts and fetuses based on euploidy, terminating or discarding blastocysts and fetuses that otherwise would potentially develop with a disability. That said, neither anti-abortion activists nor disability rights activists recognize the

76. See, e.g., Laura Sacchi, Elena Albani, Amalia Cesana, Antonella Smeraldi, Valentina Parini, Marco Fabiani, Maurizio Poli, Antonio Capalbo & Paolo Emanuele Levi-Setti, *Preimplantation Genetic Testing for Aneuploidy Improves Clinical, Gestational, and Neonatal Outcomes in Advanced Maternal Age Patients Without Compromising Cumulative Live-Birth Rate*, 36 J. ASSIST. REPROD. & GENET. 2493, 2493–2494 (2019).

77. Jens Erik Dietrich, Ingrid Cáceres Valcárel, Edison Capp, Thomas Strowitzki & Ariane Germeyer, *High Multiple Pregnancy Rates After Double Embryo Transfers in Human: A Retrospective Cohort Study*, REPROD. & FERTILITY, Mar. 20, 2025.

78. Wybo Dondorp et al., *Non-Invasive Prenatal Testing for Aneuploidy and Beyond: Challenges of Responsible Innovation in Prenatal Screening*, 23 EUR. J. HUM. GENETICS 1438, 1446 (2015).

79. *Id.* at 1440.

80. Ziegler, *supra* note 72.

81. Marsha Saxton, *Disability Rights and Selective Abortion*, in THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 236 (Nancy Ehrenreich ed., 2008).

82. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

significant likelihood of miscarriage of aneuploid blastocysts and the physical and psychological impacts that may pose to the pregnant person.⁸³

Patients with more blastocysts than they want to use, including aneuploid blastocysts, have four options: (1) disposal via thawing, in which the frozen blastocysts are taken out of a freezer and left out to thaw; (2) donating blastocysts for scientific research; (3) compassionate transfer, in which patients pay to have the blastocysts transferred to the vagina instead of the uterus and/or during a time in the patient's menstrual cycle when the blastocysts would be unable to implant; or (4) donating the blastocysts to another patient. Of these options, disposal via thawing is the easiest, as it is available at all clinics and simply requires allowing the blastocysts to thaw. Donating blastocysts for scientific research can have challenges, as clinics that do not conduct their own research often struggle to find labs to take blastocysts.⁸⁴ In those cases, IVF clinics then must contact patients again to determine what to do with the blastocysts if they cannot be donated to science, but patients are often unreachable.⁸⁵ If patients do not choose to dispose of their blastocysts via direct thawing or scientific research with eventual thawing, then their remaining options are compassionate transfers and blastocyst donation.

C. COMPASSIONATE TRANSFERS

For those who believe that thawing blastocysts or donating them to science is immoral, there are two different options: 1) compassionate transfer; and 2) blastocyst adoption. A compassionate transfer involves the transfer of frozen blastocysts into a woman's body "in a location or at a time when pregnancy is highly unlikely to occur . . . such as the vagina, or placement in the uterus at a time in the woman's cycle when pregnancy is highly unlikely to result."⁸⁶ Patients who select this form of disposal "see it as more respectful, personal, or natural than disposal in the laboratory."⁸⁷ Additionally, for an estimated sixteen percent of American IVF programs "that for religious, ethical, or other reasons do not permit discard in the laboratory," this is the only acceptable form of blastocyst disposal.⁸⁸

However, compassionate transfers are not without difficulty. Even if a patient's insurance covers IVF treatments, insurance typically will not cover a

83. See Lacey Brennan & Louise King, *Transferring Genetically Affected Embryos in IVF*, HARV. MED. SCH.: CTR. FOR BIOETHICS (June 1, 2019), [https://bioethics.hms.harvard.edu/journal/ivf-affected-embryos_\(discussing_ethical_considerations_surrounding_the_use_of_aneuploid_embryos_in_IVF\)](https://bioethics.hms.harvard.edu/journal/ivf-affected-embryos_(discussing_ethical_considerations_surrounding_the_use_of_aneuploid_embryos_in_IVF)).

84. Hannah Devlin, *Call to Help UK IVF Patients Donate Unused Embryos After Shortage Hinders Research*, GUARDIAN (Dec. 6, 2023, at 10:35 ET), <https://www.theguardian.com/science/2023/dec/06/call-to-help-ivf-patients-donate-unused-embryos-after-shortage-hinders-research>.

85. Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC NEWS (Aug. 12, 2019, at 01:34 PT), <https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806>.

86. Daar et al., *supra* note 63, at 62–63.

87. *Id.* at 63.

88. *Id.*

compassionate transfer, as it is specifically designed to not result in pregnancy.⁸⁹ Therefore, patients will need to pay for a compassionate transfer out-of-pocket, which is typically \$5,000, and will need to undergo an invasive medical procedure to their sexual organs.⁹⁰ Likewise, some physicians are ethically opposed to compassionate transfers because of the physical and psychological impact on patients without any medical benefit. For example, in a study of IVF physicians, various physicians discussed their positions on compassionate transfers, stating:

- 1) “I cannot understand how this procedure could ever be viewed as ethical to perform”;
- 2) “Honestly – why bother. It’s a way to discard embryos that makes patients with ethical challenges feel better about it but it’s a waste of time, money, and a farce. . . . [H]ow is a fake transfer really any different than deposit.”;
- 3) “My primary reservation with the practice is concern that a patient who views this as preferable to discarding an embryo may later regret the decision. If a patient finds it unacceptable to discard an embryo, they may come to realize that compassionate transfer is effectively the same thing.”⁹¹

Finally, fetal personhood laws may also prohibit compassionate transfers, as they are a form of blastocyst disposal. For example, Louisiana prohibits all types of blastocyst disposal, as frozen blastocysts are defined as juridical persons. Over twenty-four states “include personhood language in laws regulating or prohibiting abortion care”⁹² and it remains to be seen how those laws impact the legality of IVF frozen blastocyst disposition. Ten of those states define fetal personhood from every stage of pregnancy, whereas two states define fetal personhood from every stage beginning in the womb.⁹³ In 2024, the Texas Republican party nearly passed a platform to pass laws that would prohibit all types of blastocyst disposal, including compassionate transfers, requiring either the patient to use their own blastocysts for pregnancy or give the blastocysts up for adoption.⁹⁴

D. BLASTOCYST ADOPTION

While blastocyst adoption provides a moral solution for those who believe an IVF blastocyst is a person and wish to prioritize giving an IVF-fertilized egg a chance at implantation, fetal development, and birth, others hold the position that giving away a fertilized egg with no concern for lineage or immediate

89. See Jacqueline C. Hairston, Amanda Kohlmeier & Eve C. Feinberg, *Compassionate Embryo Transfer: Physician Practices and Perspectives*, 114 *FERTILITY & STERILITY* 552, 552 (2020).

90. *Average Frozen Embryo Transfer (FET) Cost: What to Expect*, GAIA FAM. INC. (last visited Jan. 20, 2026), <https://gaiafamily.com/en-us/learn/editorials/average-cost-frozen-embryo-transfer>.

91. Hairston et al, *supra* note 89, at 555 tbl. 2.

92. PREGNANCY JUSTICE, UNPACKING FETAL PERSONHOOD: THE RADICAL TOOL THAT UNDERMINES REPRODUCTIVE JUSTICE 7 (2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Fetal-personhood.pdf>.

93. Megan Messerly, ‘Scratching Their Heads’: State Lawmakers Take a Closer Look at Personhood Laws in Wake of Alabama Ruling, POLITICO (Feb. 29, 2024, at 05:00 ET), <https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973>.

94. Wagner, *supra* note 27.

relationship with the genetic parents is immoral. As will be discussed below, blastocyst adoption is morally problematic for Muslims and Jews whose beliefs require the preservation of lineage and family integrity. However, as Louisiana's law reflects, there are increasing pressures to require blastocyst adoption.⁹⁵ Beyond state law, the federal government, through the U.S. Department of Health and Human Services' (HHS) Embryo Adoption and Services Program, issues grants to increase awareness of and help facilitate blastocyst adoptions.⁹⁶ Presidential support dates back to the George W. Bush administration.⁹⁷ Under that administration, President Bush delivered remarks on blastocyst adoption and supported blastocyst adoption as a "[l]ife-[a]ffirming [a]lternative . . . for the survival and development of embryos frozen in fertility clinics."⁹⁸ As part of that presidential action, he initiated the first HHS grants to publicize blastocyst adoption programs.⁹⁹

This push is at least partly motivated by moral concerns about abandoned blastocysts. Estimates suggest that across the over five hundred fertility clinics in the United States, there are hundreds of thousands of abandoned blastocysts.¹⁰⁰ A blastocyst is considered abandoned if "a patient has not paid storage fees related to a frozen embryo for five or more years, and fails to respond to letters and calls from the clinic."¹⁰¹ Therefore, some fetal personhood activists advocate for patients to consider donating their blastocysts to other couples, rather than abandoning them without any decision. However, blastocyst adoption can come with serious downsides, as blastocyst adoption agencies often require strict contracts that severely limit the adopting patient's ability to make any decisions about the disposition of the blastocysts.

Snowflakes Embryo Adoption Program is the oldest blastocyst adoption program in the United States and the largest in the world.¹⁰² In 2022, they celebrated the 1,000th birth facilitated through their program.¹⁰³ Under the Snowflakes contract to adopt blastocysts, the patient assuming custody of the

95. Julie O'Donoghue, *Louisiana Lawmakers Move IVF Protection Bill Forward, but Doctors Still Might Be Vulnerable*, L.A. ILLUMINATOR (May 14, 2024, at 12:10 PT), <https://lailluminator.com/2024/05/14/louisiana-lawmakers-move-ivf-protection-bill-forward-but-doctors-still-might-be-vulnerable>.

96. *About the Embryo Adoption Awareness and Services Program*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF POPULATION AFFS., <https://opa.hhs.gov/grant-programs/embryo-adoption-awareness/about-eea> (last visited Nov. 1, 2025).

97. Press Release, George W. Bush, President, Fact Sheet: Valuing Life Through Embryo Adoption and Ethical Stem Cell Research (May 24, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/05/text/20050524-10.html>.

98. *Id.*

99. *See id.*; *see also* U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF POPULATION AFFS., *supra* note 96.

100. Pflum, *supra* note 85.

101. *Id.*

102. Jennifer Brown, *1,000 Babies Born Through Colorado Agency Offering "Adoption" of Frozen Embryos*, COLO. SUN (Mar. 29, 2023, at 4:05 MT), <https://coloradosun.com/2023/03/28/embryo-adoption-loveland-colorado-snowflake>.

103. Karli Adams, *Celebrating the Birth of Snowflake Baby #1000*, NIGHTLIGHT CHRISTIAN ADOPTIONS (Feb. 27, 2023), <https://nightlight.org/2023/02/snowflake-1000th-baby>.

blastocysts must agree that under no circumstances can the blastocysts be thawed for the purpose of disposal.¹⁰⁴ Likewise, no genetic test, either before or after implantation, of the blastocysts is allowed, and the patient must agree to adopt all available blastocysts from the biological parents and must implant all blastocysts that survive the thawing process.¹⁰⁵ Additionally, if a pregnancy results in multiple fetuses, selective reduction is prohibited in all circumstances.¹⁰⁶ These contractual requirements are dictated by the beliefs of the Snowflakes Embryo Adoption Program founder, who believes life begins at fertilization.¹⁰⁷

Ultimately, for some people, IVF is the only path available to having a biological child. While advances in technology, such as freezing and pre-implantation genetic screening, have increased the success rates of IVF, such advances also sometimes result in more blastocysts being created than someone needs. To increase the odds of a live birth, physicians typically fertilize as many eggs as possible, which sometimes results in more frozen blastocysts than a patient can or wants to use.¹⁰⁸ Where the law allows, blastocyst disposal can be as simple as leaving frozen blastocysts out to thaw or donating them for scientific research.

For those to whom this scenario presents a moral crisis, compassionate transfers can be an option. For those who believe frozen blastocysts are human beings, trying to become pregnant with all their blastocysts or donating them to others who will do so is an option. However, fetal personhood legislation could require all IVF patients to enter this scenario. And as the next Part discusses, American IVF patients are facing a future where fetal personhood laws prevent them from following the dictates of their respective belief systems regarding the disposition of IVF blastocysts, requiring them to conform to the religious beliefs of conservative Christianity.

II. JEWISH AND ISLAMIC LAW EMBRYO JURISPRUDENCE

To fully understand the depth of the burden on religious practice and the true scope of religious freedom liability, primers on both Jewish law and Islamic law are required. This Part describes Jewish laws and Islamic law's treatment of abortion and IVF practices. It also addresses abortion, as Jewish and Islamic IVF jurisprudence derive their rulings from their respective abortion jurisprudence. Notably, Jewish and Islamic legal classifications of potential life and legal,

104. Brown, *supra* note 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. Giovanni Cotichio, Maria Antonietta Bonu, Andrea Borini & Carlo Flamigni, *Oocyte Cryopreservation: A Biological Perspective*, 115 EUR. J. OF OBSTETRICS & GYNECOLOGY AND REPROD. BIOLOGY S2, S3 (2004) (“In human in vitro fertilization (IVF), cryopreservation of surplus embryos derived from stimulated cycles is considered to be a well-established procedure and is widely applied in order to maximize cumulative pregnancy rates per cycle of treatment.”).

human life overlap in significant ways. These primers illustrate the burdens that IVF restrictions—like those passed in Louisiana—have on the practice of the respective religions.

A. JEWISH LAW PRIMER

Jewish plaintiffs in cases challenging abortion bans represent a range of religious practices and beliefs, including Reform, Conservative, and Orthodox positions.¹⁰⁹ In their filings, they reference contemporary and historic Jewish scholars and rabbis to evince that their beliefs conflict with current abortion laws.¹¹⁰ This range of beliefs is captured in several compendia of Jewish law on abortion and medical ethics, which are referenced herein. According to Rabbi Daniel Schiff, the “normative *halakhic* positions have always held that some amount of abortion is required . . . and [abound] with complexities and nuances.”¹¹¹ This is true of historical and contemporary halakhic positions with additional diversity of opinion as between Reform, Conservative, and Orthodox Judaism. According to Rabbi Immanuel Jakobovits, Orthodox Chief Rabbi of the United Hebrew Congregations of the Commonwealth from 1967 to 1991, “[O]n one fundamental principle there is complete agreement: full human status is not acquired until birth, and until then the destruction of a product of conception does not constitute homicide culpable as murder.”¹¹²

1. Abortion

Although most Rabbinic authorities do not “consider [a fetus] a living person (*nefesh*),” a fetus “still has some status” such that “most Rabbinic authorities prohibit abortion, except in certain situations,” and consider it “as a serious moral offense even though it is not considered murder.”¹¹³ That said, Rabbi Jakobovits finds that Talmud sages “speak of the fetus in certain legal contexts merely as ‘a limb of the mother,’ not treated as a separate entity.”¹¹⁴ The fetus also lacks the legal capacity to receive gifts or for transactions to be made on its

109. See e.g., *Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 429 (Ind. 2024) (explaining that “Anonymous Plaintiff 1 [] is 39, Jewish, married with one child, [] living in Monroe County[, and] follows a kosher-style diet and is active in her synagogue” and Plaintiff Hoosier Jews for Choice is an organization whose members are “Jewish persons who believe that under Jewish law and religious doctrine, life does not begin at conception, and that a fetus is considered a physical part of the woman’s body, not having a life of its own or independent rights.”); *Sobel v. Coleman*, No. 2024-CA-0849, 2025 WL 1909448, at 1 (Ky. Ct. App. July 11, 2025) (“All three women are also Jewish, which is relevant because they have raised claims regarding freedom of religion”).

110. *Id.*

111. DANIEL SCHIFF, *ABORTION IN JUDAISM* 227–28 (2002).

112. Sir Immanuel Jakobovits, *The Status of the Embryo in the Jewish Tradition*, in *THE STATUS OF THE HUMAN EMBRYO: PERSPECTIVES FROM MORAL TRADITIONS* 62, 62 (G.R. Dunstan & Mary J. Seller eds., 1988).

113. Rosner, *supra* note 41, at 57–58.

114. Jakobovits, *supra* note 112, at 63; see Babylonian Talmud, Hullin 58a:1 (“Rabbi Eliezer holds that a fetus is considered like the thigh of its mother and is rendered a tereifa as part of its body, and Rabbi Yehoshua holds that a fetus is not considered like the thigh of its mother.”) (Adin Even-Israel trans.); see also Babylonian Talmud, Gittin 23b:9 (“A fetus is considered like the thigh of its mother”).

behalf, with the exception of the ability to inherit upon birth, if the fetus' father dies while the fetus is in utero. Rabbi Feldman and Rabbi Rosner conclude that the fetus effectively lacks a "juridical personality" under Jewish law.¹¹⁵

Rabbi Jakobovits also notes that pertinent to the question of embryonic rights or the legal status of embryos "is the rule on the suspension of the Sabbath laws if their observance would cause the slightest risk to life."¹¹⁶ Some rabbis permitted this suspension of the Sabbath laws "specifically out of regard for the life of the unborn child, but others contemplated setting aside the Sabbath law for a fetus only because any risk to its life might also endanger the mother for whose safety the Sabbath would certainly have to give way."¹¹⁷

Likewise, most Rabbinic authorities differentiate between the status of an embryo in the first forty days after conception and the status of a fetus after forty days. The Talmud states that until the fortieth day, the embryo is only a "mere fluid" and "during the first forty days of the pregnancy . . . the [embryo] is not yet considered a living being."¹¹⁸ Although this Talmudic passage actually addresses Levitical laws of impurity, scholars relied on this text "for adopting the most lenient attitude to abortions carried out during the first forty day—in other words, for attributing the least rights or status to this initial period in the life of an embryo."¹¹⁹ Because the embryo during this stage is "regarded as 'mere water' and lacking any specifically human 'rights' . . . its inviolability derives purely from its potential growth into a human being, not from its actual endowment of human qualities."¹²⁰ Based on this text, some rabbis, such as Rabbi Ya'ir Bacharach (seventeenth century), halachic expert and authoritative *minhagim* source for his era, permitted abortion without cause during the first forty days.¹²¹

Furthermore, a passage from Exodus (21: 22–25) heavily informs the halachic understanding of the legal treatment of an embryo/fetus. The passage reads:

22. When [two or more parties] fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact, the payment to be based on reckoning,
23. But if other damage ensues, the penalty shall be life for life,
24. eye for eye, tooth for tooth, hand for hand, foot for foot,

115. DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 254 (1968); see Rosner, *supra* note 41, at 53.

116. Jakobovits, *supra* note 112, at 64.

117. *Id.* at 64–65.

118. Babylonian Talmud, Yevamot 69b:11; Sheila Katz & Danya Ruttenberg, *The Jewish Case for Abortion Rights*, NEWSWEEK (June 29, 2020, at 17:24 ET), <https://www.newsweek.com/abortion-jewish-right-scotus-june-medical-services-louisiana-constitution-1514214>.

119. YAIR LORBERBAUM, IN GOD'S IMAGE: MYTH, THEOLOGY, AND LAW IN CLASSICAL JUDAISM 253 (2015).

120. Jakobovits, *supra* note 112, at 66.

121. Rosner, *supra* note 41, at 62.

25. burn for burn, wound for wound, bruise for bruise.¹²²

Rabbi Feldman and Rabbi Rosner write that Talmudic commentators on this passage “made its teaching explicit: only monetary compensation is exacted of him who causes a woman to miscarry.”¹²³ Regarding the fine demanded for the lost pregnancy, “[m]ost other Jewish Bible commentators including” agree with Rabbi Shlomo Yitzchaki’s (1040–1105) “interpretation” that “the attacker pays only compensation for the loss of the fetus . . . to the husband since the fetus is his property.”¹²⁴ The calculated compensation, explained in Mishnah Torah, is based not on the value of the lost fetus, but “how much the woman would be worth before she gave birth, and how much she would be worth had she given birth.”¹²⁵ While biblical commentaries are not authoritative legal sources, they do indicate how Jewish scholars have understood these foundational religious texts over the ages.

Notably, Torah scholars did not find other biblical passages relevant to the inquiry of induced miscarriage or abortion. For instance, Christian anti-abortion activists may reference Leviticus 24:17 (“If any party kills any human being, that person shall be put to death”¹²⁶) and Exodus 21:12 (“One who fatally strikes another man shall be put to death”) but Torah scholars did not understand these passages as pertinent to the legal permissibility or prohibition of the destruction of an embryo/fetus.¹²⁷ Rabbi Schiff argues that this is largely because the Talmud’s discussion “coalesces around the absence of the ‘full person’ status of a fetus” as the Torah does not make reference to a fetus as a *nefesh* (literally a breathing being) “or an *adam* (human) or an *ish* (man), and was, therefore, without any legal standing as a ‘person.’”¹²⁸ The embryo/fetus is understood as a potential life.¹²⁹

However, Rabbi Rosner notes that some Orthodox rabbis prohibit pregnancy termination at any stage without cause because the embryo “is considered a potential (literally: questionable) human being which, by nature alone, without interference, will become an actual human being . . . [and, therefore] has enough status to prohibit its own destruction.”¹³⁰ Similarly, some rabbis look to the requirement in the Mishnah for an abortion if a mother’s life is endangered to implicate a prohibition on abortion if a mother’s life is not endangered.¹³¹ The most restrictive Jewish abortion jurisprudence prohibits

122. Exodus 22–25.

123. FELDMAN, *supra* note 115, at 255; *see* Rosner, *supra* note 41.

124. Rosner, *supra* note 41.

125. Mishnah Torah, Bava Kamma 4:2. Note that some scholars suggest that the determination of the value of a fetus in antiquity usually included ascertaining the gender and viability of the fetus. SCHIFF, *supra* note 111, at 6.

126. *Leviticus* 24:17.

127. SCHIFF, *supra* note 111, at 28; *Exodus* 21:12.

128. *Id.* (footnotes omitted).

129. Babylonian Talmud, Yevamot 37a:5.

130. Rosner, *supra* note 41, at 62.

131. *Id.*

destruction of any embryo, except for when the mother's life is threatened, as even early potential life requires specific protections.¹³²

However, many of these scholars permit embryo termination at this stage with cause. Depending on the scholars, a range of contexts that qualify as "great need" might permit embryo termination.¹³³ Such contexts include rape, extramarital affairs, threats to maternal health, and fetal abnormalities.¹³⁴ While some scholars limit the permissibility of context-dependent embryo/fetal termination to the first forty days, some scholars extend the timeline to ninety days, based on the proposition in the Talmud that "a pregnancy is generally noticeable only after three months have passed."¹³⁵ Rabbi Schiff recognizes that "there is [likely] no Toraitic prohibition on abortion. . . . [and, therefore if] the prohibition is rabbinic, it certainly may be set aside in cases of sickness [such as mental health], even when no immediate danger is involved."¹³⁶

2. IVF

As Jewish abortion jurisprudence involves no single definitive opinion on the permissibility of abortion, likewise, multiple opinions exist on the halachic permissibility of IVF. Notably, whereas Jewish scholars are generally reluctant to widely permit abortion, especially Orthodox scholars, Jewish scholars are much more inclined to permit IVF. For instance, Rabbi Feldman notes that "[w]ith so pronatalist a . . . tradition, the Jewish response has been understandably affirmative to new reproductive techniques, such as in-vitro fertilization."¹³⁷ That said, the Jewish legal response to the development of IVF has not been unrestricted permissibility.

Jewish law addresses the permissibility and prohibition of all aspects of fertility treatments, as well as the legal status of any resulting children.¹³⁸ Per Rabbi Mordechai Halperin, three Jewish principles suggest the permissibility of IVF: "a) [t]he commandment 'Be fruitful and multiply'; b) [t]he mitzvah of loving kindness (*Gemilut Hasadim*); and c) [t]he importance of family integrity."¹³⁹ The commandment of "[b]e fruitful and multiply" is perhaps the most compelling of the principles. Halachic scholars, like Rabbi Moses ben Maimon/Maimonides, have understood this commandment as an obligation

132. 1 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 327 (1977).

133. FELDMAN, *supra* note 115, at 288; Joseph G. Schenker, *The Beginning of Human Life*, 25 J. ASSIST. REPROD. & GENET. 271, 274 (2008).

134. Schenker, *supra* note 133.

135. Babylonian Talmud, Yevamot 37a:5; Tirzah Meacham (leBeit Yoreh) & Yoelit Lipinsky, *Abortion: Halachic Perspectives*, JEWISH WOMEN'S ARCHIVE (July 27, 2022), <https://jwa.org/encyclopedia/article/abortion>.

136. SCHIFF, *supra* note 111, at 159.

137. DAVID M. FELDMAN, HEALTH AND MEDICINE IN THE JEWISH TRADITION 71 (Martin E. Marty & Kenneth L. Vaux eds., 1986).

138. Rabbi Mordechai Halperin, *Applying the Principles of Halakhah to Modern Medicine: In-Vitro Fertilization, Embryo Transfer and Frozen Embryos*, 9 PROCEEDINGS ASS'N ORTHODOX JEWISH SCIENTISTS 197, 200 (1987).

139. *Id.* at 198.

upon Jewish men to have at least two children.¹⁴⁰ Rabbi Halperin comments that multiple Jewish scholars permit IVF, if it is the only means by which someone can fulfill the commandment of “be fruitful and multiply.”¹⁴¹ This principle is understood “not only by its capacity to increase the number of offspring, but also by the effect it may have on the continued existence and adequate functioning of the family nucleus.”¹⁴²

The mitzvah of loving kindness can be understood as “[l]ove thy neighbor as thyself,” such that “one must use one’s possessions, physical strength and talents in order to lessen the suffering of one’s fellow man.”¹⁴³ Based on this mitzvah, Rabbi Halperin argues that there is an obligation to help infertile couples have children, provided that “no one else is thereby harmed . . . if manipulation of fertility brings into the world offspring which may be legally or otherwise seriously handicapped” then such fertility treatment would contravene the mitzvah of loving kindness.¹⁴⁴

In fulfilling both commandments, however, is the understanding that familial integrity must be maintained. To that end, scholars typically prohibit the use of blastocysts after a divorce, although they do often permit the use of frozen blastocysts after the death of a husband.¹⁴⁵ The importance of maintaining familial integrity has led to other rulings regarding blastocyst and sperm donation that are outside the scope of this piece. Of primary concern is that the correct blastocyst is transferred to a patient during an IVF procedure. To that end, halachically sanctioned organizations, such as PUAH, exist to ensure that the entire process meets halachic requirements.¹⁴⁶ According to Prof. Tsipy Ivry, ethnographic researcher of assisted reproduction in Israel’s religious Jewish communities, the primary service they provide is supervision of “the couple’s semen and ovum from the time they are extracted from their bodies throughout the fertilization process at the IVF laboratory until they are retransplanted as an embryo in the woman’s womb.”¹⁴⁷ They also oversee the correct placement of any extra, frozen blastocysts “in a separate sealed tank . . . reserved especially for PUAH’s couples.”¹⁴⁸

Professor Ivry notes that “there should be no objection” to freezing blastocysts “[i]f the object of freezing is to increase the chances of success of an

140. Mishneh Torah, Marriage 15:2 (limiting obligation of children to men).

141. Halperin, *supra* note 138, at 201.

142. *Id.* at 199.

143. *Id.* (footnotes omitted).

144. *Id.*

145. See Avishalom Westreich, *Present-Day Posthumous Reproduction and Traditional Levirate Marriage: Two Types of Interactions*, 2019 J. L. & BIOSCIENCES 759, 761, 777; see also Barbara Pfeffer Billauer, *The Embryo and the Agunah*, TIMES OF ISR. (Dec. 24, 2019, at 23:45 PT), <https://blogs.timesofisrael.com/the-embryo-and-the-agunah>.

146. See *Our Mission*, PUAH, <https://www.puahfertility.org/about> (last visited Nov. 14, 2025).

147. TSIPY IVRY, *Accommodating Assisted Reproductive Technologies to Rabbinic Law*, in FERTILITY AND ASSISTED REPRODUCTIVE TECH. (ART) 156 (Eleanor L. Stevenson & Patricia E. Hershberger eds., 2016).

148. *Id.*

IVF attempt . . . and to develop the embryo normally towards birth.”¹⁴⁹ This is differentiated from embryo freezing “for other reasons, such as research, [in which case] the matter would depend upon the halachic held status of the embryo during the first 40 days after fertilization, [as] during this period . . . the embryo is considered ‘just (ordinary?) water’ with respect to certain laws.”¹⁵⁰ Some halachic authorities have ruled that fertilized, frozen eggs do not hold the status of an *in utero* embryo.¹⁵¹ For instance, Rabbi Haim David Halevi (1923–1998), Sephardic Chief Rabbi of Tel Aviv-Jaffa from 1973 to 1998, held the opinion that:

All ova that are fertilized in vitro do not have the legal status of an embryo; one does not violate the Sabbath on their behalf, and it is permissible to discard them if they were not chosen for transfer, since the law of abortion only applies to [an embryo] in the womb . . . In vitro, there is no prohibition whatsoever.¹⁵²

Rabbi Mordechai Eliyahu (1929–2010), Sephardic Chief Rabbi of Israel from 1983 to 1993, rules similarly, but distinguishes between frozen blastocysts designated for a transfer and those held in reserve. He stated, “[f]ertilized ova that have been designated for transfer to a woman’s uterus should not be destroyed, since a live fetus will develop from them, but fertilized ova that have not been designated for transfer may be discarded.”¹⁵³ Rabbi Feldman and Rabbi Rosner acknowledge that many other scholars recognize that “[a] fertilized egg not in the womb, but in the environment—the Petri dish—in which it can never attain viability, does not yet have humanhood. It may be discarded or used for the advancement of scientific knowledge.”¹⁵⁴

While well-discussed, there is no consensus among halachic authorities on the permissibility of IVF or the disposal of frozen blastocysts. For instance, Haredi Rabbi J. David Bleich argues that “there are no obvious grounds for assuming that nascent human life may be destroyed simply because it is not sheltered in its natural habitat, i.e., its development takes place outside the mother’s womb.”¹⁵⁵ Furthermore, just because a rabbi holds a more permissive

149. Mordechai Halperin, *In-Vitro Fertilization, Embryo Transfer, and Embryo Freezing*, 1 JEWISH MED. ETHICS 25, 28 (1988).

150. *Id.*

151. See e.g., Richard V. Grazi & Joel B. Wolowesky, *Multifetal Pregnancy Reduction and Disposal of Untransplanted Embryos in Contemporary Jewish Ethics*, 165 AM. J. OF OBSTETRICS & GYNECOLOGY 1268, 1269 (1991); Shlomo M. Brody, *Is Destroying Frozen Embryos Permitted in Jewish Law?*, JERUSALEM POST (June 8, 2024, at 08:38 MT), <https://www.jpost.com/judaism/article-805256>.

152. Hayyi David Halevi, *On Fetal Reduction and the Halakhic of In Vitro Embryos*, 47 APPLIED SOC. SCI. INDEX & ABSTRACTS 14, 15 (1990).

153. Rabbi Dina Rosenberg, *Complexities of Fertility and Jewish Law*, SEFARIA (Feb. 26, 2024), <https://www.sefaria.org/sheets/547402.18?lang=bi&with=AboutSheet&lang2=en> (quoting Rabbi Mordechai Eliyahu).

154. COMPENDIUM ON MEDICAL ETHICS: JEWISH MORAL, ETHICAL, AND RELIGIOUS PRINCIPLES IN MEDICAL PRACTICE 51 (Rabbi David M. Feldman & Fred Rosner eds., 1984) [hereinafter COMPENDIUM ON MEDICAL ETHICS].

155. J. David Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion*, 25 TRADITION 82, 97 (1991).

opinion on abortion does not necessarily mean that they likewise hold a permissive opinion on IVF. Rabbi Eliezer Waldenberg (1915–2006), a halachic authority on complex medical issues, maintained one of the most restrictive opinions on IVF. Bioethics and Jewish law researcher who previously served on the Conservative Committee on Jewish Law and Standards, Rabbi Aaron L. Mackler, in a survey of halachic scholarly works on IVF, writes that according to Rabbi Waldenberg, IVF “violates the prohibition against ‘wasteful emission of seed’” and that the technology is so far from natural conception that it is “upsetting the order of creation.”¹⁵⁶ However, Rabbi Waldenberg is a notable example of the differences in how Jewish scholars approach questions of abortion and IVF. In contrast to his view on IVF, Rabbi Waldenberg’s opinion on the permissibility of abortion in the context of fetal anomalies is one of the most permissive opinions and has been widely adopted. He recognizes maternal psychological health, in addition to physical health, in the context of fetal anomalies as grounds for an abortion.¹⁵⁷

In addition to allowing IVF more broadly, many halachic authorities allow for the disposal of frozen blastocysts either by means of defrosting or their use in scientific research, followed by defrosting. For instance, Rabbi Feldman and Rabbi Rosner write that using “[a] fertilized egg not in the womb . . . for the advancement of scientific knowledge” is permissible.¹⁵⁸ Furthermore, they argue that “we are not killing a human being . . . we are rather taking a part of an object that has not yet achieved the status of a formed fetus, let alone a human being.”¹⁵⁹ However, they generally limit such research to frozen embryo blastocysts “originally created for purposes of overcoming infertility,” not created for the purpose of research, and require that the research benefit humanity.¹⁶⁰

Finally, a patient who decides not to use frozen blastocysts may choose to donate the frozen blastocysts, instead of disposing of them. Although some halachic authorities allow for blastocyst donation, many find blastocyst donation halachically problematic, as it could result in future incest (because resulting children would not know their siblings) and could result in a child not being raised Jewish (if donated to a non-Jewish couple).¹⁶¹ These authorities find the

156. Rabbi Aaron L. Mackler, *In Vitro Fertilization*, 1995 RESPONSA COMM. ON JEWISH L. & STANDARDS 510, 513 n. 10 (quoting 15 ELIEZER WALDENBERG, TZITZ ELIEZER 115–20 (1982)).

157. Melanie Mordhorst-Mayer, Nitzan Rimon-Zarfaty & Mark Schweda, ‘Perspectivism’ in the Halakhic Debate on Abortion Between Moshe Feinstein and Eliezer Waldenberg—Relations Between Jewish Medical Ethics and Socio-Cultural Contexts, *WOMEN IN JUDAISM: A MULTIDISCIPLINARY E-JOURNAL*, Feb. 18, 2014, at 1, 12.

158. COMPENDIUM ON MEDICAL ETHICS, *supra* note 154.

159. RABBI ELLIOT N. DORFF, COMM. ON JEWISH L. AND STANDARDS, STEM CELL RESEARCH 11 (2002).

160. *Id.* at 12.

161. Jackie Hajdenberg, *Groups Launched to Help Jewish Couples with IVF Face Uncertainty After Roe Reversal*, *TIMES OF ISR.* (July 15, 2022, 06:08 PT), <https://www.timesofisrael.com/groups-launched-to-help-jewish-couples-with-ivf-face-uncertainty-after-roe-reversal>.

passive disposal of frozen blastocysts through defrost as permissible and preferable.¹⁶²

Ultimately, many halachic scholars permit blastocyst disposal within the first forty days after conception. Some do so without any reservation, while others require a qualifying need. Scholars are more inclined to permit blastocyst destruction in the context of IVF, as the blastocyst is *in vitro*, not *in utero*, and is part of the process of facilitating the fulfillment of other commandments. In either context, the diversity of opinion of halachic scholars provides a range of halachically authoritative positions on the permissibility of abortion and frozen blastocyst destruction within the first 40 days. These positions are in direct contrast to the fetal personhood movement, which seeks to impose distinctly Catholic and Evangelical understandings of human life upon everyone. These Christian positions not only contravene prevailing legal opinions in Jewish law but also those of Islamic law, as will be discussed below.

B. ISLAMIC LAW PRIMER

Islamic law, like Jewish law, recognizes different stages of embryonic and fetal development and provides various levels of permissibility and protection depending on those stages. As in Jewish law, some scholars¹⁶³ generally allow abortion without cause in the first forty days, others require a permissible circumstance, whereas others limit abortion to only the most extreme circumstances. Additionally, while most scholars do not attribute any legal personhood until 120 days after implantation, some scholars attribute it at forty days after implantation.¹⁶⁴ These differences of opinion predominantly are found between the different schools of Sunni and Shia thought, although intra-school differences also exist. The starkest differences are between the majority opinions held within the Maliki and Hanafi schools.

1. Abortion

Scholars based these timelines on reading together the primary religious texts of the Quran and Hadith (recorded statements of the Prophet Muhammad). Of particular importance in legal interpretation is the Quranic passage describing the stages of embryonic and fetal development. This passage states:

We [*i.e.* God] first created the human being from an essence of clay, then placed it, a drop of fluid (*nufta*) in a secure enclosure. The drop of fluid We made a clot (*'alaqa*), and the small a lump of flesh (*mudgha*). This We fashion

162. *Id.*

163. See Usaama al-Azami, *Why We Need 'Ulamā': Islamic Knowledge in a Secular Age*, YAQEN INST. FOR ISLAMIC RSCH. (Oct. 22, 2025), <https://yaqeeninstitute.org/read/post/why-we-need-ulama-the-importance-of-seeking-islamic-knowledge-from-scholars>. Scholars, or ulama, of Islamic law refer to people of knowledge.

164. See Hamza Yusuf, *When Does a Fetus Become Human?*, 2 RENOVIATIO 51, 61 (2018).

into bones, then clothes the bones with flesh, thus bringing forth another creation. Bless be God, the noblest of creators.¹⁶⁵

Scholars interpreted this passage in conjunction with statements of the Prophet Muhammad (Hadith). Two Hadith also speak to embryonic fetal development. The first states:

Each of you is gathered in his mother's womb for forty days; then it is a clot of blood (*'alaqa*) for the same period; then it is a clump of flesh (*mudgha*) for the same period. Then God sends an angel who is commanded regarding four things: its occupation, its livelihood (*rizqihi*), his span of life, and its felicity or damnation in the afterlife. Then the spirit is breathed into it.¹⁶⁶

This hadith is further supported by similar hadiths indicating a transitional period at around forty days, such as: "When the mixed drop has spent forty-two days in the womb, God sends an angel to it and the angel forms it and creates its hearing, sight, skin, flesh and bones."¹⁶⁷

In understanding the Quranic passage and Hadith together, scholars defined embryonic/fetal development into three, forty-day periods, totaling 120 days. Many scholars interpreted these to mean that during the first forty days, the embryo is a "mixed drop," similar to the interpretation of Jewish scholars that the embryo is "mere water" for the first forty days. In a survey of scholarship on abortion, Professor Thomas Eich, professor of Islamic Studies focusing on medical ethics, found that most scholars focused their interpretations on the human form that develops at the 120-day period.¹⁶⁸ Later, scholars came to interpret the 120-day period as when ensoulment occurs (the traditional majority view). According to Professor Salman Younas, legal expert in Hanafī jurisprudence, some scholars, especially those of the Hanafī school of jurisprudence, permitted abortion up to the 120-day period without cause, "as long as some physical human features are not clearly discernible, because if these features are not discernible, the fetus is not a child."¹⁶⁹

According to Hamza Yusuf, President of Zaytuna College and legal expert in Mālikī jurisprudence, other scholars, especially those of the Mālikī school of jurisprudence, argued that "all the stages occur during a forty-day period," interpreting the phrase "a like period" from the Hadith above to "refer back to the first forty, and thus all the stages [described in the hadith] occur during a forty-day period."¹⁷⁰ As a result, the majority opinion within the Mālikī school

165. *Quran*, 23:12–14 (Rabea Benhalim trans.).

166. SAHIH AL-BUKHARI, *Prophets* 3332; *id.* *Beginning of Creation* 3208; *id.* *Divine Will* 6594; *id.* *Oneness, Uniqueness of Allah* 7454.

167. SAHIH MUSLIM, *Book of Destiny* 2645a.

168. Thomas Eich, *Induced Miscarriage in Early Mālikī and Hanafī Fiqh*, 16 *ISLAMIC L. & SOC.* 302, 303, 336 (2009).

169. Shaykh Salman Younas, *Reflections on Muslim Approaches to the Abortion Debate: The Problem of Narrow Conceptualization*, MUSLIMMATTERS (Aug. 19, 2019), <https://muslimmatters.org/2019/08/19/reflections-on-muslim-approaches-to-the-abortion-debate-the-problem-of-narrow-conceptualization>.

170. Yusuf, *supra* note 164.

prohibits abortion in all stages of pregnancy, with universal exception for the life of the mother and some scholars making exceptions for circumstances such as rape.¹⁷¹ However, even these scholars who generally find abortion impermissible at all stages do not hold that abortion is legally equivalent to murder.

Similar to Jewish scholars' interpretation of Exodus 21, 22–25, Islamic scholars base their rulings on the hypothetical of an attacked woman miscarrying. This hypothetical is as follows:

If a man beats a woman's stomach and she expels a dead embryo, a *ghurra* of a male or female slave is due. This equals 500 dinars. It has reached us from the Messenger of God that he did this (*annahu ja'ala dhālika*) and that [the fine] is due on the perpetrator's blood-money group (*'āqila*) within a year. If the embryo leaves [the pregnant woman's body] alive and dies afterwards, the full *diya* is due on the *'āqila*, and the perpetrator must perform *kaffāra* [fasting or freeing a slave].¹⁷²

The *diya* is the full, blood money fine due for murder.¹⁷³ It would only be due if the pregnant woman dies or if the fetus is born alive and subsequently dies.¹⁷⁴ If the woman survives the attack but miscarries, then the *ghurra* instead of the *diya* is due, which is one-twentieth of the amount of the *diya*.¹⁷⁵ Scholars disagree as to whether this fine is due to all potential heirs of the fetus, to the father, or to the woman alone, but scholars universally agree that the *ghurra*, not the *diya*, is due.¹⁷⁶ Those scholars who held that the *ghurra* should be paid to the woman alone did so based on the reasoning that payment for miscarriage was akin to “compensation paid for the loss of body parts such as fingers and teeth.”¹⁷⁷

Early Islamic scholars also interpreted scenarios strikingly equivalent to those debated in America today. For example, Katz notes that the Caliph Omar ibn al-Kattab, second caliph in Sunni Islam, ruling from 634–644 CE, ruled on a case where a woman sought an abortion and subsequently lost the pregnancy.¹⁷⁸ He ruled that the abortion provider “must free a slave (as expiation [*kaffāra*, for her sins]) and pay a *ghurra* (fine) to the father.”¹⁷⁹ However, the four Sunni schools of jurisprudence interpreted this ruling differently. According to the Hanafīs and Mālikīs, the *kaffāra* “is an optional act of devotion . . . since the fetus is not unqualifiedly a human life.”¹⁸⁰

171. Younas, *supra* note 169.

172. Eich, *supra* note 168, at 326.

173. *Id.* at 316.

174. *Id.* at 316–17.

175. *Id.* at 317.

176. Marion Holmes Katz, *The Problem of Abortion in Classical Sunni Fiqh*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 25, 29 (Jonathan E. Brockopp ed., 2003).

177. *Id.* (citing 2 ABU'L-WALID IBN RUSHD, BID'AYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID 503 (1353 A.H./1935 C.E.)).

178. *Id.* at 28.

179. *Id.*

180. *Id.*

Across Sunni and Shia schools of classical Islamic jurisprudence, there are roughly four main positions on abortion. Naureen Shameen, human rights attorney advocating for abortion access for Muslims, outlines these four positions:

- 1) Legally permissible without need for legitimate excuse within either the 120-day or 40-day timeline.
- 2) Legally permissible, within the above time frames, provided there is a valid reason, such as rape, the health of the mother is at risk, conception outside of marriage, inability to continue breastfeeding an existing child, etc.
- 3) Abortion within any time frame is disliked/*makruh* but not forbidden/*haram*.
- 4) Abortion is prohibited within any time frame, except to save the life of the mother.¹⁸¹

This range of opinions reflects “the normative pluralism that exists on the matter in the shariah.”¹⁸² Likewise, difference of opinion also exists on the permissibility of IVF under Islamic law.

2. IVF

Islam considers procreation as one of the fundamental rights of marriage, and marriage is considered half of one’s faith.¹⁸³ Based on Quranic verses and statements of the Prophet Muhammad, procreation is considered a highly recommended act of devotion. Such verses state: “And God has made for you from yourselves mates and has made for you from your mates sons and grandchildren”¹⁸⁴ and “Wealth and children are the adornments of the worldly life.”¹⁸⁵ Likewise, the Quran has a specific prayer for offspring: “Our Lord, grant us from among our wives and offspring comfort to our eyes.”¹⁸⁶ The Prophet Muhammad encouraged procreation and discouraged marriage to someone known to be infertile.¹⁸⁷ The Quran also has narratives that address infertility, such as Sarah and Abraham, who were blessed with a child, despite years of infertility and advanced age.¹⁸⁸ However, Muslims are not limited to prayer to resolve infertility. The Prophet Muhammad stated that “for every disease God

181. Naureen Shameen, *The Future of Abortion Rights in Islam*, OPENDEMOCRACY (Sep. 2, 2013), <https://www.opendemocracy.net/en/5050/future-of-abortion-rights-in-islam>. Procreation is considered so fundamental to marriage that infertility is recognized as grounds for divorce. Hadith of the Prophet Muhammad states: “Allah has assisted him in half of his religion. Let him fear Allah regarding the second half.” Abu Amina Elias, *Hadith on Nikah: Marriage is Half of the Religion* (Apr. 16, 2013), <https://www.abuaminaelias.com/daily-hadithonline/2013/04/16/nikah-half-deen>.

182. Younas, *supra* note 169.

183. See ABDULAZIZ SACHEDINA, *ISLAMIC BIOMEDICAL ETHICS* 127 (2009); see Elias, *supra* note 181.

184. *Quran* 16:72 (Rabea Benhalim trans.).

185. *Id.* at 18:46.

186. *Id.* at 25:74.

187. Ma’qil bin Yassar narrated that the Prophet Muhammad stated: “Marry the one who is fertile and loving, for I will boast of your great numbers.” SUNAN AN-NASĀ’I, *Book of Marriage* 3229.

188. *Quran* 11:69 (Rabea Benhalim trans.).

has created a cure except senility [meaning death]. So, progeny of Adam seek cure for your ailments, but do not use forbidden things.”¹⁸⁹ Based on this Hadith, Muslims are religiously encouraged to find treatment for biological problems, including advances in medical science.

Based on these Quranic verses and hadith, scholars not only permit IVF but categorize it as a religiously recommended act for those who would not otherwise be able to procreate.¹⁹⁰ Islamic scholars generally permit assisted reproductive technologies, provided the technology is not used to achieve impermissible ends.¹⁹¹ Permissibility is based on the doctrine of necessity, and the ability of technology to remove difficulty.¹⁹² Furthermore, the technology itself only contravenes the routine methods of reproduction, not any aspect of Islamic law itself. Regarding blastocyst disposal, Islamic jurists almost universally agree that “it is not murder to let a frozen blastocyst be discarded.”¹⁹³ Likewise, blastocyst disposal is “not considered abortion since the definition of abortion is to expel contents from the uterus.”¹⁹⁴

Similar to Jewish scholars, some Islamic jurists have distinguished between the blastocyst *in vitro* from that of the embryo *in utero*, stating: “Islamic law does not place any [judgment] on a woman’s [fertilized] egg except after it is in the womb. There is no [judgment] on it before it is in the womb.”¹⁹⁵ Likewise, Professors Mahdi Zahraa and Shaniza Shafie write:

[W]e should make a clear distinction between the fertilized ovum in the dish and the fertilized ovum in the womb of its mother. Indeed, an embryo is valuable. It has the potential to grow into a human being, but it is not yet a human being . . . If these embryos were treated as full human, it would have been forbidden to produce them in excess and to destroy them later. No one treats them as humans . . . We disagree with the Catholic position that this is ‘equivalent to infanticide.’¹⁹⁶

Other scholars distinguish between actual and potential life, as grounds for blastocyst disposal. For instance, Darius Atighetchi points to the National Committee of Medical Ethics of Tunisia, which finds that as “the embryo is a

189. 2 MISHKAT AL-MASABIH 947 (James Robson, trans., 1975).

190. MOHAMMED ALI AL-BAR & HASSAN CHAMSI-PASHA, CONTEMPORARY BIOETHICS: ISLAMIC PERSPECTIVES 176 (2015).

191. Zachariah Matthews, *A Review of the Rulings by Muslim Jurists on Assisted Reproductive Technology and Reproductive Tissue Transplantation*, RELIGIONS, Sep. 3, 2021, at 1, 10.

192. *See id.* at 2, 10 (explaining that “a majority of contemporary Muslim jurists . . . by-and-large permit assisted reproductive technology and tissue transplantation”).

193. *Id.* at 7.

194. *Id.*

195. *Stem Cell Research (English)*, MAJLIS UGAMA ISLAM SINGAPURA (Feb. 21, 2025), <https://www.muis.gov.sg/resources/khutbah-and-religious-advice/fatwa/stem-cell-research—english>; *see also* Matthews, *supra* note 191, at 7.

196. Mahdi Zahraa & Shaniza Shafie, *An Islamic Perspective on IVF and PGD, with Particular Reference to Zain Hashmi, and Other Similar Cases*, 20 ARAB L.Q. 152, 171–72 n. 98 (2006).

potential person; the frozen embryo should not be kept after the period of fertility of the couple or the death of one of the partners after a limit fixed by the law.”¹⁹⁷

Regarding disposal of frozen blastocysts for medical research, scholars apply two principles of Islamic law. First, “[t]here should not be any harm, and nothing should be done to cause harm.”¹⁹⁸ Second, “[h]arm should be avoided.”¹⁹⁹ Based on the understanding that an early-stage embryo is not ensouled and does not have human form, scholars permit medical research that would benefit humanity, provided that both parents consent, the research is for an Islamically permissible therapeutic benefit, and the blastocysts were not created solely for research purposes.²⁰⁰ That said, scholars prohibit any research that would result in human cloning, as that would violate familial lineage and result in a loss of human dignity, such as using donor sperm.²⁰¹

A few scholars also call for blastocyst disposal within the context of IVF, but prefer that excess blastocysts not be created in the first place. They prefer an unpopular IVF approach of freezing eggs, instead of blastocysts, and only fertilizing them as needed. This is not a common IVF treatment, as frozen eggs typically do not survive thawing as well as frozen blastocysts, resulting in diminished odds of a live birth.²⁰² However, even scholars who prefer egg freezing to fertilized egg freezing require that any excess blastocysts be left in the dish to die naturally.²⁰³ The concern of these scholars is similar to that of Jewish scholars who require halachically compliant observation of IVF to ensure that the correct embryo is transferred. Of primary concern to the scholars is the possibility that frozen blastocysts might inadvertently be transferred to the wrong patient, so they hold the position that it is better to dispose of the blastocysts than run that risk.

This concern arises because one of the five fundamental objectives of Islamic law, *maqasid al-shariah*, is preservation of lineage.²⁰⁴ Interestingly, another one of the fundamental objectives is preservation of life.²⁰⁵ However, because an IVF blastocyst is not yet considered legal, human life under Islamic law, as it is in the earliest stages of development and *in vitro*, the preservation of lineage takes precedence. Therefore, from an Islamic legal perspective, the

197. 31 DARIUSCH ATIGHETCHI, ISLAMIC BIOETHICS: PROBLEMS AND PERSPECTIVES 158 (2007).

198. *Stem Cell Research (English)*, *supra* note 195.

199. *Id.*

200. *Id.*

201. Matthews, *supra* note 191, at 7–8.

202. See Mary Ellen Pavone, Joy Innes, Jennifer Hirschfeld-Cytron, Ralph Kazer & John Zhang, *Comparing Thaw Survival, Implantation and Live Birth Rates from Cryopreserved Zygotes, Embryos and Blastocysts*, 4 J. HUM. REPROD. SCIS. 23, 24–26 (2011); Vitaly A. Kushnir, David H. Barad & David F. Albertini, *Outcomes of Fresh and Cryopreserved Oocyte Donation*, 314 JAMA 1 (2015), <https://jamanetwork.com/journals/jama/fullarticle/2425734>.

203. *Embryo Reduction: Islamic View*, ISLAMONLINE, <https://fiqh.islamonline.net/en/embryo-reduction-islamic-view> (last visited Nov. 19, 2025).

204. See JASSER AUDA, MAQASID AL-SHARIAH AS PHILOSOPHY OF ISLAMIC LAW: A SYSTEMS APPROACH 3, 22 (2008).

205. *See id.*

religious obligation is to ensure that there is not a violation of preservation of lineage over requiring that the IVF blastocyst have an opportunity at full human legal life vis-à-vis blastocyst adoption.

For this reason, even when scholars allow continued frozen blastocyst storage, they usually require the disposal of frozen blastocysts once a couple has completed their family, if the woman is no longer able to carry children, and in the event of divorce or death of either spouse.²⁰⁶ This is because death or divorce causes the end of the marriage contract, and the transfer of any blastocyst, and resulting pregnancy, would occur outside of a marriage contract. Some scholars do allow blastocyst transfers upon the death of a husband, provided the transfer is within four months and ten days after the death of the husband.²⁰⁷

In discussing the Sunni and Shia positions on blastocyst donations, Atighetchi notes that Sunni scholars prohibit blastocyst donation, as they hold that this kind of donation “confuses issues of kinship, descent, and inheritance.”²⁰⁸ Many Shia scholars hold the same view. “[N]amely, they agree that third-party donation should be strictly prohibited,”²⁰⁹ requiring frozen blastocyst disposal in the event of excess blastocysts. However, some Shia scholars permit blastocyst donation as “the Supreme Jurisprudent of the Shi’a branch of Islam, Ayatollah Ali Hussein Khamanei, the successor to Iran’s Ayatollah Khomeini, issued a *fatwa* [legal opinion] effectively permitting donor technologies to be used.”²¹⁰ Shia scholars that permit blastocyst donation based on this fatwa require that the adoptive parents recognize the resulting child as adopted/fostered in line with the Islamic laws of adoption/fostering.²¹¹

Notably, even the Islamic schools of jurisprudence that have the most restrictive opinions on the permissibility of abortion, almost universally allow for IVF and the creation of frozen blastocysts, provided the couple creating the blastocysts are legally married. Nearly all scholars allow the disposal of frozen blastocysts as they are not yet *in utero*, and some scholars require the disposal of frozen blastocysts if there is a possibility that lineage might become confused, such as in the context of divorce or death of a spouse. The Islamic positions on both abortion and frozen blastocyst disposal overlap significantly with the Jewish positions. They both differ significantly from the Evangelical and Catholic positions that fetal personhood activists seek to impose vis-à-vis litigation and legislation upon the rest of the country. The Islamic and Jewish positions are compared below and discussed in the context of the American fetal personhood movement.

206. See Marcia C. Inhorn, *Fatwas and ARTs: IVF and Gamete Donation in Sunni v. Shi’a Islam*, 9 J. GENDER, RACE & JUST. 291, 300 (2005).

207. *Id.*

208. *Id.* at 302.

209. *Id.* at 303.

210. *Id.* at 304.

211. *Id.* at 300.

C. ISLAMIC AND JEWISH LAW IN COMPARISON

The Jewish and Islamic legal traditions are legally pluralistic, recognizing a range of authoritative legal opinions. In both, a single, definitive position on abortion and IVF has not emerged.²¹² Rather, there are majority and minority opinions that have developed over time, and both legal traditions recognize the validity of these opinions. Furthermore, both understand potential human life as emerging in timed phases. In the first forty days of a pregnancy, Jewish law describes the blastocyst as “mere water” and Islamic law describes it as a “mixed drop.”²¹³ During this period of time, the greatest permissibility exists under both Jewish and Islamic law to terminate a pregnancy or dispose of an IVF blastocyst, with increased protections corresponding with increased fetal development.²¹⁴

Some of these similarities are unsurprising, given that the abortion jurisprudence of both traditions originates out of a similar hypothetical of a woman miscarrying after she is violently attacked. Within the Jewish legal tradition, Exodus 21: 22–23 lays out the legal implications of a woman miscarrying after an attack and describes the legal repercussions as a fine, not the legal repercussions of murder.²¹⁵ Similarly, Islamic law requires the payment of a fine for the loss of a pregnancy after an attack equal to one-twentieth the fine for murder.²¹⁶ Although these hypotheticals may carry other moral implications, they do not carry the legal weight of murder. This hypothetical, in part, led to the understanding in both legal traditions of embryonic and fetal life as “potential life.”²¹⁷

Accordingly, both legal traditions have developed similar IVF jurisprudence, as the legal standing within each legal tradition of early embryonic life overlap significantly. As IVF blastocysts fall early within the first forty days, they are generally afforded the least protection. In addition to an IVF blastocyst’s early stage of development, both Islamic and Jewish scholars distinguish between a blastocyst *in vitro* and an embryo *in utero*.²¹⁸ As the disposal of an IVF blastocyst does not involve the removal of an embryo from the woman’s body, but rather allows the blastocyst to defrost, scholars find

212. See, e.g., Sharmin Islam, Rusli Bin Nordin, Ab Rani Bin Shamsuddin, Hanapi Bin Mohd Nor & Abu Kholdun Al-Mahmood, *Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics*, J. ISLAMIC MED. ASS’N N. AM., April 13, 2013, at 1, 5 (providing an Islamic view on the ethics of surrogacy); Michael R. Moodie, James Conn, Azizah Y. al-Hibri, Michael J. Brody, Peter J. Cataldo, Wael B. Hallaq, Elliot N. Dorff, Russell E. Smith & William E. May, *Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 LOY. L.A. INT’L & COMPAR. L.J. 9, 53 (1993) (comparing Islamic and Jewish views on abortion and IVF).

213. See Schenker, *supra* note 133, at 273–74; Yusuf, *supra* note 164, at 59.

214. See, e.g., Jakobovits, *supra* note 112, at 66–67; Yusuf, *supra* note 164, at 65.

215. See Exodus 21, 22–23.

216. Muhammed V. Stodolsky & Aasim I. Padela, *Abortion in Hanafi Law*, in ABORTION: GLOBAL POSITIONS AND PRACTICES, RELIGIOUS AND LEGAL PERSPECTIVES 127, 132–33 (Alireza Bagheri, ed., 2021).

217. Zahraa & Shafie, *supra* note 196, at 170.

218. *Id.* at 168–171; see Billauer, *supra* note 145.

greater permissibility for the disposal of an IVF blastocyst than even an early abortion.²¹⁹ Additionally, both Jewish and Islamic scholars share concerns about potential threats to familial integrity if a blastocyst is transferred into the wrong patient. Jewish scholars have addressed this concern by providing services such as third-party observers to ensure that all aspects of IVF are kosher.²²⁰ Islamic scholars have addressed this concern by requiring blastocyst disposal in certain circumstances. There is difference of opinion regarding the permissibility of using frozen blastocysts in the event of a spouse's death, with Jewish scholars generally permitting transfer and Islamic scholars generally prohibiting it.²²¹

There are also shared contexts of when blastocyst disposal is required under Jewish and Islamic law. For instance, most scholars require the disposal of frozen blastocysts in the event of divorce, as the resulting pregnancy would not occur under a valid marriage contract.²²² Furthermore, both Jewish and Islamic scholars allow for scientific research on frozen blastocysts, provided that 1) the blastocysts were originally created with the intent of reproduction, not for research alone; 2) the research is for the benefit of humanity; and 3) the research does not contravene preservation of family lineage or a loss in human dignity.²²³ However, fetal personhood laws, like those found in Louisiana, prevent Muslim and Jewish patients from disposing of their IVF blastocysts in situations that their religions require.

III. CONTEMPORARY CONTROVERSIES

IVF has increasingly become a path to parenthood for people who would otherwise not be able to have a biological child. This often-expensive process is fraught with uncertainty, and physicians try to optimize the possibility of patients growing their families to the size they desire. This also means that because of the procedures and common practices of IVF patients, IVF blastocyst disposal becomes more likely. However, this reality contravenes the beliefs of many conservative, Christian activists who seek to legislatively limit—or even prohibit—IVF blastocyst disposal through litigation and legislation.

This Part first describes the rise of the fetal personhood movement, and how it has taken shape in legal and policy circles. Hoping to maintain the momentum from recent legal victories, the fetal personhood movement provides the ideological support structure for legal and policy interventions that aim to protect fertilized eggs. Moreover, several bouts of blastocyst litigation illustrate how the fetal personhood movement seeks to spread its values through different areas of law—divorce proceedings, contract suits, and accidental destruction

219. See Bleich, *supra* note 155, at 72; Mackler, *supra* note 156, at 519.

220. Amy Klein, *Koshering Your IVF Embryo*, TABLET (July 8, 2020), <https://www.tabletmag.com/sections/science/articles/in-vitro-fertilization-masgichah>.

221. See ATIGHETCHI, *supra* note 197, at 147; Billauer, *supra* note 145.

222. ATIGHETCHI, *supra* note 197, at 147.

223. See Matthews, *supra* note 191, at 7–8; COMPENDIUM ON MEDICAL ETHICS, *supra* note 154.

cases. Such litigation is then compared to recent state legislation that establishes severe burdens on IVF disposal, which further entrenches conservative Christian values on IVF patients.

This Part concludes with a discussion on how such tactics and results have created potential First Amendment violations under the Establishment and Free Exercise Clauses. By spreading its influence throughout state courts and legislatures, the fetal personhood movement has both enshrined conservative, Christian beliefs into law and prevented others from following their own belief systems.

A. FETAL PERSONHOOD

Litigation over IVF blastocysts exists, at least in part, because no federal or uniform state law exists as to the legal treatment of IVF blastocysts. Many scholars have addressed the inconsistencies and difficulties faced over IVF blastocyst disposition during divorce.²²⁴ Despite calls for federal or uniform state legislation on the treatment of frozen blastocysts, courts' treatment of IVF blastocysts varies widely from state to state.²²⁵ Some scholars have looked to resolve inconsistencies between court treatment and the resulting uncertainty for IVF patients through federal legislation.²²⁶ Scholars such as Mary Ziegler have proposed that states should adopt legislation "detailing the requirements of an enforceable embryo disposition" akin to the Uniform Premarital and Marital Agreements Act.²²⁷ This lack of uniformity further complicates courts' treatment of frozen embryos post-*Dobbs*.

The *Dobbs* decision overturning *Roe* not only upended abortion rights in the United States but also brought new support for the fetal personhood movement, which seeks to recognize the legal personhood of fertilized eggs.²²⁸

224. See, e.g., Mark C. Haut, Note, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 494 (1999); Ziegler, *supra* note 72, at 517; Stacie L. Provencher, *Family Law—States Should Create a Heightened Standard of Review for Contracts That Determine the Disposition of Frozen Embryos in Contested Divorce Cases*, 42 W. NEW ENG. L. REV. 295, 298 (2020); Debra B. Walker & Shalyn L. Caulley, *The Pre-Embryo Quandary: How to Eliminate Disputes That Commonly Arise After Couples Commence IVF*, 2016 U. ILL. L. REV. 1361, 1362–63; Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 407 (2013); Anna El-Zein, Note, *Embryo-Uh-Oh: An Alternative Approach to Frozen Embryo Disputes*, 82 MO. L. REV. 881, 882–83 (2017); Chi Steve Kwok, *Baby Contracts*, 110 YALE L.J. 1287, 1287 (2001); Alison P. Barbiero, Comment, *What to Expect Before You're Expecting: Clarifying Florida's Statute Governing Pre-Embryo Disposition Agreements and Divorce*, 40 NOVA L. REV. 257, 258 (2017); Olivia Lin, *Bioethics and the Disposition of Cryopreserved Preembryos: Why Autonomy-Based Contract Theory Does Not Work*, 34 FAM. ADVOC. 38, 38 (2011); Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191, 197 (2013).

225. See Walker & Caulley, *supra* note 224, at 1366 (proposing that Congress pass legislation requiring couples to enter into binding contracts regarding embryo disposition in the event of a dispute); see also Ziegler, *supra* note 72, at 562 (proposing that states adopt uniform legislation detailing the requirements of an enforceable embryo disposition contract a to the Uniform Premarital and Marital Agreements Act).

226. See, e.g., Walker & Caulley, *supra* note 224, at 1366.

227. Ziegler, *supra* note 72, at 519.

228. Carvalho, *supra* note 17.

The Supreme Court wrote in *Dobbs* that “[a]bortion destroys what [*Roe v. Wade* and *Planned Parenthood of Se. Penn. v. Casey*] call[ed] ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”²²⁹ This shift is markedly different from the understanding of Jewish and Islamic law throughout the ages. While some Jewish and Islamic scholars argue for very early legal protection of blastocysts, they recognize this stage of development as “potential life” and differentiate between *in utero* and *in vitro* contexts.

The fetal personhood movement is now looking to build upon its successful passing of “heartbeat laws,” which ban abortion after the detection of the initial movements of the protocells that will eventually develop into a heart.²³⁰ So-called “heartbeat laws” ban abortion six weeks after the first day of the pregnant person’s last menstrual cycle. While detection of cellular movement on ultrasound, especially at specific rates, can be a good sign that a pregnancy is developing normally, it “is not equivalent to declaring a fetus viable, and patients can and do experience miscarriage, stillbirth, or other developmental problems after seeing that flicker on an ultrasound.”²³¹ However, based on the false notion that if an embryo’s proto-heartbeat is detected, it is definitively viable, anti-abortion activists managed to have heartbeat bills introduced in every state legislature.²³² They were ultimately successful in passing such legislation in seventeen states, with the legislation in four of those states temporarily blocked by state courts. Post-*Dobbs*, additional legislation has resulted in a nearly total ban on abortion in thirteen of those states with very limited exceptions.²³³

Likewise, those states with near total abortion bans have also begun to see litigation questioning the legality of frozen blastocyst creation, and, more notably, frozen blastocyst disposal within the context of IVF. For instance, the issue of the legal personhood of frozen blastocysts became central to a divorce custody dispute in Texas, which the Texas Second Court of Appeals in Fort Worth ruled on in July 2023.²³⁴ The wife seeking custody of the frozen blastocysts based her claim to custody on Texas’s post-*Dobbs* abortion law, arguing that the law “require[s] frozen embryos to be treated as people and

229. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2258 (2022).

230. Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call that Misleading*, NPR (May 3, 2022, at 16:55 ET), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>.

231. Katie Heaney, *Embryos Don’t Have Hearts*, THE CUT (May 24, 2019), <https://www.thecut.com/2019/05/embryos-dont-have-hearts.html>.

232. *State Legislation Tracker*, GUTTMACHER INST. (June 15, 2025), <https://www.guttmacher.org/state-legislation-tracker>; Christina Han & Cara C. Heuser, *Antiabortion Heartbeat Bills Are Neither Morally Nor Legally Sound*, SCI. AM. (Jan. 23, 2023), <https://www.scientificamerican.com/article/antiabortion-heartbeat-bills-are-neither-morally-nor-legally-sound>. In 2025, a heartbeat bill was introduced in Congress. Heartbeat Protection Act of 2025, H.R. 682, 119th Cong. (2025).

233. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Laws Across the Country*, N.Y. TIMES (Jan. 6, 2026, at 16:54 ET), <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html>.

234. *Antoun v. Antoun*, No. 02-22-00343-CV, 2023 Tex. App. LEXIS 5096, at *8 (July 13, 2023).

handled through the child custody process instead.”²³⁵ The Texas Supreme Court declined to take the case. If the Texas Supreme Court had ruled in the wife’s favor, this would have been a significant departure from the existing caselaw which recognizes blastocysts as “quasi-property that can be governed by a contract.”²³⁶ The arguments used in the Alabama and Texas cases rely heavily on Evangelical and Catholic understandings of when life begins.

The Catholic Church has had a longstanding ban on IVF since its issuance of the *Donum Vitae* (“The Gift of Life”) in 1987, which established the principle that “if a given medical intervention helps or assists the marriage act to achieve pregnancy, it may be considered moral; if the intervention replaces the marriage act in order to engender life, it is not moral.”²³⁷ The Catholic Church objects to IVF on two grounds. First, IVF replaces the procreative marriage act, which according to the *Donum Vitae* it is “the right of every person to be conceived and to be born within marriage and from marriage.”²³⁸ Second, IVF can result in the destruction of blastocysts. On this issue, the *Donum Vitae* states: “The connection between in vitro fertilization and the voluntary destruction of human embryos occurs too often. This is significant: through these procedures, with apparently contrary purposes, life and death are subjected to the decision of man, who thus sets himself up as the giver of life and death by decree.”²³⁹

It is this second issue upon which Evangelical Christians also ban IVF. While the Catholic Church has long held this position, Evangelical Christians have only recently explicitly condemned IVF.²⁴⁰ In June 2024, the Southern Baptist Convention, which represents “the largest Protestant denomination in the U.S., . . . voted to condemn the use of in vitro fertilization, signaling the campaign by [E]vangelicals against abortion is widening to include the popular fertility treatment.”²⁴¹ The Alabama Supreme Court’s Chief Justice Parker in *LePage*, concurring in the Court’s judgment that the word “child” applied to frozen blastocysts, extensively cited the Bible and multiple Protestant theologians.²⁴²

Relying heavily on conservative Christian understandings of when life begins, the Alabama Supreme Court ruled in February 2024 that IVF blastocysts

235. Eleanor Klibanoff, *How a Denton Divorce Could Imperil IVF Access in Texas*, TEX. TRIB. (May 13, 2024, at 15:00 CT), <https://www.texastribune.org/2024/05/13/texas-supreme-court-frozen-embryos-ivf>.

236. *Id.*

237. John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, U.S. CONF. OF CATH. BISHOPS (emphasis omitted), <https://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive-technology/begotten-not-made-a-catholic-view-of-reproductive-technology> (last visited Nov. 26, 2025).

238. *See id.* (emphasis omitted) (explaining the *Donum Vitae*—a document issued by the Sacred Congregation for the Doctrine of the Faith in 1987).

239. *Id.* (emphasis omitted).

240. *See* Ericka Andersen, *How IVF Made Its Way into Evangelical Pro-Life Debates*, CHRISTIANITY TODAY (Jan. 8, 2024), <https://www.christianitytoday.com/2024/01/ivf-pro-life-ethics-christian-fertility-treatments-embryos/>.

241. Brad Brooks, *U.S. Southern Baptists Condemn IVF Procedure*, REUTERS (June 13, 2024, at 8:03 PT), <https://www.reuters.com/world/us/southern-baptists-effort-enshrine-ban-women-pastors-falls-short-2024-06-12>.

242. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 691–93, 697 (Ala. 2024) (Parker, C.J., concurring).

meet the definition of the word “child,” and thus the accidental destruction of frozen embryos resulted in liability for wrongful death.²⁴³ The Court stated that “the phrase ‘minor child’ means the same things in the Wrongful Death of a Minor Act as it does in everyday parlance: ‘an unborn or recently born’ individual member of the human species, from fertilization until the age of majority.”²⁴⁴ Chief Justice Parker cited Genesis 9:6: “Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of God made he man.”²⁴⁵ He also referenced Biblical commentaries from theologians, such as John Calvin, who commenting on Genesis 9:6 stated, “Therefore to kill man is to deface God’s image, and so injury is not only done to man, but also to God.”²⁴⁶ Chief Justice Parker also invoked the Sixth Commandment of the Ten Commandments, “You shall not murder,” and Calvin’s commentary on it, in which he states, “Man is both the image of God and our flesh. Wherefore, if we would not violate the image of God, we must hold the person of man sacred.”²⁴⁷

Based on these passages Chief Justice Parker concluded the following about the destruction of IVF blastocysts:

[T]he theologically based view of the sanctity of life adopted by the People of Alabama encompasses the following:

- (1) God made every person in His image;
- (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and
- (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God, who views the destruction of His image as an affront to Himself.

Section 36.06 recognizes that this is true of unborn human life no less than it is of all other human life—that even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory.²⁴⁸

Chief Justice Parker presents a distinctly Christian-based interpretation of the law as representative of all the people of Alabama. After the Alabama Supreme Court’s opinion, three IVF clinics in Alabama ceased operations.²⁴⁹ Two of those only resumed operations after the Alabama legislature passed legislation “exempting people who receive or provide IVF services from legal liability,” but this is not the end of the potential litigation that can arise when states recognize fetal personhood.²⁵⁰ Litigation based on the rationale of *LePage* is

243. Purvis, *supra* note 15.

244. *LePage*, 408 So. 3d at 686.

245. *Id.* at 692–93 (Parker, C.J., concurring).

246. *Id.* at 693.

247. *Id.*

248. *Id.* at 693–94.

249. Lauren Mascarenhas & Isabel Rosales, *Alabama Clinics Resume Treatment Under New IVF Law, but Experts Say It Will Take More Work to Protect Fertility Services*, CNN (Mar. 7, 2024, at 12:04 ET), <https://www.cnn.com/2024/03/06/us/alabama-ivf-fertility-protection/index.html>.

250. Purvis, *supra* note 15.

likely to increase, as attempts to pass federal legislation to protect IVF have failed, and states are increasingly passing fetal personhood laws.²⁵¹ The conservative Christian understandings of when life begins discussed in *LePage* significantly differ from the Islamic and Jewish scholars' interpretations of religious texts on the relationship between the sanctity of life, the prohibition of murder, and the legal protections of blastocysts.

B. LITIGATION OF IVF BLASTOCYSTS

Although the *LePage* case received widespread media attention, it is far from the first case that addresses the legal treatment of IVF blastocysts and is unlikely to be the last. As of 2022, several disputes about blastocyst disposition have reached the appellate court level.²⁵² Disputes over the disposal of IVF blastocysts most commonly arise in the context of divorce and accidental destruction of frozen blastocysts. Litigation related to "lost, destroyed or rendered unusable" reproductive material is relatively common.²⁵³ Between 2009 and 2019, there were 133 lawsuits "seeking recovery for cryopreserved embryo loss, damage, or destruction."²⁵⁴ In some of the lawsuits, the losses are significant, especially when resulting from cryopreservation tank malfunction. In a clinic in Ohio, over four thousand frozen blastocysts were destroyed when

251. Darreonna Davis, *Senate Bill to Protect IVF Blocked by Republican Objection*, 19TH (Feb. 28, 2024, at 15:23 PT), <https://19thnews.org/2024/02/senate-ivf-bill-blocked>.

252. *See, e.g.*, *Scott v. Barnes*, 698 S.W.3d 394, 395 (Ark. Ct. App. 2024) (rejecting appellant's challenge to a divorce decree prohibiting either party from implanting an embryo created by IVF during the marriage); *Smith v. Smith*, 892 S.E.2d 832, 842 (Ga. Ct. App. 2023) (reversing award of frozen embryos to the wife in a divorce case); *Terrell v. Torres*, 456 P.3d 13, 18 (Ariz. 2020) (upholding a family court order directing donation of the parties' cryopreserved embryos was proper because the parties' agreement directed donation of the embryos to another couple); *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 408–09 (Md. Ct. Spec. App. 2021) (interpreting an IVF contract, which did not indicate the parties' preferences in the event of divorce); *Jessee v. Jessee*, 866 S.E.2d 46, 54–55 (Va. Ct. App. 2021) (holding that the circuit court's equitable distribution award of a preserved pre-embryo to the wife was an abuse of discretion because the circuit court failed to apply the appropriate legal framework, namely, a balancing test); *In re Marriage of Rooks*, 429 P.3d 579, 595 (Colo. 2018) (requiring balancing test to resolve allocation of cryogenically preserved embryos); *Szafranski v. Dunston*, 993 N.E.2d 502, 517 (Ill. App. Ct. 2013) (honoring an agreement regarding the disposition of pre-embryos or balancing the parties' interests when there was no agreement did not violate the right to privacy); *Loeb v. Vergara*, 313 So. 3d 346, 392 (La. Ct. App. 2021) (holding that subject matter jurisdiction was lacking because Louisiana's Uniform Child Custody Jurisdiction and Enforcement Act did not apply to embryos).

253. Joseph M. Hnylka, *Contract Remedies Need Not Undercompensate Aspiring Parents When Cryopreserved Reproductive Material Is Lost or Destroyed: Recovery of Consequential Damages for Emotional Disturbance When Breach of Contract Results in the Lost Opportunity to Become Pregnant With One's Own Biological Child*, 35 J.L. & HEALTH 99, 102 (2021) (citing Gerard Letterie & Dov Fox, *Lawsuit Frequency and Claims Basis Over Lost, Damaged, and Destroyed Frozen Embryos Over a 10-Year Period*, 1 F&S REPS. 78 (2020)).

254. Joseph M. Hnylka, *Contract Remedies Need Not Undercompensate Aspiring Parents When Cryopreserved Reproductive Material Is Lost or Destroyed: Recovery of Consequential Damages for Emotional Disturbance When Breach of Contract Results in the Lost Opportunity to Become Pregnant with One's Own Biological Child*, 35 J.L. & HEALTH 99, 102 (2021) (citing Gerard Letterie & Dov Fox, *Lawsuit Frequency and Claims Basis Over Lost, Damaged, and Destroyed Frozen Embryos Over a 10-Year Period*, 1 F&S REPS. 78 (2020)).

the tank malfunctioned.²⁵⁵ Likewise, over 3,500 eggs and blastocysts were destroyed in a tank malfunction in California.²⁵⁶

Recent litigation over frozen blastocysts has focused on “seeking a judgment declaring that the life of a person begins at the moment of conception and conferring *personhood* on the embryo[s] . . . [T]his approach changed the discussion . . . from one focused on property (or *chattel* . . .) to one of personhood.”²⁵⁷ While the Alabama Supreme Court most recently made the news for this legal argument in the *LePage* case, it is not new.²⁵⁸ For instance in *Penniman v. University Hospitals Health System, Inc.*, a case resulting from the Ohio cryopreservation tank malfunction referenced above, the plaintiffs sought a “declaratory judgment that human life begins at conception and thus their embryos constitute persons under Ohio law in order to pursue a wrongful death claim.”²⁵⁹ The court in *Penniman* ultimately decided that awarding a wrongful death claim depended on viability: “[A] fetus in the womb must have a realistic possibility of living outside it . . . ’for a nonviable fetus is not a distinct human entity with rights that can be enforced.”²⁶⁰

Courts have addressed blastocyst disposition from three main approaches: “a balancing analysis, a contract-based approach, and the mutual, contemporaneous agreement approach.”²⁶¹ For instance, in *Davis v. Davis*, the court used the balancing approach in a dispute about what to do with excess IVF blastocysts. Notably, the trial court defined the IVF blastocysts as “children” and awarded custody to the plaintiff.²⁶² However, the Tennessee Supreme Court affirmed the Court of Appeals’ reversal, holding in part that the embryos did not “enjoy protection as ‘persons’ under federal law,” because in *Roe*, which was the law at the time, the “United States Supreme Court explicitly refused to hold

255. Holly Yan, *A Cleveland Fertility Clinic That Lost 4,000 Eggs and Embryos Just Got Hit with Two More Lawsuits*, CNN (Feb. 5, 2020, at 17:57 ET), <https://www.cnn.com/2020/02/05/us/ohio-fertility-clinic-lost-eggs-embryos-lawsuits/index.html>; Ariana Eunjung Cha, *These Would-Be Parents’ Embryos Were Lost. Now They’re Grieving—and Suing*, WASH. POST (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving—and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019f4e4_story.html; Jessica Ravitz, *New Lawsuits Filed Against Cleveland Fertility Clinic Where 4,000 Embryos Were Lost*, CNN (Jan. 24, 2019, at 18:14 ET), <https://www.cnn.com/2019/01/24/health/cleveland-fertility-clinic-embryos-lawsuit-bn>; John Seewer, *Lab Director Blames Hospital for Fertility Clinic Failure*, ASSOCIATED PRESS (Apr. 22, 2021, at 05:55 PT), <https://apnews.com/article/us-news-health-cleveland-science-technology-b15af26f90c64dbdcaf6e55630991bb7>.

256. The Associated Press, *\$15M Awarded to Five People Who Lost Eggs, Embryos at Fertility Clinic*, NBC NEWS (June 11, 2021, at 05:04 PT), <https://www.nbcnews.com/news/us-news/15m-awarded-five-people-who-lost-eggs-embryos-fertility-clinic-n1270439>; see Derek Hawkins, *Jury Awards \$15 Million in Landmark Case over Embryos, Eggs Destroyed in Fertility Clinic Tank Failure*, WASH. POST (June 11, 2021), <https://www.washingtonpost.com/health/2021/06/11/fertility-clinic-egg-embryo-verdict>.

257. Gerard Letterie, *In re: The Disposition of Frozen Embryos*, 117 F&S 477, 478 (2022).

258. See *LePage v. Ctr. for Reprod. Med.*, P.C., 408 So. 3d 678, 681–82 (Ala. 2024).

259. 130 N.E.3d 333, 335 (Ohio Ct. App. 2019).

260. *Id.* at 337 (quoting *Jones v. MetroHealth Med. Ctr.*, 89 N.E.3d 633, 660 (Ohio Ct. App. 2017)).

261. Ziegler, *supra* note 72, at 522 (footnotes omitted) (citing *In re Marriage of Rooks*, 429 P.3d 579, 595 (Colo. 2018); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174, 179–80 (N.Y. 1998); *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003)).

262. *Davis*, 842 S.W.2d at 589.

that the fetus possesses independent rights under law.”²⁶³ Using the balancing approach the court concluded that IVF blastocysts are “due greater respect than other human tissue because of its potential to become a person . . . Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.”²⁶⁴

Likewise, in *Kass v. Kass*, the trial court relied on abortion jurisprudence in its decision, reasoning that “a woman’s right to refuse to undergo an abortion and to carry a child to term equally applied to empower her with the exclusive right to decide to implant the pre-zygotes and give birth.”²⁶⁵ However, the Court of Appeals, applying a contracts-based approach, relied on the parties’ pre-existing contract to determine the disposition of the IVF blastocysts, although ambiguities existed within the contract.²⁶⁶ This approach differs significantly from the contemporaneous agreement approach, which prioritizes the “present-day values” of the party.²⁶⁷

Under the contemporaneous consent approach, “no embryo will be used, destroyed, or donated without the consent of both parties who created the embryo” at the time of the dispute, rendering pre-dispute agreements moot.²⁶⁸ Unfortunately, as this approach often arises at a time of deep disagreement, parties rarely reach a post-dispute agreement. As a result, frozen blastocysts under this approach typically join the hundreds of thousands of IVF blastocysts indefinitely frozen.

Therefore, IVF patients entering an IVF blastocyst disposition dispute generally lack certainty as to how their state court will resolve the dispute.²⁶⁹ The *Dobbs* decision prompted a change in the legal standing of embryos, including IVF blastocysts, that complicates this uncertainty even further. It remains to be seen not only whether one approach will prevail, but how these decisions, which relied on the legal reasoning of *Roe*, will change. With the increased passage of fetal personhood laws comes shifts in the legal treatment of IVF blastocysts. The legal understanding of IVF blastocysts falls into three categories: “1) human life at its earliest stage [as reflected in fetal personhood laws]; 2) property [as other reproductive materials, such as sperm have traditionally been treated]; or 3) an entity occupying an interim status.”²⁷⁰ Some cases such as *York v. Jones* define “frozen embryos as property under a bailment theory,” whereas others, such as *Davis v. Davis* define frozen blastocysts as

263. *Id.* at 595.

264. *Id.* at 596.

265. 663 N.Y.S.2d at 599 (Miller, J., dissenting).

266. *Id.* at 594 (Friedmann, J., concurring).

267. See Ziegler, *supra* note 72, at 528.

268. *Id.*

269. Walker & Caulley, *supra* note 224, at 1364; see also Barbiero, *supra* note 224, at 271 (“Inconsistencies between the approaches used by courts in different states as well as an overall lack of caselaw makes predicting the outcome of scenarios . . . challenging.”).

270. Howell, *supra* note 224, at 410.

“neither property nor persons, but something in between,” and more recently, such as in *LePage*, as legal persons.²⁷¹

Post-*Dobbs* it seems likely that this uncertainty will prevail, as states increasingly pass their own fetal personhood laws. Certain states have already taken steps to legislate according to conservative Christian understandings of IVF embryo’s personhood. The next Part outlines the legal protections for religious freedom under the First Amendment and the Religious Freedom Restoration Acts.

C. CURRENT LANDSCAPE OF RELIGIOUS FREEDOM PROTECTIONS

Religious liberty in the United States is protected under the First Amendment and a variety of Federal and state laws, including the Religious Freedom Restoration Act (RFRA).²⁷² RFRA, and similar state laws, impose a heightened standard of review “for government actions—including rules of general applicability—that ‘substantially burden’ a person’s religious exercise,”²⁷³ a higher standard of review than the prevailing Free Exercise case. Over twenty years, the Roberts Court has significantly changed the law with regard to the First Amendment, creating “an increasingly weak establishment clause and an increasingly strong free exercise clause.”²⁷⁴ Given the weakness of an establishment clause claim, this Article focuses on Free Exercise and RFRA claims. In both First Amendment free exercise and RFRA claims, which test the Court applies remains a central issue to determine whether a person’s religious exercise is “substantially burdened”.²⁷⁵ As will be discussed below, within the context of IVF, Muslim and Jews are substantially burdened in the free exercise of their religious beliefs when they are unable to dispose of IVF blastocysts in circumstances that their respective religion require.

1. Constitutional Free Exercise

The First Amendment via the Free Exercise Clause prevents laws that “[prohibit] the free exercise” of religion, meaning that the government may not

271. Jessica R. Hoffman, *You Say Adoption, I Say Objection: Why the Word War over Embryo Disposition Is More Than Just Semantics*, 46 FAM. L.Q. 387, 401 n.22 (2012).

272. H.R. 1308, 103rd Cong. (1933) (enacted).

273. WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020) (quoting Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1).

274. Erwin Chemerinsky, *Chemerinsky: Religion Cases Will Test Whether SCOTUS Continues to Break Down Walls Separating Church, State*, ABA J. (Apr. 1, 2025, at 15:39 CT), <https://www.abajournal.com/columns/article/chemerinsky-religion-cases-will-test-whether-supreme-court-continues-to-break-down-walls-separating-church-and-state>. Note, for the purposes of this Article, the Establishment Clause will not be discussed, as the Supreme Court’s current doctrine makes an Establishment Clause claim especially difficult. For instance, Schwartzman & Schragger have documented the difficulty of such a claim within the abortion context. See Schwartzman & Schragger, *supra* note 2, at 2302.

275. See generally Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J.F. 438 (2023) (observing that the meaning of “substantial burden” remains contested, with courts increasingly favoring an objective interference test over subjective centrality inquiries).

pass laws that infringe upon religious practice.²⁷⁶ Recent caselaw has expanded religious freedoms, while complicating the prevailing case, *Smith*.²⁷⁷ Under *Smith*, “the Free Exercise Clause does not require the government to exempt religious practice from laws . . . that are neutral and of general applicability” as such laws do not trigger strict scrutiny.²⁷⁸ However, if the petitioner can demonstrate that the government’s action substantially burdens religious exercise and is not neutral or generally applicable, then strict scrutiny applies to the government’s refusal to provide the petitioner an exemption.²⁷⁹ Since *Smith*, the Court has further developed which governmental actions are considered not neutral or generally applicable. For instance, the Court held in *Masterpiece* that the government’s actions were not neutral if motivated by religious hostility,²⁸⁰ and in *Lukumi*, the government’s actions were not neutral if the law’s objective is to suppress religious practice.²⁸¹

Scholars such as Professor Caroline Corbin, Micah Schwartzman, and Richard Schragger, amongst many others, have well documented the arguments for a religious right to abortion, especially given the Supreme Court’s demonstrated “eagerness to provide expansive protection for religious liberty.”²⁸² They have articulated the difficulty such claims may face, especially under the Establishment Clause. Notably, the Roberts Court seems largely unconcerned with religiously motivated laws that advance religion, especially Christianity.²⁸³ Namely, without “a secular purpose requirement, there is no constitutional obstacle to enacting fetal personhood laws that are explicitly justified on religious grounds,” i.e. a conservative Christian understanding of when human life begins.²⁸⁴ Therefore, while IVF legislation may be motivated by a desire to advance a specific, religious understanding of when life begins, the Court’s current doctrine makes an Establishment Clause claim especially difficult. Despite the unlikely success of an Establishment Clause challenge, a Free Exercise Clause challenge is more likely to succeed given recent caselaw expanding religious liberty rights.

Furthermore, the Supreme Court in *Tandon* articulated a shift from *Smith*, applying a “most favored nation” theory of free exercise.²⁸⁵ The Court held that

276. U.S. CONST. amend. I.

277. Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990).

278. HELEN NORTON, ADVANCED INTRODUCTION TO U.S. FIRST AMENDMENT LAW 139–40 (2024).

279. *Id.* at 140.

280. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 625 (2018).

281. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

282. Schwartzman & Schragger, *supra* note 2, at 2302; *see, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021); *see also* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free-Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 722–31 (2022) (describing the Court’s use of the shadow docket to further protect religious liberties).

283. Schwartzman & Schragger, *supra* note 2, at 2320.

284. *Id.* at 2329.

285. *Tandon*, 141 S. Ct. at 1296.

“government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”²⁸⁶ Generally, this most favored nation theory means that if a single secular activity is exempted from the law, then the law is in violation of the Free Exercise Clause because a secular activity is being treated better than religious activity.²⁸⁷ Exempted secular activity can be understood broadly. Likewise, five justices in *Fulton* signaled their willingness to reverse *Smith*.²⁸⁸ Under *Fulton*, the government’s action is generally not applicable if it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”²⁸⁹ Although the Court seems to have modified *Smith* with *Tandon*’s most favored nation approach, the Court has yet to reverse *Smith*, and questions remain as to what will replace it.²⁹⁰ Scholars have also noted that abortion free exercise challenges may result in a resurgence of *Smith*.²⁹¹

2. Religious Freedom Restoration Acts

Under the pre-*Smith* legal regime, the primary inquiry was whether the law substantially burdened the plaintiff’s religious exercise.²⁹² If a plaintiff could demonstrate a substantial burden, then “courts would apply heightened scrutiny, granting her an exemption from the law unless doing so would have harmed a compelling interest.”²⁹³ The shift away from that standard in *Smith* prompted Congressional action.²⁹⁴ In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), explicitly disagreeing with *Smith*.²⁹⁵ In the statutory finding, Congress stated that the prior compelling interest test under *Sherbert* should apply, as it provided a better standard that struck “sensible balances between religious liberty and competing prior governmental interests.”²⁹⁶

Initially, RFRA applied to “all government action at the federal, state, and local levels.”²⁹⁷ However, in *City of Boerne v. Flores*, the Court ruled that

286. *Id.*

287. Corbin, *supra* note 2, at 483–84.

288. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Barrett & Kavanaugh, JJ., concurring) (finding “textual and structural arguments against *Smith* . . . more compelling”); *id.* at 1883–84, 1923 (Alito, Thomas & Gorsuch, JJ., concurring) (calling for *Smith* to be overruled).

289. *Id.* at 1887 (majority opinion).

290. See *id.* at 1883 (Barrett & Kavanaugh, JJ., concurring) (finding “textual and structural arguments against *Smith* . . . more compelling”); *id.* at 1883–84, 1923 (Alito, Thomas & Gorsuch, JJ., concurring) (calling for *Smith* to be overruled).

291. See, e.g., Schwartzman & Schragger, *supra* note 2, at 2325.

292. *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

293. Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1761–62 (2022).

294. WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

295. *Id.*

296. *Id.* (quoting Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb(a)(5)).

297. *Id.* (“Congress justified applying the law to the states by relying on Section 5 of the Fourteenth Amendment.”).

“Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment” in applying RFRA to the state and local government level.²⁹⁸ As a result, Congress amended RFRA to only apply on the federal level.²⁹⁹ States have taken action, with twenty-nine states passing state-based RFRA and an additional ten states having RFRA-like protections in their state constitutions (thirty-nine in total). Although the language is not identical across the state RFRA protections, they all require strict scrutiny as the standard for review.³⁰⁰ RFRA requires a heightened standard of review to any federal or state, respectively, government action that “substantially burden[s] a person’s exercise of religion even if the burden results from a rule of general applicability.”³⁰¹ In such cases, the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁰² In short, the primary difference between a RFRA and First Amendment free exercise claim is that the religious claimants have greater statutory protections under RFRA because strict scrutiny applies, as opposed to a First Amendment free exercise claim, where the claimant must demonstrate a lack of neutrality or general applicability.

3. The Substantial Burden Test

Under RFRA and First Amendment free exercise claims, much debate exists as to the best test to determine whether a person’s exercise of religion is “substantially burdened.”³⁰³ This question is particularly salient as the Supreme Court is likely to overturn *Smith* and apply strict scrutiny to free exercise challenges.³⁰⁴ The concern is that if courts’ refuse to examine whether a person is in fact “substantially burdened” and simply take them at their word, then courts would be “replacing *Smith*’s categorical denial of exemptions with ‘an equally categorical strict scrutiny regime.’”³⁰⁵ As Justice Sotomayor wrote in a dissenting opinion regarding a statutory religious exemption, “*thinking one’s*

298. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

299. *See id.*; WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

300. *Federal & State RFRA Map*, BECKET FUND FOR RELIGIOUS LIBERTY, <https://becketfund.org/research-central/rfra-info-central/map> (last visited Dec. 6, 2025).

301. 42 U.S.C. § 2000bb-1(a).

302. 42 U.S.C. § 2000bb-1(b); *see also* BECKET FUND FOR RELIGIOUS LIBERTY, *supra* note 300.

303. *See, e.g.*, Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775–83 (cataloguing the development of the “substantial burden” analysis alongside the various interpretations advocated by jurists and how the Supreme Court’s understanding of that phrase has changed over time).

304. *See e.g.*, Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Symposium: Religious Privilege in Fulton and Beyond*, SCOTUSBLOG (Nov. 2, 2020), <https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond> (“[W]ith an even more conservative majority, the court seems poised to transform the free exercise clause into a constitutional source of religious privilege.”).

305. Girgis, *supra* note 293, at 1763 (quoting *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring)).

religious beliefs are substantially burdened . . . does not make it so.”³⁰⁶ Courts have mostly avoided placing limitation on what qualifies as a “substantial burden” out of concern that “any attempt to limit successful claims would require judges to play theologians, deciding for themselves what is true or important in religious matters.”³⁰⁷

To address these concerns, scholars have proposed substantial burdens tests. One such proposal, by Michael Helfand, recommends examining the “substantiality of the civil penalties triggered by religious exercise.”³⁰⁸ Another proposal recommends the following analysis: “[A] law that burdens [religious freedom] will trigger heightened scrutiny if the law leaves no adequate alternative way to exercise that liberty,” and “an alternative is inadequate if it is significantly costlier in material terms or *worse in religious terms*.”³⁰⁹ Helfand highlights that an inquiry that instead focuses on the “theological substantiality of legal burdens would likely lead to gross inequalities in application.”³¹⁰ This inequality would result because courts are likely “predisposed to favoring religious majorities, whose religious practices are more well-known and respected, as opposed to religious minorities, whose religious practices are more obscure.”³¹¹

This is especially true regarding Muslim claimants. Muslim’s religious-liberty claims have significantly lower success rates than non-Muslims.³¹² When controlling for “the type of case (such as whether the claimant was a prisoner or raised an employment discrimination claim) . . . and other judge demographic variables . . . , Muslim claimants were predicted to prevail little more than half as frequently as [non-Muslim religious freedom] claimants.”³¹³ This was true even as compared to claimants from other minority religions, such as Buddhists and Rastafarians.³¹⁴ It is also true in comparison to adherents of other faiths with “traditional [] values,” such as Catholics and Baptists.³¹⁵ Therefore, how judges determine whether there is a substantial burden is especially important within the Muslim context.

The substantial burden question intersects with the question of religious sincerity. In short, “to qualify for a religious accommodation [under any of the various religious freedom laws], a claimant must demonstrate sincerity.”³¹⁶ In the *United States v. Ballard*, the Supreme Court established that “the First

306. *Wheaton Coll. v. Burwell*, 573 U.S. 958, 966 (2014) (Sotomayor, J., dissenting).

307. Girgis, *supra* note 293, at 1763.

308. Helfand, *supra* note 303, at 1775 (emphasis omitted).

309. Girgis, *supra* note 293, at 1759, 1810.

310. Helfand, *supra* note 303, at 1788.

311. *Id.*

312. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 235–36, 260 (2012).

313. *Id.* at 236.

314. *See id.*

315. *Id.*

316. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1187 (2017).

Amendment forbids the government from prosecuting persons on the ground that their religious beliefs are empirically inaccurate . . . [as that] requires the government to evaluate theological claims.”³¹⁷ Many scholars endorse the additional test that “courts should read the First Amendment to also prohibit the government from evaluating whether persons actually hold the religious beliefs they profess.”³¹⁸ Typically, the religious accommodation claimant bears the burden of proof to demonstrate religious sincerity.³¹⁹ Provided the opponent does not contest sincerity, “then the claimant, having put some evidence of sincerity into the record, has established it as a matter of law.”³²⁰ Once claimant’s beliefs are established as sincere, the court cannot “reject his claim on the ground that it found his religiously-inspired moral reasoning to be unpersuasive.”³²¹ Furthermore, courts may not evaluate the accuracy or “truth” of the religious claim, “nor infer from a claim’s apparent inaccuracy or implausibility that the claimant is insincere.”³²² The “substantial burden” analysis on the other hand requires that a court determine “whether the government’s regulation, as a matter of law, forbids or requires the ‘religious exercise’ at issue.”³²³

The sincerity question came to a head in *Burwell v. Hobby Lobby*. In *Hobby Lobby*, the Court muddled the distinction between establishing religious sincerity and the “substantial burden” analysis.³²⁴ This confusion arose in part due to the specifics of Hobby Lobby’s claims. Hobby Lobby objected to paying for insurance that included contraceptive coverage that according to their beliefs would “in at least some cases result in the death of an innocent human being [in the form of a fertilized egg],” and they understood their religion to prohibit them “from knowingly paying for contraceptives that entail such a risk.”³²⁵ The government did not challenge the claimant’s sincerity.

Furthermore, Hobby Lobby “objected to the four [contraceptives] that . . . had the potential to prevent the implantation of an embryo. The owners said that having to cover those four drugs would substantially burden their religion by making them complicit in the destruction of a new human being.”³²⁶ The government muddled the waters in response by arguing that “even if the material penalties for violating the mandate were high, the religious cost of obeying the mandate was low—because the link between what the law required

317. *Id.* at 1188 (citing *United States v. Ballard*, 322 U.S. 78, 88 (1944)).

318. *Id.* at 1188–89.

319. *See Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

320. Chapman, *supra* note 316, at 1224.

321. *Id.* at 1249.

322. *Id.* at 1225.

323. *Id.* at 1249.

324. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

325. Chapman, *supra* note 316, at 1246.

326. Girgis, *supra* note 293, at 1778–79.

of the employers (insurance) and what their religion forbade [preventing implantation of a fertilized egg] was ‘too attenuated.’”³²⁷

The majority, in determining whether there was a “substantial burden,” looked to the financial penalties Hobby Lobby would incur for failing to comply with the federal mandate.³²⁸ Confusion arose due to the majority’s choice of words, stating, “it is not for us to say that their religious beliefs are mistaken or *insubstantial*.”³²⁹ Based on this language and Hobby Lobby’s argument, the dissenting judges understood the majority as having merged the sincerity and substantial burden inquiries. Justice Ginsburg writing in her dissent argued that the Court saw itself as having to accept on its face both the claimant’s religious sincerity and that the “claimant sincerely believed that the regulation was a substantial burden on its religious exercise.”³³⁰

Furthermore, RFRA does not provide guidance on how courts should determine whether a law “substantially burdens” a claimant.³³¹ If the Court does overturn *Smith*, it remains to be seen what test the Court will apply to the “substantial burden” analysis. Likewise, it remains to be seen how courts will rule on many RFRA abortion ban challenges.³³² As Hobby Lobby argued that its religious freedom was violated by paying for medication that may result in the removal of an embryo, the plaintiffs in RFRA abortion challenges argued that their religious freedom is violated by legislation forbidding the disposal of an embryo.

While religious freedom challenges to IVF embryo disposal bans have not yet commenced, some courts have addressed these challenges in the context of abortion with Muslim and Jewish plaintiffs. In this regard, Islamic and Jewish legal understandings of when human life begins have been directly referenced in litigation. In an order granting plaintiff’s motion for preliminary injunction for a claim that the state’s anti-abortion laws violate the state’s RFRA, an Indiana court stated: “Under Jewish law, a fetus attains the status of a living person only at birth, when the greater part emerges from the mother. Prior to that time, the fetus is considered as part of the woman’s body, not having a life of its own or independent rights.”³³³ The Court also referenced Islamic law, stating: “Although, as in any religion, there are different Islamic schools and views,

327. *Id.* at 1779.

328. *Id.*

329. *Burwell*, 573 U.S. at 725.

330. Chapman, *supra* note 316, at 1247.

331. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996).

332. Jessie Hill, *Religious Freedom Claims Could Provide New Path to Protect Abortion Rights*, STATE CT. REP. (July 16, 2025), <https://statecourtreport.org/our-work/analysis-opinion/religious-freedom-claims-could-provide-new-path-protect-abortion-rights>.

333. Anonymous Plaintiff 1 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056, slip op. at 8 (Ind. Super. Ct. Dec. 2, 2022) (order granting preliminary injunction) (citations omitted).

some Muslim scholars take the position that the fetus does not possess a soul until 120 days after conception.”³³⁴

The Court referenced the Jewish and Islamic legal perspectives in direct comparison to the State of Indiana’s claim that Ind. Super. Ct. Dec. 2, 2022.”³³⁵ This is because the Islamic and Jewish understandings of when human life begins contrast sharply with the understanding of fetal rights advocates, who base their position on specific, Christian theology. The case involves both Jewish and Muslim plaintiffs who claimed Indiana’s abortion ban significantly burdened their religious practice.³³⁶ On both questions of the permissibility of abortion and the disposal of frozen embryos, Jewish and Islamic legal positions provide a range of permissiveness not accommodated in the recent anti-abortion legislation or litigation. As a result, such litigation and legislation threaten the religious freedom of Muslims and Jews both seeking abortions and the disposal of IVF embryos. However, IVF challenges may be more likely to succeed as they do not face the same standing challenges as abortion cases,³³⁷ given the nature of IVF cryopreservation.

Louisiana is the most likely state for such a challenge. Louisiana’s IVF blastocyst disposal bans serve as a model for those looking to take the next step in the fetal personhood movement. The next Part describes recent changes in Louisiana’s IVF legislation and how this legislation violates the religious freedom of Muslims and Jews who are required to dispose of IVF blastocysts.

IV. LOUISIANA CASE STUDY

Louisiana’s recently revised May 2025 law defines viable IVF blastocysts as a “juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.”³³⁸ Non-viability is defined as an IVF fertilized egg that fails to develop further over a seventy-two-hour period except when the embryo is in a state of cryopreservation.³³⁹ This definition of non-viability does not include aneuploid-tested blastocysts, despite such blastocysts often being incompatible with life, as such testing usually occurs between 72–168 hours after fertilization. Aneuploid blastocysts have an abnormal number of chromosomes that would result in the blastocyst failing to implant, miscarriage, or significant birth defect, including death in early childhood.³⁴⁰ As such, Louisiana prohibits the disposal

334. *Id.*, slip op. at 9.

335. *Id.*, slip op. at 32 (citations omitted).

336. *Id.*, slip op. at 15.

337. Mary Ziegler, *New State Hurdles to Standing Threaten Abortion Ban Challenges*, STATE CT. REP. (Mar. 5, 2025), <https://statecourtreport.org/our-work/analysis-opinion/new-state-hurdles-standing-threaten-abortion-ban-challenges-0>.

338. LA. REV. STAT. § 9:129 (2025).

339. *Id.* § 9:121(3).

340. Marta N. Shahbazi, Tianren Wang, Xin Tao, Bailey A. T. Weatherbee, Li Sun, Yiping Zhan, Laura Keller, Gary D. Smith, Antonio Pellicer, Richard T. Scott Jr., Emre Seli & Magdalena Zernicka-Goetz, *Developmental Potential of Aneuploid Human Embryos Cultured Beyond Implantation*, NAT. COMM’NS., 2020, at 1, 2.

of all IVF frozen blastocysts. However, as previously discussed, cryopreservation and subsequent disposal of cryopreserved blastocysts have become critical components of modern IVF technology.

Louisiana defines an IVF fertilized egg as a “human embryo . . . that is biologically human, with certain rights granted by law.”³⁴¹ Furthermore, like the proposed Texas Republican Party Platform discussed below, Louisiana’s law requires that IVF patients either use their own embryos or “renounce their rights and responsibilities for the embryo . . . to a new intended parent or parents.”³⁴² This transfer is only permitted if “[t]he use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation.”³⁴³ Therefore, in Louisiana, IVF patients must either store their IVF embryos indefinitely, until they decide to use the embryos, or relinquish their rights to their embryos (and by default, genetic material). In the event the IVF patients lose track of their embryos, the state shall seize custody of the embryos so they can be implanted in another couple.³⁴⁴

In the event of a dispute between intended IVF parents, Louisiana law states that the “dispute shall be resolved in accordance with the terms and provision of the in vitro fertilization agreement.”³⁴⁵ However, the law stipulates that “any provision in an in vitro fertilization agreement that directs or provides for the intentional destruction of an embryo shall be deemed null and void.”³⁴⁶ This proviso is especially concerning. In July 2024, the Second Circuit of the Louisiana Court of Appeals applied the then-existing statute (without such a proviso) and resolved a divorce custody dispute involving blastocysts.³⁴⁷ The court concluded that the physical location of the IVF blastocysts out-of-state was not decisive.³⁴⁸ Instead, the court looked to the parties’ substantial connection to Louisiana in establishing subject matter jurisdiction.³⁴⁹

Therefore, under the Louisiana law, divorcing couples residing in Louisiana that have an IVF agreement to dispose of blastocysts in the event of divorce and/or store blastocysts out-of-state with the intention of disposing of the IVF blastocysts in the event of divorce will be unable to do so. Instead, the divorcing couple will have to either relinquish the IVF blastocysts to the divorcing spouse who wants to use the blastocysts or to another married couple for their use. Likewise, if spouses have an IVF agreement that stipulates disposal

341. LA. REV. STAT. § 9:121(1) (2025).

342. *Id.* § 9:130.

343. *Id.* § 9:122.

344. *Id.* §§ 9:130–31.

345. *Id.* § 9:131.

346. *Id.*

347. *Harper v. Harper*, 399 So. 3d 72, 74 (La. Ct. App. 2d Cir. 2024); LA. REV. STAT. § 9:126 (2024) (defining “in vitro fertilized human ovum” as “a biological human being which is not the property of the . . . facility which employs [the physician] or the donors of the sperm and ovum,” while preserving the parental rights of IVF patients who “express their identity”).

348. *Harper*, 399 So. 3d at 76.

349. *Id.*

in the event of death of one of the spouses, they will be prohibited by law from doing so. As discussed below, this presents significant religious freedom issues for people whose religions forbid embryo adoption and require IVF blastocyst disposal upon divorce.

Although Louisiana is currently the only state with legislation that explicitly prohibits IVF blastocyst disposal, other states are beginning to look to Louisiana as model legislation.³⁵⁰ Republicans are looking to this type of legislation as a way to technically permit IVF, while concurrently passing personhood laws.³⁵¹ For instance, in May 2024, the Texas Republican Party narrowly failed to adopt an official IVF platform, which the platform committee chair indicated was a fight for another day, as it was “too risky for the current moment.”³⁵² If adopted, the platform would have called for legislation that would require the State to maintain any frozen blastocysts, until the blastocysts could either be implanted into “the couples who paid to create them or by couples who are willing to adopt and implant the embryos as their own children.”³⁵³ One of the delegates, in advocating for the proposal, rooted his rhetoric in religious and anti-abortion beliefs, stating:

We call ourselves believers, we believe in the dignity of life . . . Many of us don't know that a secular world has created ways to make life in a petri dish. . . . We need to be raising young men and young women who are selfless enough to actually adopt and raise an embryo in their own womb.³⁵⁴

However, such stances and policies are not immune from suit. Laws like Louisiana's support conservative Christian beliefs, while also significantly burdening those with different beliefs, such as Muslims and Jews, to practice their religions.

As discussed, the Louisiana law defines IVF blastocysts as “juridical persons” and prohibits the disposal of IVF blastocysts in any context, including divorce.³⁵⁵ Louisiana's law is notable in several regards. First, it is longstanding and has yet to be challenged under the First Amendment or Louisiana's RFRA. Second, in May 2025 it became even more restrictive, explicitly prohibiting IVF agreements that provide for IVF blastocyst disposal in any context. Third, other politicians are looking to it as model legislation.³⁵⁶

350. See, e.g., H.F. 2575, 90th Gen. Assemb., Reg. Sess. (Iowa 2024) (increasing penalties for “causing the death of . . . an unborn person”); H.B. 1616, 102d Gen. Assemb., Reg. Sess. (Mo. 2024) (declaring that “unborn children” are entitled to the same rights as “any other human person”); S.B. 98, 123d Gen. Assemb., Reg. Sess. (Ind. 2024) (allowing taxpayers to claim fetuses as dependents).

351. Adam Edelman, *An Uptick in State Personhood Bills Fuels Growing Fears over IVF Restrictions*, NBC NEWS (Feb. 26, 2024, at 13:21 PT), <https://www.nbcnews.com/politics/personhood-bills-ivf-restrictions-alabama-rcna140228>.

352. Wagner, *supra* note 27.

353. *Id.*

354. *Id.*

355. LA. REV. STAT. § 9:126, 129 (2025); Harper v. Harper, 339 So. 3d 72, 74 (La. Ct. App. 2d Cir. 2024).

356. RICK TOWNSEND ET AL., REPUB. PARTY OF TEX., 2024 PLATFORM AND RESOLUTIONS OF THE REPUBLICAN PARTY OF TEXAS 25 (2024), <https://texasgop.org/wp-content/uploads/2024/06/2024-RPT-Platform.pdf>.

In discussing proposed legislative changes in May 2024, Louisiana senators referenced their religious beliefs that “an embryo is a life,” when discussing motivations for passing the legislation.³⁵⁷ The resulting legislation changed the nomenclature of the prior law throughout, changing all references to “in vitro fertilized ovum” to “in vitro fertilized human embryo.”³⁵⁸ Louisiana law also allows for a blastocyst to be disposed of in its secular exceptions to Louisiana’s abortion law.³⁵⁹ Therefore, Muslims and Jews in Louisiana with IVF blastocysts that they are religiously required to dispose of have claims under the First Amendment and Louisiana’s RFRA to challenge Louisiana’s Embryo Disposal Ban.

If the Court applies *Tandon* and *Fulton*, Muslim and Jewish plaintiffs in Louisiana are likely to succeed in a free exercise challenge.³⁶⁰ For a plaintiff to bring a free exercise claim against IVF bans they would need to demonstrate the following:

- 1) The ban on IVF blastocyst disposal is not neutral nor generally applicable;
- 2) The ban imposes a substantial religious, financial, and physical burden on a religious person sincerely following their faith.³⁶¹

Under *Tandon* and *Fulton*, the Court applies a “most favored nation” standard to evaluate whether a law is not neutral or generally applicable. IVF blastocyst disposal bans are based in fetal personhood laws that apply to IVF and abortion. Even the most stringent abortion laws provide for exceptions, such as protecting the life of the mother, rape, incest, or lethal fetal anomaly.³⁶² These exceptions all serve as examples of “comparable secular activities” under *Tandon*. Because the law allows the destruction of a blastocyst for these secular purposes, but does not allow for the disposal of blastocysts for religious reasons, the law fails the “most favored nation” theory of free exercise. Although Louisiana has one of the most restrictive abortion laws in the country, it still has exceptions. Namely, Louisiana permits abortion in the following circumstances: “to prevent the death or substantial risk of death of the mother . . . or to prevent the serious, permanent impairment of a life-sustaining organ.”³⁶³ However, this type of litigation could lead to the elimination of the few abortion exceptions that remain in Louisiana.³⁶⁴

357. Julie O’Donoghue, *Louisiana Lawmakers Move IVF Protection Bill Forward, but Doctors Still Might Be Vulnerable*, LA. ILLUMINATOR (May 14, 2024, at 12:10 PT), <https://lailluminator.com/2024/05/14/louisiana-lawmakers-move-ivf-protection-bill-forward-but-doctors-still-might-be-vulnerable>.

358. LA. REV. STAT. § 9:129 (2025).

359. LA. REV. STAT. § 40:1061(F) (2022); LA. REV. STAT. § 14:87.1(19)(a) (2024).

360. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

361. Caroline Mala Corbin, *Religion Clause Challenges to Early Abortion Bans*, 104 B.U. L. REV. ONLINE 37, 48 (2024).

362. *Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits*, KFF (Aug. 26, 2025), <https://www.kff.org/womens-health-policy/exceptions-in-state-abortion-bans-and-early-gestational-limits>.

363. LA. REV. STAT. § 40:1061(F) (2022); see LA. REV. STAT. § 14:87.1(19)(a) (2024).

364. Schwartzman & Schragger, *supra* note 2, at 2328.

If the Court overturns *Smith* and re-establishes a strict scrutiny standard for free exercise cases, IVF blastocyst disposal bans should also fail strict scrutiny. First, under the current Court's composition, no law has "passed strict scrutiny in a free exercise challenge."³⁶⁵ The most compelling interest the government will be able to claim is that IVF blastocyst disposal bans save lives and the state has a compelling interest in protecting the lives of "vulnerable human beings"—in the form of frozen fertilized eggs.³⁶⁶ Notably, in both the *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon*, the Court addressed laws in which the government claimed a compelling government interest in public health.³⁶⁷ However, the Court did not afford special treatment to the laws, despite their claimed lifesaving potential. Therefore, even if the government claims an interest in saving lives, caselaw does not necessarily mean that the Court will find that the law passes strict scrutiny within the context of a free exercise challenge.

Furthermore, even if the Court does not overturn *Smith*, challenges may be brought under Louisiana's RFRA. The claimant in *Hobby Lobby* successfully argued that their religious freedom was violated due to a requirement to pay for a medication that may result in embryo removal (a claim which the dissent found to be too attenuated).³⁶⁸ Muslim and Jewish claimants can make a much more direct claim. Namely, they can claim that IVF blastocyst disposal bans require them to become impregnated with IVF blastocyst or donate their blastocysts in circumstances, such as divorce, where their respective religions explicitly prohibit the transfer of IVF blastocysts and require IVF blastocyst disposal.

Regarding sincerity, claimants would likely need to establish as a matter of fact that they created IVF blastocysts as a matter of sincerely held religious beliefs around procreation and/or are now required to dispose of the IVF blastocysts due to sincerely held religious beliefs. As discussed extensively in Part II of this Article, Islamic and Jewish law have distinct understandings of when legal human life begins. Although some scholars afford early, potential life protections under both legal systems, embryonic life is universally understood as less than full human life. Even the protections of early embryonic life are differentiated in both traditions—*in vitro* fertilized, frozen eggs do not have the legal status afforded *in utero* embryos. Both legal systems balance competing legal values, such as preservation of lineage/family integrity and procreation, in determining legal rulings on IVF. This is in sharp contrast to the understanding of advocates for fetal personhood laws that define fertilized eggs as full, legal human beings.

365. Corbin, *supra* note 2, at 502.

366. *Id.*

367. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

368. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697–98, 701, 703 (2014).

Regarding the substantial burden test, such claims should succeed regardless of which standard courts apply. Indefinite IVF blastocyst storage carries a significant financial burden, typically around \$400 to \$1,500 per year.³⁶⁹ Such indefinite storage also carries the risk that the blastocyst parental identity will be lost, and the blastocyst will be transferred into a non-biological parent, which is religiously forbidden. Alternatively, the law requires pregnancy—a substantial burden itself—in religiously prohibited scenarios, such as divorce and threats to the life of the mother. Furthermore, recent caselaw has not included a substantial burden analysis; rather, once religious discrimination is found, courts move on to its strict scrutiny analysis.³⁷⁰

While diversity of opinion exists in both Judaism and Islam, there are majority and distinct legal positions that laypeople follow under the guidance of legal scholars. The majority positions in both Judaism and Islam prohibit the transfer of IVF blastocysts in the event of divorce, as the pregnancy would not occur under a valid marriage contract. Likewise, Orthodox Judaism, Sunni Islam, and the majority of scholars of Shia Islam all forbid blastocyst adoption out of concerns for preserving the lineage of the resulting child. Under the existing legislation and caselaw in Louisiana, in the event of a divorce, Jews and Muslims are unable to follow their respective religious requirements regarding the disposition of IVF blastocysts created during the marriage.

Muslims are also in such a position upon the death of their spouse, as the majority of Muslim scholars do not permit the transfer of IVF blastocysts in this situation.³⁷¹ Even those who do permit a transfer require that the transfer occur within a short period of time after the death (the blastocyst transfer must occur within four months of the father's death), and otherwise require blastocyst disposal. Additionally, Muslim scholars are especially concerned with the transfer of blastocysts into non-biological parents.³⁷² Therefore, all Muslims, including those that remain married, are required to dispose of their IVF blastocysts, either through thawing or donation to science with subsequent thawing, as soon as is practicable after having completed their family. Muslim scholars address the issue of blastocyst abandonment by requiring that Muslims take responsibility for their IVF blastocysts through disposal. Therefore, there are multiple instances wherein Louisiana law substantially burdens Muslim and Jewish IVF patients (through indefinite preservation, forced pregnancy, or forced donation) who religiously need to dispose of their blastocysts and are religiously prohibited from donating them to anyone else.

369. Lieber & Bernard, *supra* note 64.

370. See, e.g., *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67; *Tandon*, 141 S. Ct. at 1297.

371. MOHAMMED ALI AL-BAR & HASSAN CHAMSI-PASHA, *CONTEMPORARY BIOETHICS: AN ISLAMIC PERSPECTIVE* 175, 180 (2015).

372. Mawlana Ilyas Patel, *Can We Donate Our Excess Embryos After IVF for Adoption to Other Families?*, SEEKERS GUIDANCE (Apr. 18, 2024), <https://seekersguidance.org/answers/birth/can-we-donate-our-excess-embryos-after-ivf-for-adoption-to-other-families>.

Furthermore, whether lives are saved of course depends on the belief that full human, legal life begins at fertilization, which is “not a universal truth but a particular religious viewpoint.”³⁷³ As Professor Caroline Corbin has noted in the abortion context, “[w]hen life begins is a theological determination beyond the Court’s competence—and a holding from *Roe* that the Court has not yet overruled.”³⁷⁴ In matters of a religiously contested definition of truth, the Court has consistently determined that the government cannot pick which theological truth is correct.³⁷⁵ In short, if the IVF ban is understood as “saving lives,” then the ban furthers compelling government interest. If, however, the ban furthers the *religious belief* that IVF blastocyst disposal bans save lives, then it is not a foregone conclusion in which the government has a compelling interest.

The government may then respond that it is protecting “potential life”; however, “nowhere in *Casey* nor in *Dobbs* does the Supreme Court proclaim that this interest is compelling before viability.”³⁷⁶ Furthermore, within the context of IVF, there are differences in belief as to when potential life begins. For instance, as described in detail above, Jewish and Islamic legal scholars differentiate between various stages of embryonic and fetal development, including differentiating between *in vitro* blastocysts and *in utero* embryos, as to the degree of legal protection and the balancing of other competing values. Even the State of Louisiana differentiates between a newly fertilized egg (which may be disposed of) and a fertilized egg after seventy-two hours. It is a matter of belief when and to what degree to protect potential human life. Scholars such as Isabel Karpin have also noted the importance of the female body to potential personhood.³⁷⁷ She notes that “[t]he embryo is only connected with its potential for personhood by female embodiment. Those who wish to make the argument that all embryos have equivalent value do so only by rendering the

373. Corbin, *supra* note 2, at 502.

374. *Id.* at 502–03; *see Roe v. Wade*, 410 U.S. 113, 159 (1973) (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”).

375. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects.”); *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (“State government, like the Federal Government, have been required to refrain from favoring the tenets or adherents of any religion or . . . from insinuating themselves in ecclesiastical affairs or disputes.”); *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring) (“When the government appropriates religious truth, it ‘transforms rational debate into theological decree.’”) (quoting Note, Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 *YALE L.J.* 1127, 1131 (1990)).

376. Corbin, *supra* note 2, at 504 (footnotes omitted) (citing *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2261 (2022) (“The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States’ interest in protecting fetal life.”). Likewise, *Casey* describes the state’s interest as legitimate and substantial but not compelling. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (“[T]here is a substantial state interest in potential life throughout pregnancy.”).

377. Isabel Karpin, *The Uncanny Embryos: Legal Limits to the Human and Reproduction Without Women*, 28 *SYD. L. REV.* 599, 603 (2006).

female body irrelevant.”³⁷⁸ Therefore, even the question of when “potential life” begins is a question of belief.

CONCLUSION

Louisiana’s IVF Blastocyst Disposal Ban is well positioned for Jews and Muslims to test the Court’s emerging religious freedom jurisprudence under both the First Amendment and RFRA. Given recent cases such as *Tandon* and *Hobby Lobby*, religious exemptions to dispose of IVF blastocysts should be available under laws like Louisiana’s Blastocyst Disposal Ban and other fetal personhood laws. As fetal personhood advocates continue to prevail in having their understandings of early life enshrined into law, American Jews and Muslims in those jurisdictions are unable to freely exercise their respective religions and are forced to adhere to conservative, Christian understandings of when legal life begins. If Jewish and Muslim IVF patients bring religious freedom claims, it remains to be seen whether the Court will provide the same protections for Jewish and Muslim Americans as it has for conservative Christians. Time will tell whether the Court will privilege conservative Christian beliefs or protect the religious freedom of all Americans.

378. *Id.*
