Sperm is Still Cheap: Reconsidering the Law's Male-Centric Approach to Embryo Disputes after Thirty Years of Jurisprudence

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ABSTRACT: Few issues in a divorce may be as emotionally charged, or have such long-term consequences, as disputes over the control of embryos a couple had created and cryopreserved during their marriage. Most men in this scenario, still able to have children naturally, have sought to prevent their ex-wives from having a child they no longer desire. For many women, though, the embryos reflect their best, and perhaps only, opportunity to have a child. The interests could not be more polar, yet there can be no middle ground—one party's interests must yield to the other. To date, appellate courts in over one-third of the states have addressed this issue and have overwhelmingly sided with the party seeking to avoid parenthood, expressly adopting a presumption against the use of the embryos. Only twice in twenty appellate cases has a court awarded the embryos to the party seeking to use them. Though gender neutral on its face, the effect of this presumption has disproportionately favored men. Courts have privileged men's interests in avoiding the purely cognitive burdens of genetic parenthood, even when freed from any responsibilities of legal parenthood, above women's interests and investments in experiencing genetic, gestational, and legal parenthood. This Article reconsiders courts' and scholars' prior arguments in support of the presumption and rejects that the outcomes simply reflect inherent biological differences between the sexes. Rather, the Article analyzes the decisions of the 129 judges who have now ruled on this issue, uncovers a distinct difference in outcome based on the judge's gender, and argues the prevailing presumption against use reflects an implicit gender bias among judges. In doing so, the Article situates this issue as the latest in a long-line of male-centric approaches in American law to reproductive rights, autonomy, and parental responsibilities. As these cases are certain to increase

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in the coming years, this Article seeks to raise the consciousness of judges and legislators in the majority of states still to address the issue and to move the law toward a true balancing of both parties' interests.

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> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender.
>
> - United States Supreme Court Justice Joseph P. Bradley[1]

> We [women judges] bring an individual and collective perspective to our work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it [a]ffects.
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> - Utah Supreme Court Justice Christine M. Durham[2]

I. Introduction

Bad facts, it is said, make bad law. And for those seeking custody of frozen embryos after a divorce, the paradigmatic case could not be worse. In *Davis v. Davis*, a man opposed his ex-wife's use of embryos they had created during marriage, due to deep psychological scars from his traumatic childhood.[3] His parents had divorced when he was five, his father abandoned him, he was separated from his mother and two siblings, and he spent years in a boys home.[4] These experiences left him "vehemently opposed" to having his genetic material used to create a child he would not raise.[5] On the other hand, his ex-wife remarried while the case was pending, changed her position, and no longer desired to have a child. Rather, she now sought to donate the embryos to another childless couple.[6] Because the parties had not agreed in advance about embryo disposition, the Tennessee Supreme Court had little trouble balancing their respective interests in the ex-husband's favor.[7]

But the court did not stop there. It went beyond the facts and added in dicta: "Ordinarily, the interests of the party seeking to avoid parenthood

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[1] Bradwell v. Illinois*,* 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding an Illinois statute that prohibited women from practicing law).

[2] Christine M. Durham, *President's Column*, 1 NAWJ NEWS AND ANNOUNCEMENTS 1, 1 (1987), *quoted in* Betty Barteau, *Thirty Years of the Journey of Indiana's Women Judges: 1964-1994,* 30 IND. L. REV. 43, 88 (1997).

[3] Davis v. Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992).

[4] *Id.*

[5] *Id.* at 604.

[6] *Id.*

[7] *Id.*

shall prevail[.]"[8] *Davis*, however, was no "ordinary" case—yet the presumption it established against the use of embryos took root. In the thirty years since, courts in over one-third of the states have now addressed frozen embryo disputes. While courts have developed differing approaches to resolve the issue, one constant remains: the party seeking to avoid parenthood almost always prevails. In the twenty appellate court cases to date, only twice has the court awarded the embryos to the party seeking to have a child.[9]

At first reading, the opinions seem reasonable. Courts note that no person should be subject to "forced procreation."[10] They focus on the "anguish,"[11] "hardships,"[12] and possible "life-long emotional and psychological repercussions"[13] of unwanted parenthood. As is often the case, though, it is telling what aspects courts ignore. For instance, courts focus almost exclusively on the harms of unwanted parenthood, yet few have addressed one's interests in *being* a parent.[14] Likewise, courts remark that no one should be forced to procreate, but ignore that both parties *voluntarily* contributed gametes to create the embryos *specifically for procreation*.[15] Similarly, courts point out the party seeking the embryos could have protected their interests by contracting for that right, yet courts ignore that the party objecting likewise failed to protect their own interests. Courts explain that the party may seek parenthood by other means, ignoring that the embryos reflect, for many people facing fertility challenges at least, their only *realistic* chance at parenthood.[16] Finally, courts start the analysis at the moment of disposition (implantation, donation, or destruction), thereby ignoring the female's much greater physical and emotional contributions to the embryos' creation.

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[8] *Id.*

[9] *See infra* Part IV.

[10] A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000); *see also, e.g.*, J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001); Bilboa v. Goodwin, 217 A.3d 977, 992 (Conn. 2019); Susan B. Apel*, Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent*, 39 FAM. L.Q. 663, 665 (2005).

[11] *Davis*, 842 S.W.2d at 601.

[12] Jocelyn P. v. Joshua P., 250 A.3d 373, 388 (Md. Ct. Spec. App. 2021).

[13] *J.B.*, 783 A.2d at 717; *see also* McQueen v. Gadberry, 507 S.W.3d 127, 147 (Mo. Ct. App. 2016) ("This possible result would impose unwanted parenthood on Gadberry, with all of its possible life-long emotional, psychological, and financial responsibilities.").

[14] *See infra* Part VI.B.

[15] *See infra* notes 300-302 and accompanying text.

[16] While judges have suggested that foster children and adoption remain options for parenthood, this both trivializes the interests women may have in genetic parenthood and ignores the very real challenges a single, middle-aged woman faces when trying to adopt. *See infra* notes 314-315 and accompanying text.

In addition to the above, though, there is one other key fact that courts have wholly ignored. While the *Davis* presumption against use is gender-neutral on its face, in practice, it has disproportionately favored men. In the twenty embryo-disposition appellate cases, a man sought the embryos to have a child just twice. Women, on the other hand, sought the embryos to have a child thirteen times (and were successful just twice).[17] That women typically are the party seeking the embryos is not surprising. Most men have a back-up plan without the embryos—they produce sperm throughout their lifetime.[18] On the other hand, because female reproductive capacity diminishes with age, the embryos almost always reflect their best, and sometimes only, opportunity to have a (or another) child.[19] As Professor Ruth Colker noted almost twenty-five years ago, "sperm may be cheap and plentiful, but eggs are not."[20]

Just because differential impact is predictable, though, that does not make it acceptable. One might respond (perhaps subconsciously) that the outcomes simply reflect a natural consequence of biological differences—the cases favor men through no fault of the courts (or the men before them), but due to "nature itself."[21] While the biological differences are, of course, no fault of the courts (nor the men), ignoring them is. For instance, the courts

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[17] *See infra* Part IV and Tables I and II. In the remaining five cases, neither party sought to become a parent—one party sought to donate the embryos to another couple while the other opposed any use of the embryos.

[18] Rakesh Sharma & Ashok Argawal, *Spermatogenesis: An Overview*, *in* SPERM CHROMATIN: BIOLOGICAL AND CLINICAL APPLICATIONS IN MALE INFERTILITY AND ASSISTED REPRODUCTION 24 (A. Zini & A. Agarwal eds., 2011).

[19] When referring to couples who freeze embryos, this article uses "men" and "male" interchangeably (to mean individuals who create sperm) and "women" and "female" interchangeably (to mean individuals who create oocytes). This choice not to differentiate in each instance between one's sex assigned at birth and gender identity is not intended to exclude non-cisgender individuals. It was made simply for purposes of clarity and continuity as the Article incorporates outside (and older) quotations and sources. See the final paragraph of this Introduction for a clarification that the Article's premise—that a party's commitment to investing the physical, emotional, and financial resources to experience parenthood typically should outweigh the other party's purely mental discomfort—should apply to *all* individuals who freeze embryos that contain their genetic material when the parties' have not agreed otherwise.

[20] Ruth Colker, *Pregnant Men Revisited or Sperm is Cheap, Eggs are Not*, 47 HASTINGS L.J. 1063, 1069 (1996) [hereinafter Colker, *Pregnant Men Revisited*].

[21] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood."); *accord* Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.").

often frame the parties' respective interests purely in genetic terms, then refer to the parties as "entirely equivalent gamete-providers."[22] In so doing, courts claim to treat the parties on equal footing; but by ignoring the parties' different biological contributions, both retroactively and prospectively, courts uniquely disadvantage women. Ultimately, courts have found a way to protect the purely cognitive burdens of the party seeking to avoid genetic parentage (typically the ex-husband[23]) over the physical, mental, emotional, and financial commitments of the party willing to *do the work* of parenting (typically the ex-wife).[24] But this makes some sense when one considers that seventy percent of the judges in these cases have been men.

When embryo-disposition[25] cases first emerged, three scholars in particular, Professors Ruth Colker, Judith Daar, and Ellen Waldman, anticipated that the jurisprudence would develop to favor men's interests.[26]

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[22] Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

[23] Only one of the twenty appellate cases have involved parties who were not married at the time they froze the embryos. *See infra* Part IV. The position this paper promotes would apply to disputes between all couples who, with the intent to have a child together, freeze embryos that contain their respective genetic material, whether married or not.

[24] Others have set out a "sweat equity" argument focused on the women's prior physical contributions to the IVF process. I propose that such view is too limited, though, and that courts also consider the future physical (and other) contributions the party (either sex, but even more so for women) seeking the embryos is committing to, as well. *See infra* Part VI.B.

[25] This Article focuses primarily on the prospective parents' rights to access and control of the embryos, not on the embryos' potential right to life. Important arguments regarding embryos' rights, or the personhood of embryos, have animated this discussion for decades. *See, e.g.*, John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 444-54 (1990) [hereinafter Robertson, *In the Beginning*]. However, while most courts assign embryos an "interim category [between property and personhood] that entitles them to special respect because of their potential for human life," *Davis*, 842 S.W.2d at 597, no appellate court has resolved the issue based on (or even attributed any weight to) the *embryo's* status or interests. Though I address this issue briefly *infra* in Part VIII, I will bracket off any further discussion and focus throughout the article on the prospective parents' interests in and rights to the embryos.

[26] *See, e.g.*, Ruth Colker, *Pregnant Men*, 3 COLUM. J. GENDER & L. 450 (1993) [hereinafter Colker, *Pregnant Men*]; Colker, *Pregnant Men Revisited*, *supra* note 20; Judith Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 458 (1999); Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consensus*, 32 ARIZ. STATE L.J. 897, 931-32 (2000) [hereinafter Waldman, *Disputing Over Embryos*]; Ellen Waldman, *The Parent Trap: Uncovering the Myth of Coerced Parenthood in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1037

As Professor Colker noted, "When men are situated comparably to women with respect to reproduction due to use of new reproductive technologies, men are systematically treated far better than women."[27] Similarly, shortly after *Davis,* the American Bar Association Section on Family Law characterized the *Davis* presumption as "arbitrary" and noted that it failed to consider adequately (if at all) the interests of the other party—typically the woman.[28] These concerns went largely unheeded. However, with thirty years of hindsight and appellate court decisions on the issue from eighteen states,[29] these concerns have proven apt. Fortunately, since courts in almost two-thirds of states have yet to address the issue, there is still time to reshape future jurisprudence.

This Article suggests the law's direction in these cases—the aspects courts have focused on and those they have ignored—has been driven by an implicit bias favoring men's interests over women's interests. This conclusion is supported by an analysis of the individual decisions of all 129 trial and appellate judges who have ruled on this issue to date. This analysis shows that gender—not just of the parties, but of the *judges*—seems to have played a role in the courts' decisions. Indeed, the Article argues that for thirty years, embryo-disposition jurisprudence has been shaped less by fundamentally grounded legal principles, and more by the fact that over seventy percent of the judges to address the issue have been men. As Benjamin Cardozo himself acknowledged, while "'[w]e [as judges] may try to see things as objectively as we please . . . we can never see them with any eyes except our own.'"[30]

This Article situates this issue as simply the most recent expression of male-centric bias in American law regarding reproductive rights, autonomy, and parental responsibilities. This Article draws a line from the early common law doctrine of coverture, to rules that prohibited women from testifying to their own infidelity to rebut the marital presumption, to the disparate application of the marital presumption in assisted reproduction scenarios, and now to embryo disputes. Through that lens, the Article

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(2004) [hereinafter Waldman, *The Parent Trap*]. Other notable early voices included Mary Louise Fellows and Helen Shapo, cited *infra* in this article.

[27] Colker, *Pregnant Men*, *supra* note 26, at 450.

[28] AM. BAR ASS'N, *Report No. 2 of the Section of Administrative Law and Regulatory Practice*, 122 ANN. REP. A.B.A. 209, 236 (1997); *see also infra* notes 374 to 382 and accompanying text.

[29] There have been embryo-disposition appellate cases in Arizona, Colorado, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington.

[30] Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229, 232 (2015) (alteration in original) (footnotes omitted) (quoting Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 10-13 (1921)).

reconsiders the arguments of courts and commentators that have adopted and supported the *Davis* presumption against use. Finally, the Article shows that the presumption is out of step with the greater trend in family law that prioritizes relationship over biology and recognizes that legal rights arise from conduct, not genetic connection alone. Yet, in the embryo-disposition context, when one genetic parent seeks to *start* a family—and is committed to the physical, mental, emotional, and financial sacrifices and investments that requires—the law today gives the absent genetic parent a veto. Accordingly, the Article proposes that when a couple has not otherwise agreed on the disposition of their embryos, future courts should replace the *Davis* presumption with a (rebuttable) presumption favoring use of embryos.

Importantly, the Article does not suggest that those judges who have faced this difficult and emerging issue have intentionally privileged men's interests. Yet privilege does not require intent. Implicit biases are pernicious because they operate beneath the surface and undermine one's very understanding of their own conscious intent. As Professor Douglas NeJaime has noted, "courts and legislatures [often] aspire to inclusion and yet do so within frameworks that carry forward legacies of inequality."[31] This Article is not intended to impugn past judges, but to raise the consciousness of future judges and legislators who, with increasing frequency, will address this difficult issue and shape the law within their jurisdiction.

To do so, the Article proceeds as follows: Part II provides context by summarizing current assisted-reproduction technology ("ART") statistics and trends, underscoring that embryo-disposition disputes will only increase in the coming years. Part III discusses the various judicial approaches adopted in such cases, while Part IV then reviews the primary outcomes of those cases, both at the trial and appellate level. Part IV also breaks down each of the 129 individual decisions in those cases by the judges' gender, showing a distinct difference in decisions between men and women judges. Part V next considers other historical examples of implicit gender bias in parentage and ART laws. With that context in place, Part VI challenges the *Davis* presumption against use by reconsidering both the *Davis* case and conventional views of the parties' respective interests in genetic, gestational, and legal parenthood. Part VII then looks to the recent trend in family law toward recognizing functional parenthood and argues that judges in embryo-disposition cases have prioritized genetic parenthood in a manner out of step with recent Supreme Court precedent. Finally, Part VIII explores additional areas, including international approaches, to support a shift in these important cases toward a presumption favoring an individual's interest in using their frozen embryos.

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[31] Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2273, 2316 n.217 (2017) [hereinafter NeJaime, *Nature of Parenthood*].

Before advancing, I want to clarify the scope of the Article and make two fundamental acknowledgements. First, the Article focuses primarily on (1) disputes between couples who created embryos using their own (rather than donor) gametes, and (2) the (overlooked) interests of women who have been denied access to the embryos. For one, such facts reflect the great majority of embryo dispute cases to date.[32] Moreover, isolating these facts helps both to highlight the biases at work and to set out the appropriate framework for resolving these disputes. To be sure, future courts will address embryo disputes between same-sex couples, couples in which the man seeks the embryos to have a child, couples who use donor gametes, and other factual variations. Nonetheless, the analytical framework laid out in this Article should apply in any such scenario: although the strength of the parties' specific interests may differ from case to case, in most scenarios the scales should favor the party committed to investing their own physical, emotional, and financial resources to experience parenthood. Second, while this Article largely uses gender binary terms, future cases may involve individuals who identify as men yet may be able to gestate a child, individuals who identify as women yet may not be able to gestate a child, and individuals who identify as non-binary (and may or may not be able to gestate a child). Again, such factual variations should not alter the analytic framework or, in most cases, an outcome favoring a party's use of the embryos that contain that party's genetic material—regardless of that party's sex or gender—when the parties have not otherwise agreed.[33] Finally, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*[34] during final editing of this article. Given the timing, a fulsome discussion of *Dobbs* and its potential effect on embryo-disposition cases is beyond the scope of this Article. The author will simply note for now that the approach proposed in this Article may represent the rare instance where both those seeking to protect embryonic life and those seeking greater reproductive freedom for women may, in fact, find common ground.

II. Embryo Cryopreservation Trends

Since the first child was born from a cryopreserved embryo in 1984,[35] freezing embryos for future reproduction has become the preferred method for *in vitro* fertilization ("IVF"). In the United States, clinics that perform IVF must report their statistics to the Centers for Disease Control and Prevention ("CDC"), which publishes the information annually.[36] As of 2019, the most recent reporting data, 448 clinics provided ART services.[37] An ART cycle typically starts when a woman begins taking fertility medication to promote egg production, which is followed by surgical egg retrieval. Thereafter, the egg may be frozen for future use or fertilized. If fertilized, the embryo[38] may be transferred to the uterus for implantation or

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[32] *See infra* Part IV and Table IV. No embryo dispute case has involved a couple who used donor sperm, and just two cases have involved a couple who used donor eggs. In both cases, the court gave decisional priority to the male who provided his own genetic material. *See infra* note 143.

[33] For scholarship on other ART issues, see, for example, Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2001); Charles P. Kindregan, Jr., *Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMEDICAL L. 147 (2011); Kristine S. Knaplund, *Reimagining Postmortem Conception*, 37 GA. STATE U. L. REV. 905 (2021); Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899 (2012).

[34] 142 S. Ct. 2228 (2022).

[35] U.-B. Wennerholm et al., *Children Born After Cryopreservation of Embryos or Oocytes: A Systematic Review of Outcome Data*, 24 HUM. REPROD. 2158, 2158 (2009).

[36] CTRS. FOR DISEASE CONTROL & PREVENTION, 2019 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC AND NATIONAL SUMMARY REPORT (2021) [hereinafter 2019 ART REPORT]. For purposes of the report, ART includes only those techniques in which one or more eggs are removed from the female body before fertilization, and therefore excludes intrauterine insemination. *Id.* at 2, 50.

[37] 2019 ART REPORT, *supra* note 36, at 4. The data reflects a two-year trail because, in part, pregnancy success rates cannot be fully reported until nine to ten months after the end of the relevant year. *Id.* at 3.

[38] There is a debate about the proper term for a fertilized egg at this point in the process, with many referring to it as a "pre-embryo." *See* Davis v. Davis, 842 S.W.2d 588, 593-94 (Tenn. 1992).; Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 55 n.1 (1999). For purposes of this paper, I refer to the fertilized egg as an embryo to be consistent with the terminology used by the CDC in its annual reports.

frozen for future use.[39] Accordingly, a complete cycle from commencement to embryo implantation may take a few months or many years. For CDC reporting purposes, a new cycle is recorded either when ovarian stimulation or monitoring with the intent to retrieve eggs (whether for present or future use) begins or when a previously frozen egg or embryo is thawed for implantation.[40]

The CDC data demonstrates two primary trends in ART relevant to our discussion. First, and unsurprisingly, the number of couples and individuals who use ART to achieve pregnancy is growing at an accelerating rate. ART cycles increased from 107,587 in 2001, to 154,427 in 2010, to 330,773 in 2019.[41] Given the technological advances in ART, improved outcomes, the trend toward later child rearing, increasing infertility rates, growing societal acceptance of ART, and the expansion of insurance coverage for ART procedures, there is little reason to believe this trend will slow.[42]

Second, it is becoming more common for parties to use ART not to become pregnant at the time of the procedure, but to prolong (through cryopreservation) their reproductive capacity. In fact, over the past decade the use of frozen, rather than "fresh," eggs and embryos has become the preferred method of ART. ART cycles performed specifically for banking eggs or embryos (cryopreserving for future use) increased almost seventeen-fold, from 7,163 in 2010 to 121,086 in 2019.[43] During that same time, ART cycles using a patient's frozen eggs or embryos increased 4.5 times (28,245 to 126,187). On the other hand, between 2010 and 2019, cycles using a patients' fresh eggs or embryos decreased by almost one-half (100,824 to 56,369).[44] In addition, even when couples do retrieve eggs for immediate fertilization and implantation, the couple often will freeze surplus eggs retrieved or embryos created for future potential use. Overall, in 2019, almost 78.8% of embryo transfers involved frozen embryos.[45] Given these trends,

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[39] 2019 ART REPORT, *supra* note 36, at 15.

[40] *Id.* at 25, 49.

[41] 2019 ART REPORT, *supra* note 36, at 33 (providing 2010 and 2019 numbers); CTRS. FOR DISEASE CONTROL & PREVENTION ET. AL., 2010 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT (2012) [hereinafter 2010 ART REPORT] (providing 2001 numbers).

[42] *See* Carpenter, *supra* note 33, at 357-58; Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38 ACTEC L.J. 187, 193-94 (2012).

[43] 2019 ART REPORT, *supra* note 36, at 32. Notably, the information does not clarify which portion of the 121,086 involved frozen eggs versus frozen embryos.

[44] 2019 ART REPORT, *supra* note 36, at 33.

[45] 2019 ART REPORT, *supra* note 36, at 26.

the number of disputes over frozen embryos will almost certainly increase substantially in the future.[46]

While the success rates for ART have steadily improved over the years, success rates decrease significantly as women age.[47] Overall, 43.2%of embryo transfers result in a live birth for patients under the age of thirty who use their own eggs; for patients over age forty-five, that rate is just 8.7%.[48] However, these outcomes are entirely different when patients are able to use their own previously frozen embryos. For instance, for patients ages forty-one and forty-two who must begin a new IVF cycle with egg retrieval, the success rate is just 4.7%.[49] However, when patients ages forty-one and forty-two are able to use their own *frozen* embryos, the success rate jumps to 39.1%—over eight times greater.[50] This is due largely to the fact that an embryo's odds of implanting correlate more strongly to the patient's age at the time the egg was retrieved than to age at implantation.[51] This distinction

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[46] The number of divorces in the United States decreased modestly from 872,000 in 2010 to 746,971 in 2019 (with data from some states not included). CDC/NCHS NATIONAL VITAL STATISTICS SYSTEM, *Provisional Number of Divorces and Annulments and Rate: United States 2000-2019*, https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-19.pdf [https://perma.cc/32T2-FJZ7] (last visited Dec. 29, 2021). Nonetheless, the increase in couples using IVF and freezing their embryos greatly exceeds the decrease in divorce rates.

[47] 2019 ART REPORT, *supra* note 36, at 36 (reporting an increased success rate across all forms of ART from 32.0% in 2010 to 37.2% in 2019, but a consistently lower success rate during that timeframe among older patients). Success rate is based on live births, not simply pregnancies. *Id.* at 5. In addition, given the additional risks to both the patient and fetuses in multiple-birth pregnancies, ART clinics perform a higher proportion of single-embryo transfer procedures than in years past (77.3%in 2019 compared to 18.2% in 2010) and track singleton versus multiple birth ART pregnancies. *Id.* at 35.

[48] 2019 ART REPORT, *supra* note 36,at 29. This information combines results from the use of fresh and frozen eggs or embryos. The more recent CDC reports (including the 2019 ART REPORT) do not separate out information based on cryopreserved eggs versus embryos.

[49] SOC'Y FOR ASSISTED REPROD. TECH., FINAL NATIONAL SUMMARY REPORT FOR 2019, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?reportingYear=2019 [https://perma.cc/622J-9DWC] (last visited Nov. 5, 2022) (filter results by excluding "frozen egg" and "frozen embryo," then see *Patient's Own Eggs, Live Births Per Intended Egg Retrieval (First Embryo Transfer)*). This website includes most of the data compiled by the CDC in its annual reports but breaks down the data into further categories.

[50] *Id.* (filter results by including only "frozen embryo," then see *Patient's Own Eggs, Live Births Per Second or Later Embryo Transfer*).

[51] *See* 2019 ART REPORT, *supra* note 36, at 29.

is critical to the woman's interests in most embryo-disposition disputes—but it has been wholly ignored by the courts. When it comes to ART, then, time is truly of the essence—but not for men. Most men continue to produce viable sperm throughout their adult lives.[52] As women's average age at their first marriage continues to increase,[53] the average age of women upon divorce will likely increase as well. Denying women use of embryos they created while younger, *and froze to preserve the opportunity to achieve parenthood later in life*, significantly decreases—and in many cases, effectively eliminates—their opportunity to have genetically related children. Notably, the above statistics do not address the less quantifiable, but very real, physical, emotional, and financial impacts to a person of beginning the IVF process again from the start.

III. Embryo Disposition Approaches

Courts have adopted three primary approaches to resolve embryo-disposition disputes: the contract approach, contemporaneous consent approach, and balancing approach. These approaches are not mutually exclusive, but often operate together as a two-step analysis within the same decision. For instance, while a few states apply only the contemporaneous consent or balancing approach, most start with the contract approach and, in the absence of an unenforceable agreement, look to one of the other two approaches.

The following reviews the arguments for and against each approach, endorses the contract approach as the first step in any such analysis, then concludes with a table summarizing the approaches adopted in the twenty appellate cases to date. Notably, only two states have directly addressed the issue through legislation. In 2012, Florida adopted the contract approach as the first step and the contemporaneous consent approach as the second step.[54] In 2018, Arizona became the first state to grant absolute rights to the party seeking to use the embryos, as discussed *infra* in Part VIII.[55]

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[52] Sharma & Argawal, *supra* note 18, at 24. *See generally* Isiah D. Harris et al., *Fertility and the Aging Male*, 13 REV. UROLOGY 184 (2011) (reviewing changes in male fertility over the course of a lifetime).

[53] STATES CENSUS BUREAU, HISTORICAL MARITAL STATUS TABLES, https://www.census.gov/data/tables/time-series/demo/families/marital.html [https://perma.cc/7XJC-7CC3] (last visited Dec. 29, 2021) (click on Table MS-2: Estimated Median Age at First Marriage, by Sex: 1980 – Present).

[54] FLA. STAT. ANN. § 742.17(2) (West 2021) ("Absent a written agreement, decision making authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.").

[55] Most courts have held, and scholars agreed, that while individuals have constitutionally protected rights to procreate and not to procreate, these rights

A. Contract Approach

The majority of courts have adopted the contract approach as the first step in their analysis. Specifically, any agreement the parties reached at or prior to the time they started the IVF process controls the disposition of the embryos. This approach was first adopted by the Tennessee Supreme Court in *Davis v. Davis*[56] and has been judicially endorsed—at least in theory—by fifteen state appellate courts.[57] Most commentators,[58] along with professional organizations involved in ART,[59] likewise support this approach. Finally, several states' statutes require that parties undergoing ART reach a written

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would not apply in the context of *existing* embryos—or, if they do, each party's right is equal and, effectively, offsetting. *See, e.g.*, I. Glenn Cohen, *The Constitution and the Right Not to Procreate*, 60 STAN. L. REV. 1135, 1167 (2010). Thus, the reader should understand references in this Article to a party's "rights" to mean rights awarded to the party by the court after applying one of these approaches—not to inherent constitutional rights.

[56] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[57] *See infra* Table I. Though the Arizona Supreme Court enforced an embryo disposition agreement in *Terrell v. Torres*, 456 P.3d 13 (Ariz. 2020), the legislature responded with a statute providing embryos to the party seeking to use them, regardless of any prior agreement. *See infra* Part VIII. The New Jersey Supreme Court has held that it would enforce embryo disposition agreements—subject to either party's right to change their mind. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001). The court, then, is actually holding it will *not* enforce such contracts.

[58] This approach is closely associated with Professor John A. Robertson, who advocated strongly for this approach when the issue was emerging. Robertson, *In the Beginning*, *supra* note 25, at 467; John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO STATE L.J. 407, 414-18 (1990) [hereinafter Robertson, *Prior Agreements*]. His most comprehensive arguments for the contract approach appear in a later article *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989 (2001) [hereinafter Robertson, *Precommitment Strategies*]. More recently, Professor I. Glenn Cohen has argued forcefully for the contract approach. *See, e.g.*, I. Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008).

[59] The American Society for Reproductive Medicine (ASRM) recommends that IVF programs require couples to agree in writing to the use and custody of embryos in the event of divorce. *See* ETHICS COMM. OF THE AM. SOC'Y FOR REPROD. MED., *Disposition of Unclaimed Embryos: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 48 (2021). Moreover, the Legal Professional Group for ASRM has posted legal advice for drafting such agreements. Heather R. Ross, *Basic Elements of a Gamete/Embryo Donation Agreement*, LEGAL PROFESSIONAL GROUP, https://connect.asrm.org/lpg/resources/contracts/gamete-donation [https://perma.cc/VLZ7-R428] (last visited Jan. 3, 2021).

agreement regarding the custody and embryo disposition upon divorce.[60] The following addresses arguments for and against the approach, then discusses how courts have in fact applied (and avoided applying) the approach.

1. Arguments for the contract approach

Advocates argue this approach maximizes procreative liberty by keeping the state out of a couple's most personal decisions.[61] At the same time, it furthers individual autonomy by respecting the individuals' right to bind themselves.[62] The contract approach recognizes that individuals may rely on their partner's promises regarding embryo disposition before agreeing to contribute their own genetic material.[63] In many cases, a male may not agree to contribute sperm unless assured he will not become a genetic parent in the event of a divorce.[64] In other cases, a female may not agree to allow all retrieved eggs to be fertilized with her partner's sperm unless she is assured that she *could* use the embryos if they separate.[65] Denying either party the benefit of an agreement they relied upon strips them of procreative authority. Professor John Robertson warned thirty years ago that absent such authority, "decisions about embryos will be made by others in ways which might insufficiently value the reproductive concerns of the persons involved"[66] (precisely what this Article argues has occurred in the decades since). In addition, like a prenuptial agreement, this approach encourages couples to think through and address even unwanted contingencies before making a deeply personal commitment. Moreover, it locates the decisional process at a time when the parties may be more reflective and rational, rather than making agreements concurrently with

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[60] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-101 (West 2021); 750 ILL. COMP. STAT. ANN. 46 *et seq.* (West 2021); FLA. STAT. ANN. § 742.11-742.17 (West 2021); GA. CODE ANN. §§ 19-8-40 to -43 (West 2021); N.D. CENT. CODE § 14-18-01 to -07 (West 2021); OKLA. STAT. ANN. tit. 10, § 556 (West 2021); TENN. CODE ANN. § 36-2-403 (West 2021); TEX. FAM. CODE ANN. § 160.702 (West 2021); VA. CODE ANN. § 20-156 to 20-165 (West 2021); WASH. REV. CODE ANN. § 26.26 (West 2021); WYO. STAT. ANN. § 14-2-904 (West 2021).

[61] *See* Bilboa v. Goodwin, 217 A.3d 977, 984 (Conn. 2019); *In re* Rooks, 429 P.3d 579, 593 (Colo. 2018); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

[62] *See Bilboa*, 217 A.3d at 984; *In re Rooks*, 429 P.3d at 593; *Kass*, 696 N.E.2d at 180. Professor Robertson recognized that "[f]reedom to contract or to make directives binding in future situations enhances liberty even though it involves constraints on what may occur once the future situation comes about." Robertson, *Prior Agreements*, *supra* note 58, at 415.

[63] *See* Robertson, *Precommitment Strategies*, *supra* note 58, at 1006-07.

[64] *See id.*

[65] *See id.*

[66] Robertson, *Prior Agreements*, *supra* note 58, at 415.

divorce. Finally, by providing certainty, the contract approach may help parties avoid the financial and "incalculable" emotional costs of litigation regarding the embryos.[67]

2. Arguments against the contract approach

Critics, however, have challenged whether parties can properly contract in advance to the disposition of their embryos. Professor Carl Coleman, for one, has argued that the right *not* to be the genetic parent is so central to one's personhood that it must inalienable, not subject to waiver.[68] However, this ignores the fact that the other party has likewise contracted to something that may be just as central to their own sense of self: the right to *be* a genetic parent.[69] Others have pointed out that contracts regarding reproduction are generally unenforceable, such as agreements to have children during a marriage and contracts to abort or not to abort a child.[70] Such comparisons are inapposite, however, because forced performance of those contracts would violate the woman's bodily integrity. In the embryo-disposition context, "nothing akin to enforcing conception, contraception, abortion, gestation, or other bodily intrusions, much less the more ethereal goal of marital happiness, [is] being asked of the court."[71] Indeed, the objecting party need not do anything; they have already performed their part of the agreement.[72] Rather, the other party is simply seeking to complete their own performance (whether that is to have the embryos discarded, donated, or implanted).

Others have questioned whether parties can provide the consent necessary to support such contracts. For one, most embryo-disposition agreements are contracts between the couple and an ART facility, drafted and provided to the couple by the ART facility.[73] The contracts typically provide

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[67] *Kass*, 696 N.E.2d at 180; *see also* Robertson, *Prior Agreements*, *supra* note 58, at 418.

[68] Coleman, *supra* note 38, at 89. *But see* Robertson, *Precommitment Strategies*, *supra* note 58, at 1026-27; Cohen, *supra* note Cohen, *supra* note 58, at 1182-84.

[69] Cohen, *supra* note 58, at 1183.

[70] Coleman, *supra* note 38, at 93-94.

[71] Robertson, *Precommitment Strategies*, *supra* note 58, at 1022; *see also* Cohen, *supra* note 58, at 1169-71.

[72] Cohen, *supra* note 58, at 1171.

[73] Though bilateral agreements are becoming more common (and are certainly preferred), all cases to date have involved facility-provided form contracts. Only one case has also involved a bilateral agreement, though that was an oral agreement. In Szafranski v. Dunston, 34 N.E.3d 1132, 1161 (Ill. App. Ct. 2015), the court affirmed a finding that the parties had reached an oral bilateral agreement which superseded the facility-provided informed consent forms they had signed.

the couple with "check-the-box"-type disposition options, among a sea of other information.[74] Such provisions are generally intended to protect the ART facility in a dispute, not to elicit a thoughtful discussion between the individuals. It is unlikely that most couples meaningfully consider such options or, even if they do, that a check-the-box approach is up to the task.[75] Indeed, in many reported cases, the parties opted simply to agree at a later time or to permit a court to determine the disposition.[76]

To that point, though he ultimately advocated for the contract approach, Professor Robertson acknowledged that couples trying to get pregnant may not be able to "focus intelligently or meaningfully on future contingencies antithetical to their present purpose."[77] Professor Coleman, arguing against the contract approach, went further and asserted "it may simply be impossible [for either party] to make a knowing and intelligent decision" regarding post-divorce embryo disposition.[78] Similarly, Professor Helene Shapo noted the

> couple's intense emotional state at the time the clinic requires them to sign the consent form. At that time, rather than bargaining over divorce terms, the couple is far more likely to concentrate on the information in the forms explaining the difficulty or the procedures, the considerable

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See also Jocelyn P. v. Joshua P., 250 A.3d 373, 381 (Md. Ct. Spec. App. 2021) (remanding to determine whether an oral agreement existed).

[74] Waldman, *Disputing Over Embryos*, *supra* note 26, at 931-32.

[75] *Id.*; Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. ACAD. MATRIM. L. 57, 66-68, 100-01 (2011); Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191, 223-24 (2013).

[76] *See, e.g.*, *In re* Marriage of Fabos & Olsen, 451 P.3d 1218, 1225 (Colo. App. 2019) (per court order); *In re* Marriage of Witten, 672 N.W.2d 768, 773 (Iowa 2003) (mutual consent); Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020) (per court order); Jessee v. Jessee, 866 S.E.2d 46, 53 (Va. Ct. App. 2021) (per court order); *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, *1 (2018) (unpublished) (per court order).

[77] Robertson, *Precommitment Strategies*, *supra* note 58, at 994. Though Professor Robertson ultimately rejects this argument, he cites social science and cognitive science research supporting this point, Eldar Shiafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequentialist Reasoning and Choice*, 24 COGNITIVE PSYCH. 449, 449-52 (1992). Professor I. Glenn Cohen also rejects this argument and cites research to support that individuals accurately predict their emotional response to an event, but not the intensity or duration of the response. Cohen, *supra* note 58, at 1174.

[78] *See* Coleman, *supra* note 38, at 98.

> expense involved, and their chances for success. That the couple would also rationally bargain and evaluate their options regarding provision for their pre-embryos seems implausible, and therefore a tenuous basis on which to enforce the consent form.[79]

Finally, Professor Ellen Waldman has argued that even if the parties had thoughtfully considered the issue, the man typically holds undue leverage in any "negotiations."[80] Because a woman's ability to have children declines with age, the IVF process may be the woman's only chance to have children. Yet, she may hardly be in a position to request that the couple use another man's sperm, nor would most men permit that, as their purpose is to have a biological child together. The husband, on the other hand, approaches any negotiation knowing that if the marriage dissolves, he will likely have an opportunity to have a child later.[81] In other words, he has a back-up plan; his wife does not.[82] This dynamic seems to be supported by the cases—only three of the twenty cases to date involved a contract that gave the woman the right to implant the embryos. And, as discussed next, in two of those three cases, the court refused to enforce the contract.

3. Contract approach as applied

While most courts have announced they follow the contract approach, it "still entails some degree of contract interpretation, which, by definition, gives courts tremendous leeway in designing embryo

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[79] Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMPAR. & INT'L L. 75, 89 (2002); *see also* Coleman, *supra* note 38, at 56; Daar, *supra* note 26, at 458 (asking whether "contract principles that evolved largely to accommodate commercial transactions . . . [can be] appropriately applied to reproductive decision making").

[80] Waldman, *Disputing Over Embryos*, *supra* note 26, at 928.

[81] *Id.*

[82] One could argue that the woman could protect herself in this scenario by freezing excess eggs rather than embryos. Theoretically that may be true, though it ignores the challenging dynamic within the marriage that such a route may create. Perhaps one concludes that risk is one the woman must bear for her procreative freedom, but the burden this places on her should not be discounted completely. Moreover, this assumes the likelihood of success using frozen eggs is equivalent to that of frozen embryos. While the technology in this regard is improving, frozen embryos have historically provided better odds for a successful pregnancy. *See generally* Benedetta Lussig et al., *A Brief History of Oocyte Cryopreservation: Arguments and Facts*, 98 ACTA OBSTETRICIA ET GYNOCOLOGICA SCANDINAVICA 550 (2019) (reviewing the history of cryopreservation of preembryos).

dispositions."[83] Indeed, in two of the three cases in which the parties' contract granted a woman the right to use the embryos, the court did not enforce the contract.[84] Yet, in all seven appellate cases in which a contract prohibited a party from using the embryos, the courts have enforced the contract.[85] Thus, the contract approach may, in fact, be more of an outcome-oriented justification than genuine guiding legal principle.

For instance, the Massachusetts Supreme Court endorsed the enforcement of embryo-disposition contracts—but only those in which the parties agreed *not* to use the embryos.[86] In *A.Z. v. B.Z*, the parties signed seven facility-provided forms, in each selecting for the wife to receive the embryos for implantation "should we become separated."[87] Yet, when the parties divorced, the court refused to enforce the selections as between the parties because the forms simply "define[d] the donors' relationship as a unit with the clinic."[88] The court then dubiously added that "should we become separated" did not *explicitly* include divorce, and the divorce was thus a "changed circumstance."[89] In any event, the court noted that as a matter of public policy, "[e]ven had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will."[90] Finally, the court concluded, "We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy."[91]

By phrasing its reasoning in gender neutral terms, the court ostensibly put men and women on equal footing. As noted earlier, however, the court would not have forced the husband to *do* anything if it enforced the contract. There was nothing left for the man *to* do. He had already performed his part in the contract. Accordingly, this is wholly different than a hypothetical ruling requiring a woman to gestate the embryos against her will—something that has never occurred.[92] Rather, the court would merely

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[83] Daar, *supra* note 26, at 471.

[84] *See infra* Table I (*A.Z.*, *Szafranski*); McQueen v. Gadberry, 507 S.W.3d 127, 151-55 (Mo. Ct. App. 2016).

[85] *See infra* Table I (*Kass*, *Roman*, *Dahl*, *Cwik*, *Finklestein*, *Bilboa*, *Terrell*).

[86] A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000).

[87] *Id.* at 1054.

[88] *Id.* at 1056.

[89] *Id.* at 1057.

[90] *Id.*

[91] *Id.* at 1058.

[92] Similarly, in a case where the ex-husband sought to use the embryos with a *surrogate*, a court supported its denial by recognizing that it "could not properly force [the ex-wife] to give birth to another child"—though, of course, the ex-

be honoring the couple's agreement, an agreement the woman relied upon when she permitted her husband to fertilize each of her retrieved oocytes.

Similarly, the Connecticut Supreme Court recently enforced a contract to discard embryos upon divorce, but specifically left open whether it would enforce contracts permitting either party to use the embryos.[93] In Massachusetts, then, and likely Connecticut, a woman will be bound by her agreement to let her former husband to destroy the embryos they created. Yet, a man will not be bound by his agreement to let his former wife use the embryos they created, despite both her reliance and partial performance.

In other cases, courts have adopted the contract approach but avoided its application by holding the contract was ambiguous or otherwise did not reflect the parties' intent.[94] For instance, the Illinois Court of Appeals refused to enforce the embryo-disposition terms in an agreement between the couple and facility because the form contract did not give the parties any *choice*, but simply set out how the facility would handle the embryos upon a dispute.[95] The court clarified it was not establishing a bright-line rule against facility provided contracts, but that the contract must clearly indicate the parties had agency in their options.[96] Similarly, in 2021 the Maryland Court of Special Appeals refused to enforce the embryo-disposition terms of a facility provided contract, noting that "[g]iven the pervasiveness of third-party consent agreements, we emphasize that the progenitors—not fertility centers—must expressly and affirmatively designate their own intent."[97]

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husband never sought that. *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, *6 (2018) (unpublished).

[93] Bilboa v. Goodwin, 217 A.3d 977 (Conn. 2019).

[94] Jocelyn P. v. Joshua P., 250 A.3d 373, 407-08 (Md. Ct. Spec. App. 2021); McQueen v. Gadberry, 507 S.W.3d 127, 155 (Mo. Ct. App. 2016).

[95] Szafranski v. Dunston, 34 N.E.3d 1132, 1155-56 (Ill. App. Ct. 2015).

[96] *Id.* at 1158. Notably, the court did find and enforce a separate, oral agreement between the parties that granted the woman rights to the embryos for her use. *Id.* Thus, the court did support the contract approach, but expressed its discomfort with non-bilateral agreements.

[97] *Jocelyn P.*, 250 A.3d at 404 (adding that "[b]oilerplate language in a third-party form contract may not qualify as an express agreement between progenitors regarding who should have custody of their jointly created pre-embryo in the event of the dissolution of their relationship"); *accord* A.Z. v. B.Z., 725 N.E.2d 1051, 1056 (Mass. 2000) (refusing to enforce embryo disposition terms in a facility-provided contract); Patel v. Patel, 99 Va. Cir. 11 (Va. Cir. Ct. Mecklenburg Cnty. 2017) (designated as unpublished) (holding that only bilateral contracts between individuals would be enforced).

Finally, some states will enforce oral embryo-disposition agreements, while others will not consider evidence of any oral agreements.[98]

B. Contemporaneous Consent Approach

A second approach is the contemporaneous consent approach.[99] This approach disregards any prior agreement between the parties and requires the parties to agree at the time of the disposition (implantation, donation, or destruction). If the parties cannot then agree, the IVF facility shall continue to preserve the embryos indefinitely until the parties either jointly direct the facility or the parties' agreement with the facility expires (i.e., under the agreement's terms or because the individuals fail to pay the storage fee). Notably, in almost all cases, once the agreement with the facility expires—the party opposing the use of the embryos has "run out the clock"—the facility would discard the embryos or use them for research purposes.

Iowa is the only state that has adopted a pure contemporaneous consent approach.[100] The Massachusetts Supreme Court adopted a modified contemporaneous consent approach, enforcing agreements that permit either party to discard the embryos, but requiring contemporaneous consent if the agreement permits either party to *use* the embryos.[101] In other words, in Massachusetts parties may waive their interest in becoming a genetic parent, but not their interest in *not* becoming a genetic parent. In addition, Missouri (by caselaw) and Florida (by statute) have adopted the contemporaneous consent approach as the second step in the analysis if no contract exists.[102] Notably, the American Bar Association's 2019 Model Act Governing

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[98] *Compare Szafranski*, 34 N.E.3d at 1148 (enforcing oral contract), *and Jocelyn P.*, 250 A.3d at 381 (remanding to determine if oral contract existed), *with J.B.*., 783 A.2d at 714 (refusing to consider evidence of oral contract).

[99] This approach was adopted by the intermediate appellate court in Davis v. Davis, though it was rejected by the Tennessee Supreme Court. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992). Professor Carl Coleman was this approach's leading advocate in the early embryo disposition commentary, most notably in *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes* (*see supra* note 38).

[100] *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003). The court could have reached the same result by enforcing the parties' agreement, which directed the facility to act upon the mutual consent of the parties. *Id.* at 772. Regardless, though, the court held that *any* embryo disposition contract would be against public policy. *Id.* at 781-82.

[101] A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

[102] FLA. STAT. ANN. § 742.17(2) (West 2021) ("Absent a written agreement, decision making authority regarding the disposition of preembryos shall reside jointly with the commissioning couple."); McQueen v. Gadberry, 507 S.W.3d 127, 157 (Mo. Ct. App. 2016).

Assisted Reproduction likewise permits either party to withdraw consent to the other party's use of the embryos at any time prior to implantation, and expressly states that "[n]o prior agreement to the contrary will be enforceable."[103]

Contemporaneous consent proponents argue the approach keeps the courts out of highly personal reproductive decisions, leaving such decisions properly in the parties' hands.[104] Others, however, have recognized that this approach is "totally unrealistic;" if the parties could reach agreement, they would not be in court in the first place.[105] Rather, the approach simply gives the party seeking to block the embryos' use, typically the ex-husband, a "de facto veto."[106] Moreover, courts adopt a legal fiction by claiming to play no role in the outcome. For instance, before adopting the contemporaneous consent approach, the Iowa Supreme Court first declared all embryo-disposition agreements against Iowa public policy.[107] By doing so, the court is absolutely interjecting itself into such "highly personal reproductive decisions" and, as discussed *supra*, denying one party their reproductive liberty. Despite washing its hands of any responsibility, the court *did* provide for resolution, no less than an order permitting one party to discard, donate, or implant the embryo would have. Specifically, in Iowa today, the Iowa Supreme Court has given the party who objects to the embryos' use complete control—regardless of the promises that party may have made to their partner before creating the embryos.[108]

Though gender neutral on its face, the approach has "'asymmetrical consequences.'"[109] In most cases (as it did in the Iowa case), it subjugates women's interests while privileging men's interests. The party seeking to prohibit the embryos' use (typically the man) can accomplish this by doing nothing—by delaying resolution until the issue becomes moot by the passage of time.[110] The party seeking to use the embryo (typically the woman), cannot accomplish her desired result without her ex-husband's cooperation. As a

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[103] MODEL ACT GOVERNING ASSISTED REPROD. § 501(5)(b) (AM. BAR ASS'N 2019).

[104] *See, e.g.*, *In re* Marriage of Rooks, 429 P.3d 579, 596 (Colo. 2018) (Hood, J., dissenting); *McQueen*, 507 S.W.3d at 157; Coleman, *supra* note 38, at 81, 95-96.

[105] Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012).

[106] *In re* Rooks, 429 P.3d at 589.

[107] *See supra* note 99.

[108] Caroline Strohe, *The Fate of Frozen Embryos After Divorce*, 66 LOY. L. REV. 263, 285 (2020).

[109] *Jocelyn P.*, 250 A.3d 373 at 405 (quoting Bilboa v. Goodwin, 217 A.3d 977, 987 (Conn. 2019)).

[110] *Id.* at 399; *In re Rooks*, 429 P.3d at 589.

result, this dynamic provides the ex-husband with significant potential leverage in the divorce negotiations.

C. Balancing Approach

The third approach is the balancing approach. Only New Jersey has adopted a balancing approach as the first (and only) step in the analysis.[111] However, most states that follow the contract approach balance the parties' interests as the second step when no enforceable contract exists.[112] Overall, almost one-half of the cases to date have been resolved by balancing the parties' interests.[113]

The name is a misnomer, however. Most courts do not meaningfully balance the parties' interests but start from the almost irrebuttable presumption against use established in *Davis v. Davis*.[114] The Maryland Court of Appeals recently observed, "Given that the [*Davis*] Court described both parties as having equally valid, constitutionally derived procreative rights, we struggle to see why the party who desires to avoid procreation should be accorded greater respect than the party who desires to procreate."[115] The Iowa Supreme Court likewise noted this "internal inconsistency" when rejecting the balancing test altogether.[116] As Professor Mary Ziegler has noted, "conditioning the availability of a right on the existence of an appealing story undermines the very idea that the Constitution

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[111] The New Jersey Supreme Court stated that it would enforce embryo disposition contracts, but "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos." J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001). In that case—the only scenario in which a court would be involved—the court would balance the parties' respective interests. *Id.*

[112] *See infra* Table I. Missouri is the only state that has rejected the balancing approach in favor of the contemporaneous consent approach in the absence of a contract. A few additional states have resolved the issue on contract terms and not discussed which approach they would adopt absent a contract.

[113] *See infra* Table I.

[114] 842 S.W.2d 588 (Tenn. 1992). Though this Article began with a summary of *Davis*, a more detailed summary and critique of the case, specifically the presumption against use it established, follows *infra* in Part VI.A.

[115] Jocelyn P. v. Joshua P., 250 A.3d 373, 404 n.20 (Md. Ct. Spec. App. 2021).

[116] *In re* Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003). Professor I. Glenn Cohen has likewise acknowledged "[t]hat one should have such a right [not to experience genetic parenthood] seems, at first blush, intuitively obvious, and the courts and commentators in the preembryo-disposition disputes have sub silentio assumed as much, moving without pause to the question of whether that right can be waived[.]" Cohen, *supra* note 58, at 1145.

protects reproductive liberty."[117] As a result, courts have "increasingly viewed reproductive rights, but for the fact of gestation, as a matter of individual motives and circumstances[, making . . .] ART jurisprudence less principled, less transparent, and less well-explained than it ought to have been."[118]

Nonetheless, the presumption has taken hold. In the thirty years since *Davis*, courts have balanced the interests for the party seeking to use the embryos for reproduction exactly twice. In the first such case, *Reber v. Reiss*, a woman who sought the embryos had no children, had delayed cancer treatments specifically to create the embryos and preserve her ability to have children with them, and was unable to produce any additional eggs. On the other hand, her ex-husband who opposed her embryos' use *already* had a child with another woman after the couple separated (and testified that he planned to have more).[119] In the other case, *Szafranski v. Dunston*, the embryos again represented the woman's only opportunity to have a biological child, while her ex-boyfriend's primary objection was simply that her use of the embryos may hinder his ability to attract a new partner.[120] In every other case, the party seeking to avoid parenthood has prevailed.[121]

Even if the scales were truly balanced to start, though, judges have expressed vastly different views on which factors are appropriate to consider. Most courts tend to minimize, if not discredit completely, any factor that would support the party seeking to use the embryos. For instance, while one court has considered a party's religious or moral beliefs regarding embryos,[122] others have refused to do so.[123] The Colorado Court of Appeals

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[117] Mary Ziegler, *Men's Reproductive Rights*, 47 PEPP. L. REV. 665, 713 (2020) [hereinafter Ziegler, *Men's Rights*]. Professor Ziegler further explores the limitations of a balancing test in embryo disposition disputes by making analogies to balancing tests have been misused in abortion contexts. Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 531-56 (2018) [hereinafter Ziegler, *Beyond Balancing*].

[118] *Id.* at 720.

[119] Reber v. Reiss, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012).

[120] 34 N.E.3d 1132, 1161-63 (Ill. App. Ct. 2015). The court resolved the case on contractual grounds but likewise balanced the parties' interests. *Id.* at 1163.

[121] Notably, in three other cases lower courts had balanced the interests for the woman and awarded her custody of the embryos when she had no prior children and no reasonable opportunity to have children without the embryos. However, each of these decisions was reversed on appeal. Jessee v. Jessee, 866 S.E.2d 46 (Va. Ct. App. 2021); Finkelstein v. Finkelstein, 79 N.Y.S.3d 17 (N.Y. App. Div. 2018); Terrell v. Torres, 456 P.3d 13 (Ariz. 2020).

[122] Jocelyn P. v. Joshua P., 250 A.3d 373, 409 (Md. Ct. Spec. App. 2021).

[123] *In re* Marriage of Fabos & Olsen, 451 P.3d 1218, 1228 (Colo. App. 2019); J.B. v. M.B., 783 A.2d 707, 712 (N.J. 2001) (acknowledging but giving no further consideration to a party's religious beliefs).

recently held that a party's religious considerations had no place in the analysis, even though they "were 'bona fide, passionate, and antedate this dispute.'"[124] In the same opinion, the court added that the emotional concerns and hardships of the party seeking to *prevent* the embryos' use may be considered, but not those of the party seeking to *use* the embryos.[125] Similarly, the *Davis* court acknowledged "the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process[] is more severe than is the impact of the procedure on men[.]"[126] Yet, by setting the analytical starting point at the time of *disposition*, the court treated such trauma as legally irrelevant.

In addition, the cases have invited paternalistic judgments regarding a single woman's ability to support additional children. For instance, two courts weighed a woman's financial resources against awarding embryos to her (though in both cases the court on appeal noted such considerations were improper).[127] Similarly, courts have weighed the fact that the woman already had children against her interest in the embryos.[128] One court explicitly stated its concern for the woman's "ability to manage 'such a large family' as a

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[124] *In re Fabos*, 451 P.3d at 1228 (quoting the trial court). The Colorado Court of Appeals held the district court, when weighing the parties' respective interests, improperly considered the wife's religiously based view that embryos constitute life, because that view is inconsistent with the Colorado Supreme Court's prior determination that embryos are not "persons" under Colorado law. *Id.* This conclusion is quite troubling, though, as the issue was not whether the embryos were *in fact* persons, but whether the party believed them to be persons, consistent with her faith. Ultimately, because the court disagreed with the wife's deeply held religious beliefs, it held they did not even merit consideration. Notably, when the case again came before the court on a second appeal (after the trial judge again weighed the wife's religious beliefs), the court retreated a bit and acknowledged that the wife's religious beliefs were entitled to some weight, but not as much as the husband's interest in not procreating. *In re* Marriage of Fabos & Olsen, No. 20CA1881, 2022 WL 2252639, at ¶¶ 34-38 (Colo. App. June 23, 2022).

[125] *In re* Marriage of Fabos & Olsen, 451 P.3d 1218, 1228 (Colo. App. 2019).

[126] Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

[127] *In re* Marriage of Rooks, 429 P.3d 579, 594 (Colo. 2018); Jocelyn P. v. Joshua P., 250 A.3d 373, 401 (Md. Ct. Spec. App. 2021).

[128] *In re* Marriage of Rooks, 488 P.3d 116, 122 (Colo. App. 2016), *rev'd*, 429 P.3d 579, 595 (Colo. 2018); A.Z. v. B.Z., 725 N.E.2d 1051, 1054 (Mass. 2000 (noting the trial court, while ruling against the ex-wife, reasoned that children born to the couple after the embryos were frozen consisted a changed circumstance). Professor Mary Ziegler has pointed out that African-American and Latino families on average have more children than other races, and by considering family size in parentage issues, "courts tend to advantage those in racial groups that conform to the trend of shrinking family size." Ziegler, *Men's Rights*, *supra* 117, at 712 (citing Pew Research Center data).

single parent[.]"[129] By doing so, courts in effect have used a woman's past exercise of her procreative rights to limit her current procreative freedom.[130]

Moreover, by questioning a woman's ability to support her children, courts implicitly incorporate the child's best interests as a factor. Other judges have explicitly looked to the child's best interests.[131] Invariably, though, courts have used the child's best interests against the mother, suggesting that a single mother is not fit to raise a child alone—despite that in 2021, 15.6 *million* children were raised primarily by single mothers.[132] Even more troublingly, such weighing suggests a view that a child would be better off not being born at all than being born to a single mother. As Professor John Robertson noted years ago, "the rigors for the child of having any absent parent do not justify, as viewed by the child once it is born, depriving the child of life altogether[.]"[133]

Even when the embryos represent the woman's *only* opportunity to be a genetic parent, some courts have declined to weigh that in her favor, noting that she could experience parenthood through adoption.[134] Other courts, however, have recognized that the issue in these cases is not *legal* parenthood, but the opportunity for a woman to be a *genetic* parent, to experience pregnancy, and to raise the child from birth.[135] The one factor that

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[129] *In re* Marriage of Rooks, 488 P.3d 116, 124 (Colo. App. 2016) (citing the trial court decision), *rev'd*, 429 P.3d 579, 595 (Colo. 2018).

[130] Robertson, *Precommitment Strategies*, *supra* note 58, at 1020. Notably, at least one court has held the "sheer number of a party's existing children, standing alone, [shall not] be a reason to preclude preservation or use of the pre-embryos." *In re Rooks*, 429 P.3d at 594.

[131] For instance, in a Washington case (not included in this analysis because the couple used an egg donor), the trial judge denied the woman's request for the embryos because "the child would be a child of a single parent. That is not in the best interest of a child . . . ." Litowitz v. Litowitz, 48 P.3d 261, 264 (Wash. 2002).

[132] U.S. CENSUS BUREAU, HISTORICAL LIVING ARRANGEMENTS OF CHILDREN, https://www.census.gov/data/tables/time-series/demo/families/children.html [https://perma.cc/XWD3-UJAF] (last visited Jan. 28, 2022) (click on Table CH-1). Alternatively, there were 3.5 million children raised by single fathers. *Id.*

[133] Robertson, *Precommitment Strategies*, *supra* note 58, at 1026; *see also* Robertson, *In the Beginning*, *supra* note 25, at 476 n.95 ("Being raised by a single parent does not amount to wrongful life."); Shapo, *supra* note 78, at 91. At least one commentator has argued that public policy should account for the interests of *third parties*, as well, including those seeking to use otherwise unwanted frozen embryos for reproductive purposes. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 835-38 (2005).

[134] J.B. v. M.B., 783 A.2d 707, 720 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)

[135] *See, e.g.*, *In re* Marriage of Rooks, 429 P.3d at 594; Reber v. Reiss, 42 A.3d 1131, 1133, 1138-39 (Pa. Super. Ct. 2012); *Jessee*, 866 S.E.2d at 57 n.14.

courts have unanimously agreed on is if a party seeks to use the embryo himself or herself, that will be given more weight than if he or she intends to donate the embryo to another couple.[136] Ultimately, however, the *only* factor that has affected the outcome, as shown in the following table, is when the embryos represented the woman's only reasonable opportunity to have a child. (Though, even here, courts differ widely regarding what constitutes a "reasonable" opportunity—a topic we will return to in Section VI.B.)

D. Endorsement of Contract Approach

This Article joins the majority and endorses the contract approach as the first step in embryo-disposition disputes, as the author is persuaded that when the contract approach is truly enforced by courts, it maximizes the parties' personal autonomy and procreative liberty. For one, this approach does not require anything of the objecting party, but merely permits the other party to complete the agreement the parties had reached. Further, while it is true that one party may later regret the agreement, it best affords both parties agency over their reproductive decisions and respects that the other party had relied on the agreement. Moreover, unlike the contemporaneous consent approach, it does not grant one party an ultimate veto and future negotiating leverage; unlike the balancing approach, it is less vulnerable to judges substituting their own views (or biases) for those of the parties.

However, facility-provided, check-the-box forms are hardly up to the important task of reflecting the parties' actual intent, and such agreements should be enforceable only when they are bilateral agreements between the couple. Other scholars have provided sound recommendations for improving the process and reliability of such agreements.[137] And while no case to date has involved a true bilateral written agreement,[138] they are becoming more common in practice. For instance, recent articles in the New York Times and Wall Street Journal noted that many millennials are including embryo-disposition terms in prenuptial agreements,[139] and such articles help both to raise awareness and de-stigmatize such discussions.

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[136] *See, e.g.*, Jocelyn P. v. Joshua P., 250 A.3d 373, 403 (Md. Ct. Spec. App. 2021).

[137] *See, e.g.*, I. Glenn Cohen & Eli Y. Adashi, *Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 16-17 (2016); Waldman, *Disputing Over Embryos*, *supra* note 26, at 936-39; Ziegler, *Men's Rights*, *supra* note 117, at 724-27; Ziegler, *Beyond Balancing*, *supra* note 117, at 560-67.

[138] *Szafranski* involved an oral bilateral agreement the court held superseded the IVF facilities consent forms. *See supra* note 95.

[139] Jenny Gross & Maria Cramer, *The Latest Issue in Divorces: Who Gets the Embryos?*, N.Y. TIMES (Apr. 3, 2021); Cheryl Winokur Munk, *Millennials*

Nonetheless, courts will still be required from time to time to address embryo-disposition disputes when parties have not entered a valid, unambiguous contract (or when such contract simply delegates the decision to a court[140]). In those cases, a balancing approach that truly considers both parties' interests is preferable to the absolute veto the contemporaneous consent approach affords one party. But, when courts weigh the parties' interests, what exactly is the justification behind the *Davis* presumption—why should the balancing test begin with the scales tilted so far in favor of the party seeking to prevent the other's use? Why should a party's mere interest in avoiding genetic parenthood trump, except in extreme cases, another's interest in being a parent? No court has articulated a reasoned explanation. With a few exceptions, most have simply adopted *Davis* and treated the presumption as self-evident. To begin to answer that question, Part IV looks beyond the approaches and at both the actual case outcomes and the gender of each judge reaching these decisions.

TABLE I. APPELLATE CASES, APPROACHES, AND OUTCOMES

Case	State	Court	Year	Man's Interest	Approach	Prevailing Party
Cases in Which Woman Sought Embryos to Use for Own Reproduction[141]						
*Davis**	TN	Highest	1992	Prevent	Contract; if none, balance	Man: balanced interests
Kass	NY	Highest	1998	Prevent	Contract	Man: enforced contract
A.Z.	MA	Highest	2000	Prevent	Contract w/ veto *for nonuse*	Man: ignored contact
Witten	IA	Highest	2003	Prevent	Contemp. consent	Man: no consent
Roman	TX	Interm.	2006	Prevent	Contract	Man: enforced contract
*Rebe*r	PA	Interm.	2012	Prevent	Contract; if none, balance	Woman: balanced interests (only opportunity)

Embrace Prenups—But Through a Very Different Lens than in the Past, WALL ST. J. (Jan. 21, 2021).

[140] *See supra* note 75 and accompanying text.

[141] Citations, in the order of the cases as listed, are Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012); Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015); McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016); *In re* Marriage of Rooks, 429 P.3d 579 (Colo. 2018); Finkelstein v. Finkelstein, 79 N.Y.S.3d 17 (N.Y. App. Div. 2018); Terrell v. Torres, 456 P.3d 13 (Ariz. 2020); Jocelyn P. v. Joshua P., 250 A.3d 373 (Md. Ct. Spec. App. 2021); Jessee v. Jessee, 866 S.E.2d 46 (Va. Ct. App. 2021).

Szafranski	IL	Interm.	2015	Prevent	Contract; if none, balance	Woman: enforced oral contract & balanced interests (only opportunity)
McQueen	MO	Interm.	2016	Prevent	Mutual consent (took no position on Ks)	Man: was no contract or mutual consent
Rooks	CO	Highest	2018	Prevent	Contract; if none, balance	Remanded decision that had favored male
Finklestein	NY	Interm.	2018	Prevent	Contract	Man: enforced contract
*Terell***	AZ	Highest	2020	Donate	Contract	Man: enforced contract
Jocelyn P.	MD	Interm.	2021	Donate	Contract *if bilateral*; if not, balance	Remanded decision that had favored male.
Jessee	VA	Interm.	2021	Prevent	Contract; if none, balance	Remanded decision that had favored female.
Cases in Which Woman Sought Embryos to Prevent Use[142]						
J.B.	NJ	Highest	2001	Donate	Contract w/ veto, then balance	Woman: no K, balanced interests
Dahl	OR	Interm.	2008	Donate	Contract	Woman: enforced contract
Cwik	OH	Interm.	2011	Use with surrogate	Contract	Woman: enforced contract
Rucker	MN	Interm.	2016	Preserve	None adopted	Remanded decision that had favored female
Guardado	WA	Interm.	2018	Prevent	Contract; if none balance	Woman: balanced interests
Fabos	CO	Interm.	2019	Prevent	Contract; if none, balance	Remanded decision that had favored female
Bilboa	CT	Highest	2019	Donate	Contract *if for non-use.*	Woman: enforced contract

* In *Davis*, the woman's position changed during the case, and she ultimately sought to donate the embryos to another childless couple.

** Arizona now has a statute granting the party seeking to develop the embryo to life priority notwithstanding any prior agreement. ARIZ. REV. STAT. 25-318.03(A)(1) (effective August 3, 2018). The statute was passed after the case began, though, and was not applied retroactively.

[142] Citations, in the order of the cases as listed, are J.B. v. M.B., 783 A.2d 707 (N.J. 2001); *In re* Marriage of Dahl & Angle, 194 P.3d 834 (Or. Ct. App. 2008); Cwik v. Cwik, No. C-090843, 2011 WL 346173 (Ohio Ct. App. Feb. 4, 2011); Rucker v. Rucker, A16-0942, 2016 WL 7439094 (Minn. Ct. App. Dec. 27, 2016); *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, *1 (2018) (unpublished); *In re* Marriage of Fabos & Olsen, 451 P.3d 1218 (Colo. App. 2019); Bilboa v. Goodwin, 217 A.3d 977 (Conn. 2019).

IV. Embryo Disposition Outcomes[143]

Appellate courts in eighteen states have considered cases involving parties' rights to frozen embryos created from their respective genetic material.[144] Of these eighteen states, eight have addressed the issue in their

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[143] During final editing of this Article, two additional appellate cases were decided. In *In re* Marriage of Katsap, No. 2-21-0706, 2022 WL 3038429 (Ill. App. Ct. Aug. 2, 2022), both parties wanted the embryos used for procreation; the ex-wife wanted to use them herself, while the ex-husband wanted to donate them to a married couple. *Id.* ¶ 108. The parties had no contract regarding the embryos. *Id.* The trial judge, a male, balanced the parties' interests and ruled in favor of the ex-husband. On appeal, however, the court reversed and awarded the embryos to the ex-wife. *Id.* ¶ 121. That decision was authored by a woman, and joined by two men judges. *Id.* In Vergara v. Loeb, B313234, 2022 WL 4393915 (Cal. Ct. App. Sept. 22, 2022), the actress Sophia Vergara sought to prevent her ex-boyfriend from using frozen embryos they created while in a relationship. The court affirmed the trial court decision in favor of Vergara based on a form contract they had signed that required the parties' mutual consent for either to use the embryos. *Id.* at *14.

[144] *See supra* Table I. This analysis considers only cases that have reached the appellate level (and for which an appellate decision was filed prior to August 1, 2022). For one, these cases (when published) create binding precedent and shape future decisions in their respective jurisdictions. In addition, because few trial court decisions are readily available, limiting the set to appellate cases ensures the analysis represents the full universe of relevant cases. Moreover, appellate cases include rulings from at least four judges, at least three of whom (those on the appellate panel) would have had an opportunity to discuss and debate the issues together, permitting them the potential benefit of other voices and perspectives. *See* Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO STATE J. ON DISP. RESOL. 195, 202 (2017) ("[E]vidence indicates that when groups are comprised of more diverse members, those members learn from each other and provide checks on the correctness of shared information, ultimately leading to more accurate decisionmaking."). In three additional cases, appellate courts have considered a case involving disputed embryos upon divorce but decided the case on other grounds. Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1094 (Fl. Dist. Ct. App. 2001) (rejecting a claim of mediator misconduct in a mediated settlement agreement that granted rights to the embryos to the former husband); Cahill v. Cahill, 757 So. 2d 465, 468 (Ala. Civ. App. 2000) (affirming a trial court judgment that simply recognized the ART clinic was in possession of the disputed embryos and clarifying the trial court had made no determination as to the parties' respective interests in the embryos); Karmasu v. Karmasu, No. 2008 CA 00231, 2009 WL 3155062, at *2-3 (Ohio Ct. App., Sept. 30, 2009) (affirming a trial court judgment that upheld a contract that gave custody of frozen embryos to the ART clinic). An additional case involved a frozen embryo created through IVF by an unmarried

highest court, while ten have done so at the intermediate appellate level.[145] Since the issue has come before appellate courts twice in two states, this Article analyzes twenty total cases.[146] Across all courts, though, the common thread—regardless of approach—has been to favor the party seeking to prevent the other from using the embryos. Only twice has the final ruling granted embryos to the party seeking to have and raise a biologically related child.[147]

This preference against use has been consistent whether the man or woman seeks to prevent the embryos' use. The *effect* of that preference, however, has disproportionately favored men. Only twice did the man seek the embryos to have a child (with a surrogate) he would raise himself.[148] In

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couple *after* they had separated, when the former boyfriend had agreed in essence to serve as a sperm-donor. Karungi v. Ejalu, No. 351165, 2021 WL 370221 (Mich. Ct. App. Aug. 19, 2021) (awarding neither party control because the IVF facility, a necessary party to the contract, was not a party). Finally, several additional cases addressing the issue have been resolved at the trial court level without an appeal. *See, e.g.*, Findley v. Lee, Case No. FDI-13-780539 (Cal. Super. Ct. S.F. Cnty. Nov. 18, 2015) (granting embryos to husband to be discarded); K.G. v. J.G., 72 Misc. 3d 593 (N.Y. Sup. Ct. Suffolk Cnty. 2021) (enforcing contract granting wife's right to implant embryo); Patel v. Patel, 99 Va. Cir. 11 (Va. Cir. Ct. Mecklenburg Cnty. 2017) (designated as unpublished) (balancing parties' interests and granting embryos to wife for implantation). Other such cases, however, are known simply through media accounts. *See, e.g.*, Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, PATCH (Jan. 5, 2013, 1:56 AM), https://patch.com/maryland,/uppermarlboro/judge-awards-maryland-woman-custody-of-frozen-embryos [https://perma.cc/V2FQ-HKF2].

[145] *See supra* Table I.

[146] *Id.* In three additional cases, the couple had used donor eggs. In two of those cases, both from Washington, the court awarded the embryos to the husband. *In re* Marriage of Nash, 150 Wash. App. 1029 (Wash Ct. App. 2009) (unpublished) (granting the embryos to husband for implantation with a surrogate); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002) (granting the embryos to husband to be discarded). In the third, the trial court awarded the embryos to the husband, but the appellate court reversed and remanded for further proceedings. Markiewicz v. Markiewicz, No. 355774, 2022 WL 883683 (Mich. Ct. App. Mar. 24, 2022). No appellate court has considered the issue when the couple used donor sperm.

[147] For purposes of this analysis, if a court reversed and remanded a case, I considered that decision to have favored the party who benefited from that outcome. In most such cases, it is unclear which party ultimately received the relief they sought on remand.

[148] In both, the man was denied the embryos. *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, *1 (2018) (unpublished); Cwik v. Cwik, No. C-090843, 2011 WL 346173 (Ohio Ct. App. Feb. 4, 2011). In *Cwik*, the man already had two children, he had been convicted of domestic violence against his wife, and the court did not indicate whether he was capable of having further children naturally.

thirteen cases, however, the woman sought the embryos to have and raise a biological child.[149] The man prevented her from doing so in eleven of those thirteen cases. In the remaining five cases, the woman did not wish to use the embryos but sought to prevent her ex-husband from donating them to another couple.[150] In each of those five cases, the woman opposing donation prevailed.[151]

The following dives deeper into these twenty cases, considering not only the final outcome in each case but the decisions of all 129 judges who ruled in these cases along the way. This section first highlights the success women have had at the trial level (only to be largely reversed on appeal), where policy concerns play a lesser role than equity. This section next breaks down the individual rulings of the 129 judges to uncover a strong correlation between outcome and judicial gender, then considers the disproportionate assignment of the opinions to women authors. Finally, the section proposes that an implicit judicial bias favoring men's interests ties these data points together.[152]

E. Trial Courts Have Favored Women

Though women ultimately have lost the majority of these cases, they have been twice as likely to win at the trial level than men. In fact, trial judges have ruled for women in fourteen of the twenty cases.[153] Seven of those fourteen decisions, however, were then reversed or remanded on appeal.[154] Of the six trial court decisions that granted relief to the man, only two were reversed or remanded.[155] Moreover, when one considers only those thirteen

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[149] *See supra* Table I. In one case, the woman changed her position by the time of the final appeal and sought instead to donate them. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[150] *See supra* Table I.

[151] *Id.*

[152] This analysis considers only the gender of each judge and their decision without controlling for other possible factors such as race, age, or political affiliation. Because these cases are exclusively state court cases with largely elected, not appointed judges, and because many of the judges are no longer on the bench, it was not possible to obtain sufficient background information on each of the 129 judges to adequately control for those factors. Nonetheless, the differences in outcomes based on gender alone remains compelling, and the purpose of the analysis is not to prove causation but to (1) highlight the strong correlation that exists between the judge's gender and decision, and (2) challenge judges to reflect on this and acknowledge the possibility that their own implicit biases may shape their initial view of such cases.

[153] *See infra* Table II.

[154] *Id.*

[155] *Id.*

cases in which the woman sought to use the embryo to have a child, the trial court still ruled for the woman in the majority (seven) of those cases.[156] Yet, in five of those seven, the decision was reversed or remanded on appeal. In the end, women have been successful in just two of those thirteen cases.[157]

TABLE II. TRIAL COURT DECISIONS

Case[158]	Relief	Judge	Relief on Appeal
Davis*	Wife	Man	Husband
Kass*	Wife	Man	Husband
Fabos	Wife	Man	Remanded
J.B.	Wife	Man	Wife
Dahl	Wife	Man	Wife
Reber*	Wife	Man	Wife
Bilboa	Wife	Man	Wife
Jessee*	Wife	Man	Remanded
Guardado**	Wife	Man	Wife
Roman*	Wife	Woman	Husband
Rucker	Wife	Woman	Remanded
Finklestein*	Wife	Woman	Husband
Cwik**	Wife	Woman	Wife
Szafranski*	Girlfriend	Woman	Girlfriend
Rooks*	Husband	Man	Remanded
Jocelyn P.*	Husband	Man	Remanded
A.Z.*	Husband	Man	Husband
Witten*	Husband	Man	Husband
McQueen*	Husband	Man	Husband
Terrell*	Husband	Woman	Husband

* Female sought the embryos to become a parent.
** Male sought the embryos to become a parent.

One explanation for this is that trial court judges are less concerned about setting public policy and more focused on the equities between the parties immediately before them. But when viewing the case in light of existing precedent, appellate courts prioritize one's personal autonomy over another's loss of potential parenthood. That autonomy includes cognitive

[156] *Id.*
[157] *Id*.
[158] For case citations, see *supra* notes 141, 142.

freedom—the right to be free from any sense of guilt or responsibility. No one, it would seem from these cases, should be required to experience the emotional burden of being a genetic parent against their wishes, even when relieved from all legal obligations and responsibilities. It just so happens that women come out on the short end of these disputes because, unlike men (and to no fault of men), the embryos represent their only reasonable option to have a (or another) child. To quote Justice Scalia in a similar context, it is simply "nature itself" that leads to this result.[159]

Perhaps. But it should also raise questions when trial judges—who sit closest to equities, see the parties, and hear the testimony—consistently rule in one direction yet are routinely overturned. And in these cases, this dynamic has not been limited to the decisions of a single judge, but reflects a trend across twenty trial judges in eighteen states. One must ask whether there may be other factors operating beneath the surface that have driven the appellate courts' policy-based outcomes. Indeed, the answer to that question becomes evident after considering the individual rulings of all judges based not only on the party's gender, but on the judge's gender.[160]

F. Judicial Gender and Outcomes

An analysis of the decisions of each of the 129 judges to consider this issue shows that, at each level, the gender of the judge appears to have played a meaningful role in the courts' decisions. At the trial level, six cases involved a woman judge. Women won five of those six decisions.[161] Alternatively, in the fourteen cases in which the trial judge was a man, the woman won just eight of the cases, or just over one-half.[162] Notably, when isolating the thirteen cases in which the woman sought to use the embryo herself, a similar trend remains. Four of those cases involved a female trial judge, and she ruled for the woman in three of the four cases. In the other nine cases the trial judge was a man, and he ruled for the woman in just four

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[159] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (denying legal paternity to a man who fathered a child with a married woman because "California law, like nature itself, makes no provision for dual fatherhood").

[160] To determine the gender of the parties, I relied on the language used by the courts to describe the parties. To determine a judge's gender, I used a combination of information to make a reasonable conclusion, including the judge's given name, the judge's Westlaw profile (in Litigation Analytics), references to that judge in related opinions, and biographical information available on state court websites, such as photographs, organizations a judge has belonged to, and awards and recognitions for a judge.

[161] *See supra* Table II.

[162] *Id.*

of the nine cases.[163] While women are much more likely to win at the trial level, their odds are notably lower when the judge is a man.

Though women are less likely to prevail at the appellate level, a similar correlation between outcome and judicial gender remains. Male appellate judges have been twice as likely to rule for the man, doing so sixty-five percent of the time (fifty of seventy-seven judges).[164] Female appellate judges, on the other hand, ruled for the man exactly one-half of the time (sixteen of thirty-two judges).[165] Again, when considering only the thirteen cases in which the woman sought to use the embryos herself, the differences are even more pronounced. Male judges ruled for the man eighty-three percent of the time (forty-five of fifty-four judges), while female judges ruled for the man sixty-five percent of the time (fifteen of twenty-three judges).[166]

Overall, the twenty cases involved 129 judges who ruled on the issue over forty-five judicial panels.[167] Male judges ruled for the man sixty percent of the time (fifty-five of ninety-one judges), while female judges ruled for the man forty-five percent of the time (seventeen of thirty-eight judges).[168] In the thirteen cases in which the woman sought to use the embryos herself, male judges ruled for the man seventy-nine percent of the time (fifty of sixty-three judges), while female judges ruled for the man just fifty-nine percent of the time (sixteen of twenty-seven judges).[169]

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[163] *Id.*
[164] *See infra* Table III.
[165] *Id.*
[166] *See infra* Table IV.
[167] *See infra* Tables III, IV.
[168] *See infra* Table III.
[169] *See infra* Table IV.

TABLE III. JUDGES' DECISIONS BY GENDER

All Judges		
	Number	Percent
Male judges		
Rule for male	55	60%
Rule for female	36	40%
Total	91	100%
Female judges		
Rule for male	17	45%
Rule for female	21	55%
Total	38	100%
Overall		
Rule for male	72	56%
Rule for female	57	44%
Total	129	100%

Appellate Judges		
	Number	Percent
Male judges		
Rule for male	50	65%
Rule for female	27	35%
Total	77	100%
Female judges		
Rule for male	16	50%
Rule for female	16	50%
Total	30	100%
Overall		
Rule for male	66	61%
Rule for female	43	39%
Total	109	100%

G. Disproportionate Assignment of Women Judges to Author Opinions

Notably, courts have disproportionately assigned women to write the majority opinions in embryo-disposition cases. For instance, in the eight state supreme court cases to address embryo disputes, just fifteen of the fifty-four justices were women. Yet, a woman justice was assigned to write the majority opinion in six of those eight cases.[170] And, in the six supreme court cases in which a woman sought to use the embryos for reproduction, a woman justice was assigned to write the majority in five of those six cases. In three of those five cases—each of which went against the woman—the author was the only woman on the bench.[171] In the only state supreme court case that benefitted a woman, the case was a four-to-three decision with all three women justices (one of whom was the author) joining the majority.[172] Overall, twenty-five total appellate panels have addressed the issue. Within those panels, seventy-one percent of the appellate judges were men. Yet, in

[170] *Id.*

[171] *Id.*

[172] *In re* Marriage of Rooks, 429 P.3d 579 (Colo. 2018). The Colorado Supreme Court remanded the case and held that both the trial court and appellate court had considered improper factors while balancing the parties' respective interests in the embryos, including the woman's financial resources and ability to support additional children. *Id.* at 581, 585.

the twenty-one instances that a female judge joined the majority, she was assigned to write the opinion over one-half (twelve) of the times.[173] Of the twenty-five panels, only three times have female judges constituted a majority of the panel.[174] And, unsurprisingly, one of those three cases represented a rare time the court balanced the parties' interests in favor of the woman's access to the embryos—only to be reversed on appeal.[175]

Finally, this trend again is even more pronounced when considering only those thirteen cases in which the woman sought to use the embryos. In those cases, forty-seven men and twenty-one women joined the majority opinions. Yet, when a woman voted with the majority, she was assigned to write ten of those fifteen opinions.[176] Overall, though women constituted less than one-third of the judges in the majority, they were assigned to write two-thirds of the majority opinions.

H. Implicit Bias as the Throughline

What to make of these numbers? The striking differences in outcomes based on the judge's gender, and the consistency of this dynamic across the court levels and jurisdictions, cannot be ignored. In many instances, at least, the judge's gender seems to have informed at some level their view of the case, its relative equities, and each party's interests. And because the judiciary disproportionately consists of men, these cases have disproportionately favored men. Moreover, that the courts have disproportionately assigned women to author these opinions suggests the courts recognized, subconsciously at least, the gender dynamics at play and sensed that an opinion authored by a woman may improve the optics, lending some legitimacy to the courts' decisions.

Importantly, this Article does not argue the judges were intentionally favoring men's interests over those of women. Nor does it need to, for it is sufficient that an implicit bias favoring men's interests shaped the law's development. Gender-based differences in judicial decision making has been found in other legal contexts that involve a gender dimension, as well. For instance, in employment discrimination cases (in which women constitute the great majority of plaintiffs), men are less likely than women to rule for

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[173] *See infra* Table IV.

[174] Terrell v. Torres, 438 P.3d 681 (Ariz. Ct. App. 2019); *In re* Marriage of Rooks, 488 P.3d 116 (Colo. App. 2017).

[175] *Terrell*, 438 P.3d at 681, *rev'd* 456 P.3d 13 (Ariz. 2020).

[176] *See infra* Table IV. There were two additional appellate panels in this category; one had no female member (*Davis* intermediate appellate court) and the other had no female join the majority (*Kass* intermediate appellate court).

the plaintiff.[177] Another scholar found that, in such cases, simply having a single woman's voice on an appellate panel significantly increased the likelihood that the plaintiff would prevail.[178] Likewise, in cases in which gender is a salient issue, researchers have even found a significant statistical difference in outcomes between men judges who have a daughter versus men judges with no daughters.[179] Along these lines, Retired Minnesota Supreme Court Justice Rosalie E. Wahl noted that her "experience is that the presence of one woman alone on a court—one person of color—one differently abled person—heightens awareness, broadens perspective, begins to change direction in some way."[180] But, she added, "*numbers* make a *difference.*"[181]

Indeed, when viewed with this information, a fair question is whether, over the past thirty years, embryo-disposition jurisprudence has reflected a fundamentally grounded legal principle—or the fact that over seventy percent of the judges to address the issue have been men.[182] Would the law look the same today if women had had an equal voice on the bench? The next section considers these results in the context of other parentage and reproductive rights laws to show that the presence of implicit gender bias in the embryo-disposition context should not be surprising—or irreparable.

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[177] Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1629, 1639 (2019) (citing Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994) and Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RES. Q. 788, 793 (2016)).

[178] Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 1759 YALE. L.J. 1759, 1761, 1768-69, 1778 (2005).

[179] *See, e.g.*, Thornburg*, supra* note 184 at 1630 n.361 (citing Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 37 (2015)).

[180] Betty Barteau, *Thirty Years of the Journey of Indiana's Women Judges: 1964-1994*, 30 IND. L. REV. 43, 92-93 (1997) (quoting Rosalie E. Wahl, Address at the Chicago-Kent College of Law Women's Legal Studies Institute, Living the Life of a Woman Judge (July 23, 1994) (unpublished manuscript)).

[181] *Id.* at 94 (emphasis in original). Notably, Minnesota was the first state in the country to have a majority of women on its supreme court. *Id.* at 93. Today, women again hold four of the seven seats. *See Minnesota Supreme Court*, MINNESOTA JUDICIAL BRANCH, https://www.mncourts.gov/supremecourt.aspx [https://perma.cc/Q6W9-D2EB] (last visited Jan. 7, 2022).

[182] This closely resembles the percentage (sixty-six percent) of men on federal district court benches, as well. Thornburg, *supra* note 184 at 1637.

V. Historical Gender Bias in Parentage and Reproductive Law

To suggest that gender bias may have shaped embryo-disposition jurisprudence should not be particularly controversial. Rather, this merely situates the issue as the most recent expression of male-centric bias in American law regarding reproductive rights, autonomy, and parental responsibilities. This can be traced back to the common law's coverture doctrine, which deemed women to be their husband's personal property and denied women custody of their children.[183] More recently, Ruth Colker has asserted, "When men are situated comparably to women with respect to reproduction due to use of new reproductive technologies, men are systematically treated far better than women."[184] Colker wrote that in 1993, just two years after *Davis* and before any other embryo-disposition cases made their way to appellate courts. The decisions that followed over the next three decades have proved her point.

While courts and commentators often justified the law in these areas through appeals to a child's best interests, scholars have argued the primary animating force often was to protect the man's interests, both reputational and financial, and to minimize—if not completely deny—a woman's reproductive interests and autonomy.[185] Though this point can be established through numerous examples, this Article discusses two: (1) the evidentiary rule that prohibited a married couple from rebutting the common law marital

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[183] *See* Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 511-12 (2015); NeJaime, *Nature of Parenthood*, *supra* note 31, at 2273 (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235 (1985)). In 1839, Mississippi became the first state to abolish the rule of coverture legislatively, and all common law property states had done so by the end of the nineteenth century. Natalie Ram, *DNA by the Entirety*, 115 COLUM. L. REV. 873, 917 (2015).

[184] Colker, *Pregnant Men*, *supra* note 26, at 450; Barteau, *supra* note 187 at 88.

[185] Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 499 (1993). Ruth Colker also makes this observation in the context of surrogacy cases, in which courts often discuss the "best interests of the child" yet reach conclusions that most often favor the man. Colker, *Pregnant Men*, *supra* note 26, at 477. Likewise, Katharine Bartlett noted with respect to custody disputes, "[a]though we often pretend otherwise, it seems clear that our judgments about what is be[s]t for children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data." *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988). Indeed, even coverture itself perversely was defended as being for a woman's own "protection and benefit." Higdon, *supra* note 183, at 512 (quoting I WILLIAM BLACKSTONE, COMMENTARIES 433).

presumption of paternity, and (2) more recently, the extension of the marital presumption to assisted reproduction.

I. Marital Presumption and the "Lord Mansfield" Rule

Throughout the eighteenth and nineteenth centuries, most states adopted the common law's marital presumption in paternity dispute cases. Under the marital presumption, any child born to a married woman was the husband's legal child unless evidence conclusively established that genetic parenthood was not possible due to the husband's absence or sterility.[186] Given the inability to conduct genetic testing until recently, such a presumption was an uncontroversial starting point, and the high burden of proof understandable.

Most states, however, went further and adopted the "Lord Mansfield Rule," which prohibited either the husband or wife from even testifying to the wife's infidelity.[187] Proponents argued this evidentiary rule protected the child—at the husband's expense—from the stigma and financial repercussions of being deemed "illegitimate."[188]

As more recent commentators have noted, though, if protecting the child's interests was indeed paramount, "why would the court allow *anyone* to testify that the husband had not had access to his wife?"[189] The answer, perhaps, is that the rule shielded a husband from the indignity of testifying in a case regarding his "loss of control" over his wife,[190] yet permitted him to offer third-party testimony if he desired to avoid fatherhood.[191] Or, if he preferred, he could "keep the secret" to himself yet retain various legal and extralegal remedies, such as disinheriting the child by will.[192]

By also denying the wife the right to testify—the very person who could speak most directly about her actions—the law minimized women's role in the procreative process and their choice in or control over outcomes

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[186] Fellows, *supra* note 185, at 498.

[187] *Id.* at 498-99.

[188] *Id.* at 499, 507; *see also* Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 250-51 (2019) (citing the child's best interests, as well as the maintenance of marriages and the family unit). Similarly, under early American law nonmarital children were entitled to inherit from their mother but not from their father. *Id.* at 250.

[189] *Id.* at 507 (emphasis added).

[190] *Id.* at 516.

[191] *Id.* at 512 (citing an 1832 New York case in which a husband offered testimony from his mother to support that he was not the biological father).

[192] *Id.* at 512, 515.

affecting their own children.[193] And by preventing *either* party from testifying, courts were able to claim equal treatment of the sexes under the law, while in fact protecting the interests of the men before them.[194] As Professor Mary Louise Fellows concluded, "[t]he silencing along with the marital presumption itself, in effect, accomplished for the husband what science was denying him: procreative power."[195]

Notably, states began to abolish the evidentiary rule throughout the twentieth century,[196] and while the marital presumption continues in most states, it typically operates as a presumption rather than conclusive rule.[197] As discussed next, however, as assisted reproductive technologies emerged,

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[193] *Id.* at 512-13. Fellows also noted that the rule was further based on the belief of women as "untrustworthy speakers." *Id.* at 513, 517.

[194] *Id.* at 515.

[195] *Id.* at 517-18; *see also* NeJaime, *Nature of Parenthood*, *supra* note 31, at 2266 (noting that "[t]he common law's organization of parentage through marriage reflected an enforced a gender-hierarchical, heterosexual order—giving men authority over women and children inside marriage and insulating men's property from claims to inheritance by children born outside marriage"). One could argue the marital presumption and evidentiary rule protected women's interests over men's interests by requiring an otherwise unwilling husband to support his wife's child, notwithstanding her infidelity. In certain cases that may have been the result. In most cases though, given the rights and power husbands had over their wife and children at that time, such protection was largely illusory. Fellows, *supra* note 185, at 519. Rather, "In the end, the rule served only to reinforce the social norm that [the wife] should remain silent." *Id.* at 520. Fellows also situated the marital presumption and evidentiary rule in both gender and racial terms, arguing that "[b]oth have a good deal to do with the law helping the men who benefit from patriarchy and white supremacy achieve comfortable circumstances for themselves." *Id.* at 509.

[196] Feinberg, *supra* note 195, at 249; *see also, e.g.*, Davis v. Davis, 521 S.W.2d 603, 607-08 (Tenn. 1992).

[197] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2278; *see also* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571-85 (2000). Yet, a conclusive, non-rebuttable version was upheld by the United States Supreme Court in Michael H. v. Gerald D., 491 U.S. 110 (1989). Scholars have also argued the presumption that unmarried men are not fathers reflects a similar bias by allowing men to "opt-in" to parenthood through their conduct while women are automatically assigned all parental obligations. "Even as the Court addressed the claims of unmarried fathers in ways that reflected a more egalitarian approach to parenting, it did not disturb law's gendered assumption that biological mothers are automatically treated as legal parents—and thus expected to assume parental responsibilities—while biological fathers are not." Douglas NeJaime, *The Constitution of Parenthood,* 72 STAN. L. REV. 261, 282 (2020) [hereinafter NeJaime, *Constitution of Parenthood*].

the marital presumption was extended into new areas in a manner that, again, prioritized men's interests over women's interests.

J. ART and Gamete Donation

The original Uniform Parentage Act ("UPA"), published in 1973, was the first formal approach to addressing assisted reproduction issues affecting parentage. Under the UPA, if a married couple used donor sperm to become pregnant through artificial insemination, the husband was deemed the legal parent *if* he consented in writing.[198] This approach, which mirrored the long-established marital presumption, provided that intent alone, not a biological connection, was sufficient for a man to establish his paternity over children born within the marriage.[199]

Yet, when the *wife* was infertile and unable to maintain a pregnancy, she was not accorded the same presumption. Rather, she was required to have a biological connection to the child, either by providing the egg (for use with a gestational surrogate) or gestating the child (using a donor egg).[200] If she did neither and a child was born using her husband's sperm, she was required to adopt the child. Stated differently, whereas "social factors supplanted biological ties in the donor-insemination context, [for women] they merely *supplemented* biological factors."[201] Thus, if the couple used donor sperm, the husband was able to "opt-in." But if the couple used (1) the husband's sperm and a traditional surrogate,[202] or (2) the husband's sperm, a donor egg, and a gestational surrogate,[203] the wife had to obtain court approval and adopt the child to become the mother.[204]

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[198] UNIF. PARENTAGE ACT § 5 (UNIF. L. COMM'N 1973). The act included additional requirements, including that the insemination had to be supervised by a licensed physician.

[199] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2292-93.

[200] *Id.* at 2299. For examples, see Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (recognizing the child's genetic mother as the legal mother); *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (recognizing a married woman who had given birth using a donor egg as the legal mother). Unlike "traditional surrogacy," in which a woman both provides the egg and carries the child to term, a "gestational surrogate" uses a donor egg and thus has no genetic tie to the child.

[201] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2304 (emphasis in original).

[202] *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) (noting that a married woman would be required to adopt a child born to a traditional surrogate in order to be deemed a legal parent).

[203] *See, e.g.*, *In re* Paternity & Maternity of Infant T., 991 N.E.2d 596, 600 (Ind. Ct. App. 2013).

[204] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2309.

In one such case, a Connecticut couple used a traditional surrogate to have a child and raised the child together for fourteen years. When they divorced, the wife was denied parental status because she had no biological connection to the child.[205] Yet, had the couple used donor sperm, the husband would have been deemed the child's father (whether or not his wife gestated the child).[206] In another case, a married couple used the husband's sperm, an egg donor, and a gestational surrogate (not the egg donor) to have a child. After the child's birth, both the married couple and surrogate petitioned the court to recognize the wife as the child's legal mother.[207] An equally divided New Jersey Supreme Court affirmed the trial court's denial of the wife's request, and dismissed her equal protection claim that New Jersey law improperly recognizes men who have no genetic connection to a child as a parent, while denying the same to treatment to women..[208] One justice justified the differential treatment of nonbiological husbands and nonbiological wives by noting, without elaboration, the "actual physiological differences between men and women."[209]

While there are physiological differences between men and women, the legal relevance of those differences, in this context, remains a mystery.[210]

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[205] Doe v. Doe, 710 A.2d 1297, 1314 (Conn. 1998) (noting a child is deemed "a child of the marriage" if the wife becomes pregnant from a sperm donor, but not if the couple uses the husband's sperm and a traditional surrogate).

[206] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2321.

[207] *In re* Parentage of a Child by T.J.S. & A.L.S., 54 A.2d 263, 263 (N.J. 2012) (per curiam).

[208] *Id.* at 264 (Hoens, J., concurring); *see also NeJaime*, *Nature of Parenthood*, *supra* note 31, at 2311.

[209] *In re Parentage of a Child by T.J.S.*, 54 A.2d at 263 (Hoens, J., concurring).

[210] Similarly, in Amy G. v. M.W., 47 Cal. Rptr. 3d 297 (Cal. Ct. App. 2006), a court denied standing to a married woman seeking parental rights of a child her husband fathered with another woman, but who she raised within the marriage from birth. The court reasoned:

> While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man.

Id. at 17. While it is clear why the *other* woman would have standing to claim rights, as well, it is not clear why this difference would give married, nonbiological fathers standing in all cases but would not similarly afford married,

Indeed, had the woman given birth—the only meaningful physiological difference in this context between the man and woman—then she would have been deemed a parent. She was denied parenthood, however, because she (by necessity) "outsourced" her child's gestation to another woman. Yet, males *always* "outsource" their child's gestation to another. Here, the law punishes the female for her inability to do the very thing a male can never do. As Professor Colker has argued, in cases involving reproductive control issues courts often "ignore entirely, or exaggerate excessively, women's biological differences from men" to "systematically perpetuate women's subordination in society."[211]

Of course, the gestational surrogate in that case could also have claimed a biological (though not genetic) interest, but she did not. She supported the wife's petition. Nonetheless, despite having no genetic connection to the child and asserting no rights, she had legal parenthood placed upon her. A man, however, who donates sperm to a married couple—and *does* have a genetic connection—does not.[212] As Professor Douglas NeJaime concluded, "Courts do not see an equality problem when law recognizes a nonbiological father as a legal parent [by intent alone] but withholds recognition from a nonbiological mother."[213] Or, as Karen

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nonbiological mothers standing. NeJaime, *Nature of Parenthood*, *supra* note 31, at 2355-56.

[211] Colker, *Pregnant Men*, *supra* note 26, at 450. Notably, Colker acknowledged that many feminist scholars have likewise ignored biological differences between men and women to avoid "gender essentialism," or the notion that women's experiences "'can be isolated and described independently of race, class, sexual orientation, and other realities of experience.'" *Id.* at 451 (quoting Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990)). However, she countered, ignoring entirely the role of biology in women's lives, particularly in discussions regarding procreation, does a disservice to feminism. Instead, it must be considered, not alone, but in connection with the full range of women's experiences. *Id.* at 454-58.

[212] Other courts have recognized equal protection challenges to statutes that conclusively named a gestational surrogate with no genetic tie as the mother, but permitted husbands with no genetic tie to challenge their status as father. *See* Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 347 (2011).

[213] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2315. NeJaime also points out that in such cases (nonbiological intended mothers), courts often "invoke adoption as a check on nonbiological parents' fitness—even though fitness is not employed as a check on biological parents using ART. The point here is not that the government lacks an interest in children's welfare that justifies attention to parental fitness; instead, it is that the government deploys this interest selectively." *Id.* at 2320.

Czapanskiy has memorably characterized it, "men volunteer for parenthood, women are drafted into it."[214]

The takeaway from this Section is not that the law is hopelessly bound to perpetuate gender-based stereotypes and biases. Rather, it is to recognize that when courts and legislatures first wrestle with emerging issues regarding reproduction, the body of law they draw from was often built upon stereotypes and biases. Often, it is subtle, as in appeals to a child's best interests that mask an underlying favoring of men's freedom.[215] But it is almost always present. Fortunately, the law is not static, and when these biases are unmasked, the law can change. As Professor Douglas NeJaime has argued, by recently extending the marital presumption itself to same-sex couples, some courts have used the marital presumption—once a tool to favor men's interests—as a tool for furthering gender-based and sexual-orientation-based equality.[216] The remainder of this Article attempts to highlight specifically those biases that have crept into the embryo-disposition cases to date, then proposes a more equitable path forward.

VI. Toward a Presumption Favoring the Use of Embryos

As discussed above, initial legal approaches to parentage issues and responses to challenges created by ART historically protected men's interests over the interests of women. And with embryo disputes, the most recent intersection of those issues, this Article has identified concrete gender-based differences over thirty years of cases, both in party outcomes and in judicial voting. With that background in mind, this section reconsiders the arguments for the *Davis* presumption against embryo use. To provide context, the section starts by reviewing in detail *Davis v. Davis*, which remains the most influential case in this area. It was the first appellate case to address the issue, the first to establish the presumption against use, and it has been cited by almost every court since.[217] The section next considers individually the three

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[214] Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16 (1991).

[215] *See* Fellows, *supra* note 185 and *supra* text accompanying notes 186-200.

[216] NeJaime, *Nature of Parenthood*, *supra* note 31, at 2294-95.

[217] The case has been cited in seventeen of the twenty appellate cases on the issue. Of the three that did not cite it, two were brief opinions and the court applied that state's own precedent on the issue. Finkelstein v. Finkelstein, 79 N.Y.S.3d 17 (N.Y. App. Div. 2018); Cwik v. Cwik, No. C-090843, 2011 WL 346173 (Ohio Ct. App. Feb. 4, 2011). In the third, the court noted the issue was one of first impression, remanded the case to the trial court, and specifically took no position on the issue. Rucker v. Rucker, A16-0942, 2016 WL 7439094 (Minn. Ct. App. Dec. 27, 2016).

aspects of parenthood—gestational, legal, and genetic—that the *Davis* court identified, then concludes by reweighing such interests. Throughout this section, the Article argues that courts have overemphasized men's interests in avoiding genetic parenthood while discounting, if not ignoring completely, women's interests in experiencing all three parenthood aspects. When properly accounting for each of these aspects, future courts should reject the *Davis* presumption and adopt a (rebuttable) presumption favoring the party seeking to use the embryos.

K. Davis v. Davis

In *Davis*, Mary Sue Davis and her husband, Junior Davis, tried for five years to have a child by natural means.[218] During that time, Mary Sue endured five tubal pregnancies which left her unable to conceive naturally. The couple then attempted, unsuccessfully, to adopt a child before turning to IVF as their only remaining option to become parents.[219] They attempted IVF six times over three years, at a cost of $35,000, again without success.[220] With each attempt, Mary Sue underwent a month of injections to shut down her pituitary gland and eight days of intermuscular injections to stimulate her ovaries to produce ova.[221] She was anesthetized on five occasions to retrieve her eggs, returning two to three days later to transfer the eggs back to her uterus.[222] After the sixth unsuccessful attempt, Mary Sue and Junior decided to postpone any further attempts until the facility acquired the ability to freeze excess embryos for future use, permitting her to avoid additional rounds of hormonal stimulation and egg retrieval.[223]

Ultimately, Mary Sue went through a seventh and final egg retrieval process, after which she had two embryos transferred to her uterus and seven frozen for later use.[224] Two months later, when Mary Sue was again unable to achieve pregnancy, Junior filed for divorce.[225] In the proceedings, Mary Sue sought the embryos to achieve a pregnancy, while Junior wanted the embryos to remain frozen "until he decided whether or not to become a parent outside the bounds of marriage."[226] By the final appeal, however, both parties' positions had changed: Mary Sue had remarried and now sought to

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[218] Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992)
[219] *Id.*
[220] *Id.* at 591-92.
[221] *Id.*
[222] *Id.* at 591-92.
[223] *Id.* at 592.
[224] *Id.*
[225] *Id.*
[226] *Id.* at 589.

donate the embryos to another couple, while Junior wanted the embryos to be thawed and destroyed.[227]

The trial judge found for Mary Sue, holding that the embryos were "human beings" and Mary Sue should "be permitted the opportunity to bring these children to term through implantation."[228] The Tennessee Supreme Court rejected that decision, but recognized the embryos "occupy an interim category that entitles them to special respect because of their potential for human life."[229] The appellate court, on the other hand, adopted the contemporaneous consent approach, holding that the parties had "joint control . . . and an equal voice over their disposition."[230] The Tennessee Supreme Court rejected that approach, as well, noting that its true effect would be to give Junior "the inherent power to veto any transfer of the preembryos."[231]

Instead, the Tennessee Supreme Court endorsed the contract approach, but Mary Sue and Junior had not reached a prior agreement. Accordingly, the court then balanced their respective interests. The court reviewed United States Supreme Court precedent and noted that, with certain limitations, individuals have a right to procreational autonomy—including both "the right to procreate and the right to avoid procreation."[232] The court recognized that the Supreme Court had never addressed procreative rights in the IVF context, though, or the "equivalence of and inherent tension between these two interests."[233] Specifically, while Supreme Court precedent addressed gestational parenthood (child-bearing) and legal parenthood (child-rearing), this case dealt squarely with *genetic* parenthood.[234]

Before resolving the issue, the court took one additional key step and announced the parties' respective interests may only be considered *prospectively*—the parties' efforts to create the embryo were not relevant.

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[227] *Id.* at 590.

[228] *Id.* at 589.

[229] *Id.* at 597.

[230] *Id.* at 589.

[231] *Id.* at 598.

[232] *Id.* at 601. The court reviewed Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down a statute that permitted sterilization of certain categories of criminals); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a statute that banned the use of contraception by a married couple); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to contraception to unmarried individuals); and Roe v. Wade, 410 U.S. 113 (1973) (upholding the right to abort a pregnancy at least until the end of the first trimester and potentially to any point before fetal viability, which is defined in the case as twenty-eight weeks). The court noted the bodily integrity issues that animated prior Supreme Court cases on procreational autonomy were not present in this context. *Davis*, 842 S.W.2d at 601.

[233] *Id.*

[234] *Id.* at 603.

The court acknowledged, "[T]he trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men. In this sense, it is fair to say that women contribute more to the IVF process than men."[235] However, the court continued, "As they stand on the brink of potential parenthood, [they] must be seen as entirely equivalent gamete-providers."[236]

While Mary Sue and Junior were, to be sure, equivalent gamete-providers, the court does not explain *why* the respective impact to each party of the early IVF process is wholly irrelevant to the analysis. By doing so, though, the court minimized Mary Sue's role in the process. By narrowly framing their contributions as purely genetic rather than biological, the court assumed the even analytical footing it needed to justify its conclusion. Had the court, instead, considered the parties' biological contributions—even just retroactively—Mary Sue, of course, would have started with the balance in her favor. Moreover, because Mary Sue no longer sought to implant the embryos in herself, this allowed the court also to ignore any interest Mary Sue had in gestational parenthood.

Nonetheless, at this point, the court's path was clear. The court characterized the parties' prospective interests as "the joys of parenthood that is desired [versus] the relative anguish of a lifetime of unwanted parenthood."[237] Mary Sue, however, intended to donate the embryos to another couple, and thus had no "joys of parenthood" to look forward to. Junior, on the other hand, had experienced the traumatic childhood noted in this article's Introduction, leaving him "vehemently opposed to fathering a child that would not live with both parents."[238] The court noted the potential psychological consequences to Junior were "obvious" given his past.[239] The court acknowledged that Mary Sue must live with the "not . . . insubstantial emotional burden" of "knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never be children."[240] Yet, such interests were "not as significant as the interest Junior Davis has in avoiding parenthood" and "a "a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."[241]

Before concluding, the court noted the case would have been closer had Mary Sue intended to use the embryos herself, "but *only* if she could not

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[235] *Id.* at 601.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 604.
[239] *Id.* at 603.
[240] *Id.* at 604.
[241] *Id.*

achieve parenthood by any other reasonable means."[242] The court gave lip service to "the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again," yet pointed out that she still has "a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing."[243] Moreover, even if IVF was again unsuccessful, the court reasoned that Mary Sue "could still achieve the child-rearing aspects of parenthood through adoption."[244]

In the opinion's conclusion, the court added its fateful dicta: "Ordinarily, the party wishing to avoid procreation should prevail."[245] Notably, the *Davis* court cautioned that "the rule does not contemplate the creation of an automatic veto" by the party seeking to avoid becoming a parent, and "we would not wish to be interpreted as so holding."[246] Yet in all but two cases, that is exactly what has happened since.

Davis was no ordinary case. Mary Sue did not seek to use the embryos herself, but to donate them to another—a scenario that has occurred just once in appellate cases in the thirty years since.[247] Mary Sue, accordingly, truly had no interest in experiencing pregnancy or legal parenthood. Junior, on the other hand, had experienced a highly unusual and traumatic childhood that left deep psychological scars—a scenario that has not come up again in the thirty years since *Davis*. In the "ordinary" case where a woman seeks to use the embryo herself and the man seeks primarily to avoid emotional inconvenience, courts should not look to *Davis* for guidance. Rather, as discussed next, courts should weigh the man's interest in not being a genetic parent against the woman's interest in all three parenthood aspects—genetic, gestational, and legal.[248]

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[242] *Id.* (emphasis added).

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *In re* Marriage of Fabos & Olsen, 451 P.3d 1218 (Colo. App. 2019). Alternatively, in five of the six cases in which the woman was the party seeking to discard the embryos, the male sought to donate them to another couple. *See supra* Table I. In the sixth case the male sought to use the embryos with a surrogate to seek both genetic and legal parenthood. Cwik v. Cwik, No. C-090843, 2011 WL 346173 (Ohio Ct. App. Feb. 4, 2011).

[248] If the roles are reversed and the man seeks to use the embryos with a surrogate (as in *Cwik*), the woman's interest would be limited to genetic parenthood, while the man would have an interest in both genetic and legal parenthood. There are no reported cases in which both the man and woman sought custody of the embryo for purposes of raising the child themselves. In such case, a court would weigh the husband's interest in genetic and legal parenthood against the woman's interest in genetic, gestational, and legal parenthood (or, if the woman

L. The Parenthood Bundle of Sticks

As just noted, the *Davis* court identified three distinct aspects of parenthood: gestational, genetic, and legal. Professor I. Glenn Cohen has expanded on this framework over two outstanding articles, *The Right Not to be a Genetic Parent?*[249] and *The Constitution and the Right Not to Procreate*[250] (in which he concludes, despite the title, that in this context individuals have no constitutional right *not* to procreate). Professor Cohen describes these three aspects as a bundle of sticks, each with a negative right as well (i.e., the right to *be* a gestational parent and the right *not* to be a gestational parent).[251] Accordingly, these cases involve six potential interests to be weighed. He ultimately endorses the *Davis* approach that (1) embryo-disposition agreements should be enforced, but (2) absent such agreement, courts should apply a presumption against the embryos' use.[252] As in *Davis*, Professor Cohen leaves open whether that presumption may be overcome if the party seeking the embryos' use has no other route to achieve biological parenthood.[253]

The bundle of sticks analogy provides a useful analytical framework. But, when concluding that most parties would adopt a position against use, the courts and Professor Cohen apply that framework through a male-centric view. Specifically, they focus on the psychological inconvenience of genetic parenthood, of being an absent father, while discounting the other party's interest in experiencing both genetic and gestational parenthood. Moreover, both the courts and Professor Cohen adopt an overly narrow view of genetic parenthood, discounting the physical investments—both past and future—women in the majority of these case have made (and commit to making). The following reconsiders each stick in the bundle from a broader perspective. Proposing a more comprehensive "biological parenthood" approach, the Article ultimately argues that courts should flip the presumption in cases where the parties have not otherwise agreed before they begin the IVF process to the disposition of embryos.

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likewise had to use a surrogate, against her interest in genetic and legal parenthood).

[249] Cohen, *supra* note 58.

[250] Cohen, *supra* note 55.

[251] Cohen, *supra* note 58, at 1122.

[252] *Id.* at 1187.

[253] *Id.* at 1194.

1. Gestational parenthood

In every case to date, courts have simply disregarded *either* party's interest in gestational parenthood. That makes perfect sense, of course, when considering the man's interests in these cases: men cannot experience gestational parenthood. But this does not mean that the women in these cases have *no* interest in gestational parenthood to be lost. As Sherry Colb has noted, caselaw is replete with rhetorical mechanisms that "den[y] the features of women's reproductive capacity that men do not share, such as pregnancy, . . . render[ing the] women's experience invisible."[254] This may be just one expression of the male-centric implicit bias that this Article argues (and the judicial decision numbers strongly suggest) is present in these cases.

For many women, however, gestational parenthood is very real. Moreover, as Professor Cohen proposed, it can be further broken down into two aspects: the right *not* to be a gestational parent, and an interest in *being* a gestational parent.[255] The following considers both of these in turn, then suggests courts take a broader, more realistic, view of gestational parenthood in IVF cases.

a. Right not to be a gestational parent

First, the right not to be a gestational parent is simply inapplicable in these cases, as the women are not asserting such a right; to the contrary, they are seeking specifically to become pregnant. Nonetheless, courts have turned this right on its head and used it against women. They have isolated a woman's unquestioned right *not* to be a gestational parent (against her will) to argue that because they would not force gestational parenthood on a woman, they likewise could not force genetic parenthood on a man. For instance, the Massachusetts Supreme Court held that it would not enforce embryo-disposition agreements that would "compel one donor to become a parent against his or her will."[256] The court reasoned, "We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy."[257]

But that is a false construct; the court would not have been ordering the husband to do anything. Moreover, no court has ever held that a woman could be forced to implant an embryo in her body against her will. Indeed, a woman's right to bodily integrity—not to be a gestational parent—would

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[254] Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 106 (1992).

[255] Cohen, *supra* note 58, at 1121-22.

[256] A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000).

[257] *Id.*

control in that context.[258] That, of course, is a wholly different situation than presented in these cases, in which the women seek to become pregnant. By making this comparison on gender neutral terms, though, the court adopts the fiction that it is treating both sexes equally.

b. Interest in gestational parenthood

While we can therefore take the right *not* to be a gestational parent off the table, we are still left with a woman's interest in *being* a gestational parent. No court in this context has answered—or even asked—what interests a woman may have in gestational parenthood. This makes sense when viewing these cases from a man's perspective; it discounts an experience that many men cannot experience and, as a result, men judges have never seriously considered. Instead, courts have treated the loss of the opportunity to experience pregnancy as a non-event, as though a woman cannot have any recognizable interest in something she does not in fact experience.

But the law does recognize the loss of an anticipated experience in other areas, like loss of consortium claims, for example. One need not determine that a woman has a constitutionally protected right to gestational parenthood in all cases to assign at least some weight to her interest in experiencing pregnancy, or some harm to her loss of that opportunity.

Moreover, the law has long recognized, in similar contexts, the significance that pregnancy—gestational parenthood—has to many women. For instance, many states have permitted women who have agreed to place a child for adoption or to carry a child as a surrogate to claim parental rights for a period after the child's birth.[259] While those scenarios often (but not always) involved both gestational and genetic parenthood, the genetic aspects were fully known to the woman before she entered into the agreement to give up her child. These laws recognize, though, the often transformative experience of pregnancy.[260] Ignoring this in the embryo-disposition context

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[258] Cohen, *supra* note 58, at 1126-27, 1132 (referring to this scenario as the "rights bleed" from the right not to be a gestational parent to the right not to be a genetic parent). Similarly, in a case where the ex-husband sought to use the embryos with a *surrogate*, a Washington appellate court dubiously noted that it "could not properly force [the ex-wife] to give birth to another child"—a result the ex-husband never sought. *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, *6 (2018) (unpublished).

[259] Shapo, *supra* note 79, at 97-98; *see also* Margaret C. Jasper, THE LAW OF ADOPTION §§ 5.10, 5.11 (2011).

[260] A.H.W. v. G.H.B., 772 A.2d 948, 953, 954 (N.J. Super. Ct. Ch. Div. 2000) ("In recognition of the emotional and physical changes in the mother which occur at birth, voluntary surrenders are not valid [under New Jersey statute] if taken within seventy-two hours after the birth of the child.").

reduces women's pregnancy experience to little more than that of an incubator.[261]

Likewise, Katharine Bartlett has noted, adoption law and custody law have been shaped by a "strong ideology that through pregnancy and childbirth an enduring bond develops between mother and child which cannot easily be broken. This mystical bond is perceived of as inevitable and more powerful than any woman can realize in advance."[262] While Bartlett noted this ideology has at times been used to limit women's opportunities, she recognized that it remains a "constructive starting point."[263] Yet, in the embryo-disposition cases to date, courts have wholly denied such interests.

One could object that such arguments project onto women an "implicit motherhood bias," or the "notion that society implicitly defines or envisions mothers as the ideal, perfect, flawless Mother—dreamily content as such."[264] To be sure, not all women desire to experience pregnancy or to be a mother.[265] And for those who do, many aspects of pregnancy are difficult and unwanted, both physically and emotionally, and carry medical risk.[266] To discount any woman's desire to experience pregnancy entirely, though, as the courts have done in this context, serves not to respect women's interests, but to trivialize them. Moreover, these cases involve a subset of women who have gone to great lengths to preserve the opportunity to get pregnant and are now fighting specifically for that opportunity. While they are not all ideal, perfect, flawless, or dreamily anticipating their pregnancy, they have indeed signaled with their own actions some desire to be pregnant, and a strong desire to be a genetic parent.

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[261] *Id.* at 953 (noting the "simplistic comparison [of a woman] to an incubator disregards the fact that there are human emotions and biological changes involved in pregnancy").

[262] Bartlett, *supra* note 185, at 333.

[263] *Id.*

[264] Melissa L. Breger, *The (In)Visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 566 (2012) (noting that this has been used against mothers in family court proceedings who do not fit this mold).

[265] *See* Anna Brown, *Growing Share of Childless Adults in U.S. Don't Expect to Ever Have Children*, PEW RESEARCH CENTER (Nov. 19, 2021), *available at* https://www.pewresearch.org/fact-tank/2021/11/19/growing-share-of-childless-adults-in-u-s-dont-expect-to-ever-have-children/ [https://perma.cc/CB93-5RPF].

[266] Colker, *Pregnant Men Revisited*, *supra* note 20, at 1071 ("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.").

c. Gestational parenthood: a broader view

Courts have adopted a narrow view of gestational parenthood that considers pregnancy from the "traditional" perspective and ignores the very different experience of women who attempt to achieve pregnancy through IVF. For a woman experiencing a natural pregnancy, gestational parenthood occurs shortly after intercourse, before the woman even knows she is pregnant. In many cases, she may not even have been attempting to become pregnant. Yet, from the moment she is aware of her pregnancy, she has all legal rights attendant to gestational parenthood (including, for some period to time, the right *not* to be a gestational parent).[267] Few women who undergo IVF, though, would likely consider their "gestational parenthood" as merely beginning upon the embryo's implantation. Rather, most would likely include the entire process, with all the physical, emotional, and financial sacrifices they made to *achieve* implantation. Indeed, it may be judges who have projected a version of the implicit motherhood bias on women in these cases, minimizing the interests of those who do not conform to a more traditional view of motherhood at all of its stages, from conception to rearing.

By situating the analytical starting point at the embryo's disposition, not creation, courts have been able to acknowledge, yet disregard, the disproportionate efforts women undergo in IVF to fertilize eggs. Again, this may not be an intentional rhetorical decision, but simply a male-centric viewpoint expressed through a majority of men judges. Men undeniably have a different physical and emotional relationship to the IVF process than women. Certainly, a couple's infertility is emotionally difficult for both men and women. Yet, women typically experience greater negative psychological reactions, including higher levels of anxiety and feelings of guilt, helplessness, loss, sadness, and depression.[268] Overall, while infertility primarily impacts a man's self-esteem, it is often "more central to a women's

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[267] A woman's right to have an abortion had been a constitutional right for almost fifty years after Roe v. Wade, 410 U.S. 113 (1973). Although the Supreme Court reversed *Roe* in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), the right still exists in the majority of states either by statute or state constitution. *See* N.Y. TIMES, *Tracking the States Where Abortion Is Now Banned*, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/G9EP-T6X2] (last visited Aug. 9, 2022).

[268] Alicja Malina & Julia Ann Pooley, *Psychological Consequences of IVF Fertilization – Review of Research*, 24 ANNALS AGRIC. & ENV'T MED. 554, 555 (2017).

lives."[269] And, candidly, a man's physical contribution to IVF largely begins and ends with masturbation.[270]

For the woman, however, the process is physically painful and demanding. For instance, in the *Davis* case, Mary Sue had undergone the egg retrieval process *seven* times.[271] Such facts are common throughout the cases. In a 2021 embryo-disposition case, the woman testified to this experience:

> The fertility process was absolutely horrible. I gave up my career. I gave up my time. I gave up my health. . . . The one thing I wanted since I was a little kid was to be a Mom. And to be told that I couldn't be and that I had to go through this process. And I did. And I worked so hard at it. I went to every single appointment. He didn't go to all of the appointments. There were times I was there three times a day and I would go home and take him the cup, so he would give a sample and come back. I sacrificed so much of my life and my time for this child.[272]

In sum, in the typical case where a woman seeks to use the embryos to become a parent, the courts should attribute at least some weight to the significant physical, mental, and emotional efforts the woman has already put into creating the embryos, as well as the prospective loss of the opportunity to experience pregnancy. If the parties truly begin with equal competing interests, gestational parenthood concerns must tip the scales initially toward the woman, however slightly one may view this. Just because men cannot experience pregnancy, that of course does not mean women have no interest in experiencing it. While every judge would acknowledge this explicitly, many seem to discount it subconsciously.

2. Legal parenthood

The second interest in the bundle of sticks, legal parenthood, involves the enforceable obligations that flow from parentage. The *Davis* court noted that Mary Sue's decision to use the embryos to have a child

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[269] *Id.*

[270] Colb, *supra* note 261 at 103 ("Once a man has contributed genetic material, his biological task is essentially complete."); Robertson, *In the Beginning*, *supra* note 25, at 457. Of course, there are exceptions to this when a man may require medical intervention to retrieve his sperm. Coleman, *supra* note 38, at 79 n.20. Yet even that cannot reasonably be equated with the woman's IVF experience, and certainly not with the additional physical demands of the pregnancy to follow.

[271] Davis v. Davis, 842 S.W.2d 588, 591-92 (Tenn. 1992).

[272] Jocelyn P. v. Joshua P., 250 A.3d 373, 387 (Md. Ct. Spec. App. 2021).

would "impose unwanted parenthood on [Junior], with all of its possible financial and psychological consequences."[273] Again the court confuses the issue, because Mary Sue no longer sought to have a child herself, but to donate the embryos to another couple. Accordingly, Junior would not likely have been deemed a legal parent in any event.[274] But even if Mary Sue did in fact use the embryos to have a child herself, it is not clear that Tennessee law in 1990 would have imposed legal parenthood on Junior (nor did the court discuss the "possible financial" consequences). Accordingly, the court attributed an interest to Junior that was simply inapposite, then used that to help tip the scales in his favor.

Moreover, since *Davis* the trend has been to shield individuals from the burdens of legal parentage in embryo-disposition disputes. The Uniform Parentage Act (UPA) was revised 2000 to address this exact scenario. Specifically, Section 706 provides that if a couple undergoes ART but gets divorced prior to the transfer embryos to the woman, the biological father shall not be deemed the child's legal parent unless he had consented in writing and had not withdrawn such consent prior to the transfer.[275] In fact, the drafters clarified that the rule is intended only to address legal parentage, *not the parties' respective rights to the embryos*.[276] Indeed, the very rule itself acknowledges that a child may be born without both genetic parents' consent. The comment expressly notes that "the child will have a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor."[277] Similarly, the American Bar Association's 2019 Model Act Governing Assisted Reproduction follows the 2000 UPA approach in this respect,[278] as have at least fourteen states by statute.[279] In

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[273] *Davis*, 842 S.W.2d at 603.

[274] Notably, unlike in most cases to follow, Junior did assert he would fight for his child's custody—though the court suggested he would be unsuccessful. *Id.* at 604.

[275] UNIF. PARENTAGE ACT (2000) § 706 (UNIF. L. COMM'N 2000). These provisions are now at §§ 706 and 707 of the Uniform Parentage Act (UNIF. L. COMM'N 2017).

[276] UNIF. PARENTAGE ACT (2002) § 706 cmt. (UNIF. L. COMM'N 2002) ("This Act does not attempt to resolve issues as to control of frozen embryos following dissolution of marital or nonmarital relationships. As indicated in the prefatory note, those matters are left to other state laws . . . .").

[277] UNIF. PARENTAGE ACT (2000) § 706 cmt. (UNIF. L. COMM'N 2000).

[278] MODEL ACT GOVERNING ASSISTED REPROD. § 606 (AM. BAR ASS'N 2019).

[279] ALA. CODE § 26-17-706 (1975); COLO. REV. STAT. ANN. § 19-4-106(7) (West 2021); CONN. GEN. ST. ANN. § 46b-450 (West) (effective January 1, 2022); DEL. CODE ANN. tit. 13, § 8-706 (West 2021); 750 ILL. COMP. STAT. ANN. § 46/704 (West 2021) (allowing for withdrawal of consent, but not making divorce an automatic withdrawal of consent); ME. STAT. tit. 19-A, § 1926 (2021); N.M. STAT. ANN. § 40-11A-706 (West 2021); N.D. CENT. CODE ANN. § 14-20-64 (West 2021);

addition, courts in states without such legislative protection have expressed support for relieving the nonconsenting biological parent from legal parenthood.[280]

As to legal parentage, each court must determine whether legal parenthood would attach to the nonconsenting spouse in that jurisdiction. If so, this certainly is a factor that may be weighed in favor of the party seeking to prevent the embryos' use. In at least one-third of the states, though, the answer to that is a clear "no." In the remaining states, it is an open issue. No appellate court, however, has expressly held that legal parenthood must be attributed to the nonconsenting spouse. Moreover, the ABA's Family Law section noted all the way back in 1997 that the "relinquishment of parental rights and responsibilities of the party who opposes bringing the frozen embryo to term . . . does not involve concepts fundamentally different than those underlying single parent adoption, single parenthood by artificial insemination, [and] state laws governing artificial insemination[.]"[281] This issue, they concluded, "should not be a difficult one."[282]

Like gestational parenthood, most courts have focused exclusively on the man's interest in avoiding legal parenthood, giving no consideration to the woman's interest in *experiencing* legal parenthood. If one conceives of legal parenthood purely as a financial obligation, that oversight perhaps makes some sense. Raising children is often a financial drain.[283] Moreover,

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15 R.I. GEN. LAWS ANN. § 15-8.1-706 (West 2021); TEX. FAM. CODE ANN. § 160.706 (West 2021); UTAH CODE ANN. § 78B-15-706 (West 2021); VT. STAT. ANN. tit. 15C, § 706 (West 2021); WASH. REV. CODE ANN. § 26.26.625 (West 2021); WYO. STAT. ANN. § 14-2-906 (West 2021). In the past year, the Massachusetts and Pennsylvania legislatures have introduced bills that would adopt this approach. H.B. 1714/S.B. 1133, 192nd Sess. (Mass. 2021); H.B. 115, Reg. Sess. (Pa. 2021). At least one state, Minnesota, has incorporated this approach into its statutes, though only for inheritance purposes. MINN. STAT. ANN. § 524.2-120 subd. 8, 9 (West 2021).

[280] *See* Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012) (recognizing that while parents cannot waive a *child's* right to support from each, the parties may contract between themselves regarding their respective financial responsibilities to the child); Szafranski v. Dunston, 34 N.E.3d 1132, 1163 (Ill. App. Ct. 2015) (noting, before Illinois expressly protected nonconsenting parents by statute in 2017, "We see no basis in the record why [the biological father] would be precluded from seeking a legal declaration of his parental status."). For arguments that a nonconsenting parent should not be relieved of legal parenthood, see generally Apel*, supra* note 9.

[281] AM. BAR ASS'N, *supra* note 28, at 236.

[282] *Id.*

[283] *See* Aimee Picchi, *Raising a Child Costs $233,610. Are You Financially Prepared To Be a Parent?*, USA TODAY (Feb. 26, 2018, 9:43 AM), https://www.usatoday.com/ story/money/personalfinance/2018/02/26/raising-child-costs-233-610-you-financially-prepared-parent/357243002 [https://perma.cc/G6KZ-4Y4K]. However, many may view their children as a potential source of economic support once the children are adults and the parent is

for absent parents, legal parenthood is generally limited to providing financial support. But for parents who have custody of their children, legal parenthood, of course, requires more than mere financial support. Those parents are primarily responsible for the child's health, education, care, and emotional support. Many cite to these very legal responsibilities as a *reason* for wanting children—that being responsible for another person would force them to look outward, further their own personal growth and development, and give meaning to their lives.[284] As with gestational parenthood, while a party's interest in experiencing legal parenthood need not be given conclusive weight, it should at least be acknowledged and given some weight, not merely disregarded as courts have done to date.

3. Genetic parenthood

This, then, leaves genetic parenthood as the only interest actually at stake in most cases for the party seeking to avoid parenthood. When courts have addressed genetic parenthood, they have focused almost exclusively on the emotional burden to men of unwanted genetic parenthood, both exaggerating the burden and treating it as self-evident. At the same time, courts have discounted, if not completely ignored, any interests the woman has in being a genetic parent. The following considers this dynamic by illustrating how courts overstate the harms of unwanted genetic parenthood, introducing and critiquing the "attributional harm" approach proposed by Professor I. Glenn Cohen, addressing how courts diminish women's interests in genetic parenthood, and proposing a newer, broader view of genetic parenthood.

a. Men's interests: the insurmountable anguish

The *Davis* court first reflected this disproportionate concern for the burden of unwanted genetic parenthood. While characterizing Mary Sue's interest in genetic parenthood simply as "the joys of parenthood," it characterized Junior's interest as "the relative anguish of a lifetime of unwanted parenthood."[285] Similarly, a Missouri appellate court noted the man should not be subject to "all of [the] possible life-long emotional, psychological, and financial responsibilities" of unwanted parenthood. Yet, the court did not specifically identify a single such responsibility, nor did it

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out of the workforce. In other words, the costs of raising children can be viewed by some as an investment in their future security.

[284] Maja Bodin et. al., *A Wonderful Experience or a Frightening Commitment? An Exploration of Men's Reasons to (Not) Have Children*, 9 REPROD. BIOMEDICINE & SOC'Y ONLINE 19, 23 (2019).

[285] Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

acknowledge the woman's corresponding interest in *experiencing* these same responsibilities.[286] Another court identified the man's interests merely as the "typical hardships of unwanted parenthood," yet held that this self-evidently outweighed the woman's interest (unexplored by the court) in being a parent.[287] Professor Ellen Waldman has argued that in these cases, "the threat of psychological bondage is the product of the court's collective imagination," while acknowledging two dissenting justices (one of whom was a woman) in one case who "set themselves apart by rejecting the assumption that forced parenthood necessarily heralds psychological devastation."[288]

Professor Waldman effectively raises the issue, yet her conclusion goes a bit too far. This Article does not suggest that there is no harm to an individual who may become a parent against his or her wishes (albeit one who voluntarily contributed their gametes to the other for procreation without discussing what should happen to the embryos if the relationship ends). Nor does it suggest that courts have simply missed a significant, more identifiable harm they should have recognized that would have justified their conclusions. And in struggling to identify a specific harm, these courts are not alone. For instance, in wrongful birth and wrongful life cases, "judges have had a notoriously hard time pinpointing how (and how badly) a party is injured by the birth of a genetically related child."[289] Rather, the point is that by simply attributing almost insurmountable anguish to unwanted parenthood, the judges—seventy percent of whom have been men—very well may be subconsciously attributing their own perspectives, and perhaps discomfort, to these cases. They could imagine themselves in the shoes of the burdened fathers; they seem not to have imagined themselves in the shoes of the women desperate to be parents.

b. Attributional parenthood

Professor I. Glenn Cohen has attempted to fill this void by recharacterizing genetic parenthood as "attributional parenthood," noting it is not "*merely* the existence of someone who carries my genetic code, but the

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[286] McQueen v. Gadberry, 507 S.W.3d 127, 147 (Mo. Ct. App. 2016).

[287] Jocelyn P. v. Joshua P., 250 A.3d 373, 388 (Md. Ct. Spec. App. 2021) (quoting the trial court). Though the trial court noted other factors, those mentioned were merely neutral as between the parties. *Id.* Notably, the appellate court remanded this case for further balancing. *Id.* at 409.

[288] Waldman, *The Parent Trap*, *supra* note 26, at 1037, 1062 (referring to Justices Miller and Altman in Kass v. Kass, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997)).

[289] Ziegler, *Men's Rights*, *supra* note 117, at 715.

attribution of parenthood, that is the harm."[290] Further, he notes that attributional parenthood comes from three sources: (1) the expectations society places on genetic parents, (2) the expectations children place on their genetic parents, and (3) the expectations genetic parents place on themselves.[291] Each in turn could be unbundled from the others in various cases, though he concludes the latter, the expectations one puts on himself, to be the most significant.[292]

Professor Cohen takes great care to walk through economic and philosophical arguments, as well as data from other disciplines and cultural approaches to parenting, that both support and cast doubt on attributional parenthood concerns.[293] In the end, however, these concerns prioritize a man's emotional *discomfort* above a woman's interests in being a genetic parent and experiencing all that comes with it. For instance, regarding attributional parenthood from third parties, Professor Cohen provides a hypothetical in which a genetic father in this situation must endure an awkward social interaction with a former neighbor who compliments him on his wonderful daughter, requiring the father to clarify that the daughter was born over his objection and is not, in fact, his legal child.[294] To be fair, Professor Cohen presents this scenario in a humorous tone, and one would hope courts would not truly consider such a fleeting inconvenience to have any comparable weight to the lifelong interests of a woman seeking to become a parent. Yet, a Colorado Supreme Court justice adopted this very scenario years later to support his opinion.[295]

Moreover, these or very similar attributional discomforts are little different than those that millions of fathers regularly face—those who never married their child's mother, who are divorced from their child's mother, or who have given a child up for adoption (along with, in the first two cases, the financial responsibility attendant to legal parenthood as well).[296] Yet courts

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[290] Cohen, *supra* note 58, at 1137 (emphasis in original).

[291] *Id.* at 1136-37.

[292] *Id.* at 1137.

[293] For example, Cohen notes, "As a positive matter, the anthropological examples discussed above, as well as the sociological literature on sperm donation, adoption, and deadbeat dads, suggest that one can function quite well as a realized person even when one is alienated from one's genetic offspring." *Id.* at 1151.

[294] *Id.* at 1136.

[295] *In re* Marriage of Rooks, 429 P.3d 579, 597 (Colo. 2018) (Hood, J. dissenting, joined by Coats and Seymour, JJ.).

[296] *See* U.S. CENSUS BUREAU, *supra* note 132 and accompanying text (noting over 15.6 million children were raised by single mothers in 2021). To be certain, many of these fathers remain very involved in their children's lives. Yet, to be just as certain, many do not. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stevens, J., dissenting, joined by Burger and Rehnquist, JJ.) (noting that "the vast

have never deemed these challenges insurmountable. To be sure, men are more resilient than the courts in the embryo dispute cases want to treat them. Moreover, studies have shown that while people tend to accurately predict the emotions they will experience with a future event, they overestimate both the duration and intensity of those emotions.[297] In addition, men do not even have a constitutional right to know they are a parent. For instance, Justice Stevens noted in *Caban v. Mohammed*, "In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person."[298]

Ultimately, Professor Cohen, too, identifies no concrete harm, concluding that the unwilling parent will suffer "a kind of emotional-distress damage. How severe a harm is this? It is hard to give a precise answer, but it is certainly nontrivial."[299] Nonetheless, Professor Cohen adds, "[e]ven if in the pantheon of possible harms, the harm of attributional parenthood does not rank particularly high, the corresponding benefits to individuals of a use-without-prior-consent rule seem even lower, and insufficient to justify that rule."[300]

With this last step, however, Professor Cohen runs into the same problem that the courts have: while advocating for a presumption against use, he downplays the potential interests of parties seeking to be genetic parents, but fails to meaningfully explore the contents of those interests . Rather, he

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majority of unwed fathers have been unknown, unavailable, or simply disinterested").

[297] Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCH. 345, 350-51 (2003); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 162-63 (2005). Professor Cohen likewise acknowledges such research in his discussion of the contractual approach (and questions its applicability in embryo disputes), Cohen, *supra* note 58, at 1174-79, but he does not return to it while discussing the attributional parenthood concerns of the party seeking to avoid parenthood. One could likewise argue that parties seeking to use embryos, then, may overestimate the positive emotions they will experience with parenthood. Yet, this retort may be tempered by decision-making studies that show people tend subconsciously to place higher value on avoiding loss than the opportunity to experience gain. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341, 348 (1984) ("Because losses loom larger than gains, the decision maker will be biased in favor of retaining the status quo."). Moreover, these cases reflect a gain one party is taking *active steps* and committing resources to experience, rather than simply trying to prevent the event from occurring.

[298] Caban v. Mohammed, 441 U.S. 380, 392, 404-05 (1979) (Stevens, J. dissenting, joined by Burger and Rehnquist, JJ.).

[299] Cohen, *supra* note 58, at 1143-44 (internal citations omitted).

[300] *Id.* at 1154-55.

points out that given the easy access to donor sperm today, most women still have the potential to become genetic parents.[301] Again, however, this ignores the biological fact that such potential is significantly greater for a woman when she uses her own frozen embryos, rather than starting the IVF process over with "older" eggs.[302]

c. Minimizing women's interests

While courts and commentators have given little attention to a woman's affirmative interests in being a genetic parent, they have nonetheless discredited such unstated interests in various ways. For instance, Professor Cohen has noted that while individuals may have a right to procreate, they do not have right to do so with a *particular* person's genetic material (that of their ex-partner).[303] While this is undoubtedly true in the abstract, it ignores the reality of these cases—it is not only the other person's genetic material the party desires, but access to their own. For instance, an ex-wife is not demanding her ex-husband's frozen sperm; she is seeking access to embryos that contain her own DNA—DNA from eggs she went through a painful process to retrieve and which her husband voluntarily fertilized. Such embryos, even if they may not represent her only chance at genetic parenthood, certainly represent her best chance at parenthood.[304] Simply preferencing the man's right to control of the combined DNA subtly diminishes the woman's role in and contribution to the embryos.

To be sure, most women in these cases likely would prefer not to have a child that is biologically related to their ex-partner, both for practical and emotional reasons. In many cases, the woman may ultimately choose not to use the embryos. But, if her deep interest in being a parent exceeds her concerns over that inconvenience, and if the parties had not otherwise agreed in advance, she should have the right to make—or at least participate equally in—that choice. Rather, denying a woman access to embryos that contain her own genetic material (when she had not previously agreed to that) impacts her procreative liberty by requiring of her "further intrusions on bodily

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[301] *Id.* at 1155. Professor Cohen does acknowledge that, for some women, the embryos may truly represent their only opportunity to have their own genetic child. In those cases, he concludes it is "plausible" that the interests would weigh in favor of the woman, though "there is enough uncertainty here that perhaps this is the ideal place for experimentation among different jurisdictions." *Id.* at 1194.

[302] *See* 2019 ART REPORT, *supra* note 36; SOC'Y FOR ASSISTED REPROD. TECH., *supra* note 49; *supra* text accompanying notes 48-51.

[303] Cohen, *supra* note 58, at 1156; *see also* McQueen v. Gadberry, 507 S.W.3d 127, 145-46 (Mo. Ct. App. 2016).

[304] *See* 2019 ART REPORT, *supra* note 36; SOC'Y FOR ASSISTED REPROD. TECH., *supra* note 49; *supra* text accompanying notes 48-51.

integrity in the form of additional invasive medical procedures."[305] To be clear, this Article is not arguing that this would violate her right to procreative liberty—but it adds a burden only women must bear.

Similarly, the ex-husbands in these cases often frame their interest rhetorically as avoiding "forced procreation."[306] When courts adopt that framing, it ignores that the husband voluntarily began the IVF process with his wife and contributed his sperm, fully intending that it be irretrievably combined with her egg for the singular purpose of creating a child.[307] It is one thing to claim a right against the state not to be a genetic parent (i.e., the state cannot force one to donate their gametes for reproduction). It is quite another to claim one has the same right against an individual to whom one has voluntarily given (and with whom they have then irretrievable combined) their gametes.[308] As the ABA's Family Law section has noted, IVF "is an *elective* process, and is in fact a much more deliberate and considered act of procreation than coitus. It should not be a difficult concept to consider under these circumstances that *the individual* right not to procreate . . . is extinguished at the moment the embryo is created."[309]

The high bar courts set for a woman to overcome the presumption against use provides another example of a judicial devaluing of a woman's interest in genetic parenthood. For example, the *Davis* court appropriately recognized that if the party seeking the embryos' use has no "reasonable possibility of achieving parenthood by other means than use of the preembryos in question," then that party's arguments "should be considered."[310] The court did not give such facts presumptive weight, but only that they may open the door to further consideration. However, the court set an unworkable standard for what constitutes a "reasonable possibility" of achieving parenthood. Mary Sue had had five tubal pregnancies. She had one fallopian tube removed and the other ligated. She had thereafter attempted

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[305] AM. BAR ASS'N, *supra* note 28, at 237.

[306] *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012); *In re* Marriage of Fabos & Olsen, No. 20CA1881, 2022 WL 2252639, at ¶ 43 (Colo. App. 2022).

[307] *Reber*, 42 A.3d at 1140; *see also* Colker, *Pregnant Men Revisited*, *supra* note 20, at 1069.

[308] Cohen, *supra* note 58, at 1146.

[309] AM. BAR ASS'N, *Section and Division Reports*, 123 ANN. REP. A.B.A. 207, 227 (1998) (emphasis in original). Notably, when the couple created the embryo, the man intended to have a child with his wife *as a married couple*, and some have argued this intent should give him priority to the embryos upon divorce. Coleman, *supra* note 38, at 83. While that may well be true, he is free to document and protect that intent by agreement. Absent an agreement, though, there is no reason to automatically attribute the husband's preference in avoiding use of his genetic material over the wife's preference in making use of hers.

[310] Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

IVF unsuccessfully on *seven* occasions over three years—pausing after the sixth until the ART facility acquired the technology to freeze embryos, presumably to avoid having to endure once again the physical pain and costs associated with egg retrieval. Nonetheless, the court noted simply the "discomfort" Mary Sue would face if she tried IVF again before concluding: "still, she would have a reasonable opportunity, through IVF, to try once again" to have a child.[311] One can only wonder whether the court would have adopted that cavalier perspective if four of its five judges had been women rather than men.

In 2021, the Maryland Court of Appeals directly challenged *Davis* on this point. The court remanded a decision that had denied the woman rights to the embryos and directed the trial court to determine not whether she was merely "physically capable" of becoming pregnant through IVF, but whether "further IVF treatments[] are reasonable in the particular circumstances of the case."[312] The court directed the trial court to consider "the physical and emotional toll the IVF process bore on Jocelyn; her age; [and] the possibility of a *successful* process."[313] As discussed *supra*, the likelihood of success with IVF corresponds to the woman's age at the time her eggs were retrieved rather than her age when embryos are implanted in her uterus.[314]

In addition, the cost to start IVF from the beginning may, in many cases, be prohibitive.[315] While courts have been keen to limit an ex-husband's potential financial exposure, most have seemed unconcerned with their ruling's potential financial consequences to the woman. Notably, Professor Cohen does acknowledge the economic obstacles women may face to restart IVF.[316] But, like most courts, his analysis sidesteps the additional physical, emotional, and biological challenges that women, years after the embryos were first frozen, would also face when restarting the process. Others have directly dismissed such challenges. For instance, a New York Court of Appeals justice wrote that the woman's "[m]ere discomfort, expense, or other potentially surmountable difficulties should not suffice to defeat the defendant's fundamental right to avoid biological fatherhood"[317] (attributing,

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[311] *Id.* at 604.

[312] Jocelyn P. v. Joshua P., 250 A.3d 373, 409 (Md. Ct. Spec. App. 2021).

[313] *Id.* (emphasis added).

[314] *See* 2019 ART REPORT, *supra* note 36; SOC'Y FOR ASSISTED REPROD. TECH., *supra* note 49; *supra* text accompanying notes 48-51.

[315] Ziegler, *Men's Rights*, *supra* note 117, at 712.

[316] Cohen, *supra* note 58, at 1155, 1167.

[317] Kass v. Kass, 663 N.Y.S.2d 581, 593 (N.Y. App. Div. 1997) (Friedman, J., concurring). Notably, two dissenting judges—one of whom was a woman—took great care in their opinion to discuss the difficulties women face when undergoing IVF. *Id.* at 169-70 (Miller and Altman, JJ., dissenting).

apparently, an almost insurmountable weight to the emotional burdens of attributional parenthood). More recently, an all-male panel of the Colorado Court of Appeals reversed a decision that had awarded the frozen embryos to the wife because, in part, the trial court had considered the woman's prospective emotional hardship. The court amazingly concluded that to the extent the court could consider the parties' "hardship or emotional toll," it was "*only* with respect to the 'spouse seeking to avoid becoming a genetic parent.'"[318] Again, by considering primarily the man's economic concerns, yet disregarding the woman's economic, physical, and emotional concerns, courts and commentators have approached this issue from a male perspective.[319]

Finally, but perhaps most perniciously, courts have cited the possibility that a woman may adopt a child as a substitute for genetic parenthood.[320] By weighing the potential opportunity to adopt against the party seeking the embryos, courts effectively bar any meaningful route to relief for the party seeking the embryos' use. Such courts ignore that the likelihood of adoption—particularly for a single middle-aged woman—is far from a guarantee.[321] Most fundamentally, though, this rationale substitutes

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[318] *In re* Marriage of Fabos & Olsen, 451 P.3d 1218, 1228 (Colo. App. 2019) (emphasis added). In Fabos, the wife sought to donate the embryos to a childless couple. Accordingly, the woman's hardship and emotional toll in that case related to those already endured and the knowledge that the embryos, which she believed represented life, would not develop to childhood. *See id.* Yet, the court did not limit its rule to such facts.

[319] Professor Coleman, for instance, argued that "any bodily invasions the woman experienced when the embryos were created were the result of her own voluntary choice." Coleman, *supra* note 38, at 86. But this ignores, of course, that contributing sperm was also the man's voluntary choice. For his part, Professor Cohen is careful to recognize that while both men and women have opposed the use of embryos, in most cases it is the man who seeks to avoid parenthood. Cohen, *supra* note 58, at 1168.

[320] *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (noting that adoption would provide Mary Sue a "reasonable opportunity for achieving parenthood"). Early social scientists and psychologists often attributed an innate, deep biological need for men to perpetuate their genes—to achieve genetic parenthood—yet rarely attributed this same desire to women. *See, e.g.*, ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 156 (1985). Rather, women were regarded as having a need to nurture and as the vessel by which men can achieve their biological need. *Id.* A scent of such thinking is present in those decisions that weigh a woman's ability to adopt against her interest in being a genetic parent, suggesting that acting as a mother should be "good enough."

[321] *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1139 (Pa. Super. Ct. 2012); David L. Theyssen, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative*, 74 IND. L.J. 711, 712 (1999); Waldman, *The Parent Trap*,

legal parenthood for the party's interest in genetic parenthood (and wholly ignores a woman's interest in gestational parenthood). Rather, these cases are about each party's interest in *procreation*, not simply in being (or not being) a parent. Indeed, adoption was a potential option the woman rejected when she chose to go through the cost and pain of IVF, thus strongly signaling her desire for her own genetic child.[322]

d. Genetic parenthood: a broader view

So, then, how does one quantify the interests in experiencing genetic parenthood? At the day's end, they too of course cannot be objectively measured. I recognize that while this Article is critical above of others for not identifying more specifically the harms of unwanted genetic parenthood, I likewise can suggest only abstract interests in being a genetic parent: an innate, biological drive to pass on one's genetic and cultural heritage; a desire to both *create* and influence another life, perhaps a better version of one's self; a longing to experience unconditional love; a wish to achieve a greater sense of meaning and purpose to one's life; a goal to develop themselves as a person through the challenges of parenthood;[323] a desire to build a family to enjoy and draw support from in life's later years.[324] At some level, this Article, too, can only conclude these interests are self-evident and "certainly nontrivial."

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supra note 26, at 1056-59. Some have suggested the presumption against use may serve public policy purposes by encouraging adoption—particularly the adoption of children who often are overlooked by those seeking to adopt, such as those who are older or have special needs. Cohen, *supra* note 58, at 1189. Professor Cohen challenges such a policy, noting it is unfair to ask infertile individuals to disproportionately shoulder that responsibility. *Id.* at 1190. Moreover, that misses the point that the individual is seeking not only to be a legal parent, but to be a *genetic* parent, to experience pregnancy (in many cases), and to raise the child from birth. *See In re* Marriage of Rooks, 429 P.3d 579, 594 (Colo. 2018); *Reber*, 42 A.3d at 1138-39; Jessee v. Jessee, 866 S.E.2d 46, 57 n.14 (Va. Ct. App. 2021); *supra* text accompanying note 135.

[322] *See Reber*, 42 A.3d at 1138; Cohen, *supra* note 58, at 1195. In *Davis*, the couple had unsuccessfully attempted to adopt before turning to IVF. 842 S.W.2d at 591.

[323] As Katharine Bartlett has observed, parent-child "relationships . . . should be viewed not as earned, or subject to barter or exchange, but as opportunities given to us to express who we are." Bartlett, *supra* note 185, at 337.

[324] Admittedly, some of these interests could also be realized by raising an adopted child; aspects of the bundle of sticks are not always mutually exclusive. However, as discussed *supra*, the parties in these cases have expressed, by the very fact of creating and fighting for the embryos, a strong desire to experience these benefits through a genetic child.

Nonetheless, the Article argues that the differential treatment in this regard is warranted. Determining the validity or veracity of a person's interest in not being a mere genetic parent is a fraught task, particularly when nothing is being required of that person. For Junior Davis, his concerns had some gravity due to his unusual childhood—though there was still room to question his sincerity.[325] In many cases, however, the objecting party's motivation seems to be driven primarily by the desire to avoid inconvenience, or as Professor Mary Louise Fellows has stated, helping men "achieve comfortable circumstances for themselves."[326] And that has been sufficient for most courts. In other cases, one may be motivated primarily by resentment toward the ex-spouse.[327]

On the other hand, determining the validity and depth of a person's desire to have a child is not so difficult. Rather, for women, the actual sacrifices they have already made (the physical, emotional, and financial costs women incur to create the frozen embryos) and are willing to make (their willingness to endure pregnancy and childbirth) speak for themselves. And for either sex, the emotional, time, financial, and myriad other sacrifices that parenthood itself will require of them speak to their intent. By fighting for their embryos, these individuals are committing to these responsibilities and showing the depth and sincerity of their interests.[328]

It is possible, of course, that a party, after obtaining the right to the embryos, ultimately decides not to continue the IVF process for various reasons. Or, much more likely, that their attempts to implant and gestate the embryos are unsuccessful. But, in either case, the nonconsenting party simply would end up in the position they seek—the same position they would be in had the court denied the other's right to the embryos. And, while one can

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[325] For instance, the court noted Junior was "vehemently opposed" to having a child raised by a single parent. *Davis*, 842 S.W.2d at 604. Yet, his initial litigation position was that he wanted the embryos to remain frozen "until he decided whether or not he wanted to become a parent outside the bounds of marriage." *Id.* at 589. Similarly, Junior testified that the marriage was shaky before they attempted IVF (and, in fact, he filed divorced his wife just two months later). *Id.* at 592. Moreover, by the final appeal, Mary Sue sought to give the embryos to another *couple*, not to raise the child herself. *Id.* at 604.

[326] Fellows, *supra* note 185, at 509.

[327] *See* Colker, *Pregnant Men Revisited*, *supra* note 20, at 1078 n.75.

[328] *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 196 (2017) ("[I]t is hard to deny the meaning or magnitude of the harm that deprived procreation imposes on people who desperately want children. The expensive and often painful efforts that many undertake to carry a pregnancy or raise a biological child 'provide ample evidence of the weight, depth, and sincerity of'" one's interest in having a genetic child.) (quoting Fred Norton, Note, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 842-43 (1999)).

imagine a hypothetical where a scorned spouse is motivated to take on these burdens primarily out of spite, that would likely be quite the rare exception.[329] If the ex-spouse could in fact establish that, though, a presumption favoring use may be rebutted.

Professor Cohen urged courts to reconceive genetic parenthood as "attributional parenthood," at least as it relates to the right *not* to be a genetic parent. Similarly, for the corresponding right to experience genetic parenthood, this Article urges courts to think more broadly and reconceive genetic parenthood as "biological parenthood." For women, this would recognize the actual interests they have in the entire process required of them to be a genetic parent, both retroactively and prospectively. It would respect the physical, emotional, mental, and financial costs that women endured to create the embryos. It would also assign some weight to the prospective physical, emotional, mental, and financial obstacles women would face if required to begin the IVF process anew. And for either sex, it would give weight to the innate desires many have to raise, support, and shape a child in their own likeness, to pass along their genetic and familial heritage, to experience the bonds unique to the parent-child relationship, and to fully achieve their own sense of their personhood—interests that to date have received no recognition from courts.

4. (Re)Weighing the interests

Ultimately, Professor Cohen endorsed the *Davis* presumption because, in part, it reflects a "majoritarian default approach" to resolving the issue "the way that most parties would have done had they explicitly addressed the question."[330] Yet, because parties may contract around the rule, it creates "'large benefits for those who make errors [by failing to contract in advance], while imposing little or no harm on those who are fully rational [and do contract in advance].'"[331]

This invites one critical question: *who* constitutes the majority in these cases? Likewise, who receives "large benefits" from this presumption? Based on the twenty cases to date, this certainly reflects the position most

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[329] In another ART context, some opposed recognizing children implanted from frozen embryos after the death of the genetic father as "heirs" of the father, noting that doing so may encourage women to have such children to access additional survivor social security benefits. While this may have been a *result* in some cases for the woman, it is fanciful to assume a woman would weigh the short-term financial benefits over the physical, emotional, and financial requirements of both pregnancy and long-term parenthood. *See* Carpenter, *supra* note 33, at 347.

[330] Cohen, *supra* note 58, at 1187, 1191.

[331] *Id.* at 1192 (quoting Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism*,*"* 151 U. PA. L. REV. 1211, 1212 (2003)) (alterations added).

men would have contracted for. They, then, receive large benefits from a non-use presumption. But what of the women? Does this resolve the dispute in the way most "would have done had they explicitly addressed the question"? Certainly not.

It is undoubtedly true that many—likely even the majority of—women would ultimately choose not to use the embryos she created with a former partner to have a child after they separate. But it is almost certain that most women, if given the choice, would retain the *option* of doing so. And, as noted above, if a party with the option elects not to exercise it (or is unsuccessful in their efforts), the other party is no worse off.

Rather, attributing the non-use presumption to the majority privileges the male perspective as the dominant position. By assigning it the normative viewpoint for all, it replaces subjective experience for objective truth.[332] In the same vein, Professor Mary Louise Fellows has noted, "Although the cultural norms may be shared across a broad range of the society, that does not mean that they do not reflect the interests of those persons in dominant positions within the society. Evidence of the domination is found in the answer to the question: For whose benefit do the cultural norms operate?"[333] As the Supreme Court has noted in another context, "The decision instead to choose a rule that systematically harmed women could be explained only as the product of habit, rather than analysis or reflection."[334] Majoritarian default approaches have a place in areas where one has sole authority over an item or option yet fails to exercise that authority, such as intestacy. But in cases involving highly personal yet directly competing interests, seeking a majoritarian approach inevitably privileges one group's interests over another's.

Instead, future courts should drop the non-use presumption altogether and more fully balance the parties' interests. In doing so, judges should address specifically the gestational, legal, and genetic aspects of parenthood—not just one's interest in *avoiding* each, but also one's interest in *experiencing* each. This would have the following effects. First, with respect to gestational parenthood, the (proper) conclusion that men have no interest at stake would not foreclose consideration of the woman's interests in, and prior efforts to achieve, gestational parenthood. Second, regarding legal parenthood, a court would determine whether a nonconsenting party would be deemed a legal parent, not just attribute hypothetical financial

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[332] *See* Colb, *supra* note 261 at 109 (providing a fascinating critique of Justice Antonin Scalia's reasoning in Michael H. v. Gerald D., 491 U.S. 110 (1989), in which he describes a woman's infidelity as "extraordinary" and refers to "nature itself" to deny parentage to the biological, but not marital, father).

[333] Fellows, *supra* note 185, at 495 n.3.

[334] Lehr v. Robertson, 463 U.S. 248, 265 n.24 (1983) (referring to a statute that favored men over women in the selection of probate estate administrators).

obligations to that party. And even if that party would avoid such responsibilities (as in most jurisdictions), courts should not then ignore the other party's interests in taking on the responsibilities of legal parenthood. Third, in the context of genetic parenthood, courts should not overemphasize the harms of attributional parenthood while giving no consideration to the benefits of biological parenthood. Finally, courts should be cognizant of the history of gender bias in parentage cases, along with the different outcomes reflected by judges of each gender in embryo-disposition cases, and consider whether their own initial reactions to the case too may (quite naturally) have been shaped by subconscious assumptions or preferences.

To be clear, this presumption for use should apply whether a woman or man seeks rights to their embryos to have their own child. Indeed, because those interests in experiencing gestational parenthood are unique to women, the scales may be tipped even further in their favor when women seek the embryos' use. Yet, when men seek to use the embryos, their own interests in legal and genetic parenthood should not be assumed any less than a woman's corresponding interests, and their interests in experiencing each—and commitment to accepting the responsibilities that go along with that—should typically outweigh the other party's interest in avoiding the purely attributional aspects of parenthood.[335]

Of course, additional, non-gender-based biases may likewise be operating below the surface in these cases. For instance, many judges may be influenced by a subconscious schema that children should be raised (or at least be born into) traditional, two-parent homes.[336] Likewise, the *Davis* presumption may reflect that when making decisions, people tend subconsciously to place a higher value on avoiding loss (here, loss of cognitive freedom from unwanted genetic parenthood) than on experiencing an equivalent or even greater gain (here, the benefits of parenthood).[337] This could be particularly relevant when considering that individuals also tend to overestimate their emotional response to a future event.[338] Again, though, whether these biases are explicit or implicit, gender based or gender-neutral, their collective effect in these cases has been to advantage men's interests over women's interests.

Finally, why employ a presumption either way? In an ideal world, a pure balancing test would be the preferred approach. Yet given the actual

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[335] *See* Colker, *Pregnant Men Revisited*, *supra* note 20, at 1075.

[336] *See, e.g.*, *Lehr*, 463 U.S. at 257 (noting that "as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family"); Bartlett, *supra* note 185, at 306; NeJaime, *Nature of Parenthood*, *supra* note 31, at 2285, 2331.

[337] *See* Kahneman & Tversky, *supra* note 304

[338] *See* Wilson & Gilbert, *supra* note 304 and accompanying text.

implicit bias suggested by this article, both in parentage issues generally and embryo-disposition cases specifically, a presumption favoring use (however small a court may deem that presumption to be) will provide a meaningful analytical checkpoint. It will require judges to confront that the party seeking to use the embryos does in fact have genuine interests, rather than discounting them all together. It will require nonconsenting parties (and judges) to articulate *why* their interest in avoiding genetic parenthood outweighs the other's interest in experiencing it, rather than treating it as self-evident. Primarily, though, even if a judge found the interests in a case to be *exactly* balanced, a presumption favoring use would privilege the interests of those who seek to gain, who *are committed to the physical, mental, emotional, and financial sacrifices and investments necessary to make that happen*, over those who seek to prevent another from experiencing that. And in that regard—by privileging conduct over biology alone—the new presumption would bring embryo-disposition jurisprudence in line with a greater trend in modern family law, discussed next.

VII. Family Law's Shift Toward Functional Parenthood

Above, this Article challenged the presumption that the psychological burdens of purely genetic parenthood outweigh the benefits of experiencing genetic, gestational, and legal parenthood. Next, this section intends to show that courts' overemphasis on genetic parenthood in the embryo-disposition context is also out of step with the recent trend in family law which recognizes that parental rights arise from commitment over biology. [339] One *earns* such rights, they do not "spring full-blown" from a genetic connection.[340] This shift respects the close emotional bonds and commitment to children formed through *conduct*—not, that is, the fleeting conduct of procreating, but the toil, sacrifices, and joys of actual, committed parenting through highs and lows, month after month, year after year. As Professor Douglas NeJaime recently observed, "the functional turn in family law is, undoubtedly, a longstanding, far-reaching, and growing trend observable across many judicial decisions, statutory acts, law reform projects, advocacy efforts, and scholarly approaches."[341]

This trend may be best reflected in a series of four fathers' rights cases from 1978 to 1983, in which the United States Supreme Court made clear that biology alone does not confer inalienable constitutional protections

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[339] NeJaime, *Constitution of Parenthood*, *supra* note 31, at 273-77.
[340] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).
[341] NeJaime, *Constitution of Parenthood*, *supra* note 31, at 321.

to a parent.[342] Rather, the Court recognized that parental rights attach once one takes on the responsibilities of parenthood and *acts* like a parent. Michael Higdon has succinctly synthesized the Supreme Court precedent: "biological parenthood provides a nonmarital father with an incipient right, one that will not fully develop until he takes sufficient steps to foster a parental relationship with the child."[343] This recognition that conduct may trump biology has been referred to in various contexts as functional, intended, de facto, quasi, and psychological parenthood.[344]

The Supreme Court first recognized that parenthood requires conduct in *Stanley v. Illinois.*[345] A biological father had raised his three children together with their mother, though they never married. After her death, the state took custody of the children without permitting the father a hearing to determine his fitness to be a parent.[346] Though denying him a hearing due to his status as an "unwed father," the statute at issue gave married fathers, divorced fathers, and unmarried women in that situation a right to a hearing.[347] The court held the Illinois statute violated both the Due Process Clause and the Equal Protection Clause by categorically precluding unmarried biological fathers. The court emphasized that because the father had "sired *and raised*" the children, he had a substantial interest "in the companionship, care, custody, and management of his . . . children."[348]

Shortly thereafter, the Court dispelled any remaining questions whether biology alone endowed a father with parental rights.[349] In three adoption cases over six years, the Court set out what has come to be known as the "biology plus" approach to parental rights.[350] First, in *Quilloin v. Walcott* the Court upheld a Georgia adoption statute that required the

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[342]Professor Michael J. Higdon has set this line of cases out in *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1494-1502 (2018).

[343] *Id.* at 1498.

[344] *See, e.g.*, Higdon, *supra* note 183, at 1519; Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 944 (2019); NeJaime, *Constitution of Parenthood*, *supra* note 31 at 321-334.

[345] 405 U.S. 645 (1972).

[346] *Id.* at 645.

[347] *Id.*

[348] *Id.* at 651-52. Indeed, the prefatory note to the original Uniform Parentage Act, passed one year after *Stanley*, warned against states interpreting *Stanley* overbroadly and noted that potential rights of a "*disinterested* unmarried father" may be terminated. UNIF. PARENTAGE ACT, prefatory note (UNIF. L. COMM'N 1973) (emphasis added); *see also* NeJaime, *Constitution of Parenthood*, *supra* note 31, at 286; Michael Higdon, *Biological Citizenship and the Children of Same Sex Marriage*, 87 GEO. WASH. L. REV. 124, 149 (2019); Higdon, *supra* note 183, at 1491.

[349] Higdon, *supra* note 183, at 1496.

[350] *Id.* at 1499.

biological mother's consent (whether married or not), but not an unmarried biological father's consent.[351] The child had lived with his mother and stepfather for the majority of his eleven years, and the stepfather sought to adopt him against the biological father's wishes.[352] The Court denied the father's due process and equal protection claims, noting that the father had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[353] The Court added that "[u]nder any standard of review, the State was not foreclosed from recognizing . . . the extent of [one's] commitment to the welfare of the child."[354]

One year later, in *Caban v. Mohammed* the Court struck down a similar adoption statute because the biological father *had* been an active part of his two children's lives.[355] Though the father and mother never married, they had lived together during the early years of their children's lives and the father had contributed to the family's support.[356] After the mother moved in with and then married another man, the couple adopted the children without the biological father's consent. The Court distinguished *Caban* from *Quilloin*, noting the importance it attributed in *Quilloin* to the biological father's "failure to act as a father toward his children."[357] The Court concluded, "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[358] Here, though, because the father had "manifested a significant paternal interest in the child[ren]," the Court held the statute, as applied to these facts, violated the Equal Protection Clause.[359] Though dissenting, Justice Stewart likewise added, "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[360]

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[351] Quilloin v. Walcott, 434 U.S. 246, 248 (1978).

[352] *Id.* at 247.

[353] *Id.* at 256.

[354] *Id.*

[355] Caban v. Mohammed, 441 U.S. 380 (1979).

[356] *Id.* at 382.

[357] *Id.* at 389 n.7.

[358] *Id.* at 392.

[359] *Id.* at 394. Because the Court upheld the father's equal protection claim, the majority did not address his due process challenge. *Id.*

[360] *Id.* at 397 (Stewart J., dissenting). Similarly, Professor I. Glenn Cohen has noted that "[f]or years, sociobiologists argued that adoption was also 'unnatural,'

In the third adoption case, *Lehr v. Robertson*,[361] the Court reinforced the distinction between biological parenthood and functional parenthood. The biological father had not married the child's mother nor participated in the child's life.[362] After the child was born, the mother married another man who adopted the child at age two without notice to the biological father.[363] The biological father filed an unsuccessful petition to vacate the adoption order on due process and equal protection grounds. The Supreme Court rejected both claims, which it noted were based on "the mere existence of a biological link."[364] Rather, an unwed father's parental interests merit constitutional protection only when he "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' . . . ."[365] Additionally, the court noted that if a father fails to "accept some measure of responsibility for the child's future," then "the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."[366]

The Court has applied the biology plus requirement in other parentage contexts, as well. In *Nguyen v. INS*, the Court upheld a statute that granted citizenship to a nonmarital child born abroad if the citizen parent was the mother, but required additional steps if the citizen parent was the father.[367] The Court reasoned that for fathers, the opportunity "to develop a real, meaningful relationship . . . does not result from the event of birth[] as a

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that '[s]ubstitute parents will generally tend to care less profoundly for children than natural parents,' but in fact, 'studies show adoptive parent-child relationships working essentially as well as biological parent-child relationships.'" Cohen, *supra* note 58, at 1153.

[361] Lehr v. Robertson, 463 U.S. 248 (1983).

[362] *Id.* at 252.

[363] *Id.* at 250.

[364] *Id.* at 261.

[365] *Id.* (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)) (alteration in original); *see also* Higdon, *supra* note 183, at 1499.

[366] *Lehr*, 463 U.S. at 262.

[367] 533 U.S. 53, 63 (2001). In 2016, the Court struck down a citizenship statute that had different requirements for married mothers and fathers when only one was a United States citizen. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2016). If the citizen parent was the mother, the child was granted citizenship if the mother had resided in the United States for one year prior to the child's birth. *Id.* If the citizen parent was the father, the child was granted citizenship only if the father lived in the United States for ten years prior to the child's birth, five of which occurring after the age of fourteen. *Id.* Justice Ginsburg noted the statute was based, in part, on the "untenable, assumption[that] pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate . . . ." *Id.* at 1691.

matter of biological inevitability."[368] Similarly, in *Michael H. v. Gerald D.*, the Court upheld California's conclusive marital presumption that recognized the husband as the father, even when the biological father *was* actively involved in his child's life.[369] In doing so, the Court favored purely social parenthood over biology *and* conduct.

Yet, in the context of prospective parenthood, state courts have elevated biology above all other considerations. Or to be more precise, they have elevated a *man's* biological connection above all other considerations—courts have been content to minimize, if not disregard altogether, the woman's biological connections. Stated differently, the Supreme Court has held that a man has no right to be his child's legal parent if he is not involved in the child's life. At the same time, if a man simply does not *want* to be involved in his child's life, state courts give him (in most cases) the right to prevent the other genetic parent from having and raising the child.

As a result, the law presently gives a genetic parent greater rights with respect to embryos than to living children. State courts should take their cue from the Supreme Court's recognition in *Lehr* that "[t]he importance of the familial relationship" does not spring undeniably from biology, but "from the emotional attachments that derive from the intimacy of daily association."[370] This recognition should orient future embryo-disposition jurisprudence toward a presumption favoring the party seeking to use the embryos—the party who is willing to put in the time, effort, and resources to support and nourish the "intimacy of daily associations" over the party who, quite simply, does not want the emotional burden of being an absent parent.

Of course, adoption and embryo-disposition cases are not entirely analogous. For one, because adoption involves fully formed, living children, the children's best interests add another layer of interests that are not present in embryo disputes.[371] Nonetheless, the fathers' rights decisions were not decided based only on the child's best interest; the Court considered the *parent's* interest in each case, as well. Second, courts have been loath to disrupt existing family units, which is not applicable in embryo-disposition cases.[372] Third, in the embryo-disposition context, neither party has in fact

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[368] *Nguyen*, 533 U.S. at 65.

[369] Michael H. v. Gerald D., 491 U.S. 110 (1989). Scholars debate whether this case adds to or chips away at the "biology plus" construct, *see* Higdon, *supra* note 183, at 1501-02, but the case certainly further supports that biology alone—sometimes even *with* parental conduct—cannot outweigh all other interests.

[370] *Lehr*, 463 U.S. at 261.

[371] Caban v. Mohammed, 441 U.S. 380, 400 (1979) (Stewart, J., dissenting) ("It must be remembered that here there are not two, but three interests at stake: the mother's, the father's, and the children's.").

[372] *See, e.g.*, *Lehr*, 463 U.S. at 257 ("state laws almost universally express an appropriate preference for the formal family"); Quilloin v. Walcott, 434 U.S. 246,

acted as a parent. But, as argued earlier, the woman has certainly taken some very real steps (beyond merely having sex) to *become* a parent, and by the very act of transferring the embryos to her uterus, she would be committing to conduct the Court has identified as dispositive—the "care, custody, and management" of her children.[373] By fighting for the right to implant her embryos, she is undeniably expressing her genuine intent and deep interest in acting as a parent—not, like the man in most of these cases, who merely asserts a desire not to do so. In any event, while the Supreme Court cases may be distinguished and are not binding, much of the reasoning remains applicable.

Finally, while the Supreme Court has recognized greater rights for fathers of marital children (whether biological or not) than fathers of nonmarital children,[374] embryo-disposition cases blur the lines between "marital" and "nonmarital." Potential fathers could argue they should be attributed the rights of a "marital father" in cases where the embryos were created while the couple was married.[375] However, such an argument would cut against the argument fathers make in these cases that the embryos should *not* be conferred any sense of personhood until implantation.[376] Moreover, in the Supreme Court cases the fathers were asserting parenthood, not seeking to avoid it (and not denying the other parent parenthood). In embryo-disposition cases, the fathers seek to avoid the very conduct the Court held gave rights to biological fathers. Finally, the Supreme Court noted in *Quilloin* that divorced fathers have greater rights than nonmarital fathers because they "will have born full responsibility for the rearing of his children during the period of the marriage."[377] Here, of course, the father will not have born any rearing responsibility, as the parties will have divorced before the embryo was even implanted. The potential genetic father has never acted, and seeks to never act, as a legal parent.

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255 (1978) ("[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant.").

[373] Stanley v. Illinois, 405 U.S. 645, 645 (1972).

[374] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

[375] To date, nineteen of the twenty appellate cases involved married couples. The exception is Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015).

[376] *See, e.g.*, McQueen v. Gadberry, 507 S.W.3d 127, 143 (Mo. Ct. App. 2016).

[377] *Quilloin*, 434 U.S. at 256.

VIII. Additional Support for a Presumption Favoring Use

Though drowned out by the weight of caselaw, there has been support over the years for a presumption favoring use. As noted above, a few early voices anticipated the direction the law regarding embryo disputes would take and rejected the *Davis* presumption,[378] and a select few courts have likewise urged a more thoughtful, and truly balanced, approach to weighing the parties' interests.[379]

Likewise, in 1997 the American Bar Association ("ABA") Section on Family Law recommended a position that would have flipped the *Davis* presumption. Specifically, the section proposed that absent a prior agreement, the party seeking to proceed with gestation should have priority to frozen embryos, provided that party act "in good faith and in a reasonable time."[380] In that event, the nonconsenting party would be absolved of all parental rights and responsibilities.[381] The section also recommended an exception if the party seeking control is "capable of procreation without the need for additional invasive medical procedures."[382] This recognized that in most (but not all) of these cases, men but not women would still be able to have children "naturally" without the embryos.[383] The section also acknowledged it would be unreasonable to require women to repeat the expense and pain of egg retrieval when viable embryos already exist.[384] At the ABA's 1998 midyear meeting, however, some argued the ABA should not take a position on such personal and controversial issues, and the ABA House of Delegates voted to postpone the resolution indefinitely.[385]

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[378] *See supra* note 26.

[379] Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015); Jocelyn P. v. Joshua P., 250 A.3d 373 (Md. Ct. Spec. App. 2021); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012).

[380] AM. BAR ASS'N, *supra* note 28, at 235. The section took no position regarding the enforceability of contracts that allowed for the *destruction* of the embryos if one party later disagreed. *Id.*

[381] *Id.*

[382] *Id.* This policy added that "[a] party will be presumed to be capable of coital reproduction, if the medical records indicate that the party was capable of coital reproduction at the time of the in-vitro fertilization. The presumption may be rebutted by that party upon a showing that he/she is no longer capable of coital reproduction and/or gestation." *Id.*

[383] *Id.* at 237.

[384] *Id.*

[385] AM. BAR ASSOC., *Proceeding of the 1998 Midyear Meeting of the House of Delegates*, 123 ANNUAL REP. A.B.A. 1, 23-24 (1998). By 1998, the family law section had removed the exception for those able to conceive naturally from the recommendation in the "spirit of cooperation," *id.* at 23, yet the reasoning remained in the comments. More recently, the ABA recommended the contemporaneous

Moreover, countries outside the United States have recognized a party's interest in pursuing gestation in embryo disputes. The Supreme Court of Israel addressed the issue shortly after *Davis*, acknowledged *Davis*, yet awarded the embryos to the woman for her use.[386] The court, in a seven-four decision, reasoned:

> [T]he choice of refraining from parenthood is a possible way of life, which society and the law must respect. However, the choice of parenthood is not just a decision concerning a way of life; it has much greater significance for human existence. It expresses a basic existential need. Moreover, the decision to become a parent also has an element of self-realization, particularly in modern society, which emphasizes self-realization.[387]

In 2007, though holding for a United Kingdom man seeking to avoid parenthood, the European Court of Human Rights noted that Hungary, Austria, Estonia, Spain, Germany, and Italy permit a woman to implant and gestate embryos without the man's consent in various scenarios.[388]

Most notably, Arizona recently became the first U.S. state to explicitly favor the party seeking to use the embryos. A 2018 statute provides that upon divorce or legal separation, the court shall "[a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth."[389] The statute specifically supersedes any agreement by the parties to the contrary.[390] In addition, the statute relieves the non-consenting parent from legal parenthood.[391] Notably, the statute

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consent approach in its 2019 model act. *See* MODEL ACT GOVERNING ASSISTED REPROD. § 501(5)(b) (AM. BAR ASS'N 2019) and *supra* text accompanying note 105.

[386] CivA 2401/95 Nahmani v. Nahmani, 50(4) Isr. L. Reps. 1 (1996) (Isr.).

[387] *Id.* at 40 (quoting Dr. Barak-Erez, *On Symmetry and Neutrality: Reflections on the Nahmani Case*, 20 TEL AVIV U. L. REV. 197 (1996)).

[388] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. ¶ 42 (2007). The court also acknowledged, though, that a party typically may withdraw their consent in Belgium, Denmark, Finland, France, Greece, Iceland, the Netherlands, and Switzerland. *Id.* ¶ 41. Subsequently, The Ireland Supreme Court also considered the issue and held against the woman seeking the embryos' use, though primarily on grounds that the embryos had no right to life. *See* Andrea Mulligan, *Frozen Embryo Disposition in Ireland After Roche v. Roche*, 46 IRISH JURIST 202, 202 (2011).

[389] ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (effective Aug. 3, 2018).

[390] *Id.* § 25-318.03(B).

[391] *Id.* § 25-318.03(C).

gives a party priority even if they did not contribute their own gametes but relied on an egg or sperm donor, provided the couple created the embryos during their marriage.[392] If both parties seek to use the embryos, though, the party who contributed his or her gametes is given priority.[393] If both parties contributed gametes, the court shall award the embryos "in a manner that provides the best chance for the in vitro human embryos to develop to birth."[394]

Unsurprisingly, the statute has been attacked as a backdoor attempt by pro-life advocates to assign personhood to embryos—as one step in their eventual goal to outlaw abortion at any stage.[395] While arguments regarding the frozen embryos' moral and legal status have animated this discussion for years,[396] this attack misstates the statute's fundamental purpose—to protect a potential parent's procreative interests, while also protecting the nonconsenting parent from any responsibility for their former spouse's choice. As one of the statute's authors noted, the law balances "the interests of both spouses. One spouse can have the embryos for the purpose of having children, and the other spouse has no obligation as to any resulting child."[397] While one effect of the statute may be that more embryos are given a greater chance at life, the personhood objection inserts an issue into the statute that is patently outside its plain language. In addition, the statute does *not* prevent the destruction of embryos, provided both parties who contributed the genetic material consent to that, the disposition occurs prior to the divorce,[398] or the parties were not married. Overall, while opponents

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[392] *Id.* Contrast § 25-318.03(A)(3) with § 25-318.03(A)(1). In this respect, the statute is aligned with the 2017 Uniform Parentage Act, which recognizes "intended parents" regardless of biologic connection. UNIF. PARENTAGE ACT §§ 102(13) (defininig intended parent), 703 (parentage of child of assisted reproduction) (UNIF. L. COMM'N 2017). Notably, unlike the Arizona statute, though, the parentage act does not require the parties to be married. *Id.*

[393] ARIZ. REV. STAT. ANN. § 25-318.03(A)(3).

[394] *Id.* § 25-318.03(A)(2).

[395] See generally Emily Morehead, A Push for Personhood Under a New Guise: Arizona's SB 1393, 1 ARIZ. STATE L.J. ONLINE 37 (2019), https://arizonastatelawjournal.org/wp-content/uploads/2020/02/Morehead-Final.pdf [https://perma.cc/4JAP-CXBL]; Mark F. Walsh, Arizona Law Determines Fate of Frozen Embryos in Divorce Cases, ABA JOURNAL ON-LINE (Dec. 1, 2018, 2:20 AM), https://www.abajournal.com/magazine/article/arizona_law_frozen_embryos_divorce [https://perma.cc/7FGL-H56U].

[396] *See, e.g.*, Shirley D. Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 410-15 (2013).

[397] Walsh, supra note 402.

[398] Morehead, supra note 402, at 53.

paint the Arizona statute as anti-feminist, the actual result of the statute will, in many cases, empower women to make their own procreational choices without a veto from their former husband.

Moreover, courts have been unwilling to extend statutory personhood provisions to frozen embryos, even when statutes seemingly provide for that outcome. For instance, a 1987 Missouri statute—enacted three years after the first child had been born from a cryopreserved embryo—provides (1) "the term 'unborn children' or 'unborn child' shall include all unborn child or children . . . from the moment of conception "; (2) "[t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child "; and (3) "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons . . . ."[399] In addition, the legislature passed another statute that same day that defined "unborn children" as "'the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus[.]'"[400] Nonetheless, the Missouri Court of Appeals refused to apply the statutes to an embryo-disposition dispute. The court held that despite the statute's plain language, the legislature could only have intended it to apply to unborn children *in utero*.[401]

Nonetheless, the Arizona statute does have shortcomings. For one, the statute allows no discretion for judges to consider the relative equities of the case. For the reasons above, this Article advances the argument that a presumption favoring use rather than a strict, irrebuttable rule better accounts for all parties' interests. Second, the statute gives little guidance if both parties contributed gametes and seek the embryos to have a child, other than

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[399] McQueen v. Gadberry, 507 S.W.3d 127, 139-40 (Mo. Ct. App. 2016) (citing what is currently MO. ANN. STAT. § 1.205 (West 2021)). The statute was effective January 1, 1988. *Id.* at 139.

[400] *Id.* at 140 (citing what is currently MO. ANN. STAT. § 188.015(10) (West 2021)).

[401] *Id.* at 142-43. Notably, Louisiana has explicitly assigned personhood to embryos and prohibits the intentional destruction of all embryos. LA. STAT. ANN. § 9:129 (West 2021) ("A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person."). In embryo disposition disputes, the statute seemingly signals a legislative intent to grant the embryos to the party seeking to use them. However, while the legislature could have done so, the statute does not explicitly require that a party seeking to gestate the embryos is entitled to do so. Rather, a Louisiana court could, in theory, adopt a contemporaneous consent approach and order the embryos to remain frozen—neither destroyed nor implanted.

to award them "in a manner that provides the best chance for the in vitro human embryos to develop to birth."[402] Are courts to simply favor the ex-wife in such cases if she is capable of carrying a pregnancy, or are judges to make judgments regarding the respective gestational health of the ex-wife versus a surrogate (or, if the ex-wife cannot carry the child, of various potential surrogates)? Third, the statute applies only to "spouses" who undergo a divorce or legal separation. Thus, if an unmarried couple began the IVF process, perhaps (but not necessarily) contemplating marriage, but then separated, the statute would not apply. This limitation presumably expresses the legislature's preference for traditional two-parent homes. However, the statute is specifically intended to apply *at divorce*, after which time the individual seeking use would be single. Thus, this limitation serves no meaningful purpose—the person raising the child would be identically situated to a person who underwent ART with an unmarried partner.[403] Instead, it simply leaves unmarried couples with no clear guidance. Future legislatures, to the extent they adopt the Arizona approach, should extend the rule to all couples, married or not.

IX. Conclusion

Two years before *Davis*, Katharine Bartlett wrote that "our current legal thinking, shaped by an exchange view of parenthood, causes us to focus on an individual parent's achievement, biological contribution, and 'rights,' and thereby to conceive of parenthood in individualistic, possessory terms."[404] She advocated, instead, "that meanings of *responsibility* provide more appropriate norms for the parent-child relationship," including specifically those of single parents who intentionally have nonmarital children.[405] Moreover, she added that "[l]egal disputes over parenthood are an example of how the presentation of claims in terms of individual rights may force controversies into a framework that misstates the harm to be avoided and undermines the values [of parent-child relationships] we should promote."[406]

Though she was not addressing embryo disputes specifically, Bartlett's observations and concerns were apt. Appellate courts have largely

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[402] ARIZ. REV. STAT. ANN. § 25-318.03(A)(2) (2018).

[403] Additionally, because the statute is situated in the divorce statutes, it does not address the potential disposition in the event of the death of either partner, a topic I will be exploring in a forthcoming article.

[404] Bartlett, *supra* note 185, at 337 (emphasis added).

[405] Bartlett, *supra* note 185, at 337.

[406] Bartlett, *supra* note 185, at 295-96.

viewed embryo disputes as conflicts of individualistic, possessory rights stemming purely from biology, ignoring entirely the relational interests of the party seeking use. In doing so, courts have both misstated and overemphasized the cognitive harm to be avoided, privileging the party who simply seeks the status quo. Yet, this concurrently denies the other who is committed to the physical, mental, emotional, and financial sacrifices and investments necessary to experience a parent-child relationship. It denies the party who is willing to build *into the life of another* through highs and lows, month after month, year after year through the "intimacy of daily associations."[407] Indeed, when balancing interests, *those* are the societal values courts should be promoting.

In those eight states with supreme court decisions on this issue, it may take legislation to reverse the trend. In the remaining states, though, judges will be free to take a fresh look at the issue and chart, or redirect, their state's course. As they do so, this Article has attempted to shift their perspective, to bring to light potentially underlying biases, and to challenge judges not simply to whittle the issue down to purely genetic parenthood, but to truly consider one's interests in all aspects of parenthood. And in doing so, they will join the greater trend in family law that prioritizes relationship over biology, commitment over inconvenience.

In *Stanley v. Illinois*, the Supreme Court observed that "presumption is always cheaper and easier than individualized determination. But when, as here, the [presumption] forecloses the determinative issues of the competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[408] Indeed, the *Davis* presumption has done just that, foreclosing meaningful consideration of *both* parties' interests in deference to outdated understandings of parental priority. While this Article suggests a competing presumption, the purpose is not to foreclose thoughtful deliberation—I believe it is necessary specifically to *force* it. The point is not to swing the pendulum to the other extreme, but to ensure that judges appreciate that bias may have shaped the embryo-disposition jurisprudence to date, require them to consider their own potential biases, and then to actually articulate the parties' respective interests—not treating one party's interests as self-evident while ignoring the other's interests altogether. Only by doing this can one truly weigh the parties' respective interests. As a result, the law will no longer defer to men's subjective experience as objective truth; rather, it will take one more small

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[407] Lehr v. Robertson, 463 U.S. 248, 261 (1983).
[408] Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

step in its long march toward treating all parties' interests with equal weight and respect.

TABLE IV. FAVORABLE RULINGS FOR RESPECTIVE PARTIES IN EACH COURT AND GENDER OF JUDGES

Highlighted cells reflect outcomes favorable for the man

Case	Trial Court	Intermediate Appellate	Highest Court	Gender of Judges (bold indicates author)
Cases in Which Female Seeks Embryos to Use for Own Reproduction				
Davis Tennessee 1990	Wife Unanimous right to party seeking to bring embryos to term	Husband (Reversed) Adopted mutual consent approach	Husband (Affirmed) Adopted contract/best interests approach (with presumption favoring non-use)	Trial: Man Intermediate: 3 men Highest: 4 men; 1 **woman**
Kass N.Y. 1996	Wife Held right to party seeking to bring embryos to term	Husband (Reversed) Enforced contract with IVF facility to donate to facility	Husband (Affirmed) Enforced contract	Trial: Man Intermediate: Majority: 2 men; Concurrence: 1 man Dissent: 1 man, 1 woman Highest: 5 men, 2 **women**
A.Z. Mass. 2000	Husband Declined to enforce contract; balanced interests for husband		Husband (Affirmed) Noted contracts permitting use against public policy.	Trial: Man Highest: 4 men, 3 women
Witten Iowa 2003	Husband Declined to enforce contract; adopted mutual consent approach		Husband (Affirmed)	Trial: Man Highest: 6 men, 1 **woman**

Roman Texas 2006	Wife Declined to enforce contract permitting husband to discard embryos upon divorce	Husband (Reversed) Enforced contract		Trial: Woman Intermediate: 2 men, 1 **woman**
Reber Penn. 2012	Wife Found no contract, balanced interests	Wife (Affirmed) Balanced interests		Trial: Man Intermediate: 2 men, 1 woman
Szafranski Illinois 2015	Girlfriend Enforced oral agreement; also if balanced interests	Girlfriend (Affirmed) Proper under both contract and balancing interests		Trial: Woman Intermediate: Majority: 1 man, 1 **woman**; Dissent: 1 man
McQueen Missouri 2016	Husband Ignored IVF facility agreement; adopted mutual consent approach	Husband (Affirmed) No valid contract; mutual consent approach appropriate.		Trial: Man Intermediate: Majority: 1 man, 1 woman; Dissent: 1 man
Rooks Colorado 2018	Husband Gave to husband under both contract and balancing approach	Husband (Affirmed) No valid contract; but affirmed after balancing interests	Remanded Trial and appellate courts considered improper factors	Trial: Man Intermediate: 1 man, 2 **women** Highest: Majority: 1 man, 3 **women**; Dissent: 3 men
Finklestein N.Y. 2018	Wife Contract unclear, balanced interests	Husband (Reversed) Enforced IVF facility contract permitting husband to w/d consent	-	Trial: Woman Intermediate: 4 men, 1 woman
Terell Arizona 2020	Husband Balanced interests; right not to procreate	Wife (Reversed) Vacated decision and gave to wife under balancing	Husband (Reversed) Enforced contract requiring mutual consent.	Trial: Woman Intermediate: Majority: 1 man, 1 woman; Dissent: 1 woman Highest: Six men, 1 **woman**

Jocelyn P. Maryland 2021	Husband IVF contract required mutual consent; also balanced interests	Remanded IVF contract not binding, remand to see if oral contract, if not, rebalance interests	-	Trial: Man Intermediate: 2 men, 1 **woman**
Jessee Virginia 2021	Wife Balanced interests for wife	Remanded No controlling agreement; Remand to rebalance interests (trial record insufficient)	-	Trial: Man Intermediate: 2 men, 1 **woman**
Cases in Which Female Seeks Embryos to Discard Embryos				
J.B. New Jersey 2001	Wife Balanced interests – husband still fertile	Wife (Affirmed) Noted contracts permitting use against public policy.	Wife (Affirmed) Enforce K's subject to right of either party to change mind; then balance interests.	Trial: Man Intermediate: 3 Men Highest: 4 men, 3 **women**
Dahl Oregon 2008	Wife Enforced IVF facility contract providing for discard of embryos	Wife (Affirmed) Enforced contract	-	Trial: Man Intermediate: 2 men, 1 woman
Cwik Ohio 2011	Wife Enforced IVF facility contract providing for custody to wife	Wife (Affirmed) Enforced contract	-	Trial: Woman Intermediate: 2 men, 1 woman
Rucker Minnesota 2016	Wife Enforced IVF facility contract providing for custody to wife.	Remanded Trial court misread terms; specifically took no position on approach	-	Trial: Woman Intermediate: 2 men, 1 **woman**

Guardado Wash. 2018	Wife In contract parties delegated decision to court; court then balanced interests.	Wife (Affirmed)	-	Trial: Woman Intermediate: **1 man, 2 women**
Fabos Colorado 2019	Wife No contract; balanced interests and allowed wife to donate to another couple.	Remanded Remand to rebalance interests (trial court improperly balanced wife's moral views)	-	Trial: Man Intermediate: 3 men
Bilboa Conn. 2019	Wife Consent form not a contract; balanced interests	-	Wife (Affirmed) Technically reversed but enforced contract granting wife right to discard	Trial: Man Highest: 6 men, 1 woman