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Michael S. Simon

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“Honey, I Froze The Kids”: *Davis v. Davis* and the Legal Status of Early Embryos

I. INTRODUCTION

On July 25, 1978, Louise Brown, the first baby conceived by using *in vitro* fertilization (“IVF”) techniques,¹ was born in England.² The IVF process involves a number of steps. First, the doctor injects the female patient with a hormone³ to cause “hyperovulation,”⁴ allowing the doctor to extract a number of ovum from the woman’s ovaries.⁵ The doctor then mixes the extracted ovum with spermatozoa and allows the mixture to develop into embryos.⁶ Finally, forty-eight to seventy-two hours after fertilization, the doctor either reimplants the embryos into the uterus or cryogenically⁷

1. “‘*In vitro* fertilization’ means any fertilization of human ova which occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means.” 45 C.F.R. § 46.203(g) (1990).

2. See 44 Fed. Reg. 35,033, 35,053 (1979).

3. See ANDREA BONNICKSEN, *IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES* 12 app. at 147 (1989) (explaining that the human chorionic gonadotrophin (“HCG”) is injected into the patient’s body to cause the ovulation and ripeness of a large number of eggs in approximately 36 hours).

4. “Hyperovulation” through the use of HCG allows a doctor to collect an average of 5.8 eggs per patient. The maximum number of eggs collected from one patient is 17. During normal ovulation only one egg is released. Marcia Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1082-83 (1986).

5. The extraction of the ovum is conducted with a laparoscope, a thin instrument with a light and lens on the end that allows the surgeon to examine the ovaries through a thin incision. The actual removal of the ovum is done through a .9 mm needle inserted through a second incision. A forceps is inserted through a third incision to hold the ovaries in place during removal. BONNICKSEN, *supra* note 3, app. at 148.

6. See *id.* at 150. During the final stages of the process, the ovum, spermatozoa, and embryos are inspected and tested numerous times to discover genetic or physical defects. *Id.* The terms “early embryo,” “embryo,” “preembryo,” “zygote,” “prezygote,” “unimplanted embryo,” “unimplanted zygote,” and “conceptus” have all been used to designate a fertilized human ovum prior to implantation. This Note will, whenever possible, use the term “embryo” to avoid confusion.

7. The cryogenic (commonly referred to as “freezing”) process or “cryopreservation,” is in itself much simpler than the IVF process. When the embryos are at the correct stage for freezing, they are first immersed in liquid dimethyl sulphoxide, a chemical that protects them during freezing and thawing. See Joseph Saltarelli, Note, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021, 1028 (1985) (citing THE COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION: REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION 14-15 (1984)). The temperature of the embryos is then slowly reduced in a series of stages until it is between -60 degrees centigrade and -80 degrees centigrade. *Id.* at 1024. The

preserves them for later use at the two-, four-, or eight-cell stage.⁸

The combined use of cryogenics and IVF procedures significantly improves the chance for success with IVF. First, cryopreservation of IVF embryos allows clinics to store embryos and then reimplant them after the patient has recovered from the stresses of surgery and hyperovulation.⁹ The process also allows clinics to store unimplanted embryos for later use or donation, thereby reducing the "wastage" of embryos.¹⁰ Cryopreservation also gives doctors time to screen the embryos for genetic abnormalities.¹¹

In addition, IVF and cryogenics have created a completely new area of the law and are connected to emotionally charged issues such as abortion and the extent of rights to be afforded to these embryos.¹² This Note will argue that granting legal personhood¹³ to early embryos¹⁴ could prevent the use of IVF and cryogenic preservation, two of the most important methods of infertility treatment.¹⁵ It could also produce unusual situations such as legal guardians being appointed to represent a frozen entity of four or eight cells.¹⁶ Finally, scientific experimentation on embryos, to advance the science of fertility, and for the benefit of medicine in

embryos are then placed in a container of liquid nitrogen kept at -196 degrees centigrade.
Id.

The process of thawing embryos for implantation also proceeds in a slow series of stages. *Id.* The embryos are gradually brought up to room temperature, and if no significant physical damage is observed, the embryos are implanted. *Id.*

8. John Robertson, *In The Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 443 (1990).

9. See BONNICKSEN, *supra* note 3, at 30.

10. Reduction or elimination of embryo "wastage" is crucial because many critics of IVF have based their opposition on the wastage of embryos. Donald DeMarco, *Health Care Ethics: In Vitro Fertilization and Implantation*, in HUMAN LIFE AND HEALTH CARE ETHICS 137, 143-44 (James Bopp ed. 1985).

11. Without cryogenics, the embryos would have to be implanted before the genetic test results become available. See *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 53s (Supp. Sept. 1986) [hereinafter *AFS Guidelines*].

12. See LAWRENCE TRIBE, ABORTION: THE CLASH OF THE ABSOLUTES 123-24, 234-35 (1990).

13. See *infra* notes 52-56 and accompanying text.

14. As used in this Note, the phrase "early embryos" refers to fertilized human ovum prior to implantation.

15. See BONNICKSEN, *supra* note 3, at 22-23. IVF is the best possible method of treating infertility for an estimated 500,000 women with fallopian tube blockages. *Id.* Surgery to correct fallopian tube irregularities, the other most promising method of correcting infertility, is successful less than 50% of the time. *Id.*; see also 44 Fed. Reg. 35,055 (1979) ("For some women, *in vitro* fertilization may be the only way to bear children of their own.").

16. For an example of how this situation could result, see *infra* text accompanying notes 41-45.

many other areas would be drastically curtailed or halted.¹⁷

In *Davis v. Davis*,¹⁸ the most important case to date on IVF embryo rights, the Tennessee Court of Appeals reversed a Tennessee trial court's decision to award sole custody of seven cryogenically preserved embryos to the wife in a divorce proceeding.¹⁹ In reversing, the court of appeals awarded the husband and wife joint custody of the embryos.²⁰ The court of appeals also repudiated the lower court's ruling that the embryos were "human beings" and that human life begins at conception.²¹ The court of appeals rejected the views adopted by the trial court, and instead based its opinion on the reasoning in *Roe v. Wade*²² and on the intent of the legislature of Tennessee as expressed in the Tennessee statutes on murder,²³ assault,²⁴ criminal abortion,²⁵ and wrongful death.²⁶

Given the controversy surrounding this issue, this Note will explore the numerous, and generally unsuccessful, attempts to re-

17. See *infra* note 76.

18. 16 Fam. L. Rep. (BNA) 1535 (Tenn. Ct. App. Sept. 13, 1990).

19. *Id.*

20. *Id.*

21. *Id.*

22. 410 U.S. 113 (1973).

23. TENN. CODE ANN. § 39-13-201(a) (Supp. 1990) ("Criminal homicide is the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide."). For purposes of this statute, "another person" is defined as a "viable fetus." *Id.* § 39-13-214(a).

24. TENN. CODE ANN. § 39-13-101 (Supp. 1990). The statute provides:

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Id. For purposes of this statute, "another" and "another person" are defined as a "viable fetus." *Id.* § 39-13-107(a).

25. TENN. CODE ANN. § 39-15-201(c) (1990). This statute states that:

No person is guilty of a criminal abortion or an attempt to procure criminal miscarriage when an abortion or an attempt to procure a miscarriage is performed under the following circumstances:

(1) During the first three (3) months of pregnancy . . .

(2) After three (3) months, but before viability of the fetus

Id.

26. TENN. CODE ANN. § 20-5-106(a), (b) (1980). The code explains:

For the purposes of this section the word "person" shall include a fetus which was viable at the time of the injury. A fetus shall be considered viable if it had achieved a stage of development where in it could reasonably be expected to be capable of living outside the uterus.

Id.

solve the issue of IVF embryo rights by courts, state legislatures, other governmental bodies, and professional committees. Next, it will examine the facts of *Davis* and the decisions of the trial court and the court of appeals. Then, this Note will analyze the court of appeals decision and demonstrate how it is both factually and legally correct. Finally, this Note will discuss why the decision of the court of appeals is unlikely to survive for any significant length of time, thus blunting its potential impact on the issue of IVF embryo rights.

II. BACKGROUND

The experimentation with and eventual success of *in vitro* fertilization has exposed many legal and ethical issues surrounding this procedure. Since the birth of Louise Brown,²⁷ legal and ethical experts have anticipated the conundrum of *Davis v. Davis*.²⁸ The issues raised by IVF and cryopreservation impact judges, legislators, medical professionals, and legal and ethical scholars. All of these professions have faced the complexities of *in vitro* fertilization issues. Nevertheless, attempts by the judiciary, the legislature, and other bodies to reach a consensus on the issues involved have been largely unsuccessful.

A. Judicial Attempts to Resolve the Status of Early Embryos

Few courts have considered the status of early embryos because the technology involved in cryogenically preserving human embryos fertilized by IVF is only a few years old.²⁹ In addition, most IVF clinics are extremely careful, requiring that the patients sign contracts specifying the desired disposition of the embryos under any conceivable circumstance.³⁰

27. See *supra* notes 1-2 and accompanying text.

28. 16 Fam. L. Rep. (BNA) 1535 (Tenn. Ct. App. Sept. 13, 1990). See Tamara Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 525 (1990) [hereinafter *Davis, Cryopreserved Embryos*]; see also Mark Curriden, *Joint Custody of the Frozen Seven*, 76 A.B.A. J. 26 (1990) ("*Davis v. Davis* is the nightmare legal experts have warned about since *in vitro* fertilizations began in 1978.>").

29. The first birth from a cryogenically preserved IVF embryo occurred in March 1984 in Australia. Saltarelli, *supra* note 7, at 1028 n.44.

30. See John Robertson, *Prior Agreements for the Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 410 (1990). However, Professor Robertson questions whether such contracts will always be upheld by the courts. The most likely attack is by the doctrine of "fundamentally changed circumstances," which allows the courts to modify or negate contracts if the circumstances have significantly changed since the contracts were drafted. *Id.* The death of a donor spouse or a divorce are both potential "fundamentally changed circumstances." *Id.* Therefore, even if the Davises had signed a contract with the clinic it might have been negated by the court.

The first case in which a court examined the issues created by IVF,³¹ *Del Zio v. Columbia Presbyterian Hospital*,³² involved a suit by a couple who sought to be the first to attempt the IVF procedure.³³ In 1973,³⁴ Mr. and Mrs. Del Zio sought the help of Dr. Shettles of Columbia Presbyterian Hospital to find a cure for Mrs. Del Zio's infertility.³⁵ Dr. Shettles attempted his own untested IVF procedure.³⁶ When Dr. Vande Wiele, the Chairman of the Obstetrics and Gynecology Department of the hospital, learned of Dr. Shettles' actions, he removed the embryo from its incubator and disposed of it.³⁷

In 1974, the Del Zios sued the hospital and Dr. Vande Wiele for infringement of property rights and emotional distress.³⁸ The jury rejected the property claim but awarded \$49,000 in damages for the emotional distress claim.³⁹ To some, this decision represents a rejection of the idea that embryos are simply property of the parents, without any rights of their own.⁴⁰

In another case addressing the issues created by IVF, *York v. Jones*,⁴¹ a couple sued an IVF clinic in Norfolk, Virginia. The clinic refused to allow air transport of a cryogenically preserved

31. See generally BONNICKSEN, *supra* note 3 (tracking IVF and discussing the individual and governmental concerns associated with such a technique).

32. No. 71 Civ. 3588 (S.D.N.Y. Nov. 14, 1978).

33. See BONNICKSEN, *supra* note 3, at 16.

34. This was five years before the birth of Louise Brown.

35. See BONNICKSEN, *supra* note 3, at 16. Dr. Shettles was a pioneer in the field of embryology, having published the first known pictures of a developing embryo in the mid-1950s. *Id.*

36. See *id.* Dr. Shettles mixed Mrs. Del Zio's extracted ovum with spermatozoan from Mr. Del Zio in a test tube. Uncertain of how to sterilize the mixture, Dr. Shettles asked a colleague. This colleague, shocked at the "horrible-looking mess" which Dr. Shettles had created, informed Dr. Vande Wiele. *Id.*

37. See Lori Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 368 (1986); BONNICKSEN, *supra* note 3, at 16-17 (explaining that Dr. Vande Wiele was outraged about the untested procedure and believed that the unsterilized mixture could be extremely dangerous to Mrs. Del Zio).

38. See PAULA GOULDEN & BENJAMIN NAITOVE, *MEDICAL SCIENCE AND THE LAW* 124-25 (1984) (noting that the Del Zios claimed \$1.5 million in damages against the defendants); BONNICKSEN, *supra* note 3, at 16-17. Ironically, the trial began in the final weeks of the pregnancy of Louise Brown's mother, Lesley Brown. BONNICKSEN, *supra* note 3, at 16-17. The birth of Louise Brown occurred at the same time as the middle point of the Del Zio trial. *Id.* The trial and this cruel coincidence of timing left Mrs. Del Zio a "depressed, crying, overcome, broken woman." *Id.*

39. See GOULDEN & NAITOVE, *supra* note 38, at 125 (noting that the jury awarded the Del Zios \$25,000 against Dr. Vande Wiele and \$12,000 each against the hospital and its operator, Columbia University).

40. See Andrews, *supra* note 37, at 368.

41. 717 F. Supp. 421 (E.D. Va. 1989).

embryo to another IVF clinic in Los Angeles, California.⁴² The Yorks sought, by way of a temporary restraining order and preliminary injunction, to retrieve the embryo and transport it themselves.⁴³ The Norfolk clinic argued that this action would be dangerous, legally risky, and demeaning to human embryos as they would be shipped "ala [sic] cattle embryos."⁴⁴ The clinic moved to dismiss the action.⁴⁵

The United States District Court for the Eastern District of Virginia denied the clinic's motion to dismiss.⁴⁶ The *York* court recognized that the couple may have had property rights in the embryos,⁴⁷ and that recovery was possible under the doctrine of detinue.⁴⁸ The fact that the *York* court allowed the plaintiffs to seek recovery through a property doctrine seems to contradict the holding of *Del Zio*.⁴⁹ Despite this apparent conflict, both *York* and *Del Zio* agree in holding that the progenitors have certain rights in the disposition of their embryos. This consensus appears to limit the rights of the embryos themselves. In sum, *York* and *Del Zio* demonstrate that judicial determinations regarding the status of early embryos have defined neither the issues nor the boundaries within this area of the law.

B. Legislative Attempts to Resolve the Status of Early Embryos

Some states have enacted statutes that explicitly or implicitly classify early embryos as human beings,⁵⁰ and one state's statute gives them certain legal rights.⁵¹ For example, a Louisiana law⁵² defines "human embryo" as "an in vitro fertilized human ovum,

42. *Id.* at 422.

43. *Id.* at 424.

44. Robertson, *supra* note 8, at 461 n.65 (quoting letter from Dr. Howard Jones to Dr. Richard P. Marrs (Aug. 9, 1988), Exhibit H in Plaintiffs' Brief in Support of Petition for Temporary Restraining Order and Preliminary Injunction).

45. *York*, 717 F. Supp. at 422.

46. *Id.* at 429.

47. Robertson, *supra* note 8, at 463.

48. *York*, 717 F. Supp. at 427, 429. Detinue allows those with a "property interest" and a "right to immediate possession" to recover from a bailee refusing to return the property. *Id.*

49. One commentator has tried to resolve this conflict by speculating that the need to determine the competing rights of the clinic and the parents was the actual reason for the *York* decision. Robertson, *supra* note 8, at 463.

50. See MASS. GEN. ANN. LAWS ch. 112, § 12K (West 1991); MO. ANN. STAT. § 188.010-.085 as amended by L. 1986 H.B. No. 1596 § A (Vernon Supp. 1991); NEB. REV. STAT. § 28-325 (1985); OKLA. STAT. tit. 63, § 1-730 (1985); 18 PA. CONS. STAT. § 3203 (1985).

51. See *infra* notes 52-56 and accompanying text.

52. 1986 La. Acts 964, § 1.

with certain rights granted by law.”⁵³ This law recognizes the embryo as a juridical person and allows the embryo to sue or be sued.⁵⁴ The Louisiana law also states that embryos are not property and that the hospital is responsible for them.⁵⁵ The statute requires the courts to resolve any dispute regarding an embryo in accordance with the embryo’s best interests.⁵⁶ Doubts exist, however, as to the constitutionality of this Louisiana law.⁵⁷

Other states have defined embryos as human beings in attempting to regulate abortion.⁵⁸ For instance, the Missouri abortion regulation statute,⁵⁹ upheld by the United States Supreme Court in *Webster v. Reproductive Health Services*,⁶⁰ could give early embryos full legal status as living persons. The Missouri statute defines an “unborn child” as any of the various concepti stages and declares that human life begins at conception.⁶¹ The Supreme Court declined to rule specifically on the constitutionality of the section that defines the unborn child.⁶² The definitions contained in the Missouri statute, although having no direct legal conse-

53. LA. REV. STAT. ANN. § 9:121 (West 1991).

54. LA. REV. STAT. ANN. § 9:123 (“An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb . . .”). The statute further provides, “[a]s a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued.” *Id.* § 9:124.

55. LA. REV. STAT. ANN. § 9:126 (“An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum.”). Further, “[a]ny physician or medical facility who causes in vitro fertilization of a human ovum in vitro will be directly responsible for the in vitro safekeeping of the fertilized ovum.” *Id.* § 9:127. Finally, “[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.” *Id.* § 9:129.

56. LA. REV. STAT. ANN. § 9:131 (“In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.”).

57. Andrews, *supra* note 37, at 404. The United States Supreme Court has consistently recognized the progenitor’s right to exercise decision-making control over embryos even at the cost of the destruction of the embryo. See *Roe v. Wade*, 410 U.S. 113 (1973). The Louisiana law could prevent the embryo’s progenitors from exercising this control over the embryo. Andrews, *supra* note 37, at 404. *But see Developments in the Law — Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1545 (1990) (“Given increased judicial deference to the state protection of potential fetal life, courts might not find that state action to protect prezygotes is an unconstitutional violation of the genetic contributors’ limited right to control their reproductive destiny.”) (footnote omitted).

58. See *infra* notes 59-66 and accompanying text.

59. MO. ANN. STAT. § 188.010-.085 as amended by L. 1986 H.B. No. 1596 § A (Vernon Supp. 1991).

60. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

61. MO. ANN. STAT. § 188.015(6) (Vernon Supp. 1991).

62. *Webster*, 492 U.S. at 490-91.

quence, are the final steps towards a restrictive law like the Louisiana statute.⁶³

Some state abortion statutes have given embryos more specific legal rights. For example, in 1979, when the Illinois abortion law was amended specifically to restrict fetal research, the embryo and resulting child suddenly gained the protection of any physician participating in the IVF because the new law imposed unlimited responsibility⁶⁴ on those physicians.⁶⁵ This statute created a de facto state moratorium on IVF because doctors were unwilling to operate under the threat of such liability.⁶⁶

In response to this amendment, a group of potential IVF patients and their physician filed an injunctive action in the United States District Court for the Northern District of Illinois to resolve the liability issue created by the Illinois abortion law.⁶⁷ The court dismissed the suit because the Illinois Attorney General issued a memorandum that effectively excluded IVF procedures from potential liability under the statute.⁶⁸ In response to this controversy,

63. See *supra* notes 52-57 and accompanying text.

64. See BONNICKSEN, *supra* note 3, at 97. When a state representative asked the bill's sponsor if a doctor or nurse who participated in the IVF process could "be somehow called upon years later to pay for an appendectomy for [the resulting] child," the sponsor answered "yes." *Id.*

65. Act of Oct. 30, 1979, P.A. 81-1078 § 1 (codified in ILL. REV. STAT. ch. 38, para. 81-26(7) (1989)). The Act provides:

Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended, except that nothing in that Section shall be construed to attach any penalty to participation in the performance of a lawful pregnancy termination.

Id.

66. See DONALD WOLF & MARTIN QUIGLEY, HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER 15 (1985).

67. *Smith v. Hartigan*, 556 F. Supp. 157 (N.D. Ill. 1983).

68. The Illinois State's Attorney's office wrote a memorandum noting that it had never initiated a prosecution under the statute, that it had no intent to ever pursue such a charge, and that the statute would not cover a failure to implant an embryo. *Id.* at 162. The Illinois Attorney General incorporated this memorandum into its answer and also adopted it pursuant to his duty to interpret Illinois law under the Illinois Constitution. *Id.* at 163; see ILL. CONST. art. V, § 15; ILL. REV. STAT. ch 14, para. 5 (1989). While the opinions of the Illinois Attorney General are not binding, the federal district court in *Smith v. Hartigan* found that "there is a long history of their use in this State which suggests that they are far more than the personal reflections of the current office holder." *Smith v. Hartigan*, 556 F. Supp. at 163. The defendants agreed to certification of a class of all potential IVF practitioners, so as to make the memorandum effective as to all of them. *Id.* at 162-63. Because of these factors, the court found the memorandum to be highly persuasive. *Id.* at 163.

the Illinois legislature changed the statute to remove the language that had initially constrained IVF.⁶⁹

The above discussion illustrates the lack of uniformity in the state legislatures' treatment of IVF and early embryos. Some state statutes, such as that in Louisiana, suggest that early embryos should be afforded broad human rights. Other states, such as Illinois, however, have enacted legislation which seems to afford IVF the protection of traditional scientific research. The polarity of these approaches demonstrates that no uniform treatment will come from the state legislatures.

C. The Attempts of Other Governmental Bodies and Professional Associations to Resolve the Status of Early Embryos

Examinations by nonlegislative governmental bodies and professional associations into the legal and moral status of early embryos have produced many differing conclusions. Most groups have found incentive to protect embryos due to a "special respect" for their potential to become human beings.⁷⁰ Yet others have seen little reason to offer unimplanted embryos any significant protection at all.⁷¹

The United States Department of Health and Human Services ("HHS"),⁷² defines a fetus as the product of conception from the time of implantation to birth.⁷³ Thus, this definition excludes IVF embryos from the category of fetuses that are specifically protected by these regulations. IVF embryos do, however, receive some form of indirect protection under federal regulations; proposed research cannot be funded by HHS until it has been reviewed by the HHS Ethical Advisory Board ("Board").⁷⁴

69. Act of Oct. 30, 1985, P.A. 84-1001 § 1 (codified in ILL. REV. STAT. ch. 38, para. 81-26(7) (1989)) ("No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. . . . Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.").

70. See *infra* notes 95-113 and accompanying text.

71. See *infra* notes 86, 91-92, 109-11 and accompanying text.

72. This department was formerly known as the Department of Health Education and Welfare. To avoid possible confusion this Note will refer to the department as the Department of Health and Human Services, regardless of the actual designation at the time.

73. "'Fetus' means the product of conception from the time of implantation . . . until a determination is made, following expulsion or extraction of the fetus, that it is viable." 45 C.F.R. § 46.203(c) (1990).

74. *Id.* § 46.204(d) (1990) ("No application or proposal involving human *in vitro* fertilization may be funded by the Department or any component thereof until the applica-

In 1977, HHS Secretary Joseph Califano called the Board⁷⁵ together to consider all of the potential issues raised by IVF.⁷⁶ The Board filed a report which found that early embryos deserved "profound respect," but that this did not mean that they had the same legal and moral rights as "persons."⁷⁷ However, once the IVF issue became ensnared in the politically dangerous abortion issue,⁷⁸ the Board's recommendations were permanently "tabled" by HHS.⁷⁹

In 1984, a controversy in Australia presented the first widely publicized legal and moral dilemma in this area.⁸⁰ The controversy, now known as the Rios Case, involved Mario and Elsa Rios, a wealthy American couple, who traveled to Australia to undergo the IVF procedure.⁸¹ Two of the resulting embryos were cryogenically preserved after being fertilized *in vitro* in 1981.⁸² In 1984, the couple was killed in an airplane crash.⁸³

The Committee to Consider the Social, Ethical and Legal Issues Arising from *In Vitro* Fertilization, commonly known as the Wal-

tion or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical standpoint.").

75. The 15 members of the diverse Board included 8 doctors (6 of these were deans or professors), 3 lawyers, 2 ethics scholars, 1 philanthropist, and 1 businessman. 44 Fed. Reg. 35,033 (1979).

76. See Davis, *Cryopreserved Embryo*, *supra* note 28, at 515-16. The HHS regulation requiring Board approval of all federally-funded experiments on IVF was promulgated in August 1975, but the Board did not meet for almost two years. 44 Fed. Reg. 35,037 (1979). This resulted in a two year de facto moratorium on all federally-funded IVF research. *Id.* The original reason for calling the Board was a proposal submitted by Dr. Pierre Soupart of Vanderbilt University to the National Institutes of Health, which approved Soupart's proposal and passed it on to HHS. See BONNICKSEN, *supra* note 3, at 76-77. Secretary Califano promptly expanded the role of the Board to the analysis of all of the potential issues surrounding IVF. See Davis, *Cryopreserved Embryo*, *supra* note 28, at 515-16.

77. 44 Fed. Reg. 35,056 (1979). The Board also approved Dr. Soupart's proposal and recommended further research on IVF. *Id.* at 35,057-58.

78. See BONNICKSEN, *supra* note 3, at 80-81. The Board received over 12,000 letters after publication of the report. Nearly all of these letters (98%) were opposed to IVF on the basis that it was "inherently immoral." The Board also received 50 letters from 93 members of Congress, none of whom supported IVF or the Board's decision. *Id.*

79. Dr. Soupart did not receive his money, and none of the Board's recommendations calling for further study were implemented. *Id.* The Board was dissolved in 1980. See Davis, *Cryopreserved Embryos*, *supra* note 28, at 516. Because the Board has not been recalled, the de facto moratorium continues. *Id.*

80. See David Ozar, *The Case Against Thawing Unused Frozen Embryos*, HASTINGS CENTER REP., Aug. 1985, at 7.

81. *Id.*

82. *Id.*

83. *Id.*

ler Committee,⁸⁴ was formed to decide the disposition of the Rioses' embryos.⁸⁵ The Committee recommended that the embryos be destroyed.⁸⁶ In response, the legislators of the state of Victoria, Australia, passed a law specifically requiring that the embryos be made available for implantation in surrogate mothers and then placed for adoption at birth.⁸⁷ The ultimate fate of the Rioses' embryos, however, is unknown.⁸⁸

In 1985, another committee was formed, this time in England, to discuss the ethical implications of IVF.⁸⁹ This committee's report, authored by ethics professor Mary Warnock ("Warnock Report"), recommended that experimentation with cryopreservation techniques⁹⁰ be allowed to continue.⁹¹ The Warnock Report approved of the fertilization and possible disposal of multiple embryos in the IVF process.⁹²

A number of dissenters to the committee's report wrote their own report supporting their belief that "nothing should be done that would reduce the chance of successful implantation of the embryo."⁹³ However, this dissent did not endorse the position that any fertilized embryo is a human being with all of the attendant moral and legal rights.⁹⁴ Instead, the dissenters believed that the fertilized embryo deserved a profound respect because of its potential to become a legally recognized human being.⁹⁵

The position of the Warnock Report dissenters is not entirely incompatible with that of the majority. This is true because the committee did in fact recommend certain limits on the use of embryos and specifically recommended that legislation be passed to

84. Professor Louis Waller was the chairman of the committee. See Davis, *Cryopreserved Embryos*, *supra* note 28, at 518.

85. See Ozar, *supra* note 80, at 7.

86. *Id.*

87. *Id.*

88. *Id.*

89. The Committee of Inquiry into Human Fertilisation and Embryology, Department of Health and Social Security.

90. Cryopreservation of IVF embryos was then at a very early stage. See *supra* note 29.

91. MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILITY AND EMBRYOLOGY 54 (1985).

92. *Id.* at 30-31.

93. *Id.* at 90.

94. Those who are considered "strict pro-life" supporters advocate this position. For an example of the "strict pro-life" position, see *infra* note 176.

95. WARNOCK, *supra* note 91, at 90 ("[T]he embryo has a special status because of its potential for development to a stage at which everyone would accord it the status of a human person.").

prevent any property rights from accruing in embryos.⁹⁶ The viewpoint of the Warnock Report dissenters, however, that embryos must be treated with a certain respect because of their potential humanity, has gained acceptance in other examinations of the issue.⁹⁷

A more recent report, drafted by Jonathan Glover and other medical ethics scholars for the European Commission on IVF,⁹⁸ adopted the view that embryos, while not having the same rights as human beings, nevertheless should be treated with a certain legal respect because of their potential for personhood and their symbolic value as potential persons.⁹⁹ On this point, the views of the Glover Report do not differ from those of the Warnock Report dissenters.¹⁰⁰ However, neither the Glover Commission nor the Warnock Report dissenters suggested how this legal respect for the embryo should be achieved, or what actions such respect should circumscribe.

In the United States, many IVF clinics voluntarily use¹⁰¹ the 1986 Guidelines of the American Fertility Society ("AFS"),¹⁰² the leading professional group on reproductive science. The AFS Guidelines state that, because they are not "differentiated,"¹⁰³ early

96. *Id.* at 56 ("We recommend that legislation be enacted to ensure there is no right of ownership in a human embryo.").

97. *See id.*; *see also infra* notes 101, 105-06 and accompanying text.

98. JONATHAN GLOVER ET AL., ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES: THE GLOVER REPORT TO THE EUROPEAN COMMISSION 108 (1989) ("It is implausible that embryos have a full strength right to life.").

99. *Id.* at 108-10. The report takes the position that the right to respect is closely tied to the belief that symbolic entities act as "psychological barriers." These barriers, which prevent people from acting towards symbolic entities in certain ways, are important to human morality. When symbolic barriers crumble, moral barriers towards action against real entities may fall next. Some of these barriers must be overcome, as in the case of a surgeon overcoming the psychological barriers against cutting into human bodies, while others, such as those protecting fetuses, should be maintained because of the importance of the barriers. *Id.*

100. *See supra* notes 93-95 and accompanying text.

101. *See* Barbara Gregoratos, Note, *Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization*, 37 HASTINGS L.J. 977, 991 (1986) (citing the author's own telephone survey of American IVF clinics on compliance with AFS Guidelines). *But see* BONNICKSEN, *supra* note 3, at 39-40. Bonnicksen claims that most IVF facilities use the much shorter 1984 AFS Guidelines instead of the 1986 Guidelines. BONNICKSEN, *supra* note 3, at 39-40. The 1986 Guidelines were apparently published after most clinics had already adopted their operational guidelines. *Id.* However, the language of the 1984 Guidelines is not substantively different on this issue from the 1986 Guidelines. *Id.*

102. *AFS Guidelines, supra* note 11.

103. The cells of a two-, four-, or eight-celled embryo are identical and indistinguishable from each other. *Id.* at 26s. This should not be confused with the fact that every embryo, as a whole, at this stage can be distinguished from every other embryo. Robert-

embryos are not human beings and thus do not have full legal rights.¹⁰⁴ Yet the guidelines also state that early embryos should be treated with a "special respect" because they have a potential for human life and are symbolic of human life.¹⁰⁵ The AFS Guidelines state that this position implies certain rights, but not those comparable to the rights of a newborn or to the rights of a viable fetus.¹⁰⁶

The "special respect" position of the AFS is similar to the viewpoints of other legal and ethical scholars in this area,¹⁰⁷ as well as many of the other commissions formed to examine IVF issues.¹⁰⁸ However, the position of the AFS has met with some criticism.¹⁰⁹ The basic assumption of the "special respect" position is that derogatory actions taken towards a symbolic entity (*i.e.*, embryos),¹¹⁰ will negatively affect how that actor treats the represented entities (*i.e.*, human beings).¹¹¹ Critics of the AFS Guidelines, however,

son, *supra* note 8, at 483. One commentator has stated that a substantial portion of the erroneous decision in the trial stage of *Davis* was due to the inability of Judge Young to understand the difference between these two concepts. *Id.*

104. *AFS Guidelines, supra* note 11, at 26s. Experiments with mouse embryos have shown that embryos can be divided or combined at the developmental stages reached in IVF. Therefore, "at the 8-cell stage, the developmental singleness of one person has not yet been established." *Id.*

105. *Id.* at 27s-28s. The AFS Guidelines state:

The status of the preembryo should be different from that assigned to isolated cells, tissues, or organs, because those do not have the capacity of the preembryo to produce a complete person. . . . The existent preembryo therefore must be treated with respect because it is human, but it must also be treated with concern beyond respect as long as the possibility exists that it may achieve full human status in the future.

Id.

106. *Id.* at 28s. If the embryo loses its ability to develop into "full human status" then it only has to be treated with a respect for its humanness, similar to organs, tissues, or cells. *Id.* The exact position of the AFS Guidelines is somewhat vague though, because the interpretation of "special respect" will necessarily vary with each individual. *Id.* at 30s-31s.

107. *See, e.g.*, GEORGE ANNAS, *JUDGING MEDICINE* 63 (1988); Ozar, *supra* note 80, at 10; John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 925 n.41 (1973); Robertson, *supra* note 8, at 447-48.

108. *See supra* notes 91-93, 95-96 and accompanying text.

109. *See, e.g.*, Andrews, *supra* note 37, at 363; Joel Feinberg, *The Mistreatment of Dead Bodies*, *HASTINGS CENTER REP.*, Feb. 1985, at 31-32, 36-37.

110. In one way, embryos are symbolic and actual entities at the same time because of their potential to become human beings, the entities that they represent. Other examples of objects that are strongly symbolic include flags, the Torah, and dead bodies. *See* Robertson, *supra* note 8, at 448. However, none of these other symbolic items has the ability to become what it represents.

111. 44 Fed. Reg. 35,041 (1979) (citing Leon Kass, *Making Babies — the New Biology and the 'Old' Morality*, *PUBLIC INTEREST*, Winter 1972, at 33).

have claimed that this assumption is unfounded.¹¹² Even an ardent supporter of the "special respect" concept, Professor John Robertson, has recognized that there are objects other than embryos that are stronger symbols of human life.¹¹³

As the above discussion demonstrates, judges, legislators, and other groups have all come to differing conclusions about the status of early embryos. Because of the inability to reach a consensus, the cases, statutes, and professional guidelines regarding IVF embryos have often reached contradictory conclusions. This confused state of affairs gives little guidance to those who deal with IVF and cryogenic preservation.

III. DISCUSSION

The issues surrounding the status of early embryos, debated by experts and legislators, and touched upon by judges, emerged in a Tennessee case, *Davis v. Davis*.¹¹⁴ Unfortunately, *Davis* provided a flawed forum in which to decide these issues. The case was emotionally charged, and the original positions and claims of the parties changed drastically.¹¹⁵ The most recent ruling in the case, by the Tennessee Court of Appeals, is currently on appeal to the Supreme Court of Tennessee.¹¹⁶

A. *The Facts of Davis v. Davis*

Mary Sue Davis and Junior Lewis Davis had been married for about nine years and desperately wanted to have a family when they sought the help of Dr. Ray King at the Fertility Center of East Tennessee in the Fall of 1985.¹¹⁷ Mrs. Davis had previously suffered five painful and dangerous tubal pregnancies, leaving her unable to become pregnant again without using IVF.¹¹⁸ In the Fall of 1988, after six failed IVF attempts, the couple turned to the new

112. See, e.g., Andrews, *supra* note 37, at 363; Feinberg, *supra* note 109, at 32, 36-37. Feinberg believes that the symbolic connection is often overstated, unwarranted, or both. Feinberg, *supra* note 109, at 32, 36-37. This type of symbolic connection can often impede perception or action upon the real needs of the represented entities. *Id.*

113. Robertson, *supra* note 8, at 448.

114. 16 Fam. L. Rep. (BNA) 1535 (Tenn. Ct. App. Sept. 13, 1990).

115. See Curriden, *supra* note 28 (noting that both parties had remarried since the filing of the original divorce petition); see also *infra* notes 130-33.

116. 1990 WL 130807, at *1 (Tenn. Ct. App. Sept. 13, 1990). Leave to appeal was granted by the Tennessee Supreme Court on Dec. 3, 1990.

117. *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *4-*5 (Tenn. Cir. Ct. Sept. 21, 1989).

118. *Id.* at *4-*5, *52.

cryopreservation program at the clinic.¹¹⁹

On December 8, 1988, nine ova were removed from Mrs. Davis and fertilized *in vitro* using Mr. Davis' sperm.¹²⁰ The nine resulting embryos were permitted to develop for two days, reaching either a four- or eight-celled stage.¹²¹ Dr. King then implanted two of the embryos into Mrs. Davis and cryogenically preserved the remaining seven.¹²² This final attempt at IVF failed and soon thereafter the couple divorced.¹²³ The couple and the clinic had not anticipated the divorce, and no arrangements had been made for disposition of the embryos.¹²⁴

A dispute over the custody of the seven cryogenically preserved IVF embryos arose out of the divorce action.¹²⁵ All of the other issues in the divorce were resolved before the trial began.¹²⁶ Dr. King's fertility center had inexplicably failed to have the Davises sign the usual battery of consent and contingency forms.¹²⁷ Mr. Davis also filed a third-party complaint against Dr. King and the fertility center to prevent them from giving Mrs. Davis custody.¹²⁸ The court entered an injunction to prevent any disposition of the embryos until it could resolve the dispute.¹²⁹

Mary Sue Davis wished to have the embryos implanted in her or released for use by others.¹³⁰ She testified that she was emotionally

119. *Id.* at *5-*6.

120. *Id.* at *6.

121. *Id.*

122. *Id.*

123. See Appellee's Brief at 7, Appellant's Brief at 2, 4, *Davis v. Davis*, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989) (No. E-14496). Junior Lewis Davis filed a complaint in the Equity Division of the Blount County Circuit Court of Tennessee, for absolute divorce against Mary Sue Davis on February 23, 1988. Appellant's Brief at 2, *Davis* (No. E-14496) (It appears from the context, however, that Mr. Davis filed suit February 23, 1989).

124. See Appellant's Brief at 4, 5, *Davis* (No. E-14496).

125. *Id.* at 2.

126. *Id.*

127. *Davis*, 1989 WL 140495, at *57.

128. *Id.* At trial, Dr. King testified that he absolutely opposed destruction or unlimited cryopreservation of IVF embryos. *Id.* at *53. Dr King wanted to anonymously donate the embryos if they were not awarded to Mrs. Davis. *Id.* Mr. Davis filed his third-party complaint against Dr. King and the clinic on March 10, 1989. Appellant's Brief at 2, *Davis* (No. E-14496).

129. Appellant's Brief at 22, *Davis* (No. E-14496). The court issued the injunction on April 3, 1989. All of the parties agreed to this injunction. *Davis*, 1989 WL 140495, at *57.

130. *Davis*, 1989 WL 140495, at *57. Before the case reached the appellate stage, Mary Sue remarried and changed her mind about the disposition of the embryos. She wanted to have the "children" donated, but was no longer willing to have them implanted in herself. *Davis*, 16 Fam. L. Rep. (BNA) 1536 n.1; Appellee's Brief at 7, *Davis* (No. E-14496).

attached to these embryos, viewing them as her "children."¹³¹ Junior Lewis Davis, having been raised in a state foster facility after his parents divorced, was greatly disturbed by the possibility of his children being raised in a similarly broken home.¹³² He asked the court to order that the embryos be destroyed rather than allow him to be "raped of [his] reproductive rights."¹³³

B. *The Circuit Court of Tennessee Decision*

The trial court opinion, written by Judge Young, was based largely on the United States Supreme Court case *Webster v. Reproductive Health Services*.¹³⁴ Judge Young recognized the tradition of strong judicial conservatism in Tennessee, which normally would have required the court to follow the policy contained in the Tennessee statutes,¹³⁵ but he believed that the ambiguous implications of *Webster* would nullify all prior legal precedents.¹³⁶ Accordingly, the trial court dismissed the legislative intent that excluded embryos from the legal classifications of "human being" found in the Tennessee Wrongful Death Statute¹³⁷ and the Tennessee Criminal Abortion Statute.¹³⁸ Thus, the trial court considered itself free to set its own policy¹³⁹ regarding whether the embryos were human beings, both legally and morally.¹⁴⁰

Consistent with this position, Judge Young dismissed much of the testimony of Professor John Robertson, a member of the AFS board of directors and the leading legal expert in this area.¹⁴¹ He

131. *Davis*, 1989 WL 140495, at *58-*59.

132. *Id.* at *45.

133. *Id.* Mr. Davis, who remarried as well, also changed his mind and now wants custody of the embryos for his new wife (who is unable to have children). See Curriden, *Joint Custody of the Frozen Seven*, *supra* note 28, at 26. It is understandable that Judge Franks, writing for the Tennessee Court of Appeals, called this case "a mess," and "one-upmanship between parties." *Id.*

134. 492 U.S. 490 (1989). For a discussion of the potential effects of *Webster* and the Missouri statute upheld by the United States Supreme Court see *supra* notes 59-63 and accompanying text.

135. *Davis*, 1989 WL 140495, at *23 ("The court is not free to establish what it believes to be the best policy for the state.").

136. *Id.* at *21, *22 ("[T]he recent *Webster* case leaves open the door for a state to establish its compelling interest in protecting even potential human life by legislation declaring its public policy.").

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

138. TENN. CODE ANN. § 39-15-201 (1990).

139. *Davis*, 1989 WL 140495, at *23 ("This Court finds and concludes that for domestic relations purposes in Tennessee no public policy prevents the continuing development of the common law as it may specifically apply to the seven human beings existing as embryos, in vitro, in this domestic relations case.").

140. *Id.* at *2-*3, *24-*25.

141. *Id.* at *18. Professor Robertson and another expert testified that the cells of an

also rejected the testimony of Dr. Alex Shivers,¹⁴² another IVF expert, along with the guidelines of the AFS.¹⁴³ Instead, Judge Young placed great emphasis on the testimony of Dr. Jerome Lejeune, a renowned French geneticist.¹⁴⁴ The trial court accepted Dr. Lejeune's view that the embryo was "human life" with exactly the same rights as a fully grown adult.¹⁴⁵ In doing so, the court rejected all distinctions between all developmental stages in human embryos and between embryos and human beings.¹⁴⁶

After rejecting all such distinctions, the trial court held that life begins at conception, and that these embryos were "human life."¹⁴⁷ Invoking the ancient doctrine of *parens patriae*,¹⁴⁸ Judge Young found that the best interests of these "children" would be served by awarding custody to the mother.¹⁴⁹ The court decided that because the mother's position would allow these "children" life and the father's position would kill them, the "children" had to be

early, unimplanted embryo were undifferentiated. *Id.* at *10, *47, *55. Despite these expert opinions, Judge Young believed that Dr. Lejeune's testimony to the contrary was "unrebutted in the record." *Id.* at *18. Judge Young's belief that the cells of an early embryo are differentiated was the foundation of his finding that human life begins at conception, and thus that the embryos had exactly the same rights as a fully grown human being. *Id.* at *18-*19.

142. Dr. Shivers is the head of the University of Tennessee Department of Zoology. Although his testimony did not make the moral judgment that Professor Robertson's testimony did, he supported the scientific opinions of Professor Robertson. *Id.* at *10, *55.

143. *Id.* at *11-*14 (finding that the AFS Guidelines were only of "probative value," and were not binding on the court because they only represented the opinions of a private organization, not the courts or legislature).

144. *Id.* at *19. Dr. Lejeune is the author of a number of pro-life articles and is considered an ardent advocate of the pro-life position. See, e.g., JEROME LEJEUNE & PAUL RAMSEY, *THE QUESTION OF IN VITRO FERTILIZATION: STUDIES IN MEDICINE, LAW, AND ETHICS* (1984) (published by the Society for the Protection of Unborn Children Educational Trust). At trial, Dr. Lejeune testified that "as soon as he has been conceived, a man is a man." Testimony of Dr. Jerome Lejeune (published by the Center for Law and Religious Freedom, Annandale, VA) Jan. 1990, at 48. He also referred to IVF embryos throughout the testimony as "early human beings." *Id.* Dr. Lejeune consistently attributed normal, fully grown human thoughts and emotions to the IVF embryos. *Id.* He called the storage container in which they were stored the "concentration can." *Id.* at 44, 48.

145. *Davis*, 1989 WL 140495, at *19.

146. *Id.* at *21-*25. Since the court found that all embryos have the same rights as fully grown human beings, any distinction among different embryos was legally moot. At page *21 of its decision, the court began referring to the frozen embryos as "human beings." After page *24, the court almost exclusively used the term "children" to refer to these embryos.

147. *Id.* at *2.

148. *Parens patriae* is a doctrine that assumes the state is the ultimate parent and guardian of the children in custody battles. Any dispute over custody must be resolved in favor of what is best for the child. *Id.* at *23, *24.

149. *Id.* at *23-*26.

given to the mother.¹⁵⁰

C. *The Tennessee Court of Appeals Decision*

Judge Franks,¹⁵¹ writing for the court of appeals, expressly rejected the holding of the trial court that these embryos were human beings with full legal rights.¹⁵² When noting that the trial court had granted custody of the embryos to Mrs. Davis, the appellate court placed quotation marks around the word "custody."¹⁵³

The court of appeals in *Davis* rejected the controversial scientific views endorsed by the trial court and instead adhered to more conventional views about fetal development.¹⁵⁴ Contrary to the trial court, the court of appeals accepted the ideas of both Professor John Robertson and the AFS.¹⁵⁵ Professor Robertson's most recent article,¹⁵⁶ which was extremely critical of the trial court's decision, was cited favorably by the court of appeals.¹⁵⁷

Rather than focusing on the potential effects of the Supreme Court's decision in *Webster*¹⁵⁸ as the trial court had done, the court of appeals in *Davis* focused instead on the limitation of fetal rights by the Court's decision in *Roe v. Wade*.¹⁵⁹ The court of appeals in *Davis* found that the Tennessee Criminal Abortion Statute,¹⁶⁰ directly modeled after the *Roe* holding, expressly limited the legal rights of even viable fetuses.¹⁶¹ The court of appeals found

150. *Id.* at *25.

151. Presiding Judge Sanders and Judge Goddard concurred in the decision. *Davis*, 1990 WL 130807, at *7.

152. *Davis*, 16 Fam. L. Rep. (BNA) at 1536 ("even after viability, they [the embryos] are not given legal status equivalent to that of a person already born").

153. *Id.* at 1535.

154. *Id.* (accepting the finding that the cells of a four- or eight-cell embryo are undifferentiated).

155. *Id.*

156. Robertson, *supra* note 8. Regarding the trial court's decision, Robertson states: "[s]uch a conclusion has no discernable basis in common law precedent nor in Tennessee law." *Id.* at 482. For another strong criticism of Judge Young's decision see *Developments—Medicine Technology and the Law*, *supra* note 57, at 1542-44 ("the position is at odds with other judicial and legislative choices. . . . The legal system has never accorded the fetus an independent set of rights that inhere at conception.").

157. *Davis*, 16 Fam. L. Rep. (BNA) at 1536 n.4.

158. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

159. *Roe v. Wade*, 410 U.S. 113 (1973); see *Davis*, 16 Fam. L. Rep. (BNA) at 1536.

160. TENN. CODE ANN. § 39-15-201(c) (Supp. 1990). The statute provides:

No person is guilty of criminal abortion . . . when an abortion . . . is performed under the following circumstances:

(1) During the first three (3) months of pregnancy . . .

(2) After three (3) months, but before viability of the fetus

Id.

161. *Davis*, 16 Fam. L. Rep. (BNA) at 1536.

that Judge Young had ignored the public policy inherent in this statute.¹⁶²

The *Davis* court of appeals also focused on other Tennessee civil and criminal statutes that do not classify non-viable embryos as "people."¹⁶³ The criminal statutes mentioned by the court were the murder statute,¹⁶⁴ the assault statute,¹⁶⁵ and the abortion statute.¹⁶⁶ The Tennessee legislature recently amended the murder and assault statutes to include new definitional provisions which include only a "viable fetus" within the scope of the statutes.¹⁶⁷

The court of appeals also took note of the Tennessee Wrongful Death Statute,¹⁶⁸ which does not allow a wrongful death action for a viable fetus that is not born alive.¹⁶⁹ As with the Tennessee Criminal Abortion Statute, the court of appeals found that the trial court had ignored the policy inherent in the Tennessee Wrongful Death Statute.¹⁷⁰ The court of appeals interpretation was expressly based on the Tennessee Supreme Court's decisions in a line of cases starting with *Hogan v. McDaniel*¹⁷¹ in 1958. In *Hogan* and the cases that followed it, the Tennessee Supreme Court consistently

162. *Id.* ("[t]he trial court in his fact finding ignored the public policy implicit in the Tennessee statutes").

163. *See supra* notes 23-26 and accompanying text.

164. TENN. CODE ANN. § 39-13-201(a) (1990) ("Criminal homicide is the unlawful killing of another person . . .").

165. TENN. CODE ANN. § 39-13-101(a) (Supp. 1990). The assault statute reads:

A person knowingly commits assault who:

- (1) Intentionally, knowingly or recklessly causes bodily injury to another;
- (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
- (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Id.

166. TENN. CODE ANN. § 39-15-201 (1990). For discussion of the court of appeals treatment of the implications of the Tennessee criminal abortion statute, see *supra* notes 160-62 and accompanying text.

167. TENN. CODE ANN. § 39-13-214(a) (1989) defines "another person" to include a "viable fetus." Section 39-13-107(a) defines "another," "individual," "individuals," and "another person" to include a "viable fetus." Both sections were passed in 1989, and both became effective on November 1, 1989.

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

169. TENN. CODE ANN. § 20-5-106(b) (1980). The statute provides:

For the purposes of this section, the word "person" shall include a fetus which was viable at the time of the injury. A fetus shall be considered viable if it had achieved a stage of development where in it could reasonably be expected to be capable of living outside the uterus.

Id.

170. *Davis*, 16 Fam. L. Rep. (BNA) at 1536.

171. *Hogan v. McDaniel*, 319 S.W.2d 221 (Tenn. 1958).

held that a fetus is not a separate legal entity from its mother.¹⁷² The *Hogan* court stated that any change in the legal status of the fetus was the province of the legislature, not the courts.¹⁷³

IV. ANALYSIS

The Tennessee Court of Appeals correctly decided *Davis v. Davis*. To begin with, the decision is consistent with the majority of current scientific knowledge and ethical standards regarding embryos and fetal rights.¹⁷⁴ Although the authorities conflict in the definition that they give to embryos at the 48-hour stage, most agree that these embryos are not "human beings."¹⁷⁵ The idea that four- or eight-cell clusters are legally and ethically identical to human beings is a concept generally held by only certain religious communities.¹⁷⁶

Further, the Tennessee Court of Appeals opinion is consistent with the few court opinions in this area. The *Davis* court cited *York v. Jones*,¹⁷⁷ but did not discuss the *York* case or endorse that case's implication that embryos may be personal property.¹⁷⁸ However, because the court of appeals in *Davis* did not explicitly restrict its limitation of the rights of early embryos, its decision

172. *Id.* at 224.

173. *Id.* at 225 ("Only the legislature has authority to create legal rights and interests.").

174. See *supra* notes 77, 91-92, 98, 102-04 and accompanying text.

175. See *supra* notes 77, 99, 104 and accompanying text.

176. The Catholic Church's opposition to IVF stems not only from its concern over wasted embryos, but from the belief that IVF and other artificial reproduction techniques are unnatural and undignified. "[T]he Church remains opposed from the moral point of view to . . . 'in vitro' fertilization. Such fertilization is in itself illicit and in opposition to the dignity of procreation and of the conjugal union, even when everything is done to avoid the death of the human embryo." *Sacred Congregation for the Doctrine of the Faith, "Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation"* (Mar. 10, 1987) reprinted in KEVIN O'ROURKE & PHILLIP BOYLE, *MEDICAL ETHICS: SOURCES OF CATHOLIC TEACHING* 159-63 (1989); see also Pope Pius XII, *The Human Body: Papal Teachings* 387-90 (May 19, 1956), reprinted in O'ROURKE & BOYLE, *supra*, at 164-65 (experiments in IVF "must be rejected as immoral and absolutely illicit").

Not all religious groups hold such a viewpoint. Many religious groups, including segments of the Jewish community and a large portion of the Protestant community, do not agree with the views of the Catholic Church, instead believing that human life begins at birth. For a discussion of this view, see *THE RELIGIOUS CASE FOR ABORTION* (Hamilton Gregory ed. 1983).

177. 717 F. Supp. 421 (E.D. Va. 1989). For a discussion of the holding and implications of *York* see *supra* notes 41-49 and accompanying text.

178. *Davis*, 16 Fam. L. Rep. (BNA) at 1536. The court of appeals cited *York* in the conclusion of its opinion when it awarded joint custody to the Davises. The court of appeals did not, however, cite *York* during the portion of the opinion that discussed the status of the Davises' embryos.

does not conflict with the decision in *York*.¹⁷⁹

In addition, the court of appeals decision in *Davis* is consistent with the legislative pronouncements Tennessee has made regarding fetal rights. All of the Tennessee statutes that touch upon this issue clearly limit the legal status of personhood to a development point far beyond the 48-hour stage.¹⁸⁰ Unlike Louisiana and Missouri,¹⁸¹ Tennessee does not have fetal rights legislation that would contradict the intent of the criminal abortion, murder, assault, and wrongful death statutes.

In particular, the legislative intent to exclude fetuses from the legal category of human beings is evident in the Tennessee Wrongful Death Statute and the line of cases interpreting it.¹⁸² Beginning with *Hogan v. McDaniel*,¹⁸³ the line of cases continued in *Shousha v. Matthews Drivurself Service, Inc.*,¹⁸⁴ in which the Tennessee Supreme Court allowed a child that died shortly after birth to recover under the wrongful death statute. This holding in *Shousha* appeared to limit the holding of *Hogan*, however, the potential limitation of *Hogan* was itself limited by *Durrett v. Owens*¹⁸⁵ only one year later. *Durrett* strictly limited the right of a fetus to recover for wrongful death to situations where the fetus was actually born alive and then died afterwards.¹⁸⁶ The Tennessee Supreme Court in *Durrett* held that a stillborn child, despite its seven and one-half month stage of development at the time in question, could not recover under the statute.¹⁸⁷

In *Hamby v. McDaniel*,¹⁸⁸ the most recent case decided under the Tennessee Wrongful Death Statute, the Tennessee Supreme Court expressly reaffirmed the above line of cases.¹⁸⁹ In so holding, the Tennessee Supreme Court reasoned that since the legislature had not voided the *Hogan*, *Shousha*, and *Durrett* construction of the wrongful death statute by amending the act, these earlier deci-

179. Although the federal district court in *York* did not make any specific findings on the rights of early embryos, its holding that the embryos were property strongly limits any potential rights of those embryos.

180. See *supra* notes 23-26 and accompanying text.

181. See *supra* notes 52-63 and accompanying text.

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

183. *Hogan v. McDaniel*, 319 S.W.2d 221 (Tenn. 1958); see *supra* notes 168-73 and accompanying text.

184. *Shousha v. Matthews Drivurself Service, Inc.*, 358 S.W.2d 471 (Tenn. 1962).

185. *Durrett v. Owens*, 371 S.W.2d 433 (Tenn. 1963).

186. *Id.* at 434.

187. *Id.*

188. *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977).

189. *Id.* at 775-77.

sions had to be given “the effect of legislation.”¹⁹⁰ The supreme court found that it was not “appropriate or necessary to judicially determine when life begins” because such a decision would have intruded upon the arena of the legislature.¹⁹¹ The dictates of the highly conservative Tennessee judicial policy¹⁹² require that statutory expressions of the intent of the legislature control the courts’ decisions.¹⁹³ Although Tennessee’s history of strict judicial conservatism was mentioned by the *Davis* trial court, Judge Young did not follow this policy.¹⁹⁴ While not expressly mentioned by the *Davis* court of appeals, this important facet of Tennessee law was nonetheless correctly followed by that court.

The law of Tennessee restricts the courts of that state to discovering and applying the public policy as set by the legislature.¹⁹⁵ The courts are not allowed to create their own policies.¹⁹⁶ “[O]nly in the absence of any declaration in [the Constitution and statutes] may [public policy] be determined from judicial decisions.”¹⁹⁷ When the intent of the legislature cannot be found in any directly applicable statutes, the courts must examine other related areas to determine public policy.¹⁹⁸

The Tennessee Court of Appeals decision in *Davis* is wholly within the bounds of this conservative view of the judicial function. Since no legislation directly addressed the controversy, the court of appeals was required to base its decision upon analogies from any existing related statutes. The Tennessee murder, assault, abortion, and wrongful death statutes all define personhood at a developmental stage well beyond the stage that the Davises’ embryos had reached.¹⁹⁹ The appellees were unable to cite any contrary legislative expression in their brief.²⁰⁰ Thus, the court had no choice but to rule as it did.

190. *Id.* at 776-77.

191. *Id.* at 777.

192. The Tennessee doctrine of extreme judicial conservatism was most recently reiterated in *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987).

193. *Smith v. Gore*, 728 S.W.2d at 746-47.

194. *See supra* notes 134-50 and accompanying text.

195. *Smith v. Gore*, 728 S.W.2d at 747.

196. *Id.*

197. *Id.* (quoting *Cavender v. Hewitt*, 239 S.W. 767, 768 (Tenn. 1921)).

198. *Smith v. Gore*, 728 S.W.2d at 752 (“[The] Court will not accept the invitation extended by . . . case[s] to attempt to resolve existential questions concerning the value of life.”)

199. *See supra* notes 23-26 and accompanying text.

200. *See Appellee’s Brief, Davis* (No. E-14496).

V. IMPACT

The immediate impact of the *Davis* decision is a boost for scientists wanting freedom to work on IVF and cryogenics research. The decision received strong national attention in both the legal and general news media.²⁰¹ The *Davis* decision could become an important and visible precedent for cases in other states considering IVF issues. The decision may also have a positive impact upon state legislatures, perhaps persuading some legislatures to pass laws protecting IVF procedures and research, while persuading other states to follow Illinois' lead and repeal restrictive statutes.²⁰²

Unfortunately for those benefitting from the decision, the court of appeals opinion in *Davis* does not stand upon entirely solid ground. The precedential life of *Roe v. Wade* may be nearing an end. An outright overruling of *Roe* could destroy much of the legal foundation for the *Davis* opinion,²⁰³ and while such a reversal would not directly overrule *Davis*, it would clear the way for the Tennessee legislature to pass laws protecting early embryos.

Therefore, if *Roe* is overruled, the fate of *Davis* will lie in the hands of the Tennessee legislature. Ironically, the attention given to this case could be the factor that prompts the legislature to pass laws granting early embryos certain rights. Passage of a statute similar to the Missouri statute validated in *Webster* would demand an opposite holding if *Davis* were decided under such a law.

The Tennessee Supreme Court has granted leave to appeal.²⁰⁴ In light of the deferential attitude of the Tennessee courts, even a law far less direct than the one passed in Missouri would force the Tennessee Supreme Court to reverse the court of appeals holding in *Davis*. The tangential statutes relied on by the Tennessee Court of Appeals will not sustain the *Davis* holding against even a relatively indirect legislative attack.²⁰⁵

201. See, e.g., Curriden, *Joint Custody of the Frozen Seven*, *supra* note 28, at 26; *Divorced Couple is Awarded Joint Custody of Seven Embryos*, *The New York Times*, Sept. 14, 1990, at 20, col. 3; *Divorced Pair Share Custody of Seven Embryos*, *Los Angeles Times*, Sept. 14, 1990, at 19, col. 1; Marilyn Gardner, *The Tennessee Embryos - Part Two*, *The Christian Science Monitor*, June 1, 1990, at 14, col. 4; Jean Seligmann, Larry Wilson & Mary Hager, *Tempest in a Test Tube: Whose Frozen Embryos are These Anyway?*, 114 *NEWSWEEK* Aug. 21, 1989, at 66; *Seven Frozen Embryos in Joint Custody*, *Chi. Trib.*, Sept. 14, 1990, at 3.

202. See *supra* notes 64-69 and accompanying text.

203. See *supra* notes 158-62 and accompanying text.

204. See *supra* note 116.

205. Although the Tennessee murder, assault, and wrongful death statutes clearly exclude embryos from the classification of "human being," these laws are only tangentially related to the cryogenically preserved IVF embryo issue. A change in the criminal

If *Roe* somehow survives the recent conservative shift in the United States Supreme Court, the *Davis* decision will probably survive as well. The Tennessee legislature would presumably not be able to pass a law overruling *Davis* that could survive judicial analysis under *Roe*. Considering the legal foundation of the court of appeals decision, the Tennessee Supreme Court is unlikely to overrule the case on the basis of current Tennessee law.

If the Tennessee Court of Appeals decision in *Davis* is able to survive the inevitable legislative and judicial attacks, it could have a significant long term impact by providing a focus for the disparate and often theoretical opinions of judges, lawmakers, and professional groups. The existence of the *Davis* decision and its factual scenario give legal and ethical decision-makers a concrete and visible arena in which to work. The *Davis* decision could also have a potential impact in areas beyond IVF and cryogenic preservation, such as abortion and contraception. The *Davis* decision provides a strong argument for the limitation of IVF embryo rights, and this will certainly be used by "pro-choice" groups in the abortion battle. Finally, the *Davis* decision, by limiting early embryo rights, could foster an atmosphere of protection for researchers, doctors, and couples who might wish to use the IVF and cryogenic preservation procedures.

VI. CONCLUSION

In *Davis v. Davis*, the Tennessee Court of Appeals correctly applied Tennessee law to grant joint custody of seven cryogenically preserved IVF embryos to a divorced couple. Critical to this decision was the ruling by the court of appeals that these forty-eight-hour-old embryos were not legally recognized persons. This decision is in accord with the vast majority of scientific opinion and with current Tennessee law. However, the court of appeals ruling may be short-lived. If the court of appeals decision is overturned, it will be a significant blow to the interests of scientists, pro-choice advocates, and most importantly, childless couples for whom IVF is the only hope for having their own children.

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abortion statute, or any other law directly relating to family welfare or reproductive rights that gave cryogenically preserved IVF embryos special status would plainly show a legislative intent to exclude the definitions of the indirectly related statutes. Therefore, to overrule *Davis*, the legislature would not have to enact a law specifically on the legal status of IVF embryos.