

## PAPER

## Adoption first? The disposition of human embryos

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**ABSTRACT**

Anja Karnein has suggested that because of the importance of respect for persons, law and policy should require some human embryos created in vitro to be available for adoption for a period of time. If no one comes forward to adopt the embryos during that time, they may be destroyed (in the case of embryos left over from fertility medicine) or used in research (in the case of embryos created for that purpose or left over from fertility medicine). This adoption option would increase the number of embryos available for couples looking for help in having children, but that effect is less important—Karnein argues—than the observance of respect for human persons. As possible persons, she holds that embryos ought to be treated, as if they will become children, if only for a while. If enacted as a matter of law and policy, an ‘adoption option’ would wrongly interfere with the dispositional rights women and men ought to have over embryos they create in the course of trying to have children. Karnein’s proposal would also deprive researchers of certainty that the embryos they create for research would actually be available that way, leading to increased burdens of time and money and maybe even to more embryos than would otherwise be produced. Karnein’s analysis does not show, moreover, that any duty of rescue applies to embryos. No woman is required to adopt any embryo, which significantly undercuts the justification for an obligatory adoption period.

Anja J Karnein offers a ‘theory of unborn’ life that asserts respect for human embryos insofar as they might become human persons.<sup>1</sup> In this sense, the moral respect owed embryos is contingent upon their prospects as children, that is, as future persons, as against any properties or traits they might have. She argues that the moral status of persons is so important that we should respect embryos as if they are presumptive persons, until it becomes clear that they will not ever become persons. One effect of extending a presumption of expected personhood over embryos is Karnein’s recommendation that all embryos left over from fertility medicine or created for research be held out available for adoption, for a time. Karnein’s thinking is that someone, somewhere may step forward and attempt to bring that embryo to maturation as a child. Only in the absence of anyone coming forward to do that can we realistically say that the embryo has no prospects of becoming a child and is therefore no longer entitled to the protections afforded a presumptive person. At the close of the adoption period, Karnein says that it will be permissible to discard embryos left over from fertility medicine and/or use them for

research. (In this analysis, I use the term ‘embryo’ in this discussion no matter whether storage occurs earlier than the threshold that biologists describe for embryonic status properly speaking. I also use the term ‘adoption’ as Karnein does, knowing that some commentators object to it on the grounds that it implies the personhood of embryos.)

Against this proposal, I will argue against any law or public policy that would institute an adoption period before embryos can either be destroyed or used in research. The future status of embryos as human persons is insufficient to justify making all embryos available for adoption because of the moral costs to the genetic parents of the embryos and to researchers. I will show that an obligatory adoption option (as I will call it) undercuts the importance of entrusting the right of disposition of embryos to their genetic parents. I will also show that the adoption option would work against important interests of researchers. In the context of fertility medicine and research, there are good reasons to withhold embryos from an obligatory period of availability for adoption.

**OFFERING EMBRYOS FOR ADOPTION**

Karnein argues that we should take an affirmative attitude toward the creation of persons, given their value. In general, she says that if human embryos that might become persons exist, we ought to exert some (but not unlimited) effort to secure that outcome. “There is something valuable,” she says, “about letting such development occur, if there is no important reason to stop it” (ref. 1, p. 37).

At present, viable embryos are available in some abundance around the world. In 2003, researchers estimated that there were some 400 000 embryos in the USA alone.<sup>2</sup> Since 1991, some 764 311 embryos have been cryopreserved in the UK, at one point or another over the years, although Britain ‘allows’ those stored embryos ‘to perish’ after a legal maximum storage period of either 5 years or 10 years (or more in some limited circumstances).<sup>3,4</sup> Not only are embryos stored in abundance, would-be parents looking for donated embryos are in good supply too.

In light of this convergence of moral standards and biomedical circumstances, Karnein concludes that “The combination of having a viable embryo and a woman who would like to carry it to term gives the embryo a serious chance of developing into a person” (ref. 1, p. 37). She draws the conclusion that “we have reasons for allowing women to become pregnant with embryos left over from other person’s fertility procedures” (ref. 1, pp. 37–38). She says further:

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in cases in which there are such left-over embryos or in which viable embryos are produced for research purposes, we might, as a matter of public policy, want to encourage those responsible to make this fact public for a certain amount of time. They could then see whether any women wanted to carry these embryos to term. In cases in which no one wanted to, the embryos in question could be discarded or used for research purposes. (ref. 1 pp. 37–38)

Karnein only spends a limited amount of time analysing this proposal and defending it against possible objections. She also says only that we ‘might’ put an adoption option in place, but to sort out its implications and justification, I will treat the option as a formal proposal.

Karnein does not specify exactly how long this obligatory adoption option should last, but she makes clear that the waiting period is not indefinite. That is, no embryo has to be held in a waiting status until absolutely *all* possible hope of adoption is foreclosed either by reason of the effects of cryo-preservation or the practicalities of securing an adoptive parent. Neither does she see that women would be under an obligation to continue a pregnancy—once started with those embryos—if they have a reason to terminate it (ref. 1, p. 39). She also makes clear that women would be under no obligation to come forward and gestate those embryos.

### THE ETHICS OF THE ADOPTION OPTION

Karnein identifies two possible objections to the adoption option but rejects them as unfounded. I will treat her analysis in terms of three objections since the points she makes seem logically independent that way. The labels I apply to these objections are mine as well. I will offer a short commentary on why I think Karnein does not adequately neutralise the objections to the adoption option.

*Objection 1. The Disposition of Embryos Belongs to their Genetic Parents.* Karnein first entertains this objection to her proposal: that the people whose gametes were used in the creation of the embryo should have the right to decide whether those embryos should become persons. Karnein rejects this objection by arguing that embryos are not property; on the contrary, she says “embryos are, from the beginning, their own entities.” Consequently, “If embryos are no one’s property... then biological parents have no grounds for opposing the wish of someone else to carry their left-over embryos to term” (ref. 1, p. 38).

*Reply to Objection 1:* Even if we grant that embryos are not and should not be treated as property, it does not follow that the men and women involved in producing them should not direct their disposition. Human children are not property, but that does not mean that their parents have no dispositional rights over them. On the contrary, even though children are entities in their own right, parents have extensive rights of control, so much so that parents must surrender their infants for adoption before their rights over them are no longer morally relevant. If the state acts to remove children from the parents, it must show cause for intervening against the parents’ presumptive rights that way. It does not follow, therefore, from an entity’s status as ‘no one’s property’ that the people responsible for its existence should have no dispositional rights over it.

In general, moreover, Karnein systematically subordinates the interests of the genetic parents of embryos to others. For example, she identifies the end point of moral respect for embryos as the end of the adoption waiting period. But this choice does not sit well alongside her contention that development of the embryo should presumptively go forward “if there

is no important reason to stop it” (ref. 1, p. 37). Some women and men do not want to give embryos to others, even if doing so would enable others to have children they would not otherwise have. Why is their judgment not reason enough to conclude that—as far as those embryos are concerned—they should never develop as persons and that they may therefore be disposed of or used in research? Some couples and women seem to prefer, in fact, donating embryos to research rather than to fertility programmes.

The donation of embryos for fertility purposes already creates moral uneasiness for women and men. Some parties seem to want to keep embryos in storage as a way of averting feelings of loss or as a kind of psychological and genetic ‘insurance’ in keeping their reproductive options open. One study showed that women worry that donated embryos may not fare well as children with other parents. Or, they can find themselves unable to tolerate the idea of their embryos living on as children ‘out there’ and having no contact with them. As a way of managing this discomfort, some clinicians abet women in a ‘compassionate transfer,’ namely the transfer of embryos into their uterus at a time when they have no expectation of a successful pregnancy. This ritual seems preferable to some women rather than alternatives of donation for fertility medicine, research or indefinite storage. In any case, giving one’s embryos to others—even for the important purpose of having a child—is not without consequential psychological effects.

Under Karnein’s adoption option, people would involuntarily become the biological mothers and fathers of children raised by others, no matter whether they had contact with those children. It is not certain that people whose embryos were surrendered for adoption would even have to know that they became parents, but even the uncertainty that they might would be unsettling for some people. Moreover, certain analysts recommend access to various kinds of information about genetic parents, to illuminate children’s medical circumstances first and foremost but for other reasons as well. In some cases, people who surrender embryos for adoption could not predict how children born to and raised by others would affect their own lives. Again, this uncertainty would be reason enough for some people to decline having their embryos used in fertility treatments of people unknown to them. If we applied Karnein’s adoption proposal to all embryos *currently* stored, the men and women involved would have made decisions about storing embryos without any reasonable way to foresee that outcome. If we were to apply Karnein’s proposal to all embryos starting at some point *in the future*—in order to ensure advance notice of the adoption requirement—people might originally agree to the terms but then change their minds. Some people who intend to donate embryos do, in fact, change their minds. Whether implemented in the former way or the latter, Karnein’s proposal comes with the cost of some measure of involuntary parenthood.

One other effect of the obligatory adoption option deserves mention here. Many stored embryos were passed over for transfer because they were undesirable in some way relative to their prospects for implantation but not discarded for one reason or another. Some of these embryos have been stored for a long time and may face diminished prospects for viability, given the preservation techniques in use at the time of storage. In other words, an unknown number of stored embryos may face increased risks of unsuccessful implantation, unsuccessful pregnancy or disorders. Some women and men might be willing to accept these embryos for transfer, but it is hard to see why anyone should be put in situations of accepting these increased risks if other embryos can be available to them.

257 *Objection 2. Required Embryo Adoption Would Obstruct the*  
 258 *Pursuit of Fertility Medicine.* Karnein says it would be an objec-  
 259 tion to her adoption policy if it deterred people from seeking  
 260 reproductive help in the first place. In other words, because  
 261 people might worry that their left-over embryos would become  
 262 children against their will, they would avoid seeking assisted  
 263 reproductive treatments (ARTs). Karnein says that this outcome  
 264 is entirely avoidable: people could protect themselves against  
 265 having to give embryos up for adoption simply by producing no  
 266 more embryos than they are willing to implant during any one  
 267 attempt at pregnancy.

268 *Reply to Objection 2.* Limiting embryo production and  
 269 storage is, in fact, legally required in some jurisdictions. Italy,  
 270 for example, allows the fertilisation of only three embryos at a  
 271 time and requires that all embryos produced in an IVF cycle be  
 272 implanted no matter their condition, leaving no embryos in  
 273 storage.<sup>9</sup> If this approach were rigorously followed around the  
 274 world, no extra embryos would be available at all for adoption.  
 275 The diminished prospects for embryo adoption would not con-  
 276 stitute an objection to Karnein's advocacy of the adoption  
 277 option, however, because that option derives from her wish to  
 278 give embryos a chance at maturation into personhood. If all  
 279 embryos produced in fertility medicine were transferred and  
 280 none store, all embryos would have exactly that chance.

281 There can be, however, clinical reasons for producing more  
 282 embryos than should be implanted all at once as well as clinical  
 283 reasons for not implanting some embryos. Producing more  
 284 embryos than are suitable for a given transfer can be desirable in  
 285 some clinical circumstances: as a way of avoiding the risks, costs  
 286 and inconveniences of multiple instances of hormone-induced  
 287 ovulation and egg collection or as a way to preserve fertility for  
 288 parties who face the loss of gonad function to disease or dis-  
 289 order. Some parties might want embryos beyond those they  
 290 intend for their own use in order to donate them for clinical  
 291 and research uses. In any case, some embryos will be less robust  
 292 than others and therefore not necessarily useful for fertility  
 293 medicine but perhaps useful for research. These considerations  
 294 amount to a prima facie reason, I submit, to leave it to women  
 295 and men in consultation with their clinicians to make decisions  
 296 about how many embryos to produce and transfer. Otherwise,  
 297 Karnein's approach might deter some parties from ARTs in one  
 298 way or another.

299 *Objection 3. Required Embryo Adoption Would Bring More*  
 300 *People into Existence than Intended by Anyone.* Karnein  
 301 imagines that some parents might respond to the adoption  
 302 option by implanting more embryos than they otherwise would  
 303 have. The result would be the birth of more children than  
 304 wanted by the couples or—for that matter—by anyone at all.  
 305 The adoption option would, then, have as its indirect effect the  
 306 creation of unwanted people.

307 Karnein admits that there might be a reason to limit the  
 308 number of people in the future, maybe for environmental  
 309 reasons, but she does not think there can be a “conceivable  
 310 reason for denying the existence of particular future persons”  
 311 (ref. 1, p. 39). In other words, any constraint on the number of  
 312 future people should not fall on a particular class of people,  
 313 such as people conceived in vitro for clinical or research  
 314 reasons. So, all things considered, there can be no objection to  
 315 embryo adoption on the grounds that more persons might  
 316 otherwise come into existence than expected, since against their  
 317 existence per se there can be no objection.

318 *Reply to Objection 3.* Except for commentators in the anti-na-  
 319 talist camp, most people accept having children as ethical in  
 320 principle even if they cede that there might be some reason to

limit the total number of people brought into existence.<sup>10 11</sup> In  
 a sense, however, pointing to the ability of the future to absorb  
 almost any number of new children—except as some upper  
 threshold might be reached—is irrelevant as a defense of an  
 obligatory adoption option. Karnein treats the objection as an  
 objection to creating people as such. But this approach over-  
 looks the question of why women should have to face the risks  
 of additional pregnancies or of multiples in a single pregnancy,  
 in order to avoid their embryos being available for adoption.  
 Having more children than one wants in order to protect  
 human embryos from adoption by others amounts to an adverse  
 preference. Allowing women to avoid those risks and costs is a  
 good reason for respecting the rights of genetic parents to  
 dispose of embryos as they see fit. It is not the existence per se  
 of more people in the future that is at stake, it is the effect of  
 these ‘more people’ on parents—and on women in particular—  
 that generates reasons to be sceptical about an obligatory adop-  
 tion option.

## CONCLUSIONS

In 2005, law professor Alta Charo predicted that some ‘pro-life’  
 legislators might try to ‘seize control of frozen embryos.’<sup>12</sup> She  
 noted that claiming public authority to control the disposition  
 of stored embryos would not run afoul of a key defence of abor-  
 tion. Some defences of abortion cede to women the right to  
 override any putative fetal rights because of the profound effect  
 of pregnancy on women's lives. Embryos in vitro pose no such  
 effects, so why should women in this instance be able to over-  
 ride any putative interests of the embryo? Along the same lines,  
 Julian Savulescu has said “If we were really serious that embryos  
 were people, we would force couples undergoing IVF to donate  
 spare embryos to other infertile couples, just as we force  
 couples who do not or cannot care for their children to have  
 them adopted by other couples.”<sup>13</sup> For her part, Anja Karnein  
 has laid out exactly this kind of theoretical basis for public inter-  
 vention in the fate of all stored embryos and certain embryos  
 produced for research, although she argues on grounds not that  
 embryos are persons properly speaking, but that respect for  
 persons should extend to them insofar as they stand to become  
 persons.

Karnein argues that the moral principle of respect for persons  
 requires steps to protect embryos from destruction until such  
 point as it is clear that they are not going to develop as persons.  
 Doing so does not interfere with women's lives in the same way  
 that prohibitions of abortion would. From this interpretation,  
 she draws the conclusion that law and policy should require  
 people who have surplus embryos from ARTs or people who  
 produce embryos for research to offer those embryos for adop-  
 tion, if only for a time.

Karnein defends this proposal against certain objections, but  
 her defenses are unpersuasive. Because she rejects the interpret-  
 ation of embryos as property, Karnein thinks that producers of  
 embryos do not have dispositional rights over them. Because of  
 the meaning of embryos, however, the men and women who  
 produce them should be entitled to have dispositional rights  
 over them even if they are not property. Karnein is not con-  
 vinced that it makes sense to object to the adoption option on  
 the grounds that some people might be deterred from seeking  
 fertility assistance in the first place. She points out that  
 would-be parents and clinicians can protect against the obliga-  
 tory adoption option by limiting the number of embryos they  
 produce and transferring them all, so that no embryos would be  
 open to adoption. This reply makes sense, however, only by  
 assuming that this clinical procedure makes sense for everyone.

385 In some cases, it might make sense to produce a number of  
 386 embryos and store them, as against using them fresh and in the  
 387 total number produced. Karnein also engages the objection that  
 388 an obligatory adoption period would bring unwanted people  
 389 into existence. Her reply—that there is no objection in principle  
 390 to more people coming into existence—does not go to the heart  
 391 of the matter. She cedes that a moral case could be made for lim-  
 392 iting the total number of people, but she sees no reason to think  
 393 that we should work to achieve the total number of permissible  
 394 existences by excluding stored embryos as possible people in that  
 395 number. But this approach fails to take risks to women into  
 396 account as they—as a matter of adverse preference—choose to  
 397 open themselves to the risks and costs of pregnancy in general  
 398 and/or the risks and costs of multiple pregnancies in particular.

399 Karnein's analysis would impose an adoption option on  
 400 researchers as well, but her analysis focuses only on embryos  
 401 stored in the course of ARTs. Consequently, she overlooks  
 402 important effects of the adoption option for researchers.  
 403 Researchers sometimes work to produce embryos with certain  
 404 qualities suited to the research at hand. Karnein's proposal  
 405 would apply only to viable embryos, so researchers would be  
 406 free to produce and retain embryos with genetic characteristics  
 407 that stand in the way of viability. But all other embryos would,  
 408 in principle, be subject to possible adoption. Researchers could  
 409 not be sure, therefore, that the embryos they produce will be  
 410 available for the very projects for which they were produced.  
 411 They could always lose them—and the time and cost involved—  
 412 to adoption. Karnein might reply that infertile couples might  
 413 not be interested in embryos that come from research—as a  
 414 source for having children of their own—so that the demand  
 415 for 'research embryos' would be low. If so, the researchers  
 416 would likely enjoy the fruits of their labours. But on Karnein's  
 417 account, no less respect would be due to those embryos than  
 418 others produced in contexts perceived as more acceptable by  
 419 adoptive parents. If embryos were routinely adopted out of  
 420 research contexts, I expect researchers would be reluctant to go  
 421 forward with human embryonic research, not wanting to invest  
 422 time and effort in the production of embryos they might lose.  
 423 Alternately, researchers might take steps to counterbalance  
 424 potential losses by producing more embryos than there is adop-  
 425 tive demand for them, in order to ensure that they have the  
 426 research embryos they want. That outcome would surely defeat  
 427 Karnein's intentions to confer opportunities for adult life on  
 428 human embryos.

I will also note that Karnein's overall argument is not strong  
 enough to create a duty to rescue the embryos produced in vitro  
 for ARTs or research. She does not require any woman to step  
 forward and gestate any of these embryos. By her account,  
 women who step forward to gestate these embryos would do so  
 only as a matter of their own self-interests, not as a matter of  
 obligation, not even necessarily as a sign of respect for persons.  
 That the proposed adoption option for embryos would be only  
 entirely and only elective shows, I think, that respect for  
 persons does not extend to human embryos in a way that justi-  
 fies the adoption option.

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