

THE PARENT TRAP: UNCOVERING THE MYTH OF “COERCED PARENTHOOD” IN FROZEN EMBRYO DISPUTES

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When William and Janine married they both knew that they wanted to have a family. After several years of childlessness, they visited the Fairfield Fertility Center and attempted in vitro fertilization. Three embryos were implanted and an additional three were cryopreserved for future implantation efforts. Janine became pregnant but miscarried after six weeks. Several months later she was diagnosed with ovarian cancer. Janine received radiation therapy, which successfully treated her cancer but impaired her ability to produce additional viable eggs. Shortly thereafter, William filed for divorce.

William and Janine are able to agree about the disposition of all their assets except one—the frozen embryos. William wants them destroyed. He does not want to be a parent to any children who might result. Janine wants to implant the embryos and she is willing to assume full social and financial responsibility for the children. The embryos are, she states, her best and likely last chance at genetic parenthood. While sympathetic to Janine's parental impulses, the trial court follows existing precedent, which seeks, above all, to avoid creating unwanted genetic links between adults and potential biological children. The court orders the embryos destroyed.

INTRODUCTION

Developments in the highly refined arena of assisted reproduction pose legal puzzles that force a re-examination of concepts we thought that we understood. The disaggregation of gestational, genetic, and child-rearing functions challenges us to think more deeply about the creation of maternal, paternal, or familial status.¹ Active trading in

1. Compare *In re Baby M*, 537 A.2d 1227 (N.J. 1988), with *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), and *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994). In *Baby M*, the New Jersey Supreme Court invalidated a traditional surrogacy contract, refusing to terminate ties between the woman and the child conceived by her egg and through her gestational services. In that case, the contractual intent that another woman and the child's biological father raise the child did not govern. *Baby M*, 537 A.2d at 1240. In *Johnson*, the California Supreme Court upheld a gestational surrogacy arrangement on the grounds that the biological mother's intention to rear the child trumped the surrogate's claim, which was based solely on the surrogate's provision of gestational services. 851 P.2d at 781-82. In *McDonald*, sperm of the

the egg,² sperm,³ and womb markets⁴ and the growth of designer families force us to rethink the assumption that blood is thicker than contractual ink.⁵

husband was used to fertilize a donated egg that was later implanted in the wife's womb. Following separation, the father demanded custody of the child on the grounds that he was the only parent genetically related to the child. The court, however, cited the *Johnson* language that notes that gestational and biological relationships constitute equivalent claims to parentage, which could be strengthened by a showing of the intent to parent. Because the gestational mother also possessed the intent to rear the child, the court declared her the natural mother and granted her custodial rights to the child. *McDonald*, 608 N.Y.S.2d at 479-80; *Johnson*, 851 P.2d at 782.

2. An online egg donor and embryo adoption program directory lists sixteen programs across the country, with more worldwide. For instance, the Reproductive Specialty Center offers \$6,000 for the eggs of intelligent and talented women between the ages of eighteen to thirty. REPRODUCTIVE SPECIALTY CENTER, at <http://www.drury.com/needed.htm> (last visited June 28, 2004) (on file with the American University Law Review). Another egg donation company, Fertility Alternatives, Inc., offers an "exceptional donors" roster, where donors of diverse ethnic heritage and academic achievement auction their genetic material for as much as \$10,000. FERTILITY ALTERNATIVES, INC., EGG DONOR AND SURROGATE DATABASE, at <http://www.faeggonors.com/exceptional8.html>.

3. Online sperm directories list eighty-eight sperm banks across the United States, including specialized repositories targeting donors of particular ethnicity, intellectual prowess, and privacy inclinations. For example, Rainbow Flag Health Services actively recruits gay and bisexual donors. RAINBOW FLAG HEALTH SERVICES, at <http://www.gayspermbank.com> (last visited June 28, 2004) (on file with the American University Law Review). Repository for Germinal Choice in California, commonly referred to as the Nobel Prize Sperm Bank, aims to improve humanity "by increasing the proportion of advantageous genes in the human gene pool." REPOSITORY FOR GERMINAL CHOICE, at <http://www.princeton.edu/~wws320/Second%20Pages/05Infertility/artificial%20insem/Nobel%20Sperm%20Bank/topRGC.htm> (last visited Apr. 9, 2004) (on file with the American University Law Review). Pacific Reproductive Services in California offers sperm donors who are "willing-to-be known" for the child's biological heritage. PACIFIC REPRODUCTIVE SERVICES, at <http://www.hellobaby.com> (2003) (on file with the American University Law Review). New England Cryogenic Center screens all sperm donors for objective factors, such as health and age, as well as for subjective factors, such as intelligence, physical characteristics, looks and personality. NEW ENGLAND CRYOGENIC CENTER, at <http://www.necryogenic.com> (2000) (on file with the American University Law Review). The Fairfax Cryobank Sperm Storage for the Cancer Patient in Washington, D.C., Virginia, and Texas caters to cancer patients who wish to preserve sperm prior to undergoing chemotherapy. FAIRFAX CRYOBANK, at <http://www.fairfaxcryobank.com> (last visited June 28, 2004) (on file with the American University Law Review).

4. See Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 84-86, 88-89 (2002) (critiquing the recruitment of "blue ribbon" egg donors for its "oppressive medical paternalism" and advocating curtailing egg donation as "violative of basic social justice norms").

5. A person who has neither donated gametes nor performed gestational services may, nevertheless, become a parent by intent or by virtue of having caused the conception of a child. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Cal. Dist. Ct. App. 1998) (holding that when a husband consents to the procreation of a child through modern reproductive technology, he causes the conception "every bit as much as if things had been done the old-fashioned way"); see also Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602-40 (2002) (noting the complexities with which the courts must wrestle in determining the legal rights of mothers and surrogate

Technologies, such as intra-cytoplasmic mitochondrial transfer, that allow for the transfer of some, but not all, of a party's genetic material, similarly require analysis of the nature of kinship—this time at the cellular level.⁶ The cloning techniques that produced Dolly the Sheep and other animal replicas have led us to ponder the difference between procreation and replication,⁷ and the significance of a return to asexual reproduction.⁸ In much the same way, the frozen

parents); Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 236, 245 n.135 (1998) (pointing out that donations to a fertility clinic produced genetic siblings that were then given to different couples). See generally John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 533-38 (2001) (outlining the possible combinations of a fetus' genetic material resulting from the donations of a husband, wife, or other donor). At least one commentator has criticized the notion of intent-based parenting, arguing that it expressly requires a reliance on principles of contract, thereby rejecting traditional notions of family formation. See Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1310-14 (1994) (noting the failure of American jurisprudence to keep up with issues surrounding reproductive technology).

6. The majority of a cell's genetic material is contained in the nucleus. However, a minor fraction of genetic material is found in cytoplasmic structures known as mitochondria, which play a central role in metabolism. During fertilization, the DNA of the sperm and the egg will merge to form the nuclear genetic material of the oocyte. However, the DNA of the mitochondria will be inherited exclusively from the mother to the offspring through the cytoplasm of the fertilized egg. In cases where the mitochondrial DNA encodes a dysfunctional gene, the faulty gene is always inherited and may cause disease in both the mother and her children. To prevent the transfer of the dysfunctional gene to future generations, the mother's nuclear DNA may be transferred from her egg to the egg of a healthy donor through the extraction and injection of the entire nucleus. A donor of cytoplasm will thus make a contribution to the child's genetic composition, thereby achieving partial genetic parenthood. Because the mitochondrial DNA is transferred in its entirety from mother to child, the donor's DNA will be passed on in an unmodified form to future generations. Therefore, the claim to genetic parenthood will be relatively weak if the amount of the donor's DNA is considered but will be much stronger if the future impact of the donation is taken into consideration. See John A. Robertson, *Oocyte Cytoplasm Transfers and the Ethics of Germ-Line Intervention*, 26 J.L. MED. & ETHICS 211, 212-16 (1998) (discussing the potential of oocyte cytoplasm transfers as a means for overcoming infertility).

7. See George J. Annas, *Human Cloning: Should the United States Legislate Against It?*, 83 A.B.A. J. 80, 80 (1997) (stating that "[c]loning is replication, not reproduction, and represents a difference in kind, not in degree, in the way humans continue the species"); see also Lori Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 60 (2000) (urging for a ban on cloning because "[t]he notion of replicating existing humans seems to fundamentally conflict with our legal system, which emphatically protects individuality and uniqueness"); Lori Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 667-70 (1998) (arguing that the potential physical and psychological risks of reproductive cloning are sufficiently compelling to justify banning cloning altogether).

8. Leon R. Kass, *The Wisdom of Repugnance*, 216 NEW REPUBLIC 17, 21 (1997) (noting that "[a]sexual reproduction, which produces 'single-parent' offspring, is a radical departure from the natural human way, confounding all normal understandings of father, mother, sibling, grandparent, etc., and all moral relations tied thereto").

embryo cases require that we look closely at rights and interests that have been present in our legal vernacular for many decades.

The frozen embryo cases arise out of the marital dissolution of couples who, while together, pursued fertility treatment and cryopreserved extra preembryos⁹ for future implantation attempts.¹⁰ When, upon divorce, these couples disagree as to what should be done with the frozen embryos, the courts must assess and weigh the competing reproductive interests of each spouse. In these cases, the right to procreate is pitted squarely against the right to avoid procreation.

Although courts have deemed the rights to procreate and to avoid procreation “fundamental” and of “constitutional significance,” these designations attached in cases in which the state threatened to encroach on intimate personal and familial decision-making.¹¹ In the

9. The frozen embryo cases generally refer to the subject of the litigation as either pre-zygotes or preembryos. Pre-zygotes are defined as, “eggs which have been penetrated by sperm but have not yet joined genetic material.” *Kass v. Kass*, 696 N.E.2d 174, 175 n.1 (N.Y. 1998). Preembryos are defined as “that stage in human development immediately after fertilization occurs. The preembryo ‘comes into existence with the first cell division and lasts until the appearance of a single primitive streak, which is the first sign of organ differentiation. This [primitive streak] occurs at about fourteen days of development.’” *In re Litowitz v. Litowitz*, 48 P.3d 261, 262 n.2 (Wash. 2002) (citing Donna Katz, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding which Party Receives Custody of Preembryos*, 5 VA. J. SOC. POL’Y & L. 623, 628-29 n.42 (1998) (internal citations omitted).

10. See generally *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (involving a custody battle over a couple’s seven frozen embryos); *Kass*, 696 N.E.2d at 181-82 (holding that, after entry of divorce, the previous agreements regarding the custody of pre-zygotes remained valid); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (holding that the former wife of the appellant had a fundamental right not to procreate); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (prohibiting a wife to utilize frozen embryos); *Litowitz*, 48 P.3d at 261 (ordering the disposition of preembryos upon the dissolution of marriage). Additional cases in which divorcing couples have tussled over frozen embryos exist. See, e.g., *Bohn v. Ann Arbor Reprod. Med. Assoc.*, No. 213550, 1999 WL 33327194 (Mich. App. Dec. 17, 1999) (noting that the embryos would remain frozen and in the possession of the reproduction clinic until the couple had resolved the disagreement); *Wendel v. Wendel*, No. D-191962 (Ohio C.P. Dom. Rel. Ct. July 21, 1989). See *John Robertson*, 51 OHIO ST. L.J. 407, 411 (1990). However, this Article will limit discussion to those cases that have percolated through the state courts and that have resulted in state supreme court decisions.

11. The constitutional rights to achieve and to avoid procreation are characterized by longstanding histories and fuzzy borders. Since the early part of the last century, Supreme Court opinions have affirmed the importance of individual aspirations in the domestic sphere. However, the exact reach of the constitutional protection accorded these aspirations remains unclear.

The right to avoid procreation was recognized initially as a right possessed by the state in its *parens patriae* power to secure the public health. In the notorious 1927 case of *Buck v. Bell*, the Supreme Court upheld a Virginia statute authorizing the sterilization of “mental defectives.” 274 U.S. 200, 205 (1927). Writing for the Court, Justice Holmes opined, “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Id.* at 207. The individual’s right to determine, without interference, his or her own reproductive

frozen embryo cases, couples do not challenge state law's intrusion into their private sphere of decisional autonomy. Rather, the state is called upon to mediate a dispute between individuals with conflicting reproductive desires. In this posture, the three-tiered analytical structure reserved for governmental incursions on individual rights does not apply. Courts are therefore unencumbered by the constraints of the strict scrutiny test and the elasticity of the rational-

course received more considered reflection in *Griswold v. Connecticut*, in which the Supreme Court held that constitutional privacy protected a married couple's use of birth control measures. 381 U.S. 479, 505 (1965). Seven years later in *Eisenstadt v. Baird*, the Court held that the privacy interest in determining "whether to bear or beget a child" exists for unmarried and married persons alike. 405 U.S. 438, 453 (1972). Expanding upon these earlier delineations of a "right of privacy," the Supreme Court held the right "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

At the opposite end of the procreation spectrum, the genealogy of the right to procreate is commonly traced to *Meyer v. Nebraska*, a 1923 case in which the Supreme Court affirmed the due process clause's protection of the individual right "to marry, establish a home and bring up children." 262 U.S. 390, 399-403 (1923). The lineage continues with *Pierce v. Society of the Sisters*, which struck down a law that required parents to send their children to public school as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. 510, 534-35 (1925). Several decisions further strengthen the constitutional status of the right to procreate: *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), which struck down, on equal protection grounds, a criminal statute authorizing the sterilization of thrice-convicted felons, and declaring "[m]arriage and procreation [to be] fundamental to the very existence and survival of the race;" *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which found that restricting the freedom to marry solely because of racial classifications violated the central meaning of the equal protection clause and deprived persons of their liberty without due process of law; and *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), which found that parents have a constitutionally protected due process right to a fitness hearing before children are removed from their custody. Cases involving state restrictions on collaborative reproduction using Assisted Reproductive Techniques ("ARTs") have suggested that the constitutional right to procreate extends to in vitro fertilization and artificial insemination. See *Gerber v. Hickman*, 291 F.3d 617, 631 (9th Cir. 2002) (holding that a prisoner had the fundamental right to reproduce via nonsexual means, such as artificial insemination); see also *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990) (finding that a statute limiting the sale of and the experimentation on a fetus produced by asexual means impermissibly restricts a woman's fundamental right to make reproductive choices free of governmental interference); *In re Baby M*, 537 A.2d 1227, 1250-56 (N.J. 1988) (holding that the fundamental right to reproduce includes the right to use ARTs such as artificial insemination to produce, though not to raise exclusively, a child).

Media flashes detailing break-through cloning efforts continue to prompt extensive commentary as to whether the right to procreate includes the right to clone. See Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 ALB. L. REV. 625, 627-29 (2002) (comparing the judicial treatment of traditional sexual reproduction with the treatment of assisted reproductive techniques such as in vitro fertilization and cloning); see also George J. Annas et al., *Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J.L. & MED. 151, 173 (2002) (proposing the prohibition of all efforts to initiate a pregnancy by using either intentionally modified genetic material or human replication cloning).

relation test.¹² In this analytical tabula rasa, the courts must peer behind the labels and more deeply assess the values and interests embodied in these countervailing rights.

The five state supreme courts that have ruled on frozen embryo disputes have signaled that the right to avoid procreation requires greater legal protection than does the right to procreate.¹³ In reaching this conclusion, the courts have emphasized the negative right to be free of unwanted familial relations. This right, in the courts' views, supersedes the interest in forging important familial connections and in achieving genetic parenthood.

Judicial discussion of the burdens of "unwanted parenthood" is both terse and Delphic.¹⁴ Nonetheless, what emerges is a judicial presumption that the existence of a biological tie precipitates strong psychological ties.¹⁵ That is, the courts assume that the objecting spouse will, by virtue of biology, be psychologically connected to any children that might result from the embryos created with the ex-spouse. If the embryos are brought to term, the courts surmise that the objecting spouse will face two equally unpalatable options. The strength of the parental bond will lead the spouse either to pursue a

12. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1123 (1998) (arguing that the constitutional right to privacy protects relationships, not individuals, and that, once "individuals involved in reproduction are at odds, then the right of relational privacy fails to insulate them . . . from [either] the state or from the claims of one another").

13. See *infra* note 14.

14. See *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *In re the Marriage of Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). Out of these five state supreme court opinions, only the *Kass*, *J.B.*, and *Davis* courts mentioned the burdens of unwanted parenthood. However, even those opinions dealt very briefly with the subject. The *J.B.* court mentioned briefly the burdens of unwanted parenthood three times in its opinion. 783 A.2d at 711, 716-19. The *Davis* court delved into the subject of unwanted parenthood slightly further when discussing Mr. Davis's wish to avoid parenthood as a divorcee. 842 S.W.2d at 603-04. Academic commentary on these cases also gives short shrift to this topic.

Numerous articles engage the general question of whether and under what conditions dispositional agreements should be enforced. See Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 900 (1999) (noting that contracts can play an important role in determining the legal rights of parents and donors concerning embryos); see also Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. 1, 2 (2003) (discussing the use of contracts to resolve embryo disputes). Others consider whether courts are correctly siding with the party seeking procreation-avoidance. Compare Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 71 (1999) (agreeing that courts should grant the party seeking procreation-avoidance an automatic veto), with Judith Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J.L. MED. & ETHICS 197, 199 (2001) (disagreeing with the grant of an automatic veto).

15. See *infra* Part I.

social relationship with the resulting child, thereby drawing time, energy, and psychological resources away from relationships and endeavors that better reflect the spouse's autonomous choice, or to turn away from the child and to suffer a permanent and agonal sense of loss.¹⁶

Although other factors influence the courts' stance, the concern for the psychological welfare of the objecting spouse appears to be the engine driving frozen embryo jurisprudence. To be sure, the courts have not ignored the potential financial obligations facing the objecting spouse.¹⁷ While the disputing spouse could reach a private agreement to release the objecting spouse from support obligations, such a contract would not be enforceable.¹⁸ On the other hand, in a number of cases, a two-parent couple had planned to adopt any frozen embryo brought to term, and thus, the objecting spouse would have been released from financial responsibility.¹⁹ In those cases, the courts were concerned with the serious burden that unwanted parenthood would impose. These burdens, it seems clear, rest in the disruption and attenuation of psychological attachments brought into being by genetic relation. Biology, according to the courts, catalyzes this psychological attachment, and psychological parenthood constitutes the biological parent's destiny.²⁰

Although embraced by the courts, this account of parenthood is belied by the widespread phenomena of paternal disengagement, as well as by the long-standing practice of sperm donation. Empirical investigations into both of these social practices suggest that parenthood—or at least fatherhood—is, in large part, socially constructed rather than biologically pre-determined.

Inquiries into the causes and effects of “the disappearing American father” reveal that the development of a paternal self-concept is shaped by a confluence of exogenous factors. Residential proximity, relationship with the child's mother, familial and community norms, age, and maturity all play a role in determining whether genetic ties evolve into social relationships.²¹ Additionally, surveys of sperm

16. See *infra* Part II.

17. See *infra* Part I.

18. See *Grijalva v. Grijalva*, 310 S.E.2d 193, 197 (W. Va. 1983) (finding that “[t]he continuing jurisdiction of a circuit court over child support is based on the axiomatic proposition that parents cannot contract away the rights of their children”).

19. See *J.B. v. M.B.*, 783 A.2d 707, 710 (N.J. 2001) (noting M.B. intended to donate the frozen embryos to childless couples); see also *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992) (acknowledging that Mrs. Davis wished to donate the frozen embryos to childless couples).

20. See *infra* Part I.

21. See *infra* Part II.

donor attitudes and motivation reveal that the genetic links between donors and offspring do not typically inspire psychological bonds.

Similar neglect of relevant data produces other distortions in the courts' analysis. Inattention to the impediments hindering the pursuit of parenthood through adoption or Assisted Reproduction Techniques ("ARTs") leads courts to undervalue the interest in achieving procreation through the use of existing frozen embryos. A number of judges have suggested that existing frozen embryos should almost never be used over one spouse's objection because the spouse seeking parenthood can always adopt children.²² In the same vein, other judges have suggested that alternative efforts at ARTs should be attempted before the existing embryo is released for use. In so doing, these courts fail to acknowledge the physical and the emotional trauma inherent in hormonal stimulation and egg extraction, as well as the considerable challenges faced by older single women in attempting to achieve parenthood through adoption.

Further consideration of the hardships forced upon women when existing embryos are ordered destroyed strengthens the argument in favor of increased deference to the interest in using existing embryos. Moreover, the fragile correspondence between biological ties and social and psychological parenthood buttresses the argument against according paramount status to the genetic progenitor's interest in avoiding genetic links. A woman's investment in existing embryos as a path to parenthood is dramatically context contingent. So, too, is a man's propensity to psychologically attach to the offspring of former marriage partners. Presumptions, in favor either of avoiding procreation or of achieving it, are unwarranted. Instead, the courts should assess frozen embryo cases on their facts while considering both the woman's reliance interest in existing embryos and the presence of factors that predict parental disengagement and withdrawal. While a multi-factored consideration of each parent's interests challenges courts to adopt a more complex decision-making process, consideration of social science insights, as well as the harsh biological reality facing older would-be mothers would result in a more nuanced, more insightful, and, ultimately, fairer treatment of competing reproductive interests.

This Article proceeds as follows: Part I of this Article briefly surveys the frozen embryo cases that have resulted in state supreme court

22. *Kass v. Kass*, 663 N.Y.S.2d 581, 593 (N.Y. App. Div. 1997) (Friedmann, J., concurring), *aff'd*, 696 N.E.2d 174 (1998); *Davis*, 842 S.W.2d at 604.

ruling, pointing out the courts' heavy emphasis on the right to avoid procreation and their ready dismissal of the interest in genetic parenthood. Part II discusses the contingent nature of psychological parenthood, drawing first on studies relating to paternal disengagement, and second on data exploring sperm donor attitudes toward donation and offspring. Part III explores the investments that women likely have in existing embryos and the lack of alternative reproductive options that exist for single, older women. This part argues that the burdens of "forced parenthood"—usually claimed by men—are not sufficiently weighty, and that the investments of the procreation-seeking party—usually the woman—are not sufficiently weak to justify existing judicial treatment. This Article concludes by arguing that wholesale presumptions in this arena are unsound and offers a framework for courts to use in weighing and prioritizing the conflicting interests of the parties. While eliminating presumptions introduces a degree of uncertainty, such uncertainty is the price to be paid for more nuanced assessments. Furthermore, the use of guidelines will confine uncertainty to acceptable levels, while allowing for thoughtful consideration of the strength of competing reproductive interests.

I. THE CASES

A. *In re the Marriage of Litowitz v. Litowitz*²³

Although beginning the analysis with the *Litowitz* case defies chronology, it aptly illustrates the result-oriented jurisprudence of this body of case law. In *Litowitz*, Becky and David Litowitz sought the assistance of an egg donor to create embryos fertilized with Mr. Litowitz's sperm.²⁴ Upon divorce, Becky Litowitz sought possession of the embryos in an effort to augment her post-divorce family.²⁵ The trial court looked solely at the "best interests" of the embryos and awarded them to Mr. Litowitz, ordering him to donate them to an infertile couple as Mr. Litowitz had requested.²⁶ According to the

23. 48 P.3d 261 (Wash. 2002).

24. *Id.* at 262.

25. *Id.* at 264.

26. *Id.* Many commentators argue that the "best interest test" is indeterminate and allows judicial reasoning to be influenced by interests apart from the child's. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 4-11, 29 (1987) (noting the indeterminacy of the test and arguing that parental interests should be included in the analysis); see also David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 569 (1984) (recommending a search for alternatives to the "best interest test," such as encouraging negotiation and mediation services); Katharine T. Bartlett, *Children and*

court, awarding the embryos to Mrs. Litowitz would not have been in the resulting child's best interests because then the child would have been raised by someone single, divorced, and old.²⁷ Instead, the court ordered the preembryos to Mr. Litowitz "with orders to use his best efforts for adoption to a two-parent, husband and wife family outside the State of Washington."²⁸

The Washington Appellate Court affirmed the result but focused on the procreational rights of the couple rather than the interests of the embryos.²⁹ The court held that Mrs. Litowitz's right to procreate did not encompass possessory rights to a preembryo to which she donated no genetic material.³⁰ Because only Mr. Litowitz could claim a genetic link to the preembryos, he was granted sole dispositional authority to "dispose of the preembryos as he chooses."³¹

Like other courts,³² the Washington Appellate Court was unwilling to force Mr. Litowitz to become a father.³³ However, the court found that financial and psychological ties are created by "the long-term obligations of parenting, [and] not the brief act of procreating."³⁴ In other words, the court advanced a conception of parenthood that emphasized social roles rather than biological ties. It assumed that Mr. Litowitz would not suffer a sense of loss when separated from a child whom he helped conceive but would not raise. Working with a functional rather than a biological status-based definition of parental self-concept, the court was confident that those who perform parental activities would feel parental bonds, while those who do not perform such activities would feel a less compelling level of attachment. By adopting a more context-dependent position on parenthood than the trial court, the appellate court determined that it could preserve

Divorce: Custody and Support Issues, 35 WILLAMETTE L. REV. 467, 482 (1999) (arguing that the "best interest test" is not the best for children because "the child's best interests cannot be determined by comparing alternatives against a set of substantive state-prescribed norms").

27. *Litowitz v. Litowitz*, No. 97-3-00195-1 (Sup. Ct. Pierce County Dec. 11, 1998) (stating that either "the child would be a child of a single parent [and not] have an opportunity to be brought up by two parents . . . [or] the child may have a life of turmoil as the child of divorced parents" and noting that "both parties are old enough to be the grandparents of any child, and that is not an ideal circumstance").

28. *Id.*

29. *Litowitz v. Litowitz*, 10 P.3d 1086, 1092 (Wash. App. 2000), *rev'd*, 48 P.3d 261 (Wash. 2002).

30. *Id.*

31. *Id.* at 1093.

32. *See, e.g., J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (holding that a spouse had the fundamental right not to become a parent).

33. *Litowitz*, 10 P.3d at 1091.

34. *Id.* at 1092.

Mr. Litowitz's right to avoid unwanted parenthood if the embryos were donated to an out-of-state couple for adoption.³⁵

The Washington Supreme Court did not agree. Though it did not directly address the question of what the right to procreate entails, the court supplied its own definition of what the right to avoid procreation requires. Because preserving the right to avoid procreation means that the embryos do not advance toward birth, the court ordered the embryos destroyed. Despite the fact that neither party sought destruction of the embryos, the court side-stepped the question of what constitutes parenthood by finding that the Litowitzes' signed cryopreservation documents demanded the embryos be thawed.³⁶

Given Becky Litowitz's zealous battle for ownership, the court's reading is peculiar. The cryopreservation documents only authorized embryo destruction if the embryos were no longer "wanted or needed."³⁷ Additionally, the couple agreed elsewhere in the documents that if they were unable to decide what should be done with the embryos, they would petition a court for instructions.³⁸ Inexplicably, the Washington Supreme Court found that provision inapplicable.³⁹

The court's contrived reading of the fertility clinic forms reveals its determination to reach the desired goal of embryo destruction. The Washington Supreme Court never proclaimed its aim to protect Mr. Litowitz's right to avoid unwanted family ties.⁴⁰ However, its insistence on the embryos' destruction, when neither party was so requesting, reveals a reluctance to recognize a genetic link incapable of developing into social and psychological parenthood.

Although the *Litowitz* opinion is perhaps the most transparent of the frozen embryo cases, it is merely the last in a line of result-oriented cases. With varying degrees of insincerity and ingenuity, the courts have actively worked to avoid creating unwanted genetic ties. They have stressed the burdens of "forced parenthood" while dismissing the hardships associated with creating existing embryos

35. *Id.* at 1092-93.

36. *In re the Marriage of Litowitz v. Litowitz*, 48 P.3d 261, 271 (Wash. 2002) (stating that "[i]t is not necessary to engage in a legal, medical or philosophical discussion whether the preembryos . . . are 'children,' nor whether [the wife] (who was not a biological participant) is a progenitor as is [the husband] (who was a biological participant). We base our decision . . . solely upon the contractual rights . . . under the preembryo cryopreservation contract").

37. *Id.* at 263-64.

38. *Id.* at 263.

39. *Id.*

40. *Id.*

and the hurdles blocking the way to parenthood through other means. This tradition of over-valuing procreation-avoidance and under-valuing interests both in existing embryos and in the parental experience began in 1992 with the celebrated *Davis v. Davis*⁴¹ case.

B. *Davis v. Davis*

Davis was the first case of its type to reach a state supreme court. After years of infertility efforts, the Davises had cryopreserved seven preembryos but had not achieved a successful pregnancy.⁴² When they divorced, the husband, Mr. Davis, sought destruction of the embryos, while the wife, Mrs. Davis, sought to donate the embryos to a childless couple.⁴³ Because the couple had not entered into any agreements regarding embryo disposition, the court's holding focused entirely on the parties' conflicting rights to attain or avoid genetic parenthood.⁴⁴

The *Davis* opinion illustrates the power of facts to propel analyses in directions that will likely cause future mischief. The court began its analysis by declaring the legal and moral equivalence of the rights to achieve or refrain from procreation.⁴⁵ Because of this equivalence, the court eschewed bright-line rules in favor of a balancing test that considers "the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."⁴⁶ Strangely, the court concluded its discussion by establishing a presumption that significantly favored procreation-avoiders in future cases.⁴⁷

The *Davis* court took this position in large part because of Mr. Davis's testimony, which suggested that, because of his family background, he had an especially strong interest in avoiding a

41. 842 S.W.2d 588, 604 (Tenn. 1992) (holding that, where a dispute exists regarding custody of the preembryos, generally the party seeking to destroy the embryos has a greater interest).

42. *Id.* at 591-92.

43. *Id.* at 589-90.

44. *See id.* at 603-04 (looking at the various burdens imposed on the relevant parties when confronted with a constraint on parental autonomy).

45. *See id.* at 601 (acknowledging the legal symmetry of the parties' claims by commenting that both rights were of constitutional significance). The court similarly implied that both interests, the right to achieve and the right to avoid procreation, were equally central to an individual's life goals and fulfillment. *Id.* The court noted that "in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood . . . Mrs. Davis and Mr. Davis must be seen as entirely equivalent gamete-providers." *Id.*

46. *Id.* at 603.

47. *See id.* at 604 (explaining that "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question").

genetic link with the embryos in storage. Mr. Davis appealed to the court as the child of an unhappy divorce. Mr. Davis described how his parents' split had fractured his family and damaged his relationships with both parents. He explained that the divorce ended his cohabitation with either parent, that future contacts with his mother were sporadic, and that those with his father were close to nonexistent.⁴⁸ Mr. Davis testified that the divorce and the separation from his parents, especially his father, was deeply wounding and led him to object strongly to the possibility that his biological progeny would be raised without his full presence and nurture.⁴⁹ He told the court that if the embryos were brought to term, he would fight for custody. If adoption were permitted, he would be haunted by the prospect that the recipient couple might divorce, thus leaving his biological progeny to suffer the same pangs of abandonment that he experienced as a child.⁵⁰

The court, sympathetic to Mr. Davis' plight, eloquently re-packaged his claims as an appeal to preserve both his autonomy and his psychological tranquility. Specifically, if the embryos were brought to term and donated to a childless couple, Mr. Davis "would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."⁵¹ Further, "[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited."⁵² Because Mrs. Davis no longer sought implantation for the purpose of fulfilling her own reproductive aims, the court concluded that Mr. Davis' interests trumped those of his ex-wife.⁵³ Unfortunately, rather than remaining true to the balancing test it had articulated, the court adopted a presumption that, "[o]rdinarily, the party seeking to avoid procreation should prevail."⁵⁴ This presumption is inapplicable only if the other party lacks "a reasonable possibility of achieving parenthood by [other] means," such as adoption or additional, statistically dubious attempts at conceiving through In Vitro Fertilization ("IVF").⁵⁵ In ordering the embryos destroyed, the court

48. *Id.* at 603-04.

49. *See id.* at 604 (articulating Mr. Davis' fears of "psychological obstacles" that the child would face).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* (stating that, because Mrs. Davis sought to donate the preembryos, her interests should not prevail).

54. *Id.*

55. *Id.*

claimed that the rule it established did “not contemplate the creation of an automatic veto.”⁵⁶ Despite this language, an absolute veto is exactly what objecting spouses have exercised in subsequent frozen embryo cases.

C. *Kass v. Kass*

In *Kass v. Kass*,⁵⁷ the parties had signed informed consent documents that discussed embryo disposition.⁵⁸ Thus, the plurality at the New York intermediate and high courts finessed the question of the parties’ conflicting procreational rights by resolving the dispute on contractual grounds.⁵⁹ Though the informed consent documents were internally inconsistent and ambiguous, majorities on both courts held that the couple had unequivocally indicated its intent to destroy the embryos in the event of divorce.⁶⁰

While the plurality at the intermediate level limited its discussion to contractual matters, concurring Justice Friedmann and dissenting Justices Miller and Altman articulated conflicting assumptions that animate, yet remain obliquely stated in, the frozen embryo cases. Justice Friedmann, in parting company with the majority’s dodge, found the informed consent documents inconclusive and insufficiently clear to resolve the dispute.⁶¹ Instead, he argued that the court should adopt the *Davis* presumption in favor of procreation-avoidance, limited by a proviso narrowing the situations in which exceptions to embryo destruction would be made.⁶²

56. *Id.*

57. 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff’d*, 696 N.E.2d 174 (N.Y. 1998).

58. *See id.* at 583-84 (describing an informed consent document in which the couple decided that the IVF program could retain the preembryos if the couple were unable to jointly make a decision regarding the preembryos’ disposition).

59. *See id.* at 588 (basing its decision on the “clear and unambiguous” language within the informed consent agreement); *Kass*, 696 N.E.2d at 181-82 (agreeing with the lower court that the informed consent documents “unequivocally manifest” the intent of the parties and should therefore determine the disposition of the preembryos).

60. *See Kass*, 663 N.Y.S.2d at 588 (agreeing with the defendant that, because the couple could not jointly decide on the disposition of the preembryos, as required by the contract, the preembryos must be retained and used by the IVF program); *Kass*, 696 N.E.2d at 181-82 (referring to the divorce instrument signed by both parties to settle any ambiguity found in the consent agreement).

61. *See Kass*, 663 N.Y.S.2d at 592 (Friedmann, J., concurring) (arguing that the consent agreement was “susceptible of multiple and conflicting interpretations” but ultimately agreeing with the plurality that the preembryos should be donated to the IVF program).

62. *See id.* (arguing that the party objecting to the implementation of the preembryos maintains a liberty interest to avoid procreation, which should prevail over the interests of the party who seeks to procreate).

Justice Friedmann made clear his rationale for supporting a more aggressive procreation-avoidance approach. Opining on the serious burdens entailed in forced parenthood, Justice Friedmann proclaimed that:

Once a child is born, there is no way to end biological ties, and very few ways to end emotional ones Put somewhat differently, 'even if no rearing duties or even contact result[s], the unconsenting partner [the former spouse] will know that biologic offspring exist, with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite.'⁶³

Because of the serious psychological fall-out attendant upon the establishment of unwanted genetic ties, Justice Friedmann would constrict the context in which embryo implantation could occur.⁶⁴ This line of reasoning would require the spouse seeking embryo implantation to demonstrate the impossibility of achieving parenthood through additional IVF attempts or adoption.⁶⁵ "Mere discomfort, expense, or other potentially surmountable difficulties should not suffice to defeat the . . . fundamental right to avoid biological fatherhood."⁶⁶ According to Justice Friedmann, unwanted genetic links are an ill to be avoided at virtually all costs.⁶⁷

Dissenting Justices Miller and Altman disagreed. In an analysis that commentators have largely ignored, these justices took issue with Justice Friedmann's ready assumption that the right to avoid procreation should, in most cases, be upheld. Eschewing generalization, they argued for a more individualized assessment of the parties before the court.⁶⁸ Rather than tilt the balancing of

63. *Id.* at 592-93 (quoting John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 523 (1990)).

64. *See id.* at 592 ("It is the irrevocability of parenthood that is most crushing to the unconsenting gamete provider; and it is principally because of this that I find it hard to imagine a situation where a court should undertake to foist parenthood upon an unwilling individual.").

65. *See id.* at 593 (arguing that, in Mrs. Kass's case, she failed to establish that she lacked reasonable alternative means of achieving parenthood). Her testimony "that she has a medical condition that makes it difficult for her to conceive and carry a child to term, and that as an unmarried person in her late 30s she would not find it easy to recommence the IVF process" was not, according to that Justice, persuasive. *Id.*

66. *Id.*

67. *See id.* (arguing that unwanted genetic links could later lead to problems for the party who sought to avoid procreation, where, for example, places like New York have imposed a duty upon biological parents to support their children regardless of how they were conceived).

68. *See id.* at 599-600 (Miller, J., dissenting) (arguing that courts should analyze each case by using a "fact-sensitive" approach, which considers the positions of the parties and the various burdens placed on the parties depending on the disposition of the preembryo).

procreational rights in favor of the negative right to avoid genetic links, the dissenters suggested that the proper inquiry was “whether the burdens of unwanted paternity to the ‘would-not-be-father’ exceed the deprivation of a possibly last opportunity for maternity to the ‘would-be-mother.’”⁶⁹

When considering the burdens of forced paternity, the dissent noted that the injustice of imposing financial responsibility on parents who sought to prevent the child’s birth could be removed through legislation. Legislators could relieve objecting spouses of their concern over financial liability by simply treating objecting spouses as nothing more than sperm donors.⁷⁰

In their analysis of the possible psychological impact, Justices Miller and Altman set themselves apart by rejecting the assumption that forced parenthood necessarily heralds psychological devastation.⁷¹ While acknowledging that, for some, the presence of biological children might inspire strong desires for attachment—which might lead to bitter custody and visitation fights—the justices also suggested that not all biological parents feel an atavistic pull to succor their young.⁷² Instead, they suggested that, for some, the psychological impact of bringing their embryos to term would be slight.⁷³ The dissenting justices argued that a close scrutiny of the objecting spouse’s circumstances and motivations was necessary to determine the true magnitude of unwanted parenthood in any particular instance.⁷⁴ Unfortunately, courts in future cases ignored these admonitions, shifted away from individualized assessments, and moved toward a bright-line rule that recognizes the right to avoid procreation as the dominant value in these disputes.

69. *Id.* at 600.

70. The *Kass* court noted that “[w]hile commentators may debate the advisability of permitting the abrogation of customary support obligations in nontraditional family settings . . . [a] strong case can be made for legislation relieving the objectant of unwanted parenthood by treating him as a sperm donor in cases such as this.” *Id.*

71. *See id.* at 601 (Miller, J., dissenting) (“[T]here are undeniably numerous men who callously and thoughtlessly father children without any concern for their offspring. For such a man the psychological and emotional impacts of unwanted fatherhood would be less severe or even nonexistent.”).

72. *See id.* (noting that “objections to involuntary procreation should not be lightly cast aside”).

73. *See id.* (adding that the only moral and psychological burden placed on some fathers may be the mere knowledge that he has a child somewhere in the world living without his presence).

74. *See id.* at 602 (advocating an approach that considers the unique nature of each individual case).

D. A.Z. v. B.Z. and J.B. v. M.B.

The Massachusetts Supreme Court in *A.Z. v. B.Z.*⁷⁵ and the New Jersey Supreme Court in *J.B. v. M.B.*⁷⁶ also encountered frozen embryo disputes involving couples who entered into dispositional agreements prior to embarking on fertility treatment.⁷⁷ In both cases, the dispositional agreements stated that, in the event of divorce, the embryos would be implanted and brought to term.⁷⁸ Faced with the fact that these agreements, if enforced, could have possibly led to the birth of children over the objections of one gamete donor, both courts refused enforcement on the grounds that the agreements violated public policy.⁷⁹

Both the Massachusetts Supreme Court and the New Jersey Supreme Court “discovered” in their state precedents a policy against enforcing agreements that could create unwanted family ties.⁸⁰ Both courts mentioned legislative and judicial reluctance to bind birth mothers to surrogacy contracts or to adoption agreements that they could later disavow.⁸¹ These courts also noted judicial distaste for legal claims that seek to hold individuals to their earlier decisions to marry, conceive, or abort.⁸² This aversion to interfering “in intimate questions inherent in the marriage relationship”⁸³ was interpreted by

75. 725 N.E.2d 1051 (Mass. 2000).

76. 783 A.2d 707 (N.J. 2001).

77. See *J.B.*, 783 A.2d at 710 (stating that the couple signed a consent form, which described that any unused preembryos would be implanted in the wife or donated to infertile couples); *A.Z.*, 725 N.E.2d at 1053 (explaining that the couple was required to sign a preprinted consent form at the IVF clinic determining the disposition of the preembryos).

78. See *J.B.*, 783 A.2d at 710 (stating that the IVF clinic required such consent forms before undergoing treatment); *A.Z.*, 725 N.E.2d at 1054 (describing the consent form signed by both husband and wife, which stated that upon separation, the preembryos would be returned to the wife for implementation).

79. See *J.B.*, 783 A.2d at 718-19 (explaining that public policy permits an individual to object to a contract that would determine family relationships); *A.Z.*, 725 N.E.2d at 1057-58 (noting that the freedom to contract may be outweighed by public policy against forced procreation).

80. See *A.Z.*, 725 N.E.2d at 1059 (stating that liberty and privacy rights include the freedom to choose whether to enter into family relationships); *J.B.*, 783 A.2d at 718-19 (noting that the Massachusetts Supreme Court has held that enforcing a contract compelling procreation over the will of an objecting party contravenes public policy despite the persuasive arguments in support of enforcement).

81. See *J.B.*, 783 A.2d at 717 (citing various cases which held that compelled parenthood is unenforceable); *A.Z.*, 725 N.E.2d at 1058 (explaining relevant legislation that outlaws the enforcement of contracts that bind individuals into familial relationships).

82. See *J.B.*, 783 A.2d at 719 (holding that the contracts are “subject to the right of either party to change his or her mind about [the] disposition” concerning the use or destruction of the preembryos); *A.Z.*, 725 N.E.2d at 1058-59 (stating that individuals are entitled later to change their minds about important familial decisions).

83. *A.Z.*, 725 N.E.2d at 1058.

both courts to reveal a broad policy against compelling individuals to enter into intimate family relationships.⁸⁴

In *J.B.*, the New Jersey Supreme Court followed the *Davis* court presumption when it ruled in favor of the party seeking to avoid procreation.⁸⁵ Though the husband sought to donate the embryos to an infertile couple who would presumably accept full financial and social responsibility, the court nonetheless was deeply concerned with the impact on the wife. The court commented that the “[i]mplantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.”⁸⁶ Economics aside, the courts in both cases held that divorcing spouses who object to the use of the frozen embryos they created should enjoy permanent veto power over the embryo implantation because “genetic ties may form a powerful bond . . . even if the progenitor is freed from the legal obligations of parenthood.”⁸⁷

Court attitudes in these cases seem to be influenced by a unique strand of genetic determinism.⁸⁸ According to this notion, parental identity and rights flow directly from genetic ties.⁸⁹ When it comes to the emotional bonds inspired by parenthood, courts assume that biology dictates psychology.⁹⁰ However, just as the biogenetic law, which states that “ontogeny recapitulates phylogeny,” failed to withstand scientific scrutiny,⁹¹ this judicial assumption cannot bear the weight of a sustained examination. The data, amassed both by experts in family formation and dissolution and by those studying the psycho-social effects of sperm donation, suggests that psychological

84. *J.B.*, 783 A.2d at 717; *A.Z.*, 725 N.E.2d at 1058-59.

85. *J.B.*, 783 A.2d at 716.

86. *Id.* at 717.

87. *Id.* (quoting Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 290 (1990)).

88. See Robert D. Stone, *The Cloudy Crystal Ball: Genetics, Child Abuse, and the Perils of Predicting Behavior*, 56 VAND. L. REV. 1557, 1563-64 (2003) (noting that genetic determinism has gained prominence through movies as well as through political and scientific literature).

89. See *id.* at 1564 (explaining how some observers feel that genetic determinism can be morphed into eugenics or other nefarious types of genetic discrimination).

90. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 51-61 (1999).

91. While numerous connections exist between ontogeny, the development of the embryos of a given species, and phylogeny, the evolutionary history of a species, the theory, which states that an organism's growth from an embryo onward mirrors the evolutionary development of that species, has been largely discredited. STEPHEN J. GOULD, ONTOGENY & PHYLOGENY 8, 206 (1977).

and social parenthood is a much more complex, tenuous, and malleable affair than most courts are willing to acknowledge.⁹²

The first section of the following part examines the social science literature on parental disengagement and argues that biological links are not predictive of psychological attachment. Buttressing this conclusion, the second section addresses the research devoted to the psycho-social dimensions of sperm donation, which indicates that a majority of donors have no enduring feeling or concern for the children whose existence they help conceive.

II. UNCOUPLING BIOLOGICAL AND PSYCHOLOGICAL PARENTHOOD: WHAT THE DATA REVEALS

A. *Data on Disappearing Dads*

Dramatic changes in the basic configuration of the family have lent new urgency to the study of parent-child relations. Divorce rates remain steady at roughly 50%⁹³ while non-marital childbearing continues to increase.⁹⁴ With the two-parent family in retreat on multiple fronts,⁹⁵ researchers are examining the effects of single-parent child-rearing on the economic and psychological well-being of children.⁹⁶ Because existing data suggests that children who remain

92. See *infra* Part II.

93. Michael E. Lamb, *Nonresidential Fathers and Their Children*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 169, 169 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002).

94. Marcia J. Carlson & Sarah S. McLanahan, *Fragile Families, Father Involvement and Public Policy*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 461, 461 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002); see also Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 CHILD. & DIVORCE 29, 32 (1994) [hereinafter Furstenberg, Jr., *History and Current Status*] (noting that the overall number of nonmarital births has risen nearly six times, from 5% in 1960 to 28% in 1990), available at <http://www.futureofchildren.org/usr/doc/vol4no1ART3.pdf>; Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, 48 NAT'L VITAL STAT. REP. 1, 6 (2000) (reporting that nonmarital birthrates for black women rose from 56% in 1980 to 69% in 1999 and that nonmarital birth rates for white women rose from 9% in 1980 to 22% in 1999, while nonmarital birth rates for Hispanic women rose from 24% in 1980 to 42% in 1999), available at <http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs4816.pdf>.

95. See Gunnar Andersson, *Children's Experience of Family Disruption and Family Formation: Evidence from 16 FFS Countries*, 7 DEMOGRAPHIC RES. 343, 354 (2002) (estimating that between 50% and 54% of all children will spend some portion of their childhood in a single-parent household), available at <http://www.demographic-research.org>.

96. See generally Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *The Disappearing American Father? Divorce and the Waning Significance of Biological Parenthood*, in THE CHANGING AMERICAN FAMILY: SOCIOLOGICAL AND DEMOGRAPHIC PERSPECTIVES 197, 214 (Scott J. South & Stewart E. Tolnay eds., 1992) (arguing that the child/father relationship is unpredictable and that it declines over the years,

in close and continual contact with both parents fare better on measures ranging from emotional health to academic performance,⁹⁷ researchers have begun to examine the reasons why families, both marital and non-marital, dissolve and why, in the wake of that dissolution, nonresident parents tend to disengage from their children.

While the data tells a complex story, one fact is clear. Parental or, at least, paternal attachment is not biologically rooted.⁹⁸ Rather, the degree to which a parent forms deep and enduring ties with a biological child is contingent on a number of variables.⁹⁹ Residential proximity, the relationship with the other parent, cultural and familial expectations and individual maturity all play a role.

1. *Factors contributing to parental disengagement*

a. *Cohabitation and proximity*

An examination of parent-child involvement¹⁰⁰ suggests that absence does not make the heart grow fonder. When parents move

especially when the father moves out when the child is very young).

97. See Paul R. Amato, *The Consequences of Divorce For Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1282 (2000) (noting that adults and children from broken homes score lower on a variety of "indicators of well-being").

98. While this paper argues that parental attachment—for both men and women—is socially constructed rather than biologically determined, the data and conclusions discussed herein relate largely to fathers and not to mothers. This is so because in both post-divorce and nonmarital situations, the overwhelming numbers of children live with their mothers. See Sandra L. Hofferth et al., *The Demography of Fathers*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 63, 65 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002) (reporting that data collected in 1996 reveals that 23% of the children surveyed lived exclusively with their biological mother, while only 2% lived exclusively with their biological father). Consequently, the problem of nonresidential parent detachment is essentially a problem of detaching fathers. Research devoted to understanding this process of disengagement thus focuses on fathers. But see Susan D. Stewart, *Nonresident Mothers' and Fathers' Social Contact with Children*, 61 J. MARRIAGE & FAM. 894, 899-900 (1999) (finding that where the mother is the nonresident parent, mothers exhibit higher levels of telephone and letter contact and extended visitation). While the process of gestation may create ties that men do not enjoy with their children, I would still argue that parenthood is largely a socially driven phenomenon for women as well as for men. However, social forces combine to universally support the mothering role for women, while these forces serve as both spur and impediment to men's assumption of the father role.

99. See ROSS D. PARKE, FATHERHOOD 77 (1996) (pointing out that fathers do not simply decide to be involved or noninvolved but are influenced by factors ranging from attitudes, beliefs and motivations of the father to family, extrafamilial and cultural influences).

100. Parental involvement depends upon many factors. Studies have recorded factors such as geographic mobility, remarriage of either parent, inability to establish a workable childrearing arrangement with the former spouse, lack of access due to actions of the former spouse, and psychological pain at not being able to see their children in the same manner as before. A convergence of these factors may cause

out of their children's residences, parent-child relationships are likely to erode.¹⁰¹ In one study of divorce, 20% of nonresident fathers reported that they had not seen a biological child at all in the past year, while another 8% reported visiting only once.¹⁰² Data from another examination of post-divorce interactions between nonresident dads and their children disclosed that nearly one-half of the children studied between the ages of 11 to 16 had not seen their father in the last twelve months.¹⁰³ A recent national study assessing the strength and durability of "Fragile Families," which encompassed children and their never-married parents, revealed that 40% of nonresident fathers are uninvolved with their one-year-old biological children.¹⁰⁴

Empirical investigation also reveals that the erosion of parental ties is directly related to the length of time that parents and children live apart.¹⁰⁵ This pattern persists in both divorce and non-marital situations. In one study concerning children of divorce, children were interviewed about their contacts with nonresidential parents at various intervals following the parents' separation.¹⁰⁶ When asked whether they saw their nonresident father in a typical month, 31% of

fathers to remove themselves entirely from their children's lives. Studies have also found that fathers are more likely to stay involved in their children's lives if the relationship with their ex-spouse is good, if they are employed, and if they had been highly involved in their child's life in the past. See Christine Winquist Nord & Nicholas Zill, *Non-Custodial Parent's Participation in their Children's Lives: Evidence from the Survey of Income and Program Participation* (Aug. 14, 1996), available at <http://www.fatherhood.hhs.gov/SIPP/pt2.htm>

101. Frank F. Furstenberg, Jr. et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 663-64 (1983).

102. Judith Seltzer & Yvonne Brandreth, *What Fathers Say About Involvement With Children After Separation*, 15 J. FAM. ISSUES 49, 60 (1994).

103. Frank F. Furstenberg, Jr., *Good Dads—Bad Dads: Two Faces of Fatherhood*, in THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY 193, 202-03 (A.J. Cherlin ed., 1988); see A. McMurray & A.M. Blackmore, *Influences on Parent-Child Relationships in Non-Custodial Fathers*, 14 AUSTL. J. MARRIAGE & FAM. (1992) (reporting the results of a West Australian study revealing that 38% of separated fathers had less than monthly contact with their children), available at [http://users.tpg.com.au/users/resolve/ncp-report/mcm&b\(1993\).html](http://users.tpg.com.au/users/resolve/ncp-report/mcm&b(1993).html).

104. SARAH McLANAHAN ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA, FRAGILE FAMILIES ONE YEAR LATER: OAKLAND, CALIFORNIA 13 (2002), available at http://ppic.org/content/pubs/OP_1002SMOP.pdf.

105. See Judith A. Seltzer, *Relationships between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 90-92 (1991) (documenting and finding that fathers' involvement with children born within marriage declines as the time since separation increases). In data collected from the 1987-1988 National Survey of Families and Households, the numbers of fathers who saw their children once or not at all rose from roughly 13% in the first two years of separation to over 50% when the fathers had been separated from their children for eleven years or longer. *Id.*

106. Frank Furstenberg, Jr. & Christine Winquist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893 (1985).

those children whose parents had been separated less than two years answered in the negative.¹⁰⁷ At five years post-separation, the number rose to 55% and, at ten years post-separation, nearly 75% of those children interviewed stated that they did not see their nonresidential parent in a typical month.¹⁰⁸ In that same study, when children were interviewed within two years of their parents' separation, 74% indicated that they had seen their nonresident parent within the last thirty days.¹⁰⁹ That number fell to 28% when the children were interviewed ten or more years post-divorce.¹¹⁰ Indeed, when the parents had been separated for ten or more years, nearly one-half of the children interviewed had not seen their nonresidential parent in more than five years.¹¹¹

There are several reasons for this trend. One theme that emerges from qualitative studies of non-custodial divorced fathers is the dislocation men feel when they lose touch with the rhythms of their children's lives.¹¹² The routines established when living under one roof are disrupted when the couple separates. Fathers feel more like visiting uncles and are challenged by this role-shift.¹¹³ They are unsure how to accommodate to their new role and, for many, feel more comfortable simply disappearing.¹¹⁴ In the case of never-married dads, many of these individuals never forge the bonds that would keep them attached and interested in their child's life.¹¹⁵

107. *Id.* at 895.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. See EDWARD KRUK, *DIVORCE AND DISENGAGEMENT: PATTERNS OF FATHERHOOD WITHIN AND BEYOND MARRIAGE* 42-44 (1993) (identifying the "perceived role loss" as a major contributing factor to paternal disengagement).

113. *Id.* at 46 (noting that "[f]athers identified a variety of constraints in 'visiting,' with the greatest number describing the avuncular nature of the relationship and the fact that 'visiting' in no way constituted 'real fatherhood'"); see Frank F. Furstenberg, Jr., *The Disappearing American Father*, in *THE CHANGING AMERICAN FAMILY: SOCIOLOGICAL AND DEMOGRAPHIC PERSPECTIVES* 197, 216 (Scott J. South & Stewart E. Tolnay eds., 1992) [hereinafter Furstenberg, Jr., *Disappearing American Father*] (reporting that nonresidential fathers are more likely to fade into a secondary role when faced with parenting apart).

114. See KRUK, *supra* note 113, at 47; Lamb, *supra* note 93, at 177-78 (discussing the theory that men "drift away from their children after divorce because they are deprived of the opportunity to be parents rather than visitors"); Edward Kruk, *Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce*, 30 *FAM. & CONCILIATION* CTS. REV. 81, 98 (1992).

115. See Judith A. Seltzer et al., *Family Ties After Divorce: The Relationship Between Visiting and Paying Child Support*, 51 *J. MARRIAGE & FAM.* 1013, 1028 (1989). Seltzer stated that:

[s]hared experiences provide the foundation for common understandings about family obligations and norms of reciprocity in exchanges between kin. . . . For non-custodial parents and minor children, however, developing

Often, the child is perceived merely as a burden and as a friction point in the adult relationship with the mother.¹¹⁶ This research suggests that psychological attachment is borne from day-to-day experience and interactions rather than from blood or kinship lines.

b. The relationship with the other parent

Residential status aside, the second most important determinant of father involvement is the father's relationship with the child's mother. Fathers who continue romantic relationships with the child's mother tend to remain involved with the child. If the relationship cools or becomes hostile, the relationship with the child often wanes.¹¹⁷ In one study of paternal involvement during pregnancy and birth, the strength of the adult couple relationship was highly determinative of the father's involvement in the pregnancy and birth. The romantically involved cohabiting fathers were nearly seventeen times more likely to provide financial support to the pregnant mothers than the non-romantically involved nonresident fathers.¹¹⁸ In another study, those fathers who reported no romantic relationship with the mother of their child were 67% less likely to be involved with their children than the romantically linked fathers.¹¹⁹

commitment is a more precarious undertaking. The relationship has had less opportunity to develop; it depends on children's age and developmental stage, the parents' relationship with each other, and . . . many intervening events that change parents' and children's lives after a divorce.

Id.

116. *See id.* at 1013 (arguing that noncustodial fathers' involvement with a child decreases some of the negative effects children suffer because of their living with a single mother).

117. Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Father's Involvement with Their Children Over Time*, POVERTY RES. NEWSL. (Northwestern Univ./Univ. of Chicago/Joint Center for Poverty Research, Ill.), Mar.-Apr. 2000, available at http://www.jcpr.org.newsletters/vol4_no2/articles2.htm; see Marcia Carlson & Sarah McLanahan, *Characteristics and Antecedents of Involvement by Young, Unmarried Fathers* 20 (Ctr. for Research on Child Wellbeing, Working Paper No. 02-09-FF, 2002). Carlson and McLanahan report that in a study of father involvement among unmarried fathers:

[t]he relationship between the parents appears to have important implications for father's involvement with their children at one year, even controlling for their initial involvement level. When the father reports that the mother is supportive in their relationship he is much more likely to be frequently involved in the child's life. Also, the father's believing that marriage is very likely is strongly related to his involvement with his one-year-old child.

Id.

118. Waldo E. Johnson, Jr., *Paternal Involvement Among Unwed Fathers*, 23 CHILD. & YOUTH SERV. REV. 513, 523, 528 (2001) [hereinafter Johnson, Jr., *Paternal Involvement*].

119. Gina R. Hijjawi et al., *An Exploratory Analysis of Father Involvement in Low-Income Families* 22 (Ctr. for Research on Child Wellbeing, Working Paper No. 03-01-FF, 2003).

This is a common pattern when assessing the characteristics of involved and uninvolved nonresident fathers.¹²⁰

Researchers seeking to explain the reason why paternal-maternal relations play such a prominent role in post-divorce or non-marital parent-child relations have encountered two types of explanations—"his" and "hers."¹²¹ When disengaged fathers are questioned as to why they detach from their children, they frequently point to the mother's role as the parsimonious gatekeeper.¹²² According to these fathers, mothers express anger toward the father by denying access to the child.¹²³ In a variation on the theme, mothers vent their disappointment in the father to the child, which creates an arid environment for paternal-child relations.¹²⁴ Mothers, in turn, complain that once the romantic relationship ends, fathers revert to more selfish habits that supplant their earlier commitments to provide emotionally or financially for their children.¹²⁵

While not specifically identified by mothers or fathers, researchers speculate that paternal-child bonds develop when fathers involve themselves in the family unit to enjoy the warmth and the attention of a romantic partner, namely, the baby's mother.¹²⁶ When the incentives of adult companionship and support are absent, the allure of the parent-child bond is often insufficient to sustain attachment.¹²⁷

120. Carlson & McLanahan, *supra* note 94, at 474.

121. See Nora Cate Shaeffer et al., *Methodological and Theoretical Issues in Studying Nonresident Fathers: A Selective Review* 2, 4 (Nat'l Ctr. on Fathers & Families, Working Paper) (reporting that mothers and fathers differ in reporting the amounts of child support paid and received).

122. See KRUK, *supra* note 113, at 71-73 (reporting that fathers feel that mothers simply do not want them around); see also MAUREEN R. WALLER, MY BABY'S FATHER: UNMARRIED PARENTS AND PATERNAL RESPONSIBILITY 81 (2002) (noting a "culture of distrust" that permeates a separated or divorced couple). See generally TERRY ARENDELL, FATHERS & DIVORCE 81 (1995) (observing that fathers often feel that women gain "disproportionate authority" over the children after a divorce).

123. See ARENDELL, *supra* note 123, at 146-48 (opining that dissension between parents could cause the father to withdraw completely from the child's life due to frustration with the mother); KRUK, *supra* note 113, at 90 (reporting "access difficulties" as the primary reason for post-divorce parental disengagement); WALLER, *supra* note 123, at 88-90 (quoting one father who stated that the mother of his child wanted "to 'get back at him'").

124. WALLER, *supra* note 123, at 88-89.

125. Frank F. Furstenberg, Jr., *Fathering in the Inner City: Paternal Participation and Public Policy*, in FATHERHOOD: CONTEMPORARY THEORY, RESEARCH AND SOCIAL POLICY 119, 136 (William Marsiglio ed., 1995) [hereinafter Furstenberg, Jr., *Fathering in the Inner City*] (stating that "[w]omen who see men spend on themselves, their friends (new girlfriends in particular), and even other family members (including other children) resent the absence of support offered to them and their children").

126. CAROL A. HEIMER & LISA R. STAFFEN, FOR THE SAKE OF THE CHILDREN: THE SOCIAL ORGANIZATION OF RESPONSIBILITY IN THE HOSPITAL AND THE HOME 307 (1998).

127. See CARLSON & MCLANAHAN, *supra* note 117, at 5 (stating that "if the mother-father relationship is negative or hostile, interacting with the mother may be painful for the father, and he may withdraw from the child in order to avoid interacting with

c. *New relationships and commitments*

The formation of new relationships and, in turn, new obligations and commitments is associated statistically with a lessened involvement with a parent's biological children from previous relationships.¹²⁸ For more than 50% of the population, life-long partnering has been replaced with serial coupling.¹²⁹ In addition, the sequential nature of adult intimacy has, for many, led to the new phenomenon of serial parenting.¹³⁰ This trend is particularly true for divorced or never-married fathers.¹³¹ For serial parents, involvement with biological children extends throughout the duration of the adult relationship.¹³² When that relationship ends and another begins, these parents transfer their attentions to the children present in the new household.¹³³ Serial parenthood is particularly likely when the

the mother"); see also Furstenberg, Jr., *Fathering in the Inner City*, *supra* note 125, at 137 (arguing that "[a] man's allegiance to his children is maintained in part by the bond established with his children's mother [and that] when that bond dissolves, men sometimes have difficulty establishing a direct relationship with their children"); Furstenberg, Jr., *History and Current Status*, *supra* note 94, at 36. Furstenberg stated that:

[a]t the heart of the problem is that many regard parenthood as part of a "package deal" that is inextricably linked with marriage or a marriage-like relationship. Men, in particular, often relate to their children in large part through their wives or partners. The disintegration of that relationship reduces noncustodial parents' willingness to invest resources in their children. This is especially so after remarriage, when parents often feel supplanted and disadvantaged by a new figure.

Id.

128. Judith A. Seltzer & Suzanne M. Bianchi, *Children's Contact with Absent Parents*, 50 J. MARRIAGE & FAM. 3, 663, 674 (1988) (noting that biological parents have less contact with children who live with legally or socially defined substitute parents). See also Patrick McKenry et al., *Nonresidential Father Involvement: A Comparison of Divorced, Separated, Never Married, and Remarried Fathers*, 25 J. DIVORCE & REMARRIAGE 1, 9 (1996) (demonstrating that re-married dads visit their biological children less than divorced or separated dads).

129. *Id.* at 674.

130. See *id.* (noting that data from a study accords with the interpretation that "high rates of divorce and remarriage" create conditions for "serial parenthood"); see also Elizabeth C. Cooksey & Patricia H. Craig, *Parenting from a Distance: The Effects of Paternal Characteristics on Contact Between Nonresidential Fathers and Their Children*, 35 DEMOGRAPHY 187, 198 (1998) ("[S]erial parenting is becoming the norm for some men as links to their children begin and end in conjunction with the marriages or [the] relationships they have with the child's mother.").

131. Cooksey & Craig, *supra* note 130, at 198.

132. Seltzer & Bianchi, *supra* note 128, at 674.

133. See *id.* (noting that data is consistent with the notion "that noncustodial parents discard ties to their biological children with divorce, and the ties are replaced through remarriage"); see also Robert Lerman & Elaine Sorensen, *Father Involvement with Their Nonmarital Children: Patterns, Determinants, and Effects on Their Earnings*, 29 MARRIAGE & FAM. REV. 143, 145 (2000) (reporting results of a longitudinal study that showed that of the 32% of unmarried, nonresidential fathers who were not visiting their child(ren) weekly, roughly one-half "were married to someone other than the biological mother of their nonmarital child and two-thirds had a subsequent marital birth"); see, e.g., Furstenberg, Jr., *Disappearing American*

children in the new household are biologically related to the serial parent.¹³⁴

d. Other factors influencing father involvement

Paternal involvement is also influenced by the norms and signals transmitted by the family of origin.¹³⁵ The family of origin molds and transmits parental identity implicitly, through modeling and examples, and explicitly, through counsel and advice.¹³⁶ A young male who has grown up in a fatherless household is more likely to procreate and then to disengage than a male who has grown up with the steady presence of a father.¹³⁷ Additionally, another family member's response to the news of a pregnancy or a birth may have a large impact on the parenting behavior that follows.¹³⁸

Father, *supra* note 113, at 217 (asserting that “[s]ome men who become stepparents or surrogate parents in a new household often transfer their loyalties to their new family. Relations with their biological children become largely symbolic if they survive at all.”).

134. Cooksey & Craig, *supra* note 130, at 198 (stating that “[s]pecifically, it is when fathers are currently living in traditional nuclear family setting—that is, when they reside with *only* biological children and not in new ‘blended’ families—that they are less likely to see their children from former relationships”). Dr. Furstenberg, an expert on fatherhood, has explored the attitudes and behaviors of young, economically disadvantaged fathers. He discovered that these fathers often have multiple children with different partners, and become overwhelmed by the varied and conflicting social and economic obligations owed to each mother-child unit. With no clear sense of how their meager material resources should be divided, these men spread their resources and energies sporadically and inconsistently. They engage in what Dr. Furstenberg terms “selective attention” as a way of coping with a multitude of needs they can’t possibly meet. They “may be doing for some children and not for others. They may be neglecting their biological children while being a daddy to someone’s (sic) elses child.” Furstenberg, Jr., *Fathering in the Inner City*, *supra* note 125, at 140. As the juggling act becomes increasingly untenable, the men simply withdraw—limiting their attentions to the children with whom they live and abandoning the children from prior liaisons. “Relatively weak attachments to prior relationships often lead men to invest disproportionately in current families relinquishing ties to children from earlier unions.” *Id.*

135. See Waldo E. Johnson, Jr., *Young Unwed African American Fathers: Indicators of Their Paternal Involvement*, in FORGING LINKS: AFRICAN AMERICAN CHILDREN CLINICAL DEVELOPMENTAL PERSPECTIVES 147, 155-57 (Angela M. Neal-Barnett et al. eds., 2001) [hereinafter Johnson, Jr., *Young Unwed African American Fathers*].

136. See Johnson, Jr., *Paternal Involvement*, *supra* note 118, at 517 (“Parental identity and parenting development is primarily a compilation of experiences and observations over time. . . . The family of origin provides the cultural script in which many of these experiences and observations are acquired.”).

137. Frank F. Furstenberg, Jr. & Christopher C. Weiss, *Intergenerational Transmission of Fathering Roles in At Risk Families*, 29 MARRIAGE & FAM. REV. 181, 196 (2000).

138. See ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 159, 162 (1999) (describing the important role of older adults in encouraging younger men to assume the parental role); see also Johnson, Jr., *Young Unwed African American Fathers*, *supra* note 135, at 156 (telling the story of a young man who was poised to deny paternity until his mother and grandmother visited the hospital, pointed out a family resemblance and announced,

e. Limitations of the data to frozen embryo disputes

Not all of the data documenting the “disappearing dad” phenomena applies directly to frozen embryo disputes. Some of the previously cited studies indicate that father disengagement is most common among black men living on the poverty line.¹³⁹ The litigants in the frozen embryo disputes are typically white, financially comfortable professionals, socialized according to norms that vary quite dramatically from the “code of the street.”¹⁴⁰ Nevertheless, studies focusing on absent fathers whose profiles more closely resemble those of frozen embryo disputants do exist and they tell a similar story. Paternal self-concept is not biologically driven, but rather, socially enacted. The self-concept is strong when a propitious

“[y]ou are going to take care of that baby [since i]t’s your responsibility”); see, e.g., Angela Dungee Greene & Kristin Anderson Moore, *Nonresident Father Involvement and Child Well-Being Among Young Children in Families on Welfare*, 29 MARRIAGE & FAM. REV. 159, 175 (2000) (noting that father involvement is “more likely among those fathers whose family members also provide support for the child, such as clothes, toys, and child care. . . . [T]he direction or causation is unknown; however, . . . in many cases, the father’s family assists in the care and support of the child and encourages the father to remain involved.”).

139. See Furstenberg, Jr., *Fathering in the Inner City*, *supra* note 125, at 136; ANDERSON, *supra* note 138, at 182 (explaining that in the case of many black fathers, their parental role has recently been challenged by changes in the nation’s economy and job market); Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Stability and Change in Paternal Involvement Among Urban African American Fathers*, 13 J. FAM. PSYCHOL. 416, 417-19 (1999) (detailing that males who have both occupations and schooling tend to be more involved fathers); Waldo E. Johnson, Jr., *Work Preparation and Labor Market Experiences Among Urban, Poor, Nonresident Fathers*, in COPING WITH POVERTY: THE SOCIAL CONTEXTS OF NEIGHBORHOOD, WORK, AND FAMILY IN THE AFRICAN-AMERICAN COMMUNITY 224, 226-27 (Sheldon Danziger & Ann Chih Lin eds., 2003) (arguing that more jobs must become available if there is to be any hope of improving men’s “parenting roles”); Waldo E. Johnson, Jr., *Paternal Involvement in Fragile, African American Families: Implications For Clinical Social Work Practice*, 68 SMITH C. STUD. SOC. WORK 215, 215 (1998) (indicating that African-American fathers who are poor and who come from “fragile” families are most susceptible to parental disengagement); Johnson, Jr., *Young Unwed American Fathers*, *supra* note 135, at 154 (noting that a male who does not attain the “developmental tasks of adolescence” will be unlikely to “transition” smoothly into fatherhood); Jane Mosley & Elizabeth Thomson, *Fathering Behavior and Child Outcomes: The Role of Race and Poverty*, in FATHERHOOD: CONTEMPORARY THEORY, RESEARCH, AND SOCIAL POLICY 148, 148-65 (W. Marsiglio ed., 1995) (exploring the effects of race and poverty on parent involvement); Robin L. Jarrett et al., *Fathers in the “Hood”: Insights From Qualitative Research on Low-Income African-American Men*, in THE HANDBOOK OF FATHER INVOLVEMENT (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002) 233 (concluding that for many African American fathers in low-income communities, “fatherhood is a dynamic process, characterized by periods of involvement and absence.”); Timothy J. Nelson et al., *Sustaining Fragile Fatherhood: Father Involvement Among Low-Income, Noncustodial African-American Fathers in Philadelphia*, in THE HANDBOOK OF FATHER INVOLVEMENT 525 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002) (noting that many low-income fathers have difficulty fulfilling their roles as fathers).

140. See ANDERSON, *supra* note 138, at 180-83 (explaining the social norms and pressures facing black fathers in the inner-city).

set of social conditions converge to support it, and it is weak under a varying set of conditions. The next section discusses another body of data drawn from studies of sperm donors that further challenges the assumption that genetic links herald life-long emotional attachments.

B. More Uncoupling—Data from Sperm Donors

1. Sperm donor attitudes toward offspring

Artificial insemination using donor sperm has been practiced commercially for at least thirty years.¹⁴¹ More recently, concern about anonymity and sperm-donor motivation has prompted empirical inquiries into the attitudes and the preferences of those who chose to donate sperm. These studies, which delve into the psycho-social ramifications of sperm donation, suggest that most sperm donors are relatively unconcerned with the offspring their semen creates.

One study designed to evaluate donors' motivations and attitudes toward donation asked the following series of questions: Why did you decide to become a sperm donor? Would you like to be informed if use of your semen results in pregnancy? Would you like to meet the offspring when it has become an adult person? If you had the opportunity, would you like to leave a message to your potential offspring?¹⁴² In explaining motive, 32% of the respondents stated that their interests in donating were purely financial, 8% stated their interests were purely altruistic, and the remaining 60% indicated that they were motivated by a combination of the two interests.¹⁴³ Eighty percent of those surveyed stated that they did not want to be informed of any pregnancies resulting from use of their semen and 88% stated they would not be interested in meeting the offspring conceived through their donation.¹⁴⁴ None of the donors surveyed were interested in leaving any message to their potential offspring.¹⁴⁵ Consonant with their desire to remain detached, 60% of the donors surveyed stated that they would cease donating if the offspring could

141. Idant Laboratories Division, located in Manhattan, has been in existence since 1971, while the California Cryo bank was founded in 1977. IDANT LABORATORIES, available at <http://www.idant.com> (last visited June 29, 2004); CALIFORNIA CRYOBANK SPERM BANK, available at <http://cryobank.com> (last visited June 29, 2004).

142. Bjorn Pedersen et al., *Psychosocial Aspects of Donor Insemination: Sperm Donors—Their Motivations and Attitudes to Artificial Insemination*, 73 ACTA. OBSTET. GYNECOL. SCAND. 701, 702 (1994).

143. *Id.* at 703.

144. *Id.*

145. *Id.*

ascertain their identity later in life.¹⁴⁶ In a masterful understatement, the authors of this study concluded that, for this set of donors, “offspring seem not to be felt as ‘family’ with whom donors can/should be emotionally involved.”¹⁴⁷

This disinterest in potential offspring is apparent in the results obtained from other studies.¹⁴⁸ In one study of donor attitudes in the United Kingdom, only 48% of the donors surveyed stated that they wanted to know if any children had been born as a result of their donation.¹⁴⁹ This proportion shrank to 34% when asked whether they would like to receive basic information about any offspring such as the sex and the date of birth.¹⁵⁰ Less than 20% expressed a desire to have further details of potential offspring and less than 15% expressed an interest in having contact with them.¹⁵¹ When asked if they would continue donating if they could be identified, 63% answered in the negative.¹⁵²

Donors in the United States responded similarly when questioned about their attitudes toward donor offspring.¹⁵³ Nearly 71% of those questioned stated that donating sperm was like donating blood.¹⁵⁴ Only 12% would advocate changing the current practice to allow offspring contact with their genetic donor.¹⁵⁵ While non-donors were inclined to think that donation was an altruistic act, the donors themselves largely disagreed with that characterization and stressed the large role that financial compensation played in their interest in donation.¹⁵⁶

146. *Id.* at 703.

147. *Id.* at 704.

148. See Rachel Cook & Susan Golombok, *A Survey of Semen Donation: Phase II—The View of Donors*, 10 HUM. REP. 951, 954 (1995) (reporting low interest of sperm donors in offspring); see also Mark Sauer et al., *Attitudinal Survey of Sperm Donors to an Artificial Insemination Clinic*, 34 J. REPROD. MED. 362, 363 (1989) (noting the importance of remuneration in sperm-donor motivation).

149. Cook & Golombok, *supra* note 148, at 954.

150. *Id.*

151. *Id.*

152. *Id.* at 957.

153. See Sauer et al., *supra* note 148, at 363 (reporting that, because they wanted to remain anonymous, most donors surveyed were against a national registry).

154. *Id.*

155. *Id.*

156. See *id.* (noting that, while 61% of the control group of non-donors stated that donors are altruistic, only 12% of the donors themselves agreed with that characterization and also noting that, when questioned whether they would continue to donate if money were withheld, only 31% of those queried said yes, thereby demarcating the limits of their philanthropy). Semen providers canvassed elsewhere have expressed other sentiments. See A. Lalos et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REP. 212, 213 (2003) (reporting that 70% of Swedish sperm donors reported that they donated to help infertile couples).

Emotional distance was also salient in the responses of sperm donors tallied in another paper. A review paper analyzing data from multiple studies of sperm donor attitudes revealed reluctance on the part of donors to view offspring as anything other than “other people’s children.”¹⁵⁷ A tabulation of the data from eleven studies of semen providers from four different countries showed that less than one-half of those queried were willing to make contact with future offspring created from their donated DNA.¹⁵⁸ Older, married donors were more open to future contact with their offspring than were the younger donors.¹⁵⁹ Yet, even among the older and more open group of donors, the number willing to continue donating if they could be traced was low. When asked whether they would continue to donate if offspring were informed of their identity, only 41% said they would.¹⁶⁰ Comments from donors about the possibilities of a donor-child reunion ranged from tentatively positive to violently negative.¹⁶¹ Even those modestly in favor of donor “outing” expressed reservations. As one donor put it, “I think they (donor offspring) should have that right [to learn donor identity] but perhaps any

157. See Ken Daniels, *The Social Responsibility of Gamete Providers*, 8 J. COMMUNITY & APPLIED SOC. PSYCHOL. 261, 264 (1998) (quoting one commentator who defined a sperm donor as “a man with children in someone else’s family”).

158. *Id.* at 268 (listing eleven studies, in Table Two, in which sperm donors were surveyed as to their willingness to be contacted by offspring created with their sperm). In two studies, 68% of those surveyed expressed willingness. In another two studies only 15% and 17% expressed willingness. The average percentage from all eleven studies was 44%. Interestingly, oocyte donors appeared slightly more open to future contact with offspring. In four studies, over 50% were willing to be contact by donor offspring. *Id.*

159. Daniels, *supra* note 157, at 269; see also Ken Daniels et al., *Information Sharing in Semen Donation: The Views of Donors*, 44 SOC. SCI. & MED. 673, 673-80 (1997) [hereinafter Daniels et al., *Information Sharing*] (surveying donors from Clinic A and Clinic B). Clinic A services predominantly older, married donors with children of the marriage, while Clinic B services younger, unmarried donors. While 35% of Clinic A donors expressed strong unhappiness at the thought of being traced by donor offspring, 73% of Clinic B donors expressed strong unhappiness. Concomitantly, 52% of Clinic A donors said they would not mind being contacted while only 9% of Clinic B donors expressed similar equanimity at the prospect. *Id.*; see also Ken Daniels, *The Semen Providers*, in DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES 76, 96 (Ken Daniels & Erica Haines eds., 1998) (presenting data on sperm donors indicating that some are motivated by pecuniary gain, while others are motivated by altruism).

160. See Daniels et al., *Information Sharing*, *supra* note 159, at 678 (comparing a group of younger donors with older donors, which revealed that twice as many younger donors would be unhappy if they were ever traced by their offspring). In fact, one donor responded by stating that he would be “disgusted.” *Id.* See also Lalos Daniels et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUMAN REPRODUCTION 1, 212-16 (2003) (noting that altruism and desire to help infertile couples are the primary reasons for donation).

161. Daniels et al., *Information Sharing*, *supra* note 159, at 678.

approach should be through a third party . . . I don't want a begging drug addict landing on my doorstep even if he/she has my DNA[.]”¹⁶²

2. *Limits on data applicability to frozen embryo disputes*

Sperm donor attitudes toward their offspring do not necessarily predict the attitudes of objecting spouses in frozen embryo disputes. Unlike sperm donors, the gamete donors in frozen embryo cases participated in fertility treatment with the expectation that they would assume the legal, social, and financial responsibilities of fatherhood. This process may have engendered feelings of connection and expectations of family life that are not inspired by the process of donating sperm. On the other hand, the data does show that biological ties can exist absent psychological attachment and, thus, the courts' linking of the two is in error.

III. ACCORDING THE RIGHT TO PROCREATE MORE WEIGHT: WOMEN'S INVESTMENTS IN EXISTING EMBRYOS AND THE PROBLEMS WITH ADOPTION AND FUTURE ART EFFORTS AS ALTERNATIVE PATHWAYS TO PARENTHOOD

In frozen embryo cases, the right to procreate has been rendered increasingly irrelevant. If the parties have signed a contract, the courts either ignore the contractual terms favoring procreation on public policy grounds or they contort existing language to dictate embryo destruction.¹⁶³ If no contract exists, the courts revert to a constitutional analysis that pays lip service to an individual's interest in procreation, but consistently finds that interest outmatched by the interest in avoiding procreation.¹⁶⁴ In weighing these rights, the courts gloss over substantial investments that women have in existing embryos and assume that adoption or further technologically-enhanced attempts to achieve parenthood are both available and realistic.

A. *Investments in Existing Embryos*

While both men and women contribute genetic material to create preembryos, women's contribution involves far more “sweat equity.” Men's donation may be achieved relatively easily and without high-

162. *Id.*

163. See *supra* notes 75-87 and the accompanying text for a discussion of *A.Z. v. B.Z.* and *J.B. v. M.B.*, notes 57-74 and the accompanying text for a discussion of *Kass v. Kass*, and notes 23-40 and the accompanying text for a discussion of *In re the Marriage of Litowitz v. Litowitz*.

164. See *supra* notes 41-56 and the accompanying text for a discussion of *Davis v. Davis*.

tech interventions. All that is required is a private room, an empty jar and, perhaps, a Playboy magazine or video. For women, the process is more arduous.

To induce production of a large number of eggs, donors are injected intramuscularly with hormones, known as gonadotropins, during a process known as super-ovulation induction.¹⁶⁵ Typical side-effects from this process include breast tenderness, fluid retention, mood swings, irritability, and abdominal discomfort. More threatening is the risk of ovarian hyperstimulation syndrome (“OHSS”), which occurs in 1 to 2% of patients undergoing super-ovulation induction. OHSS is a severe condition, which can lead to breathing difficulties, temporary kidney non-function, and arterial and venous thrombosis. In some instances, it can be life-threatening.¹⁶⁶ Additionally, exposure to gonadotropins has been associated with slightly elevated risks of breast-cancer.¹⁶⁷

If super-ovulation occurs without incident, the egg donor is readied for egg retrieval, which is accomplished through trans-vaginal aspiration. This process involves passing a needle through the vaginal wall and removing the mature egg from the ovarian follicle. Bleeding and infection of the pelvic area are risks associated with this procedure.¹⁶⁸ Additionally, as with any surgical procedure, the risk of damage or puncture to surrounding organs is ever-present.¹⁶⁹

The court in *Davis* referred elliptically to the physical and emotional strain endured by the wife in contributing her share of the fertilized embryo’s genetic material.¹⁷⁰ Still, the court felt that the

165. Samuel Smith et al., *Diagnosis and Management of Female Infertility*, 290 J. AM. MED. ASS’N 1767, 1768 (2003).

166. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, PATIENT’S FACT SHEET: RISKS OF INVITRO FERTILIZATION (IVF) (Dec. 1996), available at <http://www.asrm.org/Patients/FactSheets/RisksIVF-Fact.pdf>.

167. See Ronald Burkman et al., *Infertility Drugs and the Risk of Breast Cancer: Findings from the National Institute of Child Health and Human Development Women’s Contraceptive and Reproductive Experiences Study*, 79 FERTILITY & STERILITY 844, 848 (2003) (showing that women who took Pergonal had a greater risk of ductal carcinoma than women who had never taken infertility medication).

168. See Dov Dicker et al., *Severe Abdominal Complications After Transvaginal Ultrasonographically Guided Retrieval of Oocytes for In Vitro Fertilization and Embryo Transfer*, 59 FERTILITY & STERILITY 1313 (1993) (reporting the severe postovocyte aspiration problems, including acute abdomen complications); R.S. Howe et al., *Pelvic Infection After Transvaginal Ultrasound-Guided Ovum Retrieval*, 49 FERTILITY & STERILITY 726, 726-28 (1988) (noting that the patients studied were not “typical” transvaginal aspiration cases); Bennet et al., *Complications of Transvaginal Ultrasound-Directed Follicle Aspiration: A Review of 2670 Consecutive Procedures*, 10 J. ASSISTED REPROD. & GENETICS 72, 72-77 (1993) (observing the rarity of complications from the transvaginal aspiration procedure).

169. Bennet et al., *supra* note 168, at 72-77.

170. The court further stated that:

We are not unmindful of the fact that the trauma (including both emotional

wife's investments were insufficient to outweigh the husband's interests in having the embryos destroyed.¹⁷¹ In subsequent cases, female investments in existing embryos have gone utterly unrecognized and ignored. Similarly disregarded is the contraction of reproductive opportunity that women face with the passage of time. Frozen embryo disputants who are denied access to their existing embryos are told by judges to seek parenthood through alternative means.¹⁷² However, achieving parenthood through additional ARTs efforts or adoption is not likely to be easily accomplished, especially for frozen embryo disputants who are physiologically at risk for conception difficulties and whose status as an older divorcee will complicate their adoption efforts. These obstacles to parenthood by alternate means will be discussed below.

B. Difficulties in Achieving Pregnancy Through Additional ART Efforts

For women, age is the enemy of fertility. Women hit their reproductive prime in their early twenties. Each advancing year represents a slight decline in the ability to conceive and to carry a child. Beginning at age thirty-five, the rates at which women fail to conceive and to suffer miscarriages increase exponentially with every year. Declines in both egg quality and number, which is associated with advancing years, lessens the likelihood that future efforts at ART will result in a live pregnancy.¹⁷³

A glance at the success rates of ART clinics confirms this stark reality. The Advanced Fertility Center of Chicago reports that the percentage of pregnancies resulting from egg retrieval from women younger than age thirty-five is 71%.¹⁷⁴ That number falls precipitously to 53% for women ages thirty-five to thirty-nine.¹⁷⁵ The rate plummets further to 31% for women ages forty and above.¹⁷⁶ The United States

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. Their experience, however, must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood.

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

171. *Id.* at 603-04.

172. See *Kass v. Kass*, 663 N.Y.S.2d 581, 593 (N.Y. App. Div. 1997) (Friedmann, J., concurring), *aff'd*, 696 N.E.2d 174 (1998); *Davis*, 842 S.W.2d at 601.

173. ADVANCED FERTILITY CENTER OF CHICAGO, OVARIAN RESERVE TESTS—EVALUATION OF EGG QUALITY AND QUANTITY (2004), available at <http://www.advancedfertility.com/testovar.htm>.

174. ADVANCED FERTILITY CENTER OF CHICAGO, IVF PREGNANCY RATES (Dec. 2003), available at <http://www.advancedfertility.com/ivfrates.htm>.

175. *Id.*

176. *Id.*

Department of Health and Human Services Centers for Disease Control and Prevention (“CDC”), which receives data from most fertility clinics operating in the United States,¹⁷⁷ tabulated the average live birth rates for all ART techniques for women of different ages using their own fresh, fertilized eggs.¹⁷⁸ As the reporting authors noted, “[a] woman’s age is the most important factor affecting the chances of a live birth when her own eggs are used.”¹⁷⁹ The live birth rate per transfer procedure for women younger than age thirty-five was 33%.¹⁸⁰ For women ages thirty-five to thirty-seven, the percentage dropped six points to 27%.¹⁸¹ For women age forty and above, the live birth transfer rate topped off at 10%.¹⁸² For women over age forty-two, the rate fell to a dismal 4%.¹⁸³

The passage of time impairs a woman’s procreative capacity on a number of levels. As the CDC data demonstrates, increasing age diminishes reproductive functioning at each stage of the ART process. That is, as women age, they are less likely to respond to ovarian stimulation and to produce viable eggs for retrieval. In addition, even those eggs that are retrieved are less likely to survive fertilization and transfer. An older woman is less likely to achieve pregnancy once the eggs are implanted into their tubes or uterus. And, as the age of a woman increases, the likelihood of carrying a fetus to term decreases.¹⁸⁴

Against this ever-increasing risk of childlessness, the creation of cryopreserved frozen embryos serves as partial insurance. With embryos already safely retrieved and fertilized, women are insulated from fear about their waning capacity to produce viable eggs. Secure in the knowledge that the embryos exist for future use, their owners need not take additional precautions such as freezing eggs or retrieving additional eggs for fertilization with anonymous donors. Had these women known that marital discord would place their

177. From January 1, 2000 to December 30, 2000, 408 medical centers performed ART procedures, of which 383 provided data to the CDC. See VICTORIA C. WRIGHT ET AL., ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2000 (Aug. 29, 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5209a1.htm>.

178. *Id.*

179. See DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTERS FOR DISEASE CONTROL AND PREVENTION, 2000 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS § 2 (Sept. 11, 2003) (referencing Figure 10), available at <http://www.cdc.gov/reproductivehealth/ART00/section2a.htm>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

existing embryos beyond reach, they may have sought to secure additional collateral against the threat of childlessness. In according the right to avoid procreation preeminent weight, the courts have chosen to disregard women's reliance interest in existing embryos. This judicial disregard is all the more stunning given the problematic nature of the alternatives facing older women who seek parenthood. This Article will now turn to the next imperfect alternative.

*C. Difficulties, Risks, and Costs in Achieving Parenthood
Through Adoption*

Both the *Davis* and *Kass* courts suggested that the feuding spouse seeking to avoid procreation should, in the vast majority of situations, prevail because the other spouse possesses reasonable alternate routes to parenthood, including adoption.¹⁸⁵ The courts' cavalier inclusion of adoption as a reasonable alternative to embryo implantation ignores the difficulties facing older, single individuals who seek to adopt.

There are three routes by which one may adopt a child. None are risk or burden-free and the burdens are multiplied for aging single women. The first and least expensive way to adopt a child is through a public agency. Public adoption agencies are charged with the placement of children who are in the care of the state.¹⁸⁶ While healthy Caucasian infants find their way into the state system, the demand for these "desirable" infants far exceeds the supply.¹⁸⁷ Contraceptive use, abortion and the increasing social acceptability of single parenthood have led to a decline in the number of infants being relinquished for adoption domestically.¹⁸⁸ Concomitantly,

185. See *Davis v. Davis*, 842 S.W.2d 588, 604 (1992) (suggesting that Mrs. Davis should pursue adoption to fulfill her desire for the "child-rearing aspects of parenthood" and noting that adoption was a viable option for her because she and her ex-husband once pursued adoption); *Kass v. Kass*, 235 A.D.2d 150, 167 (N.Y. App. Div. 1997) (opining that adoption is a reasonable alternative to pre-zygote implantation).

186. See CHRISTINE ADAMEC & WILLIAM L. PIERCE, PH.D., *THE ENCYCLOPEDIA OF ADOPTION* 35-38 (1991).

187. See generally Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575, 577 (2002) (noting that only 32% of children waiting for adoption are Caucasian and that African American children are one-fifth as likely as Caucasian children to be adopted). See also NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK: UNITED STATES DATE, ISSUES, REGULATIONS AND RESOURCES* 126 (1989) (reporting that over one-half of the children in foster care are minorities and that more than 50% of the African American children in foster care have been there for more than two years, whereas only one-third of white children remained in foster care for the same length of time).

188. See ADAMEC & PIERCE, *supra* note 186, at 160 (explaining that there are an insufficient number of infants available for adoption).

women's increasing involvement in the professional sphere, which has led to delayed childbearing and to heightened problems with infertility, has increased the numbers of adults interested in adopting. Thus, at the beginning of the twenty-first century, a mismatch exists between the numbers of parents seeking to adopt and the number of children eligible for adoption.

When public adoption agencies have a healthy, white child, they first look to place that child with a married couple and will only look to a single person as a secondary option.¹⁸⁹ Some agencies will not allow singletons to receive infants and, instead, choose to limit singles to the older "special needs" children.¹⁹⁰ These children may be physically or mentally handicapped, a member of a sibling group, older or behaviorally hard to handle.¹⁹¹ Typically, a single would-be parent must be willing to either accept these "hard to place" children or wait years for a healthy infant who has not spent time in the foster-care environment. Even when a match is made, existing laws and regulations tilt heavily in favor of the birth parents' right to reconsider.¹⁹² Birth mothers are generally provided anywhere from three days to several weeks post-birth to change their minds and, in some states, it may be years before the adoptive arrangement becomes immune from legal challenge.¹⁹³

189. See NATIONAL COMMITTEE FOR ADOPTION, *supra* note 187, at 162 (reporting that, for every available baby, there are approximately fifty to a hundred infertile couples seeking to adopt and that birth mothers express a preference for their child to be adopted by a married couple, and thus single persons seeking to adopt are at a disadvantage); see also ADAMEC & PIERCE, *supra* note 186, at 263-64 (describing the challenges faced by single persons seeking to adopt, including the refusal of some adoption agencies to accept applications from single adoptive parents and the policies of other agencies that only consider single adoptive parents "for the most difficult to place children").

190. ADAMEC & PIERCE, *supra* note 186, at 269.

191. *Id.* at 266-69. One commentator has reported that:

[m]ost of the boys and girls living in America's foster-care system were removed from parents who severely mistreated them, neglected them, or abused alcohol and drugs so intensively themselves that they could barely function. . . . [M]ore than 117,000 of them—teenagers who have bounced into and out of innumerable foster homes, infants with emotional or physical disabilities, babies born to prostitutes and people with HIV, and children of all ages who are black, Hispanic, of mixed race, or possess other "special needs"—are available for adoption.

ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 157 (2000).

192. See Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L.J. 1077, 1150 (2003) (explaining that state laws vary as to how much time the birth mother is given to revoke adoption and that a balancing must occur between the rights of the biological parents as well as those of the adoptive parents).

193. *Id.* (indicating that, in some states, the biological mother can revoke her consent to the adoption at any time up until the entry of the final adoption order).

Adopting through a private agency or independently, using only an attorney or a physician as an intermediary, is also a possibility in most states.¹⁹⁴ However, all private agencies have their own requirements regarding age, marital status and income that may exclude older single mothers. Additionally, some agencies and intermediaries allow the birth parents to select the child's parent(s) from a pool of applicants, and intact infertile couples are usually chosen before single parents. Private agency adoptions can range in cost between \$10,000 to \$25,000, with the costs fluctuating based on the race of the baby, the degree to which the agency supports the costs of the pregnancy, the delivery, and the percentage of birth mothers who change their minds. Independently arranged adoptions may be slightly less expensive but, in the event that the birth mother changes her mind, the financial losses are absorbed entirely by the adoptive parent and not by the agency.¹⁹⁵

Untenable waits, restrictions and legal uncertainty drive some parents to adopt abroad. This option, however, poses burdens of its own. First, most countries require adoptive parents to retrieve the children in their country of origin, which increases costs and fees.¹⁹⁶ Second, children adopted from other lands typically have spent from several weeks to several months in orphanages receiving varying levels and quality of care.¹⁹⁷ Little health information is provided and, in many instances, this information is falsified to increase the child's chance for adoption.¹⁹⁸ Maternal malnutrition, drug or alcohol use, HIV status, and hepatitis all threaten the child's long-term development.¹⁹⁹ Physically healthy children may develop

194. While all states permit private adoption agencies, independent adoption is illegal in Connecticut, Delaware, Massachusetts and North Dakota. ADAMEC & PIERCE, *supra* note 186, at 153.

195. See LEE VARON, *ADOPTING ON YOUR OWN: THE COMPLETE GUIDE TO ADOPTING AS A SINGLE PARENT* 189-91 (2000) (delineating the disadvantages of independent private domestic adoption, including both the emotional and the financial losses that could result).

196. *Id.* at 212 (explaining that international adoptions require adoptive parents to travel to adopt the child and that some countries even require a lengthy stay or multiple trips).

197. *Id.* at 201 (noting that "the circumstances in which a child of another country is living can vary wildly"). Some children are fortunate and are placed in "well-run orphanages or loving foster homes" but less fortunate children "may live in sub-standard institutions where they have received little nurturing and almost no one-to-one interaction with a caregiver." *Id.*

198. *Id.* at 200-01 (revealing that, although it is important to obtain as much information about an adopted child as possible, in international adoption such information is not available or is inaccurate because some "agency personnel . . . purposely exaggerate medical conditions in order to influence local authorities to release a child for adoption").

199. See ADAMEC & PIERCE, *supra* note 186, at 39-43, 194-96.

psychological deficits if they spend their first months of life warehoused in overrun state orphanages. Neglect in the early stages places these children at risk of developing attachment disorders that interfere with their ability to bond, to trust, and to empathize with others.²⁰⁰ These children are said to be “without a conscience” and can cause havoc on the adoptive family that seeks to shelter them.²⁰¹

Becoming a parent via any mechanism is a risky enterprise. No guarantee promises that existing embryos, if implanted, will lead to a healthy birth. Still, on almost any measure, implantation constitutes a far smoother road to parenthood. Adoption, especially for single older women, is an expensive process fraught with the potential for protracted delay and ultimate disappointment. Foreign adoption programs can shut down, birth mothers can reclaim their babies, and children who appear fine at first blush may be afflicted with the physical or the emotional mark of early neglect or mistreatment. Adoption is costlier, more burdensome, and presents a higher risk for heartbreak than does the implantation of existing embryos. It is not a comparable alternative. Judicial affinity for this “solution” reveals both insensitivity to the frozen embryo litigants’ parental aspirations and a profound inattention to the real-world barriers that threaten their fulfillment.

CONCLUSION

Frozen embryo cases resist easy answers. This Article has argued that courts stray when they presume that parties seeking to avoid unwanted genetic links should prevail in frozen embryo disputes. It examined the courts’ premise that the creation of biological ties presages a life of psychological bondage and found it empirically unsupported. At the same time, it argued that courts’ existing treatment of the right to procreate undervalues women’s investments in existing embryos and the difficulties attendant upon seeking parenthood through other means. Presumptions are inappropriate in the frozen embryo context where careful and fact-sensitive analysis is necessary to fairly assess the interests at stake.

Reform in this area requires, first, that state legislatures clarify the financial obligations of those who would wish to implant frozen embryos over their ex-spouses’ objection and, second, that the courts adopt guidelines that more equitably assess the parties’ competing reproductive interests. To eliminate the possibility that an objecting

200. *See id.* at 171-73.

201. *Id.*

spouse might be saddled with the financial support of a child whose birth he or she sought to avoid, state legislatures should make clear that a divorcing spouse who objects to the implantation of embryos created during the marriage should be treated like a gamete donor and not like a parent. Indeed, statutes in Texas, Colorado, and Washington provide models for future efforts.²⁰²

Once courts are assured that ordering embryo implantation will not create the moral hazard of one party fighting for a parent-child relationship that the other must fund, they can focus more on the essence of the parties' interests in achieving and in avoiding procreation. Shorn of the financial overlay, the interest of the party seeking to avoid procreation rests entirely on the psychological burdens of "forced parenthood." As argued earlier, this interest deserves consideration, but it should not trump all countervailing concerns. In assessing the strength of this interest, courts should be open to individualized showings of harm but also should be mindful that social science investigations suggest that, for most adults, psychological parenthood does not necessarily flow from a biological connection.

In considering the interests of the party seeking to procreate, courts should take seriously the physical and emotional trauma inherent in a woman's participation in ARTs and the obstacles impeding efforts to become a parent through other means. This does not mean that a woman's desire to preserve existing embryos for use should always prevail. While courts have yet to elucidate fully the core values that they seek to protect in upholding the "right to procreate," it is clear that the sanctity of the bond that links adults and the children that they nurture stands at the center of that right. As the Supreme Court stated in *Skinner v. Oklahoma*, the right to procreate is essential to the survival of the human race.²⁰³ This statement could be read literally as referencing our biological imperatives as well as gesturing more poetically to the transfiguring effect of parent-child bonds on both individuals and society. When

202. The Texas statute makes it clear that:

If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child. . . . The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

TEX. FAM. CODE ANN. § 160.706 (Vernon 2003); accord COLO. REV. STAT. ANN. § 19-4-106 (West 2003); WASH. REV. CODE ANN. § 26.26.725 (West 2003).

203. 316 U.S. 535, 541 (1942).

assigning weight to the myriad of interests that the women and men in frozen embryo cases seek to fulfill in frozen embryo disputes, courts should accord substantial weight only to those interests that lie at the heart of the parent-child bond sheltered by the Constitution. Thus, women who seek to use existing embryos to achieve genetic parenthood should be accorded the greatest judicial deference, while women who seek to donate their embryos to other infertile couples should be accorded significantly less interest. The right to procreate is not assignable, and, as the *Davis* court recognized, when embryos are sought for donation, an objecting spouse's desire to halt embryo transfer should prevail.

Although women shoulder the bulk of the physical labor in producing fertilized embryos and over time tend to suffer the greater constriction of reproductive opportunity, this does not mean that men's interests in obtaining existing embryos to achieve genetic parenthood should be ignored. As argued earlier, courts should consider, on a case-by-case basis, the would-be parent's opportunities to seek parenthood through alternative means. While, typically, men are able to produce motile sperm well into their seventies,²⁰⁴ treatment for prostate cancer or other illnesses may impair or destroy a man's reproductive capacity.²⁰⁵ In that situation, a man's interest in using existing embryos to achieve genetic parenthood is as compelling as that of the aging divorcee who can no longer produce viable eggs. The interests of the infertile parent should be accorded considerable weight when balanced against the other parent's protests.

In sum, I support greater empathy for, and judicial deference to, the interests of would-be mothers and fathers in frozen embryo disputes. Generally speaking, women's investments in existing embryos and their lack of alternative reproductive opportunities counsel in favor of treating women's interests in using existing embryos to achieve genetic parenthood with special care and concern. A spouse who seeks to block such usage should be required to offer concrete evidence of harm apart from the generalized

204. See Ernesto Gallardo et al., *Effect of Age on Sperm Fertility Potential: Oocyte Donation as a Model*, 66 FERTILITY & STERILITY 260, 263 (1996) (observing that "fertilization ability is not affected by age in males, as has been demonstrated in women").

205. AMERICAN CANCER SOCIETY, TREATMENT TOPICS & RESOURCES, WILL MY SEXUAL FUNCTION & FERTILITY BE AFFECTED?, at http://www.cancer.org/docroot/MIT/content/MIT_7_2X_Will_My_Sexual_Function_and_Fertility_Be_Affected.asp?sitearea=MIT (2004) (on file with the American University Law Review) (noting some of the risks associated with chemotherapy, such as a reduced number and motility of sperm cells, that can result in temporary or permanent infertility).

assertions of psychological harm to which the courts have, thus far, been so receptive. Such a showing should also be required when a male gamete donor seeks to use existing embryos to achieve genetic parenthood and can demonstrate that future reproductive efforts will not likely succeed.

Current judicial treatment of reproductive aspirations in frozen embryo disputes is heavily tilted in favor of the party seeking to avoid “coerced reproduction.” This is due in large part to the courts’ concern that a parent who is unsuccessful in blocking embryo development could find himself or herself financially obligated and psychologically burdened by the resulting child. However, the threat of financial servitude could be removed by legislation releasing the objecting spouses from the obligation to provide support. Additionally, the threat of psychological bondage is a product of the courts’ collective imagination. Investigations into post-divorce and non-marital childbearing and into sperm donation reveal that the psychological connections flowing from genetic links are tenuous and contingent and not absolute and pre-determined. The time is long past for the courts to abandon the myth of “the parent trap.” With a more accurate and realistic approach to the complex character of psychological parenthood, courts could move toward a more just and balanced approach to frozen embryo disputes. With both assisted reproduction and divorce seemingly permanent fixtures of our family law landscape, we only can hope that the courts will begin their journey sooner rather than later.