DISPUTES OVER FROZEN PREEMBRYOS & THE "RIGHT NOT TO BE A PARENT"

TRACEY S. PACHMAN[*]

I. INTRODUCTION

In the past few decades, medical science has progressed at a breakneck pace to provide solutions that allow infertile couples to conceive and gestate their own biological children. Not surprisingly, the speed of these medical developments, which have altered the character of human reproduction, has left the U.S. legal system scrambling to create legal standards with respect to individual rights. An excellent example of this phenomenon occurs in the context of in vitro fertilization [hereinafter IVF], where several courts have developed guidelines to resolve frozen preembryo disputes. When these courts apply long-standing legal principles to the unique circumstances of disputes over control of frozen preembryos [hereinafter "preembryo dispute cases"], it may look like jurisprudence as usual. Yet, this line of cases demands intense scrutiny, particularly from feminist scholars. The holdings of the preembryo dispute cases are molding reproductive rights in our legal system to accommodate new understandings of reproduction. Unfortunately, the shape that these rights are taking does not wear well on women. In order to understand how cases involving the reproductive innovation of IVF are directing the course of reproductive rights in the United States and impacting women, it is important to first understand the IVF process and how it generates disputes.

This article explores the "right not to be a parent," the controlling standard by which several courts have decided disputes over frozen preembryos. In Part II, I describe both the IVF process and how courts have responded to disputes that have arisen from it. Part III of this article reveals that the "right not to be a parent" has weak, if any, footing in constitutional and family law. Part IV of this paper demonstrates that although it appears to be gender-neutral, the application of the right not to be a parent in preembryo dispute cases effectively discriminates against women by failing to recognize contributions and rights of women in the IVF procedure. Furthermore, this Part discusses how the arbitrary decision to focus on the future benefits and burdens of parenthood, rather than the past contributions to the couples' efforts to achieve parenthood, devalues the enormous

---

[*] Attorney, Pepper Hamilton LLP (concentrating in corporate, securities, and intellectual property matters), J.D., University of Pennsylvania Law School, 2002; A.B., Bryn Mawr College, 1999. Special thanks for the invaluable guidance and insight of my professor, Bridget J. Crawford, and for the generous assistance and encouragement of my mother, Arlene Sorens, and my husband, Scott Pachman.

contributions of women to the IVF procedure and thereby discriminates against women in preembryo disputes. Finally, I propose a new standard that combines freedom to contract with acknowledgment of women's more significant role in the IVF process, to allow resolution of preembryo dispute cases in a manner that preserves women's personal and reproductive rights.

II. IN VITRO FERTILIZATION AND THE COURTS

A. In Vitro Fertilization

In vitro fertilization is a multi-step process through which a man's sperm and a woman's egg are combined in a laboratory dish where fertilization occurs.[1] The resulting preembryo can then be transferred to a woman's uterus, where it may result in pregnancy and birth.[2] In vitro fertilization tends to be used by women who have blocked, severely damaged, or absent fallopian tubes, but it is also used to overcome other forms of infertility, including male fertility problems or infertility caused by endometriosis or by an unknown cause.[3]

Before fertilization can take place, eggs must be harvested from a woman's ovaries. To prepare for this process, a woman undergoes approximately two weeks of intensive drug therapy intended to stimulate ovulation, as well as tests and ultrasounds to confirm that the drugs are having their intended effects.[4] To harvest the eggs, the woman undergoes an outpatient procedure during which the eggs are aspirated from the ovary by either placing a needle, guided by ultrasound, through the vaginal wall,[5] by laproscopic surgery, or by Trans-Abdominal Oocyte Retrieval.[6] Typically, only local anesthesia is required for this process,[7] but general anesthesia in the form of conscious sedation may be used.[8] Following retrieval, the eggs are fertilized in laboratory dishes using sperm donated by the man and then divide two to four times to become preimplantation embryos (pre-

---

[1] American Society for Reproductive Medicine, Fact Sheet: In Vitro Fertilization, *at* http://www.asrm.com/Patients/FactSheets/invitro.html (last visited Oct. 28, 2002).

[2] *Id.*

[3] *Id.*

[4] IVF.com, In Vitro Fertilization (IVF-ET), *at* http://www.ivf.com/ivffaq.html (last visited Oct. 28, 2002).

[5] *Id.*

[6] Cooper Center for IVF, Step #3: Oocyte (Egg) Retrieval, *at* http://www.ccivf.com/step3.htm (last visited Oct. 28, 2002).

[7] IVF.com, *supra* note 4.

[8] Cooper Center for IVF, *supra* note 6.

embryos).[9] The most viable preembryos may then be implanted in the woman's uterus or cryopreserved (frozen).[10] Women who undergo IVF treatments face risks, reportedly minimal, at each stage of the process. Such risks include ovarian overstimulation, which can lead to dehydration, blood clotting disorders and kidney damage, and injuries to structures near the ovaries including the bladder, bowel, uterus, or blood vessels.[11]

The IVF process is reportedly physically uncomfortable, emotionally draining, and financially burdensome.[12] Thus, to avoid unnecessary repetition of the egg retrieval process, ovarian stimulation often intentionally results in the production of eggs well in excess of those which can be safely implanted.[13] Cryopreservation may be used to preserve the remaining preembryos for future use.[14] An estimated 188,000 frozen preembryos exist in the United States today.[15]

The question of who should decide what should be done regarding the use or disposition of frozen preembryos has been the subject of a broad public policy debate that has resulted in legislation in a few states.[16]

---

[9] IVF.com, *supra* note 4. For a detailed description of the development of the fertilized egg in the laboratory, see Davis v. Davis, 842 S.W.2d 588, 593-94 (Tenn. 1992).

[10] *See* Cooper Center for IVF, Step #7, Cryopreservation (Freezing) Program (describing the reasons and the procedures for cryopreserving embryos), *at* http://www.ccivf.com/step7.htm (last visited Oct. 28, 2002).

[11] American Society of Reproductive Medicine, Fact Sheet: Risks of In Vitro Fertilization (IVF), *at* http://www.fertilethoughts.net/faq/asrm/riskivf.html (last visited Sept. 28, 2002).

[12] Joshua S. Vinciguerra, Comment, Showing "Special Respect"—Permitting the Gestation of Abandoned Embryos, 9 Alb. L.J. Sci. & Tech. 399, 402 (1999).

[13] *Id.*

[14] *Id.*

[15] Delroy Murdock, The Adoption Option Should be Used for Frozen Embryos, National Review, *at* http://www.nationalreview.com/murdock/murdock082701.shtml, (Aug. 27, 2001).

[16] *See* Fla. Stat. ch. 742.17 (2000) (requiring the physician and the parties to IVF to enter into a written agreement regarding the disposition of the embryos and awarding control and decision-making powers to the gamete-donors if no such agreement exists); La. Rev. Stat. Ann. §§ 9-121, 123, 129, 130 (West 2000) (defining human embryos as "persons," prohibiting their destruction, and requiring that they be made available for adoptive implantation); N.H. Rev. Stat. Ann. §§ 168-B:13 - 168-B:15 (2000) (requiring that the parties to an IVF procedure enter into a written agreement and vesting control in the gamete-donors). *Compare* Dave Andrusko, Parents of Adopted Embryos Speak Out (describing and advocating for the Snowflakes Human Embryo Adoption Program, a program that seeks to have all unused frozen embryos adopted), *at* http://www.nrlc.org/news/2001/NRL07/daves.html (last visited Sept. 28, 2002), and Murdock, *supra* note 15 (advocating the adoption of frozen embryos), with H. Joseph Gitlin, Disposition of Frozen Embryos When Parties Divorce (advocating that parents be required to execute an agreement regarding the disposition of unused frozen embryos and that such

Disputes over frozen preembryos reach the courts when the two "parents" of the frozen preembryos divorce and battle for control of the remaining frozen preembryos. Struggling with the fact that the preembryos at issue consist of equal genetic material from each of the parents and were, at least temporarily, located outside of the body of both parents, courts have decided that, in the absence of, and sometimes in spite of, the existence of prior agreements, the right not to be a parent should generally control in preembryo dispute cases.

B. Courts and the "Right Not to Be a Parent"

1. How This Standard Has Been Applied in Disputes Over Frozen Preembryos

The right not to be a parent has been articulated and relied upon in most of the preembryo dispute cases litigated so far in the United States. For instance, in Davis v. Davis, the Supreme Court of Tennessee held that in the absence of any explicit prior agreement, a divorced couple's interests should be weighed against one another, and the man's "interest in avoiding parenthood" should prevail over the woman's desire to donate the preembryos to an infertile couple.[17] The court added, "The case would be closer if [the woman] were seeking to use the preembryos herself, *but only if she could not achieve parenthood by any other reasonable means.*"[18] Accordingly, a woman's right to use the preembryos would outweigh the man's interests only if she demonstrates extreme need to use them as originally planned.[19] Further, this statement leaves open to speculation whether adoption or costly medical procedures would be considered "reasonable means" by which a woman could achieve parenthood. Notably, the court did not indicate that when the preembryos were the woman's only reasonable chance at parenthood, the woman's right to be a parent would conclusively outweigh the man's right to avoid parenthood; it said only that the case would be "closer."

In Kass v. Kass, the Court of Appeals of New York did not explicitly reach the issue of the right not to be a parent because it opted to

---

agreements should control the disposition of the embryos), *at* http://www.opts.com/embryos.html, (Aug. 11, 2000).

[17] 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied sub nom* Stowe v. Davis, 507 U.S. 911 (1992). The court indicated in dicta that it would have enforced a prior agreement, had one existed.

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

[19] For a discussion of how the language of the Davis decision ignores women's unique role in pregnancy and the hardship of pregnancy, see Sherry F. Colb, Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?, 72 B.U. L. Rev. 101, 119-26 (1992).

enforce contractual agreements between the two parties signed both at the time of the IVF procedures and upon divorce stating that the preembryos should be used for research.[20] Nevertheless, the result was that the case was decided in favor of Mr. Kass, who wished to have the preembryos donated for research purposes (thus ensuring that he would not be a parent), rather than Ms. Kass who wanted to have the embryos implanted in herself and who claimed that the preembryos were her only chance at genetic parenthood.[21]

In A.Z. v. B.Z., the Supreme Judicial Court of Massachusetts noted the preference of both the Davis and Kass courts for relying on prior agreements to resolve disputes over frozen embryos.[22] Nevertheless, the court held, "we would not enforce an agreement that would compel one donor to become a parent against his or her will."[23] The court justified its decision on the assertion that "forced procreation[24] is not an area amenable to judicial enforcement," and therefore, even an unambiguous agreement should be void on public policy grounds.[25] Thus, the right not to be a parent always trumps the freedom of the parties to contract.[26]

In the case of Litowitz v. Litowitz, the Supreme Court of Washington reversed a lower court decision that recognized the right not to procreate as described in Davis, and interpreted it to allow the male gamete-provider to donate the preembryos for adoption.[27] The court instead relied on a contract signed by the parties prior to the IVF procedure, determining that the disposition of the preembryos should comply with a signed contract that requested disposal of the preembryos if they remained frozen for five years.[28] In this case, the intended legal mother of the preembryos (the wife of the male gamete-provider) had a hysterectomy, which rendered her

---

[20] 696 N.E.2d 174, 177 (N.Y. 1998). For a discussion of the agreements between the parties in this case, see *infra* Part V.A.

[21] *Id.* at 562.

[22] 725 N.E.2d 1051, 1055-56 (Mass. 2000).

[23] *Id.* at 1057.

[24] For a discussion of why procreation is not an accurate description of the rights in dispute in the preembryo dispute cases, see *infra* Part II.B.2.

[25] A.Z. v. B.Z., 725 N.E.2d at 1058. The A.Z. v. B.Z. court held that the agreement in this case was also unenforceable due to changed circumstances and other reasons. *Id.* at 1056-57. For further discussion of the agreements between the parties in this case, see *infra* Part V.A.

[26] For a discussion of why contracts that contain monetary and non-monetary agreements (particularly prenuptial agreements) should not be enforced, see generally, Katharine B. Silbaugh, Marriage Contracts and the Family Economy, 93 Nw. U. L. Rev. 65 (1998).

[27] 48 P.3d 261, 265 (Wash. 2002).

[28] *Id.* at 270-71.

unable to donate eggs or to gestate the embryos.[29] Both parties therefore contracted with a woman to act as a donor and surrogate, while Mr. Litowitz's sperm were used to fertilize the donor's eggs, and agreed that the disposition of the unused preembryos would be determined by agreement of both parties or by a court.[30] When Mr. and Ms. Litowitz divorced, Ms. Litowitz sought to be given the preembryos for implantation in a surrogate and gestated as her legal child.[31] Mr. Litowitz wanted to donate the preembryos.[32]

In J.B. v. M.B.,[33] the New Jersey Supreme Court agreed with the Davis court in its assessment that the party wishing to avoid procreation should generally prevail.[34] The court decided that the right of J.B., the female gamete-provider, not to be a parent prevailed.[35] The court went further to say that J.B.'s exercise of this right did not infringe on M.B.'s right to procreate, because he was fully capable of becoming a father in the future through natural or IVF means.[36] On the other hand, allowing M.B. to control the disposition of the embryos for implantation in his new wife or in other infertile couples would result in the loss of J.B.'s right not to procreate and would have "life-long emotional and psychological repercussions."[37]

Together, these cases indicate that the application of the right not to be a parent in preembryo dispute cases awards control of the preembryos to the individual who wishes to have the least amount of future responsibility with respect to the preembryos. In some cases, this standard is applied only if there is no agreement to the contrary; in others, it is applied pursuant to an existing agreement; in still others, it is applied despite the terms of an existing agreement. In four out of five of these cases, the application of the right not to be a parent meant that the male disputant was granted control of the preembryos. That men have benefited more often than women under this allegedly gender-neutral standard suggests that it is a prime example of the assertion by several gender theorists that neutral standards serve only to

---

[29] *Id.* at 262.

[30] *Id.*

[31] *Id.* at 264.

[32] *Id.*

[33] 783 A.2d 707 (N.J. 2001).

[34] *Id.* at 716.

[35] *Id.* at 717.

[36] *Id.*

[37] *Id.* The court goes on to cite an article which states that genetic ties can form a powerful bond even if the legal ties are broken, most likely to support the idea that the preembryos should not be given up for adoption because the biological ties would still burden M.B. *Id.*

reinforce the status quo or to further subordinate women.[38] Though the immediate gender-correlated consequence of the application of this rule in preembryo dispute cases is that male disputants prevail more often, the meaning, and therefore the future application, of the right not to be a parent is not nearly as clear.

2. What Does the "Right Not to Be a Parent" Mean?

At first glance, the statement that an individual has a right not to be a parent seems intuitive. The alternative inspires visions of a universe that is at once Orwellian and ripped from the pages of a Margaret Atwood novel.[39] Yet, in reality, the right not to be a parent has tenuous roots and is laden with ambiguity. As will be discussed later in this paper, the courts interpret the right not to be a parent as a *constitutional* right that derives from the right to privacy and the right to procreate.[40] In fact, several of the cases treat the "right not to be a parent" and the "right not to procreate" as if they are interchangeable.[41] What the concept of being a parent means, however, is ambiguous as a matter of jurisprudence and can be interpreted much more broadly than procreation. For instance, "being a parent" can be construed to include procreation, gestation, birth, and the provision of financial, emotional, and psychological support. In fact, several of the cases refer to some variation of this list of responsibilities to justify the greater weight accorded to the right not to be a parent.

The choice to use the term "parent" interchangeably with the word "procreate" may be due to the courts' awareness that, in a sense, the parties have already exercised their "right to procreate" by fertilizing the woman's eggs with the man's sperm. In that context, the only rights under discussion are parenting rights, including gestating, birthing, and variously supporting the child. Moreover, the choice of the word "parent" appears to create a

---

[38] *See, e.g.*, Judith A. Baer, Our Lives Before the Law 120 (1999) ("[N]eutral principles, consistently applied, will ultimately reinforce the status quo."); Martha Albertson Fineman, Feminist Theory in Law: The Difference It Makes, *in* Gender and American Law 53, 58 (Karen J. Mashkle ed., 1997) ("[G]ender neutrality may ultimately be as oppressive to the interests of women as was the creation of differences."); Catharine A. MacKinnon, Difference and Dominance, *in* Feminism Unmodified 32-45 (1987), *reprinted in* Mary Becker et al., Feminist Jurisprudence 108-16 (2001) ("Gender neutrality is ... simply the male standard.").

[39] *See generally* George Orwell, 1984 (1949) (portraying a society in which citizens are obligated to reproduce to provide soldiers for the state); Margaret Atwood, The Handmaid's Tale (1986) (describing the plight of one woman in a society in which the remaining fertile women are forcibly used to conceive and bear the children of the ruling class).

[40] *See infra* Part III.A.

[41] *See generally* J.B. v. M.B., 783 A.2d 717 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

gender-neutral resolution to these disputes, which so far have pitted the reproductive and other rights of one man against those of one woman. Whatever the intended meaning of the right not to be a parent is, it leaves us with more problems and questions than solutions and answers.

III. THE ORIGIN OF THE "RIGHT NOT TO BE A PARENT"

A. The "Right Not to Be a Parent" as a Privacy Right

The constitutional basis for the right not to be a parent was laid out in detail by the Davis court. Though the Davis court gave priority to contract law for resolution of disputes over preembryos, the court also held that, in the absence of an explicit agreement, the parties' constitutional rights of privacy should be balanced against each other to resolve the dispute.[42] The court defined the right to privacy, both with respect to the federal constitution and the Tennessee constitution, as the right to be free of unreasonable government intrusion.[43] More specifically, the Davis court articulated that procreation, and therefore the parties' rights with respect to the preembryos, was encompassed within the constitutional privacy right.[44] The court cited the state constitution as the source of this right in state law without further elaboration.[45]

The Davis court identified several cases that support the existence of a federal right to procreate. For instance, the court cited Skinner v. Oklahoma, 316 U.S. 535 (1942), for its holding that procreation is a fundamental right.[46] The court also quoted Eisenstadt v. Baird, 405 U.S. 438 (1972), stating "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child."[47] The court further referred to reproductive freedom cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973).[48]

Based on these cases, the Davis court concluded that "the right of procreational autonomy is composed of two rights of equal significance—

---

[42] 842 S.W.2d at 598, 604.

[43] *Id.* at 599-600.

[44] *Id.* at 600.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 601. The Davis court acknowledges that the right to procreational autonomy in the United States is uncertain after the Supreme Court's holding in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). *Id.*

the right to procreate and the right to avoid procreation."[49] The court went on to suggest that IVF cases differ from previous cases of reproductive freedom because they do not implicate concerns about women's bodily integrity.[50] While the court acknowledged that the emotional stress and physical discomfort of the IVF process is much more severe for women than men and that it can fairly be said that women contribute more to the IVF process, "their experience ... must be viewed in light of the joy of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood."[51] The court concluded that the parties must therefore be viewed as entirely equal gamete-providers, without further explanation as to why the parties' experiences must be weighed in light of the future impact of the IVF procedure, rather than the past contributions to it.[52]

Asserting that the two parties had an equal interest in the disputed preembryos, the Davis court set itself to the task of weighing the impact that use or disposition of the preembryos would have on each party's procreational autonomy. The court consequently held that Mr. Davis's right not to procreate was more grievously infringed by the financial and psychological burden of unwanted parenthood than Ms. Davis's rights were infringed by the burden of knowing that the IVF process was futile and the preembryos would not become children.[53] In support of the incredible burden that unwanted parenthood would have on Mr. Davis, the court cited his difficult childhood in an orphanage, which informed his desire that no child of his should be born if it was not to be raised by two parents.[54] Though the Davis court may invoke a twinge of pity for Mr. Davis by reciting these details,[55] the reliance on such facts does not support the court's ultimate conclusion that disputes over preembryos should generally be resolved in favor of the party who wishes to avoid parenthood. Significantly, although couples who have created preembryos have arguably already exercised their right to procreate, this court refers to the right not to procreate and the right to avoid parenthood interchangeably without further justification.

---

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* This arbitrary choice to focus on the future benefits and burdens of parenthood, rather than the past contributions to the couples' efforts to achieve parenthood devalues the enormous contributions of women to the IVF procedure and thereby discriminates against women in preembryo disputes.

[53] *Id.* at 603-04.

[54] *Id.* at 604. Mr. Davis argued that donation to an infertile couple would not ensure that the child would be raised by both parents because the couple could divorce. *Id.*

[55] *Id.*

The court in Davis also considered the issue of whether the preembryos were property or persons and held that the preembryos could not be considered persons under state statutes or under federal law after Roe v. Wade.[56] The Davis court instead gave force to the American Fertility Society's assessment that, due to their potential for human life, preembryos should be accorded greater respect than human tissue, but not the respect accorded to persons, and articulated a standard of "special respect" for preembryos.[57] Nevertheless, the Davis court subsequently acknowledged that the legal status of the preembryos as property or persons was less significant than the preembryos' potential to become "after implantation, growth and birth, children."[58]

Initially, the trial court in Kass v. Kass awarded custody of the preembryos in dispute to Ms. Kass for implantation within a medically reasonable period of time, because, the court reasoned, the female donor has exclusive decisional authority over the fertilized eggs, just as a pregnant woman has exclusive decisional authority over a nonviable fetus.[59] Nevertheless, the appellate court decided, and New York's highest court summarily affirmed, that disputes over frozen preembryos do not implicate the woman's right of privacy or reproductive choice, and, therefore, Roe does not protect the exclusive right of female gamete-providers to decide whether to continue their pregnancy.[60] New York's highest court further held that the preembryos were not "persons" for constitutional purposes, citing Roe v. Wade.[61]

The rest of the preembryo dispute cases either do not put forth support for the right not to be a parent, or they cite Davis and the sources on which the Davis court relies.[62] The support provided by the Davis court is entirely grounded in the rhetoric of the constitutional right to privacy. Nevertheless, stretching the bounds of traditional constitutional rights to apply them to preembryo dispute cases undermines the value of these rights by using them to justify further subordination of women and their reproductive rights.

---

[56] *Id.* at 594-95. The court further noted that the likelihood that a preembryo will result in pregnancy (thirteen to twenty-one percent) and then in live birth (only fifty-six to seventy-five percent of the pregnancies), is much lower than that of a viable fetus left undisturbed in the woman's uterus. *Id.* at 595 n.17.

[57] *Id.* at 596-97.

[58] *Id.* at 598.

[59] 696 N.E.2d 174, 177 (N.Y. 1998).

[60] *Id.* at 179. The failure to apply Roe assigns fewer reproductive rights to women who participate in IVF than to women who conceive through sexual intercourse.

[61] *Id.*

[62] *See, e.g.*, J.B. v. M.B., 783 A.2d 717 (N.J. 2001).

B. The Right to Privacy Does Not Support the "Right Not to Be a Parent"

The courts first overreached when they interpreted the constitutional right to privacy as a boundary that protects one individual from intrusion by another. In fact, the Davis court explicitly defined the right of privacy as the right to be free from *unreasonable governmental intrusion*.[63] Moreover, in a child support case in which a father sought to avoid an obligation to provide child support for a child conceived when the child's mother had deceived him with regard to her use of contraception, New York's highest court stated that the decision whether to father a child, "involves the freedom to decide for oneself, without unreasonable governmental interference, whether to avoid procreation through the use of contraception. This aspect of the right of privacy has *never been extended so far as to regulate the conduct of private actors as between themselves*."[64] Furthermore, New York's highest court gave credence to the appellate court's suggestion that the inquiry into the intimate conduct of the parties before the court might have constituted an impermissible state interference with the very right of privacy that the defendant sought to assert.[65] Thus, not only do the courts in the preembryo dispute cases apply the right to privacy in an unconventional, and most likely unconstitutional, form by transforming a right to be free from government interference into a right that individuals may enforce against one another, they may have violated the privacy of both parties by inquiring into the substantive details of a uniquely private agreement.

The next judicial invention in preembryo dispute cases is the application of the so-called rights to procreate and not to procreate. If they are indeed rights in any constitutional sense, it is not clear that the disputes over frozen preembryos implicate these rights in any way. For example, the Davis court cites Skinner v. Oklahoma, 316 U.S. 535 (1942), as a source of the right to procreate.[66] In Skinner, the Court determined that forced sterilization of criminals is unconstitutional.[67] The preembryo dispute cases involve neither state action nor sterilization. The Davis court cited Griswold v. Connecticut, 381 U.S. 479 (1965), in support of the existence of the right not to procreate.[68] The Griswold court declared a statute prohibiting the use

---

[63] 842 S.W.2d at 599-600.

[64] L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983) (emphasis added).

[65] *Id.*

[66] Davis, 842 S.W.2d at 600.

[67] 316 U.S. 355 (1942).

[68] Davis, 842 S.W.2d at 600.

of contraception unconstitutional.[69] That holding was specifically structured around the privacy of married couples to make intimate choices, including the choice not to procreate.[70] Uniquely, the preembryo dispute cases do not involve state action. The couples are no longer married, and the parties are beyond the procreative steps where contraception would be appropriate.

The Davis court also relied on Eisenstadt v. Baird, 405 U.S. 438 (1972), as evidence of the right not to procreate.[71] Eisenstadt expanded the privacy right discussed in Griswold to non-married individuals, citing the fact that a marriage is actually comprised of two separate individuals.[72] This case declared unconstitutional on equal protection grounds a statute prohibiting the distribution of contraceptives for birth control purposes to unmarried individuals.[73] The Davis court quotes Eisenstadt, stating that the right to privacy clearly includes the right of both married and single people to be free of unwarranted governmental intrusion into the decision "whether to bear or beget a child."[74] While Eisenstadt supports the application to individuals of the right not to procreate, it is still not clear that the parties to a preembryo dispute case would fall under this constitutional protection from state action prohibiting distribution of contraception. Moreover, it is doubtful that all of the privacy rights described in Eisenstadt were intended to extend to both parties in a dispute because, although both parties can "beget" a child (and arguably have done so already with the IVF procedure), only a woman can "bear" a child. Perhaps more importantly, Skinner, Griswold, and Eisenstadt all define the right to procreate or not to procreate within the limited parameters of the right to decide, without unreasonable governmental intrusion, whether one's act of sexual intercourse will have the potential for procreation. The courts in the preembryo dispute cases egregiously expand the doctrine of Skinner, Griswold, and Eisenstadt to cover the right to decide, without intrusion by another equally interested private party, not to be burdened with parenthood.[75]

The Davis court's decision is again at odds with accepted legal principles when it summarily states in dicta that concerns about women's

---

[69] 381 U.S. at 485.

[70] *Id.*

[71] Davis, 842 S.W.2d at 600.

[72] 405 U.S. at 453.

[73] *Id.* at 454-55.

[74] 842 S.W.2d at 600 (citing Eisenstadt, 405 U.S. at 453).

[75] The equivalent right to procreate to the one advanced in the Skinner, Griswold, and Eisenstadt cases in the IVF context would probably be the right, once the parties donated their gametes, not to have the state interfere with their decision whether to use the gametes to create preembryos or not. The parties' other privacy rights might arguably also extend to protect them from state interference on how to use the preembryos.

bodily integrity are not implicated in frozen preembryo cases. In doing so, the court failed to acknowledge the intent and reality of the IVF procedure. In the context of the IVF procedure, the only reason why the woman consents to the bodily intrusion and removal of the eggs from her ovaries is to have them fertilized for the purpose of returning the fertilized eggs to her body. But for the couple's fertility problems, the eggs would have remained inside, and arguably a part of, the woman's body throughout the fertilization and gestation process. Moreover, these preembryos' potential for human life can be realized *if and only if* they are implanted in a woman's body for gestation. As was acknowledged by the trial court in Kass, although the IVF process artificially and temporarily places the preembryos outside of the woman's body, it still implicates issues of a woman's control over her body at every stage.[76] Furthermore, failure to allow a woman to control her preembryo affords her fewer rights than she was guaranteed in Roe v. Wade,[77] while affording the male gamete donor greater rights than he would have had in a non-IVF pregnancy.[78]

The Davis court stretched its analysis without explanation in several other respects. For instance, the court acknowledged that the woman makes a far greater physical and emotional contribution to the IVF process, but states that the court's analysis must focus only on the parties' future burdens of unwanted parenthood or the denial of the joys of parenthood.[79] Admittedly, the future impact on the parties of the use or disposition of the frozen preembryos is important in these cases, but there is no reason that the past contributions of the parties should not also be valued. In fact, the loss of the value of her prior contributions to the IVF process may be a significant burden on the woman and perhaps enough to outweigh any future burdens on the man, whatever the woman's decision. Additionally, the court gave little explanation for its analysis that the burden of unwanted parenthood is greater than the burden of the loss of the benefits of parenthood. Rather than a bright-line rule or presumption, this consideration should vary greatly based on the circumstances of the case. Moreover, the relative value of the benefits of parenthood versus the burden of unwanted parenthood may be so personal and subjective that courts are not capable of accurately measuring them.

The preembryo dispute cases thus have been grounded in constitutional rights that have been poorly stretched to fit the contours of

---

[76] 696 N.E.2d 694, 177 (N.Y. 1998).

[77] 410 U.S. 113 (1973).

[78] *Id. See also* Judith F. Daar, Assisted Reproductive Technologies & Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties, 25 Am. J.L. & Med. 455 (1999) (asserting that allowing infertile women less control over their frozen embryos than fertile women have over embryos at the same stage of development is an equal protection violation).

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

the IVF technology. The courts have transformed the right to privacy into a weapon that may be wielded by one private party against the other. They have expanded the right to procreate or to not procreate to include the right to decide to avoid the burdens of parenthood contrary to the wishes of another party. Courts have glossed over the implications that the IVF process has on women's bodily integrity—that in consenting to the IVF procedure, the woman commits to bodily pain and sacrifice with the expectation that she will be able to control the use of the resulting preembryos. Not only do these decisions fail to survive minimal constitutional scrutiny, they violate the principle that there should be no discrimination on the basis of sex.

IV. THE APPLICATION OF THE "RIGHT NOT TO BE A PARENT" & INEQUITABLE GENDER IMPACT

A. The "Right Not to Be a Parent" & Paternal Support Obligations

If one defines the right not to be a parent to include the right not to bring a pregnancy to term and the right not to support an unwanted child, then modern American jurisprudence preceding the preembryo dispute cases has not upheld this right with respect to fathers. For instance, in L. Pamela P. v. Frank S., the court held that, although the defendant's partner had deceived him with regard to her use of birth control, the defendant was still obligated to pay child support for the child who resulted from their sexual union.[80] The defendant argued that the plaintiff's intentional deception deprived him of his constitutional right to decide whether to father a child.[81] The court refrained from deciding whether there was sufficient state action in this case to support a constitutional claim.[82] Nevertheless, the court held that, even if there was sufficient state action, the plaintiff's deception did not implicate the defendant's right to choose not to procreate, because it did not limit the defendant's right to use contraception. The court further held that the plaintiff's "failure to allow [the defendant] an equal voice in the decision to conceive a child ... does not rise to the level of a constitutional violation."[83] Moreover, the court held that the right to decide whether to father a child constitutes the freedom to decide, without unreasonable governmental interference, to avoid procreation through the use of contraception, and that the right does not apply to the "conduct of private actors as between themselves."[84]

---

[80] 449 N.E.2d 713, 714-15 (N.Y. 1983).

[81] *Id.* at 715.

[82] *Id.*

[83] *Id.* at 716.

[84] *Id.*

In a number of ways, the L. Pamela P. decision does not support the "right not to be a parent," as described in the preembryo cases. The court interprets the father's constitutional rights to be limited to the right to choose to use contraception without unreasonable interference by the government. The court makes it clear that this right does not regulate the conduct of private individuals with respect to one another. Once the father's conduct results in conception, the court held that he does not have any further right to avoid his legal obligations to the child (i.e., the obligation to pay child support). L. Pamela P. demonstrates that, prior to the preembryo dispute cases, fathers did not have a right not to be a parent, insofar as they were required to pay child support even if they had been deceived into conceiving a child. Fathers also did not have standing to assert a claim of this right against their partners. This perspective stands in stark contrast to the preembryo dispute cases, in which courts have held that fathers have the right not to be a parent, in that they have a right to prevent the gestation of the preembryo against the wishes of their partner, even when they have consented to creation of the preembyros.[85]

Similarly, the court in People *ex rel.* S.P.B. v. P.D.G.,[86] held that a father, who upon his partner's announcement that she was pregnant, insisted that he did not wish to father a child and offered to pay for an abortion, was obligated to pay child support for that child. The father challenged the award of child support, which was based on a Colorado statute that imposed equal child support obligations on both parents, on the grounds that the statute violated his equal protection rights by accommodating the mother's decision to carry the child to term, while ignoring his express desire to terminate the pregnancy.[87] He also argued that the statute violated his due process rights by creating an irrebuttable presumption that a father should share the duty of child support.[88] The court held that the state's substantial and legitimate interest in promoting the welfare of the child, which could not be achieved constitutionally without respecting the right of the woman to carry her pregnancy to term, outweighed the father's equal protection interests.[89] With regard to the father's due process claim, the court held that

---

[85] Interestingly, an Illinois court held that a father was obligated to pay child support for a child who was not genetically his own as long as he had implicitly consented to the artificial insemination of his wife. *In re* Marriage of Adams, 528 N.E.2d 1075, 1087 (Ill. App. Ct. 1988). Thus, a man does not have the right not to be a parent with respect to a child who is not his genetic offspring, as long as he does not object to his wife's effecting the conception of that child.

[86] 651 P.2d 1213 (Colo. 1982).

[87] *Id.* at 1215.

[88] *Id.* at 1216.

[89] *Id.* at 1215. In support of its statement that respecting the woman's right to carry the pregnancy to term was the only constitutional means by which the state could advance its interest in providing for the welfare of the child, the court quoted Planned Parenthood of

courts could not, as an alternative to the contested presumption, inquire regarding a prior agreement between the parties releasing one of the party's obligation to the other without "governmental interference with privacy rights which the Supreme Court has deemed inviolate."[90] As a result, the court upheld the presumption that both parents should share the child support obligation.[91]

People v. P.D.G. demonstrates that prior to the preembryo dispute cases the right not to be a parent was not allocated the authority that it was given in the preembryo dispute cases. Relying on Planned Parenthood v. Danforth, the court held that the woman's right to carry the child to term overshadowed a father's right not to be a parent.[92] Furthermore, the court held that the state's interest in protecting the welfare of the child overshadowed the father's right not to be a parent, in that the state could impose both a gender-based classification and an irrebuttable presumption to achieve this end.[93] The father's right not to be a parent, so paramount in the preembryo dispute cases, is not fundamental enough to overcome either the mother's or the state's interest in a more traditional reproductive rights case.

In concert these child support cases suggest that, under modern family law prior to the preembryo dispute cases, a father did not have the right not to be a parent. Even if a father did not consent to the conception or the gestation of the child, he was obligated to pay child support—the obligation typical of male unwanted parenthood in modern American jurisprudence.

While modern family law does not permit fathers a right not to be a parent beyond the possible right not to procreate, historically, fathers were the only party who had a complete right not to be a parent.[94] At common law, a father had no obligation to support his child, while a mother was

---

Cent. Missouri v. Danforth, 428 U.S. 52, 71 (1976): "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between [the mother and the father], the balance weighs in her favor." P.D.G., 651 P.2d at 1216.

[90] *Id.* at 1217. In support of its claim that further inquiry into the existence of agreements between a mother and father that released one of the parties from obligations to the other, the court cited several cases including Carey v. Population Servs., 431 U.S. 678 (1977), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965). P.D.G., 651 P.2d at 1217.

[91] *Id.* at 1217.

[92] *See supra* text accompanying note 89.

[93] P.D.G., 651 P.2d at 1213, 1215.

[94] *See* Kelly Weisberg & Susan Frelich Appleton, Modern Family Law 509 (1998) (citing Baugh v. Maddox, 95 So. 2d 268 (Ala. 1957) in support of the proposition that, at common law, absent a statute to the contrary, a mother had an obligation to support her child, while a father had no support obligation).

obligated to support her child.[95] Today, fathers may, albeit unlawfully, exercise their right not to be a parent by disappearing, thereby thwarting any efforts to prove paternity and effect a support obligation. Thus, the strongest support for "the right not to be a parent" in our legal system may be the common law that clearly and invidiously discriminated along gender lines.

B. The "Right Not to Be a Parent" With Regard to Abortion

Historically the most well-known decision on women's reproductive rights, Roe v. Wade,[96] does not suggest that women have the right not to be a parent, but instead bases its analysis of a pregnant woman's rights entirely in terms of her privacy interest in her bodily integrity. The Supreme Court determined that the right to privacy encompasses a woman's right to decide to terminate her pregnancy.[97] Nevertheless, the manner in which this right was weighed against the state's interest in protecting women's health and was also trumped by the state's interest in protecting prenatal life indicates that it was construed as a woman's interest in making choices with regard to her own body.[98] The Roe court acknowledges that advancing the state's interest in protecting prenatal life may lead to considerable distress and burdens in the life of the woman as a parent of an unwanted child.[99] Nonetheless, the fact that these burdens may be overcome by the interests of the state, which has no biological connection or presumed obligation to support the unwanted child, suggests that, apart from doing as she chooses with her own body, a woman has little, if any, right not to be a parent.

C. Inequitable Gender Impact

The foregoing analysis of family law and abortion case law demonstrates that modern American jurisprudence has not been supportive of the right not to be a parent on behalf of either gender. Nevertheless, the impact of the failure to support this right has been vastly different for men than it has been for women. For men, the legal system's disregard for the right not to be a parent has translated into a legal obligation to financially support unwanted offspring. For women, the disregard for this right has translated into an obligation to use their bodies to gestate unwanted

---

[95] *Id.*

[96] 410 U.S. 113 (1973).

[97] *Id.* at 153.

[98] *See id.* at 148-50 (discussing the state's interests in protecting women's health and in protecting prenatal life).

[99] *Id.* at 153.

children, to provide care to unwanted children, and to financially support unwanted children. In addition, though men may have a *de jure* obligation to support unwanted children in the modern legal system, many do not follow through with this support.[100] Thus, although family law has been changed to reflect a legal principle that fathers have a financial obligation to support unwanted children, in reality women bear the greater burden of supporting unwanted children.

V. GENDER DISCRIMINATION AND THE "RIGHT NOT TO BE A PARENT" IN PREEMBRYO DISPUTE CASES

A. Women's Contributions to the In Vitro Fertilization Process

To the extent that the description of the IVF process in Part II.A. of this article focuses almost entirely on the woman's medical treatment, involvement, and risk, it is typical of all of the literature describing the IVF process. Because reproduction biologically takes place exclusively within a woman's body, any process that must take place outside a woman's body in the IVF procedure requires considerable contributions by the woman. For instance, in Davis, Ms. Davis struggled and suffered for some time in the couple's quest for genetic parenthood. In their first attempt to become pregnant, she suffered a painful ectopic pregnancy that necessitated the removal of her right fallopian tube.[101] Ms. Davis suffered four additional ectopic pregnancies before she opted to have her left fallopian tube ligated.[102] The couple then attempted to adopt, only to have the birth mother change her mind and to find that other avenues for adoption were prohibitively expensive.[103] Despite her fear of needles, Ms. Davis then underwent six unsuccessful attempts at IVF, each requiring that she endure a month of subcutaneous injections to shut down her pituitary gland and eight days of intermuscular injections to stimulate her ovaries, in addition to five anesthetizations for retrieval of eggs.[104]

In Kass, Ms. Kass endured the egg retrieval process five times, and the resulting fertilized eggs were transferred to her body nine times.[105] Ms.

---

[100] *See* Anne Marie Rotondo, Comment, Helping Families Help Themselves: Using Child Support Enforcement to Reform Our Welfare System, 33 Cal. W. L. Rev. 281, 306 n.4 (1997) (stating that fathers constitute the majority of parents who are delinquent in paying child support).

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

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] 696 N.E.2d 174, 175-76 (N.Y. 1998).

Kass became pregnant twice.[106] The first pregnancy ended in a miscarriage; the second pregnancy was ectopic and had to be surgically terminated.[107] No pregnancy resulted from IVF prior to the couple's divorce, and Ms. Kass claimed that the remaining embryos were her only chance of achieving genetic motherhood.[108]

In the case of A.Z. v. B.Z., B.Z. suffered an ectopic pregnancy that resulted in a miscarriage and forced the removal of one of her fallopian tubes.[109] B.Z. then underwent a fertility treatment that lasted one year and did not result in pregnancy.[110] B.Z. and her then-husband next attempted Gamete Inter-Fallopian Transfer, or "GIFT," during which a previously extracted egg and the husband's sperm are both transferred into the fallopian tube.[111] This procedure resulted in another ectopic pregnancy, requiring the surgical removal of B.Z.'s other fallopian tube.[112] B.Z.'s only remaining option for genetic motherhood was IVF.

These cases demonstrate that the pursuit of pregnancy through IVF and other means requires considerable pain and forbearance for the women involved. The disputed frozen preembryos would not have existed but for the continued efforts of these women. Moreover, in the context of the IVF procedure and the parties' relationship, the disputed preembryos had no potential for life but for the woman's consent to undergo yet another procedure to have them implanted in her uterus. IVF is a considerable burden on women and hardly a burden on men. Therefore, to award a woman anything less than an equal right to control the use of the resulting preembryos is to render meaningless her right to make decisions regarding her own body, her freedom to contract, and her right not to be discriminated against on the basis of her sex. In fact, true protection of women's rights necessitates a legal presumption that women have a greater right to control preembryos that result from IVF.

B. Women's Other Contributions to Procreation and Parenthood

As discussed in Part IV.C. of this article, women are *de facto* more likely to be responsible for the care and support of children. Thus, a woman seeking to be a parent is in essence agreeing to take on the majority of the burden of parenthood, in addition to seeking the benefits of parenthood. The

---

[106] *Id.*

[107] *Id.*

[108] *Id.* at 174.

[109] 725 N.E.2d 1051, 1052 (Mass. 2000).

[110] *Id.*

[111] *Id.* at 1052.

[112] *Id.*

courts in the preembryo dispute cases do not acknowledge this when weighing the burdens and the benefits of parenthood. Furthermore, biologically, women experience a more rapid decline in fertility than men do.[113] Therefore, even if a woman in a preembryo dispute case has the capacity to procreate again in the future, her chances of becoming a genetic parent will decline more quickly than will her male counterpart's. The frozen preembryos, harvested when she was younger, are more valuable to her than to her male counterpart. The courts in the preembryo dispute cases do not even make note of this crucial factor in weighing the burden of being denied the right to be a parent.

C. Gender Discrimination in Failing to Recognize Women's Contributions to IVF

A significant portion of feminist theory posits that a gender-neutral standard can, at best, maintain the status quo of subordination of women, and, at worst, further subordinate women.[114] The right not to be a parent in five frozen preembryo cases deprived four women of control over their frozen preembryos. In the one case in which the woman's right prevailed, her objectives most closely resembled what has historically been the male standard for parenthood—she wanted to have the *least* amount of parenting responsibility with regard to the preembryos.[115]

This outcome of rewarding only women who best comply with the male standard is precisely the result that feminist theorist Catharine MacKinnon predicts for gender-neutral standards, which she contends are merely a proxy for male standards.[116] The "gender-neutral" rule of preference for the right not to be a parent has been used to wrest control from women over an entity in which they have an interest equal, if not greater, to that of their male counterparts. Feminist theorists such as Martha Fineman call for the rejection of such gender-neutral standards in favor of the recognition that in some areas, and particularly in the area of reproduction, women's differences from men must be acknowledged in order to avoid perpetuating male dominance.[117] Accordingly, the courts in preembryo disputes should have recognized that women have different roles in reproduction and parenting and should not be held to a male understanding of the rights and responsibilities associated with parenthood.

---

[113] Ruth Colker, Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not, 47 Hastings L.J. 1063, 1063 (1996).

[114] *See supra* note 38.

[115] *See* J.B. v. M.B., 783 A.2d 707, 716-17 (N.J. 2001) (holding that the woman should be awarded control of the frozen preembryos because she wished to avoid procreation).

[116] MacKinnon, *supra* note 38, at 112.

[117] Fineman, *supra* note 38, at 2-3.

The practice of giving preference to the right not to be a parent has also perpetuated what theorist Judith A. Baer has described to be the essence of American jurisprudence's subordination of women—the imposition of responsibility coupled with the denial of rights.[118] In the context of IVF procedures, women bear nearly the totality of responsibilities. They must comply with medical regimens and subject themselves to repeated invasive medical procedures. If the retrieval and fertilization processes are successful, the woman must bear the risks and burdens of pregnancy. Women must endure labor in order for a child to be born. Finally, women overwhelmingly bear the responsibility of care, including emotional, psychological, and financial support, of children born with or without IVF. Despite all of this responsibility, the courts in preembryo dispute cases do not confer a corresponding right to decide the fate of the preembryos that represented both the fruit and the source of women's responsibility. Baer asserts that feminist jurisprudence should demand a balancing of responsibilities and rights for women.[119] In preembryo dispute cases, this balancing may require weighting women's rights more heavily then men's to account for women's *de facto* greater responsibility.

The application of the right not to be a parent in preembryo dispute cases is also representative of the violation of women's bodily integrity, as described by Drucilla Cornell's critique of abortion law.[120] Misled by the artificial intervention of IVF, the courts in preembryo dispute cases have treated separately what is actually part of a woman's body, creating a dichotomy even more extreme than that which Cornell criticizes the courts in abortion cases for doing.[121] Cornell asserts that the government should actively protect women's bodily integrity (i.e., providing safe abortion for all women) because women are not separable from the fetuses that grow inside them and should not be treated as less than whole persons solely due to their capacity to pass life on to a fetus by allowing it to grow inside them.[122] Likewise, women who undergo IVF should not be treated as less than whole persons by virtue of their participation in the IVF procedure. The integrity of their bodies and their right to choose what is done to their bodies are implicated in the entire process. Furthermore, women are a necessary medium for the preembryos to be produced and to be gestated.

---

[118] *See* Baer, *supra* note 38, at 11 ("Conventional jurisprudence is ... asymmetrical in its application to women. The rights component has never been consistently applied to women, but the responsibility component has.").

[119] *See generally id.*

[120] Drucilla Cornell, The Imaginary Domain: Abortion, Pornography & Sexual Harassment 32-33 (1995).

[121] *Id.* at 32.

[122] *Id.* at 32-33, 35.

While Cornell would likely advocate for a woman's right not to be a parent, she would not support giving sole control of an entity to a man since it derives its value from a woman's ability to pass on life.

VI. A FEMINIST STANDARD FOR RESOLVING PREEMBRYO DISPUTE CASES

Women are treated unequally to men in preembryo dispute cases. Suspicion of gender-neutral rules, particularly in areas such as reproduction, in which women are biologically unique, suggests that a feminist standard for resolving preembryo dispute cases should acknowledge the reproductive difference between women and men. Women make considerably greater contributions to IVF, pregnancy, and childcare. An appropriate feminist standard for resolving preembryo dispute cases is one that respects women's bodily integrity and ensures that women have rights that balance their significant responsibilities.

With these goals in mind, it is not necessary to completely discard jurisprudence as usual. There is still considerable value to preserving the privacy surrounding procreative decisions. Furthermore, the principle that couples should discuss, agree, and even contract for the use and disposition of the preembryos prior to the IVF procedure has merit. Feminist jurisprudence should value women's reproductive contributions by enforcing their contractual rights.

A. Contracts and Consent Forms In Frozen Preembryo Cases

Agreements between the parties play a role in either the facts or the court's decision in each of the preembryo cases thus far. For instance, in Davis, there was no discussion, much less explicit agreement, regarding the disposition of the preembryos in the event of divorce.[123] Nevertheless, the Davis court insisted that if such an agreement did exist, it should be presumed valid and enforced as between the two gamete providers, unless it had been later modified by agreement.[124]

In Kass, the couple signed four consent forms consenting to the cryopreservation of their preembryos and agreeing both that (1) in the event of divorce, the court would order the disposition of the preembryos in conjunction with the property settlement, and (2) in the event that the couple no longer wanted to initiate pregnancy or was unable to make a decision regarding the disposition of the preembryos, the preembryos would be used by the IVF program for research.[125] Upon their divorce, the parties

---

[123] Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).

[124] *Id.* at 597.

[125] Kass v. Kass, 696 N.E.2d 174, 176-77 (N.Y. 1998).

signed a decree that the embryos should be disposed of as outlined in the consent form and that neither party would lay claim to the custody of the preembryos.[126] Shortly thereafter, Ms. Kass filed a matrimonial action to gain custody of the embryos. The Court of Appeals of New York determined that the agreements between the parties should be enforced, and the preembryos, accordingly, should be given to the IVF program for research purposes.[127]

The court in A.Z. v. B.Z. reported that the parties signed a total of seven consent forms setting the terms for the use and disposition of the embryos.[128] The first time that the forms were completed, both husband (A.Z.) and wife (B.Z.) were present and the forms were filled out to read that in the event that the couple separated, the embryos would be returned to the wife for implantation.[129] Each subsequent time, the husband signed blank forms, and the wife later filled in the forms identically to the first forms and signed them.[130] When B.Z. tried to enforce these agreements four years after the last one was signed, the court held that it was "dubious at best" that the agreements represented the intent of the parties.[131] The court stated that it would not enforce even an "unambiguous" agreement that would have the result of forcing one party to be a parent.[132] The court based its decision in case law that supported the non-enforcement of agreements that related to marriage and procreation.[133] The court declined to rule on whether it would enforce agreements whereby both parties agreed to destroy the embryos.[134]

The agreements in Litowitz were part of the IVF contract[135] and stated that, if the preembryos were frozen for more than five years, the preembryos should be destroyed[136] and that, if the parties could not agree on the disposition of the frozen embryos, a court would decide how the preembryos should be distributed.[137] The court determined that any right Ms. Litowitz had to the preembryos was based entirely on the contracts,

---

[126] *Id.*

[127] *Id.* at 178.

[128] 725 N.E.2d 1051, 1053-4 (Mass. 2000).

[129] *Id.* at 1053.

[130] *Id.* at 1054.

[131] *Id.* at 1056.

[132] *Id.* at 1057-58.

[133] *Id.* at 1058-59.

[134] *Id.* at 1058 n.22.

[135] Litowitz v. Litowitz, 48 P.3d 261, 263-64 (Wash. 2002).

[136] *Id.* at 264.

[137] *Id.* at 268.

because the preembryos were not biologically hers.[138] Relying entirely on the IVF contract, the court determined that more than five years had passed and, therefore, the preembryos should be destroyed under the terms of the agreement.[139]

No written agreement other than one that stated that a court should decide the fate of the preembryos in the event of divorce existed in the J.B. v. M.B. case.[140] Though M.B. claimed that the parties had verbally agreed to either use or donate the preembryos for adoption and brought witnesses to testify to this effect, the court held that the parties had not entered into a separate and binding contract.[141] Though it was not required to do so, the court then adopted the approach to enforce agreements entered into at the time the IVF process was begun, subject to the right of either party to change his or her mind up to the point of use or disposition of the embryos, or holding that the contract is voidable.[142]

Agreements regarding the use and disposition of preembryos serve several positive purposes.[143] For instance, well-drafted documents require parties to be informed of the long-term consequences of the IVF and cryopreservation procedures. Such agreements preserve the privacy and autonomy surrounding procreation by allowing the parties to set their own terms. Both women and men can agree to whatever use and disposition and other terms they wish to govern their own efforts to achieve genetic parenthood. Finally, well-drafted documents require parties to contemplate contingencies, such as divorce, separation, or death, and how they will affect the use of the preembryos.

Despite the positive attributes of such agreements, the variation of the courts' approaches to agreements in preembryo dispute cases is broad. The rules enunciated include a general policy to enforce all contracts, a policy to encourage the use of contracts but to treat them as voidable by either party, and a statement that all such contracts were against public policy. Two states have passed laws requiring couples to enter into an agreement regarding the disposition of preembryos as part of the IVF process.[144] Yet, none of this case law or statutory law addresses the effect of

---

[138] *Id.*

[139] *Id.* at 269.

[140] 783 A.2d 707, 710 (N.J. 2001).

[141] *Id.* at 714.

[142] *Id.* at 719.

[143] *See generally* Donna M. Sheinbach, Comment, Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged By State Law and/or Constitutional Principles?, 48 Cath. U. L. Rev. 989 (1999) (recommending the use of contracts and prior consent documents but suggesting that they may not be enforceable).

[144] *See* statutes cited *supra* note 16.

the contributions of women to the IVF process on the enforcement of such agreements.

B. Feminist Jurisprudence and IVF Contracts Voidable by Women

Legislation requiring the parties to an IVF procedure to execute an agreement that provides for the use or disposition of frozen embryos is not alone sufficient for a feminist resolution to preembryo dispute cases. Even if legislation were enacted at the state and federal levels, multitudes of couples have already undergone IVF procedures and have not executed agreements. The issue remains as to whether or how such agreements should be enforced.

These agreements should not be enforced. Inquiry into the terms of such intimate agreements may violate the privacy of the parties to that agreement.[145] For instance, if a woman changes her mind about gestating the preembryos, a woman's bodily integrity would be violated if she were forced to have preembryos implanted against her will. Changes in circumstances, such as potential for future reproduction, could make past plans to destroy the frozen preembryos or donate them for research unreasonable. Nevertheless, if a woman wants to gestate the preembryos in accordance with an agreement to do so, allowing her male partner to void their agreement would irreparably devalue the woman's contributions to their contractual relationship, because the woman has borne nearly all the burden of performance of the agreement in the form of the IVF procedure. If a woman does not want the preembryos gestated under the same agreement, she has still carried all the burden of performance, and giving her male partner control of the preembryos unjustly enriches him. In fact, regardless of the terms of their agreement, the woman bears nearly all the burdens of performance and giving her male partner control of the embryos against her wishes will always unjustly enrich him. Thus, while prior agreements should be encouraged for policy reasons, they must be voidable solely by the female gamete donor to accurately value her contributions up to the point of cryopreservation, to preserve her bodily integrity, and to promote her equitable treatment in the eye of the law.

Admittedly, this is a non-traditional application of contract law. As Katharine Silbaugh points out in her article recommending non-enforcement of prenuptial agreements, courts tend to shy away from enforcing nonmonetary elements of agreements.[146] Her recommendation, as an alternative, is the creation of property interests in unpaid labor.[147] This model could also promote justice in preembryo dispute cases. As the

---

[145] *See* text accompanying *supra* note 65.

[146] Silbaugh, *supra* note 26, at 69.

[147] *Id.* at 142.

woman contributes almost all of the value and improvement of the preembryos, her interests should prevail in a dispute against her male counterpart. However, some might be uncomfortable with the concept of treating preembryos as property. Therefore, although either approach could be used to protect women's interests, the contract approach is preferable because it allows the parties to define the value of the preembryos and structure their plan for reproduction based on their needs and desires. Either contract or property principles may prove to be more flexible to the accommodation of difference and the balancing of responsibility and rights than the rigidly neutral language of constitutional rights.

VII. CONCLUSION

The requirement of agreements for the use and disposition of preembryos coupled with the freedom of the female gamete donor to void such an agreement protects women's reproductive interests in ways that the gender-neutral standard of the right not to be a parent never will. It recognizes that women make unique contributions to reproduction. It acknowledges that those contributions translate to burdens and responsibilities that must be balanced with the right to make ultimate decisions about the source and the fruits of those responsibilities—the preembryo. It recognizes that, for all the scientific advances, the preembryo derives its potential for life from women's power to pass life on by gestating the preembryo, and gives women control over this unique reproductive capacity and all of its implications. Though it is not cloaked in the noble language of time-honored constitutional rights, this approach offers women the justice and equality in preembryo dispute cases that are promised by our legal system.

Medical science may continue to be one step ahead of the law when it comes to human reproduction. Some day medical science may allow men to bear the responsibility of gestating and birthing a child. Society may change such that men share equally in the burden of childcare. On that day, the preference for the right not to be a parent may intersect with principles of equity and justice. In the present, however, our legal system cannot continue to pretend that the application of this rule equally protects the rights of the parties before it.