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Davis v. Davis: The Embryonic Stages of Procreational Privacy

Leanne E. Murray

Note

Davis v. Davis: The Embryonic Stages of Procreational Privacy

I. Introduction

The Tennessee Supreme Court has, in an unprecedented decision, extended constitutional protection of procreational privacy to include the right to avoid procreation after a human embryo is intentionally created outside of the womb.[1] The case of *Davis v. Davis*[2] involved a custody dispute over seven "frozen embryos" that had been created by the parties prior to their divorce.[3] Although Tennessee's highest court weighed the relative interests of the gamete-donors,[4] the court concluded that the party wishing to avoid genetic parenthood should prevail, so long as the other party had a "reasonable possibility" of achieving parenthood through other means.[5]

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1. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), *reh'g denied in part, granted in part*, No. 34, 1992 WL 341632 (Sup. Ct. Tenn. Nov. 23, 1992), *cert. denied*, Stowe v. Davis, 113 S. Ct. 1259 (1993). A human embryo may be created outside of the womb in a process called in vitro fertilization. *See infra* part II.B. In this Note, the term "embryo" will be used interchangeably with the term "preembryo," although the American Fertility Society has adopted the position that up to approximately two weeks after fertilization, the proper term for a zygote is "preembryo," as distinct from an embryo. *Davis*, 842 S.W.2d at 593. *See infra* note 82 and accompanying text.

2. 842 S.W.2d 588 (Tenn. 1992).

3. *Id.* at 589. Embryos may be "frozen" in liquid nitrogen in a process called cryopreservation. *See infra* part II.B.

4. A gamete is "a mature sexual reproductive cell, [such] as a sperm or egg, which unites with another cell to form a new organism." RANDOM HOUSE DICTIONARY 582 (Unabridged ed. 1979).

5. *Davis*, 842 S.W.2d at 604. The holding of the court is limited to situations where the parties had not entered into a prior contingency agreement. *Id.* at 597; *see infra* notes 168-72 and accompanying text.

As procreational technology advances,[6] issues such as the one presented to the Tennessee Supreme Court will become increasingly important.[7] Tennessee is the first state to directly address the specific right to avoid genetic parenthood[8] after conception.[9] Although the United States Supreme Court has denied certiorari in *Davis*,[10] advances in biological technology and changing ideas about the nature of parenthood indicate that it will only be a matter of time before the Court addresses this issue.

This Note discusses the importance of the Tennessee Supreme Court's constitutional evaluation of the right to avoid genetic parenthood. Part II traces the history of United States Supreme Court procreational privacy decisions, explains the process of in vitro fertilization, and addresses the legal status of preembryos, the products of in vitro fertilization. Part III sets forth the controversy which gave rise to the *Davis* litigation and details the decisions at the three Tennessee court levels. Part IV notes that the right to avoid genetic parenthood has not been held a "fundamental" right by the United States Supreme Court, and explains why the Supreme Court would most likely refuse to recognize such a right. Part V concludes with a pre-

6. *See generally* Jean M. Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625 (1991).

7. *See generally* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285 (1988).

8. A "genetic parent" has been described as "an individual who contributes a gamete resulting in a conception." VA. CODE ANN. § 20-156 (Michie 1992, effective July 17, 1993). However, this paper addresses an individual's interest in avoiding genetic parenthood after conception has occurred. Therefore, for the purposes of this paper, a "genetic parent" means an individual who contributes genetic material that results in a live birth. This is distinguishable from the traditional notion of a parent, which "comprehends much more than the mere fact of who was responsible for a child's conception and birth and is commonly understood to describe and refer to person or persons who share mutual love and affection with a child and who supply child support and maintenance, instruction, discipline and guidance." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (citing Solberg v. Metropolitan Life Ins. Co., 185 N.W.2d 319, 323 (Wis. 1971)). *See In re* Baby M, 537 A.2d 1227, 1253-54 (N.J. 1988) ("[t]he custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation").

9. The *Davis* court noted that "[p]reviously, courts have dealt with the child-bearing and child-rearing aspects of parenthood. Abortion cases have dealt with gestational parenthood. In this case, the Court must deal with the question of genetic parenthood." *Davis*, 842 S.W.2d at 603.

10. Stowe v. Davis, 113 S. Ct. 1259 (1993).

diction of the future of procreational privacy in the United States.

II. Background

A. *The History of Procreational Privacy Under the United States Constitution*

The United States Supreme Court decisions addressing procreational privacy have focused upon an individual's affirmative right to procreate,[11] to use contraception to prevent pregnancy,[12] and to have an abortion once pregnancy has occurred.[13] The Supreme Court has not specifically focused upon the right to avoid genetic parenthood once a human embryo is created outside of the womb.[14]

The fundamental right to become a parent has long been recognized by the Supreme Court. In *Meyer v. Nebraska*,[15] the Court held that the Fourteenth Amendment's concept of "liberty" encompasses the right to raise children.[16] The Court reinforced this concept in *Skinner v. Oklahoma*,[17] where the Court invalidated a law compelling the sterilization of criminals.[18] In

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11. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

12. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

13. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Akron v. Akron Ctr. For Reprod. Health, 462 U.S. 416 (1983); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

14. Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 473 (1992); *see also* Warren A. Kaplan, *Fetal Research Statutes, Procreative Rights, and the 'New Biology': Living In The Interstices Of The Law*, 21 SUFFOLK U. L. REV. 723 (1987).

15. 262 U.S. 390 (1923). In *Meyer*, the Court reversed the conviction of a teacher for teaching German to young children. *Id.* Justice McReynolds wrote that "liberty" denoted "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399 (emphasis added).

16. *Id.* The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

17. 316 U.S. 535 (1942).

18. *Id.* At issue in *Skinner* was the Oklahoma Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57, §§ 171-195 (West 1935). This statute, which

Skinner, the Court held that the right to procreate is "one of the basic civil rights of man,"[19] and that any law depriving an individual of that right must be strictly scrutinized.[20]

Although the right to procreate has been recognized by the Court since 1923, the right to avoid procreation was not explicitly recognized until 1965, in *Griswold v. Connecticut*.[21] At issue in *Griswold* were two Connecticut statutes which prohibited the use of contraceptives.[22] The opinion, written by Justice Douglas, cites several constitutional provisions which create "zones of privacy."[23] The *Griswold* Court held that these zones of privacy encompassed marital and sexual relationships,[24] and that state regulations could not "sweep unnecessarily broadly and thereby invade the area of [those] protected freedoms."[25]

In the following years, the Court strengthened and elaborated upon the concept of procreational privacy. In *Eisenstadt v. Baird*,[26] the Court invalidated two Massachusetts statutes[27] which granted married persons, but not single persons, access to contraceptives.[28] Justice Brennan, writing for the majority, stated with strong conviction: "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters

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mandated sterilization of a person after two felony convictions involving "moral turpitude," but excluded certain felonies such as embezzlement, was found unconstitutional. *Skinner*, 316 U.S. at 536.

19. *Id.* at 541.

20. *Id.*

21. 381 U.S. 479 (1965).

22. The two statutes at issue were CONN. GEN. STAT. § 53-32, *repealed by* 1969 CONN. PUB. ACTS 828, and CONN. GEN. STAT. § 54-196, *repealed by* 1969 CONN. PUB. ACTS 828, § 214. Section 53-32 provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined . . . or imprisoned," CONN. GEN. STAT. § 53-32 (repealed 1969); and § 54-196 provided that "any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender," CONN. GEN. STAT. § 54-196 (repealed 1969).

23. *Griswold*, 381 U.S. at 484. Among the provisions listed were the First Amendment's right of association, the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's guarantee against unreasonable searches and seizures, and the Fifth Amendment's self-incrimination clause. *Id.*

24. *Id.* at 485-86.

25. *Id.* at 485.

26. 405 U.S. 438 (1972).

27. MASS. GEN. LAWS ANN., ch. 272, §§ 21-21A (West 1990).

28. 405 U.S. at 454-55.

so fundamentally affecting a person as the decision whether to bear or beget a child."[29] This belief was the basis for the Court's decision in *Roe v. Wade*,[30] which set the standard for procreational privacy for nearly two decades to follow.

The *Roe* Court reaffirmed the concept of zones of privacy created by the Constitution[31] and held that the zones were "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[32] The Court noted, however, that the right to terminate a pregnancy was not absolute and therefore should be weighed against any state interest.[33] A state's interest in protecting a fetus was, according to the Court, compelling at the point at which a fetus became viable.[34] At that point a state could regulate and even proscribe abortion.[35]

The Court has not specifically addressed whether there is a fundamental right to avoid genetic parenthood after conception. The issue has been surreptitiously presented to the Court in abortion cases considering a father's right to decide the fate of his unborn fetus.[36] However, the Court has in the past summarily dismissed the issue of a father's rights, because of a wo-

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29. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

30. 410 U.S. 113 (1973).

31. *Id.* at 152.

32. *Id.* at 153.

33. *Id.* at 154-55. "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . ." *Id.* at 155.

34. *Id.* at 163. The *Roe* Court stated that a fetus was "viable" at the point at which it could potentially "live outside of the mother's womb, albeit with artificial aid." *Id.* at 160.

35. *Id.* at 163-64. The *Roe* Court set forth what has come to be known as the "trimester framework":

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

36. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (holding a state's spousal notice provision unconstitutional); Planned Parenthood v. Dan-

man's overriding rights of privacy, bodily integrity, and autonomy.[37] Thus, both spousal consent and spousal notice provisions have consistently been deemed unconstitutional by the United States Supreme Court.

For example, in *Planned Parenthood v. Danforth*[38] the Court considered, *inter alia*, a husband's interest in his wife's decision to abort a fetus.[39] The Court held that the spousal consent provision in Missouri's abortion statute[40] was unconstitutional, reasoning that a "state cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' "[41] Moreover,

> [t]he obvious fact is that when the wife and the husband disagree on [the decision to abort], the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.[42]

In concurrence, Justice Stewart noted that the majority too quickly discounted the issue of a husband's interest in his unborn fetus.[43] He stated:

> the primary issue [raised] is whether the [s]tate may constitutionally recognize and give effect to a right on [the father's] part to participate in the decision to abort a jointly conceived child. This seems to me a rather more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's

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forth, 428 U.S. 52 (1976) (holding a state's spousal consent provision unconstitutional).

37. *Danforth*, 428 U.S. at 67-72. *See* Stefanie L. Black, Comment, *Competing Interests in the Fetus: A Look Into Paternal Rights After Planned Parenthood v. Casey*, 28 WAKE FOREST L. REV. 987 (1993) (examining the issue of paternal rights and its treatment in the courts).

38. 428 U.S. 52 (1976).

39. *Id.* at 69. "We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Id.*

40. MO. ANN. STAT § 188.020(3) (Vernon 1974).

41. *Danforth*, 428 U.S. at 69 (quoting Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975)). The state's inability to prohibit abortion during the first trimester was created in the *Roe* decision. *See supra* notes 30-35 and accompanying text.

42. *Danforth*, 428 U.S. at 71.

43. *Id.* at 90 (Stewart, J., concurring).

> right to father children and enjoy the association of his offspring is a constitutionally protected freedom.[44]

Justices White and Rehnquist added in their dissent that the issue was not, as the majority claimed, whether the state could delegate to another its interest in the potential life of a fetus, but rather, whether the Court should recognize a husband's interest in the life of his wife's fetus.[45]

In a dissent from *City of Akron v. Center For Reproductive Health*,[46] Justice O'Connor warned that the *Roe* framework was inherently tied to medical technology, and that a state's interest in potential life existed as much at the beginning of pregnancy as it did at viability.[47] This criticism of the *Roe* trimester framework has steadily been adopted by the majority of the Court.

In *Webster v. Reproductive Health Services*,[48] the Court acknowledged that the trimester system was "unsound in princi-

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44. *Id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an unmarried father has a right to a hearing on his fitness as a parent before he could be deprived of parenthood); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See supra* notes 17-20 and accompanying text for a discussion of *Skinner*).

45. *Danforth*, 428 U.S. at 93 (White, J., dissenting). The dissent continued:

> [i]t by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.

Id. (citing *Stanley*, 405 U.S. at 651).

46. 462 U.S. 416 (1983) (O'Connor, J., dissenting). In *City of Akron*, the Court held several provisions of an Ohio abortion statute unconstitutional, including provisions requiring: 1) that any abortion after the first trimester of pregnancy be performed in a hospital, *id.* at 431-33; 2) parental consent for minors under the age of fifteen, *id.* at 439-42; 3) informed consent from the woman obtaining the abortion, *id.* at 442-44; and 4) a 24-hour waiting period prior to the abortion, *id.* at 449-51. Similar provisions have recently been deemed constitutional in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). *See infra* notes 56-70 and accompanying text.

47. *City of Akron*, 462 U.S. at 452, 459 (O'Connor, J., dissenting).

48. 492 U.S. 490 (1989). The Court in *Webster* upheld the constitutionality of a Missouri abortion statute, MO. ANN. STAT. ch. 188 (Vernon 1983 & Supp. 1993), which contained a preamble that stated that the "life of each human being begins at conception," prohibited the use of public facilities or employees to perform abortions, and required physicians to conduct viability tests prior to performing abortions. *Webster*, 492 U.S. at 504-21. The Court refused to examine the constitutionality of the statute's preamble, because the preamble "[did] not by its terms regulate abortion or any other aspect of appellee's medical practice." *Id.* at 506.

ple and unworkable in practice."[49] Chief Justice Rehnquist, who authored the *Webster* opinion, objected to the framework because it was inconsistent with the "notion of a Constitution cast in general terms and usually speaking in general principles."[50] The Chief Justice further stated that "[t]he key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."[51] The *Webster* Court also echoed the concern previously expressed by Justice White in *Planned Parenthood v. Danforth*[52] that the framework rendered the Supreme Court the country's "ex officio" medical board, with powers to approve or disapprove medical and operative practices and standards throughout the United States.[53] Acknowledging that a state's interest in protecting potential life existed before the point of viability,[54] the Court modified and narrowed *Roe*, but avoided an explicit overruling by distinguishing the facts at issue in the two cases.[55]

Recently, in *Planned Parenthood v. Casey*,[56] the Court consummated its departure from the *Roe* framework while reaffirming what it deemed to be the central holding of *Roe*.[57] The *Casey* Court upheld provisions of Pennsylvania's Abortion Control Act[58] which required, as prerequisites to obtaining an abor-

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49. *Webster*, 492 U.S. at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

50. *Id.*

51. *Id.*

52. 428 U.S. 52 (1976).

53. *Webster*, 492 U.S. at 518-19 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 99 (White, J., dissenting)).

54. *Id.* at 519. "[W]e do not see why the state's interest in protecting potential human life should come into existence only at the point of viability." *Id.*

55. *Id.* at 521. The Court emphasized that the Missouri statute determined viability to be the point at which Missouri's interest in potential human life was compelling, whereas the Texas statute in *Roe* criminalized the performance of all abortions, unless the life of the mother was endangered. *Id.*

56. 112 S. Ct. 2791 (1992).

57. The *Casey* opinion set forth what it deemed to be the essential holding of *Roe*: 1) a woman has a fundamental right to choose to have an abortion, without undue interference from the state, before the viability of her fetus; 2) a state has the power to restrict abortions after fetal viability, provided that the law contains exceptions for pregnancies which endanger a woman's life or health; 3) the state has legitimate interests from conception in protecting the health of the woman and the life of the fetus. *Id.* at 2803-16.

58. 18 PA. CONS. STAT. §§ 3203-3220 (1990).

tion: 1) informed consent;[59] 2) a twenty-four-hour waiting period;[60] and 3) parental consent with a judicial bypass.[61] The Court struck down the statute's spousal notice provision,[62] but acknowledged a husband's " 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.' "[63]

Justice O'Connor, writing for the plurality, stated that it was settled law that the Constitution limits a state's "right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity."[64] She elaborated further by recognizing that the "law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[65] Nevertheless, Justice O'Connor classified *Roe* as an "extension" of the cases protecting personal liberties, and noted that "[t]he extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate in *Roe* itself and in decisions following it."[66]

Although the *Casey* Court acknowledged that there was a realm of personal liberty within which the government could not constitutionally intrude, the Court reiterated that a state may override a woman's right to an abortion at fetal viability.[67]

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59. *Id.* § 3205.

60. *Id.*

61. *Id.* § 3206.

62. *Id.* § 3209.

63. *Casey*, 112 S. Ct. at 2830 (quoting *Danforth*, 428 U.S. at 69). The *Casey* Court held that the spousal notice provision imposed an undue burden on a woman's right to obtain an abortion and was therefore unconstitutional, because of the disparate effects of a pregnancy upon the liberty of men and women due to their biological differences, and because the prevalence of domestic violence rendered the provision a "substantial obstacle" to women seeking an abortion. *Id.* at 2799-2800.

64. 112 S. Ct. at 2806 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Washington v. Harper, 494 U.S. 210, 221-22 (1990); Wintston v. Lee, 470 U.S. 753 (1985); Rochin v. California, 342 U.S. 165 (1952)).

65. *Casey*, 112 S. Ct. at 2807 (citing *Carey*, 431 U.S. at 685).

66. *Id.* at 2808.

67. *Id.* at 2816-22.

The Court then abolished the trimester framework after determining that it did not sufficiently recognize the state's interest in the potential lives of fetuses.[68] Justice O'Connor formulated an "undue burden" standard to replace the trimester system, which had effectively prevented any state interference with the abortion decision during the first trimester.[69] The Court held:

> [t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.[70]

The United States Supreme Court has noticeably changed its views regarding abortion since *Roe v. Wade*. Although the Court still recognizes the fundamental privacy right of a woman to obtain an abortion, it is clear that changing medical technologies,[71] as well as the changing constituency of the Court,[72] have

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68. *Id.* at 2818.

69. *Id.* at 2820.

70. *Id.* at 2799. The Court explained that a regulation was an "undue burden" if it had "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.*

71. Fetuses are capable of life outside of the mother's womb at earlier and earlier stages as technology advances. *See* Chris Macaluso, Comment, *Viability and Abortion*, 64 KY. L.J. 146, 160-62 (1975). The Court in *Roe v. Wade* defined viability as the point at which the fetus is "potentially able to live outside of the womb, albeit with artificial aid." *Roe*, 410 U.S. at 160. Many states have adopted this definition. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2301.01(D) (1992); IDAHO CODE § 18-604(7) (1992); LA. REV. STAT. ANN. § 40:1299.35.1(3) (West 1992); ME. REV. STAT. ANN. tit 22, § 1598(2)(B) (West 1992); NEB. REV. STAT. § 28-326(6) (1991).

72. One of several highly-publicized aspects of the Clarence Thomas hearings focused upon the fact that Justice Thomas refused to state his position on abortion. Al Kamen, *Center-Right Coalition Asserts Itself Moderates O'Connor, Kennedy, Souter Are Reagan-Bush Appointees*, WASH. POST, June 30, 1992, at A1. Not surprisingly, Justice Thomas joined with Justices Rehnquist and Scalia in their *Casey* dissent and urged the explicit overruling of *Roe v. Wade*. *Id.* However, it is expected that, "[b]y replacing conservatives, [President] Clinton could make the Court more liberal on abortion . . . ." *Inside Politics* (CNN television broadcast, Nov. 5, 1992). President Clinton has already replaced conservative Justice White with Ruth Bader Ginsberg, a pro-choice advocate. *See* Harriet Chiang, *Ginsberg Speaks Up For Women's Rights*, S.F. CHRON., Aug. 9, 1993, at A2. Further, Justice Blackmun has recently announced his retirement and must be replaced. Such a change in constituency, while safeguarding a woman's right to abortion, may not necessarily affect in vitro fertilization, and the issue at bar. *See infra* part V.

made the Court increasingly willing to recognize a state's asserted interest in protecting the potentiality of life.

B. *The Process of In Vitro Fertilization*

The first successful birth of a child produced by in vitro fertilization (IVF) was in 1978.[73] Since then, IVF programs have rapidly increased.[74] IVF provides an opportunity for procreation to couples hindered by many forms of infertility.[75]

The process of IVF may be divided into five steps: 1) patient screening, 2) ovulation induction and monitoring, 3) ova aspiration, 4) in vitro fertilization, and 5) embryo transfer.[76] After a patient has been accepted into an IVF program, the process begins with the injection of chemicals or human hormones into a woman's ovaries to stimulate ovulation and produce multiple eggs.[77] Once a patient's estrogen has increased, the physician causes eggs to release from the ovarian follicles, again by administering a drug.[78] The eggs are subsequently removed via laparoscopy[79] and placed into a dish, to which the donor's sperm is added.[80] Two to four days after fertilization and cell division,[81] the physician injects the preembryo[82] into the woman's

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73. Melvin G. Dodson et al., *A Detailed Program Review of In Vitro Fertilization With a Discussion and Comparison of Alternative Approaches*, 162 SURGERY, GYNECOLOGY & OBSTETRICS 89, 89 (Jan. 1986).

74. *Id.*

75. *Id.*

76. *Id.* at 90.

77. *Id.* All cycles are stimulated by clomiphene citrate, human menopausal gonadotropin, followed by human chorionic gonadotropin. *Id.* The production of multiple eggs is sometimes referred to as "superovulation." John A. Robertson, *Decisional Authority Over Embryos And Control of IVF Technology*, 28 JURIMETRICS J. 285, 286-87 (1988).

78. Kaplan, *supra* note 14, at 727. The drug administered is human chorionic gonadotropin. Dodson et al., *supra* note 73, at 90.

79. Kaplan, *supra* note 14, at 727. "A laparoscopy is a procedure performed under anesthesia in which the physician places two tubes in the woman's abdomen near the naval .... The doctor then observes the ovary through a scope attached to one of the tubes .... A hollow needle is then passed through the other tube and the eggs are aspirated out of the body cavity." *Id.* n.17.

80. *Id.* at 727.

81. *Id.* at 727-28. Most preembryos are transferred to the cervical canal at the four to eight-cell stage. *See* Dodson et al., *supra* note 73, at 101-02.

82. The American Fertility Society has adopted the position that at the eight-cell stage the aggregation of human cells is still a zygote and has not yet developed the singleness of one person; therefore, up to approximately two weeks after fertilization, the proper term for a zygote is "preembryo," as distinct from an embryo.

cervical canal with a syringe-like catheter.[83] Implantation will occur, if at all, within two weeks after transfer.[84]

"Cryopreservation" is the maintenance of preembryos or other excised tissue at extremely low temperatures.[85] When multiple eggs are produced through superovulation,[86] those not implanted are fertilized, frozen, and saved for use at a later date.[87] Cryopreservation can increase the chances of pregnancy, and is less invasive and less expensive than retrieving additional ova from the woman.[88]

The success rate of achieving pregnancy through IVF is low.[89] There is evidence that the likelihood of a successful pregnancy increases when multiple embryos are transferred at one time.[90]

C. *The Legal Status of Preembryos: Legislative and Judicial Responses to In Vitro Fertilization*

To date, Louisiana has the most comprehensive and restrictive set of laws regarding the products of in vitro fertilization.[91] First and foremost, Louisiana's statute proclaims that a viable preembryo is a "juridical person which shall not be intentionally destroyed . . . ."[92] The statute entitles an in vitro fertilized ovum to sue or be sued,[93] and provides that such an ovum is not the property of the physician, IVF clinic, or the gamete donors.[94]

Davis, 842 S.W.2d at 593. *See also* John A. Robertson, *In The Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990).

83. Kaplan, *supra* note 14, at 728.

84. *Id.*

85. STEADMAN'S MEDICAL DICTIONARY 375 (25th ed. 1990).

86. *See* Robertson, *supra* note 77, at 286-87.

87. Board of Trustees Report, *Frozen Pre-Embryos*, JAMA, May 9, 1990, at 2484-87.

88. *Id.*

89. *See* Dodson et al., *supra* note 73, at 102. One clinic reported 14 pregnancies out of 110 attempts, yielding a pregnancy rate of 13 percent per laparoscopy. However, other clinics have reported a 30 to 40 percent success rate. *Id.*

90. *Id.* at 103.

91. *See* LA. REV. STAT. ANN. § 9:121-33 (West 1991).

92. *Id.* § 9:129. The statute defines a non-viable in vitro fertilized human ovum as one "that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation." *Id.*

93. *Id.* § 9:124.

94. *Id.* §§ 9:126, 130.

Under the Louisiana statute, a guardian may be appointed to safeguard a fertilized ovum's legal rights.[95] Finally, the Louisiana statute requires that all preembryos be transferred to a uterus.[96] The IVF participants are thus, in effect, required to choose between undergoing implantation themselves, or allowing their preembryos to be "adopted."[97]

The Uniform Parentage Act, created in 1973 by the National Conference of Commissioners on Uniform State Laws, was created to address the legal implications of children born out of wedlock.[98] The Act "does not deal with many complex and serious legal problems raised by the practice of artificial insemination."[99] However, the Act does state that: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[100] This Act has been adopted by eighteen states,[101] including California.[102] One court has determined that the purpose of Section 7005[103] of California's Parentage Act

95. *Id.* Section 126 provides: "[i]f the in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A court . . . may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who cause in vitro fertilization to be performed, to protect the in vitro fertilized human ovum's rights." *Id.*

96. *Id.* §§ 9:129-30. "If the in vitro fertilization parents renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation . . . ." *Id.* § 9:130.

97. *Id.* The statute therefore eliminates one's ability to avoid genetic parenthood, a right which the *Davis* court held to be at least as fundamental as one's right to become a parent. *See infra* part III.D.3.

98. UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287 (1973).

99. *Id.* § 5, cmt., at 302.

100. *Id.* § 5(b), at 301.

101. The Act has been adopted by Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287 (1973 & Supp. 1993). New Hampshire's statute has an effect similar to that of the Uniform Parentage Act, creating a presumption of fatherhood for the unmarried donor of sperm only when he and the unmarried recipient of the sperm agree in writing, prior to in vitro fertilization, that the donor shall be the father. N.H. REV. STAT. ANN. § 168-B:3(I)(e) (Supp. 1993). *See generally* N.H. REV. STAT. ANN. § 168-B (Supp. 1993), which addresses all surrogacy matters.

102. CAL. CIV. CODE §§ 7000-7021 (West 1987).

103. *Id.* § 7005 (Section 7005 is derived almost verbatim from Section 5 of the Uniform Parentage Act).

was to provide a method for a semen donor to avoid the legal consequences dictated by traditional notions of paternity.[104] However, the importance of the Uniform Parentage Act to this article is that, once a semen donor voluntarily gives his genetic material which is used to fertilize an ovum, the donor has no right to prevent the gestation and birth of the fertilized ovum. Thus, genetic parenthood would in fact be imposed upon the donor to the same extent as in the case at bar.

Virginia is one state that has not adopted the Uniform Parentage Act.[105] Thus, in Virginia, gamete donors who are not the intended parents of the in vitro fertilization process may still have parental rights or duties with respect to a resulting child.[106] In addition, preembryos are considered the property of the gamete-donors, and the IVF clinic's legal rights and duties with respect to the gamete-donors are those of a bailee.[107]

In general, legislatures have been slow to deal with the issues presented by IVF. However, it can be expected that as IVF clinics proliferate, more disputes will arise and be taken to the courts. Legislation will inevitably follow.

III. *Davis v. Davis*

A. *Facts*

This case began as a custody dispute arising from the divorce proceedings between Mary Sue and Junior Davis.[108] Prior to their divorce, the Davises had repeatedly attempted to con-

104. *See* Jhordan C. v. Mary K., 179 Cal. Rptr. 530, 537 (Cal. Ct. App. 1986).

105. Welborn v. Doe, 394 S.E.2d 732, 734 (Va. Ct. App. 1990).

106. VA. CODE ANN. § 32.1-257(D) (Michie 1992). Under the statute, a child born to a married woman who conceived the child using artificial insemination with the written consent of her husband shall be considered the legitimate natural child of both the woman and her husband. *Id.* *See* Welborn v. Doe, 394 S.E.2d 732 (Va. Ct. App. 1990), where the husband of a woman who had been artificially inseminated by the sperm of an anonymous donor sought to adopt the resulting twins. *Id.* at 733. The court held that the Virginia statute did not terminate the natural father's (sperm-donor's) rights, absent adoption by the husband. *Id.* Thus the court determined that, "[u]ntil such time as the Code is amended to terminate possible parental rights of a sperm donor, only through adoption may the rights of the sperm donor be divested . . . ." *Id.* at 734.

107. *See* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), where the court held that the IVF gamete-donors had the right to order inter-institutional transfer of their preembryo to California, where they had relocated. *Id.* at 427.

108. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

ceive a child.[109] Mary Sue suffered five painful pregnancies and, as a result, elected to have her fallopian tube ligated, which prevented her from conceiving naturally.[110] The couple thereafter decided to adopt a child.[111] Due to unexpected difficulties, however, this route also proved fruitless.[112] This led the couple to attempt to achieve pregnancy through in vitro fertilization.[113]

The Davises unsuccessfully attempted IVF six times,[114] which cost the couple considerable expense[115] and Mrs. Davis a significant amount of pain.[116] In November of 1988, the possibility of cryogenically preserving[117] preembryos became available to the Davises.[118] The Davises' IVF clinic successfully brought nine zygotes to the four- to eight-cell stage, and transferred two to Mrs. Davis while freezing the rest.[119] As with the previous six attempts, the transfers were unsuccessful. Before another transfer was attempted, Mr. Davis filed for divorce.[120]

The contested issue in the divorce was the disposition of the remaining seven preembryos.[121] Mr. Davis originally "preferred to leave the embryos in their frozen state until he decided whether or not he wanted to become a parent outside the bounds of marriage."[122] Mrs. Davis, however, wished to continue to attempt to achieve pregnancy herself with the embryos.[123]

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109. *Id.* at 591.

110. *Id.*

111. *Id.*

112. *Id.* The couple paid the medical expenses of a pregnant woman willing to give her child up for adoption. *Id.* However, upon delivery the woman elected to keep her child. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The total cost of the six attempts was $35,000. *Id.*

116. *Id.* at 591-92.

117. The process of cryopreservation involves the freezing of the conceptive product in nitrogen and storing at sub-zero temperatures. *Id.* at 592. *See supra* notes 85-88 and accompanying text.

118. 842 S.W.2d at 592.

119. *Id.*

120. *Id.*

121. *Id.* at 589.

122. *Id.*

123. *Id.*

B. *Trial Court*

The Tennessee circuit court held that temporary custody of the preembryos should be vested in Mrs. Davis for the purpose of implantation.[124] In making its decision, the court determined that 1) human life begins at conception;[125] 2) the doctrine of *parens patriae*[126] applies to in vitro embryos;[127] and 3) it was in the best interest of the in vitro embryos to be brought to term through implantation.[128] The court reserved the matters of support, visitation, and final custody until the time at which one or more of the preembryos achieved live birth.[129] Mr. Davis appealed the trial court's decision.

C. *Tennessee Court of Appeals*

The Tennessee Court of Appeals modified the trial court's holding and granted the Davises joint custody over the preembryos.[130] Significantly, at the time of the appellate decision both parties had remarried, and Mrs. Davis (now Mrs. Stowe) wished to donate the embryos to a childless couple rather than undergo implantation herself.[131]

The appellate court stated that the United States Supreme Court "has clearly held that an individual has a right to prevent procreation. 'The decision whether to bear or beget a child is a constitutionally protected choice.' "[132] The court then analyzed fetal rights under *Roe v. Wade*,[133] which held that in the first trimester of pregnancy a woman has the absolute right to termi-

124. Davis v. Davis, No. E-14496, 1989 WL 140495, at *11 (Tenn. Cir. Ct. Sept. 21, 1989).

125. *Id.* at *9

126. The doctrine of parens patriae is used in child custody determinations to refer to the role of the state in protecting the interests of the child. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

127. *Davis*, 1989 WL 140495, at *10.

128. *Id.* at *11.

129. *Id.*

130. Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Ct. App. 1990).

131. *Id.* at *1 n.1. Although Mrs. Davis' name is now Mrs. Stowe, she will be referred to as Mrs. Davis throughout the entire article to maintain continuity and clarity.

132. *Davis*, 1990 WL 130807, at *2 (quoting *In re* Romero, 790 P.2d 819, 822 (Colo. 1990) (citing Carey v. Population Serv. Int'l., 431 U.S. 678, 685 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972))); *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

133. 410 U.S. 113 (1973).

nate her pregnancy.[134] In addition, the court noted that the Tennessee abortion statutes "demonstrate[d] even more explicitly that viable fetuses in the womb are not entitled to the same protection as 'persons.' "[135] The court also examined Tennessee's wrongful death statute,[136] which does not allow a wrongful death action for a viable fetus not yet born alive.[137] The court concluded: "On the facts of this case, it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological, if not legal, consequences of paternity against his will."[138] Thus, the court awarded joint custody of the preembryos to the parties.[139] Mrs. Davis appealed to the Tennessee Supreme Court, contesting the court of appeals' constitutional basis for its decision.[140]

D. *Tennessee Supreme Court*

The issue of whether there exists a constitutional right to avoid genetic parenthood after gamete donation was one of first impression.[141] The Tennessee Supreme Court noted that no guiding caselaw existed despite the fact that approximately

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134. *Id.* at 163. *See supra* notes 30-35 and accompanying text.

135. *Davis*, 1990 WL 130807, at *2. The Tennessee abortion statute, TENN. CODE ANN. § 39-15-201(c) (1992), states in pertinent part that:

> [n]o person is guilty of a criminal abortion or an attempt to procure criminal miscarriage when an abortion or an attempt to procure a miscarriage is performed under the following circumstances: (1) During the first three (3) months of pregnancy . . . (2) After three (3) months, but before viability of the fetus . . . (3) During the viability of the fetus, if the abortion . . . is necessary to preserve the life or health of the mother . . . .

Id.

136. TENN. CODE ANN. § 20-5-106 (1980).

137. *Davis*, 1990 WL 130807, at *2. Tennessee statutes that protect viable fetuses without requiring a subsequent birth include TENN. CODE ANN. § 39-13-107 (1992) (assault), TENN. CODE ANN. § 39-13-214 (1991) (criminal homicide), and TENN. CODE ANN. § 20-5-106(b) (1980) (injury resulting in death).

138. *Davis*, 1990 WL 130807, at *3.

139. *Id.* Because frozen preembryos can only survive up to two years before implantation, "the true effect of the intermediate court's opinion [was] to confer on Junior Davis the inherent power to veto any transfer of the preembryos . . . and thus to insure their eventual discard or self-destruction." *Davis*, 842 S.W.2d at 598.

140. *Davis*, 842 S.W.2d at 590.

141. *Id.*

20,000 "frozen embryos" were in storage in the United States.[142] There did exist, however, numerous articles written by medical-legal scholars and ethicists concerning the disposition of cryogenically-preserved embryos.[143] After briefly reviewing the theories presented by these articles, the court concluded that each theory proposed a bright-line rule which should not be adopted,[144] given the relevant federal and state constitutional principles,[145] Tennessee public policy with respect to unborn life,[146] scientific knowledge and emerging reproductive technologies,[147] and ethical considerations.[148] The court concluded that resolving the issue fairly and responsibly required weighing the relative interests of each party to the dispute.[149]

The *Davis* court first addressed the question of whether the products of IVF should be termed "preembryos" or "embryos."[150] The court agreed with expert testimony that "the currently accepted term for the zygote immediately after division is 'preembryo' and that this term applies up until fourteen days after

142. *Id.*

143. *Id.* at 590-91. The court cited various articles presenting models for the disposition of frozen embryos. *See* Colleen M. Browne & Brian J. Hynes, Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. LEGIS. 97 (1990) (illustrating extreme rules that either require that all embryos be used by the gamete-providers or donated for uterine transfer, or that any unused embryos be automatically discarded); John A. Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CENTER REP., Nov.-Dec. 1989, at 7 (describing the "sweat equity" model which would automatically vest control in female gamete-donor, because of her greater involvement in the IVF process); Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 401-08 (1986) (supporting the vesting of control in the female donor when she desires to implant herself). Other models would assume implied contracts to procreate from participation in the IVF procedure, and would either give the IVF clinic the decision-making authority, or would require transfer into the female donor or a donee. One model would divide the preembryos equally between the donors (the court deemed this theory to be "the worst of both worlds" for the Davises, because both parties would then be dissatisfied, *Davis*, 842 S.W.2d at 591 n.6). Yet another model would give the preembryos to the party wishing to avoid procreation. Elisa K. Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67 (1990).

144. *Davis*, 842 S.W.2d at 591.

145. *See infra* part III.D.3.

146. *See infra* notes 187-92 and accompanying text.

147. *See infra* part III.D.1.

148. *Davis*, 842 S.W.2d at 591.

149. *Id.*

150. *Id.* at 592-93.

fertilization."[151] After fourteen days, the cells comprising the preembryo begin to differentiate.[152] While noting that the semantical distinction was not dispositive, it was important to the court because "inaccuracy can lead to misanalysis such as occurred at the trial level."[153]

1. *Is An Eight-Celled Frozen Preembryo a "Person" or "Property"?*

The Tennessee Supreme Court responded to the request made by the American Fertility Society and nineteen other national organizations as amici curiae to address the issue of whether preembryos should legally be considered "persons" or "property,"[154] despite the fact that a preembryo could not be considered a person under Tennessee law[155] or federal law.[156] The court analyzed three major ethical positions articulated by the American Fertility Society regarding preembryos.[157] The first was the view that the preembryo is a human immediately upon fertilization, and thus must be accorded the rights of a person.[158] The court rejected this view, noting that such a view would impose a duty to provide an opportunity for implantation

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151. *Id.* at 593.

152. *Id.*

> The stage subsequent to the zygote is cleavage, during which the single initial cell undergoes successive equal divisions with little or no intervening growth. . . . After three such divisions, the aggregate contains eight cells in relatively loose association . . . [E]ach blastomere, if separated from the others, has the potential to develop into a complete adult . . . . Stated another way, at the 8-cell stage, the developmental singleness of one person has not been established.

Id.

153. *Id.* at 594. The trial court had treated the preembryos as "children in vitro" to reach the conclusion that it was in the best interest of the "children" to be born. *Id.*

154. *Id.*

155. The court noted that preembryos could not be considered "persons" under Tennessee law because a wrongful death action did not exist for a viable fetus not first born alive, and because Tennessee's legislature had adopted the *Roe* trimester approach to abortion. *Id.* at 594-95.

156. *Id.* at 595. The court stated that the United States Supreme Court explicitly refused to recognize independent fetal rights in *Roe v. Wade*, 410 U.S. 113 (1973). This conclusion, the *Davis* court stated, had "never been seriously challenged." *Davis*, 842 S.W.2d at 595.

157. *Id.* at 596.

158. *Id.*

to every preembryo.[159] This view would also tend to prohibit any actions that might harm a preembryo before transfer, such as cryopreservation.[160]

The second view, also rejected by the court, was that the preembryo is no different from other human tissue, and therefore no limits should be imposed upon those with decision-making authority over the preembryo.[161] The third position, adopted by the *Davis* court, was that "the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons."[162] The rationale behind this view is that a preembryo possesses the potential for human life, which other human tissue does not possess, yet a preembryo may not realize its human potential.[163]

2. *The Enforceability of Contract*

The court next addressed 1) whether the Davises could have executed a valid contingency agreement prior to in vitro fertilization, and if so 2) whether such an agreement would be enforceable.[164] The court stated that "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors."[165] This ruling, stated the court, was in accordance with the notion that gamete-donors should retain decision-making authority over their genetic material that had created a preembryo.[166] In a footnote, Justice Daughtrey distinguished an IVF contingency agreement from an agreement regarding abortion, which would be "unenforceable because of the woman's right to privacy and autonomy."[167]

While recognizing the validity of IVF contingency agreements, the court noted that the emotional nature of infertility

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 597.
165. *Id.*
166. *Id.*
167. *Id.* n.20 (citing Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

and IVF rendered "informed consent" nearly impossible.[168] Such consent would "often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds."[169] Thus, the court ruled that if an initial agreement allowed for later modification "by agreement," the initial agreement would be binding.[170]

The court refused to find that the Davises had an implied contract to reproduce through IVF.[171] Further, the court posited that, were the roles of the parties reversed, Mr. Davis could not force Mrs. Davis to undergo implantation herself, because of her "absolute right" to terminate any resulting pregnancy in the first trimester.[172] Therefore, because the court did not find an agreement between the parties to honor, the court was forced to examine the substantive rights of the parties.

3. *The Right To Procreational Autonomy*

The court then addressed what it termed "the essential dispute: whether the parties [would] become parents."[173] The determination of this issue, according to the court, rested on the parties' constitutional right to privacy.[174] The term "privacy," explained the court, was grounded in the concept of liberty embodied in both the federal and Tennessee constitutions.[175] The court stated that the Fourteenth Amendment's concept of liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children,"[176] as well as "the right to be let alone."[177]

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168. *Id.* at 597.

169. *Id.*

170. *Id.* The court did not explain this requirement further. The requirement that an agreement would be valid only if it could later be modified by agreement seems illusory, because any agreement may be modified by a subsequent agreement between the parties.

171. *Davis*, 842 S.W.2d at 598.

172. *Id.* at 598 n.21.

173. *Id.* at 598.

174. *Id.*

175. *Id.*

176. *Id.* at 599 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

177. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

The court recognized that the concept of liberty played "a central role" in the Tennessee Constitution[178] and in several sections of the Tennessee Declaration of Rights.[179] Thus, the court held that "[i]n terms of the Tennessee State Constitution, . . . the right of procreation is a vital part of an individual's right to privacy."[180] "Federal law," stated the court, "is to the same effect."[181]

The *Davis* court acknowledged that the United States Supreme Court had "never addressed the issue of procreation in the context of in vitro fertilization."[182] The court further noted that, although the right to procreational autonomy is implicit in cases involving reproductive freedom and parental rights, the "extent to which procreational autonomy is protected by the United States Constitution is no longer entirely clear . . . . The *Webster* opinion lends even less guidance to those seeking the bounds of constitutional protection of other aspects of procreational autonomy."[183] The court then stated:

> [f]or the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of *two rights of equal significance—the right to procreate and the right to avoid procreation.* Undoubtedly, both are subject to protections and limitations.[184]

The court reasoned that "the equivalence of and inherent tension between" the two rights is more noticeable in the context of in vitro fertilization because "none of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions" are applicable.[185] The court

178. *Id.* "Indeed, the notion of individual liberty is so deeply embedded in the Tennessee Constitution that it, alone among American constitutions, gives the people, in the face of governmental oppression and interference with liberty, the right to resist that oppression even to the extent of overthrowing the government." *Id.*

179. *Id.* at 600. The court cited Section 3 of the Tennessee Declaration of Rights (freedom to worship), Section 7 (forbidding unreasonable searches and seizures), Section 19 (freedom of speech and press), and Section 27 (prohibiting the quartering of soldiers without a homeowner's consent).

180. *Id.*

181. *Id.*

182. *Id.* at 601.

183. *Id. See supra* notes 48-55 and accompanying text.

184. *Davis*, 842 S.W.2d at 601 (emphasis added).

185. *Id.* The court noted that the IVF process was more traumatic, emotionally and physically, for a woman than for a man. *Id.* Nevertheless, stated the

therefore determined that the Davises must be viewed as "entirely equivalent gamete-providers."[186]

The court noted that the mere existence of the right of procreational autonomy dictated that gamete-donors have sole decisional authority over their preembryos, "at least to the extent that their decisions have an impact upon their individual reproductive status."[187] Therefore, "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do."[188] The court further emphasized that neither Tennessee's statutes nor its constitution asserted an interest in potential life sufficient to justify infringing upon the gamete-donor's procreational autonomy.[189] Although *Webster*, and even *Roe*, permitted a state's interest in potential human life to infringe upon an individual's procreational autonomy,[190] Tennessee had not asserted such a "weighty" state interest.[191] Moreover, if a state's interest in potential life could not become sufficiently compelling in the abortion context until after the first trimester, any state interest in four- to eight-cell preembryos would have to be, at best, "slight."[192]

Finally, the court turned to the relative interests of the parties to the action.[193] Whereas courts had previously dealt with the "child-bearing and child-rearing aspects of parenthood," as well as "gestational parenthood," the *Davis* court was faced with the issue of "genetic parenthood."[194] The court concluded "that an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of

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court, the traumatic experience of IVF "must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood." *Id.*

186. *Id.*

187. *Id.* at 602.

188. *Id.*

189. *Id.* *See infra* notes 214-23 and accompanying text.

190. *Davis*, 842 S.W.2d at 602.

191. *Id.*

192. *Id.*

193. *Id.* at 602-03.

194. *Id.* at 603.

parenthood."[195] Despite the fact that someone else would gestate the preembryos and raise any resulting children as their own, the gamete-donors would still become parents "in the genetic sense."[196] The court noted that a sperm donor might regret not having contact with his biological children,[197] and that a woman who had surrendered her children for adoption could be "haunted by concern about the child."[198] These "profound impacts" upon the gamete-donors supported the retention of "sole decisional authority" in the gamete-donors.[199]

4. *Balancing the Parties' Interests*

The *Davis* court reiterated that the circumstances necessitated a balancing of two constitutionally protected rights: "the right to procreate and the right to avoid procreation."[200] With respect to Junior Davis, the court expressed concern that if the preembryos were brought to term, it would "impose unwanted parenthood on him, with all of its possible financial and psychological consequences."[201] On the other hand, a failure to attempt to bring the preembryos to term would impose on Mrs. Davis "the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children."[202] Noting that this effect upon Mrs. Davis was "not an insubstantial emotional burden," the court concluded that Mr.

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195. *Id.*

196. *Id.*

197. *Id.* n.28.

198. *Id.* at 603 (citing Elisa K. Poole, *Allocating of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67, 74 (1990)).

199. *Id.* at 603.

200. *Id.*

201. *Id.* The court then analyzed the particular psychological circumstances of Mr. Davis. He had come from a broken home, and testified that the separation from his parents had caused him severe problems when he was a child. *Id.* at 604. Mr. Davis was therefore strongly opposed to fathering a child that would not live with both of its parents. *Id.* Furthermore, Mr. Davis did not want "his" child living in a single-parent home, which might occur if an embryo was donated to a couple that subsequently divorced. *Id.* The court stated that if the preembryos were donated to another couple, Mr. Davis "would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it." *Id.* Mr. Davis testified that if the preembryos "were brought to term, he would fight for custody of his child or children." *Id.*

202. 842 S.W.2d at 603.

Davis's interest in avoiding procreation was stronger than Mrs. Davis's countervailing interest.[203] However, the court acknowledged that:

> [t]he case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means . . . she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing. Further, we note that if Mary Sue Davis were unable to undergo another round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption. The fact that she and Junior Davis pursued adoption indicates that, at least at one time, she was willing to forego genetic parenthood and would have been satisfied by the child-rearing aspects of parenthood alone.[204]

The court held that if no prior agreement governing the disposition of IVF preembryos existed between gamete-donors, the relative interests of the parties must be weighed.[205] However, continued the court, the party wishing to avoid procreation should normally prevail, if the other party has a "reasonable possibility" of achieving parenthood by other means.[206] Only when no reasonable alternative of achieving parenthood exists for the party desiring parenthood should a court consider that party's argument.[207] Where "the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail."[208] The Tennessee Supreme Court therefore affirmed the judgment of the court of appeals.[209]

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* However, the court stated that its ruling did not create an automatic veto over the party wishing to procreate and should not be interpreted as doing so. *Id.*

208. *Id.*

209. *Id.* Thus the Knoxville Fertility Clinic was "free to follow its normal procedure in dealing with unused preembryos, as long as that procedure [was] not in conflict with [the] opinion." *Id.* at 605. The procedure of the fertility clinic was to donate surplus preembryos to other couples. Davis v. Davis, No. 34, 1992 WL 341632, at *1 (Tenn. 1992). Because this was not consistent with the *Davis* decision, the Tennessee Supreme Court subsequently ordered that the preembryos be either donated for approved research or discarded. *Id.*

IV. Analysis

In *Davis*, the Tennessee Supreme Court recognized a constitutional right to avoid genetic parenthood after conception. As the *Davis* court acknowledged, this right had never been explicitly recognized in a court of law. It is this author's contention that the current United States Supreme Court would most likely refuse to recognize such a right.[210]

The decision in *Planned Parenthood v. Casey*[211] reveals that the Supreme Court would disagree with the *Davis* court, should the proper case for review arise. Although the Supreme Court recognized in *Casey* that states have an interest in the potential lives of fetuses from the moment of conception,[212] the Court ruled that this interest is not compelling enough to override a woman's right to abort a fetus before viability.[213] However, it is quite likely that, given the absence of the issue of a woman's bodily integrity and the absence of the liberty interests involved in traditional parenthood, the Court would likely hold that a state's interest in potential life could constitutionally override any interest a gamete donor may have in avoiding genetic parenthood.

In reaffirming the central holding of *Roe*, the *Casey* Court recognized that a woman's decision to terminate her pregnancy

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210. The *Davis* decision is flawed in several respects that are not addressed in this analysis. For instance, with respect to contingency agreements between gamete-donors, the court stated that such agreements would be honored, provided that there was an opportunity to modify the agreement by subsequent agreement. *See supra* note 170 and accompanying text. It is unclear what the court meant by this as all legal contracts can be subsequently modified by the parties thereto. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 5-14 (3d ed. 1987).

Further, the *Davis* court stated that its determination did not create an automatic veto over the party wishing to achieve parenthood. *See supra* note 207. Yet given the language of the court, it is difficult to imagine when the party wishing to achieve parenthood could ever prevail.

Finally, the court stated boldly that the mere existence of the right of procreational autonomy dictated that gamete-donors have sole decisional authority over their preembryos. *Davis*, 842 S.W.2d at 602. Not only was this assertion unsupported, but it was contrary to the Supreme Court's language in *Roe* that the constitutional right of procreational privacy must be balanced with any countervailing interest. *See supra* note 33 and accompanying text.

211. 112 S. Ct. 2791 (1992).

212. *Id.* at 2804.

213. *Id.*

is a protected liberty interest under the Due Process Clause of the Fourteenth Amendment.[214] Although the Court stated that it was settled law "that the Constitution places limits upon a state's right to interfere with a person's most basic decisions about family as well as bodily integrity,"[215] the Court noted that the *Roe* definition of liberty was "still questioned."[216] The liberty element of due process is not absolute, reminded the Court, but rather, a "balance which our Nation . . . has struck between that liberty and the demands of organized society."[217] Thus, the Court, confronted with a *Davis* situation, would balance the liberty of a gamete-donor with the "demands of organized society." What those "demands" are is debatable; however, a state's asserted interest in an in vitro fertilized preembryo is clearly identical to a state's interest in a preembryo in the abortion context. Therefore, if the Court determined, as the *Davis* court did, that the liberty interest of avoiding genetic parenthood after conception is equivalent to a woman's liberty interest in aborting her fetus before viability, the viability cutoff and "undue burden" standard of *Casey* would protect a gamete-donor's decision not to bring a preembryo to term.[218]

The query therefore remains: what is the liberty interest at stake in *Davis*, and is it as great as the other liberty interests already recognized by the Court, i.e., "marriage, procreation, contraception, family relationships, child rearing, and education?"[219] The *Davis* court implicitly determined that "family" and "procreation" encompass the specific right to avoid genetic parenthood after conception. However, the Supreme Court cases relied upon by *Davis* focus upon either a woman's right of bodily integrity and autonomy, or traditional parenthood and the protection of major life decisions regarding whether or not

214. *Id.* The Court also relied upon principles of institutional integrity and stare decisis in its reaffirmance of *Roe*. *Id.* Because the issue presented to the *Davis* court has never been directly addressed by the United States Supreme Court, only the first ground for the reaffirmance of *Roe* has a bearing upon whether the Supreme Court would recognize a constitutional right to avoid genetic parenthood after conception.

215. *Id.* at 2806.

216. *Id.* at 2803.

217. *Id.* at 2806 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

218. *See supra* notes 67-70 and accompanying text.

219. *Casey*, 112 S. Ct. at 2807.

to become a traditional parent and start a family. *Casey*, while protecting such life decisions, reveals the Court's respect for a state's interest in unborn life. Thus, although the *Casey* Court used strong language regarding procreational privacy, it seems that this language was simply used as a justification for the reaffirmance of *Roe*, a result which was in large part attributed by the Court to stare decisis and the institutional integrity of the Court.[220]

"Parenthood" is typically viewed as an aggregate of rights and responsibilities with respect to a child.[221] Advances in medical technology and changes in the family structure have tested the traditional notion of parenthood, as the bundle of rights and duties that comprise parenthood have slowly become distinguished and separated. This poses the question of whether the constitutional protection that has typically been accorded to "parenthood" in the aggregate should also apply to each one of the sticks in the bundle, including genetic parenthood. The *Davis* court held that full constitutional protection should be given to genetic parenthood, even when isolated from the other aspects of parenthood.[222] The *Casey* decision, decided shortly after *Davis*, reveals that the Supreme Court would probably disagree with the *Davis* court.

In further support of this contention is the fact that the right to avoid genetic parenthood after conception has traditionally not been afforded constitutional protection. While the issue has only arisen in the abortion/pregnancy context, where a woman's right to bodily integrity and decisional autonomy override a man's right to avoid genetic parenthood,[223] women have historically been able to force genetic parenthood upon men by electing to give birth to a jointly-conceived child.[224] Women have had this ability even where a man had not intended to conceive a child. In contrast, IVF sperm-donors intend to donate

220. *See supra* notes 56-72 and accompanying text.

221. *See supra* note 8.

222. *Davis*, 842 S.W.2d 588.

223. *See supra* notes 36-45 and accompanying text.

224. Further, women have historically been able to enforce more than just genetic parenthood upon men. With a successful paternity suit, women have been able to impose financial support upon the genetic father of their children as well. *See* UNIF. PARENTAGE ACT Prefatory Note, § 3, § 6, 9B U.L.A. 287 (1973 & Supp. 1993).

their gametes for the purpose of creating children. Thus, one could argue that forced genetic parenthood in the IVF context is a lesser constitutional intrusion than when a woman has a man's child against his will, because in the IVF context the gamete-donor initially possessed absolute decision-making authority.

Interestingly, the constitutionality of compelling the adoption of preembryos and enforcing subsequent genetic parenthood as Louisiana has done has not been challenged in the courts.[225] This author suggests that the Supreme Court denied certiorari on the *Davis* case because Tennessee had not asserted an interest in the Davis' preembryos.[226] However, it is likely that if a state asserts its interest in potential life from the point of conception, and the only countervailing interest asserted is the right of a gamete-donor to avoid genetic parenthood, the Court would weigh the state's interest more heavily.[227]

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225. *But see* Kim Schaefer, *In Vitro Fertilization, Frozen Embryos, And The Right To Privacy—Are Mandatory Donation Laws Constitutional?*, 22 PAC. L. J. 87 (1990) (arguing that statutes such as Louisiana's are unconstitutional because there is a privacy right to avoid biological children as long as states do not have a compelling interest in protecting an embryo); Christi D. Ahnen, *Disputes over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide? — An Analysis of Davis v. Davis, York v. Jones, and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299 (1991) (arguing that the choice of whether to bear unwanted children, accept implantation of a dangerous number of embryos, accept implantation and then incur the risks of abortion, or give the embryos up for adoption places a substantial burden upon the gamete-donors and is discriminatory because fertile couples who conceive naturally do not have to make such choices).

226. The *Davis* court held that Tennessee's lack of assertion of an interest in the four- to eight-cell preembryos could not override the Davis' interests in procreational autonomy. But the court also made it clear that even if Tennessee had asserted such an interest, it could not have overridden the Davis' constitutionally protected rights. Although the *Davis* court addressed Tennessee law, much of its decision was based upon the federal constitutional right to privacy, as defined by the Supreme Court's procreational privacy decisions. This is so despite the fact that the *Davis* court recognized that "the extent to which procreational autonomy is protected by the United States Constitution is no longer entirely clear." *Davis*, 842 S.W.2d at 601.

227. Of course, in such a situation the state would be faced with difficulties such as the impossibility of bringing all unwanted preembryos to term. Perhaps most states would choose not to assert any interest in the unwanted preembryos, and delegate their decision-making authority to gamete-donors.

V. Conclusion

The ethical dilemmas created by in vitro fertilization, while involving some of the rights present in abortion decisions, necessitate a redefining of the constitutional right to procreate and a determination of whether or not there exists a fundamental right to avoid genetic parenthood after the intentional donation of genetic material. The *Davis* decision brought into the limelight an aspect of parenthood that had never been directly considered by a court, and afforded great constitutional protection to that aspect of parenthood. The *Casey* decision indicates that the United States Supreme Court would not be so generous.

*Leanne E. Murray**

* Dedicated to my parents, Merrie and Jim Murray, and to David.