Pregnant Men Revisited or Sperm Is Cheap, Eggs are Not

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by

RUTH COLKER*

It is well known that women are, on average, economically poorer than men following divorce.1 In this essay, I will argue that women are also, on average, reproductively "poorer" than men following divorce if the couple has attempted to use in vitro fertilization2 during the marriage. Because of women's limited supply of eggs and declining fertility over time,3 custody of frozen embryos following divorce is often more important to women than to men. In other words, as the title of my article suggests, sperm may be cheap and plentiful, but eggs are not. These reproductive differences between women and men should be relevant to the disposition of disputes but are usually ignored by the courts and by society.

In my book, Pregnant Men,4 I argued that courts treat preferentially men's reproductive claims over women's when their situations appear analogous.5 When I wrote the book, there was only one re-

* Professor of Law, University of Pittsburgh. I have been fortunate to benefit from conversations with my colleagues Anne Schiff, Martha Chamallas and Jules Lobel although they each disagree with some of my conclusions. I would also like to thank my research assistant, Colleen Zak, for her excellent help in the preparation of this essay. Finally, I would like to thank the participants in the Ethics for Lunch series sponsored by the Center for Medical Ethics at the University of Pittsburgh School of Medicine for their helpful comments.


2. In vitro fertilization ("IVF") is a technique used to allow infertile couples to have a child. Eggs are removed from a woman's ovary, fertilized in a laboratory with sperm, then inserted into the woman's uterus. 2 ROYAL COMM'N ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 1160-61 (1993).


5. Id. at 164.
ported case, *Davis v. Davis,* involving the disposition of frozen embryos after divorce. In *Davis v. Davis*, Mr. Davis was given the right to control the disposition of the frozen embryos and, ultimately, to have them destroyed. I criticized *Davis* in *Pregnant Men,* arguing that the court overvalued the man’s reproductive interests in comparison to the woman’s. Since *Davis* was decided, a New York court in *Kass v. Kass* considered a similar case and ruled in favor of the woman. Although I agree with the result in *Kass*, I disagree with the general rule formulated by the court. Courts should be more cognizant of women’s unique reproductive capacity than the *Davis* court was, but should not adopt the *Kass* rule, which absolutely favored the woman’s decisionmaking authority over the man’s.

### I. The Cases

In *Davis v. Davis*, the trial judge awarded the frozen embryos to the ex-wife but, on appeal, that decision was reversed. The state’s highest court affirmed the judgment of the court of appeals and awarded the frozen embryos to the ex-husband, relying heavily on *Roe v. Wade.* It concluded that, where no prior agreement exists, the court should award the embryos to the party wishing to avoid procreation, “assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.” In *Davis*, the former Ms. Davis no longer desired to use

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6. 842 S.W.2d 588 (Tenn. 1992).
7. *Id.* at 604.
8. COLKER, *supra* note 4, at 140-45.
9. *Id.* at 143. Nonetheless, I did not argue in my book, as I do in this essay, that courts need to consider women’s declining fertility over time when they decide these cases.
11. *Id.* at *5.
12. The trial court awarded the frozen embryos to the woman, because it considered them to have the status of “human beings.” *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *9 (Tenn. Cir. Ct. Sept. 21, 1989). Although I believe that the trial judge should have awarded custody of the frozen embryos to the woman, I do not support the reasoning used by the judge.
13. *Id.* at *1.
14. 842 S.W.2d 588, 589 (Tenn. 1992) (reporting that the Tennessee Court of Appeals reversed the trial court opinion).
15. *Id.* at 600-605.
17. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). As Janet Benshoof, President of the Center for Reproductive Law and Policy acknowledged at the Symposium, she was the attorney for Mr. Davis on appeal in this case. Benshoof tried to defend her support of Mr. Davis’ position by saying that it was necessary to overturn the problematic reasoning of the trial judge, who considered the frozen embryos to be persons. Although I agree with
the embryos for her own procreational purposes; she wanted to donate them to another infertile woman. The Tennessee Supreme Court therefore concluded that Mr. Davis should be able to control the disposition of the embryos. The "reasonable possibility" exception did not apply to the former Ms. Davis' argument for custody of the frozen embryos because she did not intend to use the embryos herself to procreate. But even if Ms. Davis had wanted the embryos to implant within herself, it seems likely that the court would still have ruled in favor of Mr. Davis, concluding that Ms. Davis had a reasonable possibility of becoming a biological parent. By contrast, in Kass v. Kass, the trial court awarded the frozen embryos to the ex-wife concluding that Roe only extended procreational rights to one individual, the woman. Relying on the Supreme Court's decision in Planned Parenthood of Missouri v. Danforth, the Kass court noted that "inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." No further decisions in this case have been reported.

The Davis court incorrectly found that Roe v. Wade includes the right of a man to avoid procreation. The Kass court incorrectly found that Roe includes the exclusive right of a woman to determine the fate of an embryo even when that embryo lies outside her body. The Kass court would presumably have protected her right to have the embryos destroyed, as well as the right to have the embryos implanted in her body. Nonetheless, both courts were wrong to rely on Roe in resolv-

Benshoof that the trial judge's reasoning needed to be overturned, I disagree that it was necessary to support the extreme rule created by the Tennessee Supreme Court. As I will argue below, I believe that the rule created by the Tennessee Supreme Court harms women's reproductive interests in many divorce cases where there is a dispute over frozen embryos. Mr. Davis could have prevailed under a much narrower rule, such as one holding that a party is only entitled to custody of the frozen embryos if she wishes to implant them in herself.

18. Id.
19. Id.
20. Id.
21. Since IVF is only successful about twenty percent of the time, I assume the court would have stated that her chance of IVF success was not substantially diminished by not being given custody of the frozen embryos. See Bruce L. Tjaden & John A. Rock, Techniques of Oocyte Retrieval, in the John Hopkins Handbook of In Vitro Fertilization and Assisted Reproductive Technologies 97 (Marian D. Danewood ed., 1990) (reporting 15-18% fertilization and pregnancy rates per embryo transfer).
ing this issue. Neither party had a constitutional right to control the fate of the frozen embryos, because neither case involved the physical interests of a pregnant woman.25

Because *Roe* does not dictate the result in these cases, one must look to broad equitable and ethical principles to resolve these issues. Based on such principles, I will argue that the woman should presumptively prevail in these cases when she desires to have the embryos implanted in herself.26 A key factor tipping the result in favor of the woman, which was overlooked in both cases, is that her reproductive capacity, unlike a man’s, declines over time.27 In most cases, if the woman is denied custody of the frozen embryos, she will face a declining possibility of becoming a parent. By contrast, in most cases, the frozen embryos are not valuable to the man as a way to increase his possibility of becoming a parent in the future. Just as men are frequently more economically stable and wealthier than women after divorce, so too are men often reproductively richer after divorce. This is particularly true when it was a fertility problem that caused the couple to turn to IVF during marriage. By recognizing the ways in which men and women are not similarly situated with respect to reproduction, courts can begin to correct this imbalance by presumptively awarding frozen embryos to women who desire to use them to enhance their reproductive capacity following divorce.28 Nonetheless,

25. See infra text accompanying notes 29-43.

26. The decision to sustain the life of the frozen embryo, however, should not cause the other partner to be legally obligated for support. A critique of the law of child support is beyond the scope of this essay but, in the present context, it is unethical to impose a financial or moral status of parenthood on a party who has decided not to become a parent when the embryo did not lie inside the woman’s body. Although it is true that both parties cannot have their wishes fulfilled with regard to genetic parenthood, the law should respect their wishes with respect to emotional parenthood. By analogy, I would treat these cases as if the man relinquished his parental rights to facilitate adoption. In such cases, no support obligation ensues.

27. See 1 ROYAL COMM’N ON NEW REPRODUCTIVE TECHNOLOGIES, *supra* note 3, at 255.

28. Why do the courts resolve these controversies at all? Because courts like the Tennessee Supreme Court in *Davis* consider frozen embryos to be “quasi-property”—neither children nor property—they arguably do not have jurisdiction over the distribution of the frozen embryos. 842 S.W.2d at 597. The jurisdiction of divorce courts is limited by statute. By analogy, when a gay couple separates, divorce courts rarely get involved with their property disagreements because their property does not come within the jurisdiction of divorce courts. They must use extra-legal channels to resolve their differences. Similarly, courts should conclude, in the absence of state law on this subject, that they have no jurisdiction over frozen embryo disputes following divorce. For that reason, I would urge IVF clinics to have couples contemplate in advance their wishes in the event of divorce and to state those wishes clearly in an enforceable contract. Because this is an important issue to many people, I would also encourage IVF clinics not to offer couples a form contract on
if the woman does not desire to use the frozen embryos to enhance the possibility that she or another woman will become a parent, the Kass court is wrong to presumptively grant her custody of the frozen embryos, because her reproductive potential, as compared to the man's, is not relevant to the outcome of the case.

II. *Roe v. Wade* Does Not Resolve This Issue

Although the *Davis* and *Kass* courts turned to *Roe* for guidance on the issue before them, *Roe v. Wade* does not provide an answer to the dilemma posed by those cases. In *Roe*, the constitutional question was whether a state could infringe upon a woman's right to terminate her pregnancy. The state tried to justify such infringement by arguing that it was entitled to protect the life of the fetus. The only reason that the state's desire to protect fetal life became a constitutional question in *Roe*, was because the means the state chose—a criminal abortion statute with virtually no exceptions—infringed upon a woman's fundamental right to terminate a pregnancy. Had the state's means not resulted in an absolute infringement on her right to an abortion, it could have chosen to protect the life of the fetus.

Because the state's means did infringe upon the rights of a pregnant woman, the *Roe* Court assessed the degree of importance that could attach to the state's justification. That is, in the language of *Roe*, was the state's interest "compelling"? The Court concluded that the state's interest in protecting the life of the fetus was not compelling until the fetus attained the developmental stage of "viability." Because the abortion statute banned abortions before viability, it was unconstitutional. Nonetheless, *Roe* clearly stands for the proposition that fetal life can be valued by a state, especially when valuing that life does not impose upon women's liberty interests.

In *Davis* and *Kass*, the male plaintiffs tried to argue that they had an interest that was constitutionally protected by *Roe*—the right not
to be forced to beget children. Moreover, the men argued that the frozen embryos did not have a protected constitutional status under Roe (since they were certainly not viable), and, therefore, the state could not protect the embryos and thereby infringe their rights. The flaw in this argument is that states can choose to protect the life of any entity so long as doing so does not infringe a constitutionally (or legally) protected right of a person. In Roe, the Court emphasized that the fundamental procreation right attached to women.\textsuperscript{36} The Kass court misinterpreted this statement to mean that only women have a constitutional right to be the tie breaker when a man and woman disagree about the fate of an embryo or fetus.

But Roe only dealt with the fundamental right to make reproductive decisions when the means chosen by the state involved \textit{forcing a woman to remain pregnant against her wishes}. Put differently, Roe is not about the right of a woman to \textit{kill the fetus}; Roe is about the right of a woman \textit{not to be pregnant}. When a case does not involve a pregnant person, then the rights protected by Roe are not implicated.\textsuperscript{37}

Applying this analysis to Davis and Kass, we see that none of the parties has a right protected by Roe, because none of them are pregnant. Unlike Roe, the fetus actually does reside outside a woman’s body but, ironically, cannot have its life permanently sustained unless it is allowed to be placed inside a woman’s body.

I realize that one could broaden the rights specified in Roe to include the right to make fundamental decisions concerning the destiny of your gametes.\textsuperscript{38} That, however, is not an argument that I

\textsuperscript{36} \textit{Id. at 153.}

\textsuperscript{37} I am often asked what the application of this principle would mean to late-term abortions where the pregnant woman wants to insist on her right to have the life of the fetus terminated while the abortion is performed. If it happens to be the case that the procedure for terminating the pregnancy most protective to the pregnant woman’s health also results in the death of the fetus, I would argue under this analysis that she is entitled constitutionally to use that procedure. By contrast, if the termination of pregnancy procedure that best safeguards the health of the pregnant woman does not result in the death of the fetus then I would argue that she has no constitutional right to insist on the termination of the fetus’ life. I realize that this argument may be troubling to some women with severely handicapped fetuses. Our respect for life, however, must extend to the most disabled members of our community. As we have no right to take active steps to terminate the life of a child with a disability after birth, we have no right to take active steps to terminate the life of a fetus with a disability during an abortion so long as the abortion procedure that is used protects the life and health of the pregnant woman to the maximum extent possible.

\textsuperscript{38} “Gametes” is the term used to refer to both female and male mature reproductive cells, \textit{i.e.}, eggs and sperm. See 2 Royal Comm’n on New Reproductive Technologies, \textit{supra} note 2, at 1157.
care to make in a situation where your gametes have been taken from you with your consent. 39 In the frozen embryo context, the woman donated her eggs and the man donated his sperm with the sincere hope that they would become parents. They both expressed one of the most deeply held human emotions—the desire to have children. Following divorce, one individual may have changed his or her mind about becoming a parent while the other individual has not. To allow the person who does not wish to become a parent to play the trump card is to exercise an extremely powerful veto in the life of the other person when there initially was mutual consent. The exercise of such a veto would undermine important principles that we currently protect in the law of reproduction. If a man and woman have intercourse, and the woman deceives the man into thinking that she is using birth control, we do not allow the man to exercise a veto over her desire to carry a pregnancy to term. 40 In fact, we even impose child support on him, despite the possible fraud. 41 In the frozen embryo context, the initial desire to donate gametes is for a very clear purpose—to become parents—rather than, for example, for sexual satisfaction. Because that initial consent existed, there is no good reason to give presumptive value to the person who has changed his or her mind. 42

My reluctance to expand the rights protected by Roe arguably could leave us unprotected against a parade of horribles—sperm and eggs being harvested from cadavers or physicians surreptitiously donating unused embryos, sperm or eggs to others. If those situations were to occur, however, I suspect that legislatures would immediately

39. We should also avoid extending the genetic fascination that sometimes underlies white supremacy in our society. See generally Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 213 (1995) (exploring how race and gender define the genetic tie and “how that meaning reinforces white supremacy in a patriarchal society”).


41. See, e.g., People of the State of Colo. in the Interest of S.P.B., Child, 651 P.2d 1213 (Colo. 1982) (relying on the Uniform Parentage Act to impose support obligation on father who wanted mother to have an abortion).

42. In response to this argument, during the Symposium, Janet Benshoof noted that there was the possibility that a man might want custody of the frozen embryos in order to have them implanted in his new wife, who might also be infertile. The former wife may not desire the frozen embryos for herself but would be horrified at the prospect of another woman bearing “her” child. I agree that she may be troubled, but how unique is that situation? When an individual obtains sole custody over a child, that child is often raised in a new household with a new spouse. Of course, people should consider these scenarios before deciding to donate eggs or sperm for IVF. Such considerations may cause them to enter into contracts which resolve these issues following divorce. As I will discuss later, I strongly encourage individuals to consider such eventualities before beginning the IVF process rather than trying to resolve them in an emotional divorce proceeding.
respond and provide redress, if none already existed. Society is already mindful of our autonomy interests when they are not rooted in gender inequality, because it does value male autonomy. Thus, sperm donors who receive compensation for their services already benefit from an array of statutes that protect them from child support obligations. Their procreational autonomy to both donate sperm and have no parenting obligations are well protected. As new situations arise, I have every confidence that society will, on its own, protect male procreational interests. I therefore see no reason to create a constitutional right when we have no reason to fear legislative inaction. By contrast, we unfortunately know that, in the absence of constitutional protection, the state will often seriously infringe upon women's procreational freedom to terminate a pregnancy. Gender-based procreational autonomy rights are needed. Thus, this analysis leaves us with no constitutional result stemming from the status of the fetus or the rights derived from Roe. In order to resolve these cases, we need to consider ethical arguments that do not derive from Roe.

The conclusion in Davis that the man, not the woman, has a right protected by Roe also misconstrues Roe in another fundamental way. To the extent that Roe protects the decision to bear or beget children, it protects women from involuntary sterilization, mandatory abortion, and compulsory pregnancy. It equally protects the right to terminate a pregnancy and the right to bring a pregnancy to term. By relying on Roe for protection of the man's, but not the woman's interest, the Davis court suggested that Roe only protected the right of the individual who wanted to terminate the life of a fetus or embryo. Roe, however, does not reflect a constitutional preference for termination of life over sustaining life. In fact, if anything, Roe strikes the opposite balance by recognizing that the life that is terminated in an abortion is entitled to some state protection, although the woman's interest in terminating her pregnancy outweighs that interest until viability.

Since Roe does not resolve the issue of who should presumptively attain custody of the frozen embryos, we must look to other equitable considerations to resolve this issue. In particular, we must compare

43. See, e.g., N.J. STAT. ANN. § 9:17-44(b) (West 1993) (stating that sperm donors are to be legally treated as if they were not the father of the child with no duties stemming from the child's conception); N.Y. DOM. REL. LAW § 73 (McKinney 1988) (declaring that a child born to a married woman by artificial insemination with the written consent of her husband was to be "deemed the legitimate, natural child" of that couple "for all purposes").
how men's and women's reproductive interests are implicated in these fact patterns.

III. Valuing Women's Reproductive Interests

The reasoning in *Davis* is insulting to women's status in society, in particular to their role with respect to pregnancy, in the way that it equates men's and women's reproductive experiences. The *Davis* court discounted the enormous discomfort faced by women during nine months of pregnancy in equating men's and women's reproductive experiences. Even a "normal" pregnancy includes nausea, tremendous weight gain, and enormous tiredness, to say nothing of restricted mobility and the increased risk of medical problems like high blood pressure and diabetes. To say that men who have ejaculated so that their sperm can be used to fertilize an egg in a petri dish have faced a comparable imposition on their lives as women who face *in vivo* pregnancies, is to continue the myth that *Roe* involved the rights of two independent entities (the fetus and the woman), as if the fetus resided outside a woman's body.

The *Davis* court's disrespect for women's position in society can also be seen through the weight it gave to the man's and woman's competing interests in that case. Once the court concluded that *Roe* applied to the man's interests, then certainly it should also have applied *Roe* to the woman's interests—just as he does not want to be forced to continue with the process of begetting a child, she does not want to be forced to terminate the process of begetting a child. But, interestingly, the court never applied *Roe* to the woman in *Davis*. It only applied *Roe* unilaterally to the man.

Thus, the man gets the benefit of *Roe* because the court accepted his equitable arguments about not wanting to be forced to beget a child who would not have two parents. He argues that this interest is particularly strong for him due to his unusual situation of having been raised in an orphanage.44 Based on his unusual set of facts, however, the court concluded that all individuals who prefer to terminate the life of the embryos should be considered to have the stronger claim in this context.45

The woman's claim received only cursory consideration on appeal although she, too, has a strong argument in this case.\textsuperscript{46} Mary Sue Davis had suffered the trauma and pain of five tubal pregnancies before turning to IVF.\textsuperscript{47} She then made six IVF attempts, which were "painful, physically trying, emotionally and mentally taxing ordeals."\textsuperscript{48} Because cryopreservation was not possible for the first five procedures, "each implantation was the culmination of weeks of preparation—drugs to stimulate her reproductive system, surgical extraction of ova, insemination in vitro, anxious hours of waiting to confirm fertilization, implantation—then additional weeks of waiting to determine if an in utero pregnancy had occurred."\textsuperscript{49} Ms. Davis underwent these painful experiences because of her understanding that her husband desired to jointly beget a child with her through this process.\textsuperscript{50} Although Mr. Davis testified that the marriage was "rocky" when Ms. Davis underwent these final IVF attempts, Ms. Davis testified that she did not feel the marriage was rocky and would not have participated had she had such an understanding.\textsuperscript{51} She experienced considerable mental and physical pain due to the IVF process, which she would not have undergone but for her mutual understanding with Mr. Davis that they would jointly beget a child.\textsuperscript{52} Ms. Davis' own moral belief was also that these embryos were "the beginning of life" and actually "children."\textsuperscript{53} Ms. Davis' emotional and physical discomfort, along with her moral belief system, were overridden in order to allow Mr. Davis to prevail.

The court's assessment of their competing claims makes sense when one realizes that the court's logic depends on reading \textit{Roe} as if it involved a case in which the fetus lies outside the woman's body. The court's analysis in no way recognizes the physicality of the \textit{Roe} deci-

\textsuperscript{46} I should note that one might be skeptical of the claims made by both parties in this case. Unfortunately, people often make inflated, emotional arguments in divorce proceedings. Thus, I would suggest that courts view with skepticism the arguments made by both sides in these cases. It might be more fair to simply generalize and say she wanted the frozen embryos in order to become a parent and he did not want her to have them out of anger over the dissolution of the relationship. She may have exaggerated her physical concerns and he may have exaggerated his parenting concerns to attain the sympathy of the court. Trial courts should be attentive to these problems although there is little that can be done about them once a case is on appeal and the record has been made.

\textsuperscript{47} \textit{Davis v. Davis}, No. E-14496, 1989 WL 140495, at *25.

\textsuperscript{48} \textit{Id.} at *25.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{See id.} at *18, *25.

\textsuperscript{51} \textit{Id.} at *24.


\textsuperscript{53} \textit{Id.} at *25.
sion, or more specifically, the woman's physicality that was central to the Roe holding. Roe is one of the few cases that gives weight to women's unique and substantial contribution to the birthing process. Thus, it should probably come as no surprise that the Davis court does not want to give any weight to the disproportionate contribution that Ms. Davis made to the IVF process. The court imposed a notion of formal equality on a situation in which the parties were not in a formally equal position. In my view, that approach is as disrespectful to women as presuming differences when real differences do not in fact exist.

One might argue that the exception that the Davis court carved out—those situations where the party does not have a reasonable possibility of procreating without the use of the frozen embryo in question—serves to value the woman's procreational interest. In fact, however, it does not value her procreational interest. The exception is reflective of the structure of the opinion—it presumes that men and women are similarly situated with respect to procreation. But they are not. As women age, their fertility declines. They are less likely to be able "to conceive, to carry a viable fetus to term, and to give birth to a child without congenital anomalies." Men, on the other hand, do not experience a comparable decline in fertility over time. Thus, a woman who harvests a healthy egg while she is in her early thirties and fertilizes it with a man's sperm has a much greater chance of pregnancy and a healthy birth than a woman in her late thirties or even early forties. When she has chosen IVF to give birth, it is also frequently the case that she has fertility-related health problems that might also decrease her chances for a subsequent successful pregnancy. It is therefore virtually inevitable that the woman who is not given custody of the frozen embryos will face a declining possibility of pregnancy in the future, although that decline might not

54. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
55. See 1 Royal Comm'n on New Reproductive Technologies, supra note 3, at 255.
56. Id. at 256, 257-61.
57. See id. at 261-62 ("[T]here is a much less direct relationship between increasing age and declining fertility in men than in women.").
58. Although I have seen no statistics on the average age of a woman who undergoes IVF, my conversations with physicians who work in IVF clinics confirm that most patients are in their thirties.
59. See 1 Royal Comm'n on New Reproductive Technologies, supra note 3, at 255 ("The likelihood that fertilization of an egg will lead to pregnancy declines as a woman ages. For example, a recent study on in vitro fertilization in older women showed that the likelihood of pregnancy is greater when the eggs of younger women are used.").
be steep enough to fit the Davis court's "no reasonable possibility" test.60 For example, a Canadian study found that "[i]f a woman was infertile for three years or more, each additional year in her age reduced the probability of pregnancy by [nine] percent."61 A man, on the other hand, is unlikely to face these additional risks to his chances of becoming a parent simply because a court has declined to award him the frozen embryos.62 Although men and women's reproductive systems and capabilities differ dramatically, the court did not analyze the case in a manner that was attentive to gender. It presumed that if a woman could choose to use IVF once, she could choose to use it again later with no significant difference in the probability of a successful outcome. That assumption, however, equates women's reproductive capacity with men's—a false equation. Aware of the implications of aging on women's infertility, a Canadian commission concluded: "It is therefore important that couples make a decision about the best time to have children with full information about the impact of aging on a woman's fertility."63 I would add that it is important for courts to be aware of these gender-specific implications when they decide cases involving reproductive choices.64

60. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). The only exception would be in the situation where a woman chooses IVF because of her husband's fertility problems. That situation, however, is exceptional, because a man's fertility problems are most likely to cause the couple to turn to artificial insemination with sperm from a stranger rather than IVF because of the low success rate of IVF and the likelihood that his fertility problems will make IVF an unsuccessful alternative. See Howards, et al., Treatment of Male Infertility, 332 New Eng. J. Med. 312 (1995).

61. See 1 Royal Comm'n on New Reproductive Technologies, supra note 3, at 258.

62. The man, of course, faces his own unique set of problems. Since a man cannot sustain a pregnancy in his own body, he will always need the assistance of a woman. That factor is likely to be his biggest impediment to parenthood rather than the court's decision with regard to disposition of the frozen embryos. The likelihood of the man being able to become a father will also depend heavily on the fertility problem that originally caused the couple to choose IVF. If the woman was the individual in the couple with the fertility problem, then the man still has the option of using artificial insemination or intercourse with another woman—more successful methods than IVF—in order to become a parent. Assuming he has no fertility problems, he is unlikely to conclude that custody over the frozen embryos will even enhance his chances of becoming a parent. This fact can be seen in the Davis case. When Mr. Davis remarried, he did not desire to obtain custody of the frozen embryos to implant in his second wife. He probably realized that he would have a better chance of becoming a father through intercourse than IVF.

63. See 1 Royal Comm'n on New Reproductive Technologies, supra note 3, at 249.

64. Similarly, I would argue that in the future, when the Center for Reproductive Law and Policy is involved in the litigation of such cases, it should try to fashion a rule that is more protective of infertile women's long-term reproductive interests following divorce.
 Nonetheless, I realize that evaluation of this reproductive capacity argument will be quite fact-specific in concrete situations. In my discussion above, I have assumed that the couple chose IVF because of the woman's fertility problems. They have therefore chosen a procedure with only a twenty percent success rate. Under these circumstances, the woman will still have a fertility problem following the divorce, whereas the man will likely not have one. The man's capability of becoming a biological parent therefore increases following the divorce because he can use natural means of childbirth to become a parent; whereas, the woman's capability decreases if she cannot gain custody of the existing frozen embryos because she will have to use older eggs in a future IVF process. Of course, there are situations where couples use IVF because the man's sperm fails to fertilize the woman's egg through natural means. In that situation, the woman may have no underlying fertility problem and may have a greater chance of becoming a parent after divorce through artificial insemination or intercourse. Since those two methods have a much higher success rate than IVF, her chances of becoming a parent have not declined even though her reproductive system has gotten older. Thus, a court must evaluate why a couple chose IVF in order to assess the parties' relative chances of becoming parents in the future. However, regardless of the initial reason why a couple chose IVF, in most cases the woman suffers more significantly from the denial of custody of the frozen embryos than the man.

But let me be clear. I am not saying that those physical differences automatically mean that women's claims should trump men's claims. If the man wants to sustain life and the woman wants to terminate life, the man's claim will often prevail because he is valuing life and not forcing a woman to remain pregnant against her wishes. But when the man does not want to sustain life, the woman has undergone painful and repeated IVF procedures, and has a lesser possibility of pregnancy in the future through IVF, there is even more reason to credit her desire to sustain life. The Davis court discounted both the value of the embryo's life and the woman's physical contribution in order to allow the man to prevail. That reasoning is objectionable on gender equality grounds.

65. My discussions with physicians who work in IVF clinics confirm the appropriateness of this presumption.

66. See supra note 21.

67. This assumes of course that the woman with whom he procreates following divorce has no fertility problems.

68. See, e.g., Howards et al., supra note 60.
When I make this argument, people often ask me why I accord such weight to the value of the life of an embryo. After all, we do not live in a society with a population shortage. Ms. Davis or Ms. Kass could adopt a child if they want to become a parent, the argument goes. My response is that I believe we live in a society which faces a crisis of disrespect for life. Capital punishment is thriving along with murder; vegetarianism is unpopular and often derided; and some courts insist on describing the fetus as merely “property.” The ultimate crisis resulting from such a devaluation of human life would be another Holocaust. Because I take the threat of such a catastrophe seriously, I think it is important to demonstrate our valuation of life when a woman is not being forced to remain pregnant (or otherwise coerced). That limiting principle stems from my feminism. To achieve valuation of life through the instrumental use of women’s lives is not a sincere or acceptable way to value life.

Some people might respond to my argument by saying that a pro-life position which protects fetuses or embryos before birth is inherently anti-feminist. A sincere valuation of life, they might argue, can only occur after birth. Under this view, expressions of pro-life sentiment before birth are a cynical attempt to restrict women, not a sincere attempt to protect life. Moreover, one might argue, society’s general pro-natal policy is rooted in an attempt to coerce women to bear children. Given that we have no population shortage, and a surplus of babies needing to be adopted, a genuine pro-life position does not need to protect life before birth.

It is hard to divine whether society would be pro-life before birth if gender inequality did not exist. Such a society is hard to imagine. My argument is that society should be pro-life before birth despite the historic connection between that view and anti-feminism. A genuine, pre-natal pro-life view would cause us to value women in their pregnancies through the provision of pre-natal care, paid maternity leave, and excellent post-natal care. We need to strive toward a continuum of a pro-life perspective rather than artificially beginning (or ending) such a perspective at birth. When I lived in Louisiana, I remember the state legislature saying that it valued the life of the fetus until birth. I often joked that the legislature was unfortunately serious in that statement—which is why the state so inadequately funded


care for children after birth. It is as wrong for the feminist movement to only value that life at birth as it is wrong for the pro-life movement to value life until birth. Birth merely determines whether the fetus is dependent on a woman inside her body or (typically) outside her body; that fetus is nonetheless a life at all points on the developmental continuum.

IV. The Frozen Embryo Gift

A last, but more subtle issue raised by these cases, is what family constellation should be allowed to bear and raise the frozen embryos. Ms. Davis wanted to donate the frozen embryo to another infertile woman.\textsuperscript{71} In \textit{Kass}, although the female plaintiff ultimately requested to be allowed to implant the embryos in herself, the couple had initially used the female plaintiff’s sister as an “oocyte donee.”\textsuperscript{72} If attempts to implant the embryos in herself were unsuccessful, one must wonder if she would have requested the assistance of her sister again.

In my view, the fact that Ms. Davis wanted to donate the embryos to another woman should not be fatal to her claim. We should not value the life of the embryo because of genetic attachment to another. Rather, we should value the embryo because it is inherently valuable as life itself, especially when an individual comes forward and says that he or she wants to sustain that life. Thus, although I would give Ms. Davis or Ms. Kass the first right to facilitate the life of the embryo, they should not be the only people entitled to engage in that facilitation.

Against my position, one could argue that we should not be encouraging the birth of a child who will face genetic bewilderment later in life and live in a very unconventional family. Is it fair to a child, some might ask, to be brought into the world knowing that his mother or father might not have consented to the use of their gametes in the child’s birth? Further, how would a biological parent feel if his offspring later found him and confronted him with his desire that the offspring not exist?

These arguments sound like the arguments made against artificial insemination of lesbians in the early 1980s. At that time, some clinics argued that it was unfair to have the child raised in such an unconventional household. Subsequent evidence, however, has demonstrated that these children in fact thrive because of the love and effort that

\textsuperscript{71} Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
was put into their conception. Courts should not intervene in these children's lives by allowing biological fathers to become active in those households against the mothers' and children's consent. Besides, these cases are really just a version of adoption. The embryos are relinquished for adoption at an earlier stage than that at which most adoptions occur, but the genetic questions are quite similar.

Nonetheless, I would acknowledge that the Davis case presents a difficult ethical question. Under the facts of that case, one might say that Roe gives men and women the right to decide to bear or beget a child. Since Ms. Davis did not desire to use the frozen embryos to beget a child, one might argue that Mr. Davis must be permitted to have the embryos destroyed rather than be compelled to become a parent. Under that view of Roe, Ms. Davis has no right to insist that the embryos be donated to another woman. A more complex understanding of the family and parenting, however, compels a different conclusion. We should honor Ms. Davis' desire to be a genetic mother, just as we might honor Mr. Davis' desire not to be a genetic father. Thus, they are both making equivalent claims about genetic parenthood. By valuing his claim presumptively over hers with reference to Roe, we are once again valuing men's reproductive claims over women's. The ultimate issue then, again, comes down to who has the stronger equitable claim in this context. Because the woman wants to use the frozen embryos as a gift to an infertile woman, and that gift would sustain life, we should honor her gift request. Because it is more important for society to demonstrate its valuation of life than its valuation of genetics, Ms. Davis' claim should typically trump Mr. Davis' claim.


74. But see In re Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 357, 362 (N.Y. App. Div. 1994) (holding that sperm donor was entitled to order of filiation since he was known to the child and had considerable contact with child despite living in California).

75. Another reason that I presumptively value her desire to offer the embryos to another woman as a gift is that I am skeptical of the claims made by men in these contexts. When I asked a physician who works in an IVF clinic why men often resist the woman obtaining the embryos following divorce, she quickly answered, "spite." Unfortunately, couples usually engage in angry and spiteful behavior following a divorce. I am therefore suspicious of the man's motivations in wanting the embryos destroyed and fail to see how the woman's desire to make a gift could be primarily rooted in spite or anger.

76. Nonetheless, I qualify this outcome with the adverb "typically" because I do recognize that this is a more difficult fact pattern than the Kass case.
V. Conclusion

Because *Roe* does not resolve the issues implicated in the disposition of frozen embryos following divorce, we must look to other equitable principles to resolve these cases. An important factor to consider in resolving these cases is women's declining fertility over time. Because of men and women's differing reproductive capacities, the frozen embryos are more valuable to the woman than to the man and are more essential to her capability to become a parent. Thus, we should generally decide these cases in favor of the woman when she desires to use the frozen embryos to further her reproductive capacity.

Nonetheless, these cases are not particularly appropriate for judicial resolution. Because women's fertility declines over time, quick resolution of these disputes is essential if we are to respect women's desire to bear children. Unfortunately, the murky legal issues are likely to languish in the courts while the frozen embryos get older and the woman's capacity to serve as a gestational mother for them declines. If possible, I would strongly encourage IVF clinics to resolve these issues in advance of instituting the IVF procedure through principles of informed consent.

Unfortunately, many clinics may be tempted to resolve this issue through a form contract which specifies the outcome in the event of divorce. Because the clinic's interest may be best served by destruction of the frozen embryos following divorce, they may be tempted to include such language in their form contract. I would argue, however, that such a contract is unlikely to reflect women's informed consent if they are asked to consider their declining fertility over time. Thus, I would encourage clinics to provide women and men with complete medical information about fertility to enhance their deliberative process before beginning the IVF process. Absent such a frank discussion, I would likely conclude that form contracts do not reflect the parties' informed consent, making legal action concerning the frozen embryos possible if divorce were to occur. If clinics want to avoid litigation, and the parties want to actualize their intentions, a full and frank discussion would be beneficial to all parties before beginning the IVF process.

77. See supra text accompanying note 56.
78. Such a case is currently pending in Pittsburgh.
VI. A Final Caveat

I do have one misgiving in this whole analysis. I wonder why people engage in IVF at all, because it is such a difficult, painful, expensive, and not very successful procedure. There are always children available to be adopted. We know that people who tend to use IVF are middle or upper-class and, therefore, typically white.79 Does the use of IVF express a disrespect for the lives of poor, disabled, and often minority children who are available for adoption? My thoughts in this essay are not meant to presuppose support for IVF.80 These thoughts presume that IVF is lawful and that divorce cases arise concerning the disposition of frozen embryos. I could well imagine applying the same principles and writing an essay arguing that IVF should be made unlawful.

79. See Dorothy E. Roberts, supra note 39, at 244 (noting that, while infertility is more prevalent among poor people of color, those “who use IVF services are white, highly-educated, and affluent”).

80. Ironically, my argument that we should respect a party’s desire to donate the frozen embryos to a childless couple would serve to encourage rather than discourage IVF. It might reduce the cost of IVF by making frozen embryos more available but, unfortunately, those frozen embryos would likely be “white” thereby exacerbating the existing racial disparity in the use of this practice. See supra note 79.